tion of the death penalty. Voters' numbers were great enough, and their opposition strong enough at over 80 percent, that these counties swayed the whole state's outcome.

"No law shall be enacted providing for the penalty of death." Michigan's constitutional convention of 1961-1962 made executions unconstitutional. This provision meant that treason was eliminated as a capital offense. Michigan officials enacted the change after they found they couldn't prevent a federal execution for treason that was held in their state. As long as Michigan had the death penalty for any offense, federal authorities were empowered under United States law to execute for federal crimes committed within the state's borders.

The Michigan public has shown less support for the death penalty over the years than voters in most other states. A poll of Detroit voters in a 1986 primary showed that two-thirds of European-Americans, and about half of African-Americans, favored capital punishment. These Michiganians were much less supportive than the public nationwide, who favored the death penalty at the rate of 82 percent of European-Americans and 57 percent of African-Americans.

Of course, that was still a majority of Michiganians who supported the death penalty. On May 19, 2001, as support for capital punishment declined nationwide, a poll by the *Detroit Free Press* found that fifty-three percent of Michigan respondents supported the death penalty. But support dropped to thirty-five percent when respondents were offered the choice between the death penalty and mandatory life imprisonment plus restitution to the victim's family.

As the case of Michigan shows, public support doesn't correspond completely with law. It's hard to compare support among individual states because national poll sizes aren't big enough, and statewide polls vary in how they take a sample and word their questions. Generally, poll respondents in eastern and midwestern states show lower rates of support than do respondents from southern and western states. But the difference between most and least support may be no greater than that between Republicans (more supportive) and Democrats (less supportive).

Looking back over Michigan's years of opposing the death penalty, what's exceptional is that *some* part of the electoral system has always produced enough opposition to keep capital punishment from coming back—now the legislature, now the governor, now the public.

What are the pieces of Michigan's puzzle? How did they come together to create such an unusual picture? When I think of Michigan in the 1840s I think of it as a young state. Its European-American population, recently settled, were mostly small farmers and other homesteaders. Cities weren't very significant yet as an economic or political force. The state had only 59 miles of railroad in 1840, and land speculation, timbering, mining, and manufacturing were just beginning to be sources of great fortune for the few. In contrast to the situation in older states like Massachusetts or New York, in Michigan there hadn't been time or means for any one group of people with like interests to become entrenched as a power elite.

Judging from the record of legislative debate, members of the Michigan state assembly held the spectrum of views on capital punishment that were current in their time. In favor of the death penalty, George E. Hand, James A. Van Dyke, Hiram Stone, and others argued:

- A maximum amount of government authority is needed in order to keep a stable social order.
- Government has the right to take a citizen's life—the same right of self-defense that an individual has.
- The idea of capital punishment deters other criminals best because fear of death is our most compelling fear.

Hiram Stone, as a death-penalty supporter and writer of a minority committee report, was more concerned that a guilty murderer might later be freed from prison than that an innocent one would be hanged. Michigan legislators like Flavius Littlejohn, Charles Bush, and William A. Pratt, who opposed capital punishment, didn't meet this argument head-on, but presented a five-and-a-half page majority report stating their disagreement with Stone. The report written by Pratt made these points:

- Authoritarian government belongs to a barbarous past, not to the enlightened age of American nationhood.
- Government and church should be separate, with government paramount in worldly decisions. For this reason, it's improper to defend capital punishment on the authority of the Bible or any religious text.
- Government is made legitimate only by the consent of the governed. It would be a mockery of justice to force a citizen to "consent" to his own execution.
- Human individuals are redeemable. They can be influenced by environment and atone for their wrongs, but execution is irreversible and cuts off all possibility of reform.

Religion played a part in Michigan's death-penalty debate—maybe the biggest part, when you count the number of words devoted to the subject. Both abolitionists and retentionists cited either the Bible or "divine law" in support of their position. But their issue doesn't seem to have been whether religious teaching favored executions. Legislators were wrangling over *authority*. Where did it come from? How much of it did we need? Who should wield it? Should we keep the penalties "which terrified the people of the middle ages into submission"? Was consent of the governed no more than a "newfangled theory," as one exasperated legislator protested?

Those who favored capital punishment favored strong authority and feared social chaos above all else. "Traitors and pirates, and murderers and robbers," said Hiram Stone in a minority report of 1844, "may be deemed the common and mortal enemies of mankind, against whom society may wage a war of extermination." Those who favored abolition, on the other hand, insisted on limiting the authority of government to less than the power of life and death. Every power the government held, they felt, cut off some portion of the individual citizen's human potential. Moreover, to invoke God as the basis of government was to bring back established religion and, with it, the kind of traditional hierarchy that Americans endured under British rule.

Rebellion against authority runs through the biographies of some legislators who opposed the death penalty and wanted to see its use discontinued. A few abolitionists were known as opponents of evangelical religion. Jonathan Graham described himself as a rebel against the Puritanism of his upbringing in Connecticut. Charles P. Bush opposed the observance of Sunday as a holy day. Austin Blair, legislator during the 1840s, was governor of Michigan 1861-1865. While at school in Cazenovia Seminary, New York, Blair led student opposition to the official annual religious revival. Like fellow abolitionists Michael Patterson and Austin Wing, Blair was later a regent of the University of Michigan. His father had advocated the abolition of slavery, and Blair was one of very few politicians in his time to support the vote for African-Americans. Such a profile was unknown for any legislator who supported capital punishment.

