Inns of Court – Racial Reconciliation and Civil Rights

Moderator and Author of Materials: Mark D. Cummings
Panel: Honorable Doris Causey and Lynne Jackson

Speaker Introductions:

Honorable Doris Causey

Doris Henderson Causey is a Virginia Court of Appeals Judge, one of the first to have previously served as a legal aid attorney and state bar president. Prior to joining the court, she was the Managing Attorney for the Richmond office of Central Virginia Legal Aid Society, Inc., an Assistant Commonwealth Attorney, court-appointed attorney, guardian ad litem, and engaged in the private practice of law. She also presided as the 79th President of the Virginia State Bar (2017-2018). Making history, she is the first and only African American and first and only legal aid attorney to hold that office in the Virginia State Bar's history.

Doris has received numerous awards and recognitions including the Virginia State Bar Clarence M. Dunnaville, Jr. Achievement Award, the Old Dominion Bar Association Distinguished Service Award, the Richmond Bar Association Hill-Tucker Public Service Award, Virginia Lawyer's Weekly Inaugural Class of "Influential Women in the Law," ABA Fellow, and Virginia Law Foundation Fellow. Additionally, Doris served on the American Bar Association National Conference of Bar Presidents Executive Council (also making history by being the first Virginian to ever serve on the Executive Council). She was a member of the ABA House of Delegates. Moreover, she is involved in various statewide organizations, including the Old Dominion Bar Association, Virginia Bar Association, Virginia Judges and Lawyers Assistance Program Board of Directors, and the Virginia Trial Lawyers Association.

She is a native of Oxford, Mississippi. She graduated from the University of Mississippi with a B.A in Mathematics and a B.A in Political Science. She has a Master of Education from Tennessee State University. Her Juris Doctorate degree is from the Thurgood Marshall School of Law at Texas Southern University. She is married to Tracy Causey and they have 3 children: Caleb (20), Jillian (15) and Joshua (14).

Lynne Jackson

Lynne M. Jackson is a great-great granddaughter of Harriet and Dred Scott of the Dred Scott Decision of 1857. She delights in sharing this story with young and old, including details of the Scott's personal and family history that have not previously been known. She has presented from 3rd graders to addressing a distinguished audience at Harvard University. Her career started at The Girl Scout Council of Greater St. Louis where she became Business Operations Director. After enjoying administrative positions at Ford Motor Company and Cass Logistics, she was Manager of General Services at Bryan Cave LLC law firm until 2009.

She travels around the country sharing the history of this landmark case, the family story and attendant histories. In 2003, she received the Community Service Award from Community

Women Against Hardship. In 2007 she addressed the National Association of Attorneys General in DC. The Freedom Dred Scott Legacy Award was given by Bott Radio Network in 2007. The Missouri Senate honored her with a recognition resolution in 2008. In 2011, she received the Edwin P. Hubble Award of Initiative from the City of Marshfield, MO where Dred Scott received a star on their Walk of Fame in 2007. Mrs. Jackson received The Phenomenal Woman Award in 2011 from the Center for Racial Harmony in Belleville, Illinois. The Empowering Women Who Inspire Award was received in 2013 by Women In Vision. In 2014, she was a nominee with honorable mention for the National Women's History Month Award. In 2012, under her leadership, the Dred Scott Heritage Foundation erected the first statue of Harriet and Dred Scott, designed and created by sculptor Harry Weber, which stands outside the Old Courthouse in St. Louis, MO. Lynne has been Sunday School Superintendent, teacher, Vacation Bible School Director, and has sung in twelve choirs since childhood. She is a member of Cross Keys Baptist Church. She and her husband, Brian, live in St. Louis where they were born. Their passion is biblical apologetics which they research and teach. They have two grown children.

