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Adjudicating Homicide: The Legal Framework and Social Norms

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Mark Twain once asked, "If the desire to kill and the opportunity to kill came always together, who would escape hanging?" The great humorist was entertaining. But he was too glib. The essays in this volume indicate that throughout the history of England's North American colonies and the United States, legal decisions about the guilt of people accused of murder and the proper punishment of those convicted of murder have not followed automatically any set of principles and procedures. People, with all their human prejudices, create murder jurisprudence—the social rules that govern the arrest, trial, and punishment of humans accused of homicide, i.e., the killing of a human being.

Between colonial and present times, the dominant English-speaking inhabitants in the area that became the United States have altered significantly the rules of criminal homicide, providing increasing numbers of constitutional and judicially constructed safeguards to those accused of homicide and to convicted murderers. Changing community ideas about insanity, the development of children, gender roles, and racism have affected the law.

The essays in *Murder on Trial* analyze the effects of changing social norms on the development and application of the legal frameworks used to determine the motives and the ability to distinguish between right and wrong of people who are accused of a homicide. Especially after 1930, fewer white Americans—but not all—accepted the notion that racial and ethnic minorities were biologically and morally inferior. But the application of the law of

murder has always been uneven. Human rivalries and biases always have led prosecutors, judges, and jurors to side with or against accused murderers because of the latter's class, gender, race, or perceived mental competency.

I

Due process—fair and reasonable rules consistently applied—is the means by which governmental power is restrained and a criminal defendant's rights are safeguarded. The development of procedural fairness has long distinguished Anglo-American jurisprudence, but the concept that liberty and rights could not exist without due process of law only gradually became a part of our constitutional heritage. Supreme Court Justice Felix Frankfurter celebrated this dynamic process in 1945. "The history of American freedom," Frankfurter wrote in *Malinski v. New York*, "is, in no small measure, the history of procedure."[1]

State and federal bills of rights lay out a due process framework for criminal defendants. The Fourth, Fifth, Sixth and Eighth Amendments of the United States Bill of Rights protect the accused against unreasonable searches and self-incrimination, guarantee a public jury trial, representation by counsel, and the right to confront witnesses. The Eighth Amendment prohibits cruel and unusual punishment. These federal rights did not extend to state criminal proceedings until a series of Supreme Court rulings in the 1960s incorporated the Bill of Rights through the Fourteenth Amendment's due process clause. Together with habeas corpus, the legal term for the procedure by which a judge probes the legality of a defendant's imprisonment, the Court's rulings and changing political and social attitudes shaped the development of defendants' rights primarily by curbing governmental power. Common law rules and constitutional rights also are meant to buffer the defendant from the racial, ethnic, gender and class biases that might taint criminal proceedings. Anglo-American due process has been justly celebrated for its success in minimizing the impact of social attitudes on the law, but it is by nature an imperfect system. The proper administration of justice, Professor David Fellman observes, "depends upon the temper of the community, the nature of its prejudices and values, the character of its scapegoats, the state of the economy, the quality of its bench and bar, its educational system, and related non-legal factors."[2]

Seventeenth-century English colonists carried to North America a remarkably sophisticated legal system that they regularly modified to fit local conditions and their particular value systems. The Puritans mixed English common law and biblical injunctions to create a simplified law code that laymen could understand. Although the *Massachusetts Body of Liberties* (1641) contained harsh punishment for moral crimes, it included far fewer capital

crimes and extended greater procedural protection to the accused than did English law. In England hundreds of crimes were punishable by death. By contrast, Massachusetts listed only a dozen crimes and Connecticut just fourteen crimes for which death was the penalty. A capital defendant in the Bay Colony also had greater legal protection than did a defendant in England. A colonist facing murder charges had a right to some of the following: knowledge of the charges, indictment by a grand jury, a jury trial, the assistance of counsel, challenge of potential jurors, cross-examination of witnesses, and, from an early date, at least a limited right to appeal a guilty verdict. Significant as these procedural rights were, they were neither absolute nor unalloyed. Judges often pressured defendants to confess, warning them that nothing could be hidden from an all-knowing God; lawyers who might have buffered their clients from this kind of treatment were few and far between.[3]

New England colonists assumed their form of criminal justice was superior to Indian legal systems. For Indians justice was defined by the victim's clan and the perpetrator's clan and did not involve the intervention of an impersonal state. The blood feud was the centerpiece of Indian law, although it did not inevitably involve bloodshed. A murder victim's clan might negotiate a settlement, including the payment of valuable goods to compensate for their loss. In this way peace and social harmony were restored. However, the colonists tarred the blood feud as "barbaric" and smugly insisted all New England residents must be subject to English law. New England colonial courts made some adjustments when an Indian defendant stood trial. Interpreters explained the process to the accused Indian and Christian Indians were added to capital juries in Massachusetts. We also know not all Indian capital defendants were found guilty, nor were whites charged with murdering an Indian necessarily freed. Except in wartime, all New England defendants were presumed innocent until proved guilty.[4]

The opposite was true in seventeenth-century Virginia. All free white criminal defendants were assumed guilty as charged until proved innocent. They were not entitled to a lawyer. The accused might opt for a jury trial, but since they had little knowledge of the offense with which they were charged and could not call witnesses on their behalf, it was not a popular choice. The General Court in Williamsburg heard all capital cases, but a defendant had no greater rights in that court than in the lower courts. Servants and slaves were denied even this rudimentary form of justice.[5]

The American Revolution transformed the values that underlay criminal due process, though the pace of change varied from state to state. The Anglo-American claim that rights were linked to liberty and that governmental power had to be limited to preserve freedom had ancient roots, but following the Revolution all American citizens claimed greater individual rights than they had had as English subjects, and state and federal constitutions expressly articulated

those rights. The results of this change were striking. Trial juries provide a good example. In England, social class was the primary consideration in forming a jury of peers, but in the new American republic every propertied white adult man was eligible to sit in judgment of any defendant, a practice Americans celebrated as the most important barrier to arbitrary government.[6]

Jurors in murder trials, lawyers, and legislators in the early American republic were enormously influenced by a book published by Italian nobleman, Cesare Beccaria. Although some American patriots worried that the traditional fragility of a republic necessitated a death penalty in order to maintain order, others such as Benjamin Rush of Pennsylvania and Attorney General James Sullivan of Massachusetts denounced capital punishment as monarchical and touted the benefits of Beccaria's enlightened approach to punishment. Translated into English in the 1770s, Beccaria's *Essay on Crimes and Punishments* blasted capital punishment as unsuited to a republic. First, he argued no one could surrender to the state the right over his or her own life; therefore, the state had no right to take a life. Second, Beccaria insisted that the death penalty was not a deterrent to murder. The most hardened criminals "can look upon death with intrepidity and firmness." What they loathe is lengthy imprisonment at hard labor. Therefore, imprisonment is a greater deterrent to crime than death, but it is less cruel. "If all the miserable moments in the life of a slave were collected into one point," Beccaria argued, imprisonment "would be a more cruel punishment than any other; but these are scattered through his whole life, whilst the pain of death exerts all its force in a moment." For this reason, a reasonable person "considers the sum of all [a prisoner's] wretched moments" as worse than death. However, the prisoner, "who by the misery of the present, is prevented from thinking of the future," thinks his punishment to be less severe than death. Third, Beccaria believed executions corrupted a society. The barbarous spectacle of a public execution coarsened the spectators, deterred no one, and probably encouraged violent behavior.

