

States of Exceptionalism: Race, Violence, and Governance

by

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DEDICATION

In honor of my parents, Glynis Carr and Juli Corrigan

In memory of Kennetta Andrews (1949-2012) and Mary Margaret (Peggy) Carr (1935-2014)

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CHAPTER 1

Introduction

Modern-Day Lynchings

I've always intended to introduce this dissertation by discussing a current event that highlights the legacies of U.S. lynch law, what Roy Nash once called "a peculiarly American institution."¹ One of the earliest drafts examined public discussions of drone strikes and targeted killings, methods embraced by the Bush and Obama administrations for use against suspected terrorists. In both administrations' appeals to efficiency and safety (for U.S. troops), and in the broader racialized and decontextualized construction of 'terrorist,' I heard echoes of politicians who argued a century ago that lynch law was a justified response to the terror of alleged black criminality, and of politicians who argued two centuries ago that "though not strictly warranted by law," certain wartime measures could be justified by "the imminence of danger." Attorney John Yoo probably didn't consult the Virginia Legislature's late 18th-century edict exonerating Charles Lynch for illegally detaining suspected British loyalists during the Revolutionary war; but the justifications he advanced in "the torture memos" that liberalized U.S. interrogation policies were substantively similar. In speeches and published articles, Yoo repeatedly explained that, "the [Bush] administration decided that aggressive measures, though sometimes unpopular,

¹ Roy Nash, "Memorandum for Mr. Philip G. Peabody on Lynch-Law and the Practicability of a successful attack Thereon," May 20, 1916, May, 1916, Records of the NAACP, Film 19771 Part 7 Series A Reel 1, University of Michigan.

are necessary to protect America from another terrorist attack.”² In fact, the administration’s policies were not that unpopular.³ Yoo was not on the defensive because he advanced an unpopular position – his critics claimed he had advanced an illegal position, offering the cover of law to interrogation techniques prohibited by the Geneva Convention. Yoo’s response to this criticism generally drew on emergency discourses: “Our only means for preventing future terrorist attacks...is to rely on intelligence that permits pre-emptive action. An American leader would be derelict if he did not seek to understand all available options in such perilous circumstances.”⁴

When photos of torture and sexual abuse from a military prison in Abu Ghraib were released in 2004, scholars also connected these scenes to histories of lynching. Hazel Carby asserted that “there is a direct, but hidden, line connecting Abu Ghraib...[with] the photographs and postcards of lynching that circulated widely in the early twentieth century.”⁵ Dora Apel and Shawn Michelle Smith noted that the images from Abu Ghraib and those of lynch mobs “employ similar strategies of domination and control.”⁶ In the years since, a growing body of work has analyzed Abu Ghraib and other abuses associated with the war on terror as extensions of America’s historical culture of lynching. This literature has explored the sexualization of torture,

² John Yoo, “Commentary: Behind the ‘Torture Memos,’” *U.C. Berkeley News*, January 4, 2005, online edition, sec. Point of View, http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml.

³ Andrew Dugan, “A Retrospective Look at How Americans View Torture,” *Gallup*, December 10, 2014, <http://www.gallup.com/opinion/polling-matters/180008/retrospective-look-americans-view-torture.aspx>. Levels of support have fluctuated over time, and took a hit in the wake of the Abu Ghraib scandal. But at its lowest point still nearly 40% of Americans supported the use of torture against suspected terrorists; as of 2009, when the senate undertook an investigation of U.S. torture policy, ~55% of Americans supported harsh interrogation methods against suspected terrorists. Even those Americans who, in theory, do not support torture, may not feel strongly enough to support investigation or prosecution of torture. According to Gallup, “As of 2009, Americans looked increasingly ready to leave this chapter of their history behind, and believed whatever sins might have been committed were for good reason.”

⁴ Yoo, “Commentary: Behind the ‘Torture Memos.’”

⁵ Hazel Carby, “US/UK’s Special Relationship: The Culture of Torture in Abu Ghraib and Lynching Photographs,” *Nka: Journal of Contemporary African Art* 20, no. 1 (2006): 66.

⁶ Dora Apel and Shawn Michelle Smith, *Lynching Photographs* (Berkeley: University of California Press, 2007), 77.

the visual spectacles and iconographies of racial violence, the social psychology of complicity, and the role of trauma in racial and colonial domination.⁷

Another draft began with a discussion of George Zimmerman's exoneration for the killing of Trayvon Martin in 2012. Zimmerman's status as a neighborhood watch captain, and his subsequent decision to follow Martin and confront him with a weapon, corresponded to how groups like the NAACP used to define a lynch mob. The federal Dyer Anti-Lynching Act of 1920, for example, defined mob as "an assemblage composed of three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense."⁸ The last half of the definition, which specified that lynchers were motivated by the desire to punish some actual or supposed offense, was really the most important part, the only thing that would otherwise distinguish "lynching" from simple murder.⁹ The reason a federal bill like Dyer's was perceived as necessary was that state court systems routinely refused to punish people who committed murder on these grounds, just as the state of Florida failed to punish Zimmerman. In that draft, I focused on the racial implications of Florida's "Stand Your Ground" laws, which have led in general to lower rates of homicide prosecution, and specifically to fewer prosecutions

⁷Dora Apel, "On Looking: Lynching Photographs and Legacies of Lynching after 9/11." *Nka: Journal of Contemporary African Art* 20, no. 1 (2006): 44–59; Hazel Carby, "A Strange and Bitter Crop: The Spectacle of Torture," *Open Democracy*, October 10, 2004, http://www.opendemocracy.net/media-abu_ghraib/article_2149.jsp; Carby, "US/UK's Special Relationship"; Walter Cohen, "Lynching, Visuality, Empire." *Nka* 20.1 (2006): 116–121; Sherene Razack, "How Is White Supremacy Embodied? Sexualized Racial Violence at Abu Ghraib." *Canadian Journal of Women and the Law* 17.2 (2005): 341–363; Shawn Michelle Smith, "Afterimages: White Womanhood, Lynching, and the War in Iraq." *Nka* 20.1 (2006): 72–85; Warren Steele, "Strange Fruit: American Culture and the Remaking of Iraqi Males at Abu Ghraib." *Nebula* 3.4, Special Issue: Normalizing the Abnormal: From Lynching to Abu Ghraib (2006).

⁸ H.R. 13, House of Representatives, 67th Congress, 1st session

⁹ Under this definition, however, Zimmerman's acting alone would prevent him from being defined as a "mob." I am interested more in his motivation: that he acted in response to a perceived offense by Martin.

of white-on-black killings.¹⁰ Stand Your Ground laws, drawing on constructions of emergency, crime, and self-defense, share some disturbing elements with pro-lynching ideologies of a century ago, which routinely excused white violence against African Americans when such violence was framed as a response to real or perceived crime.

Many intervening months passed before I returned to work on the introduction again. Now the shooting of Michael Brown was in the news, and tensions between police and protestors in Ferguson, Missouri were entering their fourth month. Brown's shooting ignited a national firestorm of criticism, not only of the Ferguson police department, but more broadly of the racialized police regimen – including disproportionate killings by police – that black people are subject to in most U.S. cities. When the Ferguson grand jury declined to indict Officer Wilson for any criminal charges related to the shooting, the incident lent a spark to long-growing criticism by racial justice advocates, who identified criminalization and legal persecution as the primary mechanisms reproducing racial inequality in the twenty-first century United States. Beyond the push to see Officer Wilson indicted for the death of Michael Brown, organizers working at the intersections of racial justice and criminal justice demanded a range of reforms to the entire spectrum of systems (policing, prosecution, incarceration, parole, and execution) that contribute to contemporary U.S. racial caste systems. I noted how the incident, especially in concert with each preceding one, had caused the term “lynching” to reappear in the common vernacular, with even mainstream media outlets like *The Guardian* and *CNN* wondering about how the legacy of lynching might be at work in these deaths, and in the impunity enjoyed by the killers.¹¹ Before I could finish this version of the introduction, Freddie Gray died while in the

¹⁰ John Roman, “Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data,” Urban Institute, Justice Policy Center. July 2013

¹¹ See for example, Isabel Wilkerson in *The Guardian*, August 25th, 2014, “Mike Brown’s Shooting and Jim Crow Lynching have far too much in common.” <http://www.theguardian.com/commentisfree/2014/aug/25/mike->

custody of Baltimore police who, it was later reported, had given him a “rough ride” back to the station after arresting him.¹² The news provoked riots in Baltimore, leading to hundreds of arrests and intervention by the National Guard. Unlike in other cases, six officers have so far been indicted on serious charges of homicide and assault.¹³ But it remains to be seen whether these officers will be convicted, or what other reforms (if any) might be adopted to address the systemic problems highlighted by Gray’s death.

Each revision of the introduction has faltered on my desire for timeliness – and I’m not the only one struggling to keep up. In 2012, the Malcolm X Grassroots Movement (MXGM) published a report on black people killed by police, security guards, and “self-appointed agents of ‘justice.’” From January through June, the organization found 110 such deaths; even so the report was quickly outdated, as July brought ten more fatalities.¹⁴ The report prompted David Leonard of Washington State University to proclaim that in contemporary America, “a lynching happens every 40 hours.”¹⁵ After its initial publication Arlene Eisen, the report’s researcher and author, released updates under the title “Operation Ghetto Storm,” including additional deaths

[brown-shooting-jim-crow-lynchings-in-common](#) See also Carl Dix, “A Modern-Day Lynching - The Vigilante Murder of Trayvon Martin!” *The World Can’t Wait*. April 2012; Amy Goodman, “‘A Modern-Day Lynching’: Outrage Grows over Killing of Trayvon Martin by Neighborhood Watch Patrol.” *Democracy Now!* March 20, 2012; Whitney Hunter, “Modern-Day Lynching.” *Savannah Now*, May 22, 2012; Li Onesto, “Modern Day Lynching: The Murder of Trayvon Martin,” *Global Research*, June 5, 2012. Although sensational cases like the shooting of Trayvon Martin attract more media attention, other cases of violence in the name of fighting crime are also described with the rhetoric of lynching, particularly in black press outlets. See for example: John Noble. “Modern Day Lynching in Florida: Racist Cops Shot Suspect 68 Times.” *Black News Weekly*, February 9, 2009; “Sharpton’s Group: ‘It’s a Modern Day Lynching,’” *The Brown Watch*, August 28, 2012.

¹² Manny Fernandez, “Freddie Gray’s Injury and the Police ‘Rough Ride,’” *The New York Times*, April 30, 2015, <http://www.nytimes.com/2015/05/01/us/freddie-grays-injury-and-the-police-rough-ride.html>; Doug Donovan, “Freddie Gray Not the First to Come out of Baltimore Police van with Serious Injuries,” *The Baltimore Sun*, April 23, 2015, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-gray-rough-rides-20150423-story.html>.

¹³ Richard Pérez-peña, “Six Baltimore Officers Indicted in Death of Freddie Gray,” *The New York Times*, May 21, 2015, <http://www.nytimes.com/2015/05/22/us/six-baltimore-officers-indicted-in-death-of-freddie-gray.html>.

¹⁴ Malcolm X Grassroots Movement. “Report on the Extrajudicial Killing of 120 Black People, January 1 to June 30, 2012.” Accessed 8/26/2014: http://mxgm.org/wp-content/uploads/2012/07/07_24_Report_all_rev_protected.pdf

¹⁵ David Leonard, “A Lynching Happens Every 40 Hours.” *Huffington Post*, July 18, 2012.

and statistical analysis of the circumstances under which they occurred – reminiscent of Ida B. Well’s pioneering work compiling the first inventories and statistics on lynching in the 1890s.¹⁶ Eisen’s effort spawned a number of more comprehensive attempts to document police killings and brutality. This new data suggests a “modern-day lynching” occurs every 28 hours, a rate that outpaces the work of lynch mobs at the height of their activity in the late 19th century.

These figures have not been independently verified, but I don’t report them here to insist on their accuracy. There have always been debates over the precise definition of lynching, and disagreements over whether particular cases really “count.” So too have there been disputes over inventories of lynching victims, with scholars proposing that certain names be removed, and/or that others be added, to the lists initially created by Wells, the NAACP, and the Tuskegee Institute. What interests me more about these discussions is the fact that Americans are still having them in the first place. If “the lynching era” is thought to have ended in the 1930s, why do references to the subject remain so potent and prevalent?¹⁷

This dissertation responds to that question with a detailed study of lynching and other forms of “mob violence,” from the end of the 19th century into the first decades of the 20th, a period often referred to as “the lynching era.” Over the course of the dissertation, I deconstruct terms like “lynching” and “mob violence,” point to the diversity of types and forms of violence these phrases describe, and their elastic meaning in the hands of various historical actors. This project is specifically attentive to the ways in which actions of the state (or in some cases, inactions of the state) are implicated in the work of groups we now think of as “mobs.” By

¹⁶ Arlene Eisen, “Operation Ghetto Storm: Updated Edition,” November 1, 2014, <http://www.operationghettostorm.org/>

¹⁷ Based on qualitative and quantitative analyses, sociologists and historians have defined a fifty-year “lynching era,” stretching from ~1880 – 1930s. This is not to say that lynchings didn’t happen prior to this or never happened afterward, only to say that both the numbers of lynchings, and the importance of lynching as a cultural institution, was at its high point during these decades.

examining state involvement with lynching and mob violence in the past, I hope to shed light on the persistent problem of state violence in the present, especially police and military violence. Departing from historical and sociological studies that characterize lynching and race riots as lawless mob violence, the central argument of this dissertation is that these phenomena have been forms of legalized violence, which flourish under the legal ambiguity created by intersecting discourses of race and crisis. Such violence is simultaneously a product of law and yet detached from the accountability and oversight that law is supposed to provide. Rather than view lynching and race riots as problems of the distant past, I argue that these phenomena survive as legal precedent and shape a range of debates and discourses today – from crime and social unrest to terrorism and war.

Key Terms and Frameworks

This project is situated at the intersections of U.S. ethnic studies, legal studies, and studies of trauma and violence. In this introduction, I discuss how my research is informed by, and contributes to, academic interpretations of lynching and mob violence, theories of critical ethnic studies, and literatures of critical race and legal theory. I then discuss key terms used throughout the dissertation, including lynching, mob violence, state of exception, and states of exceptionalism. I conclude the introduction with a historiographical review of lynching. This review includes important historical background, describing how the practice of lynching has changed over time and the role it played in different periods from the colonial era to the early 20th century. The review also proposes a framework for theorizing lynching, which stresses the inter-relation between “mob” and “state” that characterized much of the phenomenon’s history. Many histories of lynching posit it as a developmental antecedent to the state, which was

eventually displaced by state and civil development. Other histories posit lynching as an alternative to the state, a form of “communal” or “popular” justice exercised either in absence of, or opposition to, the formal judicial system. In my account of lynching, the practice is both and neither of these things. Lynching was antecedent to state power, but also prototypical of state power in key ways. Lynching was an alternative to state power, sometimes used in opposition to state power, but it was also facilitated by state power, a method of (re)claiming state power, and of extending its reach. While offering a brief history of lynching, I try also to highlight the complexity of these relationships – lynching as antecedent and alternative to law, yes, but also as complement, supplement, and extension of law’s power and legitimacy.

Academic Interpretations of Lynching

Works by historians, sociologists, and feminist, cultural, and ethnic studies scholars, have offered other crucial interpretations of lynching that I drew on to design and complete this study. In particular, studies that analyze lynching as part of the ritualistic making of whiteness, and others that explain the political economy of lynching in relation to cotton production, internal labor migration, and demands created by industrialization, have helped to shape my perspective.

Studies of lynching and the making of whiteness highlight several important aspects of the practice. One area of concern is how lynching (re)produced racial and cultural boundaries of whiteness in periods when these boundaries were especially porous and fluid. It is probably not a coincidence that the half-century known as the lynching era overlaps significantly with the period when the meaning of whiteness expanded.¹⁸ Lynching was a violent assertion of absolute

¹⁸ Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* (New Brunswick, N.J.: Rutgers University Press, 1998); Grace Hale, *Making Whiteness: The Culture of Segregation in the South, 1890-1940* (Vintage, 1999); David R. Roediger et al., *The Wages of Whiteness: Race and the Making of the American Working Class*, New Edition (London ; New York: Verso, 2007).

racial difference (and racial superiority) that belied the uncertainty and ultimately the arbitrariness of racial categorization. Of particular interest to scholars working in this area are lynchings that involved Euro-Americans whose national and racial assimilation was contested, such as Irish, Italians, Jews, and other euro-ethnic minorities. These groups were sometimes the targets of lynching, indicating that their racial and citizenship status was contested well into the 20th century, when the majority of victims were otherwise black. At the same time, these groups also sometimes perpetrated lynchings, both against fellow immigrants and against African Americans, as a means of asserting the privileges of whiteness, differentiating themselves from blackness, and thereby raising their status in the broader society.¹⁹

Scholars who study lynching and the making of whiteness also point to how lynching was frequently a communal affair for whites, which forged racial solidarity across gender and class lines. Of particular interest here are the mass lynchings and spectacle lynchings that were most common at the height of the lynching era. Photographs and eye-witness accounts of these events indicate they were attended by hundreds or even thousands of spectators; farmers and laborers as well as businessmen and professionals; men, women, and children; young and old alike. These accounts reveal the constructed nature of whiteness, and the role of violence in maintaining it.²⁰

My own focus on state power grows from recognition that whiteness and state power were intrinsically linked during the lynching era, and therefore the collective construction of whiteness was related to the institutional and legal construction of government. Of all the forms of violence that could and did work to cement whiteness, why would lynching rise to such prominence? My research suggests the power of lynching to confer whiteness came, at least in

¹⁹ Cynthia Nevels, *Lynching to Belong Claiming Whiteness through Racial Violence* (College Station: Texas A&M University Press, 2007).

²⁰ Amy Wood, *Lynching and Spectacle: Witnessing Racial Violence in America, 1890-1940*, New Directions in Southern Studies (Chapel Hill: University of North Carolina Press, 2009).

part, from its quasi-legitimate status as a means of law enforcement. To lynch someone was not just about the power to kill an alleged criminal, it was also about the power to allege criminality in the first place. As I will discuss in more depth in the conclusion, this is significant when considering the current-day legacies of lynching, and the remarkable persistence of lynch-like violence despite decades of struggle against racial discrimination and animus in general society and in police forces specifically.

Studies of the political economy of lynching reveal it was deeply related to the cotton industry, and the violence used to control itinerant labor forces of sharecroppers and farmhands after slavery was abolished. In these accounts, the incidence of lynching was highly responsive to interlocking variables such as the market price of cotton; the proportion of tenant farmers in particular states and counties; and the proportion of black vs. white residents. The highest rates of lynching were found in the overlapping “cotton belt” and “black belt” areas, where black people outnumbered whites and where the workforce was dominated by tenant farmers and sharecroppers laboring on large plantations. Moreover, accusations of black criminality notwithstanding, Tolnay and Beck found that rates of lynching rose and fell with the price of cotton and had either an indiscernible or inconsistent relationship to data on violent crime.²¹ Whites may have told themselves, each other, and the world at large that any particular lynching was an outraged community’s response to crime; or that lynching in general was confined only to rural areas with ineffective judicial systems; or that the best way to eliminate lynching was to enact reforms that made it harder for criminals to evade the law. Copious data suggests, however,

²¹ E. M. Beck, J. L. Massey, and S. E. Tolnay, “The Gallows, the Mob, and the Vote: Lethal Sanctioning of Blacks in North Carolina and Georgia, 1882 to 1930,” *Law & Society Review* 23 (1989): 317; E. M. Beck and S. E. Tolnay, “The Killing Fields of the Deep South: The Market for Cotton and the Lynching of Blacks, 1882-1930,” *American Sociological Review*, 1990, 526–39; Stewart Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882-1930* (Urbana: University of Illinois Press, 1995).

that higher cotton prices incentivized violence against black laborers, probably because lynching forced them to accept working conditions and wages far worse than they would have otherwise been willing to tolerate. Amy Bailey and Terrence Finnegan, in more detailed studies of the victims of lynching, found additional factors that informed who was most at risk of being lynched. For example, itinerant laborers were more vulnerable to violence than black people who were established community members; all the better if such community ties also included positive relationships with local whites.²²

This body of scholarship is especially influential to the periodization of my study, encompassing the lynching era broadly, but honing in on events of the early twentieth century that have been linked to the disappearance of lynching: industrialization & urbanization, the Great Migration(s), and the First World War. In the accounts of historical sociologists, these forces combined to dramatically increase black mobility, such that by the time WWI drew to a close, lynching began to have the opposite effect on labor. Rather than forcing black people to accept bad conditions, violence motivated them to leave the South en masse, pulled by new opportunities in burgeoning industrial centers of the Northeast, Midwest, and west coast.²³ Not only did this create a disincentive for violence, it also placed strain on class relations within white communities, thus undermining the social cohesion lynching had previously created. Perhaps most important of all, black political consciousness underwent extraordinary changes that contributed to lynching's decline. The opportunities offered by industrialization and internal

²² Amy Kate Bailey and Stewart E. Tolnay, *Lynched: The Victims of Southern Mob Violence* (Chapel Hill: The University of North Carolina Press, 2015); Terrence Finnegan, *A Deed So Accursed: Lynching in Mississippi and South Carolina, 1881-1940* (Charlottesville: University of Virginia Press, 2013).

²³ James Grossman, *Land of Hope: Chicago, Black Southerners, and the Great Migration*, 1 edition (Chicago: University Of Chicago Press, 1991); Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration*, Reprint edition (New York, NY: Vintage, 2011).

migration expanded the ranks of new black middle classes in cities around the country (including in the deep South where lynchings were most common); these groups in turn nurtured extensive social, political, and economic infrastructure that expanded black communities' capacity for civil rights organizing. Participation in the first and second world wars heightened expectations of democratic inclusion, and underscored the hypocrisy of American racism.²⁴

It is here where I depart from social historians and historical sociologists, in order to track discourses of lynch law that persisted after its empirical diminishment. Past iterations of lynching had fluctuated and shifted, in terms of geography, types of violence, justifications, and targets. If these years were the “end” of some phase of lynching, what does the period tell us about new forms of lynching that may have been ascendant? What is at stake in calling these present-day forms of violence “lynching”?

Critical Ethnic Studies

This project is also informed by training in comparative and critical ethnic studies. Without denying the specificity of the incidents I study, I hope that some of the language and theoretical concepts explored in this dissertation will offer productive avenues for scholars working in diverse areas across history, ethnic, and American studies. Although my dissertation is grounded in African American studies, and the incidents I study predominantly involve violence against black Americans, my approach to analyzing these forms of violence centers broader ethnic studies frameworks, such as theories of colonialism and settler-colonialism,

²⁴ Mark Ellis, “W. E. B. Du Bois and the Formation of Black Opinion in World War I: A Commentary on ‘The Damnable Dilemma,’” *The Journal of American History* 81, no. 4 (March 1, 1995): 1584–90; Mark Ellis, *Race, War, and Surveillance: African Americans and the United States Government during World War I* (Indiana University Press, 2001); Chad L. Williams, *Torchbearers of Democracy: African American Soldiers in the World War I Era* (The University of North Carolina Press, 2010).

nationalism, and militarism, in addition to concepts from African American studies, such as theories and histories of slavery and anti-blackness. My scholarship is particularly indebted to cross-disciplinary subfields like critical prison studies and histories of racialized violence.

Critical Race and Legal Theory

Finally, this project is strongly influenced by critical race theory and, more broadly, critical legal theory. These distinctive bodies of theory emerged in the 1980s, to describe scholarship that explored how race and inequality are produced by law, both in doctrine and practice.²⁵ The key intervention of critical race and legal theory is to counter liberal assumptions of a “universal” subject of law. Critical race theorists have described law as a technology of racial formation, with politicians, lawyers, judges, and juries using law to determine boundaries of racial identification and limitations on the rights of citizenship. Legal historians and ethnic studies scholars have further argued that modern systems of law and governance are ontologically racial, because the development of these polities was concurrent with European and American colonial expansion.²⁶ Modern systems of law were crafted on the basis of a ‘universal’ Enlightenment subject, with colonized and racialized bodies intended as the objects, not the subjects, of governance. Since law has never been neutral in regards to race, critical race and legal theorists conclude that the vision of political liberalism – equal treatment by the law of equal subjects before the law – is in fact a damaging racial mythology. In this framework, racial

²⁵ Eduardo Bonilla-Silva, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, Fourth Edition (Lanham: Rowman & Littlefield Publishers, 2013); Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *The University of Chicago Legal Forum* 140 (1989): 139–67; Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction, Second Edition* (NYU Press, 2012).

²⁶ Denise Ferreira da Silva, *Toward a Global Idea of Race* (Minneapolis: Univ Of Minnesota Press, 2007); Ann Stoler, *Race and the Education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things* (Duke University Press Books, 1995).

and other forms of difference are external to and disavowed by law. But by conflating equality with sameness, the law actually creates and reproduces inequality. When the law treats subjects only as equal individuals, it renders itself incapable of providing meaningful remedies for systemic problems like discrimination, oppression, and violence, which operate on the collective rather than the individual level.²⁷

My research expands on the idea that race and racial inequality are “made” by ostensibly legal projects, especially when calls for collective civil rights are transformed into individualistic remedies that leave larger structures unchanged. In addition to being a racial project, I argue that U.S. law (its creation and enforcement) has been a violent project, ontologically, discursively, and materially. I further argue that the racialization of law and the violence of law are mutually constitutive. It is the violence of law that grants it race-making power, and it is the racialization of law that justifies its violence. Just as critical race theorists have argued that the law cannot be made “color-blind,” I argue that the law cannot be made “non-violent,” nor can the state’s monopoly on force be exercised with neutrality. Violence and race historically inhere to the doctrine and execution of U.S. law, and legal systems require drastic re-making, not mere reform, for this relationship to be undone.

Key Terms

Lynching

Opponents of lynching, as well as scholars of the topic, have long been challenged to find a satisfactory definition of the term. Writing in 1930, historian Genevieve Yost described one of

²⁷ Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921: Race, Reparations, and Reconciliation* (Oxford ; New York: Oxford University Press, 2002); Austin Sarat and Nasser Hussain, eds., *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* (New York, N.Y: NYU Press, 2010).

the main difficulties she encountered in her efforts to compile a comprehensive inventory of lynchings in Kansas. Put simply: “It is sometimes difficult to tell when a lynching is a lynching.”²⁸ Almost a century later, many historians, sociologists, ethnic and cultural studies scholars have continued to search for a meaningful definition. Yet, the passage of time has not made it any easier to create objective (empirical) criteria. Some scholars, such as Stewart Tolnay, E.M. Beck, Amy Bailey, and Elizabeth Hines, rely on “the NAACP definition” of lynching, which holds that:

- 1) There must be evidence that someone was killed
- 2) The killing must have occurred illegally
- 3) Three or more persons must have taken part in the lynching
- 4) The killers must have claimed to be serving justice or tradition

Yet, historian Christopher Waldrep argues that there is no such thing as “the NAACP definition” of lynching: “the papers of the NAACP...document staff debates, confusions, and disagreements – but no consensus – over the meaning of [the term].”²⁹ The criteria listed above were not officially developed until 1943, the result of a contentious three day conference between representatives of the NAACP, the Association of Southern Women for the Prevention of Lynching (ASWPL), the Tuskegee Institute, and the Committee on Interracial Cooperation (CIC). The four criteria announced at the end of the meetings represented bitter negotiations. None of the organizations were very pleased with the results, but agreed some definition was needed for legal purposes and for record-keeping.³⁰ Although the secondary literature on

²⁸ Genevieve Yost, “The History of Lynchings in Kansas,” *Kansas Historical Quarterly*, no. 2 (May 1933): 184.

²⁹ Christopher Waldrep, “War of Words: The Controversy over the Definition of Lynching, 1899-1940,” *The Journal of Southern History* 66, no. 1 (February 1, 2000): 75–100; Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (New York ; Basingstoke: Palgrave Macmillan, 2002).

³⁰ Waldrep, “War of Words.”

lynching is voluminous, Kathleen Belew concluded in a recent review that there has been a “remarkable delay in fully theorized work about lynching” a delay she attributes to “disagreement over its definition.”³¹

Scholars’ inability to reach consensus on a definition for lynching stems in large part from wide variations in how the term has been applied, variations which underscore the ways in which lynching has changed continuously in practice (I will discuss this in more detail later). Christopher Waldrep has argued that studies of lynching need to emphasize more qualitative and humanistic analysis; in his own work, he traces the history of lynching by defining it as a form of political rhetoric. That is, rather than create and impose objective criteria, he pays attention to how historical actors used the term lynching. How did people, in particular times and places, distinguish between related forms of violence, like “lynching,” “murder,” “rioting,” “terrorism,” “crime,” and/or “uprising/rebellion”? The contradictions in how these terms are applied, rather than being an obstacle to study, for Waldrep become the focus of the study, as he employs rhetorical analysis to track change and continuity in the practice of lynching across two centuries.

I follow Waldrep’s lead, and use the term “lynching” in reference to how people defined and talked about the incidents I examine, when and where they occurred. In other words, if the NAACP, the Chicago Defender, and a local or state-level newspaper all refer to an event as a “lynching,” that is how I will refer to the event. Like Waldrep, my analysis finds that close attention to the rhetoric of lynching is crucial to understanding how it has operated and changed over time. I analyze moments of divergence, when (for example) the victims of violence describe what happened as “mob violence,” but the perpetrators describe it as “enforcing the law;” or

³¹ Kathleen Belew, “Lynching and Power in the United States: Southern, Western, and National Vigilante Violence.” *History Compass* 12.1 (2014): 84–99.

when critics of lynching claim that lynchers are “brutes and savages,” while defenders of lynching apply similar terminology to the victims (who were, in some cases, accused of serious violent crime). Such divergences reveal what is at the heart of debates over lynching: not a binary opposition between orderly government and mob rule, but rather a conflict over what constitutes “order” in the first place. In Yost’s words, “the difference between a lynching and a legal hanging [was] quite often a matter of personal opinion and party affiliation.”³² Therefore, rather than try to develop objective criteria that differentiate lynchings from other forms of official and private violence, my approach is to tease out these “matters of personal opinion and party affiliation,” to demonstrate how lynching and mob violence operated as state-sanctioned political projects, and were not nearly as “private,” “lawless,” or mob-like as the wider public sometimes believes. I combine rhetorical analysis with careful archival research to get at the deeper philosophical and ethical debates – over race, violence, crime, and inequality – that surround lynching, making the historical stakes of contemporary engagements with racialized violence more visible and resonant.

Mob Violence

As is the case with lynching, “mob violence” is another term that resists precise definition. Scholars of violence sometimes use the term “mob violence” synonymously with “lynching” (as implied by terms like “lynch mob”). But in other studies, mob violence is used to refer to larger-scale violence, like riots, uprisings, or pogroms. Sociologists have used interlocking variables to categorize various forms of mob violence, for example, the size of the mob is one factor that differentiates a lynching from a riot, as is the selection of victims (lynchings are usually directed at a specific individual accused of something, while riots tend to target a class of

³² Yost, “History of Lynchings in Kansas,” 185.

people indiscriminately). Terrorism also targets people indiscriminately, but terrorism is pre-planned and organized while riots are spontaneous and disorganized. Of course, these neat taxonomies do not usually account for the wide variations in practice, especially across history and transnationally, but they can be useful in the development of a thoughtful and nuanced vocabulary for discussing different violent phenomena.

Further compounding the problem of definition, academics' use of "mob violence" does not always match how historical actors used the term, nor can they really, since the term has not been used with consistent meaning or intent. Newspapers during the period I study refer to many forms of social disorder as "mob violence" – ranging from labor strikes that turn violent (regardless of which side instigates); to vigilante raids of brothels, bars, and gambling houses; race riots and mass lynchings; and radical political violence (sabotage, property destruction, assassination and bombing). Civil rights organizations like the NAACP advocated legislation aimed at "the Suppression of Lynching and Mob Violence," indicating that they were less concerned with the precise cause or form of violence than they were concerned with eliminating an array of violent practices that combined to significantly harm individuals and communities of color.³³

A major intervention of my research is to trouble the notion of "mob violence" – specifically, to analyze the role played by state actors in the formation of mobs – and so I use the term sparingly. However, when particular historical actors (a newspaper editor, government officer, or civil rights leader, for example) use the term "mob violence," I follow suit. This is particularly applicable in the chapters that focus on the Red Summer of 1919, which featured both an unprecedented number of race riots and a major spike in rates of lynching. Organizations

³³ Kidada E. Williams, *They Left Great Marks on Me: African American Testimonies of Racial Violence from Emancipation to World War I* (New York: NYU Press, 2012).

like the NAACP often referred to such violence with one sweeping phrase – mob violence – in order to simplify their message to the public and appeal to a Progressive vision of orderly government.³⁴ My critiques of the term “mob” are not intended as retroactive empirical “corrections” (i.e., they were wrong/mistaken to call this mob violence). Rather, I understand their rhetoric as a conscious choice, and analyze some of the unintended effects such rhetoric has had. Namely, I point out that the images conjured by the term “mob” do not adequately account for the extent to which state actors were involved in the creation, authorization, organization, arming, and deployment of so-called mobs, as well as being responsible in the aftermath for ensuring that perpetrators enjoyed relative impunity for their actions. I am particularly concerned with how the language of “mob violence” has carried forward over time. Black audiences in the 1900s, 10s, and 20s, may have implicitly understood that the “mobs” involved in mob violence often included law enforcement personnel and other government officials. A century later, however, particularly in a context featuring widespread law enforcement violence against people of color, the emphasis on “mobs” has been detrimental to public discourses on race and violence.³⁵ These discourses often remain mired in notions of conscious racial hatred, as one would expect from an irrational mob. I examine the systemic *rational* connections between violence, law enforcement, and racial inequality, and point to the ways in which 19th and early 20th century campaigns against mob violence could also be described as campaigns against police violence – campaigns that are in sore need of resurrection and revival.

State of Exception

³⁴ That is to say, as I will document in more detail in the chapter on lynching, even those Progressives who were ambivalent on issues of race could be appealed to on the basis of their commitment to order. NAACP campaigns against “mob violence” were successful precisely because this rhetoric is strategic and speaks to a national audience that was otherwise painfully disinterested in the plight of black Americans.

³⁵ I do not claim these conversations never occur, just that many public discussions center on the racial biases of individual officers.

Coined by Giorgio Agamben, who was referencing Carl Schmidt's writings on states of emergency, the term "state of exception" refers to a space (temporal, physical, and political) governed by the abdication of law, where "application is suspended but the law, as such, remains in force."³⁶ These "states of exception" appear to be spaces that have been abandoned or neglected by law, but in fact they are spaces that have been prescribed and created by law, in accordance with a long-standing legal corpus that holds that constitutional and political norms can (and should) be suspended during times of emergency. The purpose of this abdication is not to overthrow existing loci of power and control, rather the purpose is to protect and reproduce political normality and the status quo in times of crisis.

This framing is especially relevant to scholarship on lynching because, as many scholars have pointed out, lynching was a form of violence that served to maintain racial, sexual, and economic norms. Understanding lynching as a form of "exceptional" violence challenges the traditional language used to describe lynching, such as extralegal, illegal, unlawful, lawless, or criminal. Although Lynch Law did not follow the rules or procedures outlined in federal or state constitutions, as we shall see, it nonetheless operated with the force and legitimacy of law, and in the majority of cases with official or unofficial government sanction.

States of Exceptionalism

In her analysis of U.S. empire and domestic race relations, Amy Kaplan observes that ideologies of American exceptionalism, codified through law, have worked to create "ambiguous spaces that are not quite foreign or domestic."³⁷ On the one hand, the universalizing impulses of American exceptionalism have undergirded political and territorial expansion, for example, Manifest Destiny was a philosophy that stressed the exceptional nature of American civilization

³⁶ Giorgio Agamben, *State of Exception*, (Chicago: University of Chicago Press, 2005).

³⁷ Amy Kaplan. *The Anarchy of Empire in the Making of U.S. Culture* (Harvard University Press, 2005) 15.

and America's ultimate destiny as a transcontinental empire. At the same time, the democratic impulses of American exceptionalism include celebrations of freedom and equality. It is America's commitment to individual liberty that make it "exceptional" compared to Europe's monarchical empires. Kaplan joins other scholars of U.S. empire in pointing out that the ideology of American exceptionalism contains conflicting ideals – supremacy *and* equality – whose coexistence are often untenable in practice. Kaplan asserts that the contradiction of American exceptionalism leads to the creation of political and territorial spaces that are simultaneously claimed and disavowed by the U.S. In the case of Puerto Rico, the Supreme Court issued a confused and confusing ruling that the territory was "foreign in a domestic sense," and therefore its residents could be subject to U.S. law despite their lack of political representation. Investment in American exceptionalism helps to explain how jurists and political leaders could justify the colonization of other nations, without necessarily altering their idea of America as a free republic. Thus America could be an empire without having any colonies, and it could have colonies without being an empire.

Drawing on Kaplan's analysis of American exceptionalism, and Agamben's analysis of states of exception, the title of my dissertation combines the terms into "States of Exceptionalism." Just as Kaplan describes the effect of exceptionalism in the creation of "ambiguous spaces that are not foreign or domestic," my dissertation contends that states of exception involve the creation of ambiguous spaces that are not quite legal or illegal. These quasi-legal spaces allow violence to flourish, violence that is at once a product of law, and yet is detached from the accountability or oversight that law is supposed to provide. But, ideologies of American exceptionalism prevent many Americans, particularly white Americans, from seeing government and state power in this light. Police brutality, discrimination, and racial bias are

treated as “exceptions” to a system that is otherwise fair and just. American political and economic systems simultaneously rely on this violence and disavow it as “un-American.”

The term “states of exceptionalism,” then, describes how state-sanctioned lynchings and anti-black riots were justified by reference to emergency conditions that required the temporary setting aside of legal and political norms. Although these norms were set aside in order to allow violence to occur, this should not be taken to mean that law somehow ceased to exist during lynchings and riots, or that they took place in defiance of law, or that they posed a fundamental threat to law. Far from it. Law not only existed during episodes of lynching and mob violence, its power was magnified exponentially. Lynching was never successfully outlawed at the federal level; attempts to gain reparations for lynching and riot-related damages have resulted in little more than official apologies and un-funded taskforces. Moreover, the legal architecture that permitted lynching to occur remains with us today, in the form of repressive criminal justice measures that rationalize disproportionate violence and repression of communities of color. Although lynching and mob violence are usually described and remembered as “illegal”, this descriptor belies the extent to which extralegal violence has functioned as a cornerstone in the development of U.S. foreign policy, state formation, and the development of criminal legal procedures.

Genealogies of Lynching: Mob Violence and State-Building

“When Virginia was the backwoods of America, without law, summary executions were common; and the accident which applied the term Lynch to illegal executions will never positively be known. Whatever else it was, in its original use it was not a term of reproach, but a mark of the high character and moral integrity of the people.” – Hubert Howe Bancroft, 1887³⁸

³⁸ Hubert Howe Bancroft, *Popular Tribunals* (San Francisco: The History Company, 1887).

“He who attacks lynching attacks one of the oldest, one of the most deeply rooted of institutions peculiarly American, one eminently respectable in origin, which is regarded by its adherents, not as in opposition to the established laws, but rather as a supplement to them.” – Roy Nash, 1916³⁹

“Lynching did not cause so much consternation then as it does now...The people banded themselves into vigilance committees for the protection of themselves and their property, and punishment by these committees was seldom considered illegal. The squatters' courts were as much respected and as effective as the government courts.” – Genevieve Yost, 1933⁴⁰

This review will trace some of the important markers of change over time in the on-the-ground practice of lynching, but it will also offer a genealogical history that highlights the discourses that made lynching seem, to many Euroamerican settlers at least, a righteous and even radically democratic institution. These pro-lynching discourses represented overarching cultural, legal, and social norms that developed in response to military and legal contradictions posed by settler-colonial expansion and the institutional development of slavery. Yet, the relationship between pro-lynching discourse and lynching as an actual practice was not a straight-forward matter of cause and effect. Pro-lynching discourses had to contend with, and adapt to, anti-lynching discourses. Both pro- and anti-lynchers had to react as new incidents became fodder for public debate. Proponents of lynching struggled to quell the public’s fear of excessive and uncontrolled violence; opponents of lynching struggled to address the public’s certainty that such violence was sometimes necessary to maintain social order. By focusing on the tensions between lynching as discourse and lynching as practice, and the ways in which discourse and practice refracted back upon each other, this section reframes our understanding of lynching to reflect how it has constituted a type of legalized violence that has been, and continues to be, foundational to modern U.S. state formations.

³⁹ Nash to Peabody Memo.

⁴⁰ “Yost, “History of Lynchings in Kansas,” 184 – 185.

Popular representations of lynching as well as academic studies (especially prior to the late 1990s), are often premised on the implicit or explicit assumption that lynching is an historical artifact. Although the *term* remains culturally potent, the vast majority of scholarship, documentaries, artwork, and other media that address lynching as a material practice situate it as a primarily 19th- and early 20th-century phenomenon endemic to the western frontier and the post-Reconstruction South.⁴¹ Many of these texts portray the violence of lynch mobs as unsophisticated and disorganized, reflecting a period of state formation characterized by weak or non-existent civil institutions, when people were more influenced by crude racial hatred, spurious racial science, and explicit ideological commitment to white supremacy. Without denying the importance of these factors, the most recent developments in scholarship on lynching have begun to explore how it was also a product of modernization, rapid industrialization, and cutting-edge developments in transportation and communication technologies.⁴² Despite growing recognition that lynching is an element of modernity, however, the terms lynch law and lynching have had difficulty shaking their connotations of barbarism and irrationality. Lynching analogies typically describe the surfacing of aggressive impulses, the rejection of civilized codes of conduct, and devolution into mob mentality. In fact, the origins of lynching are inseparable from the appearance and expansion of so-called “civilization,” that is, inseparable from the very modern modes of domination and dispossession inaugurated by European migration to the Americas.

⁴¹ For now, I will uncomfortably distinguish these areas of inquiry as “frontier lynching” versus “racialized lynching,” but by the conclusion of this review it should be clear that it is actually quite difficult (and potentially problematic) to dichotomize the two.

⁴² Jacqueline Denise. Goldsby, *A Spectacular Secret: Lynching in American Life and Literature* (Chicago: University of Chicago Press, 2006).

‘Not Strictly Warranted by Law, but Justified by the Imminence of Danger’:

The Colonial and Anti-Colonial Origins of Lynching

Lynching first entered the Anglo-American vernacular in the frontier regions of what is now western Virginia. Early settlers of the area, including prominent planter Charles Lynch, were frustrated by the requirement that they transport alleged lawbreakers across nearly 200 miles of dangerous swampland to a magistrate in Williamsburg. Arguing the law of necessity, these men organized themselves into a panel of judges, which unilaterally examined evidence, issued verdicts, and executed punishment, typically consisting of flogging and banishment. Their activities eventually popularized and spread under such monikers as “applying Lynch’s Law,” “summoning Judge Lynch,” and eventually, simply “lynching.” Correspondence between Charles Lynch and various colonial governors (including future president Thomas Jefferson), indicate that the planters’ actions elicited cautious sympathy: there was no attempt to stop them, but Lynch and the others were warned that they could be sued if they failed to exercise prudence in their unsanctioned use of governing authority.⁴³

The relationship between lynching and colonial governance was complicated during the Revolutionary War, when Lynch and his fellow planters began administering Lynch’s Law against suspected British loyalists. As one of the earliest historians of lynching would recall,

There was a considerable number of Tories in Bedford County, where Charles Lynch lived. The unsettled condition of affairs also led many desperadoes to resort to this section of Virginia. Both Tories and desperadoes harassed the Continentals and plundered their property with impunity. The prices paid by both armies for horses made horse-stealing a lucrative practice, and the inefficiency of the judiciary made punishment practically out of the question.⁴⁴

⁴³ James Cutler, *Lynch-Law: An Investigation into the History of Lynching in the United States* (Longmans, Green, and co., 1905); Michael Pfeifer, *The Roots of Rough Justice: Origins of American Lynching* (University of Illinois Press, 2011); Ashraf Rushdy, *American Lynching* (Yale University Press, 2012); Waldrep, *The Many Faces of Judge Lynch*; Walter White, *Rope and Faggot: A Biography of Judge Lynch* (Notre Dame University Press, 1929).

⁴⁴ Cutler, *Lynch-Law*, 24-25.

Lynch and his contemporaries charged suspected loyalists with treason, and imprisoned a number of people for years, without trial, in order to prevent them from giving aid to the invading British army. Following the war, in 1782, the Virginia legislature passed a law that “indemnified and exonerated” Charles Lynch and three other men for these transgressions, calling their actions “timely and effectual measures,” that “may not be strictly warranted by law, [but were] justifiable from the imminence of danger.”⁴⁵ Thus the first codified embrace of lynching emerged at the intersection of threats against national security during a time of war, and practical obstacles to the administration of criminal justice. Faced by such conditions, Virginia’s new legal authorities agreed that extraordinary measures were justified. The clause that defined Lynch’s actions as being “not strictly warranted by law, [but] justifiable from the imminence of danger,” became a cornerstone of pro-lynching discourse that can still be discerned in contemporary debates over crime, policing, torture, and warfare.

Roy Nash, a lead organizer for the NAACP’s national campaign against lynching and mob violence, explained in 1916 that Virginia’s Indemnity Act, “gave expression to a principle which found ready acceptance among the early settlers exposed to the dangers and vicissitudes of frontier life.”⁴⁶ The principle was “in the air, as it were, and it was repeatedly embodied in motion.”⁴⁷ Early practices of lynching created the basic architecture of governance (a rudimentary court system) along the outer edge of Anglo, and then American encroachment on indigenous territories of eastern North America. This territory was no longer fully controlled by indigenous groups, nor was it under the effective control of either the old European colonists or the new American settlers. As border communities, the earliest practitioners of Lynch’s Law saw

⁴⁵ “Virginia Indemnity Act of 1782,” discussed in Maud Carter Clement, *The History of Pittsylvania County, Virginia* (1929), 178 – 179.

⁴⁶ Nash to Peabody memo, 5.

⁴⁷ Nash to Peabody memo, 5.

themselves as being on the precipice between civilization(s) and wilderness, a boundary that carried a heavy burden of religious, racial, and sexual symbolism.⁴⁸ Settler-colonists felt an acute need “to take matters into their own hands, to punish lawlessness of every kind.”⁴⁹

Their description of frontier zones as “lawless” was empirical in the sense that many alleged criminals traveled to these areas to escape trial and punishment by colonial courts; but more importantly, the designation of “lawless” was a performative utterance that rejected the possibility of allowing the land to come under the control of non-Americans (British, French, Spanish, Mexican, and Indian) who might be attempting to impose or preserve their own systems of law. Just as the migration of the actual colonists was justified by the notion of an infinite, empty wilderness, the spread of Lynch’s Law was justified by the notion that this wilderness was also politically empty – lawless – and thus a perfect laboratory for the creation of new republican, democratic, and populist forms of governance.⁵⁰ Even though lynchings in this context were usually aimed at other Euroamerican settlers and colonists, the sense of danger that justified lynching was fueled by the religious, military, and racial paranoia that accompanied colonial competition and settler-colonial expansion.

Lynching and Westward Expansion

Lynching associated with settler-colonial expansion continued unabated into the late 19th century, particularly in response to horse theft and other major crimes. In the words of Genevieve Yost, a chronicler of lynching in Kansas, “What the negro problem was to the South

⁴⁸ Richard Slotkin, *Regeneration through Violence; the Mythology of the American Frontier, 1600-1860*. (Middletown: Wesleyan University Press, 1974).

⁴⁹ Nash to Peabody memo, 7.

⁵⁰ This idea would be articulated in Frederick Jackson Turner’s “Frontier Thesis,” which theorized the effects of the frontier on Americans’ psychological, social, and political development.

as a cause for lynching, horse stealing was to the West.”⁵¹ This might seem a strange analogy at first, but in fact the outrage engendered by horse thieves was inseparable from early colonists’ commitment to racial superiority, military supremacy, and capitalist expansion, just as was the case with “the negro problem” in the post-Reconstruction south. Ned Blackhawk explains that the Indian nations American settlers encountered as they expanded further west were already reeling from the effects of Spanish colonization in other parts of North America. Horses were a prime currency in the ensuing competition for land, resources, and trade advantage.

For neighboring Indians, [trade relations with Spain] became the oxygen for the community body’s survival. Acquiring these items, however, required tremendous and often violent labor, for by offering new trade items, the Spanish provided powerful incentives to those who most consistently brought in items of worth, most notably slaves, horses and hides, as the competition both to trade and to raid reshaped Indian economies.⁵²

This inducement “to trade and to raid” made the areas where American expansion intersected with European colonial claims and indigenous struggles for livelihood notoriously dangerous. For American settlers in particular, who were in the process of creating a new nation with new forms of law, the need to rely on lynching was as obvious as the need to breathe: “it was in the air, and repeatedly embodied in motion.”

As urgent the need for lynching seemed, however, it was also the object of fear, suspicion, and skepticism. Critical questions surrounded the practice: if lynch law was a form of governance, what were the checks and balances on its power? Were lynchers and members of self-appointed vigilance committees truly disinterested dispensers of justice, or had they merely found a clever cover for violence that furthered their own interests? If lynch law was in part justified on the revolutionary principle that people have a natural right to “alter and abolish

⁵¹ Yost, “History of Lynchings in Kansas,” 193.

⁵² Ned Blackhawk, *Violence over the Land: Indians and Empires in the Early American West* (Harvard University Press, 2008).

government,” and to provide for their own protection and self-defense, what was to prevent socially marginalized groups from “lynching” members of elite classes? If lynch law was only supposed to be a substitute for official governance until political infrastructure caught up with human migration, who would decide when lynch law was no longer needed, and in the meantime what effects might it have on nascent American institutions?

As cycles of vengeance and vigilantism played out against the backdrop of colonial and Indian warfare and white migration, lynching came to occupy the curious cultural and legal status of being a “necessary evil.” It demarcated a border between civilization and savagery, and “upon this border, as upon the edge of mighty fermentations, accumulated the scum of the commonwealth. [...] Society there was low and brutal, and the lynchers were not always much better than the lynched.”⁵³ Although there was no dearth of justifications for frontier lynching, the very need for it, and the character of the people who were most prone to use it, seemed to indicate something troubling about the status of civilized mankind:

Thus paradoxical is our freedom when it comes, liberty leading only to greater bondage; for the more advanced the civilization the more powerful the unwritten law [of vigilantism and lynching]. Is it not humiliating; is it not far from high or holy satisfaction, the thought that of all animals, man alone should require conventional rules...that with his intelligence and reason he should require laws to govern him, when brutes associate in comparative harmony, each with its kind, without the appointment of legislature, governor, judge, or hangman? Obviously this is the penalty man pays for his reason.⁵⁴

Early historians of lynching frequently conclude that

The social conditions which produced lynchings produced also a tolerance for them, and both vanished together. The extension of civil authority into the territory provided punishment of criminals, and its enforcement gave the people confidence to rely upon it. We like to think, also, that an advancing civilization yielded some influence against the practice.⁵⁵

⁵³ Bancroft, *Popular Tribunals*, 7.