Mark D. Cummings

Mark D. Cummings is trial lawyer and adjunct professor of law at George Mason University's Antonin Scalia Law School where he teaches Virginia Practice and Virginia Remedies. Additionally, Mr. Cummings is Co-founder and Partner at Sher, Cummings and Ellis LLC, a successful litigation firm in Arlington, Virginia. Professor Cummings specializes in wrongful death, personal injury, business disputes, and criminal and juvenile defense. During his impressive legal career, he was assigned to the defense of W. Mark Felt in the FBI civil rights conspiracy trial; this case ultimately resulted in a pardon from President Ronald Reagan. Throughout his career he has been actively involved in the Arlington County Bar Association, serving as Director (1987-89), President (1990-91), and Member of the Judicial Selection Committee (1993-2002); he currently serves as Trustee and Director of the Vicky Collins Charitable Foundation. Professor Cummings earned his B.A. from the University of Virginia and his J.D. from George Mason University's Antonin Scalia Law School.

I. Introduction[1]

American history has been marked by persistent and determined efforts to expand the scope and inclusiveness of civil rights. Although "equal rights" were established in the country's founding documents, significant portions of the population were excluded. This presentation is intended to acquaint you with the history of civil rights law in the United States. The presenters realize that given the time limitations, they could only acquaint you with statutory tools and case law. However, there is a focus on *voir dire* that the general practitioner should be familiar with. Consequently, there is a focus on recent law in Virginia applying *Batson v. Kentucky*.

Since 1776, notable events have occurred strengthening and restricting civil rights for these populations. Given the vastness of this area, this lecture will focus on four specific areas: (1) *Dred Scott v. Sandford*; (2) key pieces of civil rights legislation, caselaw, and enforcement; (3) jury abuse and *voir dire*; and (4) gender discrimination

II. *Dred Scott v. Sandford*

In 1791, the Bill of Rights was ratified. This established several important protections. Notably though, the Supreme Court in 1833 held that the Bill of Rights did not apply to the States. *Barron v. Baltimore*, 32 U.S. 243 (1833). The Supreme Court further interpreted the Bill of Rights in *Dred Scott v. Sandford*. 60 U.S. 393 (1857). The times in which Dred Scott and his wife, Harriet, filed their cases were not charitable to the couple. However, in St. Louis and beyond, there were those who were open and willing to help them establish their case for freedom. Among them were the children of their former owner, the Blow family and others who rose to the occasion. These included businessmen, judges, lawyers, sheriffs, preachers, and sympathizers in the city.

[1] We would like to thank Nicole Johnson, Associate at Sher, Cummings and Ellis, for her assistance in compiling the research and drafting of these materials and for authoring the gender discrimination portion of these materials.

Lawyers came and went, their tactics ranging from incompetent to brilliant. For over 11 years, the case made many twists and turns. Behind those changes were a parade of individuals whose actions shaped the course of our nation.

During the 11 years of litigation, Dred and Harriet Scott's cases were heard twice by the Missouri Supreme Court. First in 1846, when the Court determined that the plaintiffs were able to proceed to trial, and second in 1852. The Missouri Supreme Court decision of 1852 was also critical. The three judges who were on the Court in 1846 were not the same three judges on the Court when it made stunning statements that went against long standing precedent regarding the doctrine of "once free, always free." It was Dred Scott's case where the court did a 180-degree turnabout, signaling the end of the freedom suits in the United States. In 2021, a response was made to the March 22, 1852, decision by current legislators who unanimously renounced the decision after working with the Dred Scott Heritage Foundation. *See* Cameron Gerber, *Senate formally condemns Missouri Supreme Court's Dred Scott decision*, The Missouri Times (March 10, 2021), https://themissouritimes.com/senate-formally-condemns-missouri-supreme-courts-dred-scott-decision/.

Roswell Field took up the mantle and through the diversity clause, revived Dred's case. After a "dog fight" with John F. A. Sandford in the Spring of 1854, when Scott and Field did not back down in the face of blatant misconduct by the Missouri Supreme Court, an appeal to the United States Supreme Court was made. Their efforts included a personal first-person appeal by Dred Scott describing his plight and asking for representation at the Supreme Court for the December Term, 1854. On February 11, 1856, the Supreme Court heard his case.