The biographies of representative pro-capital-punishment legislators, by contrast, showed a respect for tradition, social hierarchy, and the privileges and responsibilities of wealth. James Van Dyke was a "prominent Detroit lawyer" and trustee of copper companies who later represented railroad interests. William Fenton came from a banking family in Norwich, New York. His father "was one of the first citizens in wealth and social position, being a prominent banker and an elder in the Presbyterian Church, of which he was one of the main pillars of support." The Presbyterian connection can be traced from the East Coast to Detroit, where the First Presbyterian Church had an elite membership and was pastored by George Duffield, Michigan's best-known supporter of capital punishment. William Fenton married a judge's daughter, emigrated to Michigan, and bought the land that later became Fentonville. Fenton ended as "Colonel Fenton," a distinguished Civil War veteran, a former mayor, and a bank president like his father. William Gray and George E. Hand were also described as prominent Detroit lawyers and representatives of the railroads.

Legislators' party affiliation doesn't really predict where individual representatives would stand on capital punishment, abolition of slavery, temperance, free public education, or other reform issues of their

decade. Both Whig and Democratic parties in Michigan were internally split and in transition between 1830 and 1860. You can only tell by looking forward to the 1850s that some of Michigan's state legislators during the 1840s were already riding the crest of a breaking wave. Michigan and Wisconsin were the birthplace of the new Republican Party, soon to elect Abraham Lincoln president of the United States.

One-fourth of all legislators favoring abolition of the death penalty were future Lincoln Republicans. None of the death-penalty retentionists of known affiliation became Republicans.

Michigan Republicanism at the start was very much a coalition of interests, but their common position was opposing Southern slave-owning interests on behalf of small farmers. As judged by the political offices they gained, these legislators made a successful career of their reformist, man-of-the-people stance. They held many more offices at state level, while traditionalist legislators who supported the death penalty became influential only locally. For example, members of the Detroit-Wayne-County elite monopolized the offices of mayor and alderman there. William B. Sprague, a physician and mill owner, was prominent as the first town clerk of Coldwater, an associate judge of the county court, and judge of probate. Like three-fourths of his fellow retentionists, he held no state-level offices other than membership in the legislature.

In keeping with the emphasis on authority, several of Michigan's well known death-penalty supporters were leaders in the military. Augustus C. Baldwin was a brigadier general of the state militia; Colonel Fenton donated to the establishment of Michigan's first Civil War regiments and led one of them into battle; Isaac deGraaf Toll was a career officer in the state militia and captained a company in the Mexican-American War. The only death-penalty opponent whose military service is mentioned is Marcus Wakeman, who fought in the War of 1812.

Among abolition supporters, James M. Edmunds was a teacher and merchant who lived in Detroit, where he served as comptroller. His main focus was state politics. Besides serving two terms each in the

state House and Senate, he was a delegate to the 1850 constitutional convention and chairman of the state Republican committee for six years. He held several Presidential appointments including the postmastership of Washington, D.C., for twenty years. Eighteen of thirty-two abolitionists held state-level offices like Edmunds's or leadership positions in the legislature. Austin Blair was governor of Michigan throughout the Civil War (two terms); and Orrin N. Giddings, after moving to New Mexico, became governor there.

The 1820s through 1850s were a crusading era all over the northern states. But Michigan, like Wisconsin, differed from the states of the Northeast in that its social order wasn't yet set in stone. Political power in the upper Midwest was shared between liberals and conservatives, who took different routes to a position of influence.

Prominent Detroit lawyers, husbands of judges' daughters, supporters of the First Presbyterian Church: such persons no doubt attained the kinds of influence most important to them through connections that were half-social, half-business. This elite and their sympathizers could be expected to support capital punishment as a byproduct of their belief in a hierarchical social order.

But Michigan legislators who opposed authoritarian tradition, and weren't themselves members of an elite, were able to be more effective politically than their counterparts in the Northeast. State government wasn't dominated by a long-standing establishment like that of the orthodox Puritans of Massachusetts or the Dutch-English leadership of New York. Michigan legislators' later careers as Lincoln Republicans would show their skill at promoting an ethical position through compromise while advancing their political careers. Wisconsin, with a similar settlement pattern in the years just before statehood, appears to have shared this political culture.

Within New England itself, only Rhode Island succeeded in abolishing capital punishment during the antebellum reform period. Theirs was a tradition of liberal dissent and suspicion of central government, and executions that had taken place under colonial rule in Rhode Island may have had less public support than elsewhere.

By the 1850s, nationwide tensions over slavery eclipsed other topics in public debate and directed political action away from the death penalty. State legislators closed ranks in order to promote their economic and political interests against those of other sections of the country. Most states' opponents of capital punishment, so vigorous in sponsoring speeches, debates, and conferences, seem to have neglected to convince the decision makers. As early as 1841, the New York legislature narrowly defeated death penalty abolition and followed with a powerful pro-execution memorandum. The New Hampshire referendum of 1844 revealed strong public support in that state. The 1850 Ohio constitutional convention, after decades of anti-death-penalty activism, upheld capital punishment.

History matters—that's what the case of Michigan demonstrates.

What happened in the past, especially as a state was being organized, is probably more important than public opinion at any given moment. Today, twelve states have laws against the death penalty—Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin—and so does the District of Columbia, a federal jurisdiction.

Seven of these states fit the Michigan pattern: younger midwestern and upper-plains states having a New-England-style activist culture and a strong element of early-arriving Scandinavian population. These states' legislatures abolished the death penalty in earlier years, before political factions became entrenched.

Alaska, Hawaii, and West Virginia gained statehood among strong feelings against authoritarian government on ethnic or working-class grounds.

Maine and Rhode Island, not heavily settled in early years, have long done without executions, but Massachusetts and Vermont were able to abolish the death penalty only in 1965. New York followed a similar pattern and has now reinstated the death penalty.

Of America's three major eras of reform, wars brought each to a close—first the Civil War, then World War I, then the Vietnam War.