The immediate result of Beccaria's argument was that five states abolished the death penalty for all crimes other than murder. In 1790, for example, Pennsylvania abolished the death penalty for robbery and burglary and four years later became the first state to divide murder into degrees. Only "wilful, deliberate, or premeditated killing" carried the death penalty. By 1846 a dozen states had enacted similar statutes.[7]

As these early nineteenth-century reforms suggest, the trial and punishment of murderers was a state matter. According to the United States Supreme Court's decision in *Barron v. Baltimore* (1833), the Bill of Rights limited only the federal government. This fact shaped the campaign strategy of moral reformers, who focused not on the reform of criminal trial procedures but on the abolition of capital punishment. Reformers who sought to

abolish the death penalty stressed religion's regard for human life and the long-term social and political benefits of abolition. New Yorker John L. O'Sullivan, for example, argued that the New Testament repudiated the Old Testament argument of retribution, and he predicted that the practical as well as the political and social benefits of abolition would be profound. A jury would be more likely to convict a capital defendant if there was no death penalty, and abolition would be a giant stride toward ending violence and tyranny throughout American life, according to O'Sullivan. Although proponents of capital punishment successfully blocked abolition in New York, a coalition of clergymen and middle-class professionals in Michigan and Rhode Island did succeed in ending the death penalty. In New York, Massachusetts, and Pennsylvania, reformers settled for moving executions behind prison walls. The Northern crusade against slavery and the Civil War sapped the effort to abolish the death penalty.[8]

In the aftermath of the Civil War, however, changes in federal criminal procedure enacted to bolster the goals of the Thirteenth, Fourteenth, and Fifteenth Amendments powerfully influenced the rights that states extended to the accused. To buttress African-Americans' freedom, Congress enacted laws permitting a criminal defendant to testify in his or her own behalf and armed federal prosecutors with the right to use peremptory challenges—a strike of a potential juror for which no justification was required. Because it signaled equality before the law, the *New York Times* believed allowing a black criminal defendant to tell his or her own story was even more important than extending to African-Americans the right to vote. Shortly after Congress enacted the law, most states followed suit by extending the right to testify to all state criminal defendants. To further protect African-American criminal defendants from prejudiced whites, states also followed Congress's lead by empowering state prosecutors, as well as defendants, to use peremptory challenges. Ironically, what seemed at the time to be part of a solution to protect African-American criminal defendants against racially prejudiced jurors became, in the hands of racist prosecutors, an *obstacle* to achieving race-neutral juries.[9]

By the 1880s the effort to implement a color-blind Constitution had collapsed. One result was the growth of "strange fruit," the extralegal lynching and the often unjust execution of black criminal defendants throughout the Southern states. The former was made possible by the unchecked rise of racial animosity and the latter by a string of Supreme Court decisions limiting the Fourteenth Amendment's due process and equal protection clauses as they applied to state criminal proceedings. In 1880, for example, the Supreme Court heard two cases involving black men convicted of murder by all-white juries. The Court distinguished the cases in a way that rationalized racially discriminatory jury selection practices. It found that a West Virginia statute restricting jury service to white males violated the Fourteenth Amendment's

equal protection clause, but it permitted to stand a Virginia practice of achieving the same discriminatory result. Southern states were quick to pick up the Court's broad hint about how best to exclude blacks from jury service. For more than a century, the vast majority of criminal juries in the South were all-white.[10]

The jurisdictional wall between state and federal criminal proceedings began to crumble when the Supreme Court heard two cases involving the so-called Scottsboro Boys, nine young black men charged with raping two white women riding on a freight train in the spring of 1931. In *Powell v. Alabama* (1932) the Court ruled for the first time that the Fourteenth Amendment's due process clause included the right to a fair trial and, therefore, required state courts to appoint counsel for indigent defendants in all capital cases. The Scottsboro Boys were retried and again sentenced to death. One of the defendants, Clarence Norris, appealed his conviction, arguing that African-Americans had been excluded from both the grand jury that indicted him and the trial jury that found him guilty of rape. Previously, the Court had rebuffed every challenge to discriminatory jury practices, but in *Norris v. Alabama* (1935) it held that "long continued, unvarying and wholesale exclusion" of black people from juries was a violation of the Fourteenth Amendment's equal protection clause. Eventually, the Scottsboro Boys were freed, but not until they had served years in jail for a crime they did not commit. Although the Court's decisions placed the burden on the defendant of proving the lack of effective assistance of counsel and the systemic exclusion of eligible black jurors, the rulings signaled the beginning of the so-called due process revolution.[11]

In the three decades following these decisions, the Court struggled to determine what procedural rights included in the due process clause should be applied to state criminal proceedings. The chief obstacle to nationalizing the Bill of Rights was the absence of a theoretical framework. Most judges held to the belief that the federal structure gave states exclusive control over state criminal matters. Still, *Scottsboro* had opened the way for exceptions. The year following *Norris*, for example, the Court reversed the convictions of three black Mississippi tenant farmers who had been sentenced to death for the murder of a white planter chiefly on the basis of their coerced confessions. During the trial, police officers freely admitted beating the defendants with a metal-studded leather belt and repeatedly placing a rope around the neck of one of the men and hanging him above the ground until he lost consciousness. At trial, the defendants repudiated their "confessions." In *Brown v. Mississippi* (1936), Chief Justice Charles Evans Hughes conceded that the Fifth Amendment's prohibition against compulsory self-incrimination did not apply to the states, but he insisted that a state could not "substitute trial by ordeal" for the fair trial standard guaranteed by the Fourteenth Amendment.[12]

Although the Court's intervention in a handful of cases had saved men's lives, its effectiveness was limited, because the "fair trial" standard was not spelled out. Indeed, as late as 1937 the Court announced that the Fourteenth Amendment did not incorporate the right to trial by jury. According to Justice Felix Frankfurter, all the Court could do was decide on a case-by-case basis if the fundamental rights of the accused had been violated. Justice Hugo L. Black, a former Alabama Klan member appointed to the Court by President Franklin Roosevelt in 1937, offered an alternative strategy. Black argued that the framers of the Fourteenth Amendment had intended to incorporate the Bill of Rights into the due process clause and to apply those rights to the states. Throughout the 1940s and 1950s Black and Frankfurter jousted over which interpretation of the Fourteenth Amendment and the Bill of Rights should determine the law of the land.[13]

The interpretive logjam was broken under the leadership of Chief Justice Earl Warren. In 1955, the year after his appointment to the Court, Warren published an essay in which he rejected judicial restraint in favor of an active, evolving interpretation of the Constitution, particularly the Bill of Rights. The pursuit of justice, Warren wrote, implied a continual revision of what rights meant, a process of creating "a document that will not have exactly the same meaning it had when we received it from our fathers," but one that would be improved because it was "burnished by growing use." Beginning in 1961, when it ruled in *Mapp v. Ohio* that the Fourteenth Amendment applied to the states the Fourth Amendment's prohibition of unreasonable searches, the Warren Court rapidly dismantled the wall separating the Fourteenth Amendment from the Bill of Rights.[14]

In 1963 the Court abandoned the fair trial interpretation. Clarence Earl Gideon, a fifty-four-year-old Florida drifter who had spent nearly seventeen years behind bars, was convinced that he had a constitutional right to an attorney to defend him against a charge of breaking and entering a poolroom with intent to commit petty larceny. The Florida trial judge told Gideon that the court appointed counsel only in capital cases, and the Florida Supreme Court rejected his appeal. But the United States Supreme Court agreed with Gideon. Writing for a unanimous Court, Justice Black insisted the Court was returning to its old precedent in *Powell v. Alabama,* in which the Court had held that a defendant "who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." Although Black's opinion used the fair trial language, the decision represented a victory for the nationalization of the Bill of Rights.[15]

The year following *Gideon*, the Court incorporated the Fifth Amendment's protection against self-incrimination into the Fourteenth Amendment. By vote of 5–4, in *Malloy v. Hogan* (1964), the Court overturned a half-century-old precedent holding that states were not bound by the Fifth Amendment. The

Court's decision was foreshadowed by a line of cases, including *Brown v. Mississippi* (1936), that overturned state convictions based on confessions obtained by improper methods. The time had come, Justice William Brennan wrote in *Malloy*, to recognize "that the American system of criminal prosecution is accusatorial, not inquisitorial. . . ." Two years later, in *Miranda v. Arizona* (1966) the Court extended the Fifth Amendment privilege to persons taken into police custody.[16]