⁵⁴ Bancroft, *Popular Tribunals*, 36.

⁵⁵Yost, “History of Lynchings in Kansas,” 203.

But, though we might like to think that the advance of civilization caused lynching to vanish, ironically, the opposite is also true: the advance of civilization is what caused lynching to appear in the first place. Especially when performed by posses and sheriff's deputies, lynching could occur with impunity only because it was covered by "the veneer of legality" civilization provided through subsequent extension of its own authority.⁵⁶ Bancroft, writing in a time and place when lynching enjoyed more popular support, described lynching as civilization's chaperone – "the law's mentor as well as the law's master."⁵⁷ But as opinion shifted against lynching, more and more histories, like that of Yost, drew sharper lines between lynching and legitimate state action despite significant evidence that lynch law and settler-colonial law were constitutive rather than strictly oppositional.

The Rise and Decline of Lynching During the Long Civil War

Starting in the 1830s and 40s, the process of westward expansion began to intersect with increasingly violent debates over slavery, as abolitionists and pro-slavery forces fought over whether it would be permitted in annexed territories and new states. Both pro-slavery and anti-slavery settlers were targets of lynch law during border wars in present-day Nebraska, Kansas, Missouri, and Texas. Free blacks and escaped slaves, and even well-established white citizens, became targets as slave-holding states encouraged vigilantism against people suspected of assisting the abolitionist cause.

This re-coding of the political meaning of lynching led to a temporary decline in its legitimacy, if not its frequency. In a notable address to the Springfield Lyceum in 1837, future

⁵⁶ Yost, "History of Lynchings in Kansas," 198.

⁵⁷ Bancroft, *Popular Tribunals*, 28.

president Abraham Lincoln reflected on the great success of American colonization.⁵⁸ Given America's vast resources and growing military might, Lincoln predicted that "if destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide." He then identified lynching, or "mobocracy," as America's primary form of suicidal ideation, condemning "the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions [of savage mobs] in lieu of the sober judgment of Courts." To those Americans who imagined themselves to be unaffected by lynch law, he described a recent outbreak of mob violence in Mississippi:

They first commenced by hanging the regular gamblers; a set of men, certainly not following a very useful or honest occupation [but technically not breaking any laws]...Next, negroes, suspected of conspiring to raise an insurrection, were caught up and hanged in all parts of the State: then, white men, supposed to be leagued with the negroes; and finally, strangers from neighboring States, going thither on business were in many instances subjected to the same fate. Thus went on this process of hanging, from gamblers to negroes, from negroes to white citizens, and from these to strangers; till dead men were seen literally dangling from the boughs of trees upon every road side; and in numbers almost sufficient to rival the native Spanish moss.⁵⁹

Lincoln's comments were delivered at a moment when there was a growing sense that lynch law had been allowed to prevail for too long, in places that no longer required it, with potentially irreparable effects on America's social fabric.⁶⁰ Widespread support existed for lynching when it was viewed as a rudimentary mechanism of populist crime control. But now significant portions of the public began to perceive lynching as a form of political terrorism.⁶¹ Eventually, lynching

⁵⁸ Abraham Lincoln, *Collected Works of Abraham Lincoln: Volume 1*, ed. Roy Basler (Rutgers University Press, 1953); Thomas Schwartz, "The Springfield Lyceums and Lincoln's 1838 Speech," *Illinois Historical Journal*, Spring (1990): 45 – 49.

⁵⁹ Schwartz, "The Springfield Lyceums."

⁶⁰ Carl Prince, "The Great 'Riot Year': Jacksonian Democracy and Patterns of Violence in 1834," *Journal of the Early Republic* (1985): 1–19.

⁶¹ Of course, others may have already viewed lynching as a form of terrorism; but as Lincoln notes in his address, its use against white people – including white people who were just socially or politically stigmatized, rather than being dangerous criminals or enemies of war – indexed the limits of lynching's popular legitimacy.

became almost indiscernible from border warfare as violent clashes in the new territories escalated toward Civil War.⁶²

“The Lynching Era”: Reconstruction and the Closing of the Frontier

In the aftermath of the Civil War, both frontier lynching and pro-slavery lynching re-emerged in new forms, and the institution of lynching began to regain the legitimacy that it lost during the strife of the prewar decades, reinvigorated by the closing of the frontier in the 1880s and 1890s. In the west, lynching was used as part of the domination of indigenous and migrant populations in order to claim meaningful sovereignty over newly acquired lands.⁶³ In the south, along with disenfranchisement and economic exploitation, lynching reestablished pre-abolition racial hierarchies. This represented a key moment in the history of lynching, when the coexistence of frontier lynching in the west and racialized post-Reconstruction lynching in the south fueled and influenced each other. In both arenas, the violence involved with lynching escalated, while the reasons a person might be lynched were increasingly petty.

White southerners drew on the rhetoric of frontier lynching to justify violence against African Americans, despite the fact that they did not live on the frontier, and courtroom justice was not only available but also quite severe. In a widely publicized speech in 1913, for example, South Carolina governor Cole Blease promised that he

would never order out the militia and ask the home boys of South Carolina to shoot down their friends and their neighbors to protect a black brute who had assaulted a white woman...when a negro criminally assaults a white woman, all they want to know is that they have got the right man, and there will be no need of a trial, and there ought not be

⁶² Clement Eaton. “Mob Violence in the Old South.” *The Mississippi Valley Historical Review* (1942): 351–370.

⁶³Ned Blackhawk, *Violence Over the Land*, 2008; Richard Delgado, “The Law of the Noose: A History of Latino Lynching,” *Harvard Civil Rights-Civil Liberties Law Review* 44 (2009): 297; Ken Gonzales-Day, *Lynching in the West: 1850-1935* (Durham: Duke University Press, 2006); Nicole Guidotti-Hernández, *Unspeakable Violence: Remapping U.S. and Mexican National Imaginaries* (Durham: Duke University Press, 2011).

any need of it in any civilized community. If we can't protect our white women from a black fiend what can we do for our country's civilization and for man's uplift?

Governor Blease's statement that "there ought not be any need" of a trial "in any civilized community," marked African Americans as excluded not only from whiteness but also civilization itself, constructing the hypothetical rapist as both "black" and as a "brute" or "fiend." In 1913, South Carolina's population density far surpassed that used by the U.S. census to designate frontier areas. For that matter, on the actual frontier it would be the *presence* of a trial, not the absence, which indicated a community was civilized, with the need for lynching having vanished upon the arrival of a regular court system. It should be noted also that Blease's embrace of lynching was *not* a generic embrace of chaotic mob violence – he specifies that lynchers in South Carolina "want to know they've got the right man," underscoring his perception that lynching was justified, essentially, as an emergency law enforcement mechanism, and did not conflict with the ideals of justice found in a regular courtroom. Despite the seemingly disparate targets and circumstances, pro-lynching Southerners succeeded in mobilizing the rhetoric of civilization because justifications for lynching on the frontier were already laden with ideas about the violence needed to shore up the borders between civilization and savagery, and the degeneration white/civilized peoples were vulnerable to if they were not vigilant(es). It was not difficult for whites living in other parts of the country to accept Southerners' decision to resort to the same law enforcement strategies that had long been utilized along the Western frontier.

Southerners' appropriation of frontier-based arguments in favor of lynching had a ripple effect back onto the practices and discourses associated with lynching on the actual frontier. Pre-Civil War, the term lynching was occasionally applied to execution-style killings, but it had also referred to a range of corporal punishments (whipping, banishment, mutilation, tarring and feathering, etc.), and it was directed more often against Euroamericans than it was against people

of color. After the Civil War, frontier lynching came to mirror Jim Crow lynching, in that it involved the summary execution of mostly indigenous peoples and people of color, who could be lynched not only as suspected criminals, but also for political or religious affiliations, perceived social or sexual deviance, or merely for using land and resources that settlers wanted to control.

In many respects – certainly in numbers – lynching was at the high-point of its power. Yet, the more power lynchers presumed to exercise, especially when characterized by gratuitous brutality, the more backlash lynching attracted. The high point of lynching in the 1890s also marked the birth of the first organized anti-lynching movement the nation had ever seen, led by formidable writers and activists such as Ida B. Wells, Frederick Douglass, and Jesse Daniel Ames. As the 19th century drew to a close, these women and men honed new arguments to use against lynching, which would prove enormously successful – though not always in the ways they had predicted or hoped for.

Lynch Law as a “Colonial Topic”⁶⁴

At the dawn of the twentieth century, both the discourse and the practice of lynching were in serious turmoil. Advocates of lynching still leaned heavily on the anti-crime, pro-white-civilization logics of frontier lynching. But opponents of lynching pointed out that the frontier was effectively ‘closed,’ American civil and criminal courts were firmly established (even if not always 100% effective), and policing as an occupation was becoming more skilled and professionalized. Anti-lynchers insisted that the arguments in favor of frontier lynching were now irrelevant, certainly in the south if not nationwide. Organizations like the Tuskegee Institute and the NAACP, building on the journalism of Ida B. Wells, began to systematically record and

⁶⁴ Thomas Smith, “The Discourse of Violence: Transatlantic Narratives of Lynching during High Imperialism,” *Journal of Colonialism and Colonial History* 8, no. 2 (2007), 5.

publicize incidents of lynching, and could point to countless examples that did not represent some unified public expression against crime, but instead advanced particular racial, class, sectional, and political interests, sometimes at the expense of the larger community or economy. After decades of rampant violence, with lynch law operating virtually unchecked throughout the West, Midwest, South, and Southwest, rates of lynching peaked in the 1890s. As opponents of lynching wore away at its rationalizations, a particular version of the practice began a slow but mostly steady decline from the 1900s through the 1930s.

It is important, however, to consider the success of the anti-lynching movement in historical context. The late-19th and early-20th centuries witnessed a major shift from transcontinental expansion to transoceanic imperialism, a transformation that weakened arguments in favor of lynching.⁶⁵ In contrast to the wars of the 19th century, which were a means of annihilation and annexation, America's early twentieth-century wars were promoted on the basis that American political and economic systems would have a liberating effect, protecting people and territory from European aggression and helping with the development of modern political and economic institutions as the basis of future claims to sovereignty.⁶⁶

Whether one favored isolationism or intervention, the idea that America's expanding civilization was synonymous with the benevolent imposition of democracy – rather than the violent destruction of pre-existing political orders – became hegemonic in debates over America's experiments with overseas colonization. This development did not go unnoticed by the increasingly powerful anti-lynching movement, which began to denounce lynching as unpatriotic and uncivilized. Lynching in America became a “colonial topic,” increasingly

⁶⁵ I am particularly indebted to Kiri Sailiata for her theorizations of military and colonial violence along what she dubs “the tropical frontier.”

⁶⁶ Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines* (The University of North Carolina Press, 2006).

frowned upon as a local law enforcement practice in light of domestic and foreign policy goals and international scrutiny.

The nationalist and imperialist packaging of anti-lynching rhetoric during this period should alert us to the ways in which denunciations of violence in the domestic sphere may have served to naturalize U.S. recourse to violence internationally. When President Woodrow Wilson rallied the nation for entry to World War I, for example, black editor Robert Owens, writing in his St. Louis, Missouri-based *Post-Dispatch*, stated, “the question that is first and uppermost in the minds of the vast majority of the black people of this country is, Are we included in this world that is to be made safe for democracy?”⁶⁷ But for President Wilson, who issued a national address against lynching a few months later, the question was, “How shall we recommend democracy to the acceptance of other peoples[?]”⁶⁸ Wilson and other national leaders adopted a public stance in opposition to lynching to maintain ideological coherence in the U.S.’s “recommendation” of democracy to other nations – a recommendation that, if refused, would be enforced through armed invasion, coup d’etats, naval embargoes, and extended military occupation.

The Strange Career of “Lawlessness”

This project focuses on the period when lynching is thought to have declined and even disappeared. I am particularly concerned with analyzing the discourses of “lawlessness” and “law and order,” terminology that appeared in the rhetoric of *both* pro-lynchers and anti-lynchers. When civil rights activists borrowed such terms (along with “barbaric,” “savage,” and “criminal”) from nationalist and colonialist discourses to invigorate their arguments *against*

⁶⁷ *The Crisis*, 16.1 May, 1918, 23.

⁶⁸ President Wilson’s anti-lynching proclamation, July 26, 1918.

lynching, they inadvertently brought with them some of the most racially coded arguments that had once existed in *favor* of lynching. For more than a century, pro-lynchers held that lynching was necessary in response to the “lawless” behavior of primitive Indians and white and black criminals. Now anti-lynchers held that lynching itself was lawless and primitive. But if the problem of lynching was that it represented primitive lawlessness and thus brought shame to civilization, what was the solution? Just as proponents of frontier lynching in the 18th and 19th centuries promised it would disappear with the establishment of political (colonial) infrastructure, critics of racialized lynching in the late 19th and early 20th centuries proposed to defeat lynching by strengthening, expanding on, and re-regulating that same infrastructure.

My reading and research into lynching during this period digs more deeply into this fundamental contradiction: lynching declined when it became associated with the rhetoric of “lawlessness,” but prior to this, lynching had in fact been a technique of law enforcement. Some of the most lawless aspects of lynching did decline – but what about lynching’s lawful undergirding, as an accepted method for apprehending and punishing alleged criminals? According to historian Ken Gonzalez-Day, “contrary to the popular image of the American West as a lawless frontier, it was areas with the most law enforcement that had the greatest number of summary executions, vigilance committees, and lynch mobs.”⁶⁹ This was true for Jim Crow lynchings as well. Nationally, from the 1870s through the 1890s, lynch mobs obtained their victim from police custody more than 75% of the time.⁷⁰ In some states, the rate was even higher: Fitzhugh Brundage found that from 1880 to 1930, lynchers in Georgia obtained their victims from police custody 80% of the time and in Virginia 94% of the time. He concluded that “local law officers, whether through woeful incompetence or complicity, often aided the work of

⁶⁹ Gonzalez-Day, *Lynching in the West*, 76

⁷⁰ Waldrep, *The Many Faces of Judge Lynch*.

the mobs.”⁷¹ A study of the 21 lynchings that occurred in 1930 found that “in every case the local officials were either grossly negligent or in open connivance with the mob.”⁷²

In this dissertation, drawing on a range of primary and secondary literature, I work to make it more apparent that lynching and mob violence are problems of law, not lawlessness. In Chapter Two, I describe law enforcement participation in incidents of lynching and challenge the typical narrative that this was a result of law enforcement officers being “overpowered” by mobs. In many cases, law enforcement collaborated with mobs. In other cases they made little or no effort to protect people who had been arrested. In still other cases, they failed to diligently investigate lynchings which, along with equally negligent prosecutors, allowed the phenomenon of lynching to continue for more than a half-century with an arrest and conviction rate in the single digits. NAACP strategies to counter lynching included a number of measures aimed at curbing police violence, seeking to protect black citizens not just from white citizens, but also from capricious violence at the hands of state actors.

In Chapter Three I describe how the principles of lynch law carried over onto the national stage as the United States grew into its position as a global power during the early twentieth century. Rather than describe this period as the “end” of lynching, I suggest it may have represented the “nationalization” of lynching. Racialized ideas of crime and savagery were woven into national narratives of domestic and international threat. Lynchings aimed at individuals declined, and local police began to close ranks against would-be lynch mobs. At the same time however, an era of violent anti-black riots took place, frequently justified by similar rationales as had once driven lynching, and ultimately claiming a much larger death toll. Yet, the

⁷¹ Fitzhugh Brundage, *Under Sentence of Death: Lynching in the South* (Chapel Hill: University of North Carolina Press, 1997), 30.

⁷² Arthur Raper, *The Tragedy of Lynching*, (Chapel Hill, 1933).

nationalization of lynching discourse was not a seamless process. Lynching had been a means for many different types of whites to claim power: immigrants used lynching to assert their whiteness politically and culturally; economically marginal whites used lynching to claim the ‘wages of whiteness,’; planters, land-owners and businessmen used lynching to control a racialized workforce; police participated in or acquiesced to lynching as an extension of their role as crime-fighters. On the national stage, such divergent groups did not have equal claim to legitimate perpetration of violence. Immigrants were suspect for their potentially anti-American politics. Economically marginal whites were feared for their pursuit of militant labor organizing. Yet, the labor movement was strong enough that capitalists’ use of violence also met heavy resistance. Out of the many groups who had once been authorized to engage in ‘exceptional’ violence, after World War One, discourses of crisis began to primarily conjure up the image of police, soldiers, and veterans as the legitimate wielders of violent emergency powers.

In Chapter Four I embark on a case study that explores in more detail the consequences of this shift. Usually narrated as an incident of “mob violence,” exemplary of race relations in the Jim Crow south, my treatment of the Elaine riots of 1919, adds to this understanding a deeper awareness of how the riot grew out of the nationalist sentiments of the first world war, and how the highly lethal violence that characterized the riot reflected the actions of organized bodies of soldiers and combat veterans more so than the frenzied, out-of-control actions of a “mob.”

To the extent that states of exception are often framed as problems of sovereignty and executive power, in Chapter Five I extend my analysis of the Elaine riots to include the trials and appeals that came out of the conflict. I show that the problem of “the exception” extends into areas of governance that are typically considered less vulnerable to the logics of emergency and crisis. In a democratic context, the judicial branch ideally enforces the checks and balances that

are supposed to exist against executive or legislative overreach. The *Moore v. Dempsey* decision, however, raises questions about courts' ability to right the wrongs that are committed during states of exception. In this case, the court proved unable to discern between the "form" of law and its substance. That is to say, since the declaration of an emergency allowed all sorts of irregularities to proceed under cover of law, the court found itself unable to pin down what, if anything, had occurred "illegally," despite the sympathetic desire of some justices to find in favor of the Elaine defendants. The strongest verdict they could issue was still "minimalist" and "feeble" according to some legal historians. The court was able to insist on judicial legitimacy – "a trial that looks like what a trial is supposed to look like." But substantive justice – revoking the state's right to put the sharecroppers on trial in the first place – remained far beyond the court's reach.

The final chapter suggests criminal justice reformers would most benefit from a sustained and rigorous critique that refuses to idealize the rule of law. To the extent that lynching has never stood in opposition to state power, but has instead been mutually constitutive of it, strategies for change must avoid reifying the notion that an ideal state maintains a monopoly on the use of force. This framing raises new questions for future generations of reformers who follow in the footsteps of yesterday's anti-lynching activists: can the state's monopolization of violence be reduced in ways that democratize power and society? Is monopolization of violence congruent with democracy? If not, how can or should the function and powers of the state be (re)defined?

CHAPTER 2

Lynching and the Legal Order

A resident of Pine Bluff, Arkansas, wrote to the editor of the Baptist Vanguard newspaper in Little Rock in 1921. The letter is undated, but it could have been written in response to a number of events in Arkansas that year, including at least six lynchings and ongoing legal developments in the Arkansas riot cases stemming from the Elaine riots of 1919. The letter describes widespread police involvement in lynching and mob violence:

[W]hen A Negro is linched, it don't matter, Night or Day, it goes to the news papers, the negro name that was linched, but know one gives the name of any one that does or helps to do the linching. [...] It is always are so that the mob gets the negro out of the hands of the Officers[.] The mob never get hands on A negro untell the Officers get him in there hands, and put him in Jale or take him by violence. But no one know the name of any member of the mob. In my judgement it appears to me that the Officers of the Law is a Part of the Mob. The lawless mob never go after A negro untell they get an Officer with them, and when the negro is killed the Officers don't know a single one in the gang.⁷³

Its lack of date necessitated that the letter be placed out of sequence with other archived correspondence that was filed chronologically by month and day. The final page of the letter is missing, and thus so is the signature, rendering its author anonymous. The migration of the letter is mysterious as well. Although addressed to the editor of the Baptist Vanguard, I found the letter in the papers of the National Association for the Advancement of Colored People (NAACP), in a folder of general office correspondence. There are no accompanying papers indicating the

⁷³ "Unknown letter to Baptist Vanguard," Undated, 1921, Records of the NAACP, Film 19771, Part 7, Series A, Reel 2, University of Michigan.

identity of the letter writer, or that of the addressee, how the letter came into the possession of the NAACP, the reaction of the staff member who received the letter, why they chose to keep it, or if anyone ever wrote back. There is just one brief note from the original archivist – “not complete,” jotted at the bottom and initialed.

The letter is barely legible as historical evidence – it is unaddressed, unattributed, undated, and decontextualized – and yet it is precisely these unmoored qualities that make it well-suited as a starting point for discussion of law enforcement complicity in lynching. The content of this letter describes what was an open secret to anti-lynching activists in the early 1900s, that is, despite the tendency of critics to describe lynching as “lawless” and the circulation of definitions that insisted on the practice’s “illegality”, lynching was in fact deeply embedded in the legal order. As the letter-writer indicates, it was not just that the legal system tolerated lynching or ‘looked the other way.’ The problem of lynching was that “the Officers of the Law is a Part of the Mob.” Although the mob in question might be “lawless,” its lawlessness was imbued with the force and authority of law because police officers, judges, sheriffs, and deputies were active as participants and bystanders to the violence. It was not its illegality, but precisely its *legality* that gave lynching its apparently omnipotent power.

Opponents of lynching, as well as scholars who study the topic, have long been challenged to find a satisfactory description of the relationship between lynching and law. Some scholars, such as Stewart Tolnay, E.M. Beck, and Elizabeth Hines, rely on “the NAACP definition” of lynching, which holds that:

- 1) There must be evidence that someone was killed
- 2) The killing must have occurred illegally
- 3) Three or more persons must have taken part in the lynching

4) The killers must have claimed to be serving justice or tradition

Yet, despite the inclusion of the second criterion, which specifies that lynching is a killing that occurs “illegally,” disagreements within the NAACP and amongst other anti-lynching organizations indicates a lack of clarity over what this terminology meant.⁷⁴ NAACP staffers did not agree on whether killings by police officers should or should not count as lynchings. Advocates of including such killings in annual lynching statistics argued that the police often killed black suspects summarily, and that sheriffs were elected with the votes of KKK members. But opponents contended that crafting anti-lynch laws in a way that would interfere with police work provided ammunition to defenders of lynching, who claimed that anti-lynching laws were essentially “pro-crime.” Killings by posses were even more difficult to classify since posses were technically lawful formations of officially deputized citizens, yet their brutal and disproportionate violence made them indistinguishable from mobs in the eyes of many of their targets. In their public rhetoric, anti-lynching activists described lynching as a form of “lawlessness.” But privately, in debates with each other and in lengthy exchanges with legal advisors, there wasn’t any prevailing opinion as to where the legitimate violence of the state ended and the illegitimate violence of the mob began.

This chapter builds on and extends conversations about these topics by exploring the legitimation of lynching more closely, in order to explicate the relationship between lynching and the legal order in a way that does not reproduce some of the false binaries that have so far dominated these examinations: binaries between legal and extralegal, between public and private, and between “the rule of the mob” and “the rule of law.” First I revisit the theoretical framework of the dissertation, the notion of the state of exception, and discuss why this concept

⁷⁴ Waldrep, “War of Words”; Waldrep, *The Many Faces of Judge Lynch*.

is useful for understanding the complex relationship between “lynch law” and formal law. I argue that when lynching is defined and remembered as illegal, this obfuscates the mechanisms by which it operated as a tool of the state’s policing powers. I critically analyze tropes that appear in news coverage of lynching, particularly in incidents that involve the custodial transfer of suspects out of police custody and into the hands of lynchers. Newspapers repetitively narrated stories of overpowered jailers and anonymous crowds; I speculate about what these tropes reveal about the means by which lynchers maintained anonymity and legal impunity, even while participating in public and nominally illegal activities. Ultimately, I depart from scholars who have characterized this period as marking the beginning of the end for lynch law. When lynching is understood as an expression of the cultural logic of exception or emergency, these decades appear to be a moment when one manifestation of lynch law was suppressed while other forms flourished. In particular, the logic of exception – the legitimating essence of lynch law – was preserved and exercised frequently in new forms of federal and international military power. This subject is taken up in more detail in Chapters 3 and 4, which examine the participation of military veterans and federal troops in the race and labor riots of the Red Summer of 1919.

Lynching as Exceptional Violence

The relationship between lynching and law has been quite convoluted. Binaries like legal vs. illegal, lawful vs. lawless, and constitutional vs. unconstitutional, fail to capture the ways in which lynching has acted simultaneously within and outside of the law. However, the concept of “the exception,” which describes these binaries as symbiotic rather than dichotomous, provides a more useful framework for understanding this “peculiarly American” form of violence.

In my focus on ‘the exception,’ I center the practices and discourses that allowed the perpetrators of lynching to carry out these acts with impunity. It is well known how the victims of lynching were cast out of law; but how did the perpetrators of lynching manage their relationship to law, which was also necessarily liminal? Lynchers could be defined as those who perpetrate violence within states of exception: they abandon law, yet this abandonment is justified in the law’s name. Although they almost always declare their actions were a response to crime, or the threat of crime, lynchers are themselves guilty of crime. Such a contradictory cognitive process, even if it is justified by hegemonic discourse, requires cultural labor in order to succeed. Too often, lynching is described as a senseless, irrational form of violence. The moniker “mob violence” that is often used synonymously with lynching invokes the excited masses engaged in collective hysteria, allowed to go unchecked because of a weak state that is unable or unwilling to exert sufficient control. But, we remember lynching this way at our own peril. Lynchers and their defenders not only found their engagement with violence reasonable, they also crafted rhetoric to explain the legitimacy of this violence to various publics (including the state itself, which generally supported or acquiesced to their activities). They did not mindlessly break the law, they intentionally and systematically adjusted the application of law, often quite self-consciously. Understanding how lynchers claimed exceptions to law helps us understand, not only the exceptions, but also the nature of law itself.

Persons Unknown

Basic information about lynchings, especially during “the lynching era” when a number of individuals and organizations began documenting the practice, is widely available in print and online. Usually, one will find lists that categorize lynchings by the name and race of the victim,

the county and state where the lynching occurred, the alleged offense (if any) that led to the lynching, and the method of execution (hanging, burning, shooting, etc.).⁷⁵ But while these lists are a rich source of information about the victims of mob violence, they include almost no information about the perpetrators. This is not because such information is unavailable. The NAACP did not just passively document lynchings, they proactively investigated them. They sent letters to their local contacts requesting additional information about news of any lynching the clipping services sent – even if only rumors or gossip. Depending on what information they gleaned through these means, NAACP staffers then selected some cases to investigate further, by use of hired private detectives, travelling office staff, and journalists who were allies to the anti-lynching cause. In some cases, lynchings occurred on the watch of anti-lynching governors; in these cases state-level investigations and prosecutions into lynching sometimes occurred. The U.S. State Department also investigated lynching allegations, usually prompted by the lynching of foreign nationals on U.S. soil, which led other governments to request compensation and legal accountability.⁷⁶ Newspaper records, archival material, and secondary literature also include many detailed recollections, from which much information about perpetrators can be gleaned. Even when the names of individual perpetrators remain unknown, these and other records still might include information about who is most likely to have participated, because the local dynamics that led to a lynching sometimes strongly indicate a certain class of perpetrators – for example, a scholar might conclude that members of a particular immigrant community were responsible, even if they don't know which members exactly; or they might conclude that the

⁷⁵ Philip. Dray, *At the Hands of Persons Unknown: The Lynching of Black America* (New York: Random House, 2002); National Association for the Advancement of Colored People., *Thirty Years of Lynching in the United States, 1889-1918*. (New York: Negro Universities Press, 1969); Tolnay and Beck, *A Festival of Violence*.

⁷⁶ Because of this they offer very little insight to the lynching of black people during the post-Reconstruction era; but, they offer tremendous insight to how officials in the federal government thought about lynching, both before and after anti-lynching movements forced such official responses.

perpetrators represented particular occupational or class interests. Yet, there is rarely any attempt to account for this information in published lists of lynching; existing scholarship on lynching tends to reproduce the lie of coroner's juries, giving the impression that the majority of lynchings happened "at the hands of persons unknown."

By far the most common pattern of law enforcement participation in lynching involved the custodial transfer of victims from police or jail into the hands of lynchers. Merely being arrested carried the threat of death, as those in police custody frequently found themselves in a shadowy jurisdiction of law presided over by Judge Lynch. This pattern aligns with the assertion of the anonymous Pine Bluff resident whose letter claimed that "The mob never get hands on A negro untell the Officers get him in there hands." In most cases, the officers involved claimed that the custodial transfer was accomplished against their will or without their knowledge. On March 24th of 1914, for example, an unidentified man was removed from the county jail in Inverness, Mississippi. The local newspaper reported that the mob broke down the doors of the jail and the sheriff claimed that the perpetrators could not be identified.⁷⁷ In Elmore, Alabama, in January of 1915, Sheriff Jackson reported that a mob of 15 – 20 men physically restrained him, bound him to a chair, and took away his keys, before removing Ed and James Smith from the local jail and lynching them both from a nearby railroad trestle.⁷⁸ Most infamously, in the events leading up to the Omaha race riot of 1919, a mob of hundreds of citizens surrounded the city jail, fired on the sheriff, set fire to the jail when he refused to give up the keys, and almost killed the mayor when he tried to interfere with their pursuit of their target.⁷⁹

⁷⁷ "Mississippians Lynch Negro," *Belleville News-Democrat*, March 25, 1914.

⁷⁸ "Negro Hanged By Alabama Mob," *Savannah Tribune*, January 9, 1915.

⁷⁹ They were eventually successful in lynching Will Brown, a black man accused of rape; but in this case, the completion of the lynching was only the beginning of a three day course of rioting, in which large portions of Omaha's African American community were burned out of house and home. The riot only ended after national

The Omaha case, however, was unusual. Far more often, lynchings were contained events that started with the arrest of a criminal suspect, and ended with that suspect's death at the hands of un-named persons. The ability of these persons to access prisoners kept under lock and key demands some explanation beyond that typically provided by officers implicated in the incident. On a case by case basis, the story of being overpowered by a mob might be believable. It stretches credulity, however, to propose that lynch mobs all across the country were so clever, and local sheriffs so incompetent, that bands of men could go about breaking down jail doors and escaping detection 98% of the time.

As is the case with many aspects of newspaper coverage of lynching, the articles that discuss these cases of custodial transfer report the news with formulaic stock phrases, often repeating hearsay and acting as a mouthpiece for the white community. Descriptions of these events, if they offer any detail at all, tend to stress the overwhelming strength of the mob, the relative powerlessness of local police, and the likely guilt of the lynched suspect. Phrases like "overpowered by a mob of masked men," and "forced to surrender," generally written in passive voice constructions, operate to construct plausible deniability for local and state law enforcement personnel, whose possible participation in lynch mobs is minimized by the repetitive insistence that their interest in protecting the prisoner was overwhelmed by an anonymous showing of community force. Of course, since official investigations of lynching were exceedingly rare, in most cases historians can only speculate as to the veracity of police officer's claims. Occasionally there is some evidence supporting the officer's claim of resistance, as in cases where there is a verifiable paper trail documenting a request for help from nearby counties or from the governor. More often than not, however, police officers claimed to have been

guard troops were brought in to restore order. I discuss federal troops' conduct in the race riots of 1919, and the rhetoric of "restoring order" in Chapter 3.

overpowered by mobs without offering, or being asked for, any evidence to support this version of events (Figures 1 – 5).

NEGRO LYNCHED IN TEXAS.
JEFFERSON, Tex—Fifteen masked men Saturday took Dave Thompson, a negro, from the Marion county jail here where was held charged with wounding Matt Taylor, a constable, and hanged him to a bridge. No arrests had been made Saturday night.

Figure 1: The appearance of masked men to remove a prisoner from custody is a trope that appears repeatedly in coverage of lynchings. Very rarely did journalists or other officials ask questions about how this custodial transfer was possible. Source: “Negro Lynched in Texas,” *The Idaho Daily Statesman* (Boise, ID), January 4, 1914.”

**NEGRO LYNCHED IN
OKLAHOMA**

**NEGRO WHO SHOT MAN WHO
HAD BUT LITTLE MONEY,
IS HANGED**

By United Press
Oklahoma City, Okla., Jan. 27.—
Ben Dickerson, a negro, who robbed
W. A. Chaffin, a traveling salesman,
here Sunday evening, was lynched
near Noble, twenty-five miles south,
at daylight today. A party in six
autos, said to be from here, over-
powered the jailer of the county jail
at Purcell, where Dickerson had been
taken, and took him nine miles north
to Noble.

Figure 2: Another vague description of a mob “overpower[ing]” a jailer. Source: “Negro Lynched in Oklahoma,” *The Aberdeen Daily News*, January 27, 1914.

LYNCH NEGRO WOMAN WHO KILLED WHITE MAN

MUSKOGEE, Oklahoma, March 31
Marie Scott, negro woman who killed
Lemuel Peace, a youthful white man,
Sunday night, by driving a knife into
his heart, was taken from the Wag-
foner county jail early today and
hanged to a telephone pole. The mob
which was masked, overpowered the
jailer, threw a rope over the woman's
head and dragged her out of the jail.

Twelve men bound the jailer when
he answered the knock at the door.
The mob then pulled the woman from
her cell, tied a rope around her neck
and dragged her to a telephone pole
a block from the jail. An hour later
the sheriff cut down the body of the
dead negress.

Marie Scott stabbed Peace to death
Sunday when he, with other young
white men, had gone to the negro
quarter of Wagoner.

Figure 3: "The mob, which was masked, overpowered the jailer." Although the lynching occurred only a block away and the sheriff was on the scene quickly, no investigation or arrests resulted. Source: "Lynch Negro Woman who Killed White Man." *The Olympia Daily Recorder*, March 31, 1914.

GEORGIANS LYNCH BLACK

Negro Said to Have Been Suspected of Stealing Shoes

Grovelown, Ga., May 7.—Charles Jones,
negro, was taken from two officers near
here late last night by a number of white
men and lynched. It is said that Jones
was suspected of having stolen some
shoes from a local merchant. This morn-
ing the body, riddled with bullets, was
found in the public road.

Figure 4: These articles further convey the helplessness of the officers by frequent use of the passive voice. Source: "Georgians Lynch Black." *New Orleans Times-Picayune*, May 7, 1914.

NEGRO IS LYNCHED.

Princeton, Ky., June 4.—Masked men overpowered the county jailor here early today, dragged Arthur Bell, a negro, from his cell, and hanged him to a tree in the jail yard. Bell was charged with having attacked a young white woman in the eastern part of Caldwell county last week.

Figure 5: "Masked men overpowered the county jailor." A typical example, no further explanation is offered. Source: "Negro is Lynched," *The Kalamazoo Gazette*, June 5, 1915.

In a few cases where investigations did occur, these types of stories were quickly undermined by inconsistencies, gaps, and contradictions. The previously mentioned case of the lynching of Ed and Will Smith in Elmore, Alabama, serves as one example. Wetumpka County's Sheriff Jackson initially claimed to have been bound to a chair and physically restrained, while a group of fifteen to twenty masked men forced the jail trustee to unlock the two prisoners' cells.⁸⁰ This version of the story was reported in a number of newspapers on January 4th, the morning after the lynching occurred.⁸¹ Alabama Governor Emmet O'Neal, however, was a critic of lynch law, and ordered an investigation into the incident. Five days later, after the investigation had been concluded, the *Savannah Tribune* reported a somewhat different set of details than those that were given initially. Now the sheriff described the mob as being comprised of only five masked men, though he still insisted they were armed, and that they overpowered him and bound

⁸⁰ "An Alabama Lynching," *The Emporia Gazette* (Emporia, KS), Jan. 4, 1915. In some news articles, the sheriff is listed as Johnson instead of Jackson.

⁸¹ "Alleged Negro Slayers Are Lynched by a Mob," *The Evening News* (San Jose, CA), January 4, 1915; "Two Negroes Lynched by Mob in Alabama," *Fort Worth Star Telegram*, January 4, 1915; "Mob Takes Negroes," *Idaho Daily Statesman*, January 4, 1915.

him to a chair. There was no mention, however, of a jail trustee unlocking the jail for the members of the mob. Instead, the sheriff's wife was reported to have told investigators that "she bolted the jail door before retiring, but that later the sheriff unbolted it and went out." The investigation failed to determine, however, whether or not the sheriff ever re-bolted the door prior to the arrival of the lynch mob.⁸²

The sheriff's story was first reported as a sympathetic and believable tale of being overpowered by at least 15 armed men, tied up, and forced to stand by while another employee was coerced into unlocking the jail. Under investigation, however, this story changed to one in which the sheriff intentionally unlocked the jail and left the premises for unknown reasons in the middle of the night. Five men came to the jail – not fifteen – and when they arrived they found the doors already unlocked. The sheriff still maintained that the men tied him to a chair before removing the Smith brothers from their cell, but this detail is less believable in light of these allegations. The overall story is less sympathetic, as the sheriff appears at best to be someone who would accidentally leave the jail unlocked in the middle of the night, or at worst in active collusion with the men who carried out the lynching.

A similar incident occurred on December 20th of 1918, when Maggie and Alma House (sisters, 20 and 14 years old respectively), and Major and Andrew Clark (brothers, 20 and 18 years old respectively) were taken from the county jail at Shubuta, Mississippi, and lynched on a bridge over the Chickasawka river, a few miles from town.⁸³ They were accused of conspiring to murder Dr. H.L. Johnston, who owned the land where they were all employed as laborers. Initial

⁸² "Negro Hanged by Alabama Mob," *Savannah Tribune*, January 9, 1915.

⁸³ Finnegan, *A Deed So Accursed*; National Association for the Advancement of Colored People, *Thirty Years of Lynching in the United States, 1889-1918*; "Lynching: An American Pastime," *The Washington Bee*, January 4, 1919; Subject file: Lynching, Records of the NAACP, Part 7, Series A, Reels 1 and 2, University of Michigan. Reel 1 contains the original report of Detective Church, while Reel 2 contains correspondence and draft materials between Church and W.E.B. DuBois fact checking in preparation for publication in *The Crisis*.

reports of the incident included statements from Deputy Sheriff William Crane, the officer on duty when the lynching occurred, who explained his failure to protect his prisoners with the familiar story of having been overpowered by masked men, made to surrender his keys, and forcibly restrained while members of the lynch mob removed the Clark brothers and House sisters from their respective cells and brought them outside to waiting automobiles.⁸⁴

The NAACP employed a private detective named Robert Church, a white man from Memphis, Tennessee, to travel to Shubuta and investigate this quadruple lynching. As in the case of the lynching of Ed and Will Smith, the findings of the investigation reveal troubling inconsistencies with the version of events published in contemporary news clippings. Local papers had reported that the alleged murder victim was a wealthy, retired dentist; Detective Church found that the actual victim was the dentist's son (of the same name), and that he had been engaging in a non-consensual sexual affair with both of the House sisters. Furthermore, the younger Alma House was rumored to be pregnant with the young Dr. Johnston's child. According to Church's report, the affair was discovered by the Clark brothers when they arrived to live on the farm for what was supposed to be a brief stint of labor to pay off a debt incurred by their father after he purchased a mule from the older Dr. Johnston. Major Clark and Maggie House, who were both the same age, became enamored of each other; however, their relationship was threatened by the possessive claims of the younger Dr. Johnston, who threatened to kill Major if he did not end the relationship.

On December 10th, Dr. Johnston was shot and killed; in the words of Detective Church, his killing is "surrounded in mystery," and "as all of the principals are dead, it will never be known how Dr. Johnston met his death." In an early draft of his article for the Crisis on the

⁸⁴ In some renderings, the sisters' names were given as Howze.

Shubuta lynching, W.E.B. Du Bois asserted that the conflict between the younger Dr. Johnston and Major Clark was well known in the surrounding community, and that a local white man may have committed the murder knowing it would be blamed on the Clark brothers.⁸⁵ However, he also allows for the possibility that Major Clark, with or without help from his brother and the House sisters, may have killed the dentist. This possibility is couched in terms of Southern values and masculine honor, when Du Bois points out that “If the negroes did kill Dr. Johnston, yet they were only following the example set by ‘the superior race’ in the South, who avenged violation of womanhood by violent means.”⁸⁶

Certainly, the fact that this lynching involved two female victims, and that two of the victims were teenagers, was a major impetus for the NAACP’s decision to investigate the lynching in the first place. There was enhanced rhetorical value in publicizing this lynching because of how the facts of the case overturned core tenets of the gendered and racialized assumptions that were usually offered in defense of lynching. Maggie and Alma House’s respectability and honor had been threatened by Dr. Johnston’s repeated assaults. Major Clark – *if* he was even guilty of the murder at all – was only abiding the same norms of masculinity that white men regularly invoked as *carte blanche* justification for violence against black men. That the four were lynched anyway did much to support the NAACP’s assertion that lynching was not, in fact, a justified response of self-defense by white men on behalf of white womanhood. The Clarks and Houses were not lynched to protect white womanhood, they were lynched to protect white manhood, specifically the right to sexually and economically exploit agricultural workers in the larger context of a plantation economy.

⁸⁵ Finnegan, *A Deed So Accursed*, 248; Subject file: Lynching, Records of the NAACP, Part 7, Series A, Reels 1 and 2, University of Michigan.

⁸⁶ “Lynching at Shubuta,” *The Crisis*, March 1919.

Detective Church's investigation overturned another trope as well: that of the overpowered jailer obligated to stand by and helpless to interfere as a mob removes his prisoner. As previously discussed, the generic conventions of lynching coverage usually worked to reinforce this trope through the repetition of certain phrases like "forced" and "overpowered." These phrases functioned to discursively partition mob rule from the rule of law by constructing arrest and incarceration as a legitimate and orderly state function that was interrupted and usurped by the actions of an hysterical mass of people. The partition between mob and officer was underscored by the relative brevity and lack of details included in many news articles. As in Figures 1 – 5, the news coverage tended to begin *in medias res*, giving the impression that the lynching happened spontaneously, with masked men simply appearing at a jail to remove a prisoner as if out of thin air. These articles feature decontextualized action, lending an aura of chaos to the lynching event.

In some cases this may have been accurate, but in the Clark-House case the lynching seems to have been a well-planned, choreographed affair. Plans were made in advance, transportation was organized for potential spectators, and logistical arrangements were made regarding transportation of the prisoners and the site of the execution. Detective Church's investigation revealed that the arrestees were first moved to two different county jails each several miles from Shubuta. In the jail in Meridian, police tortured Andrew Clark until they extracted a confession that he helped his brother murder Dr. Johnston. Several days later, all four prisoners were returned to Shubuta for a preliminary trial; by this time, the lynching was already the subject of open discussion around town. During the day "automobiles began pouring into the little town, as well as other vehicles and individuals on foot." If not previously aware that a lynching was to occur, by this point it seems unlikely that local law enforcement could have

failed to notice such an uptick in pedestrian and vehicular traffic. Indeed, Church's report indicates that the Chief of Police from the jail in Meridian, where Andrew Clark had been tortured before being returned to Shubuta, was among those who arrived by auto late in the afternoon of December 20th.

A mob of this size would certainly be sufficient to overpower one person, even if that person was armed. But in this case, it does not seem that any effort was needed to convince Deputy Sheriff Crane to surrender his prisoners. Church reported,

Although [Deputy Sheriff Crane] states that he was overpowered and forced to surrender the keys to the jail, the evidence shows that he went into the street in front of the jail at the request of the mob, allowed them to handcuff him, take his keys from him, and go into the jail and take the four prisoners without any trouble whatever. [...] There is no evidence to show that he made any attempt whatever to protect the prisoners in his charge or to prevent the mob from taking them from the jail.

This section of the report concludes with the curious detail that, "At the same time that the mob was approaching the jail, another group went in the power house nearby and shut off all light from the town, plunging it in darkness." Presumably, this was done to lend credence later on to the inability of witnesses to identify any particular individual as the lynch mob's leader.

In both of these cases – the lynching of the Smith brothers, and that of the Clark brothers and House sisters – we have instances of a sheriff or deputy sheriff failing to maintain custody of prisoners, in each case claiming they were prevented from doing their duty by the strength of an overwhelming mob. Under investigation, the Smith case turned out to involve a much smaller mob than originally claimed by the sheriff, and the very real possibility that the sheriff colluded with the mob by intentionally leaving the jail unlocked for them. In the Clark-House lynching, the mob turned out to have been pre-organized and accompanied by other law enforcement officers. Each case also features the somewhat choreographed binding or handcuffing of the jailer to a chair in front of the jailhouse, or at least a carefully fabricated story of such, despite

the lack of any real resistance on the part of the officers. Did the mobs in each case tie Sheriff Jackson and Deputy Sheriff Crane to their chairs in order to prevent them from interfering with the lynchings? This is possible, but it seems unlikely given other details of the cases. In the Smith lynching, the Sheriff is implicated as being the one who unlocked the jail in the first place; in the Clark-House lynching, the Deputy Sheriff at the least was aware of the lynching for many hours and did nothing to prepare for it, and at worst was acting in concert with officers in charge of the other jails where the suspects had been held during the days prior to their transfer to the jail at Shubuta.

Similar questions surround the choice of the mob in the first case to don masks, and in the second case to cut the lights to the town so that it would be “plunged into darkness.” Though the police officers in each case would have us believe this was done to conceal the mob member’s identities, it’s not clear in either case why the mob would need to conceal themselves. They had the sympathy if not the outright cooperation of local law enforcement. Masks and darkness only served as partial concealment in any case; neither mob took care to conceal other forms of evidence that could have led to their identification (in particular, their vehicles). Assuming for the moment that each sheriff in question was in active collusion with the lynch mob, why would they have to be tied or handcuffed, and why would the mob feel compelled to performatively conceal their already-known identities?

Methods of cultural analysis can be a useful starting point for resolving some of these contradictions. It is not enough to simply say that the perpetrators of lynching lied in order to serve certain obvious and practical needs, such as the need to avoid prosecution. If it were only a matter of serving practical needs, *any* story would do, and over the course of hundreds of incidents we would likely encounter hundreds of different stories explaining (or explaining

away, as it were), the troubling details of each case. But in incidents of lynching a *particular* story tends to be told again and again with little regard for the actual details of the individual cases – and this particular story seems to have worked most of the time. The story of being overpowered, helpless to stop the mob and ignorant of their identities, was repeated whether or not it effectively accounted for other known details of particular incidents of lynching.

I would argue that these stories were told for some other purpose, fabricated not merely to meet individual needs, but also in response to broader social and political imperatives connected with the process of invoking and revoking states of exception in the context of representative democracy.⁸⁷ The trope of the prisoner dragged from jail and the sheriff overpowered by a mob played an important symbolic role in the establishment of a state of exception – an officially legitimated space in which some form of otherwise illegitimate violence was permitted to occur.

The restraint of the sheriffs – either the reality of doing it, or the fabricated claim that it occurred – created a symbolic narrative about the law itself, and the relationship of both the sheriffs and the lynchers to it. Apologists for lynching claimed that formal law was not powerful enough, certain enough, or swift enough to punish alleged rapists and murderers, particularly if they were black.⁸⁸ This assertion is undermined by the fact that so many lynching victims (75% of the cases I have so far located) were removed from police custody. Formal law was powerful, certain, and swift enough to arrest these alleged law-breakers within hours or days of their

⁸⁷ I make this distinction because theories of emergency rules and states of exception have primarily developed to make sense of the violence perpetrated by totalitarian regimes, such as Hitler's Third Reich. As discussed in more detail in the conclusion, the notion of the exception is still relevant to democratic contexts, but the relationship between sovereignty and exception is significantly more complicated.

⁸⁸ Sharoni Denise Little, "Death at the Hands of Persons Known': Victimage Rhetoric and the 1922 Dyer Anti-Lynching Bill" (Ph.D. thesis, Indiana University, 2005); George C. Wright, *Racial Violence in Kentucky, 1865-1940: Lynchings, Mob Rule, and "Legal Lynchings"* (Baton Rouge: Louisiana State University Press, 1990).

supposed crime. Any serious study of the fate of black defendants in southern courts at the time would further confirm the power, certitude, speed, and severity of formal law when it came to the conviction and punishment of alleged black lawbreakers. Yet, by restraining and binding the sheriff in charge of the jail – perhaps at his own behest – the lynch mob and the police officer engaged in an elaborate staging of the powerlessness of the law, discursively creating a power vacuum that did not really exist, and then eagerly rushing to fill it.

In the case of the Smith lynching, the script also featured the masking of the mob, despite the very real possibility that its members were known to Sheriff Jackson and that he may have colluded with them to make sure the jail would be unlocked when they arrived. In the case of the Clark-House lynching, there is a similar element in reports of the mob’s dramatic step of cutting power to the entire town, “plunging it into darkness,” despite the fact that during a lengthy period of daylight the mob had already begun assembling in full view of the deputy sheriff, and that it included at least one fellow police officer. This element of the event can be interpreted as part of how the state of exception was staged to permit a state-sanctioned regime of lynching without directly implicating any officers of law. The concealment functioned on a symbolic register to sever lynching from the normal bounds of space and time, marking it as an event that could not be seen and therefore could not be remembered or accounted for later.

This concealment allowed individual law enforcement officers to claim with a thin veneer of credibility that they did not know who removed and lynched their prisoners. More importantly, however, it bespoke a larger cultural and political need to inculcate the legal system from association with or responsibility for such miscarriages of justice. Since witness and testimony are crucial aspects of the jury trial system, the masking of the mob, and the plunging into darkness of the scene of the lynching, symbolically communicated the powerlessness of the

legal system to locate the lynchers or hold them accountable, even after normal conditions were restored. Of course, this script obscures the likelihood that representatives of the legal system colluded with the mob before, during, and after the lynchings, that the members and leaders of the mob were known to police, and that numerous witnesses to these premeditated acts of violence certainly must have existed. In spite of this, the script maintained that lynchings occurred in an unseeable space, carried out by unknowable forces, while law was temporarily bound off to the side.