Some changes in opinion have survived wartime conservatism, but the change of mood was as palpable then as it is now as the United States conducts another war. In 1866, one year after the end of the Civil War, death-penalty abolitionist Marvin H. Bovee wrote at length to Governor Oglesby of Illinois requesting clemency for two condemned murderers, the young Barney Vanansdell and James Lemon. Bovee had led Wisconsin's repeal of the death penalty, and advanced arguments in his letter similar to those used by abolitionist legislators in Michigan. But Bovee's closing point concerned the effect of war on respect for human life:

> However glorious and patriotic the cause for which war may be prosecuted, the demoralizing effect upon the public mind is ever apparent. Ours has been no exception. Since the breaking out of hostilities, the general respect for human life has been very much lessened, while the debasing effect upon the minds of very many who were immediately engaged, is noticeable by all. The killing of thousands is not well calculated to inspire feelings of reverence for human life, but, on the contrary, often stimulates the worst passions of man ... [Vanansdell and Lemon may not] be sufficiently skilled in that branch of governmental science by which an individual is enabled to draw that *very nice distinction* between the *laudable virtue of killing* by national authority, and the *reprehensible criminality of killing* upon individual responsibility.

Most reform movements nationally died with the Civil War. Before the war, reformers could argue that the state didn't have the right to demand a citizen's life. But this point was settled when both Union and Confederacy introduced the draft, sending soldiers to their deaths whether or not they had volunteered. The conflicts leading to the Civil War provided first a set of social tensions that provoked violence, then an object lesson in the use of violence to resolve social tensions.

Two Union soldiers posed in captured Ku Klux Klan "uniforms" (1868).

6

Legacy of Conquest

Civil War, Slavery, and the First Ku Klux Klan

I grew up in New Orleans, Louisiana, without knowing for sure that the Civil War had ended.

Never mind that the war began eighty-something years before my birth, and eighteen years before my grandmother's birth. My grandmother still sang me to sleep with the camp song she learned from her father, a Confederate veteran:

Shoo fly, don't bother me
Shoo fly, don't bother me
Shoo fly, don't bother me
For I belong to Company B.

"Bee"—get it?—wins out over fly.

When I was eleven years old, I found myself at the cemetery on Confederate Memorial Day wearing a party dress and officially excused from school in order to recite an embarrassingly bad poem of many stanzas called "The Sword of Lee." The poem was written by long-dead Confederate army chaplain Father Abram Ryan. Before me was an audience of the elderly, mostly women. Perhaps they were daughters of veterans but, like my grandmother, they couldn't have been old enough to have their own memories of war.

It was supposed to be a joke that, for Southerners, the war hadn't ended. But not everyone was kidding. According to Father Ryan and other authorities (such as my sixth-grade teacher), the South was "defeated, yet without a stain." Father Ryan was wise enough to suggest

that our "conquered banner," the Confederate flag, be folded permanently, but—as we all know—140 years later, some Southerners have never wrapped it up and put it away. Even those who placed the Civil War in the past believed, like Father Ryan, that the South's was "the cause of Right." And if we were right, then wasn't losing the war ethically superior to having won it? We (in this case, the white, Anglo-Saxon Protestants, plus Father Ryan) were better than others because we had had the moral refinement to risk everything in defense of a principle.

I'm sorry about the years of childhood I wasted trying to swallow such guff. But I've come to think it could have been worse. I could have grown up in a place or time where people really didn't know the Civil War ever happened. Some might even think the past doesn't matter. Bone deep, I know it does. The past is the grandmother who sings you to sleep, the Confederate flag on sale at a gift shop or tattooed on the arm of the man sitting next to you on the bus. The past is all around you, making you who you are by telling you where you came from.

I got a big helping of the past when I got love and admiration for reciting a poem about the tragic glory of the Confederacy.

The Civil War was a big helping of the past for America in a short four years' time.

Contrary to the wishes of some of my ancestors, the Civil War kept the United States one nation.

The war made the Thirteenth, Fourteenth, and Fifteenth constitutional amendments possible, ending slavery, promising the vote (at least to all men, if not to women) and equal protection under the law.

The war created a whole new set of economic winners and losers—my mother's parents' families among the latter.

Another thing the Civil War did, both North and South, was to give white and black people a new level of grievance against each other. The Civil War made it inevitable that slavery would end, and from 1865 to 1870 the U. S. Constitution began to define African-Americans as citizens. I know white Southerners weren't ready (putting it mildly), and I don't think most white Northerners were ready either, for the loss of

their cherished "racial superiority" *or* the perceived threat to their livelihood that a new population of citizens created. I don't think African-Americans were ready for the bitterness and fury that greeted them, or the nearly unending delays and disappointments they would endure, as they stepped forward to claim the status that Constitutional amendments were finally setting forth in words.

Most troubling to me is that our two-hundred-year history with slavery before the Civil War provided all the evil wisdom we would ever need to fight the racial war among ourselves after the official war ended. We had a repertoire of riots, mob terrorism, unequal law, and unequal punishment, and all the justification to discriminate and to repress that an all-white version of the past could afford. I don't think that the distinction between legal and illegal means was ever that important. When the law was available, it was used. When it became unavailable, as it was for a while during and after the Civil War, intimidation and terrorism were used instead. Having learned that both law and terrorism worked, we then applied them simultaneously. Nor do I think the distinction between slaves and free blacks was very sharp in the minds of most European-Americans who felt they had reason to fear or resent African-Americans. After all, Chief Justice Roger B. Taney of the U. S. Supreme Court had stated, in the Dred Scott ruling of 1857, that free blacks "were identified in the public [i.e., white] mind with the race to which they belonged, and regarded as part of the slave population rather than the free."

From day one, the presence of African-Americans had a primarily economic meaning for most European-Americans. For most, the argument over slavery wasn't about the indecency of one human being claiming to "own" another, and asserting the claim by force. A large part of the slavery debate was about competing economic advantages—plantation agriculture with slave labor versus freehold agriculture, jobs for white workingmen versus jobs for free blacks and for slaves hired out by their owners.

