

Violence and Political Incivility

by David Lyons*

The charge to our panel refers to “the deterioration of the political conversation,” to “deep . . . divisions in society,” and to recent violence—especially the tragic events in Tuscon.¹ It asks us to identify “the virtues required for our common life as citizens in a democracy and for civil democratic conversation.”² I shall offer observations and conjectures on each issue, stressing the historical background.

Let me suggest, first, that the nonconstructive and increasingly abusive character of our political discourse may be relatively mild manifestations of an even more troubling malaise of our society—commonplace unlawful violence. I wish to draw your attention to a neglected aspect of that problem. When violence is addressed, we usually focus on practices that are condemned and targeted by public officials and fail to consider the illicit role that officials themselves have often played. A central feature of our civilization since the earliest colonial times has been unlawful violence that is tolerated, encouraged, or engaged in by public officials.

Let us go back in time. Land and labor were the two great needs of early English colonists in mainland North America. Land was needed to accommodate increasing numbers of immigrants. Labor was mainly sought by those colonies, such as Virginia, that developed economies, and ultimately social systems, built upon the production and export of cash crops such as tobacco and cotton. The latter also created a demand for agricultural land.³

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1. See *Purpose Statement, Mercer Law Review Symposium 2011, Citizenship and Civility in a Divided Democracy: Political, Religious, and Legal Concerns*, MERCER LAW (Oct. 7, 2011), <http://www.law.mercer.edu/content/law-review-symposium-2011>.

2. *Id.*

3. For all aspects of the colonial period, see generally GARY B. NASH, *RED, WHITE, AND BLACK: THE PEOPLES OF EARLY NORTH AMERICA* (5th ed. 2006).

Native Americans, or Indians, although ambivalent about the newcomers, allowed them to establish a settlement and, more importantly, food when the latter faced starvation. The colonists thereafter acquired land in various other ways, but mainly by force. As European immigration accelerated and diseases carried by the newcomers swept devastatingly through the nearest tribes, colonial settlers soon greatly outnumbered their indigenous neighbors. So when the colonists' aggressive expansion led to Indian uprisings, Indians were unable to drive the colonists out. The colonies imposed treaties under which tribes ceded most of their territories.⁴

Treaties between colonies, and later between the United States, and Indian tribes, usually stated that the newly demarcated and reduced Indian lands would be guaranteed forever. But the guarantees were rarely, if ever, respected. That was standard colonial practice and became standard U.S. government practice, which continued into the twentieth century.⁵

That coercive, often violent process began in colonial Virginia. It continued, for example, in colonial New England—most tragically when colonists from Massachusetts, seeking control of Connecticut, massacred Pequot women, children, and elders in Mystic—and in the trans-Appalachian West when the colonies did nothing to stop violations of the Royal Proclamation of 1763. The unlawfully violent process continued after Independence during “Indian Removal” from the Eastern states—when the Cherokees, for example, were evicted from their territory and forced onto the devastating “Trail of Tears,” although the law required their consent;⁶ in the newly established state of California where Indians were displaced, enslaved, and decimated;⁷ in the newly acquired Southwestern territories, which had been taken by force from Mexico,⁸ and in the new Northwest.⁹ The violent seizures of land continued in the Great Plains (partly by destroying millions of buffalo as a means of starving the resistant and resourceful tribes) and was

4. See generally *id.*

5. See generally COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (Nell J. Newton ed., 2005).

6. See generally STUART BANNER, HOW THE INDIANS LOST THEIR LAND 191-227 (2005).

7. See generally ROBERT F. HEIZER & ALAN J. ALMQUIST, THE OTHER CALIFORNIANS (1971).

8. See generally JUAN GONZALEZ, HARVEST OF EMPIRE 27-57 (rev. ed. 2011); MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO (2d prtg. 1996).