To 1966 there had been little public comment about the Court's foray into state criminal justice, but *Miranda* ignited a firestorm of criticism. Across the country, district attorneys, police officers, and politicians lashed out at the Court's decision extending the Fifth Amendment's protection against self-incrimination to questioning initiated by police after a person has been taken into custody. Prior to *Miranda*, state courts had decided on a case-by-case basis if a suspect's confession had been voluntary, that is, given without fear or favor. Ernesto Miranda's confession to rape and kidnapping would have passed the voluntariness standard, but writing for a 5–4 majority Chief Justice Earl Warren rejected trickery, intimidation, and the lies police too often used to secure a suspect's confession. To replace those reprehensible techniques, Warren spelled out the now-familiar fourfold warning police must give to a suspect before he or she is subject to "custodial interrogation." Suspects must be told they have a right to remain silent and that anything they say can and will be used against them. The police also must inform suspects of their right to talk with an attorney before being questioned and to have an attorney present when being questioned. Suspects must be told that if they cannot afford an attorney, one will be provided. Finally, suspects must knowingly and effectively waive their rights before any questioning may begin. Despite the exaggerated response from police and prosecutors—a Boston-area district attorney predicted innocent people would be murdered and their killers set free—studies have since demonstrated that most suspects waive their rights to remain silent, and the police get their confession.[17]

The Warren Court's due process revolution reached a divisive climax in *Witherspoon v. Illinois* (1968). Following a nineteenth century practice a state criminal court could challenge a potential juror for cause or a prosecutor could use a peremptory challenge if he believed the juror held an opinion about capital punishment that would prevent him (for several decades after passage of the Nineteenth Amendment women in many states were excluded from jury service) from finding the defendant guilty of murder. By this means the court or a prosecutor eliminated jurors who had qualms about the death penalty. Lawyers referred to this process as "death qualifying" a capital jury. A death-qualified jury in Illinois convicted William Witherspoon of murder in 1960. On appeal before the Supreme Court, Witherspoon claimed the Illinois procedure deprived him of his Sixth Amendment right to a fair trial by an

impartial jury. Writing for the majority, Justice Potter Stewart concluded that dismissing a juror opposed to the death penalty made the jury unconstitutionally prone to return a death sentence. The state might legitimately exclude jurors who would automatically vote against the death penalty, but it could not eliminate those who merely voiced general objections or expressed conscientious or religious scruples about sentencing a defendant to death. Just prior to the Court's *Witherspoon* decision, the U.S. Congress enacted legislation designed to end the practices that had for a century perpetuated the all-white jury in the South. The Jury Selection Act (1968) required federal jurors to be chosen randomly and to represent a cross-section of the community. In *Taylor v. Louisiana* (1975) the Supreme Court extended the Jury Selection Act's provisions to state criminal proceedings. Many observers thought *Witherspoon* and the Jury Selection Act signaled the beginning of the end of capital punishment.[18]

In fact, unknown to outsiders, the Court had decided in the spring of 1971 to select a handful of capital cases for review with an eye toward resolving the death penalty issue "once and for all." As preparation of the death penalty cases was well under way, the composition of the Court changed dramatically. During his first two years in office President Richard M. Nixon, whose "law-and-order" campaign promised dramatic changes at the Court, appointed Warren Burger and Harry Blackmun, as chief justice and associate justice, respectively. Just as the fall term was about to begin, Justices Hugo Black and John Marshall Harlan resigned. Nixon appointed William Rehnquist, an Arizona conservative, and Lewis Powell, an outspoken critic of the Warren Court, to fill the vacancies. On January 17, 1972, this Nixon Court heard oral argument in *Furman v. Georgia*.[19]

William Furman, a twenty-six-year-old black man with a sixth-grade education, had been convicted of shooting to death a Savannah, Georgia, homeowner during a late night break-in. The police responded quickly and found Furman hiding in nearby woods. He still had the murder weapon. A court-appointed attorney represented Furman. The trial lasted just one day. Although Furman testified the shooting was accidental, he was sentenced to death because the murder had occurred during the commission of a felony, the break-in. The Georgia supreme court affirmed the conviction, but stayed Furman's execution pending an appeal to the United States Supreme Court. The National Association for the Advancement of Colored People, Legal Defense Fund, which had recently made a commitment to a campaign against capital punishment, represented Furman before the Court. Anthony Amsterdam, a University of Pennsylvania law professor, centered his argument on the conviction that "evolving standards of decency" had made the death penalty cruel and unusual. The death penalty persisted in America, Armstrong insisted, solely because juries imposed it rarely and against the outcasts of

society. "The short of the matter," he concluded, "is that when a penalty is so barbaric that it can gain public acceptance only by being rarely, arbitrarily, and discriminatorily enforced, it plainly affronts the general standards of decency of the society."[20]

The Court handed down *Furman* on the very last day of its 1972 term. By a 5–4 vote, the Court struck down the death penalty as contrary to the Eighth Amendment's prohibition against cruel and unusual punishment. Each of the nine justices wrote a separate opinion, a splintering that had not occurred since the early nineteenth century. The majority was split on the key issue: was the death penalty inherently unconstitutional, or was the process simply flawed? Justices Brennan and Thurgood Marshall concluded the death penalty was cruel and unusual, plainly unconstitutional. Brennan condemned capital punishment as degrading to human dignity, arbitrarily severe, and unnecessary. Marshall agreed, adding that it was offensive to contemporary values. Justice William O. Douglas rejected the "evolving standards of decency" argument and focused primarily on the way in which the penalty was disproportionately applied to the poor and disadvantaged. To many observers' surprise, Justices Potter Stewart and Byron White cast their votes with the majority. By his own account Stewart had spent sleepless nights wondering why some men sat on death row while thousands of others convicted of rape and murder had received jail sentences. For this reason, he thought the death penalty cruel and unusual in the same way that being struck by lightning was cruel and unusual. Unlike Stewart, White found nothing repugnant about capital punishment, but like his colleague, he could not fathom how a punishment imposed with great infrequency for the most atrocious crimes could be a deterrent.[21]

Although they also wrote separately, the dissenters struck common themes. Each accused the majority of privileging their personal views, rather than deferring to legislative judgment or finding a specific constitutional violation in the death penalty statute before the Court. The dissenters also pointed to opinion polls showing widespread public support for the death penalty, thereby undermining the "evolving standards of decency" argument. Finally, Chief Justice Burger's dissent recognized the narrow common base on which the majority opinion rested, and he invited states to write new death penalty laws that would provide specific standards for capital sentencing.[22]

Four years later, in *Gregg v. Georgia* (1976), the death penalty was before the Court again. By a 7–2 vote the Court embraced a procedure designed to minimize arbitrariness and affirmed the constitutionality of the death penalty. A capital trial was to be bifurcated. The jury deliberated first to determine the defendant's guilt or innocence and then, if the defendant was found guilty, to determine the sentence. In the sentencing phase the jury considered evidence showing aggravating and mitigating circumstances. Ju-

rors had to agree on at least one aggravating circumstance (a prior capital felony conviction, a jailbreak, etc.) before it could impose the death penalty. The statute also required consideration of mitigating factors such as a defendant's youth and his or her emotional state at the time of the murder, among others. And, the state supreme court had to review all death cases to determine whether the sentence was "excessive or disproportionate to the penalty imposed in similar cases."[23]

Gregg did not end the controversy over the death penalty, but whatever hope the abolitionists had was shattered a decade later in *Lockhart v. McCree* (1986) and *McCleskey v. Kemp* (1987). Lockhart argued that eliminating jurors who were philosophically opposed to the death penalty produced a jury unconstitutionally biased toward convicting a defendant. For a slim majority, Justice William Rehnquist rejected the argument. Even if the death qualification process tended to skew juries toward convictions at the guilt stage, Rehnquist wrote, that bias did not violate a defendant's right to an impartial jury. Warren McCleskey's plea fared no better with the Court. A black man convicted of the 1978 shooting death of a white Atlanta police officer, McCleskey argued that the Georgia death penalty was implemented in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. He produced a massive statistical study showing that the odds of a death sentence for someone accused of killing a white person were four times higher than the odds of a death sentence for someone charged with murdering a black person. Justice Lewis Powell wrote for a bare majority who rejected McCleskey's data. The Georgia study did not prove race was a significant factor in McCleskey's trial, but merely showed a "discrepancy that appears to correlate with race." To be of legal, as opposed to social science, value, Powell wrote, McCleskey must show that specific decision-makers in his case acted with discriminatory purpose. In a bitter dissent, Justice William Brennan argued that the Court rejected McCleskey's claim about pervasive racism within the justice system "at our peril." We "remain imprisoned by the past so long as we deny its influence on the present," Brennan warned.[24]