Among the many crazy outcomes of treating human beings as property, whites had to contend with their own fear that slaves would free themselves, rob their masters, and take revenge. This was the beginning of unequal punishment for white and black. Looking at pre-Civil-War Massachusetts as an example, I see that around twelve percent of all persons executed between 1676 and 1795 were slaves. In the general population only about one percent were slaves. In New York state, slavery was abolished only in 1827, and thirty slaves were legally hanged or burned alive after supposedly participating in a conspiracy to rebel in 1741.

The state of Virginia around 1820 listed seventy-three capital offenses for slaves against only one—first degree murder—for white persons. This was a more extreme difference than in other states, but slaves in just about every state where slavery was legal could be, and were, executed for a greater number of offenses than whites.

In the years leading up to the Civil War, discrimination in citizenship against free blacks went along with discriminatory punishment of both free and slave. Some examples of pre-Civil-War discriminatory laws that whites made to target free blacks *outside* the South:

- forbidden to serve in militia, vote, give testimony in cases involving European-Americans (Illinois, Indiana, Ohio; 32 discriminatory statutes in all);
- forbidden to vote or belong to the state legislature or militia by the Iowa and Michigan constitutional conventions (33 statutes);
- forbidden to marry European-Americans in Illinois, Indiana, Iowa, and Michigan (36 statutes).

Of states in this region, Wisconsin might be seen as liberal, since laws in this state forbade *only* the vote to African-Americans. Discriminatory laws were all about making newly formed states and territories unwelcoming to free African-Americans. Meanwhile, more and more in Southern states, "free" blacks could be enslaved for a period of years if they were convicted of one of a variety of offenses.

Racism was already institutionalized in the South as slavery, slave codes, and laws discriminating against freedman. But the legacy of racism created by laws outside the South has been as lasting, if less intense. It carried into lynching in the North as late as 1930, and can still be seen in the rolls of those being executed today.

Effects of laws passed before the Civil War were worsened by the war itself. In the North, the Emancipation Proclamation implied that white citizens of the Union would be risking their lives for African-Americans whom the white working class already looked on as economic competitors. Only two months after the proclamation went into effect, Congress enacted a draft law. The law's worst feature was that it allowed potential draftees to get out of service by paying three hundred dollars or hiring a substitute—a blatant act of coercion against the poor, who would have to offer their own lives while the prosperous escaped danger. Workingmen in a number of Northern cities took out their otherwise helpless rage on African-Americans, but a three-day riot in New York City brought about the greatest number of casualties. Starting on the day that new draftees' names appeared in newspapers, white mobs estimated at up to 50,000 went berserk. When the riot seemed to have ended, President Lincoln sent in watchdog troops he could ill spare from the Army of the Potomac. By then the rioters had hanged, burned, or beaten to death eleven African-Americans, burned down the Colored Orphan Asylum, looted the Colored Seamen's Home, razed whole city blocks, torn up railroad tracks, cut telegraph lines, and forced factories and shops to close.

In the Natchez area in one year during the Civil War, a Southern researcher writes, forty African-Americans were hanged and forty more imprisoned for supposed insurrection.

Today we'd call these acts atrocities. But they didn't prevent the Union leadership at the close of the Civil War from embracing and empowering their former enemies.

The Thirteenth Amendment guaranteed the end of slavery, and in effect allowed African-Americans to act as legal persons—for example,

by entering into contracts for marriage and property transactions. Hardly had Lee surrendered, however, when the legislatures and courts of Southern states set about subjugating the African-American population in every way except the Constitutional minimum of outright slavery. Under the new Southern "black codes," with many more prohibitions in addition to the examples I give, African-Americans couldn't vote, serve on juries, or act as witnesses except in a case involving an African-American. Black occupations, ownership of weapons, use of liquor, and their very presence in towns were all regulated. The obvious intention was repression—to guarantee docility and maintain a work force of cheap labor.

Within a year of the end of the Civil War, according to reports gathered by the Freedmen's Bureau, there were 33 people openly murdered by whites in Tennessee, 29 in Arkansas, 24 in South Carolina, 19 in Kentucky, and for two years in Louisiana, 70 victims. Freedmen were killed or injured for attempting political leadership, even for trying to farm or to vote, or for trivial acts that whites liked to call "insubordination." In Georgia, as an agent of the Freedmen's Bureau reported, an African-American was hanged for killing a mule, another stabbed for refusing to enter his dog in a dog fight, another stabbed for not bringing a cup of coffee quickly enough. In the last case, the white man who did the stabbing was fined fifty dollars. The longest sentence that the civil authorities gave any white man for a crime against an African-American was twenty days' jail time. The totals of casualties may be exaggerated or undercounted. But, as they stand, the numbers are equal to those murdered at the height of the so-called mob lynching era that began fifteen years later.

In effect, Southern white governments were working toward a legal state between slavery and freedom, and as close to slavery as they could get.

Southern white intransigence led directly to the Freedmen's Bureau Acts (1865) and Civil Rights Act (1866). When these had little effect in the South, Congress passed the Reconstruction Acts the following year,

and these acts led directly to the Fourteenth or equal protection amendment.

Those who ratified the amendment intended to enforce it, as the Civil Rights Act was meant to be enforced, through temporary military protection for African-Americans followed by long-term civil protection. But the military rule under which the Reconstruction South supposedly lived was impotent. Violence quickly became organized and, by 1867, European-American vigilante groups were common in the South under the name of "regulators," "rangers," "moderators" or, bluntly, "n****r killers."

As in the West, newspapers commonly abetted vigilante terrorism. Their editors, hand in glove with vigilance groups, not only saw to it that hatred of African-Americans filled every newspaper page, but also goaded local whites to acts of violence—conveniently listing the names of local white and black Republicans who would make suitable targets. All the while, vigilantism was justified much the way it had been on the frontier, by the Big Lie technique: in this case, that the courts did not punish crime by African-Americans.