A. The Decision

In this infamous case, the Supreme Court held that African Americans could not be citizens and thus, were not among the "People of the United States," as defined in the Constitution. *Dred Scott*, 60 U.S. 393 (1857):

> The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. The Court also interpreted the Fifth Amendment to provide property protections to slave owners, thus deeming all statutes that would deprive a slave owner of their "property" unconstitutional. *Id.*

B. The Backlash

As for Dred Scott, three months after the Supreme Court announced the opinion, he and his family were freed. When the Supreme Court decided the case, Irene Sandford (the Scott's then-owner) had married her second husband, Calvin Chaffee, a U.S. congressman and abolitionist. Throughout the litigation, Mr. Chaffee was unaware that Irene still owned the Scott family. When the opinion came down and he learned of her ownership, Mr. Chaffee sold the Scott family to Taylor Blow, the son of Peter Blow, Scott's original owner. Taylor Blow freed the Scott family on May 26, 1857.

On a national level, the decision strengthened the abolitionist movement and led to

national political disputes culminating in the American Civil War.[2] After the war ended, the civil rights amendments to abolish slavery (Thirteenth Amendment), to protect the legal equality of formally enslaved people (Fourteenth Amendment), and the voting rights of male ex-slaves (Fifteenth Amendment) were ratified:

> **Thirteenth Amendment.** Section 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2: Congress shall have power to enforce this article by appropriate legislation.
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> **Fourteenth Amendment.** Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.
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> **Fifteenth Amendment.** Section 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2: Congress shall have power to enforce this article by appropriate legislation.

Despite their ratification, many states were reluctant to enforce these new protections. A century of civil rights agitation and litigation was required to bring consistent enforcement.

III. Key Cases and Legislation in Racial Equality

Jim Crow Laws & the Enabling Supreme Court Decisions

1880

Jim Crow laws were a collection of state and local laws that legalized racial segregation, primarily in southern states. These laws began shortly after the Civil War era but lasted nearly a century. They were meant to deny African Americans the right to vote, serve on juries, get an education or fraternize with white people. At the start of the 1880s, big cities in the

[2] It also served as a further catalyst for John Brown, whose raid on October 16-18, 1859, in Harpers Ferry, Virginia further energized the abolitionist movements.

South were not actually beholden to Jim Crow laws and Black Americans held more freedoms in population centers.

Many Southerners were displeased with these freedoms, which gradually led to more laws in population centers to enforce segregation. Segregation was enforced for public transportation, hospitals, jails and in public places. These laws also prevented African Americans from living in white neighborhoods. Marriage and cohabitation were strictly forbidden in most southern states. Many notable individuals fought against Jim Crow laws, including Charlotte Hawkins Brown, Ida B. Wells and Isaiah Thornton Montgomery.

1883

In 1883, the Supreme Court decided five landmark cases where the Court held that the Thirteenth and Fourteenth Amendments did not permit Congress to protect African Americans against discrimination by private individuals. In 1886, the Court, however, held that a law is unconstitutional if it is applied in a discriminatory manner, even if it is neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In 1896, the Court decided *Plessy v. Ferguson*, which set forth that the Fourteenth Amendment did not prohibit all distinctions based on race, or mandate social equality between the races. 163 U.S. 537 (1896). These opinions enabled Jim Crow laws to persist into the 1960s.

The Niagara Movement and the birth of the NAACP

By the 1920s, a significant portion of educated African Americans migrated out of the South. Various publications encouraged Black Americans

to move North. In the early part of the 20th Century, the Niagara Movement began. It was a Black civil rights organization dedicated to abolishing Jim Crow laws and promoting civil rights.