This narrative helped to resolve the legal contradictions posed by lynching, allowing lynching to occur under the auspices of legal authority. This form of exceptional violence could occur without compromising nationalist claims regarding the exceptional character of American democracy, contributing to a ‘state of exceptionalism’ that simultaneously relied on and denied the resort to violence outside of formal systems of law. The sheriff’s next-day testimony to inquiring outsiders served not only to protect himself against liability, but also to protect the relationship between violence and law from scrutiny or reform. Having been temporarily suspended, the power of the law was quickly restored, with a slightly damaged but recoverable reputation. With the mob now dispersed, the normal order of things could and would return, usually accompanied by vigorous protestations by the powers that be against the “lawless” mob that had dared to usurp the regular functions of the state. Such protestations, whether or not they may have been genuine, rarely yielded concrete forms of accountability for either private individuals or police officers who conspired in the lynching of American citizens.

Sheriffs and police officers permitted their real or discursive immobilization so that some other application of law could occur. But at no point was the sheriffs’ power, or the power of the law, actually usurped, as the language of force and overpower would have us believe. The

sheriffs maintained authority by assuming the power to set the terms of the exception. Simultaneously, the sheriffs' impunity was also maintained, because the invocation of the exception as a practical matter meant no police officer would directly carry out the violence in their official capacity as a representative of state power. That most lynchings could not possibly have occurred without the explicit or implicit blessing of those holding positions of power was rendered invisible by the trope of literally or figuratively binding the sheriff to a chair. The binding was not necessary as a matter of practicality because in most cases there is little evidence that police put up any resistance against would-be lynchers in the first place. Instead, the binding served as part of a script that allowed the letter of the law to be broken, even as the power of the law to govern was exponentially amplified. Lynchings occurred as a manifestation of the strength of the legal system when it was permitted to operate within a state of exception. The successful invocation of a state of exception unleashed the power of the state, transforming the power to arrest and detain into the far greater power of granting life or death.

Investigate, Indict, Prosecute, Convict

The real and symbolic legal authority that gave cover to the act of lynching offered protection in the aftermath as well. Until well into the twentieth century, lynching was considered outside the bounds of legitimate federal action, and even state governments were wary of (and prohibited from) intervening in local matters of crime, unless asked for assistance by a mayor or sheriff, or propelled to action by pressure or scandal. Considering the extent of official involvement in lynching at the local level, it is unsurprising that investigations were rarely initiated by county officials unless a significant split occurred between major power

brokers in an area where a lynching occurred.⁸⁹ Nonetheless, domestic political in-fighting, international pressures, and requests for financial reparations from families of victims sometimes led to official investigations, indictments, and prosecutions.

Dating back to at least the 1850s, and continuing into the post-Reconstruction lynching era, the United States was petitioned by other governments to investigate the lynching of foreign nationals in U.S. states and territories on many occasions. During this period, the U.S. paid hundreds of thousands of dollars in indemnity settlements to the governments of Albania, China, Greece, Italy, Mexico, Spain, and Sweden among others.⁹⁰ Long before public opinion shifted against lynching, almost every president from Benjamin Harrison to Woodrow Wilson issued denunciations of the practice, usually after some local incident caused a scandal of national or international proportions.⁹¹ Significantly, however, the State Department usually claimed that these settlements were voluntary – a matter of respectful politics, not legal obligation.⁹² This desire to deny liability sometimes incensed foreign governments, particularly those who had been at the receiving end of vigorous harassment by U.S. embassies for far lesser crimes

⁸⁹ Nevels, *Lynching to Belong Claiming Whiteness through Racial Violence*; Tolnay and Beck, *A Festival of Violence*; Jeannie M. Wayne, "Low Villains and Wickedness in High Places: Race and Class in the Elaine Riots," *The Arkansas Historical Quarterly* 58, no. 3 (October 1, 1999): 285–313. In Nevels' work, a series of lynchings in Brazos county, TX resulted in investigations (but no indictments) in part because of tensions between two opposing candidates for sheriff's office, who disagreed over how the lynchings should have been handled, and who each represented different social, religious, and ethnic interests within the white/immigrant communities of the county. Tolnay & Beck propose that tensions within white class structures tended to depress rates of lynching, whereas lynching was most common when it was perceived to serve the interests of both poor whites and the planter class. Wayne makes a similar point in her analysis of the Arkansas riot cases.

⁹⁰ William Carrigan and Clive Webb, *Forgotten Dead: Mob Violence against Mexicans in the United States, 1848-1928*, 1 edition (Oxford: Oxford University Press, 2013); Gonzales-Day, *Lynching in the West*; Albert Pillsbury, "A Brief Inquiry into a Federal Remedy for Lynching." *Harvard Law Review* 15.9 (1902): 707–713; Charles Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens," *The Yale Law Journal*, 25.7 (May, 1916), 561-581.

⁹¹ These types of scandals became more and more common as anti-lynching agitators adopted conscious media strategies in their work, hiring investigators, writing articles, and soliciting friendly journalists to publicize the gruesome details of each new incident.

⁹² James W. Garner, "Responsibility of States for Injuries Suffered By Foreigners within Their Territories on Account of Mob Violence, Riots and Insurrection," *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 21 (1927): 49–81.

committed against Americans traveling abroad.⁹³ As the U.S. became an increasingly powerful military and economic force at the global level, its apparent inability to wield power within its own borders became a cause for embarrassment and concern for state and national leaders, who were removed from the local tensions and politics that often precipitated incidents of lynching.

There was also pressure from within. Starting in the early 20th century, with the emergence of muckraking journalism and the formation of organizations like the NAACP, private parties began conducting their own investigations, especially of the lynching of African Americans who comprised the majority of victims by the 1890s.⁹⁴ With the help of journalists, private investigators, field officers, and sympathetic locals, early civil rights organizations carefully inquired into each incident of lynching that was reported in the press, and in a number of cases they forwarded the results of their investigations to responsible state and local actors. Although elected officials and impaneled juries did not always choose to act on the information gathered by these independent investigations, their dissemination in publications like *The Crisis* and *The Chicago Defender* did much to inflame anti-lynching sentiment. This kind of publicity made it more difficult for law enforcement officials to lose their prisoners without attracting the criticism and disbelief of outsiders. Moreover, vivid and sensationalized descriptions of lynchings – often accompanied by photographs – gave moral strength to a growing national anti-lynching movement, which pressed for state and federal measures to bring an end to the practice.⁹⁵

⁹³ Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens," 572.

⁹⁴ National Association for the Advancement of Colored People., *Thirty Years of Lynching in the United States, 1889-1918*.

⁹⁵ Ida B. Wells, *Southern Horrors and Other Writings; The Anti-Lynching Campaign of Ida B. Wells, 1892-1900*, ed. Jacqueline Royster (Bedford/St. Martin's, 1996); William G. Jordan, *Black Newspapers and America's War for Democracy, 1914-1920* (Chapel Hill, NC: University of North Carolina, 2001).

In the long-term, investigations of lynching certainly contributed to the demise of the practice. In the short-term, investigations were rarely successful, and tell us more about the limits of law than they tell us about its power. If the most prominent pattern in the act of lynching involved the removal of a prisoner from the custody of police, then the most prominent pattern in the aftermath of lynching involved the massive failure of systems for investigating and prosecuting violence. Processes designed to ensure a fair and speedy trial for private citizens accused of crime utterly failed when set to the task of prosecuting violence perpetrated by lawfully constituted authorities. In fact, investigations and trials of lynchers did not just fail, they often failed spectacularly. Official investigators rarely secured reliable witnesses, which were necessary for successful prosecution. As is clear in the cases previously described, the lack of witnesses was sometimes given a thin cover by the lynchers' wearing of masks, or their disruption of electric lighting systems. But in many other cases, even unmasked lynchers failed to elicit the recognition of their friends, neighbors, and elected officeholders who were subpoenaed as witnesses. When investigations did yield cooperative witnesses, and officeholders willing to pursue prosecution, juries often failed to return indictments. When the rare indictment was secured, convictions did not usually follow, as formerly cooperative witnesses disappeared (along with police and coroner records), judges issued hostile instructions, and juries refused to return guilty verdicts.

A few examples illuminate the typical problems that plagued investigations of lynching. After a double lynching in Madison County, FL, in 1882, although there was clear evidence of police misconduct, and two eyewitnesses furnished the names of five men who led the lynching, the coroner's jury returned the usual verdict that James Savage and Dennis Eagan had met their

deaths “at the hands of unknown parties.”⁹⁶ In Decatur, IL, in 1893, despite the combined investigative efforts of the Governor, the State’s Attorney, and the county sheriff, and despite a judge’s strongly worded jury instructions encouraging the return of indictments, coroner’s juries twice refused to do so against any of the fifteen to forty men (including police officers) who were considered as probable participants in the lynching.⁹⁷

In 1916, tensions mounted with the Italian embassy after Albert Piazza and Joe Speranza were lynched in Illinois in October of 1914 and June of 1915, respectively. In the case of Piazza, he was in the custody of the acting mayor of Haynesville and three sheriff’s deputies at the time of the lynching, who gave the usual story of being overpowered by a mob of unknown men. A number of details did not add up – or added up too precisely. The mayor transported the prisoner by car instead of taking a train that would have left earlier and gotten to the destination faster. The mob materialized at the precise point in their journey in which they happened to be passing through the corner of a different county, which complicated issues of investigation and jurisdiction. Although none of the men wore masks, and many hailed from the small village over which the mayor presided, the mayor and his deputies implausibly claimed they did not recognize a single person in the crowd of men who abducted their prisoner.⁹⁸

They mayor and his deputies may not have realized their conspiracy would touch off international tensions, but it did, and soon a liaison of the Italian consulate and an Illinois State’s Attorney arrived in Randolph and Perry counties and spent more than a month investigating the

⁹⁶ Edward C. Williamson, “Black Belt Political Crisis: The Savage-James Lynching, 1882,” *The Florida Historical Quarterly* 45, no. 4 (1967): 402–9.

⁹⁷ Sundiata Keita Cha-jua, “‘Join Hands and Hearts with Law and Order’: The 1893 Lynching of Samuel J. Bush and the Response of Decatur’s African American Community,” *Illinois Historical Journal*, Vol. 83, No. 3 (Autumn, 1990), 187-200. This incident also featured the complicity of a sheriff’s deputy and the guards at the jail, but the sheriff was not in town at the time. However, his not being in town was perceived as suspicious in itself, because he personally promised the prisoner Samuel Bush would be protected, but then left town for a family vacation.

⁹⁸ Charles Waatson, “Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens.”

incident. After weeks of working against a wall of silence in the town, one man who participated in the lynching, Thomas Kilgrove, broke down and told the investigators what had happened. His statements to investigators were sufficient for the indictment and arrest of the mayor and all three sheriff's deputies, with the strong implication that further arrests would soon follow.

When it came time for the trial, however, Kilgrove could not be located. The liaison of the Italian consul, Charles Watson, was deputized, found Kilgrove in a nearby county, and brought him to court the next morning. At the first court's recess, Kilgrove was surrounded by friends of the defendants, who attempted to throw him out of the courtroom. When the state's attorney protested to the judge, he was informed that since the court was in recess, it had no power to intervene. Kilgrove managed to remain in the courtroom but he did not testify that day, and the next day he was gone again; this time Watson was unable to locate him. The state proceeded to make their case on circumstantial evidence, but at the end of the day's proceedings, declared themselves unable to move forward with the prosecution of the mayor. With the mayor's charges dropped, the attorney for the sheriff's deputies was able to have the charges against his clients dismissed as well. A few months later Kilgrove returned to town. He was remanded before the same judge who had earlier failed to protect him from harassment when he attempted to testify. Charged with failure to appear before the court when summoned, the judge found Kilgrove guilty of contempt and sentenced him to 90 days in jail. Thus Kilgrove, the would-be witness for the prosecution, was ultimately the only person to be sentenced in connection with Piazza's lynching.

When a crowd killed Jay Lynch outside the courthouse where he was convicted of murder in Lamar, Missouri, in May of 1918, there were some indicators that legal accountability might be possible. The Governor of Missouri expressed his disapprobation and assisted county

Prosecutor H.W. Timmonds with an investigation of the incident. A journalist from the nearby Kansas-City Star reported that “nearly everybody in this town of twenty five hundred persons knows who was in the mob. The men wore no masks, and in the fight made in the circuit court room...Sheriff Sewell called many of the participants by their given names.” But during follow-up conversations the next day, the journalist was already beginning to witness the collective decision to forget, the early stages of the formation of an open secret: “When telling of the affair today [however] persons inadvertently mentioned the names of participants, then qualified their statements by saying that perhaps it was a case of mistaken identity. ‘Really I couldn’t remember a single man in the mob,’ a resident said today, ‘although I saw the whole affair.’”⁹⁹ Sheriff Sewell reported that he would not reveal the names of those who took the prisoner from him, even if he was subpoenaed, but he was never forced to make good on this as the Governor’s investigation quickly stalled due to lack of information.¹⁰⁰

A similar pattern of thwarted action and lack of follow-through characterized many cases that were initially met with expressions of outrage and condemnation,¹⁰¹ but even vigorous attempts at prosecution rarely succeeded. A few months after the lynching of Jay Lynch in Missouri, in November of 1918, Will Byrd and George Whiteside were removed from the jail in Tuscumbria, Colbert County, Alabama and killed outside the courthouse. With the wartime rise in lynchings, race riots, and other forms of mob violence, state and local officials were eager to take action. Governor Charles Henderson and the Alabama Attorney General immediately set out

⁹⁹ “Untitled,” *The Kansas City Star*, May 29, 1919.

¹⁰⁰ This incident is discussed in *The Kalamazoo Gazette*, May 29, 1919; *The Kansas City Star*, May 28, 1919; *The Kansas City Times*, May 31, 1919; and the *Aberdeen Daily American*, May 31, 1919.

¹⁰¹ Walter White, “The Work of a Mob,” *The Crisis* 16.5. A similar incident occurred after mass lynchings in Brooks and Lowndes Counties, Georgia, in which six African Americans were killed following a dispute with a landlord. The NAACP’s private investigator furnished the names of probable participants in the lynching to the Governor, but no investigation or indictments were pursued.

to collect evidence for presentation to a grand jury. The first attempt to bring evidence to the grand jury failed, but the second attempt yielded 24 indictments, including against one of the officers on duty at the time the prisoners were removed from custody. The case was assigned to a judge from a different county to ensure greater objectivity.¹⁰²

Frank Dillard, a restaurateur, and Jeff Jenkins, an auto mechanic, were the first to stand trial. But witnesses whose testimony had been sufficient for indictment did not hold up as well with the passage of time. The first witness for the prosecution was the Chief of Police, who was present in the jail when the lynchers came for their victim, but who may also have been working in concert with them. An observer reporting to the NAACP noted that the chief was rumored to have told the jail trustee, “Don’t put that...Byrd in a cell as they are coming after him in a few minutes.”¹⁰³ Despite his proximity to and possible foreknowledge of the event, the police chief claimed not to know anything about the lynching or the lynchers. The next witness, a black teenager by the name of Sam Rivers, provoked laughter from the jury when he admitted that the detectives who procured his testimony offered him money to secure his cooperation. Saul Stubbs, a black prisoner lodged at the jail when Byrd and Whiteside were removed, definitively identified Frank Dillard as a leader of the lynch mob, and proved to be the best witness the state was able to put up. Aspects of his testimony were corroborated by two other witnesses, one white and one black.

In a curious pattern, all the witnesses for the defense claimed they were close enough to the mob to say with certainty that Frank Dillard and Jeff Jenkins were not part of it, but not so

¹⁰² “Sent to Jail: Thirty-nine Alleged Southern ‘Cracker’ Lynch-Murderers,” *The Cleveland Gazette*, January 18, 1919; “Bulletin,” *The Crisis*, 18.1 (May, 1919), 37. “Lynching: An American Pastime,” *The Washington Bee*, January 4, 1919.

¹⁰³ Records of the NAACP, Administrative File, Sub-file on Lynching in Alabama, 1919-1939, Film 19771, Part 7, Series A, January, 1919, University of Michigan. The NAACP sent observers to the trial, and this account is reconstructed from hand-written notes.

close that they could clearly make out who was. John Sharp, resident of Colbert County and friend of Dillard's for over twenty years, reported that he saw Dillard "standing about twenty feet from the jail," that he "stood alone, away from the mob," and that "although the men in the mob were nearly as close to him as was Dillard, he could not recognize any of them." Conveniently, the only other person Sharp *could* recognize was co-defendant Jeff Jenkins, who Sharp claimed was also "standing apart" from the mob. Other witnesses testified they had seen Dillard eating at his restaurant at the time of the lynching, and that Jeff Jenkins had been near the mob but not a member of it. The testimony of one white man and three African Americans (one a boy, one a fellow prisoner), were not enough to overcome the witnesses called by the defense. Dillard and Jenkins were found not guilty by the jury, which prompted the judge hearing the case to dismiss the charges against the remaining defendants, including the police officers who had allowed the prisoners to be taken.

Even near the close of the lynching era, when the annual rate of incidents was at an all time low, and each newly publicized outbreak of violence prompted a familiar cycle of national outrage, regional defensiveness, and local shame, convictions remained difficult to procure. In Virginia in 1926, the killing of Raymond Bird (removed from police custody) attracted the immediate outrage of the Governor, and the judge presiding over the grand jury said the incident had brought shame on the state, whose dignity could be recovered only through a reassertion of law and order. Nonetheless, the grand jury failed to bring any indictments. The investigation was suspended for five months, during which time Floyd Willard went on a hunting trip with some friends and bragged about taking part in the lynching. The grand jury reconvened and indicted Willard, but a number of witnesses attested that he had an alibi. Willard put aside his pride and

ascribed the bragging to drunkenness and misplaced regret for having missed the event. After a 10-minute deliberation, the jury found him not-guilty of all charges.¹⁰⁴

The same year, in LaBelle, Florida, Henry Patterson was killed by a posse that included a number of town officials and sheriff's deputies. The only prominent official in the town to oppose the lynching was the county judge, Herbert Rider, who expended considerable social and political capital seeing to it that the lynching was investigated and alleged participants put on trial for murder and rioting. The investigation featured problems that sound extraordinary, but as we have seen in lynching trials, were actually quite common: witnesses failed to appear, the jury was openly hostile, the coroner's inquest vanished, and the sheriff was (implausibly) able to recall only a handful of names out of the dozens of accused lynchers who included his neighbors and people he regularly worked with in an official capacity. The State's Attorney resigned (citing the case as the reason) and the new State's attorney was not motivated to continue the prosecution. Citing a lack of witnesses or concrete evidence, the grand jury failed to indict anyone for the lynching. They did recommend removal of the sheriff for his negligence in preventing or investigating the lynching, but in an unfortunate example of circular reasoning, Florida's Governor Martin refused to follow the jury's recommendation because, he explained, if even a grand jury investigation could not turn up the identities of the lynchers, certainly the sheriff could not be held responsible.¹⁰⁵ Instead of leading to his condemnation, the sheriff's obstruction of the grand jury had the effect of inculcating him from responsibility.

¹⁰⁴ Paul G. Beers, "The Wythe County Lynching of Raymond Bird: Progressivism vs. Mob Violence in the '20s," *Appalachian Journal* 22, no. 1 (1994): 34-59.

¹⁰⁵ Jerrell Shofner, "Judge Herbert Rider and the Lynching at Labelle," *The Florida Historical Quarterly*, 59, no. 3 (Jan., 1981): 292-306.

Prosecutions of accused lynchers did not always fail, but it was easier to get convictions for minor charges than it was for the gravest crime of lynching, which was usually murder.¹⁰⁶ The most serious punishments dealt out to lynchers involved cases where the alleged perpetrators were perceived as social outcasts (drawn, in other words, from the smaller and non-representative fraction of cases that did *not* involve police officers or prominent citizens), or in cases where the victims were not black. In 1889 in Wisconsin, in a rare case involving a female lyncher, Norwegian immigrant Bertha Olson enlisted the help of male relatives and neighbors in the lynching of her husband, an abusive alcoholic whose threats and assaults Olson had suffered for years.¹⁰⁷ In theory he was just the type of unrepentant criminal, unassimilated immigrant, and threat to women's safety, who might have fit some people's ideas of a deserving target for lynch law. But in practice, the incident was perceived by the Olson's anglo-American neighbors as a sign of dangerous disorder amongst the enclaves of recent immigrants, and allowing a woman to murder her husband with impunity was not something the community would stand for. In the words of historian Jane Pederson, "as the dialogue about the case developed, no virtue associated with womanhood could be claimed for Bertha"; she and her son, and two of their neighbors, were prosecuted and sentenced to life in prison.¹⁰⁸ The only other case I have found so far in

¹⁰⁶ William Green, "To Remove the Stain": The Trial of the Duluth Lynchers," *Minnesota History* 59, no. 1 (Spring, 2004): 22-35. Green describes how, after the triple lynching of three African Americans in Duluth, Wisconsin, in June of 1920, the state was ultimately successful in obtaining some convictions. However, while the crowd that participated in the lynching numbered in the hundreds, the district attorney was only able to secure evidence to bring about 37 indictments (12 for murder, 25 for rioting). Of these, only three cases ultimately resulted in convictions, and these for the lesser charge of rioting. None convicted were police officers, although a report ordered by the Governor put primary blame on local police for failing to prevent the lynching. Moreover, the three who were convicted only ended up serving one year out of their five-year sentence, as they later received commutations.

¹⁰⁷ Jane Pederson, "Gender, Justice, and a Wisconsin Lynching, 1889-1890," *Agricultural History* 67, no. 2, *American Rural and Farm Women in Historical Perspective* (Spring, 1993), 65-82.

¹⁰⁸ Pederson, "Gender, Justice, and a Wisconsin Lynching, 1889-1890," 79.

which the conviction of a lyncher resulted in such a severe sentence (life imprisonment) was in Geneva County, Alabama, in December of 1920; the victim, Alto Windham, was white.¹⁰⁹

Even some of the most highly celebrated efforts to hold officials liable for complicity in lynching reveal the difficulty of achieving meaningful accountability. In March of 1906, Ed Johnson of Chattanooga, Tennessee, was convicted of murder and sentenced to hang. Against great odds, lawyers on his behalf filed a series of successful appeals, until the case eventually came before the Supreme Court, where Johnson's conviction was called into question and a new trial ordered. Sheriff Joseph Shipp, in sympathy with outraged white residents of Chattanooga, allowed a large crowd of lynchers to remove Johnson from jail, and did nothing to prepare for or defend against the mob despite having ample warning that crowds were forming for that purpose. As the numbers show, Shipp had good reason to think he could get away with this – 99% of lynchings ended without any investigation or prosecution, and perhaps as many as three-quarters of these incidents involved officers of the law. Yet, the case of Johnson was unique compared to the vast majority of lynch victims who were taken from officers *before* a trial ever took place, rather than after one had already been completed, let alone appealed to the Supreme Court. Since the Supreme Court had already issued a writ of habeas corpus in the Johnson case, the usual objections regarding state's sovereignty in criminal matters could be side-stepped, and Sheriff Shipp and five other men were brought up on charges in connection with the lynching, convicted, and sentenced to serve time in the federal penitentiary.¹¹⁰

¹⁰⁹ "Third Man Sentenced in Connection with Lynching," *Dallas Morning News*, December 19, 1920, 2.

¹¹⁰ Mark Curriden and Leroy Phillips, *Contempt of Court: The Turn-of-the-century Lynching That Launched 100 Years of Federalism*. New York: Faber and Faber, 1999; George Thomas, "Bigotry, Jury Failures, and the Supreme Court's Feeble Response," *Buffalo Law Review* 55 (2007-2008), 947 – 980; and Michael Tigar, "Two Trials in and about Chattanooga - Lynching and Federal Judicial Power," *Litigation*, 26.3 (Spring, 2000): 49-64.

The case of *United States vs. Shipp* is lauded as an early civil rights victory that sent a strong message to law enforcement officers regarding their responsibility to uphold due process and the rights of the accused. Yet it is important to note that Shipp and the other lynchers were not actually convicted of lynching (nor of murder, assault, kidnapping, manslaughter, or any of the other serious felonies that might be a likely charge in the aftermath of a lynching). They were convicted only of contempt of court; three served sentences of ninety days in jail, while the other two served only sixty days. All were released early, their sentences reduced for good behavior. The case did help set an important precedent for federal judicial review over allegations of denial of due process; but it did not set a precedent for the rigorous prosecution or punishment of participants in lynching.

Anti-Lynching Legislation and the Logic of the Exception

Although the public rhetoric of anti-lynching activists positioned lynching firmly outside of the law, using terms such as barbaric, uncivilized, lawless, mob rule, and un-American to describe the practice, their internal conversations and the strategies they pursued for ending lynching reveal that they understood it to be deeply embedded in the routine operations of the criminal justice system. The NAACP drafted template anti-lynching legislation for adaptation at both the federal and state level. Representatives of these and other organizations disagreed on how to formulate criteria that would distinguish lynching from officially sanctioned capital punishment on the one hand, and plain old murder on the other. They debated topics like how large must a group be to qualify as a ‘mob,’ whether or not the term applied only in fatal cases, and how to characterize a lynch mob’s intentions and motivations.¹¹¹ These debates yielded

¹¹¹ Waldrep, “War of Words.”

multiple competing definitions of lynching, which were further multiplied in the texts of proposed anti-lynching laws that were adjusted to comply with various state's constitutional and juridical particularities. Yet, across the many definitions to be found in organizational documents, dictionaries, and legislative texts, common threads are discernible. The way these statutes define lynching, the consequences they outline, and the means of enforcing the measures, all indicate that activists in the NAACP and other progressive circles saw lynching as a method of law enforcement. A close reading of some of these texts supports my contention that a positivist description of lynching as "illegal" is a misnomer. These laws do not merely identify illegal behavior and codify its illegality; rather, they confront the ways in which lynching had been embedded in law and attempt to disarticulate lynching and law from each other – a task that would prove difficult if not impossible until after World War One.

In effect, one can read the texts of anti-lynching legislation as counter-discourses to the dominant scripts offered by sheriffs who routinely claimed to have been overwhelmed by masked mobs in the process of shepherding a prisoner toward safekeeping or guarding him whilst in custody. Where the dominant scripts maintained the primacy and legitimacy of the legal system by discursively severing the rule of the mob from the rule of the law, the text of the NAACP's template state-level anti-lynch law rejected this binary by defining the term "mob" as

[A] collection of [...] persons assembled for the unlawful purpose of offering violence to the person or property of another person suspected of having violated the law, or for the purpose or under the pretense of exercising correctional or regulative powers over another person by violence, and without lawful authority.¹¹²

By characterizing the mob's intent as "exercising correctional or regulative powers over another person by violence," the NAACP spoke directly against the logic of exception that claimed crime

¹¹² "An Act to Suppress Mob Violence," Records of the NAACP, Section 1, Film 19771, Part 7, Series A, Reel 1, Subject file: lynching, University of Michigan.

justified the setting aside of legal norms. At the same time, the clause “without lawful authority” signalled the NAACP’s acquiescence to law-and-order forces who insisted on the legitimacy of police use of force, incarceration, capital punishment, and other officially sanctioned exercises of violent governance.

The template legislation also tackled the problem of legal impunity for lynching, by directly addressing the problems of custodial transfer and refusal to witness. The draft law asserts that, “if anyone shall be taken from the custody of a sheriff or his deputy, whether confined in jail or not, and shall be lynched, it shall be prima facie evidence of a failure on the part of the sheriff to do his duty.”¹¹³ The final section of the template holds that

[I]t shall be the duty of every citizen, upon learning that anyone is advising the formation of a mob, or that a mob has formed, or that a lynching is contemplated, or is under way, to immediately notify the sheriff, and it shall then be the duty of the sheriff, in addition to other duties imposed by law, to inform the Governor by the quickest means possible, and it shall then be the duty of the Governor to immediately use every means at his command to prevent the formation of the mob, or to disperse it if already formed, and to prevent the mob from lynching or committing any other unlawful act.¹¹⁴

These sections are alternative scripts of power that refuse the power of police officers to decide on an exception, and reject the flimsy trope of the helpless, overwhelmed officer. They also reject the symbolic “masking” of the perpetrators of violence; they declare interference with lynch law to be a duty of all citizens. They demand that witnesses and bystanders actively see, remember, and testify against lynching, in defiance of the dominant social scripts that cast lynching into impenetrable darkness and insisted on the indiscernibility of its perpetrators.

Significantly, these sections also establish a clear chain of command, from citizen to sheriff to Governor, with every level of power having clearly defined responsibilities vis a vis the

¹¹³ “An Act to Suppress Mob Violence,” Records of the NAACP, Section 1, Film 19771, Part 7, Series A, Reel 1, Subject file: lynching, University of Michigan.

¹¹⁴ “An Act to Suppress Mob Violence,” Records of the NAACP, Section 1, Film 19771, Part 7, Series A, Reel 1, Subject file: lynching, University of Michigan.

prevention of lynching. This leaves no room nor any plausible excuse for the dereliction of duty, regardless of whether that dereliction would be caused by popular excitement or official negligence. The bill aspires to prevent the law from disavowing responsibility for lynching by casting blame on “the mob,” so too does it aspire to prevent “the mob” from escaping the notice of the law. If “sovereign is he who determines the exception,” in the words of political theorist Carl Schmidt, then the NAACP’s ideal vision of an anti-lynching law repudiates this vision of sovereignty. Neither the mob nor the police would be permitted to declare an exception to the rule of law as formally written; such exceptions would be de facto illegitimate, and the mere fact of a lynching would constitute evidence that such an exception had been permitted. To underscore this point, the legislation outlined a variety of consequences that went far beyond penalizing individual lynch mob participants. The legislation also provided that sheriffs be removed from office, and that the taxpayers of the locale where a lynching occurred be held financially liable for punitive damages brought against the city or county by any surviving relative or other legal representative of a lynched person.

In both the definition of terms and the provision of punishment, anti-lynching legislation sought to eliminate the exception by undermining the narratives that law enforcement officers had created to conceal their widespread collusion in lynching. Correspondence between private lawyers, NAACP legal advisors, and lawmakers underscores the intentionality and critical importance of this aspect of the legislation. In the fall of 1914 and winter of 1915, for example, the NAACP was working to secure sponsors for a proposed anti-lynch law in the state of Pennsylvania, part of the long-term response generated by the public burning of Zach Walker in Coatesville in 1911.¹¹⁵ May Nerney (NAACP Secretary) and Joel Springarn (Chair of the

¹¹⁵ Dennis B. Downey and Raymond M. Hyser, *No Crooked Death: Coatesville, Pennsylvania, and the Lynching of Zachariah Walker*, Blacks in the New World (Urbana: University of Illinois Press, 1991).

NAACP Board of Directors) approached Samuel Scott, a member of the Pennsylvania House of Representatives, about introducing a law for the suppression of mob violence. Scott passed the proposed text to James McKirdy, the Assistant Director of the Legislative Reference Bureau in Harrisburg for review. McKirdy and Scott were both sympathetic to the idea of an anti-lynching law, but McKirdy flagged a number of practical concerns about the bill for discussion with the NAACP legal counsel, including the sections providing for the removal of sheriffs from office and spelling out the financial culpability of cities and counties where lynchings occurred.

Regarding the removal of sheriffs from office, McKirdy described such a penalty as a form of “cruel and unusual punishment,” holding that

In the case of action against the officer whose dereliction of duty permitted the lynching you require the man to prove an impossibility; that is to say, to prove affirmatively that he did all in his power to protect the person. The presumption is that he has done all that lies in his power and the burden should be upon the prosecutor or plaintiff to show that he was derelict and that through his dereliction the disturbance arose.

[...] You state that the officer through whose dereliction of duty the lynching occurred shall thereafter be ineligible to any [...] office of profit or trust in Pennsylvania. *If this is not cruel and unusual punishment I do not know the meaning of the term.* Through a temporary dereliction at a time of sympathy with the mob, or detestation of the crime committed, or using his heart instead of his head, should be punished through the rest of his life with a liability of a monetary damage [sic]. I think the mere statement of the proposition shows the unreasonableness of it.¹¹⁶ (emphasis added)

This objection posed a problem for the legal counsel of the NAACP, who knew that any presumption of innocence for law enforcement officers would all but guarantee the continuation of lynching. Indeed, the cultural scripts that had grown up around lynching, which narrated the story of the helpless officer overpowered by a mob, depended on a presumption of innocence for the officer in question. The officer’s innocence went hand-in-hand with his helplessness,

¹¹⁶ James McKirdy, letter to Samuel Scott, October 15, 1914. Records of the NAACP, Film 19771, Part 7, Series A, Reel 1, Subject file lynching, general. University of Michigan. Scott appears to have passed McKirdy’s letter on with comments to Charles Brinsmead (volunteer legal consultant for the NAACP), Joel Springarm (a lawyer and the Chairman of the NAACP’s board of directors), and May Childs Hernay (Secretary of the NAACP from 1912 – 1916).

concretized in his symbolic blinding and binding in the public narratives that frequently circulated after a lynching.

Attorney Chapin Brinsmeade, responding on behalf of the NAACP, was generally amenable to the revisions suggested by McKirdy, particularly when it came to the adjustments required to align the proposed law with existing components of Pennsylvania's criminal code. But he squarely rejected McKirdy's suggestion that sheriffs should enjoy any presumption of innocence. "We do not agree with you at all as to the last part of Section 6," he wrote in an unusually curt tone.

We think the burden of proof should be on the sheriff. [...] The punishment does not seem to me to be too severe. An officer of the law, charged with the suppression of mob violence, who "because of sympathy with the mob, or detestation of the crime committed, or using his heart instead of his head" allows one of the public, whom he is charged to protect, to be injured or killed, thereby shows himself unfit to hold any office under the commonwealth.¹¹⁷

The NAACP thus rejected a version of sovereignty that would forgive police officers and sheriffs for consciously stepping aside and granting jurisdiction to Judge Lynch. Lynching, they insisted, was not merely a criminal act in and of itself. Lynching was also evidence of *another* criminal act – the criminal negligence of police officers. In the face of this evidence, the burden fell on police officers to prove that they had resisted the mob with every means available to them. The requirement that the Governor must be notified meant that police officers would have to leave an official trail of resistance; their word would not be taken for granted. The unwillingness of the NAACP to shed these provisions from proposed anti-lynching legislation indicates that they were aware of the frequency with which incidents of lynching could be traced back to the collusion and complicity of police officers and the custodial transfer of victims from police to

¹¹⁷ Chapin Brinsmeade to Samuel Scott, October 29, 1914, Records of the NAACP, Film 19771, Part 7, Series A, Reel 1, Subject file lynching, general. University of Michigan.

mob.¹¹⁸ Where the dominant scripts obfuscated the ways in which lynching often occurred as a normal (albeit controversial) technique of policing, anti-lynching legislation placed primary importance on the recognition that lynching was being used in this way and included components designed specifically to put a stop to the practice.

Tracking the successes and failures of state and federal anti-lynching laws offers further evidence challenging any analytical framework that would position the rule of the mob and the rule of law as opposites. At the state level, the sections of the laws that provided for the punishment of police officers and the financial liability of cities and counties were the most frequent subjects of constitutional challenge. At the federal level, the very assertion of federal jurisdiction in cases of lynching proved to be so controversial that national anti-lynching legislation was never passed. Lawmakers at the state and federal level were more than willing to pass laws criminalizing the participants in lynch mobs; indeed, such participation was technically criminal with or without the existence of legislation aimed specifically at the suppression of mob violence. They balked, however, at components of the bill that directly challenged the mechanisms by which states of exception were invoked. This proved a source of great frustration to the NAACP, whose staff knew that the prosecution of individual lynchers would never occur if sheriffs maintained the ability to officially or unofficially distribute quasi policing powers to citizens at their own discretion, under the guise of being “overpowered.” Staff working for the

¹¹⁸ Records of the NAACP, Subject file: anti-lynching legislative campaign, Film 19771, Part 7, Series B, Reel 26, University of Michigan. These provisions were also challenged by individual correspondents with the NAACP, and office staff took care to refute arguments that tried to exonerate police officers. See December 5th, 1924 correspondence with Bishop Finley, who questioned these provisions. Walter White responded, “Sheriffs, prosecutors and other law enforcement officials...are now elected almost entirely by white voters...this has made for the indifference, laxity and even connivance of these peace officers in lynchings...These officers will be stimulated to action only if they know that there is a personal penalty which they may suffer for failure to act.”

passage of anti-lynching legislation bemoaned the impossibility of its passage, noting that “those states that do prove willing to enact these laws are generally those that need them the least.”¹¹⁹

War: The Grim Emancipator

Although legislative campaigns to eliminate the state of exception for lynching were never successful, lynching began to attract increasing amounts of attention and criticism across a broad spectrum of the public during World War One. This was partly because of the rhetoric crafted by national political leaders to secure the broader public’s support for the war, which was justified under the ambitious slogan of “Making the World Safe for Democracy.” Those who had been working on the fight against lynching immediately capitalized on this rhetoric by admonishing President Wilson and asking for federal support in “making the South safe for Democracy.” As early as 1914, before the U.S. had formally entered the war, the NAACP’s editorials and press releases began to include statements about lynching that compared it to the behavior of America’s wartime enemies. When the state of Louisiana was the site of four lynchings over just one month in August, Board Chairman Joel Springarn wrote to Governor Luther Hall that “surely it is a cause for reproach to the whole country that events are occurring within its borders which equal in barbarism any that are reported from the theatre of war in Europe.”¹²⁰ Progressive publications, such as *The Nation*, were quick to adopt this rhetoric. When Jim McIlhheron was taken from police and burned at the stake in Estill Springs, Tennessee, a *Nation* columnist commented sardonically:

Had any such item as this come out of Belgium or Armenia, we should know what to think of the unspeakable Germans and Turks responsible. A wave of horror would sweep

¹¹⁹ Nash memo to Peabody.

¹²⁰ Correspondence between Joel Springarn and Luther Hall, September 3rd, 1914, Records of the NAACP general file on lynching, Film 19771 Part 7 Series A Reel 1, University of Michigan.

over the country and there would be an extra rush to the enlistment offices. But when Americans thus debase themselves, nobody volunteers to end the evil, nobody speaks about it – at least, nobody who is white – and we complacently turn to the congenial task of setting up democracy in Germany.¹²¹

Not only did this discourse appear in left-leaning circles, it was increasingly embraced in Progressive circles, which included many “law and order” elements, who had previously been hesitant to criticize lynching because of their perception that it helped to control crime. This change of heart in mainstream sectors of white American society was reflected in increasing numbers of correspondents with the NAACP who represented commercial, religious, and educational institutions, as when Jackson Davis of Richmond, Virginia’s Chamber of Commerce wrote to the NAACP in support of their anti-lynching efforts, noting the role of the war in his transformed position on racial matters:

The World War has set us all to thinking in new terms of brotherhood. Surely we in this country who have a belated race at our very doors, cannot preach brotherhood unless we practice it at home. This thought is being brought home to hundreds of people throughout the country as never before in our history.¹²²

In 1918, the Tennessee Law and Order League – a participant in the Tennessee Conference of Charities and Corrections – issued a resolution that referred to lynching as “treasonable,” and asserted that it would “inevitably increase the length of the war and the cost in dead and wounded we will have to pay for victory and thus give aid and comfort to the enemy.”¹²³ The Tennessee organizations joined the NAACP and many others in demanding that President Wilson issue a national address on the subject. With pressure mounting, and rates of lynching having nearly doubled since the U.S. had entered the War, President Wilson finally did issue a

¹²¹ “Untitled,” *The Crisis*, 16.1 (May, 1918) 25.

¹²² Correspondence between Jackson Davis (Chamber of Commerce, Richmond, VA), and un-named NAACP officer, November 30, 1917. Records of the NAACP Records, Subject file: lynching, general, Part 7, Series A, Reel 1, University of Michigan.

¹²³ “Press release,” Records of the NAACP, Subject file: lynching, general, office correspondence, Part 7, Series A, Reel 1, University of Michigan.

proclamation criticizing lynching. In crafting his address, Wilson drew on rhetorical arguments that had originated in the black press, arguing that lynchers harmed America's war efforts.

No man who loves America, no man who really cares for her fame and honor and character, or who is truly loyal to her institutions, can justify mob action while the courts of justice are open and the governments of the States and the Nation are ready and able to do their duty. We are at this very moment fighting lawless passion. Germany has outlawed herself among the nations because she has disregarded the sacred obligations of law and has made lynchers of her armies. Lynchers emulate her disgraceful example.

This was the same president who, three years earlier, had hosted in the White House a private screening of the newly released film, *Birth of a Nation*. But in the interim, the United States' entry to war had drastically changed the terms of the exception, turning a pro-lynching President – and arguably a pro-lynching American populace – to a new outlook which exalted American institutions and courts of justice and declared adherence to law a “sacred obligation.”

Yet, Americans' newfound commitment to the rule of law cannot necessarily be taken at face value. Here, the insights of scholars like Amy Kaplan, Sarita See, and Melanie McAllister are helpful for reminding us that the foreign and the domestic have always been linked in U.S. policy, rhetoric, statecraft, and cultural production. In that light, the statements of Wilson and other Progressives might be interpreted as a culmination of pro-imperialist thinking, not merely a repudiation of lynch law. Indeed, if lynch law is understood as an expression of the logic of emergency, then the imperialist packaging of anti-lynching rhetoric during this period should alert us to the ways in which these denunciations of violence in the domestic sphere served to naturalize U.S. recourse to violence in the international sphere. The contradiction faced by President Wilson as a result of World War I was related to but distinct from the contradiction faced by African Americans. For black editor Robert Owens, writing in his St. Louis, Missouri-based *Post-Dispatch*, “the question that is first and uppermost in the minds of the vast majority

of the black people of this country is, Are we included in this world that is to be made safe for democracy?"¹²⁴ But for President Wilson, as articulated in his anti-lynching address two months later, the question was, "How shall we recommend democracy to the acceptance of other peoples[?]"¹²⁵ To the extent that black and white progressive activists had framed lynching as anti-democratic, Wilson was forced to adopt a public stance in opposition to lynching in order to maintain ideological coherence in his "recommendation" of democracy to other nations – such as Haiti in 1915, new European nations post-WWI, and the numerous territories and protectorates across the pacific that had been only recently acquired during the Spanish-American and Phillipine-American wars two decades prior.

During World War I, the U.S. faced an unprecedented national emergency, in the form of full-scale mobilization for entry to a global, multi-front war. As had happened frequently throughout U.S. history up to this point, the terms of racial formation, war-making, international relations, and capitalist development precipitated drastic changes in the practice of lynching, spelling the end of a particular post-Reconstruction version of this long-standing institution. Nonetheless, the cultural logic of lynch law, the logic of exception, persevered, just as it had persevered before. The logic of emergency, which holds that legal norms can be set aside, and the killing power of the state unleashed during exceptional times of crisis remained a central aspect of U.S. statecraft and jurisprudence. New understandings of national sovereignty made it increasingly rare that correctional powers would be distributed to unofficially deputized citizens at the local (city, county, or state) level. This power was retained, however, by policing units positioned at higher levels of government. And, this power was frequently exercised, in the form

¹²⁴ Reprinted in *The Crisis*, 16.1 May, 1918, 23.

¹²⁵ President Wilson's Anti-lynching proclamation, July 26, 1918.

of brutally broken strikes and other labor actions, collusion between troops and mobs during race riots, and ongoing military incursions in central and South America, Africa, and the Pacific.

An editorial cartoon (Figure 6), published in the NAACP's official publication, *The Crisis*, edited by W.E.B. DuBois, perfectly symbolizes the contradictory effects of WWI in terms of how black people became both newly empowered to resist some forms of violence, while simultaneously remaining particularly vulnerable to the imperialist vision of statecraft that would continue to rely on violence to govern peoples of color both domestically and globally. The cartoon's caption reads "War: The Grim Emancipator," and the image features a hyper-masculine, larger-than-life, godlike image of The War, holding an outstretched sword of War Work, which he uses to break the chains of the Negro Wage Earner, thus emancipating him from Economic Slavery. Given DuBois' writings on the war – he supported African American participation although this cost him significant social and political capital within many black political circles – it is likely that this cartoon can be taken at face value as an attempt to drum up excitement about the war by highlighting its potentially liberatory effects on ordinary black laborers.¹²⁶

¹²⁶ Jordan, *Black Newspapers and America's War for Democracy, 1914-1920*.



WAR. THE GRIM EMANCIPATOR

Figure 6: "War: The Grim Emancipator," *The Crisis*, Vol. 16.2, 72.

Yet, perhaps unintentionally, there is something sinister about The War's proffered sword of War Work, which seems to coercively propel the Negro Wage Earner forward under the threat of injury or impalement. The image also suggests the possibility of betrayal, as the Negro Wage Earner is positioned not merely to be impaled, but specifically to be stabbed in the back. An ominous wisp of smoke severs the arm holding the sword from the body of The War, as if the arm and the sword are autonomous forces that will outlast the finiteness of The War as a

contained historical event. Although the Wage Earner's chains have been broken, his shackles remain and there is a sword at his back. The disembodied body holding the sword is marked as German by his helmet, nonetheless the figure could also represent a growing transnational (or at least transatlantic) identification of civilized whiteness in relation to less-developed Others. The image speaks to the elusive, and perhaps illusory, promises of increased civil and economic status that figures like DuBois predicted would result from actively supporting the U.S. at war.

Conclusion

In many respects, obstacles to the criminalization of lynching can be interpreted as a straight-forward matter of federalism. One of the most important lessons of lynching is that, when local officeholders fail to protect citizens' rights, higher powers (either state or federal governments) must be legally entitled to intervene. Certainly, this was the strategic analysis pursued by Progressive-era lawyers, policy-makers, and philanthropists, such as Albion Tourgee, Moorfield Storey, and George Peabody, who wrote extensively of the need for state and federal anti-lynching legislation that would remove power from sheriffs and allow Governors and U.S. attorneys to safeguard constitutional protections when necessary (or to investigate and punish local officers who failed in this regard). So too has this been a prominent theme in scholarship on lynching, of which a considerable portion is devoted to tracking the failure and success of anti-lynching legislation and analyzing major Supreme Court decisions that strengthened federal oversight of state and local criminal proceedings. This line of inquiry is also in keeping with the long-standing notion that the solution to lynching was to "use the law against lawlessness."

Despite the utility of federalism as an analytical frame for analyzing lynching, however, there are a few limitations to this lens. A primary limitation in my view, relates to how the

concept of federalism implicitly defines lynching as a problem of “localism,” in which localized popular sentiment undermines the rules of law, and thus a higher (i.e. less local) form of law is empowered to supercede it. Yet the problem of lynching was not necessarily that *local* sentiment overwhelmed law, but rather that pro-lynching sentiment in general (regardless of whether it reflected local, regional, or national views) was given expression in the actions of lawful authority, and thus perpetrators of violence were protected *even when* higher powers found cause to intervene. Absent extraordinary scandal or other external political pressures, higher authorities often failed to take advantage of their legal powers, or exaggerated their limits. Thus, if one sets aside the issue of local vs. federal protections, some of the central philosophical (and legal and political) problems posed by lynching remain, in large part, unresolved. What can be done when representatives of the state use their actual power to exceed their constitutionally-defined power? What if there is no higher power to provide recourse, or the higher powers that do exist do not have the capacity or the political will to respond?

These questions will be especially relevant for the next chapters, which examine state and federal involvement in race riots of the early twentieth century. I examine both the written protocols and the actual behavior of state and national guard units and federal troops especially during the Red Summer riots of 1919, and show how their actions were driven by racialized notions of emergency, not unlike those that rationalized lynching. The numerical decline of lynching during these decades belies the immense loss of life and destruction of communities that occurred as the logics of lynching were incorporated to national policing and military bodies.

CHAPTER 3

The Use of Organized Bodies¹²⁷

Like a prairie-fire, the blaze of revolution was sweeping over every American institution of law and order a year ago. It was eating its way into the homes of the American workmen, its sharp tongues of revolutionary heat were licking the altars of the churches, leaping into the belfry of the school bell, crawling into the sacred corners of American homes, seeking to replace marriage vows with libertine laws, burning up the foundations of society. – Attorney General Mitchell Palmer, 1920¹²⁸

"The very idea of America makes me shake and tremble and gives me nightmares." – Josephine Baker, remembering the East St. Louis riot of May, 1917¹²⁹

The Birth of a Nation

Previous chapters have suggested that the early 20th century witnessed a series of national and international phenomena that altered the material and ideological terrain of debates over lynching and lynch law. Many of these centered on emergencies related to national security, and accompanied the U.S.'s ascendance to global power: the Spanish-American and Philippine-American wars; limited military conflicts with Haiti and Mexico in the 1910s; the start of WWI in 1914; and the Bolshevik Revolution of 1917. The sense of peril and threat felt by U.S. leaders is well symbolized in Figure 7, a political cartoon penned by John McCutcheon of the Chicago Tribune, and reprinted widely. The United States is analogized as "The World," a globe in a

¹²⁷ United States War Department, *Military Protection, United States Guards: The Use of Organized Bodies in the Protection and Defense of Property during Riots, Strikes, and Civil Disturbances*, War Dept., Office of the Adjutant General; no. 882 (Washington: G.P.O., 1919).

¹²⁸ A. Mitchell Palmer, "The Case Against the 'Reds,'" *Forum* 63 (1920) 173 – 185.

¹²⁹ As quoted in Howard Zinn, "The Massacres of History," *The Progressive Magazine* (Aug. 1988).

hospital bed, surrounded by menacing figures labelled “terrorism” and “Bolshevism.” Miniaturized and racialized, “Costa Rica” and “Mexico” shoot weapons and wave swords from the floor below, which is littered with empty bottles: War 1914, War 1915, War 1916.... From above and behind, a laborer and presumptive trade unionist slams a sledgehammer repeatedly onto the globe’s head; the literal and figurative “strikes” threaten to debilitate the patient just when he is most in need of strength.



Figure 7: "A Nervous Wreck," *Literary Digest*, July 5th, 1919.

It is during this period of international crisis that lynching in the U.S. is thought to have declined, and even disappeared. Most scholars agree that WWI and the interwar years constitute the final decades of the “lynching era,” a period when rates of lynching dropped to single digits, after staying in the double and even triple digits for nearly five decades, since ~ the 1880s.¹³⁰ During these same years, however, the expansion of federal power domestically and internationally also led to new forms of violence that took a disproportionate toll on African Americans. In the years 1916 – 1921 alone, while approximately 334 individuals were lynched, as many as 800 people were likely killed in major civil disturbances at East St. Louis (1917), Omaha (1919), Elaine, Ark (1919), and Tulsa, Okla. (1921), all of which involved state militia, national guard troops, and federal military battalions, acting in concert with deputized posses, members of the Citizens Protective League, and (later) the American Legion.¹³¹ In other words, between 1916 and 1921, more African Americans were killed by members of the U.S. armed forces acting in concert with large organized vigilante groups than were killed by lynch mobs acting in concert with local police.