In 1986 the Court revisited the use of racially discriminatory peremptory challenges, the preferred means since the Jury Selection Act of achieving an all-white jury. Three decades after *Norris v. Alabama* (1935) held the systematic exclusion of African Americans from jury pools a violation of the equal protection clause of the Fourteenth Amendment, Robert Swain, a black man convicted of raping a white woman, was sentenced to death by an all-white Alabama jury. Swain argued the equal protection clause prohibited prosecutors from using their peremptory challenges to remove all the would-be black jurors. Speaking for the majority, Justice White insisted a prosecutor was entitled to the presumption he or she was using the state's peremptory challenges to obtain a fair and impartial jury. Moreover, there was no equal

protection argument, since members of any group were vulnerable to peremptory exclusion "whether they be Negroes, Catholics, accountants, or those with blue eyes." White did recognize some danger, but he set an extraordinarily high evidentiary bar. In order to show an unconstitutional use of peremptory challenges, a defendant must provide evidence that "in case after case, whatever the circumstances, no Negroes ever served on petit juries."[25]

Swain allowed prosecutors throughout the country to continue using peremptory challenges to achieve an all-white jury. From 1965 to 1986, several cases reached the Court in which the evidence supported a black defendant's claim that prosecutors had used peremptory challenges to eliminate all black would-be jurors. In the face of this growing body of data, the Court finally overruled *Swain*, holding in *Batson v. Kentucky* (1986) that using race as the reason for striking a potential juror was contrary to the equal protection clause of the Fourteenth Amendment. According to *Batson*, a prima facie case of discrimination exists whenever a prosecutor's use of peremptory challenges creates a racial pattern. The burden is then on the prosecutor to convince the judge that he or she struck black potential jurors for nonracial reasons. Although *Batson's* rules seem tightly drawn, prosecutors have continued to use racially motivated peremptory challenges by relying upon indulgent or biased judges.[26]

We are more than forty years from the beginning of the modern due process revolution, and nearly thirty years have passed since the Court upheld the constitutionality of capital punishment. The Rehnquist Court has chipped away at the protections extended to the accused and has taken steps to speed up the executions of men on death row. Murder trials are still plagued with serious procedural errors. In 2002 and 2003 several state governors released all convicted prisoners on death row in their states because the governors had seen evidence of large numbers of jury verdicts that were tainted by violations of the rules of due process established by statute law and Supreme Court decisions.

II

Human societies have always distinguished between justifiable homicide (in self-defense, whether in peacetime or during war) and criminal homicide. The preceding section has detailed the way statute law and judge-made law defining criminal homicide have changed in English-speaking North America during the last four centuries. Murder prosecutions have been influenced greatly by such changes. Murder jurisprudence has also been affected by the existence of powerful social norms that influenced the way juries, judges, prosecutors, and lawmakers viewed persons accused of criminal homicide. From the seven-

teenth century on, English settlers and their descendants subjugated the indigenous people and imposed their culture on the vanquished in a pattern that, in one way or another, would be replicated across the North American continent as the English dealt with African Americans and Hispanics.

In seventeenth-century New England, a dual pattern of legal culture existed. Where English sovereignty reigned, whites and Native Americans were subject to English jurisdiction. From the earliest contacts along the eastern coast of North America, the English denied the legitimacy of Native American legal traditions, which the English regarded as heathen (i.e., non-Christian) and barbaric. Outside the pale of European settlement, tribal law prevailed for Native Americans. Justice in matters of murder for Native Americans was based on consanguinity and clan retribution, while for the colonists the criminal law was coextensive with state jurisdiction and was guided by the laws passed by each colonial legislature. Depending on circumstances and political expediency, Native Americans who killed one another might be subject to either jurisdiction.[27] As John Navin demonstrates, initially the English settlers and the eastern Indians were pragmatic, working out behavioral norms as they interacted, albeit against a background of cultural suspicion, political negotiation, and the need to mainain order. Certainly the need for law and order and self-interest combined when Plymouth authorities executed Thomas Peach in 1638 for the murder of a Narragansett, and peace was preserved a year later, when, thanks to the damning testimony of his tribesmen, Connecticut officials executed Nepaupuck for murdering Abraham Finch. The same commitment to peace motivated the weak United Colonies government to defer to Uncas, allowing him to execute a Mohegan suspected of plotting against the powerful Connecticut sachem.

However, by the 1670s immigration had swelled the English population of southern New England; and Native Americans had been hit by a plague in the 1630s that had drastically reduced their numbers. The government of Plymouth Colony was aggressively pressuring the Wampanoags to sell more land to the English. The Wampanoags, led by King Philip, did not want to give any English permanent title to Indian land. Tensions mounted. In 1675, when three Wampanoag Indians were charged with the murder of John Sassamon (who might have died of natural causes), the trial took place in an highly charged atmosphere. The Plymouth colonists did not give the Wampanoags the rights that were specified in the 1641 Charter of Liberties, which had been promulgated by the Massachusetts Bay Colony and was adopted by the Plymouth Colony. The Wampanoags on trial for the murder of Sassamon did not have a "lawyer" (we do not know if they asked for a lawyer and were turned down). In all other capital cases in the Massachusetts Bay Colony, accused Indians always had a lawyer. Most importantly, the Wampanoags were convicted on the basis of the testimony of one witnesses,

not the two witnesses stipulated by the Charter of Liberties. Concluding that the English could not be trusted, King Philip declared war in an attempt to roll back English power.

From the beginning, the Plymouth and Massachusetts Bay colonists had insisted that accused white murderers of Native Americans be tried only in colonial courts. (There were cases in which colonists prevented Indians accused of murder from receiving a trial: in Marblehead, Massachusetts, enraged women in 1677 murdered and mutilated two captive Indians rather than let the judicial process unfold.) Native Americans and African Americans were allowed to testify against whites accused of crimes. But because colonists did not fully trust nonwhites, whom they regarded as inferior, such testimony was generally held valid only it was accompanied by corroborating evidence.[28] Although the colonial statutes were silent on the subject of jury composition, there is no record of an Indian being chosen as a juror for the trial of a white person. (In some instances, especially on the frontier and despite abundant evidence, local juries of whites refused to convict whites accused of murdering Indians.) [29] By contrast, Indians were allowed to serve on juries trying Indians, as long as white jurors outnumbered substantially the number of Indians.

Overall, Native Americans accused of murdering whites were less likely to receive reduced sentences for manslaughter than were Indians who murdered Indians. (Native American women accused of infanticide, however, were as likely as English and African America women to win acquittal or a reduced sentence.) As Nancy Steenburg's essay suggests, when judges and jurors dealt with murders committed by children whose age placed them on the cusp of adulthood, so that it was hard to determine if they understood that murder was wrong, Native American/Black children and Irish children were less likely to receive a break than were children of English/Protestant stock.

For more than two centuries, the paradox of slavery and freedom persisted in the colonies and the United States. Especially in the South, slaves accused of murder were either punished by their masters without trials or were tried by all-white juries. White masters accused of murdering their slaves rarely were convicted of this capital crime. Frederick Douglass relates the story of a slave owner's wife, Mrs. Hicks, who beat to death the fifteen-year-old cousin of Douglass's wife: "There was a warrant issued for her arrest, but it was never served. Thus she escaped not only punishment, but even the pain of being arraigned before a court for her horrid crime."[30]

The Civil War eradicated slavery, but during 1865–66 black codes and vagrancy laws in the South continued to subjugate four million freedpeople. African Americans were repeatedly denied the right to vote, the right to contract—without landowner coercion—the right to testify against whites in court, and the right to serve on juries. With laws designed to subjugate blacks enforced by sheriffs and judges who wanted to profit from the labor of blacks,

legal intimidation and unpunished landowner violence, including murder, severely oppressed the freed slaves.