The first Ku Klux Klan, which gave its name to nearly all Southern terrorism thereafter, began as something very like the college fraternity from hell.

As far as is known, six bored young Confederate veterans formed the Klan around May of 1866 in the small town of Pulaski, in central Tennessee. Greek fraternities along with other secret brotherhoods had been multiplying since the end of the American Revolution, and one writer speculates that the KKK's ritual, disguise, and clandestine way of operating were based on that of a well known antebellum Southern fraternity, Kuklos Adelphon, or the first Kappa Alpha Order.

In researching the Kappa Alpha Order, I find that it still exists. I read on its website that it seeks to give its members a lifetime experience based on the example of "Robert E. Lee, our spiritual founder." Well,

Lee certainly did what the Order invites its recruiters to do today: "Have fun, Travel the country, Meet great people, Make an impact!" Even my grade school, the one that sponsored my appearance at the cemetery on Confederate Memorial Day, was named Robert E. Lee. Eventually New Orleanians elected a predominately African-American city council, who decided that public buildings shouldn't be named after slaveowners. But that wasn't very long ago.

Supposedly, the early Ku Kluxers—whether or not they had anything to do with Kuklos Adelphon—intended to start a social club. But it's hard not to wonder whether the KKK began as a kind of orchestrated shivaree—a case of "the community" co-opting its still-unsettled young males to enforce its standards.

Or were the Klan's activities even taken from community standards? In retrospect, after the written organizational document was revised in 1868, it sounded a lot like a political prescription that wily elders administered to the more aimless, perhaps more self-interested and more easily manipulated, young.

Certainly, the history of the Klan reveals how easily a political agenda could be fitted to the long-familiar shape of shivaree. Less than a year after its founding, the Klan was reorganized to serve the ends of Tennessee Conservatism against the Unionists under Governor Brownlow. The enmity between Republicans and Conservatives, or proto-Democrats, was extraordinarily bitter, and an appeal to racism was a centerpiece of the Conservatives' takeover strategy. They knew there would be white voters to hear them if they threatened that the African-American vote would carry the Unionists to political victory.

The Conservatives' strategy backfired in the short run when Klan violence led to Governor Brownlow's calling out the militia and gave him an excuse to disenfranchise all former Confederates. But disenfranchisement was brief for those who were white, and the long-run success of terrorism in the South was spectacular.

The Klan's "Prescript," or organizational document, as revised in 1868, affirmed "the inalienable right of self-preservation of the people

against the exercise of arbitrary and unlicensed power." In pursuit of "self-preservation," the Klan, led by Nathan Bedford Forrest and aided by several other former Confederate generals, spread across entire the South during the first four months of 1868. In Kentucky, for example, where freedmen hadn't received the vote by 1868, Klan persecution served to drive African-American owners and even tenants from their land. This motive for persecution was common where small-farm agriculture predominated over plantation agriculture, since it was in these regions that African-Americans were most likely to acquire land. Throughout the South, the Klan drove off European-Americans as well as African-Americans who tried to conduct schools for freedman, and Klansmen retaliated against blacks who tried to take "white" jobs. The factional aspects of Klan terrorism perhaps reached their culmination in Louisiana during the presidential election in 1868. A combination of the Klan in northern parishes and the "Knights of the White Camellia" in southern parishes instigated violence resulting in 1,081 deaths. Victims, when not shot or hanged outright, were given whippings as high as 200 lashes with whips, ropes, switches, or tree limbs. In one case the victim, who died, was given 900 lashes with the stirrup from a saddle. Another who died had crosses cut into the flesh of his entire body including the soles of his feet.

The Klan's founding statement is a classic example of blaming an opponent for the severity of one's own tactics. The document's language reads as if the power of the Reconstruction government and the new status of African-Americans were visited from nowhere—and this upon a Southern people who favored "Constitutional liberty, and a Government of equitable laws instead of a Government of violence and oppression."

Equitable laws, it seems, would allow the reigning members of power structures based on property rights to formulate their society's lifeways unopposed. With such a civic agenda, it's no surprise that the Klan set about restoring equitable laws through violence and oppression.

Major General John Pope, who commanded the third Reconstruction Military District including Alabama, Georgia, and Florida, wrote to President Grant about his fear that Southern politicians would undermine ostensibly fair laws. Injustice on the part of Southern courts, Pope predicted, would "render justice impossible and establish discrimination against classes or color."

It's interesting to me that Pope identified not only color but social class as targets of discrimination. Again and again in the 140 or so years since Pope wrote that letter, Southern class conflicts that went along with slavery have gotten buried. Instead, researchers and writers play the race card exclusively in assigning causes of collective violence. The first or post-Civil-War Klan charted a campaign of terror that marked out both African-Americans and any European-American who might try to assist a freedman. Conservative loyalists in Tennessee, whether white or black (and there were black conservatives, just as there are today), weren't molested. Like vigilantism in San Francisco or on the mining frontier, Klan actions both neutralized specific political opponents and terrorized those who supported or depended on them. The difference between the West and the South was that, in the South, the rank and file weren't being intimidated into leaving the area. African-American labor, like that of the white working class, was as much needed after Emancipation as before. The racist strategy of the Conservatives fulfilled two objectives—spurring poor whites to solidarity with rich whites, and conquering by dividing when it came to labor's wages and conditions among the working class.