9. See generally Chief Joseph, *The Fate of the Nez Percés Tribe, 1879*, in GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY 237 (Wayne Moquin & Charles Van Doren eds., 1973).

punctuated, though not quite ended, with the massacre at Wounded Knee.¹⁰

Violence was applied outwardly too, though it was not always so blatantly unlawful. For example, the U.S., as already noted, provoked a war with Mexico in order to seize half of its neighbor's territory. American planters and missionaries, with the illicit aid of U.S. Marines, seized control of the independent nation of Hawaii so that it could be annexed by the U.S.¹¹ During the same period, Puerto Rico and the Philippines were taken from Spain by force. The Filipinos had nearly achieved independence from Spain and resisted U.S. colonization. In order to overcome their resistance, the U.S. Army was obliged for several years to conduct a war upon that population.¹² In view of popular American sympathy for the Cuban revolution, which had all but succeeded against Spain prior to American intervention, the U.S. refrained from formally making Cuba its colony. However, the U.S. Army forced the Cuban Constitutional Convention to accept the substance of the Platt Amendment, which made that nominally independent nation an American colony in all but name.¹³ One might also note that scores of U.S. military interventions and military occupations in Central America, South America, and the West Indies secured resources and markets for American businesses.¹⁴ All of that violence was conducted by our government, at least some of it contrary to U.S. law.

To achieve a fuller, balanced view of the relations between violence and public policy, we must also take account of the official toleration or encouragement of violence that has been practiced by private individuals. The prime example is official acceptance of and involvement in thousands of assaults upon African-Americans.

This practice reached a peak after slavery was abolished, when African-Americans were no longer anyone's valuable property (and thus no slave owner had to be compensated when an African-American was killed). During the short-lived period of Reconstruction (1863-1877), African-Americans and their allies were subjected to a "reign of

10. See generally DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (4th prtg. 1971).

11. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES 312* (Perennial Classics 2003); see also TOM COFFMAN, *NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAII* (rev. ed. 2009).

12. ZINN, *supra* note 11, at 312-20.

13. See GONZALEZ, *supra* note 8, at 63-64.

14. See, e.g., RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS21311, *U.S. USE OF PREEMPTIVE MILITARY FORCE 3* (2003); GONZALEZ, *supra* note 8, at 58-78.

terror."¹⁵ After the Compromise of 1877,¹⁶ however, federal troops were withdrawn from the former Confederate states, and the large landholders (formerly slave holders) resumed control through force and fraud.¹⁷ African-Americans were then systematically disenfranchised, and Jim Crow was imposed. That political process was made possible, in part, by thousands of lynchings—during the crucial decade of the 1890s, at the rate of two to three per week. Prosecutions for the assault, rape, or murder of African-Americans were rare. Even rarer were convictions.¹⁸ Some lynchings were even publicized in advance, with arrangements made for transportation to the site. Photographs taken at lynchings show participants and observers *facing* the camera. Such images were reproduced on postcards, which were sent through the U.S. mail.¹⁹ It is clear those present had no fear of prosecution. Public policy from 1877 to the 1950s accepted this aspect of the Southern way of life. That policy applied to the North as well, especially as violence was employed to confine participants in the Great Migration of African-Americans from the rural South to the urban North, thus creating the twentieth century's black urban ghettos.

So much for officially sanctioned violence. I turn now to the closely related topic of labor, intense demand for which resulted from a commitment of Southern colonial economies to the production of cash crops. Initially, most agricultural laborers served under "indentures"—a contractual agreement to work for a specified period of years (perhaps five) in exchange for one's passage to America.²⁰ The arrangement seemed to offer to those whose services were thereby secured better prospects than prevailed in England at the time. Colonists who paid for the passage of newcomers earned the right to acquire a prescribed acreage of land. Affluent colonists thereby became owners of increased productive capacity, which secured greater profits as well as the capacity to secure more servants and to claim more land—a cycle that gave rise to the Tidewater Aristocracy.²¹

By the middle of the seventeenth century, economic conditions began to improve in England, and it became more difficult and more costly to

15. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 412-59 (1988).

16. See RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 32 (2003).

17. *Id.* at 587-601.

18. See generally ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980).

19. See JAMES ALLEN ET AL., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000) (noting in particular photos 54, 74, and 75).

20. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1148 (1981).