In opposition to the racist policies of President Andrew Johnson and Southern white landowners, Republicans implemented Reconstruction. To secure basic civil rights for the former slaves, Congress passed and the states ratified the Thirteenth (1865), Fourteenth (1868) and Fifteenth (1870) Amendments. The first definitively ended slavery everywhere in the United States. The second held that no state could "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the last post–Civil War amendment barred discrimination in voting based on "race, color, or previous condition of servitude." (Giving the former slaves the vote would prevent the reemergence of slavery and maintain the hegemony of the Republican Party.) With their right to vote protected, many freedman found they were treated relatively fairly by judges (often white Republicans elected by both black and white voters) when the freedmen went to court to collect full wages or crop payments from parsimonious white landowners.

The veneration for private property, pervasive racist attitudes, and the tradition of states' rights barred any redistribution of wealth or financial compensation to the former slaves for the exploitation they had endured at the hands of their masters. There was no hoped-for "forty acres and a mule." Often trapped in sharecropping and debt peonage, the freedpeople had little economic wherewithal with which to protect their basic freedoms in a hostile environment. (In the 1880s some Southern African Americans were able to migrate to better jobs or to Arkansas and Oklahoma, where many purchased cheap land.) Northern public opinion during the 1870s turned more to other problems besides the incomplete civil rights revolution of Reconstruction: economic downturns, labor unrest, political corruption, monetary policy, and the rise of big business. As part of the Compromise of 1877 that led to the election of the Republican Rutherford B. Hayes, the last federal troops were withdrawn from the solidly Democratic South. Southern whites then intensified their use of illegal force to prevent African Americans from exercising their civil rights, and especially the right to vote. When Congress responded with civil rights statutes, the U.S. Supreme Court, in the 1873 *Slaughterhouse* cases, narrowly interpreted the protections to African Americans and restricted the ability of the federal government to intervene at the state level to preserve the civil liberties of African Americans. Then, in *Hutardo v. California* (1884), the Court ruled that Fifth Amendment rights to due process during criminal trials (and civil actions) were not protected by the Fourteenth Amendment.

Racial attitudes hardened during the 1890s. White domination was assured, but its structure had not been firmly fixed since the end of slavery. Black men still voted in significant numbers in some parts of the upper South

and competed with whites for jobs. In the early 1890s the Populist movement in the South urged a class alliance of hard-pressed black and white farmers against the white elites who controlled the Democratic Party. When white elites intimidated or bribed blacks to vote against the Populist candidates, white agrarian radicals backed the disenfranchisement of blacks by means of literacy tests, poll taxes, and grandfather clauses. The Supreme Court upheld the legality of these legal instruments. On the social side, Jim Crow segregation, sanctioned in cases such as *Plessey v. Ferguson* (1896), legitimated racial apartheid, an outcome most attractive to poor whites.

Without federal protection for the civil liberties of blacks, white violence, ranging from public whipping to murder, went unpunished, whether conducted on a small scale or on a large scale, as in Wilmington, North Carolina, in 1898 when elite whites launched genocidal attacks against blacks who had helped to elect radical officials to positions in the city's government. After 1880, especially in cotton-producing areas and the "black belt," of the lower South, the lynching of blacks accused by whites of murder, assault, rape and insubordination intensified. Lynching was summary punishment and ignored the normal due process of law (indictment, jury trial, appeal). Although lynching subsided in the 1920s, blacks accused of murder (and other crimes) did not receive proper due process in the South. The historian W. Fitzhugh Brundage writes that the justice blacks accused of raping white women received in Southern courts entailed a "disregard for evidence and a ferocity only a step removed from the so-called justice imposed by mobs."[31] Since blacks rarely were allowed on juries in the South until the civil rights era of the 1960s, black men and women accused of murder could hardly expect to receive impartial justice, and especially when blacks were accused of murdering whites. The Supreme Court did not begin to address this issue until 1986.

In the 1890s an average of two African Americans were lynched per week in the South. But economic and racial polarization proceeded unevenly. Virginia never had a strong white or white-black agrarian radical movement. In 1895 many blacks still voted in Virginia. Thus, in chapter three, "Jim Crow Justice, *the Richmond Planet,* and the Murder of Lucy Pollard," Michael Trotti shows that in a racially charged ax murder case in 1895 that took place near Richmond, Virginia, many state militiamen as well as prominent whites supported a color-blind adherence to the rule of law. A black man was convicted and hanged for the brutal killing of a white woman. He accused three black women of the actual murder. Pressure from the African American community and the actions of various white officials, however, led to their acquittal. Paternalistic reluctance to execute these humble women acted in their favor, especially because the testimony against them seemed patently contrived. Fearful of mob violence, the governor, at the sheriff's insistence,

employed a sufficient force of militia to maintain order. Whites and blacks served on the first juries in the case, and both races contributed money to the defense of the accused black women. Furthermore, prominent white lawyers eventually took up the cause of the defendants, and state militiamen filed affidavits charging the state's leading witness with inconsistent statements. The state's attorney dropped two of the cases, and the appeals courts overturned some of the guilty verdicts. Despite a racially biased criminal justice system, especially involving the adjudication of murder, many white Virginians concluded that an obvious miscarriage of justice—especially in a capital case—was a threat to all. As the white-owned *Richmond Times* editorialized, "If they are to be judicially murdered under the present progamme, the life of none of us is safe."[32]

In Atlanta, Georgia, in 1913 Leo Frank was charged with the murder of fourteen-year-old Mary Phagan, an employee in the mill he managed. At trial, the prosecutor stressed Frank's Jewishness and implied that he "engaged in sexual acts with his nose."[33] A white mob eventually lynched Frank while he was in jail awaiting the outcome of his appeal of his murder conviction. In May 1920, in the middle of a period of intense fear of the activities of immigrant revolutionaries, Nicola Sacco and Bartolomeo Vanzetti, Italian immigrants who were militant anarchists and frequently carried revolvers, were charged with payroll robbery and the murder of two payroll guards in Braintree, Massachusetts. The prosecutor in this case (Frederick Katzman) decided early on that anarchists must have carried out the robbery. The eyewitnesses to the robbery initially were unsure of their identification of the two robbers; but at trial, under pressure from Katzman, several witnesses went on to proclaim the certainty of their identifications. Documents first made available in the 1970s also suggest that Katzman initiated or condoned evidence tampering, substituting a bullet that was not actually found at the murder site for one that had been found there to buttress his case that the murder weapon had been a gun Sacco had stolen during an earlier robbery.[34]

Since World War II racial and ethnic biases in the United States have declined or have been muted. But racial prejudice is still virulent in many communities. The 1988 Philadelphia murder trial of Mumia Abu-Jamal took place in a city that had been racially polarized since the 1960s. As Dave Lindorff's essay notes, a judge and a prosecutor, both of whom appear to have been racially biased, perpetrated and condoned procedural irregularities during Abu-Jamal's murder trial, thereby contributing to a guilty verdict and a jury vote for the death penalty. Like the celebrity murder trial of O. J. Simpson during the mid-1990s, the case of Mumia Abu-Jamal raises important issues that transcend the final verdict of guilt or innocence. An extraordinary expansion of civil liberties accompanied the civil rights revolution of the 1950s–60s, which was in effect a second Reconstruction a full century after the Civil War.

The aftermath of the Holocaust and other atrocities during World War II made clear that systematic oppression of African Americans in the United States was, in the words of the Swedish sociologist Gunnar Myrdal, the "American dilemma." Employing a wide variety of tactics, ranging from civil disobedience to urban rioting, the civil rights movement forced a series of state laws, federal statutes, and Supreme Court rulings to affirm adherence to due process and equal protection of the law at the local and national level. The effort was to confront the gross violations of the criminal law that had disproportionately been borne by African Americans, who presently constitute close to one-half of the nation's prison population, the largest in the world. Yet persistent racial bias and unequal distribution of wealth in the larger society continues to unbalance the scales of justice. Policing, procedures, and personnel, if not the law itself (notably drug laws), continue to be stacked against African Americans, particularly poor black men with limited formal education. Technological advances in criminology, such as DNA testing, show that alarming numbers of (largely African American) inmates on death row were wrongly convicted of murder. Despite the civil rights revolution of the 1950s–60s, the legacy of slavery, sharecropping, and segregation has left America, in the words of the Kerner Commission in 1968, two societies—one black, one white, separate and unequal. Indeed, the U.S. Department of Justice reported in 2003 that black men have nearly a one in three chance of being incarcerated during their lifetime.