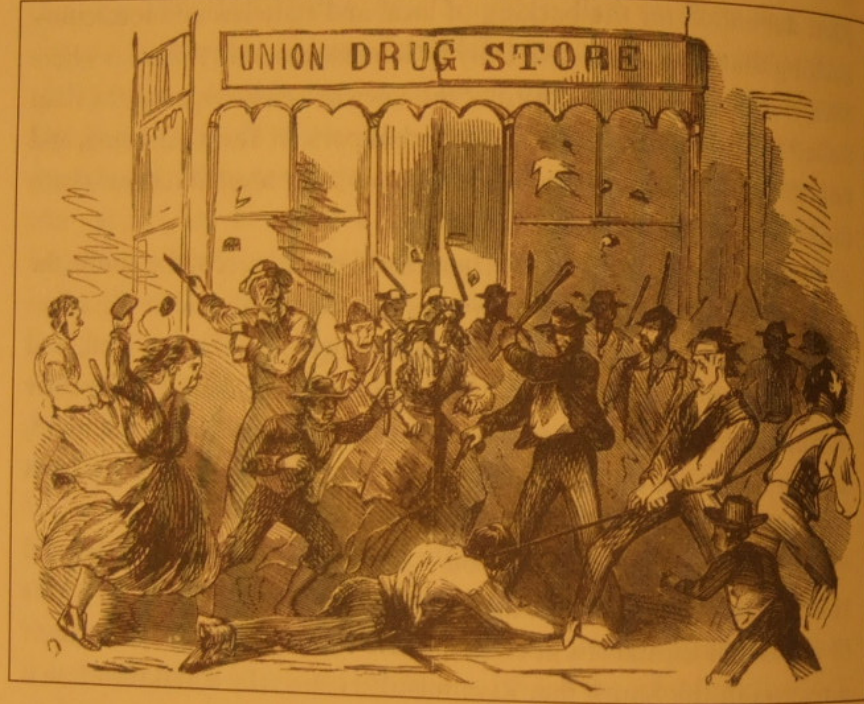
Much Klan violence was carried on under the influence of alcohol, much by young European-American males who had just returned to the tame world from a life of socially approved manhunting and pillage. Their social place and economic future under postwar conditions—at least if Republicans maintained control—were in question. The Klan's leadership tried to take a moral high ground for their power grab, but their messages were ambivalent at best. "Ordinary Klansmen," one researcher wrote, "may have found it hard to draw a logical distinction"

between mass rallies featuring a lynching and attended by a hundred members, and a night of drunken bullying done on impulse. Leaders approved of threatening African-Americans, but may not always have approved of carrying the threats through.

Internal contradiction reached the point that leading citizens began to oppose the Klan, if not often publicly. Because African-Americans sometimes retaliated violently against Klan oppression, white opponents could cite their fear of "race war." But effective opposition to the Klan depended on the backing of local and state law enforcement—backing that seldom existed. Only in Tennessee, and in Arkansas where KKK members burned a third of the town of Lewisburg, was the Klan forced to disband. In these states, and in parts of Texas, Alabama, and Louisiana, the Conservative leadership probably severed relations with the Klan by 1869 or 1870.

By this time, or at a slightly later date in other parts of the South, the political objectives of the gentry class had begun to be achieved: effectively disenfranchising freedmen, preventing their owning land, and discouraging their education for anything but farm labor. Further intimidation that would result in African-Americans' leaving the South, as they did in an initial migration of 1879-1880, was not in the elite's interest.

What's more, well-backed Southerners—like well-backed Northerners—were becoming involved in railroading and other forms of industrial capitalism. It couldn't have been lost on many boards of directors in the South that Klan members at a rally could turn into a mob, and a mob could riot—burning their buildings and goods as in Lewisburg, Arkansas, or tearing up railroad track as the New York draft rioters had done in 1863.



New York rioters protesting the draft killed at least twelve persons (1863).

7

Shivaree

Punishment by Mob

On an evening in March of 1834, on the grounds of his widowed mother's plantation south of Natchez, Mississippi, James Foster, Jr., took his wife Susan on a walk to the edge of the bayou and beat her to death. Susan was fifteen years old. Foster claimed he had "switched" Susan for "being unchaste" and that she had subsequently "had a fit." Foster carried his wife's body to a slave cabin before summoning his sister and niece and begging them to "resuscitate" Susan. When Foster's uncle inspected Susan's body the next day, he found signs of an extensive beating, including bleeding from the nostrils. But he cooperated with other family members in privately burying Susan's body less than twenty-four hours later. James was not present. Possibly, he was still sleeping off an alcoholic binge that triggered his murderous attack.

Four days later, Susan's injuries were confirmed when coroner's officers dug up the corpse. They found a broken arm as well as whip marks from head to toe. Foster had left the area but, when the arrest warrant for murder was issued about two months later, he was easily found and did not resist returning to be jailed. Foster was soon to be punished, not by the law but by his neighbors.

Binge drinking and wife-beating were not uncommon in James Foster's social world. His neighbors might have overlooked or tolerated one or two incidents. But Foster had killed a helpless individual who was both under his protection and a member of his family. More, he was a compulsive gambler who had previously been arrested for fraud in Louisiana, then forfeited his honor by jumping the bail posted by his friends. Foster's untrustworthiness was both moral and economic. In

judging Foster guilty of murder, his neighbors seem to have concluded, "A man who would rob his friends and deny responsibility for his debts would murder his defenseless wife."

The community was not pleased by what happened when Foster came before the court. Judge Montgomery declined even to prosecute Foster on the charge of murder. The crime was potentially a capital offense, but the judge had already dismissed similar cases because of questions about how the grand jury was convened. Foster's case came on the last day before Montgomery's retirement, and it seems he just didn't want to rock the boat.

But the crowd was waiting outside, and they saw Foster as a symbol of all that was spurious and shifting in their social world.

When Foster emerged from court, the hostile crowd gave him a kind of sporting chance to outrun them. But the demoralized Foster, who had been confined in shackles for six months, was immediately captured and marched to a ravine. There he was tied to a tree. Over a period from about noon to sundown, the mob beat him by turns with a cowhide whip. Then, while tar was being heated, Foster was partially scalped, this penalty having been chosen instead of alternative penalties still on the law books at the time, namely branding or ear-slitting.