The Niagara Movement was led by a group of African American lawyers: W.E.B. DuBois, William Monroe Trotter, H.A. Thompson, James Diggs, Max Barber, Henry L. Baily and many others. The Movement dramatically opposed social segregation and disenfranchisement. They took issue with Booker T. Washington, who advocated a policy of accommodation.[3]

1905

In 1905, W.E.B. DuBois gave a notable speech to the Niagara Movement. DuBois stated that:

> We are not more lawless than the white race; [yet] we are more often arrested, convicted and mobbed. We want justice, even for criminals and outcasts. We want the Constitution of the country enforced. We want Congress to take charge of Congressional elections. We want the Fourteenth amendment carried out to the letter and every State disfranchised in Congress which attempts to disfranchise its rightful voters. We want the Fifteenth amendment enforced and No State allowed to base its franchise simply on color.

In this address, the Niagara Movement also sought to abolish the convict lease system which targeted African Americans and "leased" them out to pay off fines. This system had little oversight and many prisoners were abused and worked to death. Urging a return to American "principles,"

[3] Booker T. Washington opposed the Niagara Movement and as a result, the National Press Club dismissed DuBois and the Niagara Movement.

DuBois appealed that we return to the faith of "our fathers" and appealed for every person to be considered equal and free.

The movement met again in August 1906, this time in Harpers Ferry, West Virginia on the Storer College campus.[4] The conference included African American women leaders as well.

1906

The NAACP was born here on a hillside in Harpers Ferry in 1906. For the first time, the event was covered by the press, including Mary White Ovington, a journalist from the New York Evening Post. On John Brown's birthday, the men and women of the Niagara Movement marched to the old arsenal in silent procession, barefoot, with lit candles in hand to pay homage to John Brown's memory and sacrifice. Later, they sang the "Battle Hymn of the Republic." An inspiring speech by Reverdy E. Ransom electrified the crowd. This event signaled a new direction in civil rights.

On the last night of the conference, DuBois addressed the country demanding (1) equal educational opportunities, (2) enforcement of the 14th Amendment, (3) representation in State and Federal elections, (4) justice for African Americans, and (5) equal employment opportunities.

This was the "birth point" of the NAACP. DuBois struck a chord to all Americans when he closed his speech with: "Cannot the Nation that has absorbed ten million foreigners into its political life without catastrophe absorb ten million Negro Americans into that same political life at less cost than their unjust and illegal exclusion will involve?"

[4] Many were guests at the Hill Top House Hotel that was built and operated by Thomas Lovett, a Storer College graduate.

1909

This was a rallying cry and in early 1909, the NAACP was born, and W.E.B. DuBois was its Director of Publication. For the next 60 years, the NAACP emerged as the leading organization opposing the KKK and actively attacking Jim Crow laws.

1948

In 1948, President Truman, by Executive Order 9981, terminated social segregation in the United States Armed Forces. Truman also established the President's Committee on Equality of Treatment and Opportunity in the Armed Services to recommend revisions to military regulations to implement President Truman's policy.

Segregation enforcement in Southern States

1954

In 1954, the Supreme Court decided *Brown v. Board of Education*, which held that racial segregation in schools was unlawful. 347 U.S. 483 (1954). For the first time in American history, segregation is deemed illegal by the United States Supreme Court. But, in many states it persisted. In fact, it wasn't until 1964, with the passage of the Civil Rights Act, that segregation was explicitly forbidden by statute. Until the Act's passage, courts continued to address suits regarding segregation on a case-by-case basis.

In 1956, *Browder v. Gale* was decided holding that school bus segregation was unlawful. 142 F. Supp 707 (1956). In *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, the Court held that state action to enforce segregation was unlawful, and therefore a board of directors operating as an agent of the state could not refuse to admit African Americans into its college. 353 U.S. 230 (1957).

1957

The Civil Rights Act of 1957 established the United States Commission on Civil Rights and the Civil Rights Division of the Department of Justice. The Civil Rights Act of 1960 established federal inspection of local elections and created penalties for people obstructing others' right to vote.