When Malcolm X pointedly told Northern, black audiences in 1964, "South? Don't talk of the South! When you are south of the Canadian border, you are South," he might well have had Philadelphia in mind.[35] By 1970 the population of the city was 40 percent black, and the west side was a notoriously rundown ghetto. Frank Rizzo, the police chief and later mayor of Philadelphia built his political career on white dislike of blacks, which was particularly vocal in the Italian American south side. His harassment of the Black Panthers during the late 1960s and early 1970s and encouragement of police brutality made him the Northern equivalent of Eugene "Bull" Connor, the infamous commissioner of public safety in Birmingham, Alabama. The zeal of Rizzo's 1978 raid on MOVE, a militant black group, was exceeded only by the actions of Wilson Goode, the city's first African American mayor. Intimidated by militant white officials, Goode permitted the police in 1983 to launch a Vietnam-style attack with helicopters, antitank weapons, and firebombs on the defiant MOVE that killed eleven men, women, and children and burned down a whole city block.

In this context, Dave Lindorff's essay, "Justice Denied: Race and the 1982 Murder Trial of Mumia Abu-Jamal," deals with the conviction of a former Black Panther for the murder of a Philadelphia policeman in 1981. While in prison on a death sentence, Abu-Jamal's case has garnered international attention. He has indicted the way in which the dominant white

culture mistreats young black men and the way in which racism corrupts the justice system. Abu-Jamal also sees prison and capital punishment as products of bias permeating the law. Without question, race played a significant part at his trial. Prosecutors challenged for cause twenty potential black jurors because they expressed reservations about capital punishment. Despite the Supreme Court's ruling in *Batson v. Kentucky* (1986) prohibiting race-based peremptory challenges, the Philadelphia prosecutor used that means to strike at least ten black potential jurors. And the trial judge did not challenge the prosecutor's actions.[36]

Abu-Jamal has been spared execution because a federal appeals court judge has found that the trial judge's sentencing instructions to the jury misrepresented the options jurors had to indicate they believed there were mitigating circumstances that justified a sentence of less than death for Abu Jamal. In addition, in February 2003 the Supreme Court in the *Miller-El* decision ruled 8–1 that a black death row inmate in Texas must be granted a hearing on a claim that the prosecution improperly excluded blacks from his jury. The *Miller-El* decision may well lead Abu-Jamal to appeal his trial verdict. Academic studies have shown that Philadelphia prosecutors from 1978 to 1986 excluded blacks from juries at a rate more than twice that of whites. It is, of course, naïve to believe that racial bias has been driven from the courtroom, especially when a radical black man is on trial.[37]

III

Throughout the history of colonial settlement and the creation of the United States of America, people who were mentally ill were treated with special sympathy by the courts. By 1700, a belief had emerged in England and the English colonies that when the mentally ill committed crimes, their punishment should be mitigated, because their mental illness prevented them from knowing they had acted wrongly.

According to the legal concept of *mens rea*, a person can be held responsible for a criminal act only if he or she has some degree of critical understanding of such actions. Without sufficient mental competency, some degree of rational volition, an individual cannot be found culpable. This tradition was well established in English law even when John Locke wrote the *Second Treatise on Government* in 1690. Locke observed, "But if, through defects that may happen out of the ordinary course of nature, any one comes not to such a degree of reason, wherein he might be supposed capable of knowing the law, and so living within the rules of it, he is never capable of being a free man, he is never let loose to the disposure of his own will (because he knows no bounds to it, has not understanding, its proper guide) but is continued under the tuition and

government of others, all the time his own understanding is incapable of that charge." The English philosopher and physician cited the case of children and the insane, among others, who were not legally accountable.[38]

Reflecting English seventeenth-century law, age differentiated the legal standing of youth in the North American colonies. It was presumed that children under age seven simply could not be criminals and should never be tried. Children who were between eight and fourteen years old were presumed innocent of illegality unless persuasive evidence proved otherwise. Youth who were fourteen and older were considered adults and subject to the full force of the law. In the New England colonies in the seventeenth century, juvenile murder fell under a mix of ecclesiastical and secular laws. Ecclesiastical and secular laws were initially mixed in matters of murder, with biblical injunctions calling for retribution for murder. Despite the scriptural imperative, by the eighteenth century colonists in practice set different standards for children and adults. Enlightenment concepts of the innocence of children led to an emphasis on nurturing mothers, moral education, and beneficial environments. By the mid-nineteenth century, as popular thought increasingly differentiated between adolescents and adults, reform schools to separate "youthful" offenders from hardened adults (both had formerly been jailed in the same prisons) were opened in a number of Northern states. Separate juvenile courts were established in the early twentieth century.

Based on meticulous archival research, Nancy H. Steenburg's essay, "Murder and Minors: Changing Standards in the Criminal Law of Connecticut, 1650-1853," shows how cultural norms affected juvenile justice cases, which are hard to track down for the early period. Youngsters tried for murder were treated leniently when they were under the age of discretion—age fourteen. At fourteen, children were assumed to be able to understand the difference between good and evil, and thus were capable of forming criminal intent. A glaring exception occurred with a nonwhite child in 1786. Twelve-year-old Hanna Occuish, of Pequot-African ancestry, was found guilty of murder and hanged, despite testimony that she had not been raised to understand Christian and European-American values. Indeed, racial bias and anti-Irish sentiment appears to have contributed to unduly harsh sentences in many murder trials involving youths. By the 1830s antebellum reformers advocated differential treatment for children who were convicted of crimes; they were incarcerated in separate cells from adult convicts and then placed in juvenile reform schools.

The essays on the insanity defense by Lawrence B. Goodheart and Alan Rogers also illustrate the complexities of the law when dealing with capital defendants. The principle in English jurisprudence that the insane were not criminally responsible for homicide was well established in the New World. In

seventeenth-century Connecticut, Harvard-educated Gershom Bulkeley rendered such an opinion in defending a deranged mother of filicide: "If she were not compos mentis at the time of the fact it is no felony and consequently no willful or malicious murder; and if she be known to be a lunatic, though she have her lucid intervals, there need be very good and satisfactory proof that she was compos mentis, for the law favors life."[39] During the nineteenth century, Enlightenment rationalism led many educated Americans to consider mental illness a medical matter. The influential McNaughten rule, based on an English murder case in 1843, defined the legal basis of insanity in a manner not unlike Bulkeley's. If a defendant at the time of the crime could not tell the difference between right and wrong, he or she was legally insane and thus not criminally culpable. Furthermore, American physicians like Isaac Ray argued that a condition of moral insanity existed: a mania or irresistible impulse might compel one to murder, even though other aspects of cognition appeared entirely normal. The new doctrines of forensic psychiatry, however, contradicted the social norms of individual self-control and personal responsibility that were so important to emerging middle-class culture.

In "Murder and Madness: The Ambiguity of Moral Insanity in Nineteenth-Century Connecticut," Lawrence B. Goodheart explores the controversial matter of legal insanity in Connecticut, a pioneer in the treatment, not punishment, of the insane. The resolution of a brutal ax murder case in 1835 showed, asylum doctors thought, the complementary relationship between medicine and the law. Although the building blocks for a new understanding between science and jurisprudence seemed to be in place, a workable accord between psychiatry, the law, and the public was not achieved by the end of the century, as many had expected. In 1876, after nearly fifty years of experience with the insanity defense, the Connecticut Supreme Court expressed its frustration: "Unsoundness of mind is a fact which is not susceptible of proof." In fact, the Massachusetts Supreme Judicial Court (MSJC) worked on this definitional problem for another one hundred fifty years before achieving what it regarded as a workable relationship with psychiatry and a defendant's pleas of not guilty by reason of insanity.