Soon tarred and feathered over his fresh wounds, Foster, though he fainted several times, was led and carted back to town. The festive nature of this sinister procession was signaled not only by the crowd's having gotten drunk but by their banging pots and lids, whistling, and drumming as they accompanied Foster. A mass of blood, tar, and feathers, Foster, by several eyewitness accounts, was scarcely recognizable as human. "The mob believed he was a monster at heart," said the editor of the Natchez *Courier*, "and were determined that his external appearance should correspond with the inner man."

Were they the community, or were they a mob? The crowd's actions, half-Mardi Gras and half lynching, have been known for centuries as *shivaree*—a collective gesture of mockery toward a community member, carried out in the festive atmosphere of parading, dancing, masking, dressing in costume, singing, and drinking. In its European origins, and often in America, the charivari or shivaree was sometimes just a celebration of marriage. If unfriendly, it was humiliating more often than harmful to the victim. The luckier offenders were simply hanged in effigy, or made to throw coins from their window or invite the mob inside for refreshments. Typical offenses related to marriage customs—choosing a much older or younger partner, abusing one's partner, or failing to provide for the family. James Foster's beating his wife to death, when it became known to the community, may be what signaled his punishment by shivaree.

Shivaree asserted the authority of ordinary members of the community in the face of acts by the few who defied their standards. But when the most serious issues are at stake, shivaree-like public demonstrations in our own time get out of control just as James Foster's beating did. The 1992 acquittal of four police officers after they beat Rodney King was followed by a protest in south central Los Angeles that escalated to copycat beatings, looting, and the burning of stores—a six-day riot that left 54 known dead, 2,383 injured, and 13,212 arrested, with $700 million in property damage around the county. The riot, stopped by National Guardsmen and federal troops, spread to several other cities including Atlanta, Georgia, where 300 were arrested. The protest led to federal prosecution of the police officers for civil rights violations, and conviction of two of the four.

James Foster's offenses invited harsh punishment because the crowd felt his escape from legal penalties was unjust. Once the mob formed, it seemed to take on a life of its own. The real question is why Foster wasn't killed.

The three hundred or more bystanders who gathered outside the courthouse to wait for Foster were usual for a frontier settlement of the day—farmers and laborers, slaves, and Choctaw Indians, all come to town for Saturday court day and market. Some were there to ply

their trade, like the riverboat gamblers and prostitutes. Others, like the half-grown, self-indulgent young sons of nearby plantation owners and the idling children of the town, were there to get some excitement or pass the time. Some had strong feelings about Foster's misdeeds. They expected Foster not to be punished legally, and they whipped up their indignation while they waited in the company of the like-minded.

Witnesses reported that few members of the gentry were to be seen. But they were represented, and in no minor role. When Foster came out of the courthouse, he was accompanied by both his own defense attorney and the lead prosecutor. Both were men in their early 30s. On the rough frontier that was Mississippi in the 1830s, both had participated in fistfights over politics. But they were also members in good standing of the establishment. The prosecutor, Spence Monroe Grayson, was a rising young lawyer from an aristocratic Virginia family. The defense attorney, Felix Huston, had the best-paying law practice in town and had acquired a plantation—and a measure of gentility—by marriage.

In court, Felix Huston saved James Foster from a death sentence. Afterward, Huston delivered his client to the crowd while prosecutor Grayson, symbol of the power of law, stood by with arms folded. This paradox spoke volumes about the relations of elite and hoi polloi in the community. Landowners and members of the bar like Huston and Grayson stood at the apex of the community power structure. They were among those with the most to gain when established authority was preserved, because law and order protected their wealth. The jobs and trade they generated indebted others to them. But these leaders couldn't exercise political and economic dominance over the community if they couldn't make good their claim to the moral high ground. Foster himself, though morally fallen, came from a well-to-do plantation family. In protecting Foster from death, Huston and Grayson came to the defense of one of their own. Yet, when the offender so publicly mocked ethics and law as Foster did, his fellows could not let him go lightly punished.

Witnesses said that Huston and Grayson themselves led Foster to his punishment but also kept it within some kind of limit.

At first, however, the crowd did not fall on Foster pell-mell but, in near silence, formed a line. When the procession reached the place of punishment, a customary spot for such acts, it was probably Huston or Grayson who "reasoned" with the crowd, saving Foster from the full scalping that would have killed him. But by the time the crowd brought Foster back to the jail, they were drunk and calling for what was left of his blood. It was Grayson, Foster's prosecutor only hours before, who mounted the steps of the jail and pointed out to the crowd that it had already done its duty. Most then left. The sheriff helped Foster up the steps to the jail and locked him in for his own protection against the stragglers muttering vengeance outside. It was the middle of the night by the time two mounted men appeared, leading a third horse, and found the coast almost clear at the jail. Still fending off a few members of the mob, the two mounted men got Foster onto the spare horse and, despite a shot from a lookout that grazed Foster's hat, spirited him away.

One of James Foster's mounted rescuers was his sister Sarah's husband, Daniel McMillan. The other was probably McMillan's son. The two led Foster home to the senior Mrs. Foster's plantation where the whole story had begun. It took Foster a full five months to recover. But he wasn't able to disappear forever from Natchez, to a fate still unknown to this day, without paying one last penalty. Public records show that Foster signed over his share of his father's estate to his nephew, his sister Sarah's son The boy's father, it seems, would not have rescued James Foster without this reward. Foster's degradation at the hands of both community and clan was complete.

In the minds of many, historically and today, deviance from accepted morals and customs threatens the public safety and should be punished accordingly. We hold to certain doctrines: *The young*

must be socialized, the family must remain intact, people mustn't represent themselves falsely. The shivaree wasn't so much a deliberate action as part of a half-spontaneous vocabulary of public gestures—one of several means that some members of the community, acting as a group, used to express their moral judgments.