In previous chapters I have argued that lynching acted as a supplement to law in times of crisis or emergency. As sociologists have noted, however, most lynchings (as distinguished from related forms of collective political violence) were instigated in response to specific, *local* emergencies. Lynchings were usually justified on the basis of individual crimes (and/or crime waves); county and even municipal-level power struggles; and interpersonal conflicts within relatively small communities.¹³² This is not to say that lynching was unrelated to larger national

¹³⁰ National Association for the Advancement of Colored People., *Thirty Years of Lynching in the United States, 1889-1918*; Tolnay and Beck, *A Festival of Violence*.

¹³¹ This does not include those who were killed in less serious incidents that had lower death tolls, nor does it account for the thousands of persons who were displaced during these and other acts of violence.

¹³² R. Senechal de la Roche, “Collective Violence as Social Control,” in *Sociological Forum* 11 (1996): 97–128; R. Senechal de la Roche, “Why Is Collective Violence Collective?,” *Sociological Theory* 19, no. 2 (2001): 126–44.

issues – the topic was inseparable from conflicts over slavery and race; social upheaval created by western expansion; economic booms and downturns, etc. However, although lynching might have been caused or exacerbated by national issues, its manifestation was usually personal and local in nature. This chapter explores how the logics of lynch law – and its relationship to official state action – expanded and nationalized during the early 20th century, focusing specifically on the domestic effects of World War I. As with other chapters, I am particularly attentive to linkages between state-sanctioned and ‘extralegal’ forms of violence. First, I look at specific incidents of mass violence, and attempt to identify the “organized bodies” who incited and participated in them. I map these organized bodies onto official power networks to demonstrate that, similar to regional variations of lynching, the major race riots of this era were characterized by joint operations of ‘private’ vigilante groups with ‘official’ law enforcement personnel. In addition to material acts of violence, I examine how the discourses that undergirded lynch law on the frontier and in the postbellum U.S., were incorporated to law and protocol surrounding domestic emergencies, a category which includes riots, strikes, and ‘insurrections.’ I argue that the legal frameworks that dictated how national state power could be used in these situations reproduced earlier “states of exception,” in which the suspension of legal norms operated to strengthen national policing power. Even as some forms of exceptional violence (such as the extrajudicial execution of suspected criminals) became less common, other forms of exceptional violence flourished, and they did so in spaces of impunity created by national legal and military powers. The Jim Crow and frontier versions of lynching began to decline in the South and West, but lynch-like collective violence, rationalized by similar cultural and legal logics, was ascendant on the national stage.

The Red Summer, and Jim Crow lynching more broadly, are often discussed in the context of the re-emergence of the Klan, emblematic in the popularity of the film *Birth of a Nation*. Disciplinary divides between history, American studies, ethnic studies, and labor studies, has led to limited analysis of how the Red Summer of 1919 and the Red Scare of WWI are related to each other, despite the fact that they happened simultaneously. I do not wish to disconnect lynching from the longer narrative of racial formation that is suggested by examining texts like *Birth of a Nation*. I do, however, want to explore in more depth the simultaneity of the Red Summer/Red Scare. Both waves of violence may have been related to a different “birth of a nation” that was occurring, a birthing of modern American statehood whose nationalist discourses – even when they were race-neutral – impacted the character of collective racial violence as much as did the explicitly race-conscious discourses associated with the Klan.

After the signing of the armistice in 1918, rather than subside, domestic racial and economic tensions only continued to escalate. The demobilization of nearly two million soldiers coincided with a global postwar economic contraction, fueling an unemployment crisis in the U.S. The tenuous consensus against wartime labor action gave way to increased union agitation as workers who had borne the brunt of wartime inflation were now left to shoulder the fallout of a postwar recession. In ways that were shaped and inflected by regional variations such as population density, immigration patterns, and predominant types of industry, multiple forms of racial violence spiked precipitously in every region of the country. Concentrated in rural areas of the South, West, and Midwest, rates of lynching rose dramatically. During the economic boom-time of the war, rates of lynching had fallen, with an average of 56 incidents per year from 1914 – 1918, including an all-time low of only 38 lynchings in 1917. But in 1919, at least 83 lynchings were recorded, and it would be another four years before these rates returned to their

lower pre-war levels.¹³³ In the urban population centers of the Northeast and Midwest, the exponential growth of African American neighborhoods as a result of the first Great Migration stressed social relations, and increased conflicts between African- and European-Americans over jobs. These conflicts were exacerbated by unions' policies of racial exclusion, which led employers to use black workers as scabs and strikebreakers when all-white union memberships walked off the job. This dynamic set the stage for a wave of severe race and labor riots, which afflicted more than two dozen towns and cities (Figure 8). In fact, more race riots occurred in 1919 than had occurred during the previous twenty years. On top of all this, with some of the constraints on wartime political dialogue lifted, many of the most militant voices of the labor movement returned with a fury, and several cities and industries were rocked by violent and protracted general strikes.

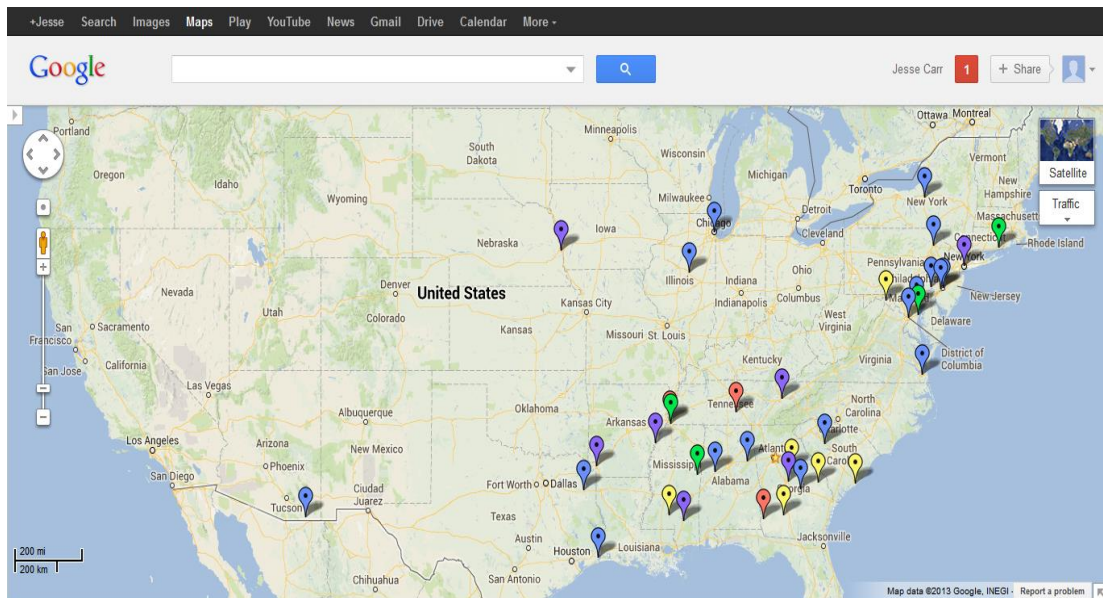


Figure 8: Red Summer of 1919 Race Riots – Red/yellow markers occurred in the winter/spring, while green/blue/purple markers show riots in the summer-fall. The most riots occurred in mid-summer, in July (blue)

¹³³ National Association for the Advancement of Colored People, *Thirty Years of Lynching in the United States, 1889-1918*.

markers), and it was shortly after this long and violent month of conflict that leaders in Helena consulted military leaders stationed near Little Rock about emergency preparations for similar violence in Phillips County.

Against this backdrop of social chaos, as American society struggled with the reverberations of its recently completed war, a new organization called The American Legion was formed, ostensibly to represent the interests of World War I veterans, millions of whom were navigating difficulties such as accessing the health and pension benefits their service entitled them to, finding employment in a tight postwar economy, and generally reintegrating to civilian society. Yet the Legion was more than just a veterans' social and advocacy organization, it was also highly nationalistic, and its members envisioned themselves as having a domestic moral and political mission that extended directly from the overseas missions they were sent on as soldiers. "For God and country we associate ourselves together," proclaimed the editor of the Legion's national magazine in its second issue, which coincided with the height of Red Summer race rioting in July. Legionnaires committed themselves "To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred per cent Americanism; ... [and] to inculcate a sense of individual obligation to the community, state and nation."¹³⁴ The goals set by the organization to meet these objectives mapped squarely onto the ways in which the emerging national security state envisioned its own role in guaranteeing security and upholding Americanism. For example, the Legion committed its members to "fight Bolshevism and ultra-radicalism," to pressure Congress to investigate and prosecute conscientious objectors, and to enact harsher immigration laws that would allow the U.S. "to deport alien slackers as well as every naturalized citizen convicted under the Espionage Act."¹³⁵ During the first two years of its publication, the Legion's national magazine instructed

¹³⁴ "Editor's Note," *American Legion Weekly*, July 11, 1919, 10.

¹³⁵ "Editor's Note," *American Legion Weekly*, July 11, 1919, 10.

its members to lend active assistance to law enforcement and other government agencies, so as to uphold what they constructed as “law and order.” Legion posts from around the country reported proudly on their vigilance, as members assisted police with strike duty, surveilled their communities, and reported anything they deemed suspicious to the authorities. In a number of cases Legion posts were involved in explicit acts of harassment, intimidation, and violence, acts which were celebrated in the pages of the national magazine as necessary and laudable examples of positive action on behalf of the nation these former soldiers swore to defend.

A statement published in the inaugural issue of The American Legion’s weekly magazine, issued on July 4th, 1919, is representative of this other birth I refer to. The first page of the first issue of the magazine declared:

The *American Legion Weekly* is born on this one hundred and forty-third anniversary of the signing of the Declaration of Independence. Appropriately so. The principles and ideals of that epochal document in human liberty are those of The American Legion, which the *American Legion Weekly* represents.

The Legion itself is a spontaneous expression of purpose by those millions of Americans who helped crush autocracy. Out of their common experiences through the dark months of the war has grown a comradeship and a patriotism which is vitalized by their organization into this single concrete force which will stand always as a barrier against the forces of greed, ignorance, and chaos.

The American legion is the epitome of that Americanism for which it stands.¹³⁶

The two births – Thomas Dixon’s *Birth of a Nation* represented by the second Klan, and the syndication of The American Legion’s weekly magazine on the 143rd anniversary of the Declaration of Independence – were united by a notable term: “Americanism.” It is important to note that the groups stressed *Americanism*, rather than *whiteness*. This is not because whiteness had lost its political or social valence; quite the contrary. In fact, the term “Americanism,”

¹³⁶ “The Spirit of the Legion,” *American Legion Weekly*, July 4, 1919.

particularly when accompanied by “100%” and “pure,” as it often was, carried with it the assumption of whiteness. Yet, during this same period, the category of whiteness was undergoing major contestation, transformation and expansion. As used by organizations like the Klan and the Legion of the 1920s, “Americanism” indicated conformity to a specific form of whiteness. Not just Anglo, not just European, not even necessarily hereditary or genealogical, “Americanism” described whiteness of a particular ideological, economic, political, and sexual persuasion. To be 100% American was to be white, yes, but also to be pro-capital, nationalistic, suspicious of foreign influences, committed to self-sufficiency and individualism, Christian, and normatively heterosexual.

This point is underscored by close analysis of political cartoons from the time. The benefit of examining evidence from visual culture is that elements of racialization are made more visible in artists’ renderings of the ideology of Americanism. These images also underscore the extent to which the fundamental logic of lynch law (the logic of “emergency”) was evoked against those people who fell outside the category of “100% American,” thus contributing to the unleashing of state violence that occurred when unions went on strike, and when African Americans defended themselves against physical and political attacks.

One image in particular stands out because it replicates Attorney General Mitchell Palmer’s description (in the epigraph) of the radical alien “burning up the foundations of society.” The cover illustration of the *American Legion Weekly*’s second issue depicts a bomb-wielding man, labeled as a bolshevist, who is poised to destroy “American Institutions,” represented by a federal-style pillar (Figure 9). The cartoon’s language of “American Institutions” represented as a pillar resonates with Palmer’s description of work, church, school, home and marriage as the “foundations of society.” Next to this foundational pillar, a menacing

figure labeled “American Legion” is authoritatively approaching the Bolshevik, with a clenched fist and a determined look on his face. Who is this man, and what does he signify (beyond a specific organizational membership)? What is his relationship to the Bolshevik and the bomb? How will he defend “American Institutions,” and what authorizes him to do so? What do the

answers to these questions tell us about the shifting logics of racialized state-sanctioned violence?

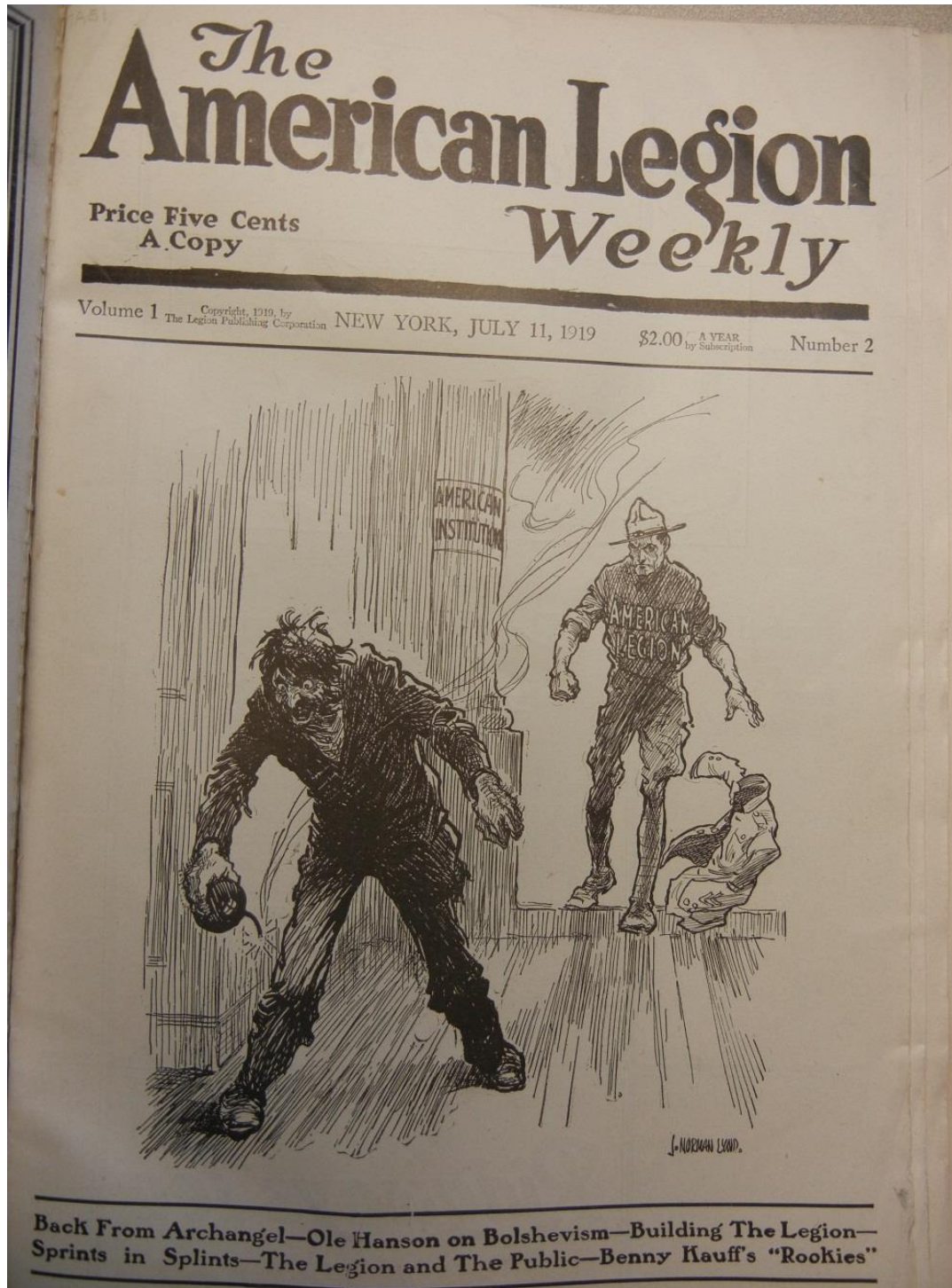


Figure 9 *The American Legion Weekly*, July 11, 1919 [cover image]

The American Legion has been a difficult organization to analyze. It could accurately be described as a veterans' social organization, a non-partisan advocacy organization, or as an organization of veterans-turned-vigilantes, and the balance of the organization's activities shifted over time, with the vigilante aspect declining sharply after the initial hysteria associated with the early years of the 1920s Red Scare. Even in the Legion's own materials, contradictory assertions are made regarding the group's political identity or lack thereof. On the one hand, one of the weekly magazine's most oft-repeated slogans was "Policies, Not Politics," signaling a disinterested, non-partisan approach to defending veterans' interests, as well as a strong opposition to anything representing what they sometimes called "special interests" and other times described as "the autocracy of the masses and the classes" (referring to what they implied were the greedy behaviors of both the wealthy classes and the working class rabble rousers of the labor movement).

The most notable non-partisan policies pursued by the Legion included an array of veterans' compensation and benefits, the likes of which would eventually form the basis for the G.I. Bill passed after WWII. On the other hand, particularly during the Red Scare of the 1920s, Legion members also acted as vigilantes, taking it upon themselves to rid their communities of undesirable elements and pressuring Congress' to enact decidedly political policies, such as deportation measures, new immigration restrictions, and limitations on freedoms of speech and political association.

Members of the American Legion also joined civilians from organizations such as the Citizens Protective League (CPL) and volunteered their assistance to local law enforcement agencies. In at least two incidents, the major riots at Omaha, Nebraska and Elaine, Arkansas in 1919, these sorts of public-private partnerships were implicated in deadly displays of militarized

violence. In countless other communities across the country, immigrants, members of labor unions, and racialized groups were black-listed by major employers, subject to random assaults, surveilled, and run out of town as a result of organized efforts by members of the American Legion, the CPL, and similar local organizations.

When viewing the images in this chapter, therefore, it's important to note that though the image may be laden with symbolism, it is not necessarily metaphorical. Political cartoons often use the visual rhetoric of warfare to depict social tensions and conflicts that have not actually entailed any violence. But in this case, the image of a member of the American Legion taking physical action against the perceived threat of the bomb-wielding Bolshevik, reflects realities of political violence during the period – both that of Bolsheviks (some of whom really did set bombs in various American cities), and that of organizations like the Legion, who pursued strategic campaigns of vigilantism that supplemented and complemented official campaigns of repression.

The Legionnaire pictured in Figure 9 has discarded his coat so recently that it has yet to hit the ground, symbolic of the veterans' recent return from combat overseas. Between his face and the pillar of American Institutions is a thin plume of smoke rising from the Bolshevik's lit bomb. The plume of smoke is the emergency, the exception, which authorizes the "legion" to respond to the danger – likely with violence, if the Legionnaire's facial expression and body language are any indication. The image offers official legitimation for the members' violence by positively framing them within and on behalf of "American Institutions," with the implied violence perpetrated by a respected social actor who blurs the line between soldier and civilian. Political cartoons of this time are abundant with similar images of bombs, usually wielded by figures whose dark hair and skin allude to the "swarthy" features of Eastern European

immigrants who were most associated with radicalism (Figures 10 – 13). These images invoke the idea of a mortal threat facing America – a threat that necessitated a drastic response.

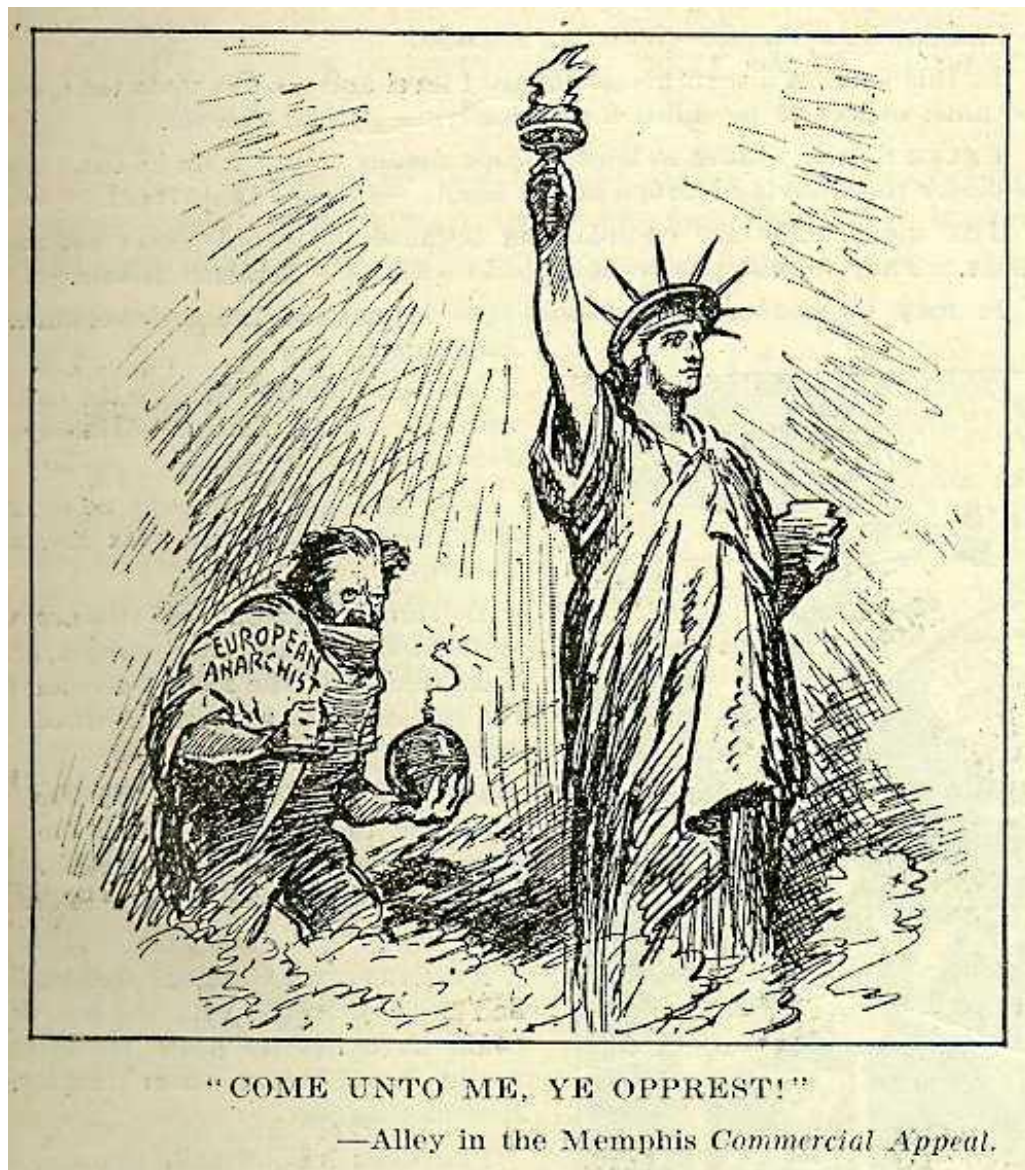


Figure 10: "Come Unto Me, Ye Opprest!" *Literary Digest*, July 5, 1919.

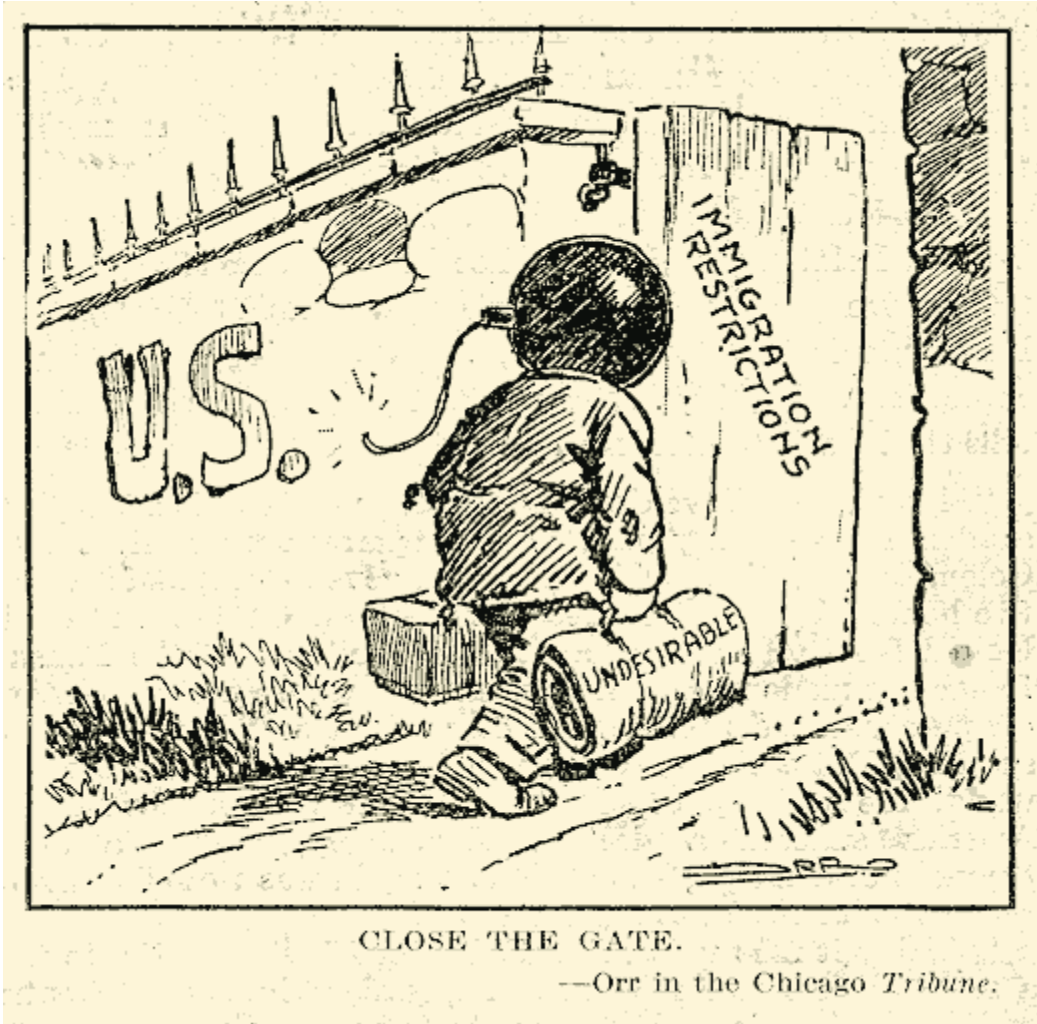


Figure 11: "Close the Gate," *Literary Digest*, July 5th, 1919.

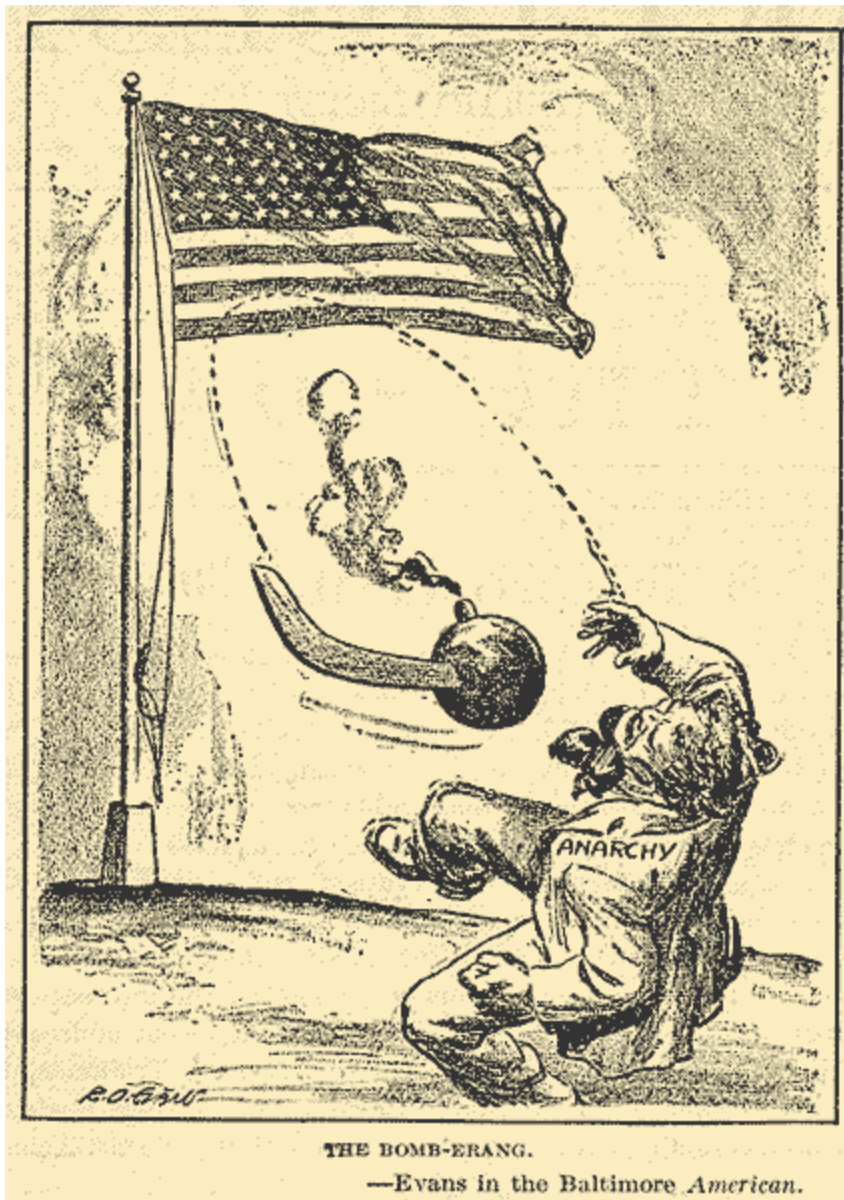


Figure 12: "The Bomb-erang," *Literary Digest*, May 13th 1919.



WHAT A YEAR HAS BROUGHT FORTH.

----Kirby in the New York World.

Figure 13: "What a Year Has Brought Forth," *Literary Digest*, November 22, 1919.

In most cases, the bomb-wielders are implicitly or explicitly represented as European immigrants – as in Figure 14, where a member of “American Labor” has delivered a knock-out punch to a radical who is clearly labeled “foreign extremist.”



Figure 14: "The Patriotic American," *Literary Digest*, June 28, 1919.

There is a double meaning, however, in the American Laborer’s assertion that he is “kind of particular about who calls me brother.” The presumably European extremist is much darker than

his counterpart, the conspicuously white member of “American Labor,” a pattern that is also evident in the other images. Some historians of racial formation in the U.S. assert that this kind of blackening is one of many indications that European immigrants were not initially perceived as fully white.¹³⁷ Others have challenged this narrative, arguing that European immigrants – even those members of despised groups who faced discrimination – were nonetheless granted privileges of whiteness that were still denied to persons of color, such as a path to citizenship, rights of property ownership, and relatively unencumbered enfranchisement, which allowed immigrants to improve their status over time by creating vibrant neighborhoods and sought-after voting blocs.¹³⁸ I shift away from debates over the construction of whiteness, and instead consider how the darkening of the “foreign extremist” is also a construction of Blackness, invoking the racialization of lawlessness that was a central component of the lynching discourses described in previous chapters. Belying the apparently anti-European and xenophobic nature of the texts, these images can and should also be read as a commentary on international and domestic colonial and racial tensions.

The conflation of Bolshevism and blackness was not just a matter of visual rhetoric. Many white Americans feared that Bolshevik spies and propagandists had infiltrated African American communities and were exacerbating racial discontent – a rather improbable contention but one that was widely shared. In Philips County, Arkansas, for example, in an incident known as The Elaine Massacre (which I will discuss in more detail in the next chapter), African

¹³⁷ Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 2008); Matthew F. Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Harvard University Press, 1999); David R. Roediger, *Working Toward Whiteness: How America's Immigrants Became White: The Strange Journey from Ellis Island to the Suburbs* (Basic Books, 2006).

¹³⁸ Eric Arnesen, “Whiteness and the Historians’ Imagination,” *International Labor and Working-Class History* 60 (October 2001): 3–32; Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, New foreword edition (Princeton, NJ: Princeton University Press, 2014).

American farm workers created a sharecroppers' union and hired a lawyer to protect their economic interests during the autumn cotton harvest. The sharecroppers union was infiltrated, and on the night of October 1st, 1919, one of their meetings was attacked by a sheriff and his deputies. In the resulting shoot-out, one of the deputies was killed, inciting an all-out assault on African Americans living in the region by local whites, who were deputized en masse, organized into posses led by members of a local chapter of the American Legion, and eventually supported by a battalion of federal troops from nearby Camp Pike. The political elite of Philips County claimed that the black sharecroppers had planned a general uprising and intended to systematically kill all the whites of the area, urged on by Bolshevik propaganda and an "organized effort" of white trade unionists. Although no evidence was ever produced to verify this alleged plot, local residents continued to assert for many years that the so-called "uprising" had been the result of Bolshevik propaganda.¹³⁹

Some accounts of the Red Summer suggest the violence was the result of "hysteria," which psychologizes the Black-Bolshevik connection as paranoid conspiracy theory.¹⁴⁰ However paranoid it may have been, the feared relationship between black people and Bolsheviks become the subject of highly methodical and deliberate investigations taken on by respected community leaders nationwide. One group that carried out this work was the American Protective League, a joint public-private venture, authorized by state governments to carry out the local work of

¹³⁹ Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (Middletown, Conn.: Wesleyan University Press, 1988); Grif. Stockley, *Blood in Their Eyes: The Elaine Race Massacres of 1919* (Fayetteville: University of Arkansas Press, 2001); Robert. Whitaker, *On the Laps of Gods: The Red Summer of 1919 and the Struggle for Justice That Remade a Nation* (New York: Crown Publishers, 2008).

¹⁴⁰ Joey McCarty, "The Red Scare in Arkansas: A Southern State and National Hysteria," *The Arkansas Historical Quarterly* 37, no. 3 (1978): 264–77; Robert K. Murray, *Red Scare; a Study in National Hysteria, 1919-1920* (New York: McGraw-Hill, 1964).

national defense. Governor Thomas Kilby's proclamation admitting individuals to Alabama's APL stated that

Reposing full trust in your Patriotism, Prudence, integrity, and Ability, I do, by virtue of the Power and Authority in me vested as Governor of the State of Alabama, hereby commission you a member of the Alabama Post-War Council of Defense, established by Act of the Legislature of 1919, charged with the duty of organizing the State for cooperation with the Federal Government and all local agencies, in meeting the exigencies and emergencies incident to post-war adjustment.

African American unrest, or the potential for it, was a central 'exigency and emergency' this group concerned itself with. In the state archives in Alabama, for example, I found a brief letter circulated by members of the American Protective League to county officials and business owners throughout the state, and even to APL leaders in other parts of the country, inquiring as to whether there was any trouble or unrest amongst African Americans in their area. The urgency with which the problem was treated is evident in the letter's opening, which began "Dear Sir: I communicate with you in confidence regarding a matter, about I am, of necessity requesting of you immediate response and report." The letter went on to inquire of each recipient a report on "any feeling or discussion, or meetings of any character, in secret or otherwise, among negroes relative to their status after the war." Responses flowed in from around the state, which taken together indicate an extensive level of surveillance. This was not the result of national hysteria, it was the result of methodical national planning and preparation, justified in the name of national emergency (Figures 15 – 16).

ALABAMA DIVISION

PHONES OFFICE, MAIN 204
RESIDENCE, MAIN 1240

American Protective League

Organized with Approval and Operating Under Direction of
United States Department of Justice, Bureau of Investigation

A. C. CROWDER, STATE INSPECTOR

307-11 JEFFERSON COUNTY BANK BUILDING

BIRMINGHAM, ALA.

WHEN ANSWERING, REPORTING ON, OR
IN ANY OTHER WAY REFERRING TO THE
SUBJECT OR CONTENTS OF THIS LETTER
USE THIS FILE NO.

October 31, 1918.

Hon. Wm. C. Sanders,
Luverne, Ala.

Dear Sir:

I communicate with you in confidence regarding
a matter, about which I am, of necessity requesting of
you immediate response and report.

Is there in your County any feeling or discus-
sion, or meetings of any character, in secret or otherwise,
among ~~white~~ negroes relative to their status after the war,
and upon the return of negro soldiers from the war?

Is there any impression or any effort to obtain
"social equality" or political recognition?

Please report to me immediately, as I am required
to obtain this information through our organization throughout
the sixty-seven counties in Alabama. Similar action is being
taken in other states.

Of course, you appreciate the importance of de-
stroying this letter, and keeping inviolate its contents,
and reporting to me in the strictest confidence by first
mail.

Yours truly,


State Inspector.

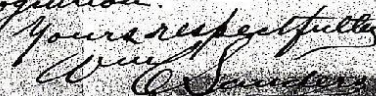
Dear Sir: ^{to} In answer, this, must say that I
learn of no developments indicative of Negroes seeking
social equality or political recognition.
11/4/18
Yours respectfully


Figure 15: Inquiry from American Protective League to the Honorable William Sanders. Alabama State Records and Archives, Papers of the American Protective League.

ALABAMA DIVISION

PHONES | OFFICE, MAIN 204
RESIDENCE, MAIN 1240

American Protective League

Organized with Approval and Operating Under Direction of
United States Department of Justice, Bureau of Investigation

A. C. CROWDER, STATE INSPECTOR
307-11 JEFFERSON COUNTY BANK BUILDING

BIRMINGHAM, ALA.

November 8, 1918.

WHEN ANSWERING, REPORTING ON, OR
IN ANY OTHER WAY REFERRING TO THE
SUBJECT OR CONTENTS OF THIS LETTER
USE THIS FILE NO.

Hon. Charles Henderson, Governor,

Montgomery, Alabama.

My dear Governor:

Supplementing my letter of 5th instant to Chairman Lloyd M. Hooper, I now hand you twenty-five letters from as many Chiefs of American Protective League in the twenty-five counties of Alabama reporting to me by letter, and from which you will note that the situation is not as grave as we anticipated - at least up to this time.

Without exception, the counties covered by my organization, who have reported to me either by letter, or otherwise, indicate that no concerted action of any character has yet taken place, or is contemplated.

The Governor of Mississippi being out of town at the time this matter was brought to the attention of his office by me, responds as per letter hereto attached.

Yours truly,


State Inspector.

Figure 16: The American Protective League forwarded responses to Governor Charles Henderson. This letter also indicates communication with governors of other states. Alabama State Records and Archives, Papers of Governor Charles Henderson.

Not only did this narrative take hold in the rural South, by the fall of 1919, at the height of post-war violence, the notion of radical influence in black communities was a key component of national discourse, and an important factor influencing national security policy as defined by the newly created Federal Bureau of Investigation, headed by J. Edgar Hoover (whose later authorship of COINTELPRO was largely inspired by the impression of black radicalism he formed during these earlier years).¹⁴¹ An article published in *The New York Times* in the fall of 1919 summarized a congressional inquiry regarding the violence of the Red Summer, which concluded that “[Bolshevists] are winning many recruits among the colored race.”¹⁴² Under the subheader “Reds Inflaming Blacks,” the article explained,

When the ignorance that exists among negroes in many sections of the country is taken into consideration the danger of inflaming them by revolutionary doctrine may be apprehended. It is held that there is no element in this country so susceptible to organized propaganda of this kind as the less informed class of negroes.

The article goes on to conflate these alleged Bolshevik racial agitators with members of organizations like the NAACP, implying that a dangerous fusion was taking place between Bolshevik ideology and African American aspirations for basic civil rights, and that it was this combination (not racial injustice per se), that was responsible for the intense levels of violence. The article claimed that “governmental response” and “carefully considered policy” were needed to remove the causes of race riots, else they would continue. Ironically, this was a claim that members of the NAACP probably would have agreed with, if it weren’t for their drastically

¹⁴¹ Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (Oxford University Press, USA, 2010); Mark Ellis, *Race, War, and Surveillance: African Americans and the United States* (Indiana University Press, 2001); William Jordan, “The Damnable Dilemma’: African-American Accommodation and Protest during World War I,” *The Journal of American History* 81, no. 4 (March 1, 1995): 1562–83; William G. Jordan, *Black Newspapers and America’s War for Democracy, 1914-1920*.

¹⁴² “For Action on Race Riot Peril: Radical Propaganda Among Negroes Growing, and Increase of Mob Violence Set Out in Senate Brief for Federal Inquiry,” *The New York Times*, October 5, 1919.

different diagnosis of what those causes were. Although civil rights organizations were successful in pressuring government offices to take some positive actions to address racial discrimination, the most immediate government actions and carefully considered policies undertaken in response to the racial and industrial clashes of WWI and the post-war era involved the devotion of significant resources to the surveillance of civil rights organizations and black-owned newspapers.¹⁴³

The political cartoon in Figure 17, titled “It Happens About Like This,” captures the blurring of the lines between blackness, bolshevism, and foreignness particularly well. The figure is portrayed drawing on the cartoonish aesthetics of minstrelsy. The first two blocks depict a figure with “No Brains” who is riled to treason by the influence of “poison literature,” a narrative that is remarkably similar to the official stance on the relationship between bolshevism and blackness. It is not until the third block that the figure is revealed to be a Russian immigrant and thus headed for deportation.

¹⁴³ Capozzola, *Uncle Sam Wants You*; Ellis, *Race, War, and Surveillance*; Wray R. Johnson, “Black American Radicalism and the First World War: The Secret Files of the Military Intelligence Division,” *Armed Forces & Society* 26, no. 1 (October 1, 1999): 27–53; Jordan, *Black Newspapers and America’s War for Democracy, 1914-1920*.



Figure 17: "It Happens About Like This," *Literary Digest* February 7, 1919

Black people who were engaged in organized resistance, however, unlike the Russian immigrant, could not be deported. Their exclusion was instead accomplished by campaigns of mass violence, murder, and displacement. This is resonant with Agamben's assertion that states of exception come into being as a way of dealing with categories of citizen who cannot be integrated to the political system. While the Red Bolshevik could be captured and returned to

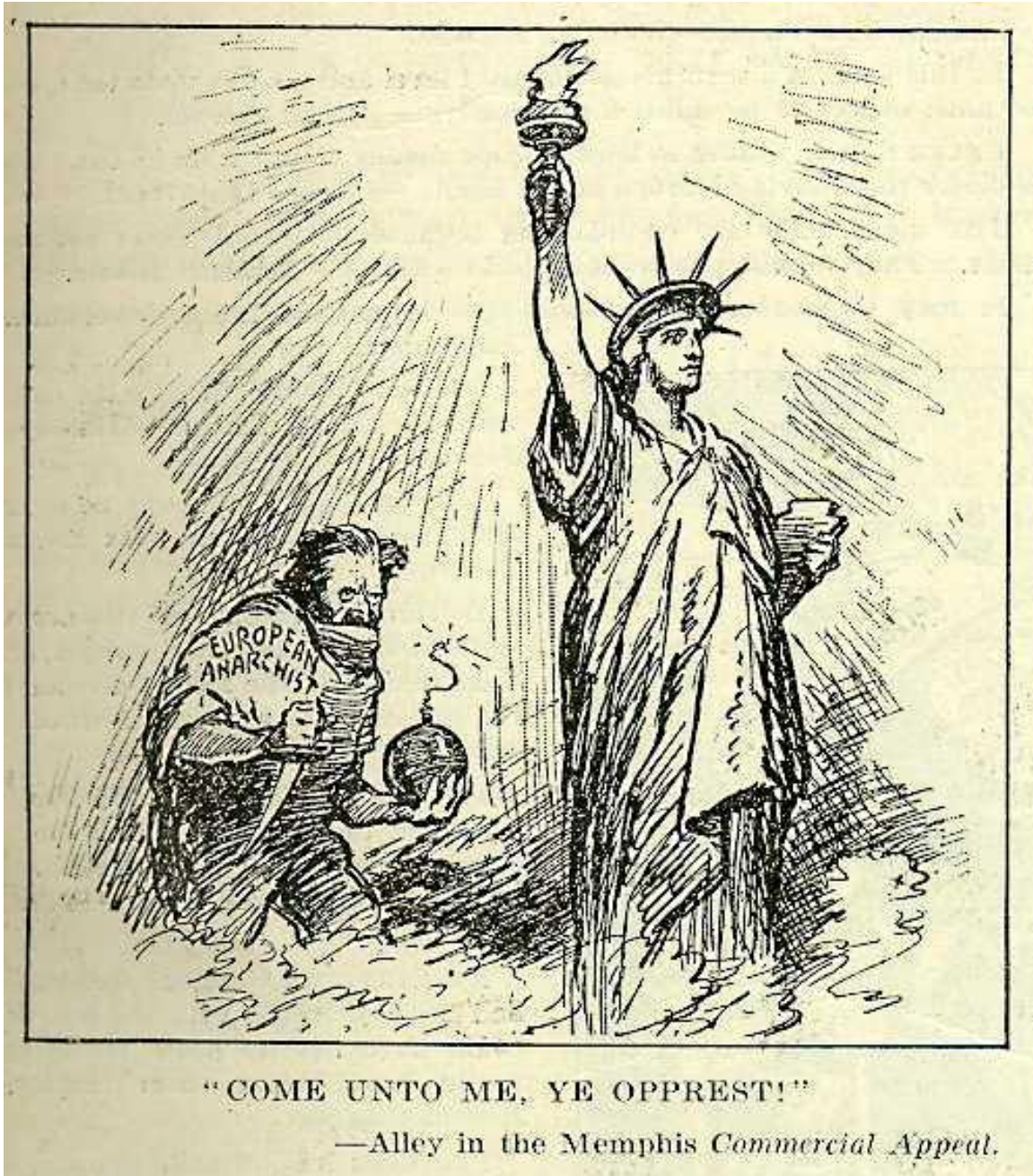
Russia, the Black Bolshevik could not be sent anywhere, nor be permitted to fully assimilate into “100% Americanism” (despite military service and fervent claims of patriotism from many influential black spokespeople), given the term’s conflation with whiteness. As a threat that could be neither absorbed nor repelled, the logic of exception dictates elimination.

As lynching discourses were incorporated into narratives of national emergencies and war, important transitions occurred. Jim Crow era lynchings were justified on the basis of specific individual threats: African Americans targeted for lynching were accused of brutal crimes. As the discourse of ‘threat’ took on a broader, national scope, the racialized criminal threat expanded as well; whole populations were deemed dangerous and threatening. Certainly Jim Crow-era lynching also relied on the criminalization of whole racialized populations. But lynchings, while they terrorized and intimidated everyone in the targeted group, were still usually aimed at individuals who had been accused of specific criminal acts. In the massive race riots and industrial clashes that characterized the Red Summer and the Red Scare, this no longer held true. The racialized images of crime were used to justify violence that embraced what sociologists like Roberta de la Roche would call “collective accountability.” In events like the mass deportation at Bizbee, Arizona, and the dozens of race riots of the Red Summer of 1919, violence was aimed at entire populations of people – neighborhoods were emptied of their residents, hundreds of people were killed in short spans of time, mass exoduses of sometimes thousands of residents followed. Usually such an exodus was precisely the intended effect of the violence in the first place, as police and business leaders asserted the need to “clean up” a lawless area, or “clear out” an undesirable group from a particular section of the town or county. Both forms of violence (Jim Crow-era lynching, and the race and labor riots of the Red Summer/Red Scare) were justified by similar logics. But the changing character of this violence,

from individual to mass, reflects the nationalization of culture, the emergence of a national military infrastructure, and the surge of industrial development facilitated by the completion of continental expansion and the pursuit of new military and capital ventures overseas.

Just as the racialization of threat was collectivized and mapped onto nationalistic binaries, shifts occurred in the sexualization of threat as well. The violence of Jim Crow-era lynching relied on accusing individuals of rape, an individual threat whose veracity was supported by what Angela Davis has labeled “the myth of the black male rapist.”¹⁴⁴ These individual accusations (linked to group stereotypes) were accompanied by sensationalized accounts of the sexual victimization of individual white girls and women (also linked to larger intersectional social constructions). In the nationalization of lynching discourse, the violence of militarized policing relied on the creation of an association between criminality and any amassment or mass movement of racialized and/or immigrant groups. *Individual* accusations of crime were hardly necessary to justify violence against these groups, rather, newspapers reported on “crime waves” and general conditions of “lawlessness.” When individual accusations of crime did occur, the entire group faced repercussions, not just the accused individuals. Concomitant with this collectivization, the notion of (white) female victimhood was also collectivized, as in Figures 18 and 19, in which the potential for female victimization is abstracted to represent the vulnerability of America as a nation, and the aggression of vigilance/vigilante organizations is thus naturalized as a form of masculine honor on behalf of a besieged Lady Liberty.

¹⁴⁴ Angela Y. Davis, “The Myth of the Black Male Rapist,” *Women, Race, & Class* (Vintage, 1983).



“COME UNTO ME, YE OPPREST!”
—Alley in the Memphis *Commercial Appeal*.

Figure 18: “Come Unto Me, Ye Opprest!” *Literary Digest*, July 5, 1919.