Alan Rogers's essay, "'This troublesome issue': Murder and the Insanity Defense in Massachusetts, 1844–2000," tracks the MSJC's long, torturous path to a new era in the relationship between murder, malice, and a defendant's mental state. The MSJC was the first court of last resort to adopt modern rules on criminal responsibility by welding together a cognitive and an emotional test, but the law continued to hold psychiatry at arm's length, and the public remained skeptical. Spurred by reformers and several high-profile cases, the MSJC experimented with new rules extending greater protection to capital defendants making an insanity defense. Advances in biological psychiatry, particularly successes in treatment of mental illness with psychotropic drugs,

and research indicating that mental illness was an organic disease, not a moral failure, contributed importantly to that resolution. The Massachusetts court took a major step toward bringing psychiatry and the law into theoretical harmony by recognizing the impact of permanent diminished mental capacity on a murder defendant's ability to act with malice.

Texas and other states had followed the MSJC rulings with legislation in the 1970s that held that even if a murderer knew he or she had committed a wrongful act, a demonstrable mental illness made the murderer "incapable of conforming his conduct" to social norms and the murderer should not be convicted of a homicide. But the 1982 acquittal on the grounds of insanity of John Hinckley Jr, who in 1981 had tried unsuccessfully to assassinate President Ronald Reagan, created a backlash against the insanity defense in many states. In 1983 the Texas legislature reverted the law to a standard very close to the McNaughten rule. Thus, in 2001, when Andrea Yates, a diagnosed schizophrenic, drowned her children in the bathtub of her home, she was convicted of capital murder in March 2002. The prosecution had acknowledged her mental illness, but under the 1983 Texas law she could not plead that she was unable to behave in accordance with social norms.[41]

IV

New ideas about mental illness were not the only fresh intellectual currents in the mid-nineteenth century. After 1800, many women and men, especially the affluent, altered their views about gender roles. The notion that middle-class and elite women should receive more than a basic education led to the founding of scores of private female academies. Women educated in such schools often took paid and volunteer jobs in institutions that were outside the home, especially schools and charities. In the late 1840s a limited number of American women launched a voluble movement for equal civil rights for women. The first women's rights movement was especially successful in getting states to allow married women to control their own property. In the years after the Civil War, small numbers of women moved into elite professions like medicine and law. But most middle- and low-income women still embraced the traditional notion that a woman's place was in the home, nurturing her family.

Certain additional aspects of gender roles were in flux in the mid-nineteenth century, particularly notions about fatherhood and views about women's honor. After 1850, male parenting increasingly was seen as a trait of manhood. Male parenting would improve the morality of the nation's children. The upheaval of the Civil War reinforced this domestic paradigm. Thomas Wier had placed his children among the Shakers in order to protect them while he served in the Union army; when he returned from the war he

sought to reclaim his rightful role as guardian of his children's moral development. Caleb Dyer, head of the Shaker community, refused to release Wier's children; enraged, Wier shot Dyer.

Elizabeth A. De Wolfe shows that the trial defense used by Wier's attorneys stressed his alleged temporary insanity, brought on by the effects of war and the loss of his children. But Wier was convicted. However, Wier's wife, and eventually his daughter, waged a public campaign for his pardon, and received a great deal of support after arguing that because a father's nurturing of his children was so important, Wier should be forgiven for murdering Dyer, who had headed a community whose rigid rules fragmented families and prevented fathers from parenting their children. New Hampshire's governor freed Wier in 1880.

A 1879 New Haven murder trial reveals the persistence of this new view of fatherhood. Formidable forensic evidence suggested that Rev. Hebert Hayden had poisoned a lower-class, pregnant woman who had written a note stating she was his mistress. The defense questioned the technical evidence and then stressed the respectable, middle-class character of Hayden and his family, noting his role as a father: "You are to settle whether those bright little children shall have a father whose name they cannot mention but with a blush of shame. You, gentlemen, are to say whether that devoted father . . . shall be sent from this courthouse disgraced. . . ."[41]

Laura-Eve Moss's analysis of the acquittal of George W. Cole for the murder of L. Harris Hiscock, his willing wife's adulterer, indicates that in the mid-nineteenth century many jurors held to the age-old belief that a man could not be blamed if, in a fit of rage after discovering adultery, he tried to vindicate his honor and his wife's honor by murdering the adulterer. But this belief may have been amplified, in the thinking of juries, by the emergent notion that a *temporarily* insane person, driven to such insanity by justifiable anger over being dishonored, should not be punished for the ensuing violent assault. Since jurors rarely explained their deliberations, it is hard to know if the temporary insanity defense was taken seriously or was a rationalization for exonerating a man who the jurors felt had an "ancient" right to avenge his honor.

But most newspaper reaction to the Cole murder trials and his subsequent acquittal was critical. Editorial writers propounded a new paradigm of women's and men's honor. First, women were increasingly portrayed as having a strong sense of honor, comparable to a man's. Second, influenced by evangelical religion, many editors argued that Cole should have practiced dignity, not vengeance, doing all he could to protect his wife's honor by shielding her from publicity and disgrace. While the jury did not accept this argument, most editorial writers did.

While some people's ideas of gender roles changed in the nineteenth century, the age-old belief in the virtues of an ordered home and the moral

superiority of a middle-class or upper class home persisted. For example, in the 1879 New Haven trial of Rev. Hayden, the defense compared the honor of his good wife, who dressed properly and was dignified, with the coarse speech and appearance of the sister of the house servant whom Hayden was accused of ravishing and killing.

> You are to settle whether that woman henceforth is to be a widow with the stinging disgrace that her husband was a murderer. . . . That loving old mother . . . waits upon your lips for the decision which shall either make her happy . . . or make her remaining days ten-fold more wretched. . . . So do your duty with that group that their hearts shall not be broken.

After eleven of the twelve New Haven jurors voted to acquit (the twelfth, a farmer, voted for a manslaughter conviction), one juror commented: "How can we convict a man with a beautiful wife like that?"[42]

After 1880, scientific racism, based on distortions of Charles Darwin's writings, influenced many Americans, who concluded that the evolutionary process had led to the creation of many distinct human races, each of which had evolved at different rates. The descendants of immigrants from Northern European countries—England, Scotland, Ireland, Germany and the Scandinavian countries—believed they were members of the most highly evolved, superior races. Americans of Northern European stock believed that immigrants from Southern and Eastern Europe, who arrived in large numbers after 1880, were members of backward, less evolved races that were both highly immoral and intellectually inferior to the descendants of Northern European races.

The most famous murder of the nineteenth century was the August 4, 1892 axe slaying of Andrew and Abby Borden in Fall River, Massachusetts. Lizzie, Mr. Borden's daughter, was charged with his murder. (Abby Borden was Lizzie's stepmother). Lizzie Borden was tried and acquitted. Ten months after the murder of Lizzie Borden's parents, Bertha Manchester, a young Fall River, Massachusetts woman, was killed by a brutal axe attack. The Fall River police quickly arrested José Correira, a Portuguese immigrant and manual laborer, even though there was evidence that Bertha's father appeared unconcerned about his daughter's demise. Correira, who was subsequently convicted and imprisoned, fit the stereotype of the "savage" criminal who belonged to an "inferior" race.

The acquittal of Lizzie Borden for the axe murders of her parents was influenced by luck and by the skillful manipulation of cultural symbols. Borden benefited from a decision by the trial judge that inconsistent statements she had made at the coroner's inquest could not be introduced by the prosecution

during her trial. Tiffany Bidler Johnson demonstrates (chapter 10) that Lizzie Borden and her attorneys showed jurors photographs of the interiors of her parents' home to suggest that a young adult raised in cultured, neat, comfortable physical environment could not possibly commit a brutal crime. In his closing arguments, one of Borden's attorneys emphasized the brutal nature of the axe murders to suggest to the jury that a woman of middle class status and Northern European origins could not possibly commit such savage deeds. This line of reasoning resonated with newspaper reports of the arrest of José Correira for the murder of Bertha Manchester, accounts that appeared just as Lizzie Borden's trial was about to start. The existence of an alleged axe murderer who was a common laborer and a member of an "inferior" race emphasized the point that Borden's defense was trying to establish: Lizzie was a properly socialized, middle class woman; only a member of the lower orders of society was capable of committing a savage axe murder.