21. NASH, *supra* note 3, at 146-47.

recruit indentured servants. By that time, however, England and some of her North American colonies, such as Rhode Island and Massachusetts, had become active participants in the African slave trade, and slaves became less expensive. Landowners began to shift their focus to slave labor.²²

Slavery had been introduced into the first English North American colony, Virginia, early in the seventeenth century—perhaps as early as 1619.²³ For the colony's first fifty years, however, slavery was unlawful.²⁴ It was unlawful because the practice involved forcible imprisonment and assault, which private parties required authorization to employ, authorization that they lacked. Although enslavement could be imposed by legislation as a punishment for a crime, or upon prisoners of war, it was not otherwise permitted by English law, which applied to the colonies.²⁵ The Virginia legislature and its courts acknowledged the practice before taking any action to make it lawful, which was within legislative authority provided that the King approved.²⁶

When the Virginia legislature finally began to legislate about slavery—in the 1660s, following a judicial decision that freed two individuals who were unlawfully held as slaves²⁷—its first two enactments reversed the common law doctrines that had decided the case. The legislature decided to allow the enslavement of Christians and to declare that a child would follow the condition of its mother rather than its father.²⁸

22. *Id.*

23. IRA BERLIN, *MANY THOUSANDS GONE* 29 (1998).

24. The incompatibility of slavery with the English common law was first formally declared in *Sommersett v. Stewart* in 1772. See generally *The Case of James Sommersett, a Negro*, available at http://memory.loc.gov/cgi-bin/query/D?llstbib:1:/temp/~ammem_319l::. It had earlier been noted by William Blackstone in 1765. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *412. But there had been no relevant changes in English law between the settlement of Jamestown and 1772.

25. See VIRGINIA CHARTER (1606), available at <http://www.lonang.com/exhbris/orgamc/1-606-ecv.htm>; Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.); 7 Co. Rep. 1a. The Virginia legislature could have authorized slavery but took no such action until late in the seventeenth century. In *Sommersett v. Stewart*, Lord Mansfield declined to apply his ruling to the colonies, where by 1772 slavery had been accepted for a century and a half. See *Sommersett*, *supra* note 24.

26. See An Act for the Dutch and All Other Strangers for Trading to this Place, Act XVI (1659-1660), in 1 *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619*, at 540 (William Waller Hening ed., 1823) (enacting in 1659 an act encouraging the importation of slaves); Warren M. Billings, *The Cases of Fernando and Elizabeth Key*, 30 WM. & MARY Q. 467 (1973).

27. See Billings, *supra* note 26 (discussing Elizabeth Key's suit).

28. An Act Declaring that Baptisme of Slaves Doth Not Exempt Them from Bondage, Act III (1667), in 2 *The Statutes at Large; Being a Collection of All the Laws of Virginia*,

Given our topic, we should note that the Virginia legislature's next enactment concerning slavery immunized slave masters from criminal liability for using lethal methods of discipline.²⁹ That law, which made private violence lawful, laid the groundwork for routine brutality against African-Americans.

Slavery in Massachusetts also has an interesting history. In 1641, the colony published a code of laws which made kidnapping a capital offense but permitted the purchase of slaves.³⁰ The irony, of course, is that most if not all of those who might have been purchased as slaves after 1641 would have become slaves as a consequence of kidnapping.³¹

My reason for reviewing these developments has been to suggest that the public policies, which for most of this country's existence sanctioned unlawful violence, especially unlawful violence by officials, helped to lay the groundwork for troubling aspects of American culture, from private violence to political incivility.

It may not have escaped the reader's attention that the principal victims of these public policies have been peoples who are classified in America as non-white. Of course, the situations of those peoples have changed. Slavery was abolished a century and a half ago and less absolutist (though often lethal)³² forms of systematic discrimination, such as Jim Crow, have since been officially denounced. The reforms that have been undertaken in the past half century now seem irreversible, and the illicit sanctioning of unlawful violence is correspondingly much less common, at least within the territorial boundaries of the U.S. But three hundred and fifty years of the practice and policy of white supremacy have left in place one of the deepest divisions in American society, to which I now turn.