F836
7/18/19

The American Legion Weekly

Price Five Cents A Copy
Two Dollars A Year

NEW YORK,
AUG. 15, 1919

The Challenge of
the Vesle

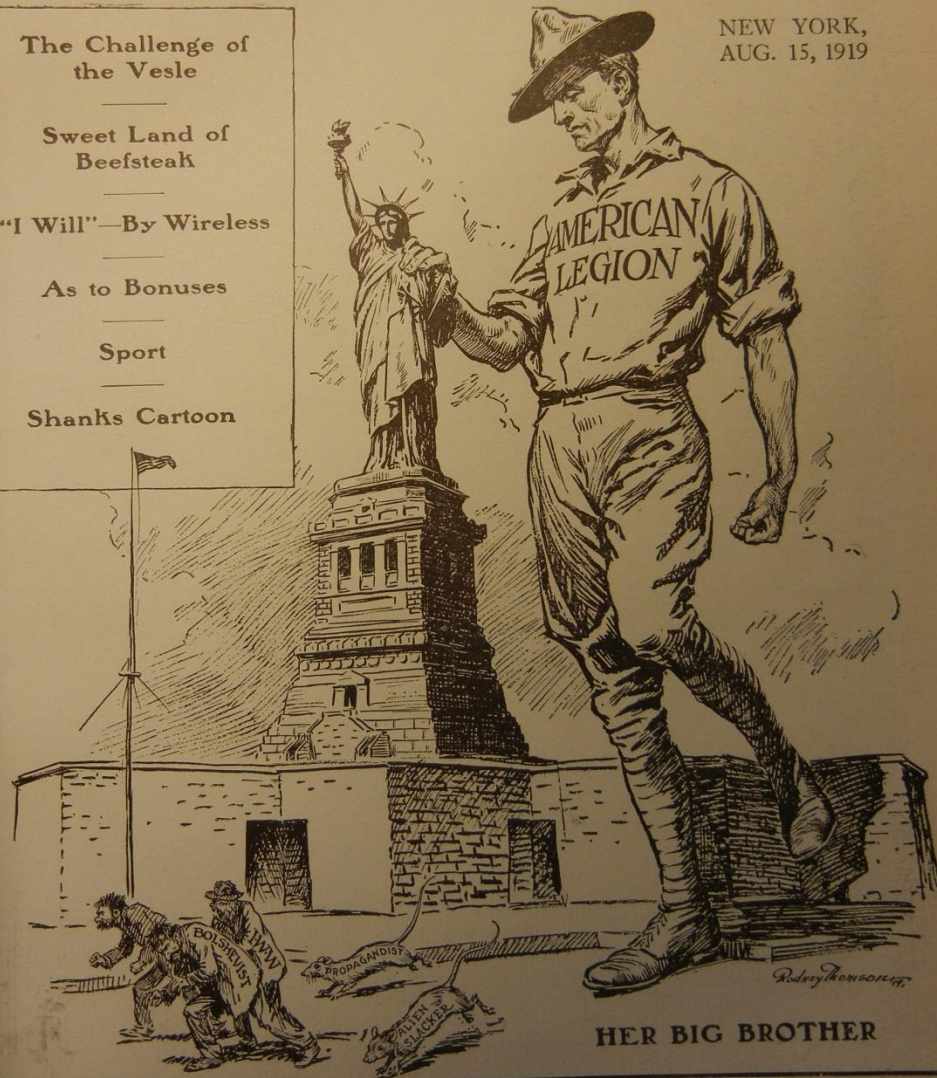
Sweet Land of
Beefsteak

"I Will"—By Wireless

As to Bonuses

Sport

Shanks Cartoon



HER BIG BROTHER

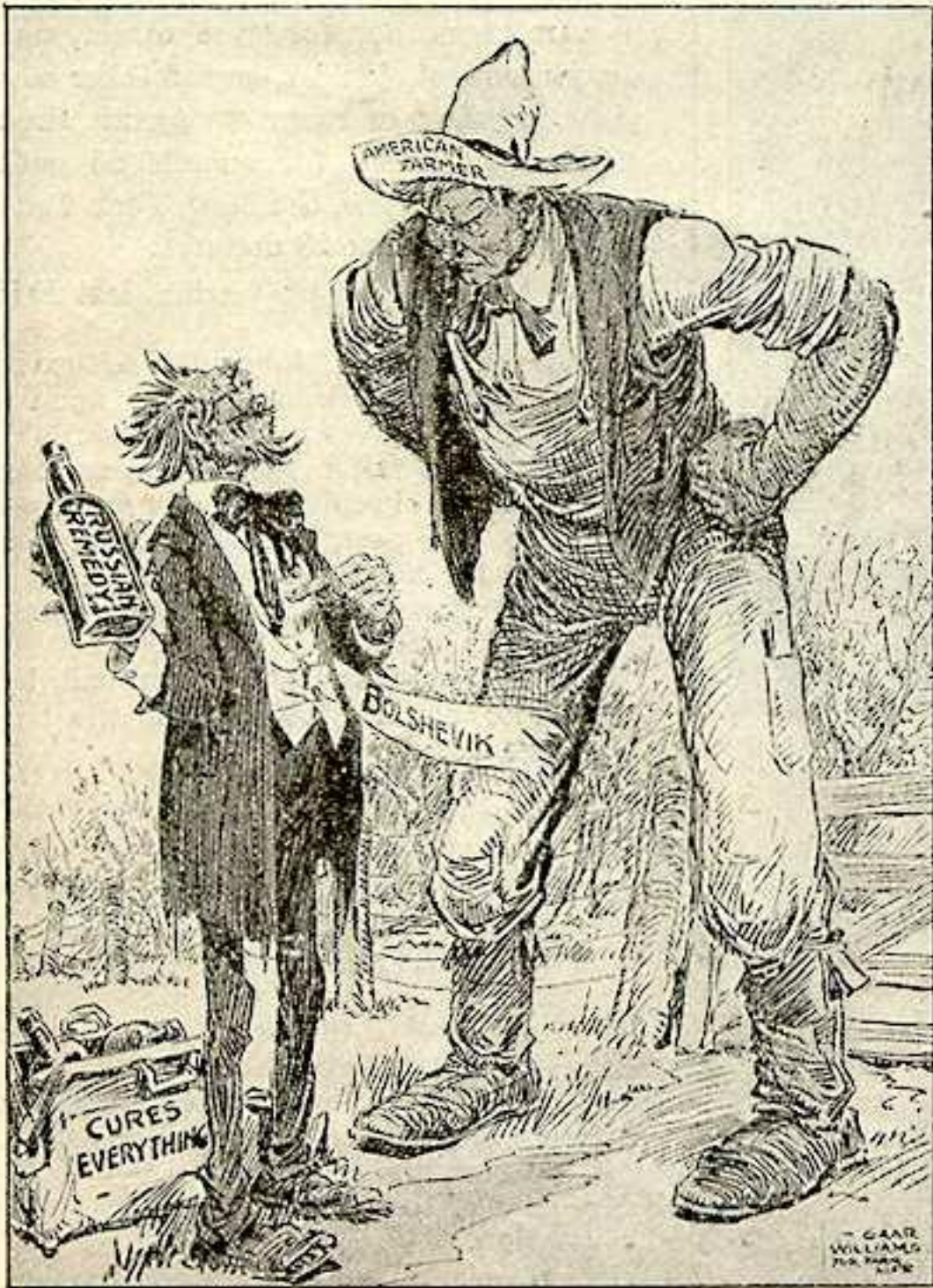
PUBLISHED WEEKLY BY THE LEGION PUBLISHING CORPORATION, NEW YORK
Application for Entry as Second Class Matter Pending

Figure 19: "Her Big Brother," *American Legion Weekly*, August 15, 1919 [cover image]

These depictions of Lady Liberty signal a potential openness to certain aspects of gender liberalism. In a period when white women gained the franchise, these images indicate an emergent heterosexual nationalist gender scheme, in which both white men and white women play a role in national politics – women representing the moral culture of the U.S. while men provide the muscular security that defend these national values from both external and internal threats.

And yet, as Figures 20 and 21 indicate, if America was often feminized and represented as vulnerable, there was less consensus around what the abstraction of white manhood might look like. Who could be an appropriately masculine, national figure capable of defending her (America)? Images I've shown so far sometimes depict structural/symbolic obstacles to radicalism (pillars, columns, walls, flags, fortresses); others depict masculine defenders, either generic Workers, or generic Soldiers. But by the early 1920s, the image of the soldier had become much more common than depictions of workers, which reveals an important aspect of states of exception.

In depictions of Workers as masculine defenders of America, some commentators took comfort in the idea that nativist working class white Americans would reject the ideological influence of European immigrants. In Figure 20, the strength of laborers – in this case, the American farmer – is communicated via a visual iconography of masculinity, made all the more stark by contrast with the short, skinny-chested, raggedy Bolshevik. The disparity is underscored by reference to able-bodied-ness, as the farmer queries the Bolshevik, “Do I Look Sick?” (Indeed, he does not.)



" SAY—DO I LOOK SICK?"

—Williams in *Farm Life* (Spencer, Ind.).

Figure 20: "Do I Look Sick?" *Literary Digest*, July 5th 1919.

Yet, the strength of labor was also a source of tension and anxiety, even more so after the U.S. became a major supplier for warring European nations in 1914, and then entered the war itself in 1916. Any work stoppage – and during this period of industrial volatility, there were many – had the potential to disrupt the mobilization for war, which required massive upticks in resource extraction, manufacturing, and international shipping of supplies, from the soldiers themselves (and everything needed to sustain them), to the materials of war such as munitions, planes, battleships, and communications infrastructure. This put the U.S., and the capital investors whose interests were served by the containment of labor, in a difficult position. Accommodation of labor threatened profits, but alienation of labor threatened to transform a “radical alien” problem into a “radical nativist” problem – or worse, a radical interracial working class coalition. In Figure 21, this tension is communicated by the depiction of labor as a form of monstrous femininity. The caption reads, “There are moments when married life seems quite endurable even to a man who thinks he’s henpecked.” This image does a lot of contradictory gender work, as the feminization of labor operates to queer the “Reds” whose lack of masculinity is evidenced by their domination at her [Labor’s] hands, and yet at the same time, Labor itself is depicted with a rhetoric of female masculinity, as a wife who inappropriately dominates her husband, the henpecked capitalist (whose own weakness vis a vis the labor movement is also portrayed through the trope of failed masculinity).

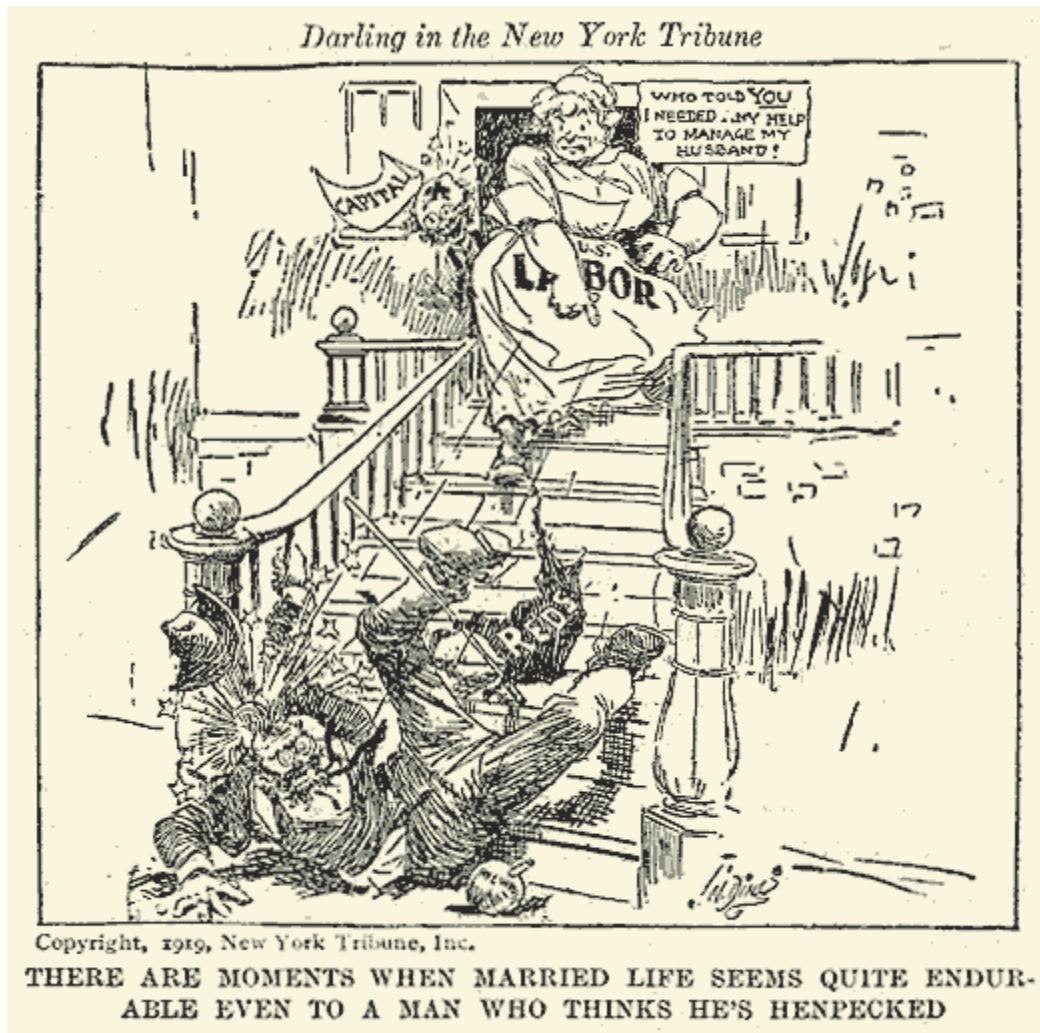


Figure 21: “Married Life,” *Literary Digest*, July 2, 1919.

The ambiguous gendering of American Labor underscores one of the central difficulties of the “exception,” that is, the actual perpetration of violence. The reason this issue of perpetration is so important is that the people who perpetrate violence within spaces of exception are endowed with a powerful form of absolute sovereignty. Agamben suggests that, along with the power to decide the exception, comes the power to delimit the boundaries of normal life. The entwinement of these two powers is crucial to one of Agamben’s central arguments, which holds that the exception is not *really* an exception at all, since the “moment of decision,” that is the

moment in which sovereign power may decide to suspend the law, merely *recedes* during the normal legal order, but never disappears entirely.¹⁴⁵ The ambiguous gendering of American Labor is one way of expressing the dangers of enfranchising the wrong type of man with the power to enact exceptional violence. Such a power could not and would not be contained to “exceptions,” it would include within it a certain degree of power over the normal order of things. Such power could not be entrusted to just any white man – it could only be entrusted to a “100% American” white man. In a pinch, the crude working class power of labor would do and was certainly powerful both numerically and organizationally in the form of whites-only labor unions; but the loyalty of labor could not be trusted, as the white working class was liable to succumb to economic propaganda and place its own class interests ahead of emerging national priorities.

In light of this tension, a “new national figure” (Figure 22) was needed who could offer unambiguous protection for American interests in the face of domestic and international emergencies, defined as threats against the interlocking national imperatives of racial formation, capital accumulation, and (trans)national expansion. The figure capable of protecting these interests was depicted as a soldier, or a veteran, tested by war, aware of the dangers facing America: a manly patriarch uncompromised by private or ideological interests. His experience of armed combat ensured that he was capable of taking individual action against threat; yet this same experience also ensured that his individual actions were channeled through a hierarchy of military rank, and expressed themselves on behalf of national interests that were determined at a much higher level of the chain of command. The ability to decide the exception – to substitute personal conceptions of justice and morality for legal and constitutional norms – was a

¹⁴⁵ Peter Fitzpatrick and Richard Joyce, “The Normality of the Exception in Democracy’s Empire,” *Social Science Research Network Scholarly Papers* (Rochester, NY: Social Science Research Network, March 2007).

dangerous sort of power that only certain kinds of subjects could claim. The danger of sharing this power was tempered by the soldier's military training, which stressed conformity and obedience as much as it did individual initiative and bravery. The new national figure was a patriotic warrior –precisely the kind of friend America would want in an emergency (Figure 23).



Figure 22: "The New National Figure," *Literary Digest*, December 27, 1919.



When Fellers Need A Friend

Figure 23: "When Fellers Need a Friend," *The American Legion Weekly*, July 25, 1919, 9.

Most of the images I have shown, like Figure 24, explicitly invoke government – not just “the nation” but also the “state.” The soldier, the eagle, and Uncle Sam are the legitimate perpetrators of violence. But to the extent that these images appear as part of popular culture, it is not always easy to discern to what extent they depict state-sanctioned violence, vs. to what extent they merely utilize the iconography of government as a rhetorical strategy for claiming legitimacy for nationalist-popular violence.

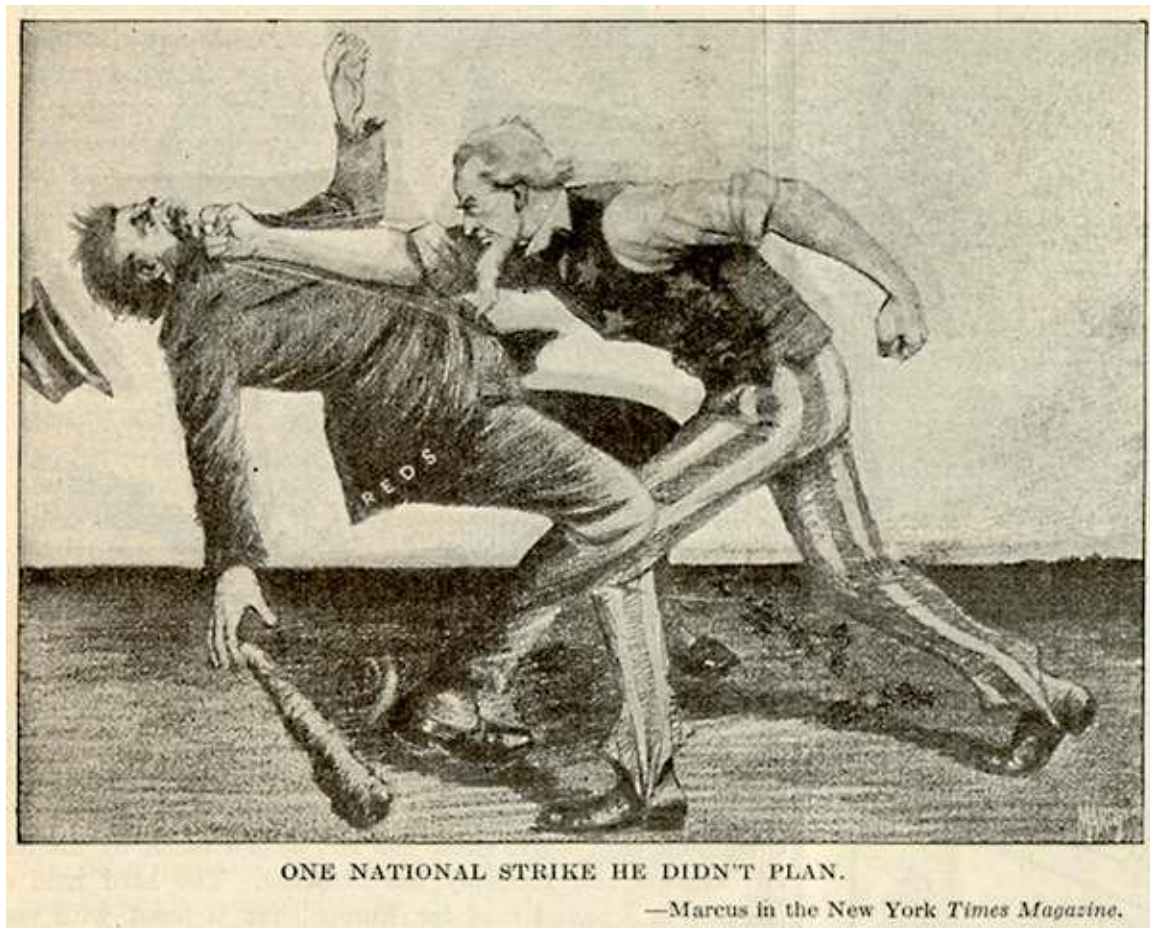


Figure 24: “One National Strike He Didn’t Plan,” *Literary Digest*, February 7, 1920.

This confusion is amplified by the participation of organizations like the American Legion, the Citizens Protective League, and other groups that blurred the line between citizen, soldier, and police in major acts of violence associated with industrial disturbances and racial conflict.

Should these be considered “private” organizations, lending credence to the monikers “mob violence” and “riot”? Or were the members of these organizations acting in accordance with lawfully constituted authority to a sufficient degree that their behavior should be considered governmental, lending credence to terms like “state sanctioned,” and substitution of the term “riot” for alternatives such as “massacre,” “race war,” and “pogrom”?

Although there is certainly an element of both popular and state-sanctioned violence, I would argue that the implied state sanctioning in the cartoons is not just a rhetorical strategy for legitimating popular violence, but rather a realistic portrayal of the workings of state power in periods of crisis, when the state’s ability to wield violence is amplified by the legal invocation of exceptional governance, and the state’s monopoly on violence is loosened to allow extralegal and extrajudicial actions to occur with impunity. I draw this conclusion based on two bodies of evidence. One is comprised of evidence of explicit collusion between official police and military forces in many violent and deadly conflicts of this period. The second consists of a close reading of legal texts of the period, which describe the role of the military in responding to civil emergencies, and indicate that the massive use of violence was not only lawful, but an encouraged tactic for maintaining and restoring order.

Collusion between American Legion and Law Enforcement Officials

My interest in the American Legion began with research into the Elaine Massacre, which was one of the deadliest of the three dozen major and minor race riots that occurred during the Red Summer of 1919. One might suppose that the coordination between the American Legion, prominent town officials, and military officers was idiosyncratic. It is tempting to think that the American Legion posts that operated in the deep South (Philips County is in the Mississippi delta

region of Arkansas), were Klan-like and this form of collusion emerged from the regional adherence to the Jim Crow system. Reading the Legion's national weekly newspaper for the year 1919, however, gives more credence to the assertion of scholars like Jacqueline Goldsby, who hold that anti-black mob violence of this period was a "networked, systemic phenomenon indicative of trends in national culture."¹⁴⁶ Based on the self-reported activities of Legion posts published in a regular feature of the magazine, the involvement of the Legion in the Elaine Massacre may have been an extreme incident, but it was not an isolated one.¹⁴⁷ The pages of the organization's weekly magazine are replete with accounts of newly established Legion posts offering their assistance to law enforcement agencies, including in several locales where deadly and destructive riots would eventually occur in 1919 and throughout the early 1920s.

These accounts are not a distinctly southern phenomenon – they pour in from around the nation. The very first edition of the magazine, issued July 4th, 1919, featured a report from Oakland, California, informing the national readership that "Active propaganda is now in effect to overcome anarchistic tendencies in the State by supporting the effort of the local police authorities." Leaders of Kansas' first post of the Legion issued a similar announcement, promising law officers "that members of the society would lend active assistance in stamping out the Bolshevik menace during the 1919 harvest." Members of a post in Louisiana promised that they stood "ready to oppose any anarchistic disorder that may take place."¹⁴⁸ In the next issue of the magazine, an update from the post in Oakland reported that members had "organized an armed force of 200 ex-service men to co-operate with the police in the event of any IWW

¹⁴⁶ Goldsby, *A Spectacular Secret*.

¹⁴⁷ It is worth mentioning that the battalion of federal troops from Camp Pike, who were also WWI combat veterans, may have been members of the Legion as well. Given the popularity of the organization at the time, they were almost certainly exposed to the organization's literature.

¹⁴⁸ "News from the Post," *American Legion Weekly*, July 4, 1919, 8 – 9.

outbreaks,” describing their “obligation to perform this duty at home as it was for us to defend the flag in the trenches of France.”¹⁴⁹ Legionaires in nearby Stockton warned that “The time has come to teach a lesson that America should be run by and for Americans.” Members of the Redwood, California post actively worked to expel Asian immigrant workers from the area.¹⁵⁰ The Detroit Post of the Legion reported that they had created “a reserve police force which makes any previous protective measures sink into insignificance.”¹⁵¹ Perhaps the largest mobilization of Legion members to support official police and military authority was reported in El Paso, Texas, where the representatives of the local post announced that “men [were] organizing a home guard consisting of a regiment of three battalions of four hundred men each.” The update explained, “This post is near the Mexican border and believes in preparedness.”¹⁵²

In many cases, these efforts toward “preparedness” did not necessarily precipitate major riots, but in Elaine, “preparedness” certainly maximized the violence that was visited upon the sharecroppers who had dared to organize a union. And, Elaine is not the only place where this happened. A series of updates between August of 1919 and January of 1920 indicate that pre-planned Legion involvement also characterized the deadly Omaha riot, which overlapped with the events in Elaine. In the August 1st, 1919, edition of the Legion’s weekly magazine, a lengthy report was filed describing a meeting between the mayor of Omaha and the members of the newly established Douglas County Post of the American Legion there. The mayor made a report of union activities to Legion members, inciting them with images of “the red flag of anarchy [being] carried down Farnam Street in a parade”, asking them

“Now what are you going to do with that red flag if it does appear?”

¹⁴⁹ “Legion Posts are Keeping Faith: Meet Peace Problems with War Spirit,” *The American Legion Weekly*, August 1, 1919, 19 – 20.

¹⁵⁰ “The Week in the Legion,” *The American Legion Weekly*, May 7, 1920, 22.

¹⁵¹ “Legion Posts are Keeping Faith,” *The American Legion Weekly*.

¹⁵² “What the Local Posts are Doing,” *The American Legion Weekly*, January 2, 1920, 23.

‘Tear it down and tramp on it,’ yelled several members of the Legion.” The mayor continued: “‘A wave of anarchy has touched Omaha and we’ve got to stop it....The police force would be inadequate in an emergency. So, before I leave this meeting tonight, I’m going to obtain from your chairman a roster of The American legion and if disturbances arise, I’m going to ask you men of the Legion to help maintain order. Can I count on The American Legion?’” The members of the Douglas County Post responded, “we’ll say you can!”

The report concluded, “Before they adjourned the members passed a resolution that everything savoring of anarchy which might arise in the territory covered by Douglas post should be put down immediately and firmly.”¹⁵³

The meeting between the mayor and the Legion’s Douglas County post took place on June 25th, and was reported in the Legion’s weekly magazine on August 1st. On September 28th, a major riot broke out in Omaha, and posses comprised of white civilians, many wearing military uniforms, randomly killed and assaulted African Americans throughout the city, and looted or burned homes and businesses in the most prominent blocks of the Black section of town over the course of three days of violence. Not only did federal troops and police fail to quickly control the violence, but as in Elaine, there are numerous reports indicating they may have participated in it. Nonetheless, a few weeks later, the October 24th, 1919, edition of the American Legion weekly magazine reported that, "The Legion has been complimented by General Wood for the efficient aid in handling the riots in Omaha. Four hundred members were deputized as special police. ‘I hope,’ says the general, ‘that throughout the length and breadth of this land the Legion will make arrangements to meet any situation of lawlessness which may arise.’”¹⁵⁴ Such arrangements were indeed being made in numerous states representing every region of the country.

¹⁵³ “Legion Posts are Keeping the Faith,” *The American Legion Weekly*.

¹⁵⁴ “Omaha Post Commended,” *The American Legion Weekly Magazine*, October 24, 1919, 34.

The Legion received criticism from some quarters, on the grounds that their extreme tactics were creating disorder rather than preventing it. But in spite of these occasional dissenting voices, newly formed posts of the Legion continued to establish close relationships with law enforcement agencies and were allowed to act as a kind of special police force in many of the communities where they operated, despite the violent and repressive tactics they often employed. For many, the Legion's involvement in violence and threats of violence may have been an attractive, rather than a repellent aspect of the organization. The January 9th, 1920 edition of the magazine included a report from the Richard L. Kitchens Post out of Helena, Arkansas – the same post whose members had been placed in charge of posses that engaged in killing sprees during the Elaine Massacre three months earlier in October. “There are now over 400 members in Richard L. Kitchens Post,” read the report, “the membership having been doubled in the recent drive.”

Even with all this evidence of overlapping membership in vigilante groups, private militias, state militias, police and military forces, it is still tempting to imagine that the resultant violence was caused by mismanagement. If *only* the lawfully constituted authorities had handled these incidents, un-“aided” by private/vigilante groups, perhaps their behaviors would have been less characterized by prejudice and one-sided violence.

Here, I turn to a second body of evidence, which consists of legal manuals that govern the lawful use of force in the suppression of civil disorders. I focus on three patterns related to militarized violence during the wartime and Red Summer riots, patterns that have been the most widely critiqued in literature from history, sociology, and political science: First, that when troops were called to restore order, they used excessive force. Second, that more often than not, when troops were called in, they sided with the aggressors, and failed to protect the targets of

violence, that is, failed to protect black people, or in other regions of the country Mexican- and Asian-Americans, and instead either didn't intervene or actively joined in white mobs' violence against various racialized groups, including immigrant "foreigners." And third, that the rights of criminal defendants were not respected during the trials and investigations that followed the riots, leading to an unequal (and in some cases grossly inaccurate) distribution of blame, such that union members and people of color involved in riots faced sanctions ranging from expulsion from their communities to torture and legal execution, while very few white rioters were ever held to account for their behavior.

In the remainder of this chapter, I examine each of these patterns and demonstrate that they are not a result of vigilante groups' *encroachment* on authority of lawfully constituted police, nor do they represent a failure of "the rule of law" when it is corrupted by prejudice. In fact, each of these patterns is a manifestation of how the rule of law works during a crisis, and each pattern reflected adherence to – not deviation from – the laws of military behavior governing domestic emergencies.

The Use of Excessive Force by Police and Troops

Certainly, when you read depictions of the major conflicts of the period, the amount of force, and the destructiveness of the weapons used, seems excessive, particularly when you consider these involved conflicts between citizens, not conflicts with a wartime enemy. In East St. Louis, for example, at least 50 persons were killed and 250 buildings were destroyed.¹⁵⁵ In Omaha and Elaine, military units used artillery and mounted machine guns against civilians who

¹⁵⁵ Robert Asher, "Documents of the Race Riot at East St. Louis," *Journal of the Illinois State Historical Society* (1908-1984) 65, no. 3 (October 1, 1972): 327.

were either unarmed, or armed only with rifles, rocks, and clubs.¹⁵⁶ In a number of the riots, the death toll didn't start to rise until *after* the military was called in, even though the most commonly stated justification for activating troops was generally to *prevent* the loss of life.

But when you compare the actions of troops to guidelines on the use of force to suppress civil disorders, it becomes clear that excessive violence is explicitly called for by central tenets of emergency law. Emergency law places decisions about force squarely in the hands of whatever authority is invested with the power to declare the exception. As articulated in Byron Bargar's manual on *The Law and Customs of Riot Duty* (quoting the Supreme Court in *Luther v. Borden*), "Power is essential to the existence of every government...The State itself must determine the degree of force the crisis demands."¹⁵⁷ Bargar goes on to say that "the enforcement of law by the military arm of the government is necessarily arbitrary and harsh."¹⁵⁸ What are the limits on this arbitrary and harsh form of government? Legal texts indicate that once the emergency is over people are welcome to sue whomever they want, but while the emergency is in effect, "whatever force is requisite, is lawful."¹⁵⁹

Byron Bargar is not a lone voice – he represents an uncontroversial consensus view in legal texts published during the 1910s and 1920s. The War Department's own manual required that troops called on to put down disorder do so "with as little force as possible" yet the very next sentence immediately transformed this limitation by saying that "In the majority of cases the way to accomplish this is to use at once all force necessary to stop the disorder."¹⁶⁰ In the War

¹⁵⁶ Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases*; Clayton D. Laurie, "The US Army and the Omaha Race Riot of 1919," *Nebraska History* 72, no. 3 (1991): 135–43; Orville D. Menard, "Tom Dennison, the Omaha Bee, and the 1919 Omaha Race Riot," *Nebraska History* 68, no. 4 (1987): 152–65; Jan. Voogd, *Race Riots and Resistance: The Red Summer of 1919* (New York: Peter Lang, 2008).

¹⁵⁷ Byron Bargar, *The Law and Customs of Riot Duty; a Guide for National Guard Officers and Civil Authorities, with Commentaries on Federal Aid*, (Columbus, OH, 1907), 62 – 64.

¹⁵⁸ Bargar, *The Law and Customs of Riot Duty*, 98.

¹⁵⁹ Bargar, *The Law and Customs of Riot Duty*, 114.

¹⁶⁰ United States War Department, *Military Protection, United States Guards*, 16.

Department's manual, "as little force as possible" is accomplished by the use of "all force necessary," which is essentially the same principle as Bargar's assertion that the state can use "whatever force is requisite." The War Department goes on to summarize the priorities of troops called to riot duty as follows: "Allow no tumultuous gathering; permit no delay; a few stern, resolute words; if these be not heeded, then strike resolutely, boldly; let there be no hesitation; if necessary, take life at the outset."¹⁶¹ The use of excessive force was permitted, even required by law, and the determination of what amount of force was requisite was left solely to the discretion of individual authorities called to respond to the crisis.

This transference onto "individual discretion" is part of why norms of whiteness, masculinity and 'Americanism' were and are such important technologies for determining who can legitimately perpetrate violence. When violence is executed, its success or failure is a manifestation of the success or failure of individual men. This narrative facilitates the twin discursive processes of scapegoating on the one hand, and lionizing on the other, both of which attribute responsibility for violence onto individual men, while obfuscating the source and authorization of violence in rules of law. In the words of Brigadier General Louis Babcock, "Officers must rely upon their common sense and military judgment, rather than upon set rules, in solving the ever-changing problems arising in the performance of this important duty."¹⁶² Since the execution of state power during times of crisis relied on Officers' "common sense and judgement," rather than "set rules," military experts agreed that "An ambitious officer may, by decisive action and proper disposition of troops, acquire fame."¹⁶³

¹⁶¹ United States War Department, *Military Protection, United States Guards*, 18.

¹⁶² Louis Babcock, *Troops on Riot Duty: A Manual for the Use of the Armed Forces of the United States*, 3rd ed., rev. (Menasha, WI: 1918), vi.

¹⁶³ United States War Department, *Military Protection, United States Guards*, 14.

Troops Act Prejudicially toward Different Classes of Rioters

Troops summoned for riot duty sometimes had no information or wrong information when they arrived on the scene. In Elaine, Arkansas, for example, troops from Camp Pike were told that a Bolshevik-inspired sharecroppers' uprising was taking place, when in fact the sheriff had initiated an unprovoked attack on a lawful meeting of a sharecroppers union. When troops arrived on the scene, they joined in the violence of the white mob rather than putting a stop to it, because that's what they had been called in to do. In other riots I have mentioned military leaders were called in and told of generic racial and industrial disturbance. When soldiers arrived on the scene their version of "restoring order" involved the wholesale destruction of some of the most successful and prominent African American neighborhoods of cities such as East St. Louis, Chicago, Omaha, and Tulsa, and the displacement of thousands of residents (in addition to high death tolls).

This kind of complicity, or obvious taking of sides, is rightfully criticized in historical and legal assessments of these incidents. But what is mentioned less often is that soldiers and officers who behaved in these ways may have been following the law, not simply corrupting it with their personal prejudices. Brigadier General Louis Babcock's "Manual for the Use of Troops in Aid of the Civil Authority," (1918) refers frequently to the "lawless element," as in this passage: "The frequency of explosions of dynamite and other high explosives laid by the lawless element in our large cities, shows the danger to be apprehended from this source in times of riot and disorder."¹⁶⁴ The invocation of bombs and explosives, and the association of the bomb-wielder with an unspecified "lawless element" carried all the weight of the classed, racialized, sexualized tropes of "lawlessness" I have previously discussed. Of course, there were

¹⁶⁴ Babcock, *Troops on Riot Duty*, 68.

anarchists and Bolsheviks during this time who did plant bombs and explosives, but in passages like these the law subtly draws on that truth to make a more questionable assertion that in any time of riot and disorder, the military's first response should be to crack down on the "lawless element," regardless of whether any actual bombs or actual anarchists or Bolsheviks were involved.

Byron Bargar's manual advocates that "forces may be used in a general round-up of the disorderly elements of the community," predicting that "When the jails are full of these people, lawlessness will begin to disappear."¹⁶⁵ The War Department's manual agrees, stating that, "in some cases, where resistance is particularly bitter it may be necessary to evict all the inhabitants of some blocks."¹⁶⁶ The War Department goes even further, providing a very specific list of exactly who comprises this lawless element of society: professional agitators, anarchists, socialists, thieves, cutthroats, vagabonds, and ruffians.¹⁶⁷ Notice how this list creates an amalgam of wartime enemies, criminals, and ideological or political enemies: drawing on the earliest colonial discourses from frontier, border, and plantation of who is an appropriate target for lynch law/emergency law, terms that over several hundred years came to carry particular types of classed, gendered, and racialized meanings.

In cases where the military came in and sided with particular classes of citizenry, rather than saying that this represents incompetence or prejudice or corruption, it's important to note that these types of distinctions were spelled out by law. As symbolized in Figure 25, military leaders who were properly prepared to administer martial law in a community affected by a strike, riot, or insurrection, would have been prepared to preventatively declare areas of the city

¹⁶⁵ Bargar, *The Law and Customs of Riot Duty*, 110.

¹⁶⁶ United States War Department, *Military Protection, United States Guards*, 25.

¹⁶⁷ United States War Department, *Military Protection, United States Guards*, 18.

to be sources of "disorder," and target these areas for mass removal as a legal tactic or strategy for "restoring order."

DRIVING 'EM OUT

SWOOPING DOWN on the brood of vultures comprising the alien I. W. W.'s, the Anarchists and the Socialists, everywhere hatching discontent and misery, the great American Eagle is driving 'em out!

Hard, cruel, destructive, uncompromising and murderous, these brutes in human form are seeking to destroy industry, all that industry creates, and Christian civilization itself.

Pressing their hideous doctrines upon the lowest element, their propaganda leads to chaos and explosive dangers.

They have resolved that the honest laborer must go, or become their pawn.

Lacking the power to reason, they are wolfish and vicious.

Without cause they resort to the torch and terrorism, sparing neither life nor property.

The American Eagle, backed by the American Flag, is determined to drive 'em out and keep 'em out!

Refusing to reform and become decent, law-abiding Americans, they have no rights under the American Constitution.

The old Eagle has his eye on 'em and he's going to sweep 'em out.

Every loyal American in every walk of life should help the sturdy beak and talons in the unrelenting fight.

Start to-day!

To-morrow may be too late!



Figure 25: "Driving Em Out," Robert Hanson, *The Great Bisbee Deportation*, 22.

Suspected Rioters Were Abused

This is an especially prominent theme in analyses of the Elaine Race Riot, or the Elaine Massacre as some prefer to call it. One of the most widely criticized aspects of this incident was the use of torture to extract false confessions from the sharecropper union's leaders regarding the supposed uprising. During and after the riot, hundreds of African Americans were arrested, and first questioned separately as to who the union organizers were and the details of their planned insurrection. When confessions and details were not forthcoming, certain individuals were identified who were most suspected of wrong-doing based on the limited intelligence available from the Committee of Seven's infiltration of the union in the weeks leading up to the conflict. These individuals were separated from the rest of the group and tortured, often within earshot of the other arrestees. Then a new round of interrogations of all the arrestees would begin. This continued for several rounds over the course of more than a week until finally twelve African American men were identified as union ringleaders. They were charged with responsibility for the five white deaths that occurred, hastily convicted in a jury trial, and sentenced to death by a judge. No one was ever prosecuted or convicted for the 250+ African American deaths that occurred, deaths that were explained away by discourses of necessity and emergency.

Although the sharecroppers' convictions would eventually be struck down by the Supreme Court, it should be noted that the police and military were following, almost to the letter, emergency law pertaining to the use of the military in civil disorders, which had this to say about the interrogation of prisoners:

Catch the...apparent leaders of the mob and separate and isolate these men by confining them in non-communicating cells of the city prison or county jail. Make out a list of

questions ...Bring out each man separately and get his answers to these questions. It is wonderful what a difference there will be in the answers. Each man knows the truth, but each man tells a different lie in order to conceal it. Then proceed to administer punishment for the lies told. Then ask the same questions over again. The answers will again vary, but some of the men will have weakened and told the truth in some instances. Some of the answers to the various questions will be found to corroborate others and thus the true answer may be deduced. If not – proceed as before. Punishment and re-examination and the truth will eventually come out.¹⁶⁸

Notably, the residents of Helena, Arkansas bragged throughout the trials that in any other section of the country, the men would have been immediately lynched. Helena residents were proud of their community for never having had a lynching in the history of the town. However, I would suggest that the residents of Philips County did not really need to engage in the practice of lynching, because the larger discourse of lynching was so fully incorporated into the laws surrounding civil emergencies, which they had successfully defined the sharecroppers union to be. There was little need for a Jim Crow style lynching, because emergency doctrines had already activated a space of exception where official military violence could occur with impunity.

This brings me to the conclusion, and to the title of this chapter, the notion of “The Use of Organized Bodies.” In this chapter I have suggested that the U.S. system of law emerged out of an amalgam of practices from border, frontier and plantation that included racialized structural exceptions, designed to allow an incredible unleashing of state sanctioned violence, with gender used as a key technology for naturalizing violence and disavowing responsibility for perpetration onto men instead of law. I have called attention to how the discourse of emergency allowed disparate private and social forces to be organized into official bodies: vigilante groups, sheriff’s posses, military units – bodies of people who were authorized to engage in violence – as well as bodies of law that provided a structure of legitimation within which these individuals were

¹⁶⁸ Babcock, *Troops on Riot Duty*, 84.

permitted to act with wide latitude. The next chapter offers a more in-depth case study of an incident when this occurred: the Elaine riots of 1919.

CHAPTER 4

The State and the Mob in the Elaine Riot of 1919

*Communities may not be able to stop agitation or effectively counteract it,
but they can see that the processes of law are applied with severity.*
– “Race Riots,” *Helena World*, October 11, 1919

Small and innocuous, the plaque in the American Legion Hut in Helena, Arkansas, which honors local veterans of World War I, might leave a careful reader feeling disconcerted. “Erected as a tribute to the patriotism of the boys of Helena who so nobly gave their lives at their countries call,” [sic] the plaque includes the names of six men (Figure 26). Four of these were enlisted soldiers who died after battles in France in the autumn of 1918: Mike Hammett and Marvin Grauman, both killed in action; Richard Kitchens, who died in-country of pneumonia;



Figure 26: Photo taken by author, 2013. American Legion Hall, Helena, Arkansas.

and John Connelly, who was wounded in battle and later died in a government hospital in the U.S. The listing of these names on a memorial to soldiers' sacrifices during the First World War is unsurprising. But following them, the names James Tappan and Clinton Lee appear, both described as having been "Killed Oct. 1st, 1919, Elaine Riot."¹⁶⁹ This is odd because, by October of 1919, the First World War had been over for quite some time. A formal armistice was declared in November of 1918, and the Treaty of Versailles was signed in June of 1919. James Tappan and Clinton Lee were no longer members of the armed forces when they died in October of 1919, having been discharged several months earlier when hostilities ended.¹⁷⁰ Their deaths occurred less than 20 miles from their homes in Phillips County, Arkansas – 4,500 miles away from European warzones, and nearly a year after the end of combat. Both men were killed during a domestic racial conflict, the Elaine race riot, which erupted in response to a unionization effort spearheaded by black sharecroppers. How did James Tappan and Clinton Lee, who died during a conflict driven by the violent racialized economies of cotton production in the Mississippi River Delta region, end up on the same plaque with the names of men who died the previous year in hospitals and battlefields thousands of miles away, in a global military conflagration?

Answering this question requires understanding the story of the Elaine race riot, a story which is typically remembered – when it is remembered at all – as an example of extralegal mob violence that exemplifies southern (in)justice at the height of the Jim Crow era.¹⁷¹ I hope to instead explore how the violence that unfolded in 1919 in Arkansas was an example of

¹⁶⁹ *The Arkansas Legionnaire*, May 26, 1923, 1; describes the plaque and the circumstances of the men's deaths (but does not describe the Elaine riot).

¹⁷⁰ "Arkansas Troops Returning Home," *Helena World*, January 4, 1919, 3.

¹⁷¹ Nan Woodruff, "African-American Struggles for Citizenship in the Arkansas and Mississippi Deltas in the Age of Jim Crow," *Radical History Review* 1993.55 (1993): 33–51; Nan Woodruff, *American Congo: The African American Freedom Struggle in the Delta* (Chapel Hill, N.C.: University of North Carolina Press, 2012); Kieran Taylor, "'We Have Just Begun': Black Organizing and White Response in the Arkansas Delta, 1919," *The Arkansas Historical Quarterly* 58, no. 3 (1999): 264–284; Jeannie Whayne, "Low Villains and Wickedness in High Places;" Robert Whitaker, *On the Laps of Gods*.

legitimized, state-sanctioned violence, justified by reference to national emergency conditions, and carried out by constituted authorities at the local, state, and federal level.

In light of this, and in ways that might prove surprising, the American Legion plaque actually serves as an uncannily accurate public rendering of the political and cultural logics that were responsible for the violence that occurred in Phillips County nearly one hundred years ago. Historically incongruous though it might be, the plaque admits openly what most other treatments of the riot ignore or gloss over: that the white men who slaughtered black sharecroppers in the swamps and canebrakes of Phillips County did so “at their country’s call.” They did so during a spasm of *national* violence that was a direct extension of the militarized culture of a nation at war; in fact, their violence was so much an extension of the nation’s involvement in World War I, the names of two white men who died during the riots could be placed next to the names of other men who died in the battlefields of France, and this would seem perfectly coherent to their fellow veterans who wished to preserve and honor their memory. The plaque was intended to provide a certain kind of closure for the white residents of Phillips County, who were invested in constructing their use of violence against black sharecroppers as ethical violence in service to the nation-state – violence that was necessary for the restoration of pre-war normalcy in a new post-war social landscape. But, seen from a different perspective, the plaque could also be said to represent a failure of closure, because in its admission of the relationship between the waging of international war and the perpetration of domestic race riot, it provides an opening through which a critique of state violence can be formulated.

This chapter tells the story of the riot, highlighting the extent to which it reflected patterns of state power (local, state, and federal), rather than being a result of unchecked mob violence or mob “domination.” I show how the riot emerged from expanded civilian and official

policing, which itself was a reflection of the militarization of culture in a nation at war. My aim in re-telling this story is to place it in a national and global context, to highlight the role of state action, and to call attention to details that have gone un- or under-analyzed in past treatments.

The Elaine Riots of 1919

By the time shots were exchanged between white lawmen and black sharecroppers late at night on September 30th of 1919, white residents of Phillips County had been in a state of high alert for several years. A smaller group of men representing the leading business and political interests of the area had spent at least three weeks preparing for an all-out race war. The details of the night in question are open to debate – who fired the first shot? Did police set out to harass the sharecroppers, or were the officers ambushed by armed guards while pulled over to fix a flat tire on their squad car? These questions are significant, but more important than the answers (which are unknowable), is the fact that the apparent emergency of an armed confrontation came out of a long chain of escalating tensions and official preparation for violence. When a confrontation finally occurred, it had all the desperate characteristics of an emergency – chaotic movements of people, tragic misunderstandings and accidents, mass killings over a dispersed area, and official confusion that at times reached the level of collective hysteria. Though it may be an apt descriptor however, the temporal connotations of the term *emergency*, which invokes sudden and unexpected danger, belies the careful, long-term cultivation that set the stage for the events that would unfold.

On the night of the initial shoot-out, a deputy sheriff, accompanied by a railroad security agent and a black trusty¹⁷², were driving near a tiny settlement called Hoop Spur when they came

¹⁷² This is an inmate who is trusted by the police and given more freedoms in exchange for services/help. For example, common 'trusty' activities might be to act as a chauffeur, messenger, or personal assistant for the sheriff.

upon a secretive meeting of a nascent organization for sharecroppers, the Progressive Farmers and Household Union (PFHU). The officers stated that they stumbled on the gathering while in pursuit of a bootlegger, after they pulled off the road to fix a flat tire. They alleged that black union members standing guard outside the meeting opened fire on the lawmen after they accidentally came into their vicinity, immediately killing the railroad security agent and wounding the deputy sheriff. The injured officer and unharmed trusty escaped in different directions and alerted Sebastian Straub and Frank Kitchens from the Phillips County sheriff's office in Helena that a shooting had taken place. The law enforcement officers at the scene of the shoot-out were initially uncertain of the nature of the trouble, and speculated that they had disrupted a large bootlegging operation – or at least this is what was reported to the local press. But Sheriff Kitchens and Acting Sheriff Straub believed they had something more significant on their hands. Both men had heard rumors that sharecroppers were planning to cause trouble and wondered if this was what their deputies had actually interrupted. Through the early hours of the morning, they gathered local men into posses, and waited for daylight to find and arrest the shooters.

By the morning of October 1st, as posses set out for Hoop Spur (just a few miles north of the slightly larger town of Elaine), the incident that would soon be known as the Elaine race riots had barely begun, and yet there were already different, and contradictory stories circulating about what had happened outside the church the night before. The local paper reported that an officer had been ambushed and killed by members of a bootlegging operation.¹⁷³ The posse members who set out for Hoop Spur were under the impression they might be on their way to put down some sort of black tenants' uprising. Members of the Progressive Farmers and Household

¹⁷³ "Bootleggers Ambush Three Peace Officers," *Helena World*, October 1, 1919.

Union (PFHU), who had rushed home or scattered into the woods following the shoot-out, reported to family and friends that the deputy sheriff's gang had fired on their meeting unprovoked, killing several persons. Some claimed that their own guards fired no shots; others held that if the guards did shoot it was only in self-defense. Union members suspected that the men who shot at the church had gone to Hoop Spur with the deliberate intention of breaking up their meeting. About fifty black men, concerned that retaliatory violence would soon follow, gathered at the home of union leader Frank Moore (the "Moore" of Moore v. Dempsey). They were armed with rifles, and prepared to defend themselves.¹⁷⁴ Other black residents – those who knew something was amiss – hid in their homes or prepared to take refuge in the intricate network of swamps, canebrakes, and bayous characteristic of the delta. They did not realize that a white security agent had been killed, but even without this information, they were aware of the implications of what had happened the night before. Shooting at white men, whether they were private citizens or police, was likely to bring a violent response.¹⁷⁵

The question of whether the police stumbled on the meeting accidentally, or came intending to break it up, and the question of who actually fired the first shots, are among the many details of the Elaine race riots that might never be known definitively. For their part, the local sheriff's office was active in the summer and fall of 1919, trying to rid Phillips County of bootleggers. Arkansas was one of several states that passed its own prohibition legislation about a year in advance of the 18th amendment, which did not go into effect until 1920. Crime reports in the *Helena World* in the weeks and months leading up to October of 1919 were dominated by

¹⁷⁴ Nan Woodruff, *American Congo*. Woodruff discusses this and black resistance more broadly in great detail. Frank Moore's statement can be found in Ida Wells' booklet, "The Arkansas Riot," published in 1920 and distributed by the NAACP for their legal defense fund.

¹⁷⁵ Of course, many black residents of the area had no idea anything had happened, and wouldn't realize anything was wrong until the next morning when violence escalated and became widespread throughout the southern portion of the county. Many bystanders were arrested or killed who had no connection to the union.

cases of people charged with the illegal sale and transport of whiskey and mash, indicating that the sheriff's office did expend considerable time and energy enforcing the newly enacted ban on alcohol. Their story of stumbling on the union meeting in pursuit of a bootlegger is plausible considering the larger context of escalating conflicts between bootleggers and sheriffs in Arkansas and across the nation at the start of the Prohibition era.