1964

In 1964, the Supreme Court banned segregation in public accommodations in *Heart of Atlanta Motel, Inc. v. United States*. 379 U.S. 241 (1964). Following these landmark decisions, Congress passed the Civil Rights Act of 1964 which significantly expanded protections. The separate titles provided the following protections:

- Title I: Forbade discriminatory application of voter registration rules.
- Title II: Forbade discrimination based on race, color, religion, or national origin in public accommodations engaging in interstate commerce.
- Title III: Forbade states and localities from preventing access to public facilities based on race, color, religion, or national origin.
- Title IV: Desegregates public schools. Permits U.S. Attorney General to sue to enforce.
- Title V: Gave more power to the Civil Rights Commission to enhance the enforcement of federal civil rights.
- Title VI: Forbade discrimination by programs that receive federal funding.
- Title VII: Banned employment discrimination on the basis of race, color, religion, sex, or natural origin, though there is an exception for *bona fide* occupational qualifications. The Act created the Equal Employment Opportunity Commission (EEOC) as a tool of enforcement.
- Title VIII: Set rules for compiling voter registration data.
- Title X: Created the Community Relations Service.
- Title IX: Made it easier to remove cases involving civil rights to federal court.
- Title XI: Gives defendants held in contempt under Titles II – VII the right to a jury trial.

1964

The Civils Rights Act of 1964 explicitly banned all discrimination based on race, including racial segregation in schools, business, and in public accommodations. The following year, Congress enacted the Voting Rights Act (VRA) to restore and protect voting rights. The VRA prevents state or local governments from enforcing any voting law that results in the denial or abridgment of the right of citizens to vote on account of race, color, or language minority group. It also prohibits literacy tests for voting.

1967

In 1967, the Supreme Court decided *Loving v. Virginia*, which struck down a Virginia statute criminalizing interracial marriage. In 1968, the Court held that the Thirteenth Amendment permits Congress to regulate sales between private individuals to prevent racial discrimination. In 1976, Congress enacted the Civil Rights Attorney's Fees Award Act which permits federal courts to award reasonable attorney's fees to the winning party in a civil rights case.

IV. Jury Abuse

African Americans were also disenfranchised with respect to juries, including both the ability to serve on juries and the ability for defendants to have a jury of their peers. These rights to serve on a jury and the right to have an impartial jury comprised of your "peers" as guaranteed in the Fifth Amendment were also historically withheld from African Americans. The Civil Rights Act of 1875 outlawed race-based discrimination in jury selection. 18 U.S.C. § 243 (2010) ("No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.").

In 1880–nearly a century after the Fifth Amendment was ratified–the Supreme Court held that states could not exclude citizens from jury service on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Racially integrated juries in some jurisdictions enforced the rights of Black defendants but in most of the South, the refusal to enforce anti-discrimination laws meant that Black people continued to be denied the basic rights of citizenship, including jury service. *See* James Forman, Jr., "Juries and Race in the Nineteenth Century," The Yale Law Journal 113, no. 4 (2004): 931 ("[A]ccording to black papers of the day, exclusion was the more common phenomenon in most counties.").

"Jim Crow" laws effectively excluded African Americans from juries and voting. These laws also restricted the ways African Americans could work, live, and enjoy their lives by forbidding social integration with white people. These laws also largely restricted voting and jury participation. For example, in 1898, Louisiana lawmakers amended the state constitution to "establish the supremacy of the white race." The new constitution diluted the participation of Black jurors by permitting felony convictions as long as nine out of 12 jurors voted to convict. As a practical matter, this meant that if three Black jurors voted to acquit a Black defendant, the other nine white jurors' votes were still enough to convict the defendant. Astonishingly, despite its explicitly stated purpose to maintain white supremacy, this practice was not struck down by the Supreme Court until 2020. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Counties also often would remove African Americans from the jury pools or required jury pools to be selected by white members of the community. The Court repeatedly deferred to state court decisions finding no discrimination and rejected complaints about racially biased jury selection, even in cases involving the death penalty. *See Franklin v. South Carolina*, 218 U.S. 161, 168, 172 (1910) (denying relief to a Black defendant sentenced to death where Court found