V

The essays in this collection show that the careful investigation of murder reveals much about the crime and the society in which the crime occurred. Homicide focuses attention on the victim, the defendant, their general characteristics—race, ethnicity, mental competency, gender, and age—and society's perception of the larger cultural context of the crime. At trial, these characteristics, as well as a society's fundamental values manifested in the legal rules by which a court seeks to protect the rights of a capital defendant, are highlighted. In short, murder and its adjudication often reveal the core values of a society.

This anthology points to a fundamental tension in American legal history between the ideal of justice—equality under law, protection of the rights of the accused, and humaneness—and deep and enduring social biases and economic inequalities. Ideally, the criminal justice system neutralizes bias and makes possible a defendant's fair treatment before the law. Since World War II there has been a significant expansion of personal freedom and legal protection, especially for the most vulnerable economic and racial groups in American society. Yet, despite reforms and changes over time, the wealthy, powerful, and dominant ethnic and racial groups remain most likely to tilt the scales of justice in their favor.

It would be, however, too fatalistic to spotlight only the negative aspects of the American legal system. This collection of essays shows that the law of murder has been made more equitable and humane over the course of American history. The framers of the Constitution believed an active and informed citizenry was necessary to maintain a republic and the rule of law. So there is

reason to believe that pursuit of justice will be improved even more if the public supports the ideal of having the legal protections of the Constitution and federal and state laws tendered, fairly and equitably, to *all* inhabitants of our country.

Notes

1. *Malinski v. New York*, 324 U.S. 401, 414 (1945).

2. David Fellman, *The Defendant's Rights Today* (Madison, Wisc.: University of Wisconsin Press 1976), 11.

3. Max Farrand, ed., *The Laws and Liberties of Massachusetts* (Cambridge, Mass.: Harvard University Press, 1929). Lawrence H. Gipson, "The Criminal Codes of Connecticut," *Journal of Criminal Law* 6 (1915): 177, 182

4. Yasuhide Kawashima, *Igniting King Philips' War: The John Sassamon Murder Trial* (Lawrence, Kans.: University of Kansas Press 2001), 66–73.

5. Warren Billings, "Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth Century Virginia," *Journal of Southern History* 47 (1981): 569.

6. William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass.: Harvard University Press, 1975).

7. Cesare Beccaria, *An Essay on Crimes and Punishments* (Palo Alto, Calif., 1953), 97, 99, 101–104.

8. *Barron v. Baltimore*, 32 U.S. 243 (1833); Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* (New York: Oxford University Press, 1985), 142–44. Alan Rogers, " 'Under Sentence of Death': The Movement to Abolish Capital Punishment in Massachusetts, 1835–1849," *New England Quarterly* 66 (1993): 27–46.

9. *New York Times*, October 6, 1865; *Boston Daily Evening Transcript*, October 16, 1865; George Fisher, "The Jury's Rise as Lie Detector," *Yale Law Journal* 107 (1997): 575, 713.

10. *Strauder v. West Virginia*, 100 U.S. 303 (1880) and *Virginia v. Rives*, 100 U.S. 313 (1880); Jeffrey Abramson, *We the Jury* (New York: Basic Books, 1994).

11. *Powell v. Alabama,* 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935); Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State Uniersity Press, 1979).

12. *Brown v. Mississippi*, 297 U.S. 278 (1936). To avoid being lynched or sentenced to death again, Ed Brown and the other two defendants pleaded no contest to manslaughter and received prison terms.

13. *Palko v. Connecticut*, 302 U.S. 319 (1937) and *Sonzinsky v. U.S.,* 300 U.S. 506 (1937). William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), 251–57.

14. Earl Warren, "The Law and the Future," *Fortune* 51 (November 1955): 106, 226. *Mapp v. Ohio*, 367 U.S. 643 (1961).

15. *Gideon v. Wainwright*, 372 U.S. 335 (1963). At his retrial Gideon had a lawyer, and a jury acquitted him.

16. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

17. *Miranda v. Arizona,* 384 U.S. 436 (1066).

18. William Oberer, "Does Disqualification of Jurors for Scruples against Capital Punishment Constitute Denial of a Fair Trial?" *Texas Law Review* 39 (1961): 545; *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

19. Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change* (Chapel Hill, NC: University of North Carolina Press: 1992), 70, 75.

20. Ibid., 71–75. *New York Times*, January 18, 1972.

21. *Furman v. Georgia*, 408 U.S. 238 (1972).

22. Ibid.

23. *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court found the death penalty for rape unconstitutional in *Coker v. Georgia*, 433 U.S. 584 (1977).

24. *Lockhart v. McCree,* 476 U.S. 162 (1986). *McCleskey v. Kemp*, 481 U.S. 279 (1987). More appeals were brought on behalf of McCleskey, all of which failed. He was executed September 25, 1991.

25. *Swain v. Alabama*, 380 U.S. 202, 222 (1965).

26. *Batson v. Kentucky*, 476 U.S. 79 (1986); Randall Kennedy, *Race, Crime and the Law* (New York: Pantheon Books, 1997), chap. 6.

27. Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 1–15*;* Roger Lane*, Murder in America* (Columbus: Ohio State University Press, 1997), 46.

28. Kawashima, *Puritan Justice: White Man's Law in Massachusetts, 1630–1763* (Middletown, Conn.: Wesleyan University Press, 1986).

29. Kawashima, *Igniting King Philips' War*; Kawashima, *Puritan Justice*, 129–131.

30. The cousin had been watching Mrs. Hicks's baby and had fallen asleep from fatigue. When the crying baby awakened Mrs. Hicks, she was so enraged that she grabbed a stick and beat the young woman to death. *Narrative of the Life of Frederick Douglass, An American Slave* (New York: Signet Books, 1968), 41–42.

31. W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880–1930* (Urbana: University of Illinois Press, 1993), 71.

32. Historians have noted that beginning in the eighteenth century, English jurisprudence in capital cases stressed strict adherence to legal procedures. If a person's life was to be taken, the law had to be followed to the letter. Without adherence to the processes stipulated by the law in capital cases, in which the punishment was the most severe possible—death—all law would come into disrepute. Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England,* ed. Douglas Hay, et al. (New York: Pantheon, 1975), 17–64.

33. Nancy MacLean "Gender, Sexuality, and the Politics of Lynching: The Leo Frank Case Revisited," in *Under Sentence of Death: Lynching in the South,* ed. W. Fitzhugh Brundage, (Chapel Hill: University of North Carolina Press, 1997), 169.

34. William Young and David E. Kaiser, *Post Mortem: New Evidence in the Case of Sacco and Vanzetti* (Amherst: University of Massachusetts Press, 1985).

35. Malcolm X, "The Ballot or The Bullet," 1964.

36. Lindorff's article details other procedural biases of the trial judge, who played the race card in his own way. Compare Judge Albert Sabo's behavior with the Rhode Island Supreme Court, sitting as a trial court, in the 1844 murder trial of two Irish brothers, John and William Gordon, known to be sympathetic to Dorr's Rebellion. After the conviction of the first brother, the all-Protestant Supreme Court, despite its distaste for the Irish, acceded to a defense request to delay his sentencing so that if the trial of the second brother provided new evidence that exonerated the first brother, his life could be spared. Charles Hoffmann and Tess Hoffmann, *Brotherly Love: Murder and the Politics of Prejudice in Nineteenth-Century Rhode Island* (Amherst: University of Massachusetts Press, 1993).

37. David P. Lindorff, "Rigged Justice," *In These Times*, April 14, 2003, 4–5.

38. John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 33–34.

39. Quoted in Walter R. Steiner, "The Reverend Gershom Bulkeley, of Connecticut, An Eminent Clerical Physician," *Johns Hopkins Hospital Bulletin* 27 (1906): 47–52.

40. *New York Times*, March 13, 1902.

41. Virginia A. McConnell, *Arsenic under the Elms: Murder in Victorian New Haven* (Westport, Conn.: Praeger, 1999), 118–120.

42. Ibid.