If the deputies did stumble on the meeting by accident, it is also plausible that the black guards stationed outside the union meeting might have shot at them. Many historians who have studied Elaine have been reluctant to acknowledge this, since it seems to disrupt a simpler and more comfortable narrative of unmitigated white violence perpetrated against a passive and therefore “innocent” black population.¹⁷⁶ Yet as scholars of black political culture more generally have pointed out, a tradition of organizing – including militant resistance to racial and economic oppression – had existed throughout the south since at least the antebellum era.¹⁷⁷ This was particularly true in Helena and in Phillips County more broadly, which had been a center of black political life in Arkansas since the Civil War, and which enjoyed a black-majority population of 75%, lending black residents a certain degree of influence even in the face of systematic exclusion from the official realms of politics. Jeannie Whayne, an expert in Arkansas history who has closely studied the riot, points out “The fact is that the black union organizers were men, southern men. They were angry over their treatment, they understood the seriousness of the actions they were taking, they were familiar with guns, and they were ready to use them.”¹⁷⁸ The union chose to station armed guards outside their meeting because they were

¹⁷⁶ Jeannie Whayne, “Black Farmers in the Red Autumn: A Review Essay,” *The Arkansas Historical Quarterly* 68, no. 3 (October 1, 2009): 327–36.

¹⁷⁷ Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Belknap Press of Harvard University Press, 2005).

¹⁷⁸ Jeannie Whayne, “Black Farmers in the Red Autumn,” 331.

prepared for trouble; if confronted by a group of armed white men late at night it may well be they fired on the deputy's car, either pre-emptively or in self-defense.

On the other hand, there are plenty of indicators that the deputy's interruption of the PFHU's meeting was not coincidental or accidental – the story told by the sharecroppers, that their meeting was interrupted as a deliberate act of anti-union intimidation, and that they were fired on unprovoked, is equally plausible. World War I dramatically altered social and economic conditions throughout the nation. Relations between white and black communities, as well as between capital and labor more broadly, deteriorated significantly after the U.S.'s entry to the war in 1917. Anti-black and anti-union sentiment were fueled by an amalgam of volatile political currents. Starting in the early 1910s, build-up to the war increased global demand for raw materials and consumer goods, and the burden of meeting this demand fell largely on the U.S, even more so after armed conflict broke out in Europe and Africa. Rising wartime prices were a potential economic boon for landowners and industrial capitalists, but for common laborers they amounted to dangerous inflation unless wages rose concurrently. Unions representing workers in most major industries initiated strikes and other labor actions designed to claim their share of wartime profits.¹⁷⁹

But although unions were widespread and ostensibly popular amongst some groups of Americans, union activity during wartime attracted criticism. To belong to a union, which would negotiate with employers for a fair contract, was acceptable. To go on strike or otherwise cause a work stoppage or slow-down was more controversial. Representatives of the War Department

¹⁷⁹ Cliff Brown, "Racial Conflict and Split Labor Markets: The AFL Campaign to Organize Steel Workers, 1918-1919." *Social Science History* 22, no. 3 (1998): 319–347. Brown writes that "Between 1916 and 1920, America experienced 18,633 strikes. Unrest peaked in 1919, when there were over 4.16 million striking workers. This was more than twice the number of strikers for any other year from 1880 to 1940 and represented one-quarter of the private sector." (320)

and the Commerce Department of the Council on National Defense released statements criticizing workers who went on strike, which they argued was at best unpatriotic, and at worst treasonous, to the extent that such actions interfered with U.S. war readiness.¹⁸⁰ *The New York Times* supported the positions of these government institutions, editorializing that “The Government’s difficulty is not the opportunity for the establishment of the unlawful activities of unionism or for the unfair betterment of conditions of organized labor at the expense of non-unionists and taxpayers alike.” Editors of the *Helena World* took care to reprint such statements, usually accompanied with a special note emphasizing that local leaders’ opinions aligned with those espoused by national bodies.¹⁸¹

The association between union membership and anti-Americanism was amplified by perceptions that the most militant labor leaders were also immigrants, legally considered white but hailing from racially suspect national, religious, and cultural groups. The confluence of patriotic pro-war and anti-immigrant nationalism became all the more potent after the Bolshevik Revolution of 1917, which added the specter of a global communist threat to existent concerns about connections between unionism, immigration, and anti-Americanism. Although African Americans were not immigrants, they too came in for increased scrutiny as a result of combined pro-war, anti-immigrant, and anti-communist sentiment. J. Edgar Hoover, the first director of the F.B.I., (newly created in 1919, but preceded by a similar organization called the Bureau of Investigation, founded in 1908), considered the militancy of African Americans among the number one domestic threats facing the nation in the years during and following WWI. These national investigating bodies, staffed by federal police drawn from the ranks of secret service agents and U.S. marshals and working alongside the Military Intelligence Bureau, expended

¹⁸⁰ “Sound Reasons,” *Helena World*, November 19, 1917, 4.

¹⁸¹ “Sound Reasons,” *Helena World*, November 19, 1917, 4.

considerable resources on the surveillance of African American political and social organizations. They also censored black newspapers and investigated individuals considered to be influential leaders. African Americans were thought to be especially vulnerable to Bolshevik propaganda; they were considered easily deceived by whites who encouraged them toward social agitation and rebellion.¹⁸² A national narrative developed over the course of WWI that connected pro-war nationalism with anti-immigrant sentiment and suspicions of union organizing; these currents combined and were transformed into a politics of anti-blackness.

In Phillips County, Arkansas, this national dynamic manifested in day-to-day tensions over the movements of strangers through the area, and growing suspicions among white landowners and merchants that something nefarious was afoot with the laboring population of black tenants. Residents carefully followed national debates over restrictions on immigrants, which were considered a badly needed national security measure. Proposed restrictions (the majority of which were put into effect) required alien enemies to obtain a permit for travel, prohibited them from coming within 100 yards of docks or ports, and banned them from traveling on waterways. Phillips County's boundaries were comprised of the Mississippi River on the east and the White River on the west and so Helena, on the Mississippi side, was the home of depots and spurs for several major rail lines. In fact, Helena was one of the only port towns, and certainly the largest, to be found on the long stretch of the Mississippi river extending between Memphis, Tennessee, and Vicksburg, Mississippi, a geographical factor that had long influenced patterns of trade and settlement in the area. The proliferation of rail and water travel

¹⁸² Mark Ellis, "J. Edgar Hoover and the Red Summer of 1919." *Journal of American Studies* 28, no. 1 (1994): 39–59; Mark Ellis, *Race, War, and Surveillance*; Christopher Capozzola, *Uncle Sam Wants You*; William Jordan, *Black Newspapers and America's War for Democracy, 1914-1920*. For an account of the Red Scare in Arkansas specifically, see Theodore Kornweibel, *Seeing Red: Federal Campaigns against Black Militancy, 1919-1925* (Bloomington: Indiana University Press, 1998); Joey McCarty, "The Red Scare in Arkansas: A Southern State and National Hysteria."

in and around Helena meant it was the home of industrial facilities – not just endless fields of cotton and giant stands of river-grown timber, but also the mills, gins, and factories required to process these raw materials and prepare them for transport to urban centers such as New Orleans, Memphis, St. Louis, and Chicago. Many local residents considered their town to be a potentially strategic target for hostile internal enemies and felt personally invested in helping to enforce new wartime restrictions.

In early October of 1917, a dredge boat exploded at Crittenden, about 80 miles north of Helena, and although the cause of the explosion was never determined, it was widely suspected that pro-German spies were to blame. Over the following weeks, Helena’s daily local paper printed a series of plausible, but unsubstantiated rumors – that one of the men implicated in the explosion had mailed a trunk to Helena, that the trunk contained nitroglycerine, and that one or more agents of the Industrial Workers of the World (I.W.W.)¹⁸³ was “headed to Helena with the intention of committing some sort of overt act.”¹⁸⁴ Sheriff Frank Kitchens notified mills, factories, and compresses around the county to place extra guards on their property. Local residents speculated as to whether the I.W.W. might be involved in recent disruptions to their telephone service. The editor of the paper advised the reading public that “careful watch be maintained by the people of Helena and vicinity for strangers who cannot give proper accounts of themselves,” a description that very well could have applied to black union organizers from nearby counties, and white lawyers from Little Rock, who would soon begin to travel and speak

¹⁸³ aka “The Wobblies,” a particularly radical labor organization. To be clear, although the sharecroppers were trying to start a union they were in no way affiliated with the Wobblies. However, the fear of the Wobblies, and the patterns of surveillance generated by this fear, would have nonetheless affected and constrained any attempt on the part of sharecroppers to organize, especially because of suspicions that radical white unionists might specifically set out to agitate racial trouble.

¹⁸⁴ “Plans of Helena Found on I.W.W.” *Helena World*, November 16, 1917, 1; “As to IWW,” *Helena World*, November 18, 1917, 4.

at late-night meetings of laborers and tenants in secret locations scattered through the backwoods. E.M. Allen, president of the recently founded Helena Men's Business League, warned the public that, "since this country entered the great war, German interests, directed from a central office in this country, have been doing everything possible to encourage strikes, labor troubles and internal strife of every nature wherever the opportunity presented itself."¹⁸⁵ Undoubtedly, "internal strife of every nature" included the deliberate provocation of racial hostilities as a means to undermine America's social cohesion, not to mention its labor force. Allen reiterated instructions that the newspaper had printed previously: "Citizens everywhere are warned to question the loyalty of any men or group of men who attempt to demoralize civic activities."¹⁸⁶ The editor of Helena's paper recommended that "immediate action [against such individuals] be taken when deemed necessary," following this with the ominous statement that "what this action should be should not be difficult to determine."¹⁸⁷ In case anyone did have difficulty ascertaining what action was needed, an editorial a few days later asserted that organizations like the I.W.W. "should be stamped out completely by the Government. Members of it should be treated as they deserve, even to assessing the death penalty. When a house is infested with rattlesnakes, there is but one logical thing to do, and that is to kill the snakes."¹⁸⁸

As in other parts of the country, concerns about pro-German and/or pro-Bolshevik influence manifested partially through increased suspicion and surveillance of black communities in and around Helena and the larger Phillips county area. Helena's management of race vis a vis the larger war effort consisted of active surveillance and repression, carried out by

¹⁸⁵ E.M. Allen, "Why the Business Men's League is a Necessity," *Helena World*, December 9, 1917, 1.

¹⁸⁶ E.M. Allen, "Why the Business Men's League is a Necessity."

¹⁸⁷ "Plans of Helena Found," *Helena World*, November 16, 1917. Instructions to question strangers are repeated in "Notes from Defense Council," *Helena World*, November 26, 1917, 3. The editor advised, "spies are all around us and suspicious activity should be reported and investigated."

¹⁸⁸ "As to IWW," *Helena World*, November 18, 1917.

police and military officials, complemented by a more subtle and insidious campaign of positive propaganda, directed by a variety of social and civic institutions. The Bureau of Intelligence and the Military Intelligence Bureau kept tabs on even the smallest and most innocuous black organizations; for example, in Helena, they monitored The Royal Circle of Friends, an all-black burial insurance society founded by Helena resident R.A. Williams, which allowed poor and working-class people to pool their money so they could afford headstones and funeral services when one of their community passed away.¹⁸⁹ Despite the apolitical nature of such a service, the Royal Circle was organized along the lines of a fraternal organization, a type of group that inspired fearful curiosity on the part of government agents because of their secretive nature and thus their potential to act as an alibi for political organizing. Black churches and schools were specially targeted for visits from members of the Phillips County Home Defense Council, which helped to coordinate war readiness activities at the local level. The organization dispatched “four-minute men” and representatives of civic organizations like the YMCA and the Red Cross to deliver pro-war speeches tailored to reach black audiences.¹⁹⁰

Such propaganda efforts were occurring all over the country, and a number of influential black leaders threw their support behind the war. Widespread black support for the war was not enough, however, to appease the suspicions of many whites, or of the government agencies charged with domestic intelligence and policing. Nor did their support for the war minimize black communities’ rejection of a racially restricted democracy. The contradiction between fighting a global war “to make the world safe for democracy” while racial violence and

¹⁸⁹ Correspondence of the Military Intelligence Division Relating to "Negro Subversion", 1917-1941 › 401-450 › 409 - IO 4th C-A forwards report. Re: Royal Circle of Friends of the World. War Department/National Archives, Washington D.C.

¹⁹⁰ “Army Officers at Colored Church,” *Helena World*, December 16, 1917, 1; Ann Dawson, “Report of the War Work of the Helena Schools 1918-1919,” *Phillips County Historical Quarterly* 37, no. 3–4 (Fall 1999): 34–36.

segregation at home persisted, proved difficult for many black citizens (and especially for black soldiers) to tolerate. The critical rhetoric espoused by leading civil rights organizations as the war wore on in turn aggravated official suspicions regarding the questionable loyalty of black Americans. “Racial feelings,” as they were often called in newspapers, became more and more laden with tension and mutual suspicion. Major riots occurred in 1917, first at East St. Louis, and then near Camp Logan in Houston, Texas. Following the Houston riot, nineteen black soldiers were executed, making the incident one of the largest mass executions in American military history. The incident represented the worst fears of whites in terms of the dangers of arming a potentially hostile minority racial population; and it also represented the worst fears of black people, who noted bitterly that the soldiers’ willingness to sacrifice for the nation had been rewarded with what amounted to a “legal lynching.”¹⁹¹ After the Houston riots the *Helena World* began to feature regular news items describing African American support for the war, and letters from local black enlistees reporting that they were happy and well-treated in their segregated military units.¹⁹² “Those who have an idea that such soldiers are mistreated or deprived of their rights in the army should read what Simmons has to say,” advised the newspaper editor in a preface to one such letter.¹⁹³ From the small offices of a rural southern newspaper, to the grand halls of the White House and the War Department, white officials faced the same delicate contradiction. Could they cultivate black patriotism without fueling black nationalism? Could they train black soldiers without creating black militants?

¹⁹¹ The topic was covered regularly by publications including *The Defender*, *The Crisis*, and *The Washington Bee*,

¹⁹² “Willie Simmons Writes of Life at Camp Pike,” *Helena World*, November 28, 1917, 1; “Helena Negro is Pleased with Army,” *Helena World*, December 21, 1917, 1; “Negroes Well Treated in Army Cantonments,” *Helena World*, December 30, 1917, 1.

¹⁹³ “Willie Simmons Writes of Life at Camp Pike,” *Helena World*, November 28, 1917, 1.

As explored in more detail in the previous chapter, after the signing of the armistice in 1918, rather than subside, domestic racial and economic tensions only continued to escalate, with groups like the American Legion, the American Protective Counsel, the Citizens Protective League, and others engaging in surveillance and law enforcement activities that blurred the private-public division of state and policing power.

As was the case in other areas where American Legion posts were founded, the political apparatus of Phillips County viewed the members of this veterans' organization as natural allies in their work to suppress dissension and political agitation, and included them in the elite circle of county officers and landholders who were entrusted with law enforcement responsibilities. Men like E.M. Allen, president of the Helena Men's Business League; Phillips County Sheriff Frank Kitchens; and former Sheriff Sebastian Straub, were keenly aware of the waves of rioting that unfolded across the country in places like Chicago and Washington, DC, as the summer of 1919 wore on. The news was especially alarming to Sebastian Straub, former sheriff of Phillips County and a major landowner and cotton producer, and to Jos. C. Meyers, a merchant who was one of the pre-eminent suppliers of "furnish" to sharecroppers in the area. Both had been hearing rumors since the winter of 1918 that "some trouble was brewing" among the sharecroppers working in the area. It is not clear if they coordinated their activities or worked independently, but both men hired private detectives from Chicago to pose as itinerant laborers, and over the course of the winter, spring, and summer of 1919, received from these detectives a series of alarming reports indicating that black farmers, including a number of veterans, were holding secret meetings, often late at night. Some of these meetings had been visited by white men. Late in the summer of 1919, these detectives told Straub that the sharecroppers' planned to demand a "settlement" from their landlords, and when this settlement was not forthcoming they

alleged the sharecroppers had a list of 21 landowners who would be killed along with their families, and their land redistributed amongst union members. In September, Sheriff Frank Kitchens developed a protracted illness, and Straub was appointed acting sheriff of the county.¹⁹⁴ Undoubtedly he viewed his activities spying on local sharecroppers as an extension of his duties as a lawman. He continued the surveillance, discussed his knowledge with members of the Men's Business League, and informed the families who were supposed to be the targets of the sharecroppers' insurrection that they should prepare for trouble in early October.

Individual planters took action based on these reports, or not, depending on the seriousness with which they took the supposed threat.¹⁹⁵ But members of the Men's Business League and of the recently founded local post of the American Legion evidently took the reports very seriously. With officers from Camp Pike and Fort Smith, they began to coordinate emergency preparations for possible racial violence in Phillips County. As early as August 14th, about six weeks prior to the start of the Elaine riots on October 1st, the potential for racial conflict in the area, and the role that local law enforcement, military units, and white veterans should play if such conflict were to occur, was the subject of advance conversation, preparation, and planning. At a whites-only event celebrating the founding of the Richard L Kitchens Post of the American Legion in Helena, members of the Men's Business League approached U.S. Army major general S.D. Sturgis, who advised them that "the army...could provide troops to quell

¹⁹⁴ However, Sheriff Kitchens was a member of the Committee of Seven and it's clear he advised as to how the situation should be handled. He was not in good enough health to join or lead a posse or actively assist in fighting.

¹⁹⁵ J. W. Butts and Dorothy James, "The Underlying Causes of the Elaine Riot of 1919," *The Arkansas Historical Quarterly* 20, no. 1 (April 1, 1961): 95–104. According to Butts and James, Straub's son said some people didn't believe it, which frustrated Straub. A landowner interviewed by Butts says he had all the black folk working his land come surrender their weapons to the commissary store. Others turned to blacks they viewed as loyal and tried to learn more.

domestic violence, but only in an extreme emergency.”¹⁹⁶ For any disturbances that fell short of this “extreme emergency” standard, the Legion members eagerly volunteered their services.

In light of the fact that Sebastian Straub and Jos. Meyers – aided by local landholders, private detectives, police officers, and black residents – had been spying on the PFHU for almost a year leading up to the riot, and had specifically identified October 6th as the date of an alleged insurrection, the black sharecroppers’ suspicion that police were sent a week in advance to deliberately break up their meeting cannot be easily dismissed. The fact that Sheriff Kitchens and Acting Sheriff Straub reported one thing to the newspaper, yet told the posses they activated something different, also does not speak well to the integrity of their story. Influential black spokespeople at the national level found every aspect of the story – from the allegations of a planned insurrection, to the idea of the police innocently wandering into the union’s meeting while fixing their flat tire – to be frankly incredible. “The persons capable of planning and executing such a terrible deed were not above furnishing that excuse for their action,” stated Ida B. Wells in a booklet on the riot, written based on interviews she conducted with union leaders and their wives and distributed by the NAACP to raise funds for the sharecroppers’ legal defense. “Had this been a conspiracy of Negroes to kill whites, they would not have started in by killing their own members, breaking up their own meeting, nor burning their own church.”¹⁹⁷ Even some whites who accepted the story of the insurrection found the police officer’s story of a flat tire outside the union meetinghouse contrived and convenient: “it was ...hard to understand how it so happened that the car in which [the police] were driving was able to pull through several miles of ‘bad’ roads, then suddenly came to a standstill on a ‘good’ road near the negro church where the first shots were fired,” wrote Louis Dunaway, reporter for the *Arkansas*

¹⁹⁶ Robert Whitaker, *On the Laps of Gods*, 78.

¹⁹⁷ Ida Wells Barnett, *The Arkansas Race Riot*.

Gazette, in a travelogue published a few years later.¹⁹⁸ Certainly, if Meyers and Straub informed the Men's Business League and the threatened plantation owners that "trouble was brewing," it makes sense that they would also inform Sheriff Kitchens, and that he might then make this known to his deputies. Once Straub was appointed acting sheriff, he would have been involved in decisions about when and where to dispatch personnel. If he was willing as a private citizen to hire detectives to spy on the union, surely he would have had no qualms as acting sheriff about using police officers to do so (especially if he believed they were conspiring to commit murder). In my opinion, even if the specific officers involved in the shoot-out didn't know exactly what they were getting themselves into, when they reported back what happened to Straub and Kitchens, these men probably knew that bootleggers were not responsible for the shooting.

Whether or not the officers intentionally set out to disrupt the union meeting, once they realized that was what had happened, Straub and Kitchens worried that union leaders would attempt to carry out their rebellion early. In response to this fearsome possibility, the men activated their emergency plans for racial violence, plans that had been in development for several months, at least since the launching of the local American Legion post in August. They made calls to a pre-identified list, and soon a few hundred men, most of them members of the Legion, began to gather in downtown Helena and at the mercantile company in Elaine.¹⁹⁹ J.W. Butts was one man who received the call to arms; his family was on the alleged hit list held by the union. Butts' recollection, committed to writing in 1960, seems to indicate that the sheriff already suspected the shootout involved the union, even while his early-morning report to the

¹⁹⁸ Louis Dunaway, *What a Preacher Saw through a Keyhole in Arkansas*, (Little Rock, AR: Parke-Harper Pub. Co., 1925): 105.

¹⁹⁹ Mrs. Ables, personal communication with J.W. Butts, 10-15-1960. According to Butts, "the operator on duty at Elaine that night (Sept. 30, 1919) [said] that she was not surprised when a call for help was put through the exchange, for she had been warned by the District Supervisor of the Company to be on the alert because trouble was brewing."

press stuck to the story of a bootleggers' ambush. "I was astounded on the morning of October 1st to receive a telephone call from my brother at approximately 7 o'clock," he remembers, "telling me that trouble had already occurred at Hoop Spur and he was going down to Elaine with a group of other men, who had been deputized, and there they would search the trains and aid in guarding Elaine."²⁰⁰ As the men arrived, the sheriff formed them into posses, most of which included a mixture of civilians, civil officials, police officers, and veterans. The men were deputized, and those that needed them were supplied with guns and extra ammunition. They decided to wait for the light of morning to set out toward Hoop Spur and track down the people who had been at the church.

If mass violence was still preventable after the union meeting shootout, it was now coalescing into the realm of inevitability. From Helena and Elaine, several large groups of armed white men, most with police and military backgrounds, were preparing to go to Hoop Spur to put down what they feared might be a kind of modern-day slave revolt. Waiting in farms and fields along the way, armed black men – also led by military veterans – lay hidden, waiting to defend their families, friends, and neighbors who were hiding in nearby fields and forests. They anticipated an onslaught of white violence, provoked by nothing more than the legal and nonviolent activities of their chartered farmers' union. When the two groups clashed, their combined military training (and more generally, the militarized culture that now governed race relations in the county and the country at large) all but guaranteed deadly results.

As dawn turned to daylight, armed white men from Elaine to the south and from Helena to the north converged on the stretch of riverfront cotton fields near Hoop Spur. "We were all loaded and ready," recalled Henry Bernard, "and the American Legion met us there."²⁰¹ The men

²⁰⁰ Statement by J.W. Butts, October 17, 1960.

²⁰¹ Interview between Henry Bernard and JW Butts, December 7, 1960.

drew on their experience in the army to form platoons led by ex-servicemen, while a lookout on horseback directed them toward any congregation of black people he happened to spot. Bernard remembers the groups' coordinated movements:

He says, 'There's a big gang over there in that cotton field.' We went over there, and they took to the woods. And he said 'There's another one down this bayou,' said there were some 45 or 50. So we got in the corn field and went down this bayou to flank the house. When they saw us, they got in this bayou.²⁰²

Dr. Butts did not collect oral histories from black residents of Helena, but it is not that great a challenge to read through the testimony of white posse members and imagine the sharecroppers' perspectives. Some of them had been trying to form a union and had been shot at the night before, with some of their members killed. Others were aware of the union's meetings and thought the idea, on the whole, ill-advised, either because they genuinely opposed unionization, or because they feared precisely this sort of reaction on the part of white authorities.²⁰³ Still others might not have been aware of the union's activities and were simply on their way to work in the morning. Regardless of their knowledge about or opinion of the union however, black people in southern Phillips County were confronted that morning by large groups of armed white men marching against them in military formation. They saw the thick roughage of corn, cotton, and cane that thrived in the Mississippi river's marshy inlets and bayous, and took cover in its protection as fast as they possibly could.²⁰⁴

Posse members took the sharecroppers' evasive actions as evidence, not of fear or self-preservation, but of guilt, and became even more aggressive in their attempts to chase black people down, firing shots after them as they tried to run away. Ed Ware, secretary of the union,

²⁰² Interview between Henry Bernard and J.W. Butts, December 7, 1960.

²⁰³ Personal Interview between J.R. Carpenter and J.W. Butts, 10-15-1960. The mayor of Elaine at the time, J.R. Carpenter, would later recall, "I knew several weeks before the riot that trouble was brewing, due to reports made to me by some of the older negroes who did not approve of the plot against the planters."

²⁰⁴ Nan Woodruff, *American Congo*.

had already heard rumors that posses were forming to do violence. He was near his house discussing these reports with a neighbor when he saw one of the platoons come around the bend and proceed toward his land:

I went out in my field about 200 yards from my house, sitting there talking to two other men about the threats that I had just received. I happened to look up and I saw a Negro by the name of Kid Collins running down the road in front of my house and followed by a crowd of white men. [...] They had almost surrounded my house when the old man, Charley Robinson, and Isaac Bird and myself began to run. The old man was crippled and could not run and they shot him down and took him up from there and carried him and put him in my wife's bed and let him stay there four days.²⁰⁵

Joseph Fox and Albert Giles had a similar recollection of that morning: “we saw about 150 armed white men coming to our house and we left the house and ran on down into the woods and carried our sister down in the woods with us and they came and hunted us out and they shot at the women and killed three men.”²⁰⁶ Frank Moore, whose group included armed men, still chose to flee rather than to fight when they saw the size and strength of the posse-platoon formations coming after them:

There was about 300 or 400 white men armed with guns walking and in automobiles at the railroad coming from Elaine to kill us. So we all ran back of the field and just as we got back of the field there was a big crowd of white men shooting and killing Jim Miller and his children and brother and setting them on fire. So when we saw them shooting and burning them we turned running and went to the railroad east from there.²⁰⁷

Large numbers of them did make it to cover, where they began a long period of tense waiting, some subsisting in the canebrakes for almost a week before surrendering themselves to military authorities.

It was during the chaos of these morning hours, with multiple posses coming from different directions, and then dispersing and chasing after smaller groups of black residents, that

²⁰⁵ Ida Wells-Barnett, *The Arkansas Riot*, 13 – 14.

²⁰⁶ Ida Wells-Barnett, *The Arkansas Riot*, 14.

²⁰⁷ Ida Wells-Barnett, *The Arkansas Riot*, 17.

posse members James Tappan and Clinton Lee were killed: veterans of the first world war, sons of prominent local families, and members of the Richard Kitchens Post of the American Legion in Helena. Clinton Lee's death was blamed on the sharecroppers, supplying the first-degree murder charge that was later the basis of twelve capital convictions and a Supreme Court appeal. At least one person in Frank Moore's crowd did fire back at the crowd of men that was pursuing them, though black survivors of the event either didn't know who that person was or intentionally avoided naming them. Frank Moore vehemently denies that it was him.²⁰⁸ Ida Wells-Barnett, writing of the incident a few months later, did not bother to dispute the possibility that Lee was killed by one of the sharecroppers (be it Moore or someone else), but argued that the murder charges were invalid because the killing was committed in self-defense:

Clinton Lee met his death while he and hundreds of other white men were chasing and murdering every Negro they could find, driving them from their homes and stalking them in the woods and fields as men hunt wild beats. [...] Both these white men ... were in the attacking parties with crowds of other white men. If there was any conspiracy, it would seem to be among white men to kill and drive away Negroes.²⁰⁹

But the white residents of Phillips County, and particularly of Helena, were aggrieved and outraged – they shut down virtually the entire city for both men's funerals a few days later, even as the county was still being patrolled by federal troops and martial law remained in effect.²¹⁰

The deaths of Tappan and Lee also had a more immediate, and a more chilling effect: they made local officials feel they had lost control of the situation. Multiple calls were made: to the governor of Arkansas, requesting assistance from federal troops, and to what I believe were probably sheriff's offices, county courthouses, or private homes of pre-identified men in

²⁰⁸ Interestingly, the *Helena World* initially reported that Clinton Lee at least was killed "accidentally," before publishing a correction the next day attributing the deaths to a black shooter.

²⁰⁹ Ida Wells-Barnett, *The Arkansas Riot*, 11.

²¹⁰ "Proclamation" *Helena World* October 2, 1919, 1; "Proclamation," [rep.] *Helena World*, October 3, 1919, 1.

neighboring counties. These calls served to officially mobilize a battalion of 500 federal troops, dispatched with the Governor of Arkansas at their side, who arrived the next day (October 2nd), and to unofficially mobilize at least 1000 [double check] white men from surrounding counties in Arkansas and across the river in Mississippi, who began arriving in Phillips County later in the afternoon on October 1st, and continued to arrive over the course of October 2nd. Both the U.S. army and the civilians from neighboring counties lent their assistance to put down what they believed was some sort of Bolshevik-inspired revolution on the part of the region's black majority; they brought with them hundreds of rifles and a dozen mounted machine guns, supplemented by an extra shipment of rifles and ammunition from the police department in Memphis, Tennessee. The violence committed following the death of Tappan and Lee ultimately escalated into what Bessie Ferguson, the first academic to ever study the riot, would describe as “a ruthless and indiscriminate hunting down and killing of negroes.”²¹¹ It will likely never be known how many people were killed, but estimates range from 100 – 850. The most recent comprehensive analysis of the death toll arrived at approximately 250 as the safest estimate possible from integrating assorted accounts of what took place.²¹² To this day, rumors of mass graves persist among older black residents of Phillips County.²¹³

During the first day of the riot, a loose assembly of Phillips County's leaders and powerbrokers began to cohere as a formal investigative body that dubbed itself “The Committee of Seven.” Although this body was at first an impromptu collaboration, it was soon given official power by the Governor to investigate the riot and issue indictments, and it grew out of previously existing relationships forged in the Helena Men's Business League, The American Legion, and

²¹¹ Bessie Ferguson, “The Elaine Race Riot,” Thesis (M.A.), George Peabody College for Teachers, 1927), 60.

²¹² Robert Whitaker, *On the Laps of Gods*.

²¹³ I first came across mention of this in Whitaker's text; the rumor was repeated to me when I travelled to Helena in April and October of 2013.

the institutional centers of county politics. The formation of The Committee of Seven and the identities of the men entrusted to lead posses typify the state collusion that characterized the perpetration of the Elaine Massacre. The members of The Committee of Seven included Frank Kitchens, the sheriff of Philips County; T.W. Keesee, Sr., president of the Helena Cotton Exchange, and owner of 2000 acres of productive cotton land; J.G. Knight, mayor of Helena; E.M. Allen, president of the Helena Businessmen's League as well as owner of major property-holdings in the town of Elaine; H.D. Moore, a county judge; E.C. Hornor, president of the Bank of Helena with capital invested in more than 12,000 acres of cotton-producing land; and Sebastian Straub, another large landowner and Acting Sheriff during the riot. The men who were drafted to head up posses also had connections to both private and official realms of power: members of the Richard Kitchens American Legion post were all recently demobilized WWI combat veterans; Herbert Thompson was a captain in the American Expeditionary Forces in France; Dick Dazell was a deputy sheriff; J.G. Myers was a major in the Arkansas National Guard; and Amos Jarman was the previous sheriff of the county. Members of the Committee, and of posses, had been entrusted with public offices, elected posts, and special appointments; they were affiliated with leaders in business, agriculture, politics, and the military. They viewed themselves as upholders of law, not as its defilers.

The language used by the *Helena World* underscores that the men who participated in the posses saw themselves as agents of law and order, acting "at their country's call," as the Legion plaque would later reiterate. They were participating as supplemental troops – emergency first responders if you will – in an urgent military mission. In its first lengthy article following the initial day of rioting, the paper's narration of the previous day's events describes a sophisticated military operation. They twice refer to the conflict as a "race war." While describing a brief

period of calm that was interrupted by renewed rumors of trouble, the paper declares that “another battle appeared to be imminent.” Members of posses were “maintaining headquarters” at strategic locations, while county judge H.D. Moore acted as a kind of communications officer and “set at a desk with a telephone at his elbow and kept in constant communication with posse leaders.” Judge Moore also coordinated with the Assistant Superintendent of the Missouri Pacific railway to send special trains of armed men between Helena and Elaine “at a moment’s notice” if needed. James Tappan was said to have been “shot from a ‘trench’ while crossing a field in company with two other young fellows,” language that is remarkably reminiscent of the experiences of “trench warfare” that defined WWI for most common soldiers, and was now transplanted by newspaper editors to the cotton fields of Arkansas, where the rich farmland was laced with miles of canals and irrigation ditches. When describing veterans, the paper identified posse members by both name and military ranking. As the first day of fighting wore on and nighttime approached, the men waited eagerly for federal troops from Little Rock; if they constituted a mob you might think they would fear the arrival of troops, but instead they mention the “cheering news” that soldiers are on the way, indicating that they saw the battalion as reinforcements coming to their aid.

While waiting overnight, the large platoons of men divided themselves into smaller groups of three to five armed citizens who then “patrolled each block in the downtown and residential sections of the city,” while “a small army waited at the Phillips county court house to respond to emergency calls.” The men assigned to these duties referred to themselves as “sentries,” and enforced a curfew, challenging anyone who tried to pass, and investigating reports of shooting and other strange noises.²¹⁴ They also felt the terror and fear that any soldier

²¹⁴ “Quiet Reigns After Day of Wide Unrest. Situation at Elaine and Hoops Spur Now in Hands of Troops,” *Helena World*. October 2, 1919, 1.

does, although the fact that the negro insurrection was almost entirely fabricated meant these fears usually proved unfounded. “We that night formed a cordon around the town of Elaine to repel any invasion which might come from the woods around, where we knew a world of negroes were,” J.W. Butts would later recall. “No incident happened during the night, though I was scared as hell when several cows came wandering through the cotton patch where I was stationed, and resisted the impulse to shoot.”²¹⁵

Platoons, headquarters, patrols, sentries, army. Being “stationed” as part of a “cordon” to “repel an invasion.” Constant communication. Special trains. These are not the words of an hysterical mob. When one takes the language used by the *Helena World* holistically, it’s clear that the so-called mob violence that occurred during the first and second day of the Elaine riots was conceived of, organized, and executed as a sophisticated military operation, albeit a military operation carried out with the assistance of many people who were not part of any official military hierarchy. In case any doubt remains as to the spirit of cooperation that existed between civilian first responders and the official military forces sent to restore order, the sentiment is expressed beautifully in a thank you note from Colonel Isaac Jenks to the residents of the county, published in *the Helena World* about a week following the conclusion of the riot:

On behalf of the officers and men of the United States Army who have been stationed among you for the past several days, we wish to express the thanks of the military for the hospitality, friendliness, and hearty cooperation accorded us at all times. We speak for all our forces here, officers and men, when we say that to serve you in the emergency has been a pleasure, and no one rejoices more than we of the Service that the clouds which threatened have now disappeared.²¹⁶

Not to be outdone, the soldiers comprising the 76th Field Artillery Unit sent their own thank you note:

²¹⁵ J.W. Butts personal statement, October 17th, 1960.

²¹⁶ “Grateful for Cooperation,” *Helena World*, October 9, 1919, 1.

The officers and men of the 76th Field Artillery wish to thank the people of West Helena for the kindness and hospitality they have shown us during our stay here. It has been a pleasure rather than a duty for us to serve them. During our stay here they have shown us the hospitality of the Southern people. We only wish that our stay was a little longer that we might become better acquainted. We wish to thank the Mayor and his officers for their help in our little stay. We hope to have the opportunity to visit your wonderful little city again in the near future, but not on the same mission.²¹⁷

It's no wonder the editors of the paper were so eager to associate Clinton Lee's death

with an official, war-related military action. They issued an "Important Correction," declaring

that

In the excitement and uncertainty created by the events of yesterday it was stated that Clinton Lee was shot and killed "accidentally." The statement was made in absolute good faith, but investigation divulged that young Lee was shot by a negro with a high power rifle. Other Helena boys who were with him bear witness to this fact. The sympathy of the entire city goes out to this bereaved family and that of James A. Tappan, who died from his injuries yesterday afternoon. They died in the line of duty, and their memories will live forever in the hearts of the people of Phillips county.²¹⁸

The American Legion Hall had not even been built yet, but citizens of Helena already had declared what the plaque would later memorialize: Tappan and Lee died in the line of duty. They gave their lives "at their country's call," and that is why they merited placement alongside the names of those men who died in the trenches of France.

In the years after the riots, the NAACP's relentless media campaign and the legal bungling of county prosecutors began to turn public opinion against the government of Phillips County and the state of Arkansas. After the fact, some local partisans attempted to blame the violence that had occurred on "mobs from Mississippi." For example, Bessie Ferguson's thesis, completed in 1927, concluded that the "indiscriminate killings which took place" were the responsibility of "a party of twelve men from Mississippi equipped with eleven guns and an axe [who] created havoc wherever they went."²¹⁹ Based in part on recollections gathered from

²¹⁷ "From West Helena", *Helena World*, October 9, 1.

²¹⁸ "Important Correction," *Helena World*, October 2, 1919, 1.

²¹⁹ Bessie Ferguson, "The Elaine Race Riot," 84.

residents of Helena, such a statement served to acknowledge the undeniably brutal violence that took place (which by that time the NAACP had documented quite convincingly), while still displacing responsibility for the violence elsewhere, onto outsiders from Mississippi who acted beyond the bounds of propriety. In this way they could still lay claim to their own residents' honor, who used ethical violence on behalf of law and order, and who shouldn't be held responsible for what those crazy Mississippians might have done.

Some posses may have armed themselves with unusual weapons, such as axes or whatever else was on hand, and in retrospect perhaps some white residents of the region genuinely regretted the scale of violence that took place. But the Mississippians who flooded into Phillips County had good reason to believe their presence and their actions were welcome. They had been specifically invited by a call for reinforcements, issued in local papers and probably also by private calls among the networks of spies and informants that had been strengthened and extended by domestic intelligence agencies during the war. When these Mississippians arrived they found posses being directed by none other than the Phillips County sheriff, who was backed by a local judge, the mayor, and a special committee of leading citizens. Some of these Mississippians may have even collected rifles or extra ammunition from the Phillips County Courthouse, which quickly gathered a large arsenal and offered such supplies free for the taking. After the first day of fighting concluded, *The Helena World* reported that

Parties of armed men who came to Helena from Clarendon, Marianna, Marvell and other points near Helena on the Arkansas side, and other parties from Lula, Tunica, Friars Point, and Clarksdale, Miss, aided in patrolling the streets of Helena last night, and assisted in preserving order in the trouble zone.²²⁰

The paper described the parties from Mississippi as "visitors," who "aided" and "assisted," not as invaders, mobs, or brutes. In the days following the riot, ambassadors from a variety of

²²⁰ "Quiet Reigns After Day of Wide Unrest," October 2, 1919, 1.

government offices and social agencies in Mississippi and Arkansas visited Phillips County and consulted with Phillips county officials over strategies they could put in place to prevent negro uprisings in their own districts.²²¹ If there was ill-will between white residents of Helena and their white counterparts in surrounding delta counties, it was not remarked on during or in the immediate aftermath of the riot. It was not until much later, when officials from Phillips County began to face criticism, that the story of mobs from Mississippi being responsible for the damage began to circulate. In light of the scapegoating dynamics that often surround these types of incidents, attempts to isolate responsibility onto “mobs” that always seem to hail from elsewhere, and whose identities never seem to be ascertainable, should be read with a high degree of skepticism.

The hundreds (perhaps thousands) of local/regional men from Phillips county and from surrounding delta counties in Mississippi and Arkansas, were relieved of their duties when a battalion of 500 federal troops, bearing 12 machine guns and hundreds of regulation army rifles, arrived in Helena on the morning of October 2nd, along with the Governor of Arkansas, Charles H. Brough. Some of the soldiers were not thrilled about being sent on this particular mission. The troops sent to Phillips County were members of the Third Division Infantry, veterans of the Second Battle of the Marne. This had been a punishing three-week battle in which more than 12,000 Americans were killed or wounded (a tiny fragment of the total casualties, which exceeded 200,000). The division had a reputation for solid fighting under pressure, but they resented being sent into a domestic conflict when their terms of service were so close to being over. Arthur Brown, one of the soldiers dispatched to quell the riot, recalled,

²²¹ “Thirty-five are captured in big drive,” *Helena World*, October 7, 1919, 1; “Mississippi Watching for Developments,” *Helena World*, October 8, 1919, 1; “Commends the Helena People – Secretary, Mississippi Welfare League Investigates Negro Insurrection Here,” *Helena World*, October 10, 1919, 1.

One of the men was shot in the foot and he was as mad as a March hare for he went through 8 battles in the War...He never received a scratch, was cited for bravery, received the D.S.C. [Distinguished Service Cross], and was one of 27 men out of 175 who came from the battles without a wound, alive, and to come down in a negro settlement and get a shot foot makes him mad as – so you see how things are.²²²

Troops sent to restore order in Phillips County were angered by this duty, anger mostly directed at the black citizens of the area, who they were told had initiated the violence. Moreover, since black people had already been put in the position of having to either flee or defend themselves, soldiers were brought into a situation where “neutrality” would have been impossible. They were brought in by the same political leaders who organized the posses; they were brought in on the side of the posses and therefore they were vulnerable to the self-defensive actions of armed black people in the area.

To invoke the epigraph at the start of this chapter, the collaboration between county-level law enforcement, civilian posses, and military commanders against the Progressive Farmers and Household Union showed that “Communities may not be able to stop agitation or effectively counteract it, but they can see that the processes of law are applied with severity.”²²³ This is both the problem of Elaine, and the legacy of Elaine, with which I am trying to grapple, and my reason for wanting to include it in the dissertation. Understanding what happened at Elaine highlights, not the problems and legacies of the racist “mob,” but the problems and legacies of the racial state, whose “processes of law” developed to function on a spectrum of severity. As outlined in the previous chapter, once martial law has been declared, rules governing the use of force are framed to allow overkill. That is to say, military commanders facing a violent domestic crisis are encouraged to use as much force as deemed necessary to restore order and the military

²²² Arthur Brown, “‘Dear Maude’ - Letters from the Jumping Off Place,” ed. Gerry Crabb. *Phillips County Historical Quarterly* 37, no. 3–4 (Fall 1999): 37.

²²³ “Race Riots,” *Helena World*, October 11, 1919.

manuals I discuss in that chapter often warned against “half-measures,” whose inadequacy might encourage further resistance. In the hands of angry, resentful troops fresh from the trauma and chaos of war, the processes of law were applied with extraordinary severity, transforming the Elaine race riot into what some scholars now insist was a massacre.

There is no question that troops sent to Phillips County to put down the race riot participated in the torture and killing of African Americans. Stories of such incidents are included in accounts of survivors, soldiers, and other eyewitnesses. Union leaders interviewed by Ida Wells recounted that, once arrested by soldiers, they were handed over to the Committee of Seven in Elaine and Helena, whose members ordered brutal acts of torture, including whipping, drugging, and electrocution. At least one soldier was usually present during these interrogations, while others stood guard in and outside the county jail and other buildings used as makeshift prisons, fully aware of the torture being carried out inside, and sometimes actively participating.²²⁴ Arthur Brown, one of the soldiers activated for riot duty, recalled:

One negro was burned the other day. Some hanged and one dragged. They do not stop to do burial but a [indecipherable] and the negro is dumped in and covered up. They are giving a negro the 3rd degree, and he is confessing his part in the affair. One big fat negro is made to do double time which means he's kept running from one place to another. If he stops for an instant he is prodded with a bayonet. One negro woman is kept awake. She has not slept for three days. The minute she dozes, she is made to walk. Another was given a drink of liquor to loosen up and he sure did talk, implicating several. These have been brought in.²²⁵

These kinds of reports were confirmed by white Helena residents, such as Gerard Lambert, who owned the Lambrook plantation in Phillips County.

Troopers brought [a prisoner] to our company store and tied him with stout cord to one of the wooden columns on the other porch. He had been extremely insolent and the troopers, enraged by the loss of two of their men that day in the woods, had pressed him with questions. He continued his arrogance, and one white man, hoping to make him speak up, poured a can of kerosene over him. As he was clearly unwilling to talk, a man suddenly

²²⁴ Ida Wells-Barnett, *The Arkansas Riot*.

²²⁵ Ida Wells-Barnett, *The Arkansas Riot*, 40.

tossed a lighted match at him. The colored man went up like a torch and, in a moment of supreme agony, burst his bounds. Before he could get but a few feet he was riddled with bullets. The superintendent told me with some pleasure that they had to use our fire hose to put him out.²²⁶

Torture was used by federal troops, and by county-level officials, for a number of interrelated purposes: to punish the black arrestees for their “uprising,” to gather what was considered urgently-needed intelligence about the extent of the union’s plot (or really, to manufacture evidence of it, since it’s improbable there ever was a plot in the first place), and to terrify other black prisoners into testifying against fellow arrestees lest they receive the same treatment.

Although there is little dispute that troops participated in torture, and that they killed some people who they perceived to be resisting, beyond this narrow consensus the actions taken by soldiers to “restore order” on October 2nd and 3rd (and to a lesser extent for the rest of the month when they remained stationed in Phillips county) are another area of factual dispute about which scholars of the riot disagree. Griff Stockley asserts that federal troops went further than just a few isolated incidents of brutality and torture, and perpetrated what he calls a massacre. He asserts that troops used machine guns to mow down black sharecroppers in the fields and canebreaks; in at least two incidents he claims they disarmed and then slaughtered large groups of more than one hundred persons, groups that included men, women, children, and the elderly. Stockley’s assertion rests on a patchwork of evidence, most of which consist of accounts gathered during or soon after the riots, combined with recollections of Phillips County residents in oral histories conducted years (or in some cases decades) afterward. Yet, Jeannie Whayne, a historian who specializes in Arkansas history and the history of the delta more broadly, insists that although some individual troops may have used excessive force, the military as a whole was

²²⁶ Griff Stockley and Jeannie M. Whayne, “Federal Troops and the Elaine Massacres: A Colloquy,” *The Arkansas Historical Quarterly* 61, no. 3 (2002): 277.

probably responsible for stopping a massacre, not perpetrating one. In her estimation, had it not been for the interventions of military commanders, violence against black people by the white civilian posses would have continued to escalate unfettered; instead it was mostly concluded within a day or two. Wayne criticizes Stockley's evidence for consisting of (at best) hearsay and circumstantial evidence and (at worst) relying on the self-serving statements of Phillips County residents who have motive to deflect blame away from themselves (and have shown a clear propensity to do so).²²⁷

I cannot claim to arbitrate evidence that is widely agreed to be inconclusive. Instead, my goal is twofold: (1) to think about how the violence of the riot reflected a collusion of different kinds of state authorities, operating during a "state of exception," and (2) to think about how the event is remembered, and to reflect in particular on the effects of remembering the Elaine riots as a problem of "mob-domination." In light of those purposes then, I would want to re-direct the debate between Wayne and Stockley away from the question of precisely how many people were killed by the posses, vs. how many were killed by the military, or whether the military fueled the riots versus quelled them. Those questions are over-determined by a false binary between the "mob violence" carried out by posses, and the military violence enacted during the process of "restoring order." One risk of such a binary is that it separates the 'mob' from the 'military,' failing to reflect the blurriness that actually existed. Another risk is that, once dichotomized in this way, a certain legitimacy is granted to state violence, and withheld from the violence of the mob. The violence of the military is normalized; the only question really left to ask is, did they use their legitimate violence appropriately? Was the violence used by troops excessive, arbitrary, and capricious?

²²⁷ Grif Stockley and Jeannie M. Wayne. "Federal Troops and the Elaine Massacres."

For example, one iteration of Stockley's critique of the army is his statement that "United States troops worked with the white mobs that were in the area," and he limits this critique to a small number of rogue units, who he supposes were acting under poor leadership. He contrasts these excessively violent units against others who acted protectively, either by disarming un-deputized white posses, or by taking black survivors of the massacre into custody without harming them. In other words, Stockley's critique of the army is that, at times, legitimate state authority became "mob-dominated," thus permitting irregularities and injustices to occur.

Wayne takes a slightly different tack but ends up drawing the same distinction between violence committed by enlisted troops and white citizens. She says at the end of her debate with Stockley:

I was half hoping that Mr. Stockley would convince me...that the military was responsible, and perhaps we could turn to the federal government and demand reparations. But I remain convinced that the evidence is simply not there. What we have is undisputed evidence of a massacre, and that a great injustice was perpetrated against African Americans in the Arkansas delta. But we cannot lay the blame for that event at anyone else's feet. I'm a child of the Arkansas delta, just as is Mr. Stockley, so I speak as a native daughter. The responsibility for what took place there is our responsibility. Just as the responsibility for the poverty and injustice that exists there today rests with us. No amount of trying to blame all of that on someone else will suffice.²²⁸

In Wayne's analysis, federal troops can hardly be blamed for using lethal force to put down the riot once it was already under way, particularly when they encountered "a state of great excitement," featuring hundreds of armed whites in pursuit of African Americans, some of whom were also armed and putting up active resistance. The responsibility for the massacre lies with the white community of Phillips county: they harassed the union, they activated the posses from across the delta, and thus in Wayne's view they are responsible not only for the violence

²²⁸ Grif Stockley and Jeannie M. Wayne. "Federal Troops and the Elaine Massacres," 282.

committed by the “mobs,” but also by extension for the violence used by the military to restore order once they arrived and found both whites and blacks heavily armed and fighting.

This is a good point to reflect on the rhetoric of “mob violence,” which is the predominant language used to describe this riot (language that shows up again in *Moore v. Dempsey*, as we shall see in the next chapter). Throughout Ida Wells-Barnett’s piece, for example, she refers to all these groups of white men as “mobs,” summarizing the riot in this way: “What they could not do lawfully they did unlawfully with the aid of public sentiment and the mob.”²²⁹ The booklet, distributed under the auspices of the NAACP’s legal defense fund, was part of a larger arsenal of propaganda the organization distributed as part of their multi-pronged campaign against lynching and mob violence.²³⁰ “Mob” and “illegal” were terminology that many individuals and organizations found attractive for strategic polemical reasons. To call a white posse an “unlawful mob” was a counter-discourse against the predominant white narrative that held these groups were dutiful citizens engaged in the work of law enforcement and the protection of their communities.²³¹ As I argued previously these descriptors must be read critically. Calling lynching and mob violence “illegal” – indeed, the very attribution of such violence to a “mob” in the first place - was not so much an empirical description, but rather a strident critique and a long-term aspiration. By using the term “unlawful mob,” Wells-Barnett, and the NAACP, undermined the white version of the story by attributing criminality to the white posses instead of to the black sharecroppers. The NAACP contended that whites’ methods of “crime-fighting” were actually an animalistic display of mob mentality, rhetoric that both

²²⁹ Ida Wells-Barnett, *The Arkansas Riots*, 11.