no proof that grand jurors were excluded on basis of race: "Under this statute the Supreme Court of South Carolina held that the jury commissioners were only required to select men of good moral character, and that competent colored men were equally eligible with others for such service. We find no denial of Federal rights in this provision of the statute."); *see also Gibson v. Mississippi*, 162 U.S. 565 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Tarrance v. Florida*, 188 U.S. 519 (1903); *Brownfield v. South Carolina*, 189 U.S. 426 (1903); *but see Carter v. Texas*, 177 U.S. 442 (1900) (reversing where defendant not provided opportunity to prove claim of racially discriminatory jury exclusion); *Rogers v. Alabama*, 192 U.S. 226 (1904) (same). The Court did not condemn these actions until 1935, when it reversed the convictions of the Scottsboro Boys who were convicted by an all-white jury, and it was determined that the jury commissioner excluded all African Americans from the jury pool. *Powell v. Alabama*, 287 U.S. 45 (1932).

The practices, however, continued and in 1945, the Supreme Court upheld a Texas county's policy of allowing only one African American to serve on each grand jury. The Supreme Court also addressed the prosecution's use of preemptory strikes to exclude African American jury members in *Swain v. Alabama* in 1965. 380 U.S. 202 (1965). While *Swain*, was a welcomed decision, the test set forth by the Court made it difficult to prove that the juror was struck for a prejudicial reason. In *Swain*, the Court held that the use was prohibited but the test set forth required proof of intention. In 1986, the Court revisited the *Swain* decision. *Batson v. Kentucky*, 476 U.S. 79. In *Batson*, the Court reaffirmed the ruling that a juror could not be struck based solely on their race and removed the need for proof of intention. *Id.*

The problem remained that it is relatively easy for an attorney intent on precluding a juror based on race to give a "pretext" obscuring a race or gender-based strike. The Virginia Supreme Court grappled with this issue in *Coleman v. Hogan*, 254 Va. 64 (1997). *Coleman* was a civil case where Plaintiff, an African American woman, sought damages against a white male Defendant. The sole African American juror on the panel was peremptorily struck.

On query from Plaintiff's Counsel the Defense's Counsel stated: "I didn't strike her because she was Black, but because of her gender. I thought she would be sympathetic to the Plaintiff because they were both women…" After that colloquy, the court reseated the juror. The Defense Counsel again struck the same juror but stated that he was striking her because she was a student. Despite the Plaintiff's strenuous objections, the court permitted the Defense Counsel's second strike based on the fact she was also a "student," a racially neutral reason.

On appeal to the Virginia Supreme Court, the Plaintiff argued that "[C]ounsel cannot qualify or lessen the discriminatory effect of a preemptory strike based on gender by relying on the explanation of the juror's 'student' status." In addition, Plaintiff argued that once a constitutionally infirm reason was articulated, "any additional neutral reasons are suspect" and "that strike must be disallowed in toto." The Virginia Supreme Court agreed, holding that "Once the trial court determines that the basis for a preemptory strike is unconstitutional, any other reasons proffered at the same time, or subsequently, cannot erase the discriminatory motivation underlying the original challenge." *Coleman v. Hogan*, 254 Va. 64 (1997).

Baston and *Coleman* have largely been followed since the cases were decided. However, a recent Virginia case, *Bethea v. Commonwealth*, casts doubt. 297 Va. 730 (2019). In *Bethea*, an African American defendant raised a *Batson* challenge when a prosecutor used two of four allotted preemptory strikes to remove two African American jurors. *Id.* at 753. In response to the

Batson challenge, the prosecutor stated that she used the strike because the juror appeared "emotional" during *voir dire* and was not responsive to specific questions. *Id.* at 737. The trial judge accepted this "neutral" explanation. *Id.* at 737-38.