Let us go back in time once again. Early on, religious differences were mixed up with other distinctions, to the characterization of which the language of "race" has long contributed. Although racial categories have never been clear, universally accepted, or stable, what mid-twentieth century Americans thought of as racial differences have played a major

from the First Session of the Legislature in the Year 1619, at 260 (William Waller Hening ed., 1823); Negro Womens Children to Serve According to the Condition of the Mother, Act XII (1662), in 2 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619, at 170 (William Walter Henning ed., 1823). Thus the legislature began to regulate slavery before authorizing it.

29. An Act About the Casuall Killing of Slaves, Act I (1668), in 2 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619, at 270 (William Walter Henning ed., 1823).

30. THE BODY OF LIBERTIES 91, 94 (1641) (William H. Whitmore ed., 1890).

31. BASIL DAVIDSON, THE AFRICAN SLAVE TRADE 120-24 (rev. ed. 1980).

32. See, e.g., DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008).

role in American development from early on. European newcomers differentiated themselves from America's indigenous peoples, who were seen not only as non-Christians but also as profoundly different human beings. Anglo-Americans differentiated themselves from Irish-Catholics, who had been seen by the English since they invaded Ireland as an inferior, savage race.³³ Later, Americans whose origins lay in Northern and Western Europe differentiated themselves from those arriving from Southern or Eastern Europe (mainly Catholics and Jews), whose whiteness was questioned.³⁴ European-Americans set themselves apart from those who came here from Asia and the Pacific Islands.³⁵ But the deepest and most resistant division appears to stem from the race-based institution of chattel slavery, whose subjugated population overwhelmingly came from Africa or who descended, at least in part, from Africans.

When the United States secured their independence from Great Britain, during the European "Enlightenment," anti-slavery agitation was becoming significant, and slaveholders became ambivalent about owning slaves. Reservations about the institution were expressed by Jefferson, for example, despite his commitment to white superiority.³⁶ Reservations about the institution were demonstrated following Independence when manumissions increased markedly in the Upper South, at known economic cost to those who freed their slaves, as there was a strong, incessant demand for slaves in the Lower South.³⁷

At the time of Independence, the abolition of slavery was conceivable, which accounts for the Lower South's anxious agitation for slavery protections under the new Constitution.³⁸ It was assumed, however, that the former slave owners would be compensated for the loss of their most valuable property.³⁹

Abolitionism became a major movement at the same time as slave-produced cotton became the engine of America's economic development. During that period, positive sentiments for slavery began to displace apologetics.⁴⁰ The Civil War finally brought emancipation without

33. *See generally* NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

34. *See generally* DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS* (2005).

35. *See generally* ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850* (1988).

36. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 138-43 (William Peden ed., 1982).

37. GARY B. NASH, *RACE AND REVOLUTION* 7-20 (1990).

38. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 3-36 (2d ed. 2001).

39. NASH, *supra* note 37, at 36-37.

40. *See generally* SLAVERY DEFENDED: *THE VIEWS OF THE OLD SOUTH* (Eric L. McKittrick ed., 1963).

compensation for slave owners. However, compensation for the former slaves seems never to have been entertained seriously. When Southern land reform was rejected by Congress—effectively abandoning the social reconstruction of the slave states even before Reconstruction was formally terminated—the possibility of compensating ex-slaves for their profound injuries likewise ended.⁴¹

Thus, African-Americans, whose labor was principally responsible not only for Southern wealth but also for a major part of Northern industry and commerce, emerged from slavery without material resources. Few were able to secure a plot of land or any other basis for economic and political independence. Before long, the federal government abandoned the freedmen, most of whom became sharecroppers or tenant farmers. Their subordinated, exploited fate was sealed when the large landowners (former slave owners) resumed economic control, disenfranchised African-Americans, and regained political dominance.⁴²

Jim Crow was accepted by all branches of the federal government until after World War II. Reforms were secured when the emergent Civil Rights Movement coincided with Cold War pressures on the U.S. within the context of colonial liberation in Africa and Asia. But, while reparations (on a small scale) would be provided for some of the wrongs done to Japanese-Americans and Native Americans,⁴³ no serious consideration would be given within the political system to the idea of reparations for African-Americans, who continued to be burdened by the legacy of slavery and Jim Crow. Discriminatory practices in the workplace and community, ranging from wages to housing loans, resulted in a black-white “wealth gap” and a significant gap between the life prospects of blacks and whites.⁴⁴

One way to get a sense of that deep division within American society is by applying the ideal of equal opportunity. Equal opportunity does not mean equal success, but it also does not mean the mere absence of overt discrimination. It means that our achievements will depend substantially (with the constraints of circumstances) upon our talents and efforts.