²³⁰ Claudine L. Ferrell, *Nightmare and Dream: Antilynching in Congress, 1917-1922* (New York: Garland, 1986).

²³¹ Gail Bederman, *Manliness & Civilization: A Cultural History of Gender and Race in the United States, 1880-1917* (Chicago: University of Chicago Press, 1995). Bederman’s work documents how Wells and the anti-lynching movement more broadly utilized discourses of “civilization” to develop a culturally potent critique of lynch law.

reflected and advanced their larger critique of white supremacist violence as inimical to the practice of democracy. When Ida Wells called the actions of white people “unlawful,” she was painfully aware that it was the sharecroppers who were on trial for their lives, while the actions of whites had never been subject to any sort of legal sanctioning.

One reason the mobs were not subject to legal sanction is that, however ‘unlawful’ their actions may have been in theory, most of what they did was under the banner of legally constituted authority. The mobs were led by combat veterans, who held respected positions in the community. The mobs were given firearms and ammunition by the sheriff’s office to use in putting down the alleged insurrection. The mobs were, quite possibly, called up by a regional phone tree designed with precisely this purpose in mind. And, the mobs were part of a vaster pattern of organized surveillance and repression of African American communities, being carried out by both state and federal governments.

Following the language of writers like Barnett, as well as the language used in legal briefings by the NAACP-hired defense attorneys who worked the Moore v. Dempsey case, current-day historians also tend to describe the men who patrolled Phillips County on the first day (and likely killed many people) as “mobs.” Even the treatments that use the more accurate terminology of “posse” do not (in my opinion) sufficiently foreground the *legality* of posses. There is a similar tendency to describe as “mobs” the thousands of men who flooded into the county from surrounding areas on the second day of the riots. By extension, all the violence done by these groups is labeled as “mob violence,” and the Elaine riots and subsequent trials are remembered as being “mob-dominated.” In contrast, the federal troops who arrived in Phillips County escape the designation “mob” in most accounts, by virtue of being part of the U.S. army. Mobs are disorganized and leaderless; the military is formed of cohesive units accountable to a

chain of command. So, although both groups commit horrible acts of violence, including indiscriminate slaughter of unarmed people, torture, burning, etc., the violence committed by civilians is described as “mob violence” while the exact same violence committed by the U.S. army is described as “restoring order.”

Ironically, the major exceptions to this approach can be found only in the most racist treatments of the riots. Just as the problematic American Legion plaque helps to make state violence more visible, the racist defenses of white Phillips County residents tend to highlight the orderly and organized nature in which they approached a dire emergency, and the subordination of “mob” mentality to the forces of law and order, while the more progressive/liberal treatments of the riot make a very strong distinction between mob and law, perhaps because they are invested in a redemptive narrative of Elaine’s role in the nationalization of the bill of rights and the liberalization of the state on matters of race.

This is a moment where the methodological choice to focus on perpetrators of violence and perpetrator discourses becomes very important. My own research into this incident so far leads me to reject many aspects of the “white” narrative of Elaine – I do not, for example, believe that the sharecroppers were planning an insurrection, and I strongly suspect the police intentionally broke up the union’s meeting. I also believe there was a much higher death count in the incident than military leaders were ever willing to admit. But when it comes to the narrative regarding the riot itself, I find more convergences than divergences between the white narrative and the black narrative, with the major differences being, not factual, but polemic and rhetorical. Whites and blacks agree that armed posses committed mass violence throughout Southern Phillips County; whites and blacks agree that black people were rounded up and arrested en masse, that they were shot [at] when they tried to run away or resist, and that once arrested many

were subjected to torture. The substantive difference is that the black residents of the community (and people then and now who are sympathetic to them) describe this as “mob violence,” while the people who carried out the violence describe it as “the ultimate triumph of law and the determination of constituted authority.”²³² The counter-narrative of the sharecroppers is important because it offers a critique of what “the ultimate triumph of law” tends to look like in America. But the force of this critique is severely blunted if we do not also give credence to the discourses of the perpetrators of violence, who tell us as plainly as they possibly can that their violence emerged from “constituted authority” and not from any “mob.” We need new polemics for our own time; if we carry forward the polemics of a century ago, we also carry forward a false distinction between “mob violence” and “restoring order.” This then creates a framework where the state’s norms for evaluating the legitimacy of violence become our own norms, and private violence is the only kind of violence visible *as* “violence,” while activities related to policing are normalized as mere responses to or suppressors of violence. In other words, if – usually in our eagerness to distance ourselves from them – we ignore what perpetrators of violence tell us about the violence they enact, we miss an opportunity to understand something about how state-sanctioned violence works, ideologically, legally, and materially.

I would offer that bodies of literature describing states of exception offer good reason why the line between troop violence and mob violence has proven so difficult for scholars like Wayne and Stockley to draw. Even if the entire Arkansas delta was dug up and all the sharecroppers’ bones recovered and duly accounted for (a suggestion that is sometimes mentioned but has never been acted on), this blurry line would never become clear, because this

²³² “An Orderly City,” *The Helena World*, Oct. 3, 1919, 4.

blurry line is the trademark of a state of exception, particularly in how it has developed and reproduced itself in United States culture.

The Elaine riots grew out of a quasi-legal space that allowed violence to flourish. Far from being a sudden emergency, or what the paper initially called an “ambush,” the conflict was years in the making, and grew from seeds of suspicion, surveillance, and a collaboration of official and unofficial policing techniques, techniques whose scope was greatly expanded thanks to the infusion of federal resources and attention that were justified by concerns over military readiness and national security. The rules of emergency allowed the state to incorporate the mob: civilians were deputized, provided with arms, and permitted to function as semi-autonomous military squads. Simultaneously, the terms of emergency allowed the state itself to behave like a mob: the rules of engagement not only allowed but required and encouraged maximum force to ensure prompt domination. The domination sought by military forces is a kind of domination that is only possible if the use of force is cruel and capricious – if it is, in effect, terrifying to those who are its targets. The editor of the *Helena World* summed up this strategy with concision: “The troops, 500 strong, are equipped with rifles and machine guns and the effect on the turbulent negroes of the southern part of the county is expected to be pacific.”²³³

Although it is never articulated as such, there is some ideal vision of state violence, either unconscious or simply untheorized, that lingers in the subtext of scholarship on Elaine. Scholars, journalists, legal analysts, and other commentators on the riots aspire for some exercise of state violence that would be protective of the marginalized and productive of the conditions of justice, and upon examining what happened at Elaine, they decry the state for not living up to these ideals, or they decry the white people of the delta for corrupting the state’s power and wielding it

²³³ “Quiet Reigns After Day of Unrest,” *Helena World*, October 2, 1919.

incorrectly. The state's actions during Elaine fall short, but the possibility of a "pure state," one that is out from under the thrall of the mob, is maintained as an unspoken fantasy. Within this framework, the only critique of state violence that is readily available is one that critiques that violence for being specifically *racial*. That is, state violence itself is normalized, even idealized, but the use of that violence in an excessive, arbitrary, or capricious manner (against a group of people based on race and class, or in the service of particular racial or classed interests) is the legitimate subject of debate and criticism. What I would instead like to tease out, both in this chapter and in the larger arc of this dissertation, is that we might have this process flipped. That is, the problem of state violence is not that it is racial or even that it is used in service of capitalism. Rather, the problem of the state is that it is an organized system of violence, and the *reason* it is an organized system of violence is that organized systems of violence are necessary to enact the types of arbitrary, excessive, and capricious forms of control that are necessary to produce race and capital.²³⁴

Rather than use Elaine as a reason to support the liberalization of state violence, I would argue that the Elaine riots offer a trenchant critique of how state power in the U.S. is fundamentally organized, and gives particular insight to how states of exception are produced and reproduced.

²³⁴ Silva, *Toward a Global Idea of Race*; Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the US State* (Durham: Duke University Press Books, 2011).

CHAPTER 5

‘Mere Form of Law’: Mob Violence in *Moore v. Dempsey*

Despite plenty of variation in how the riots are now told, there are no longer two competing versions of what happened at Elaine – the alleged “Negro insurrection” is disproven, or at least disbelieved, and Elaine is described as a race riot, and sometimes even as a racial massacre. Narratives of the riot reflect widespread agreement that the PFHU was a legal and peaceable organization; that the riot was instigated by whites disrupting a peaceful gathering; and that African American deaths were far greater than the 25-person figure initially reported by the military. The ascendance of this narrative reflects the enduring success of the NAACP’s publicity and legal campaign on behalf of the Elaine sharecroppers. It also reflects the efforts of historians who, starting in the 1960s, brought the incident and associated legal briefings to light, conducted research into the activities of the PFHU, and weaved the story of the riots into modern historiographies of sharecropping, Jim Crow, and labor organizing.²³⁵

This chapter explores the ascendance of this more cohesive narrative of the riots, focusing on how the incident is now associated primarily, if not exclusively, with the concept of “mob violence.” The first section draws on some of the earliest sources on the riot, including newspaper reports published during and immediately after the riot in 1919; articles written by Walter White and Ida B. Wells, which circulated in black newspapers and were used in NAACP

²³⁵ O. A. Rogers, “The Elaine Race Riots of 1919,” *The Arkansas Historical Quarterly* 19, no. 2 (1960): 142–50; Stockley and Whyne, “Federal Troops and the Elaine Massacres;” Stockley, *Blood in Their Eyes*; Taylor, “We Have Just Begun;” Arthur Waskow, *From Race Riot to Sit-In: 1919 and the 1960s* (Doubleday, 1967); Whyne, “Low Villains and Wickedness in High Places;” Whyne, “Black Farmers in the Red Autumn;” Woodruff, *American Congo*.

fundraising and publicity campaigns while the sharecroppers' cases were under appeal; and a master's thesis published in 1927, written by Arkansas resident Bessie Ferguson, which represents the first academic treatment of the riots. Based on these materials, I suggest that the association between the Elaine riots and "mob violence," represents a complex social discourse, within which there are competing and contradictory versions of "mob" and "law" at work. From the perspective of whites in Phillips County, black sharecroppers had conspired to commit mob violence against whites, and their attempted insurrection had been put down by law. From the perspective of African Americans, a sharecroppers' union attempted to seek the protection of law, and was met instead by lawless mob violence. My goal here is not to imply that these two versions are of equal validity, but rather to identify the broader philosophical and legal issues that were at stake in the rounds of court appeals that followed the sharecroppers' convictions, as each side of the story was asserted and/or contested within the judicial system.

Next I turn to the legal material associated with the Arkansas riot cases, which include briefings filed by both defense and prosecution, as well as formal rulings issued by the Arkansas State Supreme Court and the United States Supreme Court. I examine the briefs and rulings for evidence of how the final ruling affected the multiple interpretations of "mob" that were at work in conflicts over the riot. Since the court ruled in favor of the defendants, many commentators do not acknowledge how the ruling either disputed or declared irrelevant key aspects of the appellant's case. I argue that the descriptor of "mob violence" which is now inseparable from accounts of the riots reflected courts' ambivalence toward the defense's allegations of *state* violence. The historical legacy of the court case has been understood as a major victory against mob violence, guaranteeing a fair trial with due process. I argue instead that the case's short-term

and long-term effects have been more limited and ambiguous, excising some forms of mob violence but leaving others embedded in the everyday forms and ceremonies of the legal system.

I conclude by reflecting on a range of current-day sources of information on the riots, from personal websites and wikis, to libraries, encyclopedias, and reviews of scholarship. I reflect on the ways in which the discourse of mob violence continues to shape and delimit how the riots are understood in the present. The case has been described as a blow against mob domination, but this description does not account for the complexity of the multiple mobs that acted during the Elaine riots. Which “mobs” were struck down by the ruling, and which were allowed to continue operating? What does this tell us about states of exception?

‘Every Right to Feel Proud’: White Perspectives on Law and Mob

Immediate post-riot accounts in the *Helena World* underscore the extent to which white perspectives and black perspectives diverged on the issue of “mob violence.” White leaders in Philips County were extremely satisfied with the manner in which they had handled what they perceived to be an incipient black uprising. They compared the details of their riot favorably with disturbances that had taken place in larger cities of the North and Midwest. “In view of the mob spirit prevailing in various sections of the country, Helena and Phillips county has every right to feel proud of the conduct of the people here during a period of the utmost tension,” declared the editor of *The Helena World* on October 3rd, a day after federal troops arrived to restore order.²³⁶

In spite of the fire which must burn in the breast of every citizen who knew and loved those who have been slain in the line of duty...there has been no suggestion of departing from due process of law and no threat of mob violence. Every man and woman in this county has faith in the ultimate triumph of law and in the determination of constituted authority.²³⁷

²³⁶ “An Orderly City,” *Helena World*, October 3, 1919, 4.

²³⁷ “An Orderly City,” *Helena World*, October 3, 1919, 4.

The local paper repeatedly referred to the riot as “the most serious trouble that has come upon [the town] since the Civil War,”²³⁸ a significant claim considering that Helena had been occupied by Union troops during the war, and was the site of a battle that claimed more than 200 lives and left almost 1000 wounded. But despite the extreme nature of the recent emergency, “Philips County emerged from the ordeal of fire and withstood the acid test...there has been no resort to mob violence and no attempt to seek revenge outside the pale of law,” reported the *World*. This was not necessarily surprising, considering that white Helena residents’ collective identity had long included a conscious commitment to law and order and an aversion to mob mentality. Despite its location in the lynch-prone cotton-producing Mississippi river delta region, no lynchings had ever been recorded in the county, a fact that white leaders occasionally boasted over. The political leadership of the town envisioned themselves as stewards for an up-and-coming modern city, one that eschewed the kind of violence that might dampen prosperity by scaring away labor, investors, or new business. “Review the record of other cities and communities in which similar disorders have occurred and compare,” challenged the typically boosterish newspaper editors. “We have set the good example, and thus challenge the world to set a higher mark than ours. We are back to normal and no man can criticize the method by which we have attained that condition.”²³⁹

The paper’s assertion that Philips County was “back to normal” was not quite true, however. There was still the matter of the alleged insurrection, the five white men who were dead, the hundreds of black residents who remained in police or military custody, and the possibility that the union’s so-called conspiracy was not isolated to Philips County but actually

²³⁸ “Confidence Everywhere Restored,” *Helena World*, October 5, 1919, 1; “Back to Normal,” October 5, 1919, 6; “The Law and the Mob,” *Helena World*, October 7, 1919, 4; “Work for Negro Leaders,” *Helena World*, October 9, 1919, 4; “Arkansas and the Negro,” *Helena World*, October 9, 1919, 4.

²³⁹ “Back to Normal,” *Helena World*, October 5, 1919, 6.

extended throughout the South, and perhaps even the entire nation.²⁴⁰ Arkansas Governor Charles Brough was just as impressed by Helena residents' handling of the riots as they were impressed by themselves. In private communications with county leaders, and in speeches following the affair, Brough repeatedly emphasized "the patriotism and self-restraint of the white citizens of Phillips county in refraining from mob violence," promising that the white leadership's strategy for squelching the riot "would always be a badge of honor to that county."²⁴¹ In light of their admirable conduct during the riot, Governor Brough officially designated the Committee of Seven to be in charge of the post-riot investigation, asking them to identify the root causes of the riot and the extent of the sharecroppers' plot; the Committee was also charged with gathering evidence sufficient to indict any persons who were criminally liable for what had occurred.²⁴² The Committee began its work immediately, meeting for hours each day in the Phillips County courthouse, and traveling to Elaine to interrogate prisoners who were held there.²⁴³ They took these duties seriously, ever cognizant of the trust that had been placed in them by the Governor, and by extension the law-abiding citizens of the county, something they rarely failed to mention in their public statements.

White leaders' commitment to law and order was not limited to matters pertaining directly to the riot. They instituted a wholesale social inventory of the county, and instituted new policing protocols designed to crack down on all sorts of illicit behaviors. "The work of our people is not finished," intoned an editorial published a few days after the riot concluded.

There should be a thorough house cleaning and the process should be applied first right here in Helena. The sale of whiskey, wood alcohol, denatured alcohol, and sundry other

²⁴⁰ *Helena World*, October 3 – 5, 1919.

²⁴¹ "The Negroes Best Friends," *Helena World*, October 9, 1919, 4.

²⁴² "Inward Facts about Negro Insurrection – President EM Allen of Business Men's League Issues Statement to Press," *Helena World*, October 7, 1919, 1.

²⁴³ "Committee of Seven Wants the Evidence; Persistent Effort to Determine Source of Agitation Leading to Uprising," *Helena World*, October 6, 1919, 6.

spirits continues in Helena... and a vicious element is always gathered [where these items are sold]. There are pistols in the hip-pockets of Negro boys... The old or young man who habitually carries a deadly weapon, naturally has inclination to use it on something, and that something might be another boy or man. Lacking a target, he discharges his weapon in the air and disturbs the peace of the city. Automobiles careen over the streets of the city at high speed throughout the night and it is not uncommon for the occupants to indulge in loud talk. Sometimes the program is interspersed with yells and profane language. All these things contain the potentials of trouble and disorder, and they ought to be stopped. ... It is hoped that the Committee of Seven will exert its influence to wipe out this damnable traffic and charge authorities with stopping the gambling and pistol-toting and the wild hullabaloo at night.... We have got to clean up and we have got to begin at home.²⁴⁴

Since the county remained under martial law, military commanders were able to enact some of these restrictions immediately, without having to wait for new laws or policies to be considered by any public body or voted on by citizens. Shortly after the appearance of the editorial, military officials halted the legal sale of whiskey, and personally visited grocers and druggists throughout the county to inform them they could no longer sell otherwise legal products that contained a high percentage of alcohol.²⁴⁵

Officials also took steps to prepare for and prevent future outbreaks of violence. When federal troops began to withdraw from the county, members of the Committee requested that they leave their guns and ammunition at Helena “for protection against any blacks who may still be looking for trouble.”²⁴⁶ Citing the “absolute need of providing means of preserving peace,” the Committee of Seven decided that, if the War Department was not willing to leave a portion of its own arsenal behind, the county should purchase the necessary weapons instead. They advised the county to stock at least 100 regulation army rifles and 5000 rounds of ammunition to be stored at the sheriff’s office in case of another riot. The purpose of this requisition was to

²⁴⁴ “Let’s Clean Up,” *Helena World*, October 7, 1919, 4.

²⁴⁵ “Proclamation is Addressed to Negroes: Sheriff Kitchens and the Committee issue Circular Containing Good Advice,” *Helena World*, October 8, 1919, 1.

²⁴⁶ “Helena to Have Army Equipment,” *Helena World*, October 11, 1919, 6.

prevent future outbreaks of lawlessness. In a telegram sent to the Governor's office and to officials at the War Department, the Committee of Seven announced, "Our county has never permitted mob violence to exist and we intend in the future to maintain the proud record of our past."²⁴⁷

Phillips County's white leadership was not just proud of their commitment to law and order: they saw this commitment as being central to their identity as a community. They celebrated the triumph of orderly government over the forces of anarchy that had threatened their community with violence. This was not a case of whites creating justifications or rationales for their resort to mob violence, as has sometimes been documented in connection with lynchings.²⁴⁸ Helena-area whites did not perceive themselves to have utilized mob violence in the first place.

Black Perspectives on the Riot: Reconstructing Law and Order as the Work of a Mob

Mere days before the convicted sharecroppers' execution date, lawyers from Little Rock and New York City filed an appeal with the first circuit court of Arkansas seeking to nullify the convictions on the grounds that the defendants had not been granted fair trials. This first appeal specified only that eligible black residents had not been permitted to sit on the jury – a complaint that Phillips County officials dismissed as an inconsequential technicality considering that all-white juries were and had been the norm throughout the South for several decades, and the Supreme Court had so far declined to intervene. The circuit court agreed and dismissed the appeal, and a new execution date was set for the twelve men. Defense attorneys didn't intend to give up so easily, however. They resubmitted their appeals to the Arkansas State Supreme Court, this time based on judicial error. In the rush to convict their clients (readers might recall that the

²⁴⁷ "Telegram," *Helena World*, October 11, 1919, 6.

²⁴⁸ Brundage, *Under Sentence of Death*.

jury's deliberations only lasted about five minutes for each trial) the jury ballots for one group of six defendants had not been properly filled out, thus nullifying the verdict. New trials would be needed for these six men, and a worrisome wrinkle had emerged, as now the original group of twelve union organizers was split into two, with the convictions of one group upheld while the other group's convictions were voided pending their retrial. As 1919 drew to a close, the Committee of Seven and Phillips County's white residents more broadly, had so far failed to achieve any legal closure to the incident.

In December, Walter White published a cleverly titled article in *The Nation*, "Massacring Whites in Arkansas," in which he flipped the mainstream script about the riots. Black union members had been accused of plotting to massacre whites, but White alleged it was the whites who had done most of the massacring.²⁴⁹ The article debunked the allegations of a black insurrection, explained the larger context of agricultural peonage, and revealed the horrific torture that had been employed to coerce confessions from the accused men. Shortly after the publication of White's article, early in the winter of 1920, the NAACP began to circulate a booklet on "The Arkansas Cases," whose outraged subtitle informed readers that the brutal stories of violence contained within were "not a description of conditions in Mexico or the Belgian Congo, but in the United States!"²⁵⁰ The booklet, based on interviews Ida B. Wells conducted with the imprisoned sharecroppers and their wives, was timely and effective. Its analogies to Mexico and the Belgian Congo referenced recent global conflicts, and compared Phillips County's white residents to the United States' least civilized wartime enemies – a tried and true rhetorical strategy in national campaigns against lynching and mob violence.

²⁴⁹ Walter White, "Massacring Whites in Arkansas," *The Nation*, December 6, 1919.

²⁵⁰ Ida B. Wells, *The Arkansas Riots*.

The NAACP's publicity and fundraising efforts were boosted by the work of their legal team, which simultaneously pursued two different defense strategies for the two groups of defendants respectively. For the men whose convictions had been upheld, they prepared a new appeal on new grounds, which I will return to momentarily. But for the men whose convictions had been overturned, and who were facing retrial, they took a different route, executed by Scipio Jones, an African American lawyer based in Little Rock who did most of the Arkansas-based legal work in conjunction with NAACP attorneys based on New York and Washington, DC. Jones knew that the Phillips County prosecutors were reluctant to re-try one group of defendants while the other group's convictions were still under appeal. They felt the wiser course of action was to wait and see how the U.S. Supreme Court resolved the case; if their side lost, then some of the evidence from the original trial might be ruled inadmissible and retrials for both groups of defendants might be required. On the other hand, if their side won then the original convictions would be upheld and the prosecution could quickly re-try the other half of the group, and execute all 12 men together as originally planned.

What the county failed to consider, however, was that the State of Arkansas several years earlier had passed a statute aimed at providing criminal defendants with speedier trials. If defendants were bound over for two successive terms of court, their charges would be automatically dismissed. Twice, Scipio Jones appeared in court prepared to defend the six sharecroppers facing retrial; and, twice, he offered no objection when the prosecution requested postponement.²⁵¹ When the third court term rolled around and prosecutors once again requested postponement, Jones surprised them by citing the relevant state statute and requesting the judge to dismiss all charges. The prosecution objected that the defense had agreed to their requests for

²⁵¹ Cortner, *A Mob Intent on Death*; Whitaker, *On the Laps of Gods*.

postponement, but Jones pointed out that the law didn't require defense to object. It only required that defense be ready to proceed, which Jones had diligently ensured was part of the record each time he assented to postponement. The NAACP and Scipio Jones had managed to free six of the men despite the manufactured evidence and prevailing spirit of bias against their clients. This was not accomplished by providing the defendants with a fair trial, however. On the contrary, it was accomplished by avoiding trial altogether.

The downside to this victory, at least from the NAACP's perspective, is that the process by which the men were acquitted did not set any meaningful legal precedent – not for the other six men whose appeals were pending, or for the dozens who had been convicted on lesser charges, to say nothing of future defendants who might be subjected to the same treatment the sharecroppers in Elaine had received. The NAACP could only achieve its larger goals by litigating the cases of the remaining six based on constitutional claims and the underlying merit of the cases. To this end, the legal team had used the time between appeals to interview witnesses and survivors of the riot and gather affidavits that contradicted the public story conveyed by the Committee of Seven. In addition to the testimony of black survivors and witnesses, crucially, staff attorneys located two white railroad security officers (colleagues of one of the white men who was killed). Immediately following the riots, these men left the area. They did not live in Phillips County; their railroad security jobs involved a life of travel. As outsiders, and as white men of a different class background than the elites who populated the Committee of Seven, the security guards were less invested financially, socially, and legally in the narrative the Committee had created.²⁵² They confirmed the indiscriminate killing of unarmed black civilians, cast doubt on the murder accusations that had been levelled against the

²⁵² Whyne, Jeannie M. "Low Villains and Wickedness in High Places."

black union leaders, described the torture used to coerce the defendants into confessing, and asserted that these activities had been open, widespread, and occurred with the full knowledge and participation of the Committee of Seven and military field commanders. When the time came, lawyers for the defense were prepared with new material for their appeal, which accused the Committee of Seven of inflaming public opinion and creating an atmosphere of “mob domination,” such that the jury was intimidated into returning a “mob verdict.”²⁵³ The appellant’s brief described the sharecroppers’ trial as being “but an empty ceremony carried through in apparent form of law.”²⁵⁴

The members of the Committee of Seven and leading civic organizations of Helena were grievously offended by accusations that they had encouraged mob spirit to prevail in the county. They had pointed out on more than one occasion that, unlike in the race riots in Chicago, Washington D.C., and Omaha, where white mobs engaged in unprovoked attacks against innocent black bystanders, in Elaine, “every Negro killed...met their death at the hands of civil officers, citizen posses organized and duly commissioned, or soldiers of the United States Government, all of whom were engaged in the work of suppressing outlawry and restoring order.”²⁵⁵ County officials had received letters and telegrams from the Governor of the state, and from numerous military officials, praising the manner in which they conducted themselves. Where did the NAACP get the audacity to compare the methodical deliberations of the Committee of Seven to the hysterical behavior of a lawless mob? It’s probably clear to most readers in the 21st century who was right and who was wrong in this case, but in 1919, many white residents of Phillips County were convinced they were the ones being mobbed. They had

²⁵³ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923)

²⁵⁴ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923)

²⁵⁵ “Race Riots,” *Helena World*, October 11, 1919, 4.

been threatened by some sort of uprising, and they made careful and diligent use of legal channels to put down that uprising. Now they were accused of evincing a “mob spirit” and the men who were responsible for James Tappan and Clinton Lee’s deaths might be released on what they perceived to be legal technicalities.

The Arkansas State Supreme Court, however, found no evidence to corroborate defense claims of mob domination. “The trials were had according to law,” explained the justices:

The jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdict returned. We cannot therefore in the face of this assume that the trial was an empty ceremony conducted for the purpose only of appearing to comply with the requirements of law when they were not in fact being complied with.”²⁵⁶

Normally that would have been the end of it – indeed, the Governor of Arkansas signed new death warrants for the men, and Phillips County began to make arrangements for their burial. But the defense secured a writ of habeas corpus before a Chancery judge, once again halting the executions at the last minute. The Attorney General of Arkansas gave his opinion that the Chancery court had overstepped its jurisdiction, but due to the conflicting legal writs, the case would now proceed to the U.S. Supreme Court.

Arguments Before the Supreme Court

The stakes in the Arkansas Riot Cases were exceptionally high. In the words of Scipio Jones and Moorfield Storey, who authored briefs on behalf of the six co-defendants whose appeals eventually continued all the way to the U.S. Supreme Court, “The evidence on which [the sharecroppers] were convicted was manufactured, the witnesses were beaten and terrorized, and the record of the whole case shows what, if consummated, is only judicial murder.”²⁵⁷ But

²⁵⁶ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

²⁵⁷ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

the stakes extended even beyond something so grave as judicial murder, for the trial of the sharecroppers was not only about their right to due process when accused of crime, it was also more broadly about the criminalization of black people's social and economic mobility. In an unusually emotional passage, Storey and Jones pleaded with the justices to understand the gravity of what had happened in Arkansas, and what it would mean if the sharecroppers were allowed to be legally executed:

We have distinct evidence that all Negroes at that time were in danger of their lives, and that two or three hundred men were killed. What would be expected of human beings in circumstances like that? Can we ask that they lie down and be killed without any attempt to assemble for their own protection?²⁵⁸

The defense lawyers making their appeal to the Supreme Court were not only defending these six black sharecroppers against charges of murder. More broadly, they were asking for recognition of their clients' humanity.

This appeal on behalf of black humanity began with the most basic of rights – the right *not* to be made to “lie down and be killed.” But the brief as a whole touched on other rights as well. The first major section of the appellant brief, titled “The Origin of the Trouble,” is comprised of a thorough overview of the sharecropping system and the suffering of black agricultural laborers within it, with specific details from the lives of farmers in Phillips County. The lawyers recounted on behalf of their clients how sharecropping had “kept them down, poverty stricken and effectually under [the white planters’] control,” and called it an “oppressive and ruinous system.” They went on to describe their purpose in forming a union, the attack that occurred on their meeting at the Hoop Spur church, the formation of white posses who hunted and killed hundreds of innocent black residents of the area, and the torture rooms created by the Committee of Seven to manufacture evidence of the alleged “insurrection.” In fact, one must

²⁵⁸ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

read six or seven pages deep into the appellants' brief before one even arrives at the gross injustices that attended the actual trials being appealed.

The issue of peonage was so central to the NAACP's decision to pursue the case, they often discussed the trials as a referendum on the status of black agricultural laborers in the South, and a number of black news outlets shared this perspective. The NAACP's annual report for 1922, for example, widely re-printed in black and progressive papers, referred to its work on the cases as "Defense of the Arkansas Peonage Victims," and included its update on the case alongside their related work under the broader category of "The Fight Against Peonage." Likely co-authored by a number of staff and board members, the annual report stated that

[T]he fight has been conducted not only to right a grievous wrong done to these colored farmers. It is hoped as well, by taking their cases before the highest tribunal in the land to open up the entire question of peonage, which is the greatest economic handicap and source of much of the brutal exploitation under which the colored man suffers in the cotton-raising communities of the U.S.²⁵⁹

Other papers that reported on the case also stressed the occupational status of the defendants, using descriptors like "our farmers," "colored farmers," or "Negro peons."²⁶⁰ Through this case, the NAACP sought to criminalize whites' use of legalized, state violence, arguing that the Committee of Seven's actions were actually a form of "mob violence," which reinforced the economic exploitation of black communities as a whole.

The injustices of the trial – and the fact that there had been a trial at all – made the Elaine riots a perfect test case for the larger goal of "opening up the entire question of peonage." The sharecroppers who were accused of murder were appointed counsel who made little substantive effort to defend them; their trials lasted for less than 45 minutes and verdicts were returned in

²⁵⁹ "American Nation Aroused to Lynching Danger Says NAACP Report for Year 1922; Arkansas Riot Victims' Case Carried," *The Appeal*, January 6, 1923, 2.

²⁶⁰ This is in contrast to typical news accounts of lynching or mob violence, which would usually focus on other aspects of the victim's identity, for example "Accused Murderer Lynched" or "Georgia Negro Lynched."

approximately five minutes. Members of the posses who had only days ago been killing black people in the canebreaks were allowed to serve on the jury, as were members of the Committee of Seven, and the evidence presented at trial was the product of horrible acts of torture. Even with the brutal manufacture of evidence, what evidence existed was still insufficient to sustain a guilty verdict, argued the defense. At most, the prosecution proved that the defendants might have been present when the shots that killed Clinton Lee were fired. Were it not for the extreme prejudice existing against their clients, counsel for the defense argued that no reasonable jury would have returned guilty verdicts for first-degree murder.²⁶¹

Egregious though these legal errors might have been, the overall composition of the appellants brief indicates that lawyers for the defense saw the procedural problems of the case as merely the tip of the iceberg. Their clients were not just on trial for murder, they were on trial because they had attempted to organize a union of sharecroppers. The case was about their clients' right to peaceably assemble, their right to petition to address their grievances, their right to the protection of law, and their right to reap the fruits of their own labor. The case was also about their clients' right to defend these rights, with violence if necessary, even against attacks carried out under cover of law. Their clients had been charged with murder as part of a systematic effort to suppress all those other rights, and so the stakes of the case went far beyond the need to ensure a "fair trial." The problems of the trial were not problems of due process or minor errors in the application of law. "We are not speaking of mere disorder, or mere irregularities in procedure," defense attorneys argued, "but of a case where the processes of justice were actually subverted."²⁶² The trial itself was a vehicle of unfairness and no amount of procedural tweaking could make it otherwise.

²⁶¹ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

²⁶² *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

Mobs and “Mob Spirits”

The problem facing the defense as they proceeded to make their case of mob violence was that the trials “were not mob-dominated, but were actually mob-conducted.”²⁶³ The mob acted *through* the law, not against it. The appellants’ brief claimed that “although a trial in form, [it was] only a form,” and that “the whole proceeding [was] a mask,”²⁶⁴ or as Chief Justice Holmes phrased it in his summary of their position, “an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when in fact the law was not being complied with.”²⁶⁵ But how could they prove that the law was not really the law, that the trial was not really a trial, when the Committee of Seven had successfully engaged the “form” of law by complying with its requirements? The defense had to prove mob domination in trials that were, on the face of things, “had according to law.” They devised two strategies for addressing this problem. In some sections of the brief they refer to a literal mob of “several hundred white men...assembled at or near the Court House and jail for the purpose of mobbing [the defendants],” which would have lynched the men if not for the presence of U.S. soldiers.²⁶⁶ Additionally, if the mobs outside the courtroom were not enough to convince the judges, the defense also posited a more abstract “mob spirit,” arguing that “all, Judge, jury and counsel, were dominated by the mob spirit that was universally present in court and out.”²⁶⁷

Defense lawyers had very little concrete evidence to prove the existence of literal mobs at the time of trial. Even if there had been mobs present at the time of the defendants’ arrest (which

²⁶³ Whitaker, *On the Laps of Gods*.

²⁶⁴ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

²⁶⁵ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

²⁶⁶ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

²⁶⁷ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

Phillips County maintained were not mobs, but deputized posses), the trials occurred nearly a month later when Phillips County was “back to normal.” Beginning about a week after the riots, the newspaper calmly reported updates from the Committee of Seven regarding plans to try union members and alleged ringleaders, including the intended timeline, whether or not the court would be open to the public, and other logistics related to the mass prosecution.²⁶⁸ Authorities do not appear to have felt threatened by a mob – on the contrary, their deliberations over how to manage the trials indicate they had some control over the presence of spectators and their behavior at trial. It is true that soldiers were present outside the courthouse during the trial, but it’s not clear that they were there to protect the black defendants from a lynch mob. In fact, the opposite is more probable. Although the paper frequently mentions soldiers in or around the courthouse in the days and weeks following the riots, there is no mention of hostility or conflict between the soldiers and white residents of the town or county. “The troops are quartered in the Circuit Court room in the court house and ready to respond to an emergency,” the *Helena World* reassured its readers after the riot had ended.²⁶⁹ A few days later, the paper promised that, although the majority of troops had been released from duty, a small contingent would remain stationed at the courthouse to prevent any attempt to rescue those who had been arrested. In other words, the soldiers who were stationed in the Phillips County Courthouse were there to protect *whites* against *black* mobs (the insurrectionists or their sympathizers), not the other way around.

As for the presence of “mob spirit,” a “spirit” might be even harder to prove than a literal mob. Defense described “the excitement and feeling against the defendants,” and the “unfriendly and violent spirit” that characterized their trials. But how does one concretize “excitement” and

²⁶⁸ “Another Batch of Prisoners Brought In From Elaine for Interrogation – Military Ban on Intoxicants – Circuit Court Meets Monday Next Week,” *Helena World*, October 9th, 1919, 1.

²⁶⁹ “Conditions Near Normal,” October 9, 1919, 2.

“unfriendliness” in briefs that will be read by men hundreds of miles away, months or years after the riot occurred? Defense held that the evidence against the sharecroppers was so flimsy, they couldn’t have been found guilty except for the extreme prejudice against them. But this argument was somewhat circular, using the fact of a guilty verdict as evidence of that verdict’s irrationality. And in any case, it was not the Supreme Court’s job to assess the evidence for guilt or innocence. The constitution might guarantee a trial with due process, but it does not guarantee that verdicts will be correct.²⁷⁰ The defense’s assertion of a “mob spirit” rested more on hypotheticals than it did on hard evidence. “No juryman could have voted for an acquittal and continued to live in Phillips county and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob,” they reported to the court. These claims were built on conditional assertions regarding the existence of a hypothetical juryman who wanted to acquit the sharecroppers, but couldn’t because he was intimidated by “mob spirit.” Of course, no such juryman existed. The actual jurors in the case believed the men to be guilty, and quickly and unanimously voted to convict. There is no evidence that any juror felt intimidated into returning a guilty verdict.

The defense additionally submitted into evidence a series of letters and appeals written by Helena’s civic organizations to the governor of Arkansas in November of 1920, more than a year after the first trials had been completed. As the appeals dragged on, the idea of a plea bargain had been raised, with advocates for the sharecroppers suggesting Governor Brough should step in

²⁷⁰ Roger Berkowitz, “Error-Centricity, Habeas Corpus, and the Rule of Law as the Law of Rulings,” *Louisiana Law Review* 64 (2004 2003): 477; James Gallman and James Storey, “Relief by Federal Habeas Corpus from Arkansas Conviction Challenged as Unconstitutional,” *Arkansas Law Review* 2 (1948 1947): 424; Michael J. Klarman, “The Racial Origins of Modern Criminal Procedure,” *Michigan Law Review* 99, no. 1 (2000): 48–97; Emanuel Morgolis, “Habeas Corpus: The No-Longer Great Writ,” *Dickinson Law Review* 98, no. 557 (Summer 1994); Yale Rosenberg, “Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy,” *12 Hastings Constitutional Law Quarterly* 12 (1985 1984): 597; George Thomas, “Bigotry, Jury Failures, and the Supreme Court’s Feeble Response,” Herbert Wechsler, “Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ,” *University of Colorado Law Review* 59 (1988): 167.

and pardon the defendants, or at least commute their sentences. Many white residents of Phillips County were opposed to this and wrote letters of protest. The American Legion wrote one such letter, as did Helena's chapters of the Rotary and Lion's Clubs. The following letter, authored by members of the original Committee of Seven, is a typical example:

Dear Governor:

We, the undersigned members of the Committee of Seven, appointed by you in the Elaine-Hoop Spur Insurrection in this County, earnestly urge you to let the law take its course untrammelled by Executive Clemency.

With all the provocation our people refrained from mob violence. The reason they did this was that this Committee gave our citizens their solemn promise that the law would be carried out. This Community can be made a model one so far as resorting to mob violence is concerned, but should the Governor commute any sentence of these Elaine rioters, this would be difficult, if not impossible.

We respectfully urge you to support law and order as we supported it. There were 150 Negroes legally guilty of murder in the first degree – actively present and assisting in the willful and deliberate murder of white citizens – and this Committee assisted in seeing that only leaders were brought to trial. Leniency has been already shown. We think the law itself is on trial. All of our citizens are of the opinion that the law should take its course.²⁷¹

Defense attorneys asserted that these letters were an open admission of mob domination. Their interpretation was that the defendants would have been lynched, “but for...the promise of some of said committee and other leading officials that if the mob would stay its hand they would execute those found guilty in the form of law.”²⁷² They argued that, “only conviction followed by execution would have been regarded as an equivalent for lynching.” The presumption of guilt was so strong going into the trial, defense attorneys claimed, “a fair trial would have been impossible.”

Ironically, prosecutors and white residents of Phillips County felt these letters proved their *aversion* to mob violence. They were angry, and even tempted toward lynch law, but their leaders had reminded them of their commitment to law and order and asked them to trust that

²⁷¹ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923), 71.

²⁷² *Moore et al. v. Dempsey*, 261 U.S. 86 (1923), Exhibit E.

justice could and would be had through formal prosecution in a court of law.²⁷³ Now that the courts had done their duty and the men were convicted, Phillips County's leaders wanted the law to "take its course." In his dissent to the ruling later, Justice McReynolds seemed flabbergasted that the defense had construed the letters as they did, calling the petitioner's allegations "reckless."

I find nothing in this statement which counsels lawlessness or indicates more than an honest effort by upstanding men to meet the grave situation. . . . These resolutions are not violent and certainly do not establish the theory that defendants' conviction in November, 1919 – a year before – was an empty form and utterly void.²⁷⁴

The United States Supreme Court therefore was asked to discern the presence of "mob spirit" in trials that were, on the face of things, "had according to law." But, the only concrete evidence they had of this "mob spirit" were affidavits from the defendants and the railroad security guards (which the prosecution had never had the chance to rebut in court), letters written a year later by Helena's leading civic organizations (which could be interpreted for or against the notion of mob spirit), and the defense's assertion of their client's innocence (a problem that writs of habeas corpus were not necessarily designed to resolve). Had the sharecroppers at Elaine been subjected to mob violence, and given "the mere form" of a trial? Or had the white citizens of Phillips County been subjected to an uprising and responded legally, and the issues being raised by the defense were "mere technicalities"?

²⁷³ As a more recent example, it is helpful to consider debates over treatment of suspected terrorists. Many citizens and governmental officials say that terrorists should be "brought to justice." Most people who say this probably mean that alleged terrorists should be tried, convicted, and punished according to law. They would be upset if trials led to acquittals, or overturned verdicts, based on perceived technicalities. One could take the phrase "bring someone to justice" to mean that a verdict of guilty has been pre-decided and therefore due process is lacking. However, the phrase is often used to mean that, despite overwhelming certainty of a suspect's guilt, on principle they should be held accountable within the legal system.

²⁷⁴ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923), 101.

“We Believe the Law Itself is On Trial”: Technicalities and the Form of Law

Before turning to the court’s decision, it’s worth pausing to consider an area of rhetoric where prosecution and defense diverge from each other, which involve the concepts of “mob” and “legal technicality.” From the white’s perspective, the sharecroppers’ union was the ‘mob’ and the white posses who fought them in the fields were agents of law and order. The white men who died during the riot were memorialized on a plaque honoring local veterans of World War I; this was certainly not how the perpetrators of mob violence would have been treated in Helena, which prided itself on commitment to law and order. The guilt of the sharecroppers was so evident in the minds of Phillips County’s white residents that their trial *was* in many ways a mere formality – a logical extension of the police and military force that had been necessary to stop the union in the first place. But, it was an important formality. It was by adhering to this formality that the white citizens of Phillips county distinguished themselves from a mob. It was the Committee of Seven’s utilization of the forms and ceremonies of law that made the sharecroppers’ execution a somber action of the state, as opposed to the frenzied ‘lawless’ execution they certainly would have suffered if town officials allowed them to be executed informally by white posses. From the white perspective, defense attorneys were taking advantage of Phillips County’s commitment to law and order. The defense was picking over the case, finding any mistake they could, throwing every argument that might possibly work at any judge they could get to hear their case.

For their part, the defense’s legal narrative relied on a very different understanding of “mob” and “legal technicality.” The Committee of Seven had acted like a mob – they had spied, broken up a peaceful meeting, and systematically attacked the entire black population of the southeast portion of the county. Then they had tortured pre-selected defendants into false

confessions of murder for the purposes of a sham trial. From the defense’s point of view, the trial itself was a “legal technicality” that concealed and legitimized the Committee of Seven’s mob-like behavior. They made multiple appeals, on every conceivable grounds, before any judge that would hear them, because, as they put it, “we are not speaking...of mere irregularities in procedure, but of a case where the processes of justice are actually subverted.”²⁷⁵ They did not see their defense strategy as based on “technicalities;” rather, they saw the original trial as a “false ceremony,” whose inauthenticity must be revealed by any means necessary. “It is our duty,” asserted defense counsel, “to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death.”²⁷⁶

The chart below (Table 1) delineates the competing versions of “mob” that went before the Court:

²⁷⁵ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923), 35.

²⁷⁶ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923), 35.

Table 1: Black and White perspectives on the riot and trial.

| | White Perspective | Black Perspective | |
|--|---|--|---|
| The Sharecropping System | Status-quo economic system, to challenge it is akin to political insurrection and treason | A “ruinous and oppressive” system held in place by legalized as well as mob violence | |
| Progressive Farmers and Household Union | A “super criminal” organization, planning a violent insurrection | A legal union pursuing civil court actions | |
| The American Legion | Patriotic combat veterans, with military training and discipline - well-equipped to put down an insurrection | Leaders of the mob – instigated rioting the morning after shoot-out at Hoop Spur | |
| The Committee of Seven | Civic leaders appointed by the Governor to investigate the riots | Created mob spirit – oversaw torture of defendants, manufactured evidence, decided verdict in advance of the trial | |
| Federal Troops | Military force enlisted for aid, proper channels were used and protocol for domestic disturbance was followed. | Troops offered safety from posses led by the Legion and outsiders | Troops killed unarmed people, arrested en masse, participated in torture of defendants. |
| Mississippians/Outsiders | Fellow concerned citizens who came to the aid of their neighbors | Mobs from other parts, worked with local mobs | |
| Overall | This was an example of whites using all lawful means to put down an insurrection, then bringing the leaders of the insurrection to justice in a court of law. | The entire incident from start to finish was the work of white mobs. From the shoot-out at Hoop Spur, to the next-day’s American Legion posses and the other mobs that followed, and all aspects of the Committee of Seven’s investigation up to and including the trial & conviction. | |

The Construction of the Mob and the Narrowing of the Law

From the outset of its decision, the court rejected or simply ignored most aspects of the defense's briefs. Justice Holmes began his response to the appellants brief by clarifying that the court was "not affirming the facts to be stated," but instead viewed the defendants' testimonies as "only what we must take them to be." In other words, since the affidavits were legally gathered, notarized, and entered into the record without challenge from the prosecution, the court was forced to "take" these facts, but in light of the prosecution's objections, the justices refused to "affirm" them. By taking facts but not affirming them, Holmes on behalf of the Court slowly whittled away at the defendants' arguments, defeating them not through legal argumentation, but simply by rendering them superfluous:

The petitioners say that [Clinton Lee] must have been killed by other whites, but that we leave on one side, as what we have to deal with is not the petitioners' innocence or guilt but solely the question of whether their constitutional rights have been preserved. They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial.²⁷⁷

Holmes, speaking for the majority, accepted the form of the sharecroppers' testimony, but 'leaves on one side' or 'passes by' the substantive meaning of that testimony. But by passing by this testimony, he arrives at a very narrow legal judgment, namely, that the *Moore v. Dempsey* case spoke "solely [to] the question of whether their constitutional rights have been preserved" while everything else about the riots – and the circumstances leading up to them – was deemed "not directly bearing upon the trial." So, the problem facing the black defendants was not that the majority of justices found their testimony legally insufficient. Instead, the problem was that the Court did not find their testimony legally *relevant*. These limitations set the stage for Phillips

²⁷⁷ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923), 88.

County officials to continue to use legal procedures to extend their punishment of the sharecroppers, and evade legal accountability for their own resort to violence.

When faced with explaining the sharecroppers' testimony to the Supreme Court, Phillips County prosecutors tried to back-track and say that the affidavits were fabricated – but both Chief Justice Taft and Associate Justice Oliver Wendell Holmes agreed that this was legally inadequate. The prosecution had already demurred to the content of the affidavits; if the affidavits were true (which the state had admitted by demurring) then habeas corpus was indeed appropriate and new trials with due process and untainted evidence were required. However, with all matters related to the exploitative sharecropping, police brutality, and murderous posses having been ruled irrelevant, the only issue at stake from the court's perspective was the preservation of the appellants' rights at trial. The defense counsel's message that the trial itself constituted the unfairness was "passed by." The court did not overturn the verdict, but instead referred the case back to a lower circuit court, this time with the instruction that the content of the affidavits would need to be examined for their validity.

This chart (Table 2) shows how the court's ruling addressed (or failed to address) each aspect of the "mob" described by defense attorneys.

Table 2: Court’s ruling in relation to white and black perspectives.

| | White Perspective | Black Perspective | Court’s Ruling |
|--|---|---|---|
| Sharecropping System | Status-quo economic system | A “ruinous and oppressive” system | “Not directly bearing upon the trial” |
| Progressive Farmers and Household Union | A “super criminal” organization | A legal union pursuing civil court actions | “Not directly bearing upon the trial” |
| American Legion | Patriotic combat veterans, with military training and discipline | Leaders of the mob | Not addressed. |
| Committee of Seven | Civic leaders appointed by the Governor | Leaders of the mob | “if true as alleged, they make the trial absolutely void...the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.” |
| Federal Troops | Military force enlisted for aid, proper channels were used | Troops offered safety from posses but also killed unarmed people, and tortured detainees. | Only mentioned as being there to prevent mob violence – no mention of role in riot and interrogation. |
| Mississippians/ Outsiders | Fellow concerned citizens | Mobs from other parts | Not addressed. |
| Overall | This was an example of whites using all lawful means to put down an insurrection, then bringing the leaders of the insurrection to justice in a court of law. | The entire incident from start to finish was the work of white mobs, including the Committee of Seven’s investigation up to and including the trial & conviction. | Everything related to the union, the attack on the church, and the riot was ruled irrelevant to the case. A lower court should review the evidence and determine if a new trial is required. |

When the court’s ruling is broken down in this way, the limitations of the verdict are striking.

The court only addresses one portion of the defense counsel’s appeal, ruling every other aspect irrelevant. The portion where the court does rule in favor of the defense is conditional: “if true” then the trial is void, and so a new judge “should find whether the alleged facts are true.” Not only did the court refuse to affirm the facts as alleged by defense counsel, their ruling also left

open the possibility that even if the facts were proven, the convictions might still be valid if they could “be explained so far as to leave the state proceedings undisturbed.”²⁷⁸ In other words, the Phillips County prosecutors would receive a second chance to argue against the affidavits, and a fifth chance to re-prosecute the share-croppers with whatever evidence they could gather “legally.”