After being convicted, the defendant moved to set aside the verdict because of the *Batson* challenge, arguing that the prosecutor's reasoning was pretextual because there was no evidence in the record that the juror was "unresponsive." *Id.* at 738, 742. The Supreme Court of Virginia stated that "implausible and fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination," a mere mistake of memory alone is not sufficient proof of pretext and underlying discriminatory motive. *Id.* at 751. This rationale flies in the face of dicta in *Batson*.

After *Bathea*, it seems that a judge may determine that even a factually inaccurate explanation is sufficient to withstand a *Batson* challenge when a challenger fails to carry his/her burden in proving purposeful discrimination. *See id.* at 753.

V. Civil Rights Prosecutions - Hate Crimes

In 1957, Congress created the Civil Rights Division of the Department of Justice. The Civil Rights Division has enforcement authority to bring both civil suits and criminal charges. This section of the program will focus on the work done by the Criminal Section of the Civil Rights Division.

> The Criminal Section investigates and prosecutes cases throughout the United States involving the interference with liberties and deprivation of rights defined in the Constitution or federal law. Criminal Section prosecutors handle cases involving law enforcement misconduct, including but not limited to, instances of excessive force and sexual misconduct. The Section also prosecutes hate crimes, that is, acts of violence or threats of violence motivated by bias based on statutorily-protected characteristics. Criminal Section prosecutors also handle human trafficking matters, involving compelled or coerced labor, services, or commercial sex acts. Finally, the Criminal Section prosecutes acts of violence or threats of

> violence that interfere with an individual's freedom to access reproductive health services or clinics.

See About the Division Criminal Section, United States Department of Justice, https://www.justice.gov/crt/criminal-section. Initially, the Criminal Section focused on prosecutions based on violations of laws dating back to the post-Civil War Reconstruction Era. Congress has since passed notable Hate Crime Legislation, allowing the Criminal Section to more readily prosecute individuals engaging in hate crimes. *See* 42 U.S.C. § 3631; 18 U.S.C. § 245.

> Section 3631 makes it unlawful for an individual to use force or threaten to use force to injure, intimidate, or interfere with any person's housing rights because of that person's race, color, religion, sex, handicap, familial status, or national origin. The statute also makes it unlawful to similarly use force or threaten to use force against anyone who is assisting an individual or class of persons in the exercise of their housing rights.
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> Section 245 makes it unlawful to willfully injure, intimidate, or interfere with any person, or attempt to do so by force or threat of force, because of that person's race, color, religion, national origin, or because of that individual's activities as outlined by statute.

Civil Rights Offenses Criminal Enforcement, United States Department of Justice (April 19, 2021), https://www.justice.gov/usao-ma/civil-rights/civil-rights-offenses.

In 2009, Congress enacted The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. 18 U.S.C. § 245.

> Section 249 criminalizes willfully causing bodily injury (or attempting to do so with fire, firearm, or other dangerous weapon) when (1) the crime was committed because of the actual or perceived race, color, religion, national origin of any person or (2) the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person. The statute criminalizes only violent acts resulting in bodily injury or attempts to inflict bodily injury, NOT threats of violence (which may be prosecutable under other hate crimes statutes).

Civil Rights Offenses Criminal Enforcement, United States Department of Justice (April 19, 2021), https://www.justice.gov/usao-ma/civil-rights/civil-rights-offenses.

Most recently, on March 29, 2022, President Biden signed into law the Emmett Till Antilynching Act. The legislation was the first to specifically declare lynching a federal hate crime. The Act built upon the Matthew Shepard and James Byrd, Jr. Hates Crimes Prevention Act by offering new tools for hate crime prosecution based on race.

VI. Civil Enforcement for Racial Discrimination

In 1871, Congress enacted the Civil Rights Act of 1871, otherwise known as the "Klu Klux Klan Act," which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. Code § 1983. In other words, Section 1983 provides an individual the right to sue state government employees and those acting "under color of state law" for civil rights violations. Although Section 1983 was passed in 1871, it could not be used to prevent abuses by state officials or those acting under the color of state law until 1961. In 1961, the Supreme Court decided *Monroe v. Pape*, which authorized individuals' ability to file suit against state officials. 365 U.S. 167 (1961). The Court also stated that the legislative purpose was to provide a federal remedy in federal court because state governments and courts, "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might now be enforced and the claims of citizens to

the enjoyment of rights privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id*.