41. FONER, *supra* note 15, at 228-40, 308-11, 603.

42. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 67-118 (2002); WORMSER, *supra* note 16, at 19-123.

43. See Civil Liberties Act of 1988, Pub. L. No. 100-383, § 104, 102 Stat. 904, 905 (1988); H.D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* (1990).

44. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997).

Consider then the life prospects of newborn infants, who cannot be considered responsible for their own prospects. Equal opportunity means that the relevant conditions of newborn infants are comparable, regardless of whether the infants are white or black, rich or poor, male or female. It means that the infants face conditions that equalize their opportunities for success.

I suggest, for a start, that relevant conditions include pre-natal and post-natal medical care; healthy and adequate housing, nutrition, and day care; adequate time with parents; educational opportunities, job opportunities, and life expectancy. In fact, relative to the average newborn white infant, the average newborn black infant faces not only inferior but also inadequate pre-natal and post-natal medical care; inferior and inadequate housing, nutrition, and day care; inferior and inadequate educational and job opportunities; a substantially lower chance of surviving infancy; and a shorter life expectancy.⁴⁵

The same applies to poor Americans, of all colors. The current recession, bad as it is, did not create those conditions. The recession has made bad conditions worse. Before the recession, tens of millions of Americans were living below the poverty line. Many people working full-time at minimum wage jobs qualified for food stamps. Many people working full-time could not afford medical care. Some people working full-time were homeless. That was true before the recession. Things are worse now.

Government policies since the 1960s have greatly reduced overt discrimination. During the 1960s, the federal government also turned its attention to poverty,⁴⁶ but government policies have hardly touched the black-white wealth and life prospect gaps. They have not substantially promoted equal opportunity. On the contrary, in recent decades (beginning long before the current recession), government policies have enabled the rich to become a whole lot richer and have allowed those who were not poor to become poor.⁴⁷

45. See, e.g., Rebecca M. Blank, *An Overview of Trends in Social and Economic Well-Being, by Race*, in 1 *AMERICA BECOMING* 21 (Neil J. Smelser et al. eds., 2001); Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 *AMERICA BECOMING*, *supra*, at 391; Melvin L. Oliver & Thomas M. Shapiro, *Wealth and Racial Stratification*, in 2 *AMERICA BECOMING*, *supra*, at 222; Raynard S. Kington and Herbert W. Nickens, *Racial and Ethnic Differences in Health: Recent Trends, Current Patterns, Future Directions*, in 2 *AMERICA BECOMING*, *supra*, at 253.

46. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964); Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).

47. For quick view, see Paul Krugman, *Inequality Trends in One Picture*, N.Y. TIMES BLOG (Nov. 3, 2011, 10:02 AM), <http://www.krugman.blogs.nytimes.com/2011/11/03/inequality-trends-in-one-picture/>. For a more detailed view, see *Income Inequality in the United*

Wealth attracts political influence. America's increasing inequalities in income and wealth correspond to increasing differences in political influence. I suggest that many of those, black and white, who see no prospect of better conditions for themselves or their children, are embittered, politically alienated, and confused. It would be surprising if political discourse did not degenerate into abuse and the search for scapegoats.

Race and class are the deepest divisions within American society. Our political discourse does not address them openly. But it does seem to address them indirectly. An opposition to "big government" is very often an opposition to programs that might promote equal opportunity. Likewise, "trickle-down" economic policies are guaranteed to increase rather than reduce inequality. Concern for the "middle class" often seems like concern for white Americans, most of whom used to have jobs, pensions, and health insurance.

I will now turn briefly to the last point in our charge: the virtues we require are those that enable us to face those deep divisions squarely. I suggest that these include open-mindedness, a willingness to learn from history, a commitment to the honest appraisal of facts and policies, a sense of mutual responsibility, and, not least, empathy and courage.