That is what is now referred to as the *Moore v. Dempsey* decision. It is important to note that the decision, in terms of the practical reality of the situation, did not force the Phillips County court system to provide the defendants with due process, nor did it overturn their convictions, nor did it “set them free” as is often proclaimed in shorter summaries of the verdict. The court instead proposed that the men be put on trial again. This limited proposal was not even mandated; indeed, a new trial never took place. At this point, Phillips County prosecutors had not actually lost at all – they had merely suffered a setback with the Supreme Court. Given that they had so successfully maintained the myth of the insurrection up to this point, it seems that if they had closed ranks they could easily have discredited the testimonies of two working class white men, employed as thugs by the railroad company, and a handful of black sharecroppers who were already stigmatized by suspicions of Bolshevik influence and anti-white violence. Both Cortner and Whitaker document that following their defection, both of the two white security guards had been fired from their jobs, one had been arrested on trumped up charges and held in jail for several weeks, and both had eventually been forced to leave the state due to threats against their life. Although the men were willing to sign affidavits about what they witnessed, there is no indication they would have been willing to actually return to Arkansas and testify in open court, let alone that their testimony would have been believed.²⁷⁹ Surely, after the

²⁷⁸ *Moore et al. v. Dempsey*, 261 U.S. 86 (1923).

²⁷⁹ Whitaker, *On the Laps of Gods*, 298.

investment of so much time and energy, and the humiliating mistake that had resulted in the release of the other half of the defendants on a technicality, the members of the Committee of Seven and the County prosecutor sincerely *wanted* to see the remaining defendants executed. Yet, Phillips County prosecutors did *not* proceed with the case. Instead, after a series of closed door meetings between Scipio Jones, members of the Committee of Seven, and the prosecuting attorney, the decision was made to drop the charges of murder, have the six men plead to lesser charges, and then to have their sentences commuted by the governor so that they would soon be released from prison. Not only that, all the men who were already in prison on felony convictions would be released through either sentence commutations or indefinite furloughs.

Why would the Committee of Seven and the Phillips County prosecutors have made this decision? The compromise they reached is unfavorable to them in every respect, and completely contrary to the desires of their own constituents. One is left thinking that Scipio Jones is the one who had leverage over the white elite, rather than the other way around, despite all appearances to the contrary. Whitaker interprets the decision this way: first, allowing the accusations contained in the writ of habeas corpus to be the subject of trial in a federal court would cause the affidavits to become widespread public knowledge – affidavits that told “of a massacre of blacks and of judicial proceedings of the most grotesque sort.”²⁸⁰ Whitaker supposes that in the delicate out-of-court negotiations that followed the incident, Scipio Jones asked members of the Committee of Seven to consider, “Did the state – and the Helena planters – really want a trial to be held in federal court that would focus on whether the initial trials had been grossly *unfair*? Did they want a re-airing of testimony that the sharecroppers had been whipped and tortured to testify falsely?”²⁸¹

²⁸⁰ Whitaker, *On the Laps of Gods*, 266.

²⁸¹ Whitaker, *On the Laps of Gods*, 300.

Griff Stockley's description of what he believed to be a cover-up jointly undertaken by federal troops and the Committee of Seven touches on similar themes of collusion and secrecy. He argues that, "If one accepts the evidence that a massacre by the military and white mobs took place, then the actions of the principals afterward take on an entirely different meaning and character."²⁸² Stockley notes that, "both the military and the white power structure in Phillips County (including Governor Brough) would make much of the argument that a massacre by blacks was averted by the quick response of the military."²⁸³ But after the affidavits from the white railroad agents materialized, this argument seemed to crumble. Stockley concludes:

Since the cases involving these particular affidavits never went to trial and thus were never tested in court, questions will always remain about the veracity and accuracy of the assertions in them; however, the fact that the prosecution went to such lengths to discredit [the men who wrote the affidavits] and then settled the cases without additional trial suggests the fear their prospective testimony engendered in the white power structure of Phillips County.²⁸⁴

"*Questions will always remain*" about the veracity and accuracy of assertions that the mob, the Committee of Seven, and the military jointly perpetrated a massacre, jointly ran a number of torture chambers, and jointly covered up evidence that there had been no insurrection to begin with that might justify this extreme level of violent repression. Questions will *always remain* about these assertions, a lack of resolution that opened the door for ongoing violence and exploitation in Arkansas and elsewhere. To this day there has never been a reconciliation of a basic factual narrative of what occurred in Elaine, let alone any accountability or reparations for the extensive violence that is likely part of that story.

Moore v. Dempsey was not able to touch, let alone undo, the effects of the riots for individual survivors, or for Phillips County's black residents as a whole. Upon their release from

²⁸² Stockley, *Blood in Their Eyes*, 35.

²⁸³ Stockley, *Blood in Their Eyes*, 44.

²⁸⁴ Stockley, *Blood in Their Eyes*, 45.

prison, the freed men became exiles from their former homes in Arkansas. The collective property losses of just those twelve accused union leaders totaled almost \$90,000 (in 2013, this would be more than \$1 million), and that figure does not include the losses incurred by the 79 individuals who were given penitentiary sentences, or to the hundreds of other men and women who were detained, injured, and released only upon their promise to work at conditions set by their employers.²⁸⁵ The union was broken, its leaders killed or scattered. The courts refused to intervene until the prosecutors made a mistake that the judges could not easily ignore. The Supreme Court required that this mistake be corrected, but they did it in a way that left a glaring escape hatch for those who were actually responsible for the violence to avoid detection or punishment. The suppression of what really occurred was so successful that it would be more than 40 years before historians would vindicate the NAACP and the black sharecroppers of the county; of course, by then another two generations of hyper exploitation and the transfer of wealth out of the black community had been accomplished. To this day, more than 60% of the residents of Phillips County are African American, and nearly 40% of them live below the poverty line.²⁸⁶

Perception of the Case as a Victory

The corrective role of the judicial branch, especially at the federal level, has tended to weaken the tenor of critique found in commentary on the Elaine riots. Scholars of the Elaine massacre have turned to the *Moore v. Dempsey* decision as evidence that what happened in

²⁸⁵ J. S. Waterman and E. E. Overton, "The Aftermath of *Moore v. Dempsey*," *St. Louis Law Review* 18 (1932/1933): 117; Ida B. Wells, *The Arkansas Riots*. Waterman and Overton describe the effect of the decision on the defendants and their families. Wells notes the specific financial losses suffered by each farmer's household. Financial calculation is estimated based on figures provided by the Bureau of Labor Statistics' "CPI Inflation Calculator" (http://www.bls.gov/data/inflation_calculator.htm).

²⁸⁶ "Poverty Statistics by County: Phillips County, Arkansas," *The United States Census Bureau*, 2010.

Arkansas was an *abuse* of state power, rather than an *expression* of state power. Examinations of the riot often conclude on an uplifting note: the riots demonstrate how the yokes of legitimate government can be overwhelmed by the spirit of the mob, but the subsequent verdict in *Moore v. Dempsey* demonstrates how the rule of law can exorcise the mob spirit and restore legitimacy to governing institutions. The Encyclopedia of the American Constitution and the Encyclopedia of Race and Crime both call *Moore v. Dempsey* a “landmark decision,” for its role in the expansion of habeas corpus and the nationalization of the 14th amendment. Monographs that examine the decision, such as Cortner’s *A Mob Intent on Death*, Whitaker’s *In the Laps of Gods*, and Stockley’s *Blood in Their Eyes*, all highlight the redemptive nature of the Supreme Court verdict. It is a case that is said to have helped cement the nationalization of the fourteenth amendment, and to have struck a blow against the power of racist mob violence. Jeannie Whayne, however, in a review of scholarship on the riots, suggests that such accounts “[do not] fully unpack the implications of the Moore decision by taking the reader through the cases that followed, which is unfortunate given the emphasis [placed] on its precedent-changing nature.”²⁸⁷ In other words, while histories of the Elaine riots tend to describe Moore as a victory of lasting consequence, they rarely support this claim with evidence of the case’s long-term impact.

This may be because such evidence is sparse. Michael Klarman, a legal historian who specializes in issues of race and the Supreme Court, describes the court’s decisions during the Progressive era as “minimalist constitutional interpretations – the very least that a straight-faced commitment to constitutionalism entailed.”²⁸⁸ Another legal scholar, George Thomas, offers

²⁸⁷ Whayne, “Black Farmers in the Red Autumn,” 335.

²⁸⁸ Gabriel J. Chin and Randy Wagner, “The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty,” *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, April 14, 2011); Klarman, “The Racial Origins of Modern Criminal Procedure,” 886; I put aside Klarman’s larger argument that such Supreme Court decisions represent a “counter-majoritarian” difficulty that then inspired social backlash. In my reading, the

Moore as an example of a “feeble response” by the Supreme Court: “the intervention provided a partial remedy to the worst kind of abuses, but really only sent a message to the authorities to be more discreet when forcing black suspects to confess.”²⁸⁹ Thomas’ concluded that “The only clear message [to state courts] is that the trial must be, in form, what trials look like.”²⁹⁰ Indeed, some legal scholars have even concluded that the Court was not obligated to intervene at all, and that the decision could have gone either way.²⁹¹ Robert Whitaker reasons that the progressive justices on the court were so moved by the sharecroppers’ testimony of suffering, they found a way to do so even though they could just as easily have declared the trials valid.²⁹² But this would seem to undermine the notion that the case strengthened the constitution and the rule of law, for it suggests the court acted out of benevolence – not legal duty – and future courts, lacking such benevolence, might be free to rule otherwise.

It might seem unwise, or just petty, to critique a ruling for its benevolence, or to critique justices of the court for trying to reach beyond these minimalist interpretations during a period that has been described as the “nadir” of American black-white race relations. As I have worked on this chapter, the most consistent critique I’ve received is that the court did what it was legally able to do, and perhaps even more than it was legally able to do. What were the justices supposed

problem is not that these decisions were counter-majoritarian but that they upheld “tyranny of the minority” as explained by Chin.

²⁸⁹ Thomas, “Bigotry, Jury Failures, and the Supreme Court’s Feeble Response,” 947.

²⁹⁰ Thomas, “Bigotry, Jury Failures, and the Supreme Court’s Feeble Response,” 956.

²⁹¹ Berkowitz, “Error-Centricity, Habeas Corpus, and the Rule of Law as the Law of Rulings;” Paul Butler, “One Hundred Years of Race and Crime,” *Journal of Criminal Law and Criminology* 100, no. 3 (January 1, 2010): 1043; Holland Brooks, “Race and Ambivalent Criminal Procedure Remedies,” *Gonzaga Law Review* 47, no. 341 (2011); Gallman and Storey, “Relief by Federal Habeas Corpus from Arkansas Conviction Challenged as Unconstitutional;” Randall Kennedy, “The State, Criminal Law, and Racial Discrimination: A Comment,” *Harvard Law Review*, Symposium: Changing Images of the State, 107, no. 1255 (1994); Charles J. Ogletree, Austin. Sarat, and Inc. ebrary, *When Law Fails Making Sense of Miscarriages of Justice* (New York: New York University Press, 2009); Thomas, “Bigotry, Jury Failures, and the Supreme Court’s Feeble Response;” Whitaker, *On the Laps of Gods*.

²⁹² Cortner, *A Mob Intent on Death*; Whitaker, *On the Laps of Gods*.

to do? They could not have ruled on the validity of the sharecropping system as a whole. They could not have forced a state or federal court to prosecute members of the Committee of Seven for misconduct. They could not have awarded the sharecroppers “reparations” for what was lost during the riots. I agree with this feedback. Neither the constitution nor legal precedent would have allowed the Court to reach a decision that represented justice for the defendants in the *Moore* case.

The legal scholars I quoted earlier agree as well. Despite their use of terms like “feeble” and “minimalist,” Klarman and Thomas do not suggest the court could have or should have decided differently than they did. Instead, Klarman suggests that the court was an obstacle to outright constitutional nullification at a time when substantive justice was impossible to achieve:

In an era in which the South politically could get away with lynching, massive black disfranchisement, the formalization of segregation, and the reenactment of statutory codes for coercing black labor, the Court stood as a barrier to the adoption of schemes that came too near to formal nullification of the Constitution.²⁹³

Despite the court’s willingness to go against popular opinion, in the larger context of extreme social and political inequality, Klarman concludes that, “in terms of concrete consequences, as opposed to symbolism, the Court's rulings made almost no difference in the lives of African-Americans.”²⁹⁴ For his part, Thomas does not conclude that the courts could have decided differently; their feeble decisions were legally sound, or at least legally reasonable. Instead, he concludes that an entirely new federal appeals apparatus is necessary, which would be devoted to reviewing substantive claims of innocence, not mere legal error. In this way, defendants who are railroaded by community passion, over-zealous prosecution, and/or jury bigotry, could pursue an appeal no matter how diligently the “form of law” was followed during their trial.

²⁹³ Klarman, “The Racial Origins of Modern Criminal Procedure;” 945.

²⁹⁴ Klarman, “The Racial Origins of Modern Criminal Procedure;” 897.

My own concern in this chapter is not with issuing a personal critique against the justices, nor with issuing a legal critique of the ruling. For me, the fact that the legal system *could not*, legally or practically, reach a fair or just decision is what merits attention – not what the decision “should have been,” but what it “could not have been,” and why. Such a profound failure demands more scrutiny than what is offered by either the idealism of Whitaker or the “hopelessness” of Klarman.²⁹⁵

Form vs. Substance – Back to the Mob

The *Moore v. Dempsey* decision has been described as a redemptive decision that helped re-make the nation by federalizing the 14th Amendment; but, it has also been described as a minimalist interpretation of the constitution that lacked any real means of enforcement. Both interpretations revolve around a concern for form versus substance. Those who praise the Moore decision appreciate that it prevented the Committee of Seven from carrying out the work of a lynch mob under the guise of legal formality. Those who critique the decision point out that it elevated primarily the procedural aspects of legal formality and failed to touch upon the substantive, foundational issues of justice that were at stake. Both of these interpretations, however, are affected when one considers the complex construction of “mob” and “mob spirit” that was central to defense counsel’s strategy. In the defense’s account, the “form” of law refers to legal ceremonies enacted by the mob to cover up their flaunting of its “substance.” For their part, the prosecutors did not try to claim that a mob-dominated trial would be legitimate – they

²⁹⁵ David Garrow, “Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*,” *Virginia Law Review* 80, no. 1 (February 1994): 151–60. Garrow calls Klarman’s analysis “hopelessly hollow.” Klarman argues that modern historians have been over-invested in the hope offered by Supreme Court decisions, whose importance lays more in their ‘symbolic’ role, that is, their ability to act as fundraising and publicity vehicles for larger social movements.

claimed that there was no mob in the first place, and that the law had been carried out in both substance and form. In response, the Supreme Court's ruling held that if the defense's allegations of a "mob" were true, the original proceedings were void; however, if the prosecution could explain what happened "so far as to leave the state proceedings undisturbed," the sharecroppers could still be re-tried and convicted.

This is a small but crucial difference. The defense's argument was that the state's legitimate proceedings *were* the work of a mob; the two were so intertwined as to be inseparable, and therefore the state had ceded its claim to legitimacy. The court's response, however, posed the mob and the state as a dichotomy, and asked a lower court to determine if the mob's influence could be sufficiently disentangled so as to "leave the state's proceedings undisturbed." Defense counsel's careful, strategic, rhetorical construction of "mob" and "mob spirit" lost most of its nuance in the hands of the Court. The defense wanted to use the case to show how the entire political economy of the south was a form of legalized 'mob' violence, fueled by bigotry and prejudice that defense said amounted to a "prevailing mob spirit." The court's ruling, however, narrowed the defense's construction of mob and "mob spirit" down to the most literal interpretation – an actual mob, vicious and threatening, that had unduly influenced the outcome of a legitimate state proceeding – and thus their ruling was based on a quite different understanding of "mob" than what the defense asserted.

In light of this, the current-day disagreements over whether *Moore* was "redemptive" or "minimalist" miss the point, because both viewpoints are based on the court's interpretation of mob violence. The court's interpretation of mob violence, however, was a very narrow version of what the defense meant by mob violence. And the defense's decision to call what occurred "mob violence" was, in the first place, a rhetorical strategy for challenging state violence. The verdict

is seen as redemptive by those who feel it was a concrete step of progress toward the goal of a fair trial. The verdict is seen as minimalist by those who feel it did not go far enough toward the goal of a fair trial. But the defense did not want a “fair trial” for their clients. They wanted to prove that a fair trial could not be had within the larger political and economic context of white supremacy.

These different understandings of mob become all the more significant when one considers how the court’s paring down of “mob” manifests in popular memory of the riots. Consider the following descriptions, taken from a variety of semi-authoritative sources that enjoy wide public circulation (as opposed to the more nuanced descriptions one might find in academic or law review journals):

The riot was an uprising which ensued after a gathering of African-American men, women, and children were attacked by the Ku Klux Klan at their church in Hoop Spur, Arkansas. In the days following the attack, fifty to sixty African-Americans were killed while attempting to defend themselves from their attackers.²⁹⁶

Approximately 100 African-American farmers, led by Robert L. Hill, the founder of the Progressive Farmers and Household Union of America, met at a church in Hoop Spur in Phillips County, near Elaine. [...] Whites resisted such organizing by blacks, and two went to the meeting. In a conflict, guards shot one of the white men. Violence ensued in the town and county, leaving five whites and 100-200 blacks dead.²⁹⁷

A shooting incident that occurred at a meeting of the Progressive Farmers and Household Union escalated into mob violence on the part of the white people in Elaine (Phillips County) and surrounding areas. Although the exact number is unknown, estimates of the number of African Americans killed by whites range into the hundreds; five white people lost their lives.²⁹⁸

²⁹⁶ Frederick Walker, “Robert T. Kerlin Resources,” *Virginia Military Institute Archives*, November 14, 2015, http://www.vmi.edu/Archives/Records/FacultyStaff/Robert_T_Kerlin_Resources/.

²⁹⁷ “Elaine Race Riot,” *Wikipedia, the Free Encyclopedia*, October 21, 2015, https://en.wikipedia.org/w/index.php?title=Elaine_race_riot&oldid=686819195.

²⁹⁸ Grif Stockley, “Elaine Massacre,” *The Encyclopedia of Arkansas History & Culture*, June 12, 2015, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=1102>.

Almost a century later, the association between the Elaine riots and “mob violence,” is so strong, at least one account of the riot falsely claims they were instigated by the KKK. In Wikipedia’s initial summary of the riots (viewed more than 20,000 times in the last year), the instigators of the riot are described generically as “whites,” who disrupt the sharecroppers’ meeting seemingly of their own volition. The article’s first mention of ‘guards’ refers to the African American men who stood guard outside the PFHU meeting, who whites accused of firing the first shots. No mention is made until much later in the article that the whites were themselves also “guards”; one was a sheriff’s deputy, the other a private security guard for the Missouri-Pacific Railroad. The Online Encyclopedia of Arkansas gives the most thorough account, but readers who stop after the first few paragraphs will come away with the concept of “widespread mob violence on

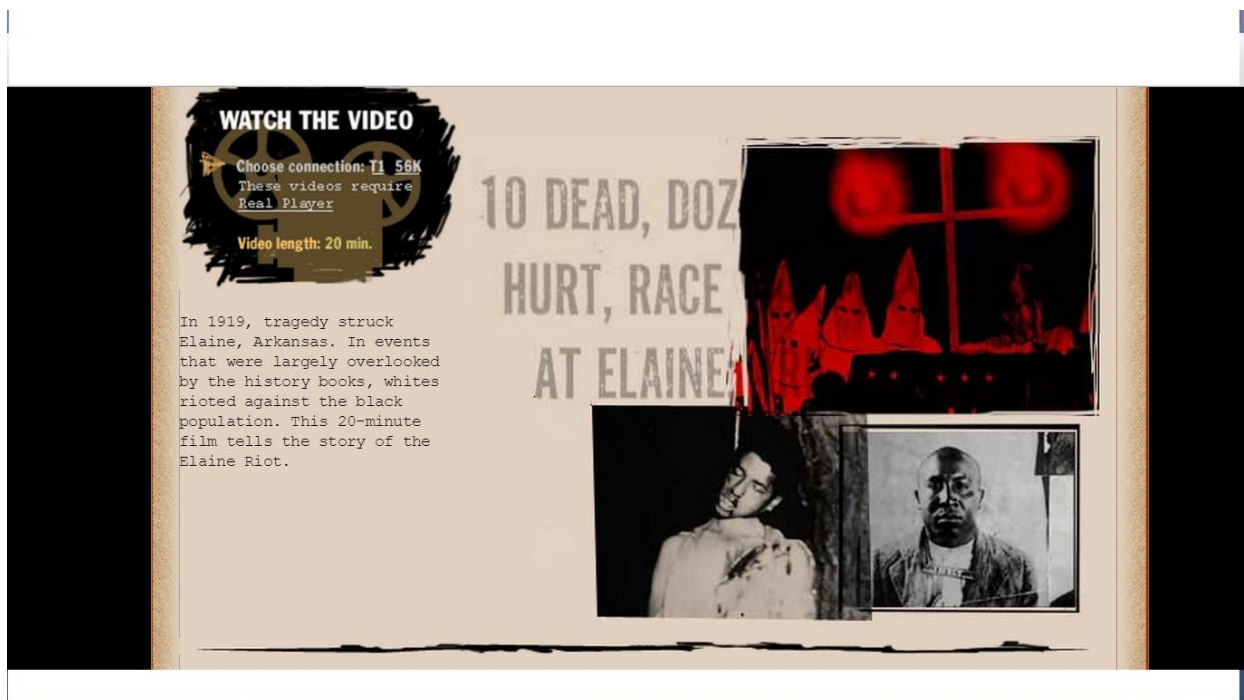


Figure 27 “The Elaine Riot: Tragedy and Triumph,” *Public Broadcasting Service*, 2002.
https://www.pbs.org/wnet/jimcrow/tools_riot.html

the part of white people,” with details of county, state, and federal law enforcement violence not

appearing until much later in the entry.²⁹⁹ The Public Broadcasting Station (PBS) produced a brief, 20-minute video about the riots, featured as part of a larger curriculum on “the rise and fall of Jim Crow.” On the organization’s website, a link to the video is positioned alongside two iconic photographs (Figure 27). One depicts robed Klansmen from an unspecified place and time, and another shows the mutilated body of Abram Smith, one of two victims of a spectacle lynching that took place in 1930, in Marion, Indiana. The film reflects current historical scholarship on the riots, but the accompanying publicity and visual presentation of the website implies a strong connection to Klan violence, when in fact none has been documented.

What these accounts have in common is that state action recedes (and even disappears), while the notion of “mob violence” is foregrounded. Over time, the Court’s interpretation of mob violence as a force external to law seems to have had more lasting reach than the defense’s more complicated notion of state-organized violence that uses the law as an extension of the mob. The court decided that mob-domination was illegitimate, but it could not take on the more complex problem of mob-conduction. As a result, the legal opinion that was issued failed to address the crux of the problem presented by Elaine – a problem that still faces Americans today. The problem at stake is not necessarily what to do when law is *corrupted* by inequality and violence (as implied by the concept of mob *domination* of the law). Rather, the problem at stake is, what can be done when the law itself acts as a *conduit* for inequality and violence? What can be done when the law, rather than being *dominated by violence*, in fact operates as the very system that *enables the violence of domination*?

²⁹⁹ Brent Riffel, “Lynching,” *The Encyclopedia of Arkansas History & Culture*, October 22, 2014, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?search=1&entryID=346>. The Elaine Riots are also referenced in the entry on lynching, underscoring that the incident is remembered as mob violence.

CHAPTER 6

Conclusion: Lynch Law All Around Us

It would be difficult today to find anyone who publicly speaks out in favor of lynching; the twentieth-century civil rights movement brought shame to the term. But, although America has mostly shed its associations with the racist, vigilante mob, what has happened to the more abstract “mob spirit” that defense counsel identified at work during the Elaine riots? And, what has happened to the lawful ungirding of lynching, which for most of its history was used as a method of law enforcement?

Utility of “the Exception” for Understanding Systemic Racial Violence in the United States

The concept of the exception helps to resolve a major paradox of systemic racial violence in U.S. history, which is the problem of how such violence has often taken place simultaneously within and outside of the law. For example, when we compare the actions of the Committee of Seven to the text or doctrine of law their behavior appears absolutely “illegal.” But when we consider how that violence was carried out, it is equally obvious that primary responsibility lies with legally constituted authority, and the enormous powers these authorities were able to summon through the ordinary workings of governance – surveillance, deputization, military activation, interrogation, prosecution, and execution. It would have been difficult, perhaps impossible, for a “mob” to squelch the sharecroppers’ union so effectively, without the material resources and legal authority conferred by all these different state powers. So many aspects of

what happened at Elaine were, at least on the face of things, “legal,” the highest court of the nation was unable to find a constitutional basis for effective intervention.

Similarly, when one reads news reports of large mobs binding jailers, breaking down prison doors, absconding with prisoners, and then gruesomely killing them, it is difficult to imagine any better description than “lawless mob violence.” But of all the different kinds of criminals that local and state governments put so many resources into apprehending during the late 19th and early 20th centuries – horse thieves, bank robbers, moonshiners – why did lynchers prove so difficult to capture, prosecute, and convict? When you then consider that the jailers were often in collusion with the mob, that prisons were left mysteriously unlocked or unguarded, and that small-town sheriffs proved conveniently unable to remember anyone’s name or description sometimes after lengthy interactions with a mob’s members and leaders, the term “lawless” seems less appropriate.

In Agamben’s words,

the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other.³⁰⁰

If lynching and mob violence are understood as “exceptional,” the ability of perpetrators to act within and outside the law is less contradictory. Sheriffs, police officers, mayors, governors, military commanders and others who have featured in this research are constituted with a form of executive sovereignty – limited though it might be in theory by checks and balances – which allow them to formally or informally declare emergency conditions. Within this state of emergency, exceptions to law are allowed. The dictates of legal procedure become secondary, and the very concept of ‘legality’ loses its force. During an emergency, necessity trumps legality,

³⁰⁰ Agamben, *State of Exception*, 23.

thus allowing things to occur ‘under cover of law’ that would, in normal times, be illegal. Courts, retroactively, can attempt to correct some wrongs that occur within these states of exception. In general however, the discourse of emergency offers sufficient legal cover to protect perpetrators in the aftermath of violence. The concept of the exception reveals that systemic violence is both legal and illegal, and this is precisely what makes it so powerful and difficult to challenge.

Conceiving of the systemic racialized violence I have described as “exceptional” has drawbacks as well. First, the term itself implies temporariness, invoking exceptions to law during times of emergency. Once the emergency is over, so too should be the exception. In Agamben’s theorization of the term, however, it is not so simple. The power to declare an exception continues to reside with sovereign powers even during times of normality. The very existence of the power to declare an exception thus influences the ‘normal’ social order, not just during a distinct crisis or emergency. The state of exception – and the violence that occurs within it – remains an immanent threat, capable of reproducing social and political boundaries even in the absence of explicit acts of violence. Nonetheless, even though Agamben acknowledges that the power of the exception persists during times of normality, the terms exception and emergency tend to invoke a phenomenon that is temporary, or at least periodic. Some ethnic studies scholars have critiqued or elaborated on Agamben’s notion of the exception by positing the concept of a “permanent state of exception,” in order to describe how racialized exceptions to law are embedded in American institutions and in constant operation. Achille Mbembe, for example, identified the plantation, the prison, and the colony as zones where permanent states of exception have been produced and maintained.³⁰¹ Native studies and postcolonial scholars have added to

³⁰¹ Achille Mbembe, “Necropolitics,” *Public Culture* 15, no. 1 (December 21, 2003): 11–40.

this list the frontier and the reservation.³⁰² Furthermore, military historians and scholars who specialize in peace and conflict studies have pointed out that the U.S. has been in a near constant state of war since its founding in the late 18th century.³⁰³ To the extent that the power of the exception is rooted in wartime powers, the absence of distinct periods of “peace” in U.S. history draws into question whether the American ‘exception’ is really an exception at all, as opposed to being a permanent feature of our political and legal infrastructure.

Another drawback of Agamben’s theorization of the exception is that it has proven very awkward to apply in the context of the American political structure, which combines principles of republicanism, federalism, populism, and liberal democracy. Indeed, the United States received minimal treatment in Agamben’s text, confined to two or three pages in chapter one, which serve to raise more questions than they answer. Agamben’s analysis is that the basis of the exception in the U.S. can be found in the national constitution, “in the dialectic between the powers of the president and those of Congress.”³⁰⁴ Which of these bodies has “supreme authority in an emergency situation”? – the constitution offers conflicting answers. Agamben then traces this contested exception through a series of presidential and congressional actions during wartime, starting with Abraham Lincoln’s suspension of habeas corpus during the Civil War. “Whether strictly legal or not,” said Lincoln, the measures were taken “under what appeared to be a popular demand and a public necessity.”³⁰⁵ According to Agamben, these decisions indicate Lincoln believed “even fundamental law could be violated if the very existence of the union and the juridical order were at stake.”³⁰⁶

³⁰² Mark Rifkin, “The Frontier as (Movable) Space of Exception,” *Settler Colonial Studies* 4, no. 2 (2014): 176–80.

³⁰³ Mary Dudziak, *War Time: An Idea, Its History, Its Consequences*, Reprint edition (Oxford University Press, 2013).

³⁰⁴ Agamben, *State of Exception*, 19

³⁰⁵ Agamben, *State of Exception*, 20

³⁰⁶ Agamben, *State of Exception*, 20.

Agamben then moves to the first world war, claiming that “during WWI President Woodrow Wilson personally assumed even broader power than those Abraham Lincoln claimed,” however Wilson repeatedly received permission from Congress (unlike Lincoln), leading Agamben to conclude that Wilson, “instead of declaring the state of exception preferred to have exceptional laws issued.”³⁰⁷ During WWI, Congress “even made it a crime to ‘willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States.’”³⁰⁸ Agamben concludes his treatment of the U.S. with a brief examination of Roosevelt’s response to the Great Depression, Eisenhower’s decision to intern people of Japanese ancestry during WWII, and George W. Bush’s strategy for prosecuting the war on terror. Agamben argues that

because the sovereign power of the president is essentially grounded in the emergency linked to a state of war, over the course of the twentieth century the metaphor of war became an integral part of the presidential political vocabulary whenever decisions considered to be of vital importance [were] being imposed.”³⁰⁹

Perhaps in part because the theory of the exception has been more frequently applied to absolute dictatorship and monarchies, Agamben locates the American exception as deriving from executive powers at the highest realms of government. For Agamben, the uniqueness of the American system lies in the fact that Congress, too, has the power to legislatively declare exceptions – and, on occasion, these powers come into conflict. Even when they do not conflict (as when Wilson and Congress were united on the need for emergency measures during WWI), they produce different *kinds* of exceptions – the exception of unilateral presidential declaration, as distinct from the issuing of “exceptional laws” by Congress.

³⁰⁷ Agamben, *State of Exception*, 21.

³⁰⁸ Agamben, *State of Exception*, 21.

³⁰⁹ Agamben, *State of Exception*, 21

What this theory of the exception does not account for, however, is that the U.S. system features a complex republican system that distributes sovereignty horizontally across multiple branches of government, *and* vertically across local, state, and federal jurisdictions. Further complicating things, the American system has significant populist elements, such that sovereignty is also vested in ‘the people’ themselves, with powers to vote, sit on juries, run for office, organize militias, and petition or protest against the government, among others. This makes it more difficult to identify precisely where ‘sovereignty’ resides, and therefore to determine who (if anyone) claims the power to unilaterally declare an exception. If one considers the exception to revolve exclusively around the suspension of habeas corpus by the president or Congress, many important elements of exceptional governance will go unaccounted for – a problem that is exacerbated further if one wants to fully understand racialized states of exception, whose permanence cannot be explained by presidential or congressional action alone.

In the case of lynching, for example, this form of violence can be tied directly to wartime powers, with Virginia’s legislature excusing the actions of Charles Lynch on the basis that they were “timely and effectual measures which, though not strictly warranted by law, were necessary on account of the danger” posed by British loyalists during the American war for independence. But in this case, the power to declare an exception did not flow from the top down, as it did in each of Agamben’s examples. Instead, the exception was first declared “on the ground,” by men like Charles Lynch who perceived themselves to be acting according to “the law of necessity.” It was only later that Lynch’s unilateral decision-making was condoned and codified by the legislature, granting retroactive legal impunity. This pattern remained a feature of lynching throughout its use in frontier areas, where ‘exceptions’ were used to create and expand the reach of state power, rather than originating in some preexisting state power defined by the

constitution. By the time Abraham Lincoln made the decision to suspend habeas corpus during the Civil War, far from being a radical departure from previous understandings of constitutional governance, Lincoln tapped into a long-standing tradition of American statecraft, governance via lynch law, which held that a different form of law held sway during wartime emergencies, and in particular within the border regions between warring parties. This may be why, in addition to referencing the relevant portions of the Constitution to defend his decision, as Agamben notes, Lincoln cited as equally important the fact that his enforcement of such wartime provisions “appeared to be a popular demand.”³¹⁰ Furthermore, lynching was held in place through other forms of bottom-up “exceptionalism,” as well. Jury nullification, for example, is not an executive power – but it played an undeniable role in the ability of lynchers to perpetrate violence with impunity.

Similarly, in the case of the Elaine riots, and other conflicts of the Red Summer, such violence was directly tied to the ability of Phillips County’s leaders to declare a state of emergency in the region. Here, the exception flowed from both the bottom-up and from the top-down. First, as noted by Agamben, President Wilson and the national Congress issued exceptional laws, creating an environment in which otherwise legal activities could be labelled and treated as illegal, particularly activities that represented any form of challenge (even mere utterances) against the status quo “American system of government.” The laws issued by Congress and signed by Wilson, on the face of things, had nothing to do with sharecropping in the South. But, by creating such broad powers of criminalization, the stage was set for pre-existing conflicts to be opportunistically transformed into issues of war and national security. Within this space of exception the mayor of Helena and members of the Committee of Seven had

³¹⁰ Agamben, *State of Exception*, 19.

a legitimate legal basis on which to surveil and criminalize the sharecroppers' union, which in turn set the stage for the violence that followed when an actual emergency (the shoot-out at the Hoop Spur Church) got underway. Emergency powers allowed the sheriff to deputize civilians en masse; allowed the Governor of Arkansas to authorize military intervention; allowed the Committee of Seven to pursue extraordinary measures in their interrogation of suspects, and etc.

Agamben is right when he notes American historians' understanding of how World War I significantly expanded executive/emergency powers. But, the power of the laws he cites (such as that which criminalized even mere criticism of the U.S. system of government) came not just from President Wilson's direct implementation of measures like the Espionage act, but also in the "mob spirit" such laws created, such that law enforcement agents at multiple levels of government could suppress the lawful activities of its citizenry without even having to charge them with specific violations related to espionage or conspiracy. It was the ways in which these laws expanded on the power of criminalization more broadly, which allowed so many local and state level leaders to declare otherwise lawful activities as the work of insurrectionists, which thus necessitated a violent response. Since sovereignty is such a centerpiece of Agamben's explanation of the exception, the diffuse forms of sovereignty found in the U.S. pose significant theoretical challenges that require further explication, far beyond the national constitution's contradictory definitions of congressional versus presidential powers. This is not to say that the notion of the exception cannot be applied to the U.S., it is only to say that Agamben's theorization of sovereign power does not sufficiently explain how states of exception are invoked and maintained in the U.S. context.

Lynching Discourses

“Law” and “lawlessness” are inadequate terms for understanding lynching. Agamben’s notion of the exception helps to explain how these categories become blurry during times of real or perceived emergency. But at the same time, the notion of the exception as originating primarily in the national constitution and the sovereignty vested in congress and the office of the president, fails to capture the complexity of the American system, in which sovereignty (and thus exceptional powers) are diffuse, overlapping, and decentralized. I propose that a more useful way of describing lynching lies in discourse, rather than legal doctrine. Despite how much lynching has changed over time, and despite the complicated forms of ‘sovereignty’ that it entails, there are at least four discourses that have sustained and invigorated the practice over time. These discourses include the notion of ‘emergency,’ but also extend to include constructions of race and crime, which were deeply imbricated in the origins of lynching and thus in the origins of American exceptionalism.

First, one of the most basic features of lynching discourse is the notion that the rule of law requires supplementation or modification in the face of emergency or crisis. Emergency discourses lay the groundwork for lynching by minimizing constitutional procedures as mere technicalities that can and should be disregarded under dire circumstances. During times of imminent danger and periods of extreme volatility, lynch law is a means to ensure a desired social or political outcome, even if it requires departing from legal norms. Rather than undermining them, this departure is claimed necessary to maintain the overarching integrity of dominant political institutions. The benefit of identifying this as a “discourse,” rather than trying to pin it down to a specific law or article of the constitution, is that “discourse” identifies the broader philosophy which undergirds the creation of legal doctrine like the constitutional

passages highlighted by Agamben. The exception in America does not originate in the Constitution's ascription of circumstances under which habeas corpus can be suspended. The reverse might be more accurate: Americans included exceptions to habeas corpus in their constitution, because the principle of the exception was already "in the air and repeatedly embodied in motion"³¹¹ through settlers' early experiences of colonial and Indian warfare, and how these wars intersected with practical obstacles to administering criminal justice in frontier zones. In other words, it is not just that exceptions resulted from the constitution; the constitution itself resulted from exceptions. It is the broader discourse of "emergency" that underlaid these exceptions. The parts of the constitution cited by Agamben are the effects of the discourse of emergency, the effects of the exception, not their cause.

A second feature of lynching discourse relates to the construction of what Anne McClintock calls "anachronistic space," that is, the process of mapping the boundaries of civilization across space and time, such that movement through physical space is imagined to also constitute movement through evolutionary time.³¹² In the symbolic universe constructed by anachronistic space, the world is filled with savage Others who do not abide by the rules of civilization. The civilized person must adapt in order to survive. Narratives of anachronistic space map out zones that are governed by an alternative legal and moral order; these zones require governance by violence. Discourses of anachronistic space work alongside discourses of emergency to establish times, places, and circumstances where the rules of law cease to exist, pockets of lawless chaos that are produced and maintained within the larger legal order. This adds to Agamben's notion of the exception by clarifying that emergency discourses, in and of themselves, are not sufficient to cause the forms of mass political violence with which Agamben

³¹¹ Nash, "Memo to Peabody."

³¹² Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (Routledge, 1995).

is concerned. President Bush's pursuit of a "War on Terror," for example, might explain why seemingly lawless practices could take place under cover of law, such as enhanced interrogation, extraordinary rendition, targeted assassination, and full-scale military invasion of sovereign nations. But, it does not explain how particular individuals or acts are labelled as terrorist in the first place, or why exceptional measures would be taken against some terrorists and not others. The notion of anachronistic space underscores that not all emergencies, nor all criminal-terrorists, rise to the threshold of threat thought to justify the invocation of emergency powers. This helps also to address the process by which "permanent" states of exception can be created, defined by boundaries of race, sex, nation, and other axes of power/difference.

A third feature of lynching discourse extends from the first two, and relates to social constructions of criminality. Lynching discourses construct criminal activity as, first, constituting a social crisis or emergency and, second, representing a form of racialized savagery. The social crisis created by crime justifies severe sanctions, while the savagery displayed by criminals marks them as irredeemable subjects who cannot be integrated to society. This third feature of lynching discourse constructs crime as not merely an undesirable behavior that requires some social/collective response, but more fundamentally as an existential threat that requires a severe and permanent solution, usually organized around the elimination of criminal bodies. Recognizing the role of criminality helps to fill in some of the gaps left by an analysis that would limit "emergencies" only to those posed by international threats, like war or invasion. Especially when you look at how the problem of "crime" intersected with the problem of "war" during the origins of lynching, the justification for the exception came from this entanglement. Lynching was justified because the consequences of crime were exaggerated in a wartime situation; simultaneously, the exigencies of war prevented the regular administration of justice,

thus creating added need for the exceptional administration of justice in the form of lynching. War as crisis; crime during war becomes a special kind of sub-crisis; exceptional measures theoretically exist to help you win a war; but in the colonial context the purpose of winning the war is to win the right to create and enforce law. So, creating and enforcing law (by lynching) is part of how the war is won and gets then built into the regular infrastructure for fighting crime.

Finally, a fourth feature of lynching discourse involves the strategic deployment of meta-languages that articulate race, culture, and nation, with sex, gender, and sexuality.³¹³ These meta-languages constitute broad norms against which figures of perversion can be produced – ultimate Others who are appropriate targets of lynch law. For example, black feminist scholars have pointed to the importance of “the myth of the black male rapist” and the “threat of social equality” in the perpetuation of Jim Crow era racial violence.³¹⁴ Scholars situated in postcolonial studies have noted how the sexualization of ‘savagery’ undergirded the forms of lynching that characterized frontier areas during colonial expansion and warfare.³¹⁵ This last feature of lynching discourse dissociates lynching from political culture, constructing violence as a natural (instinctual) response to the threats posed by perversion, savagery, and terror. This helps explain the ‘internal’ exceptions that Agamben’s work does not account for. [elaborate]

Neither empirical identifiers, nor legal doctrine, manage to capture the complexity of lynching, or of exceptional governance in the United States more broadly. Critical and

³¹³ Evelyn Brooks Higginbotham. “African-American Women’s History and the Metalanguage of Race.” *Signs* 17.2 (1992): 251–274.

³¹⁴ Angela Davis, “Rape, Racism and the Myth of the Black Rapist;” Hannah. Rosen, *Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Race in the Postemancipation South*, Gender and American Culture (Chapel Hill: University of North Carolina Press, 2009).

³¹⁵ Gail Bederman, *Manliness & Civilization*; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA: South End Press, 2005); Ann Stoler, *Race and the Education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things* (Duke University Press Books, 1995).

interpretive strategies focusing on discourse are better tools to identify practices that manifest states of exception in the U.S.

Lynching Discourses in Popular Culture

By describing lynch law through its discourses, my aim has been to make contemporary engagements with lynching more visible and resonant. We might consider, for example, the rhetoric of “modern-day lynching” that has appeared to describe disproportionate racialized police killing.

Considering how dramatically lynching has changed over time, the practice cannot be separated from the cultural narratives that accompany and justify it. Without these narratives, it is difficult even to discern lynching from other forms of violence. We might consider, for example, the predominant contemporary television genre of the police procedural, where the U.S.’s cultural inheritance of lynch law is particularly visible in the form of the renegade crime fighter who is not above breaking the law in order to enforce it (tellingly, sometimes referred to as “the cowboy cop”). Given the historical relationship between lynching, settler-colonialism, and law enforcement, what are the implications of the prominent and celebratory role this figure plays in American social imaginaries? Police procedurals and crime dramas feature a range of law enforcement agencies, with different jurisdictions, levels of authority, and investigative methods. Yet with all this diversity, each are replete with narratives that invoke the moral quandaries of lynching. Just as was the case with lynchers in the 18th and 19th centuries, the heroes of this genre are those who are able to overcome the practical challenges posed by law in the quest to apprehend criminals – preferably without crossing that murky line where, “the lynchers are no better than the lynched.” The glorification of this type of law enforcement

officer, essentially a lyncher, is part of the social context in which debates over criminal justice reform play out, including real-life incidents of police brutality, racial profiling, capital punishment, and vigilantism.

Consider the following examples, drawn from the most popular police procedurals of the last decade.³¹⁶ Representing the gold standard of such shows, NBC's *Law & Order* franchise follows the stories of detectives and district attorneys who work to put dangerous criminals behind bars. The original *Law & Order* was split equally between policing and prosecution, but in subsequent spin-offs the "law" (policing) has come to dominate, while the "order" imposed by courts has been sidelined and reduced to an advisory role. The show's characters are depicted constantly pushing the limits of protocol when it comes to searches, evidence collection, threats and intimidation of witnesses, and physical violence against people suspected of crime. Criminals are constructed as being too sophisticated to be caught by straightforward legal methods; they must be manipulated or entrapped, or simply executed outright when legal mechanisms inevitably fail. Detectives and prosecutors are especially prone toward misconduct when faced with what they consider an emergency – an imminent crime, a victim that could still be saved, or one of many permutations of the "ticking time bomb" scenario.

Two popular CBS dramas, the *Crime Scene Investigation (C.S.I.)* franchise, and *Criminal Minds*, feature the use of cutting-edge scientific investigation methods – forensics and behavioral analysis respectively. These shows draw on discourses of anachronistic space, using science to dehumanize criminals into an assemblage of fingerprints and bodily residues (on *CSI*), or to a psychological "profile" (on *Criminal Minds*). On an advertisement for *Criminal Minds*, for example, Special Agent David Rossi explains to an introductory criminology class that "we use

³¹⁶ Measured by distribution, ratings, and industry awards.

behavioral science, research, casework and training to hunt down monsters— rapists, terrorists, pedophiles, and our specialty, serial killers.”³¹⁷ The fact that these criminals are “monsters” underscores the necessity of using violent force to contain them, even if this means occasionally bending the rules or exploiting procedural loopholes. On *C.S.I.: Las Vegas*, investigator Nick Stokes is demoted at the end of season 11 after leaving his jurisdiction to pursue, and ultimately kill, a suspected serial killer. On *Criminal Minds*, FBI special agent Elle Greenway is unofficially forced off the team at the end of season two after killing a suspected serial rapist while off-duty (the official FBI inquiry rules the shooting justified). Three years later, team leader Aaron Hotchner is exonerated for murdering a serial killer who had targeted his wife. Although both series idealize rigorous scientific methods, and thus seem to distance themselves from the irrational methods of a lynch mob, their scientific emphasis does not eliminate the perceived need for lynching. Quite the contrary: the scientific emphasis legitimizes lynching, leaving the audience confident in police officers’ ability to determine the objective “truth” of who is guilty, in contrast with courts of law, where alleged criminals can take advantage of legal technicalities and due process protocols.

TNT’s *The Closer*, one of cable television’s most highly rated dramas, is implicitly based on the idea that courtroom justice – a full trial with due process – is too onerous to be effective, especially when dealing with dangerous criminals. The show features homicide detective Brenda Johnson, a skilled interrogator who has a knack for eliciting voluntary confessions, thus eliminating the need for trial and appeals. One of the *The Closer*’s most significant plot arcs involves the suspicious death of Turrell Baylor, an African American man who admitted to murdering an elderly man and his grandson in the course of a robbery, but only after receiving a

³¹⁷ “Profiling 101,” *Criminal Minds*, CBS, May 9, 2012.

guarantee of immunity for his cooperation with the police anti-gang unit. Johnson has obtained his confession, but her hands are tied by legal protocol. In a tense, under-narrated sequence at the end of season six's eighth episode, Johnson drops Baylor off at his house, and drives away resolutely as a neighborhood mob closes in on him. The implication is that she, or someone within the department, leaked Baylor's confession and then intentionally left him unprotected to meet his fate at the hands of neighborhood vigilantes. This plot arc is especially remarkable when one recalls that the vast majority of incidents during the Jim Crow "lynching era" featured precisely this sort of custodial transfer between police and mob. By the premiere of season seven, *The Closer's* main plot centered on whether or not Johnson would be the subject of a private lawsuit and department sanctions for Baylor's death, consequences that were at the top of the NAACP's wish list when it came to anti-lynching legislation. Despite these obvious parallels, the word "lynching" is never used to describe this plot arc – not by writers, fans, or media critics, nor by any of the characters in the show itself. Perhaps this is in part because we are so conditioned to associate lynching with "lawlessness," while remaining less cognizant of the ways that lynching is, and always has been, inseparable from the imposition of *law*.

These representations are significant when one considers the liminal position between lynching and law. Historically and today, lynching has involved the passive or active complicity of law enforcement agents (official *and* private), who claim to act on behalf of public safety and security. Even when their violence is excessive, disproportionate, or violates legal protocol, lynchers have enjoyed legal impunity so long as they can frame their actions within pre-existing narratives that articulate savagery and civilization with crime and punishment. The ubiquity of popular representations that almost unanimously embrace law-enforcement violence bolsters the narrative frameworks that are central to lynchers' claims of respectability. To return to the

examples I listed in the introduction (Trayvon Martin, Troy Davis, and Oscar Grant), only Oscar Grant's killer was successfully prosecuted, and this was mostly the result of strenuous protest by Oakland residents (Grant's killer was initially subject to a temporary job suspension). He served two years in prison, a seemingly mild sentence considering the mandatory minimums that sometimes place non-violent offenders behind bars for decades. Recent FOIA requests for documents pertaining to the FBI's internal investigations of officer-involved shootings revealed that 98% of such shootings, spanning the last two decades, have been deemed "justified" by the agency. In the minority of shootings that were deemed improper, the most severe penalty was a letter of censure placed in the agents' files.³¹⁸

Indeed, many of the most pressing civil rights and social justice issues of today revolve around various forms of "modern-day lynching," from mass incarceration to 'stop-and-frisk,' racial profiling, the rise in deportations and militarized violence along the U.S.-Mexico border, and the detention and torture of suspected terrorists. Critiques of these practices have some amount of mainstream currency; the *New York Times* recently called mass incarceration "a disastrous experiment that must end," for example.³¹⁹ But if there is to be a truly effective anti-lynching movement in the present, it is imperative that we look to the past for critical guidance. The imposition of new laws, or changes in how old laws are enforced, or insistence on "professionalism" among law enforcement personnel, might serve to blunt the effects of lynch law, but they will not eliminate it entirely, because there is lawlessness within the law itself.

Ironically, one answer to this paradox might lie with the reclamation of what it means "to take the law into one's own hands." If lynch law is a mechanism of settler-colonialism, then "taking the law into one's own hands" could be read as an assertion of anti-colonial sovereignty.

³¹⁸ "The F.B.I. Deemed Agents Faultless in 150 Shootings," *The New York Times*, June 18, 2013.

³¹⁹ "End Mass Incarceration Now," *The New York Times*, May 25, 2014.

Organizations pursuing “transformative justice” strategies do just this, encouraging people and communities to “take the law into their own hands,” to seek out creative means of building safety that do not necessarily rely on institutions of colonial domination, such as police and prisons.³²⁰ They are confident this will lead, not to lawlessness, but to more equitable social conditions “without the appointment of legislature, governor, judge, or hangman.” Bancroft held these systems of violence were the necessary price man [sic] must pay for his “intelligence and reason,” a phrase intended to distinguish “civilized man” from “brutes who associate in comparative harmony.” In some ways, he was right. Legislature, governor, judge, and hangman - and prison, detention center, and torture chamber – have been the price America has paid for its reason (that is, for its imposition of colonial law.) Only a thoroughly decolonized anti-lynching movement can hope to change this.

³²⁰ Incite! Women of Color Against Violence., *Color of Violence: The Incite! Anthology* (Cambridge, Mass.: South End Press, 2006); Incite! Women of Color Against Violence, “Community Accountability,” *Incite-National*, 2014, <http://incite-national.org/page/community-accountability>; Generation Five, “Transformative Justice: A Liberatory Approach to Child Sexual Abuse and Other Forms of Intimate and Community Violence,” *Generation Five* (2007); Community Against Rape and Abuse (CARA), “Taking Risks: Implementing Grassroots Community Accountability Strategies,” CARA, nd.

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