Since 1961, Section 1983 has continued to be expanded, allowing individuals to sue police officers, correctional officers, state and municipal officials, municipal entities, and private parties acting under color of law who have violated their federal civil rights. In 1976, Congress enacted Section 1988, which granted courts the discretion to award reasonable attorney's fees to the prevailing party as part of the costs. This created a class of Plaintiffs that were, in effect, encouraged to be a "private prosecutor."

VII. Gender Discrimination[5]

In addition to race discrimination, African American women have long been subject to gender discrimination. Gender discrimination can happen in a variety of context, but employment discrimination is one common form. In one of the first cases brought to the Supreme Court regarding gender discrimination, *Bradwell v. The People of the State of Illinois*, the Court permitted the refusal of a woman from entering the legal field because of her gender. 83 U.S. 130 (1873). In doing so, the Court affirmed the lower court's opinion which stated that "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws." *See id.* at 130 (upholding denial of Myra Bradwell's application to practice law in Illinois).

Congress was slow-moving in enacting federal legislation ensuring fair employment practices. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431, 431 (1966). Representative Vito Marcantonio proposed the first fair employment practices bill to Congress in

[5] With approval, much of this section was drawn from a piece by Nicole Johnson, Associate at Sher, Cummings and Ellis: Nicole Johnson, *Glass Ceiling or Concrete Wall? Removing the Barriers to Gender Equality in the Legal Field through Statutory Remedies*, 32 GEO. MASON U. C.R.L.J. 35 (2021).

1941. *Id.* However, this bill never made it past the referral to the House Committee on the Judiciary. *Id.* The next year, another similar bill was proposed but also died in the Committee. *Id.* Throughout subsequent years, Congress reviewed hundreds of fair employment practices bills but none survived, and most never made it out of the Committee. *Id.* at 431.

After nearly two decades of unsuccessful bills, Congress passed two civil rights bills: the Civil Rights Act of 1957 and the Civil Rights Act of 1960. Civil Rights Act of 1957, Ch. 315, 71 Stat. 634 (1957) (codified in scattered sections of 5, 42 U.S.C.). Although the passage of these Acts positively impacted women's rights, much remained unprotected. The National Association for the Advancement of Colored People, along with other prominent organizations, aggressively pushed for further protections. Marches around the country, including the first March on Washington where Martin Luther King, Jr. gave his "I have a dream speech," added additional pressure. While both Republican and Democrats had pledged their support for civil rights legislation in 1960, this pressure heightened the sense of urgency. And by 1964, the time came for Congress to act on its promises.

After hotly contested issues in both the House and the Senate, on July 2, 1964, President Johnson signed into law the Civil Rights Act of 1964. Civil rights advocates had much hope and belief that the Act would be an end to discriminatory employment practices in the United States. In President Johnson's bill-signing proclamation, he stated, "This act is a challenge to all of us to go to work in our states and communities, in our homes and in our hearts, to eliminate the last vestiges of injustice in America." *See* Merriman Smith, *Civil Rights Law Now In Force*, LEOMINSTER ENTERPRISE, July 3, 1964, at 4, https://www.rarenewspapers.com/view/561965?image list=1. Civil rights advocates were uncertain about the law's strength, and organizational

leaders announced their intentions to test the law. Although many issues remain, the Act made huge changes to employment practices throughout the country.

VIII. Conclusion

Throughout the nation's history, there have been consistent effort towards racial reconciliation. The path so far has certainly not been linear, and work is still needed going forward, but the efforts of civil rights advocates before and among us continue to inspire our collective effort towards racial reconciliation. It is incumbent on the practitioners to identify hate crimes, color of law violations, and other discriminatory practices and seek through the judicial process to put an end to racial and other forms of discrimination.