Legal judgments didn't necessarily take the place of the shivaree. The Puritans, taking the Bible as law, were able to express moral judgments by legal means. We know that they also carried on the shivaree, at least in connection with marriage. After Americans became a nation, we formally separated religion and state by adopting the first amendment to the Constitution in 1791. When the laws of American states no longer punished fornication or the excessive drinking of alcohol, these kinds of offense went on being censured by American communities. But offenses that *were* punishable in law—like the murder James Foster committed—also went on being punished by shivaree. Mobs like those whose members punished Foster protested the light punishments and acquittals the legal authorities sometimes handed down.

As early as the years before the American revolution, the shivaree also turned political. The Stamp Act passed by the British parliament required colonists to pay a tax on every government and business document they created. Under colonial government, the act was taxation without representation, and it was part of Britain's policy of managing its colonies' trade for maximum profit to the mother country. To the cry of "Liberty, Property, and No Stamps!" opponents of British policy raised scaffolds on which they hanged dummies representing provincial officials and ransacked officials' houses. Especially popular was the burning of carriages, symbol of wealth and upper-class standing—to the point where one wealthy Quaker, though not a British sympathizer, took to calling his coach a "leathern convenience."

Such events could be called riots, but they weren't without organization, as when placards and broadsides mysteriously papered colonial towns, warning the populace not to make use of stamped paper. Intimidation was a tactic, both against non-complying merchants and against government functionaries. Mobs marched by torchlight in the streets in Boston, New York, and other communities. Some of these actions were encouraged if not arranged by the Sons of Liberty, founded in Boston in 1765 and quickly spread throughout the British colonies. The Sons were a semi-secret organization of tradesmen and artisans who opposed the Stamp Act. Merchants and printers, who would have been hardest hit by the tax, were especially active in the group. There is no doubt that more prominent colonists as well, such as John and Samuel Adams in Boston, covertly contributed their organizing skills, influence, and money. Arrayed against the Sons and their sympathizers were colonial governors, officers of the military, and a wealthy few among the colonists who stood to receive paid commissions as distributors of stamps.

What happened to the spirit of patriotic opposition, born in part of mob activism, when an oppressive colonial government gave way to self-government of Americans by Americans? During and after the Revolution, the shivaree turned uglier as both occupying British troops and Whig crowds engaged in acts of collective violence up to and including murder. Worse, representative government was established and public disorder still did not cease. Now lethal in effect, the shivaree as riot began to be applied to private, partisan resentments. Burning, looting, and multiple murder of bystanders, based on ethnicity or religion, reflected the tensions of an increasingly diverse and divided society.

At a certain historical point, when the main objective of a mob was to kill one or more persons, the mob's actions began to be known as lynchings. "Lynching" didn't originally mean lethal punishment, only whipping offenders outside the law. The name came into use around 1790 for a Virginia justice of the peace who was known for the practice. But during the nineteenth century, even before the Civil War, shivaree-style acting out combined with so-called civic reform and punishment of crime to result in murders by "vigilance committees," "whipping bands," and then the Ku Klux Klan.

By the late 1800s, mob lynchings were openly directed against victims on the basis of their race or ethnicity. Only forty years ago, in 1964, when the bodies of three Civil Rights workers were found shot execution-style in Mississippi, the state's courts did not prosecute anyone for the killings. It was clear only from federal civil rights prosecutions that at least fourteen white persons from the community carried out the killings. Seven defendants each received six years or less in federal prison time. But only in 2000 did prosecutors in Mississippi begin pursuing murder charges.

The United States is unique among developed nations in that *extralegal execution has scarcely been punished throughout our history.* Among Americans, sometimes nationwide and sometimes only in local communities, lynching went on being passed off as "popular justice." Further developments from about 1850 on show that both these words were a misnomer. Rather than "justice," vigilante and mob lynchings were repressive and self-serving acts. Rather than an outpouring of general sentiment on the part of a whole "population," lynchings were instigated by, and served the interests of, a relative few.

Even when the shivaree became deadly, it continued to be justified as a gesture of social enforcement between equals. But it isn't clear that only "ordinary" citizens, otherwise powerless, participated. Mob action was a way for even the influential to intimidate their opponents without a legal grievance.

Some historians have flatly stated that the shivaree in its "police" function couldn't have existed as a custom without the approval, even support, of a local elite. After all, it was gentry who had the most access to police power. By directing the crowd's energy, whether openly or behind the scenes, the gentry underscored their own power in the minds of others. A bargain between commoner and gentleman could be struck because both parties fundamentally shared the same interest in social order and agreed on its administration. As in the case of James Foster, a few leaders also used mob action to keep a member of their own class, even their own clan, in line. The bargain was a good one for

Foster's rescuers, enhancing their position at the expense of a potential rival from their own world. Using Foster's payoff of land, Daniel McMillan established his son as a landowner without McMillan's having to make his own estate smaller by dividing it.

When the Natchez crowd returned James Foster alive, if barely, they may have been drawing an accepted line between torment and execution. Foster would surely have met his death at the hands of the crowd if he had been a man of the people. Especially if he were an outsider—someone from another community, like many gamblers and prostitutes in Natchez, or a foreign immigrant, or an Indian or African-American. In such a case, the town elite wouldn't have had a reason to intervene. They might, in effect, have conceded the right of ordinary citizens to "execute" a moral offender at or below their own social level. Avoiding execution was a privilege of rank and station, and most executions outside the law would take place either when hoi polloi mobbed a scapegoat from their own world, or when local factions of about equal power and authority took each other on. The punishment of moral offenses would not have been half so deadly if it hadn't become entangled with contests over property and politics. We must look to these contests to understand how and why America came to use extralegal executions, and sometimes the legal death penalty as well, as tools of economic and political repression.