

Blacks in the Diaspora

Darlene Clark Hine, John McCluskey, Jr., and David Barry Gaspar
General Editors

Unequal Justice

A QUESTION OF COLOR

Coramae Richey Mann

Indiana University Press

BLOOMINGTON AND INDIANAPOLIS

1993

*Law and Its Enforcement
against Minorities*

When whites talk of "criminal justice"
To minorities it means "just us."

—Anonymous

The Lawlessness of American Law

Throughout its history, American law is replete with evidence of discrimination against racial minorities in employment, housing, public and private education, political power, health care, and marriage. These types of legal action reflect the social-structural condition that leads to criminal behavior by minorities, particularly when the issues of color and economics are introduced. Law has been defined by Donald Black as "governmental control" that varies directly with rank in that "people with less wealth have less law" (cited in Gottfredson and Hindelang, 1979: 3). Chambliss and Seidman (1971: 65) respond more acutely to this perspective when they state, "In all societies, regardless of how the interest groups vary in number, those which are most likely to be effective are the ones that control the economic or political institutions of the society. The most influential groups will of course be those which control both. As a consequence, legislation typically favors the wealthier, the more politically active groups in the society."

Clearly, Native Americans, Asian Americans, African Americans, and Hispanic Americans historically have been in positions of less wealth; therefore, according to the above perspectives, they have less law and less access to the law, and have been and currently are abused by the law. The inequalities accruing to minorities under our system of law and justice not only are present in the contemporary operation of our legal system, but also have existed since its origin.

What sociologists (and other social scientists, for that matter) who try to explain the "law in action" frequently overlook or, according to Quinney (1974: 24), "fail to realize" is that the law of American society has been formulated by

only a few, those “representing the power elite with similar interests—who dominate the political process.” The evolution of American law, especially criminal law, clearly demonstrates how the “minority crime problem” developed and has been exacerbated throughout the history of this country. In his espousal of a radical humanistic perspective in criminology, Friedrichs (1982: 214) finds that “the principal danger for a humanist criminology is that it exposes and condemns injustices in the criminal justice system without sufficient attention to the structural roots of these injustices.”

This section examines the genesis of American law as related to racial minorities and focuses on two basic aspects in the social structure which influenced law development—minority labor, specifically “the exploitation of numerous and varied forms of labor including slave labor, forced labor and bonded labor as well as wage labor” (Schwendinger and Schwendinger, 1977: 6), and “legal” violence, or how “the legal system provides the mechanism for the forceful and violent control of the rest of the population” (Quinney, 1974: 52). As is the practice in this book, in order to understand the inequities applied to racial minorities within the American legal system, it is necessary to examine the historical record. Therefore, this section traces the process of customizing the criminal law for American minority members through several time periods, depicted in Table 4-1: the colonial period, the constitutional era through the time of the Civil War, the postbellum period to the First World War, and the time of World Wars I and II and the post-World War II era until today.

THE COLONIAL PERIOD

No other minority has had as many laws, opinions, or treaties directed at controlling their welfare as the American Indian. The Schwendingers ably describe the law in this context:

One can say that certain bourgeois laws themselves have undermined pre-existing production relations together with the customs, laws, and lives of people everywhere. For example, not only were slave relations secured by such laws but treaties were imposed on American Indian tribes legalizing the wholesale and violent theft of natural resources, and the transformation of these resources into bourgeois property. (1977: 6)

In contrast to the Mexican government, which does not legally view Indians as a separate and distinct group, the Canadian and United States governments signed treaties with the Indians or defined their legal status through legislation which recognized them as a separate group. The U.S. treaties guaranteed the Indians permanent occupancy and use of certain areas in exchange for the ceding of lands to the federal government (Wingspread Conference, 1973). In addition to treaty making, in 1789 the federal government “asserted criminal jurisdiction over Indians” (Peak, 1989: 394).

Prior to the signing of these “agreements” with the government, the Indians were battling to retain their tribal lands, since the “notion of racial inferiority” had become “an excuse to push Indians off their lands” (ibid.). But Indians were

TABLE 4-1: Major U.S. Legislation Affecting Racial Minorities (1690-1976)

Historical Period	Legislation by Type of American	
Colonial (1619-1776)	Native Treaties (1754) Rape laws	African Slave Codes (1690) Rape laws
Constitutional-Civil War (1776-1865)	Cherokee Nation v. Georgia (1830)—ousted from lands	U.S. Constitution 1/5 of a human being (1776) Dred Scott (1857)— blacks unequal to whites Emancipation Proclamation (1863) freed slaves
Postbellum to World War I (1865-1917)	Appropriations Act (1871) eliminated treaties	Black Codes 13th Amendment (1865) abolished slavery Civil Rights Act (1866) 14th Amendment (1868) accorded citizenship 15th Amendment (1870) granted right to vote Pace v. Alabama (1883)— anti-race mixing Plessy v. Ferguson (1896)— “separate but equal” Jim Crowism
		Asian —
		Hispanic —
		Oregon Constitution denied vote (1857) Texas annexed (1857)
		State laws similar to Black codes Chinese Exclusion Act (1882) prohibited immigration California Alien Act (1913) denied Japanese land ownership

TABLE 4-1 (continued)

Historical Period	Legislation by Type of American		
World War I to 1976	Native 1924-citizenship granted	African Civil Rights Acts (1964)	Asian Immigration Law of 1924— excluded immigration
	Public Law 280 (1953) states' rights over crimes	Voters Rights Act (1965)	Hispanic 1930's Immigration laws— excluded immigration
	Native American Church v. U.S. (1959) Tribal law higher than state law	<i>Loving v. Virginia</i> (1967) anti-miscegenation unconstitutional Civil Rights Acts (1968)	Bracero Program (1942) "stoop labor" permitted immigration
	U.S. Code (1976) states' rights over criminal and civil cases		President's Executive Order (1942) internment Exclusion Act repealed (1943)

sorely losing their fights with encroaching settlers and traders who were subsequently aided by the military. As described in Chapter 1, the ensuing demand for land "spurred the federal government's decision for 'removal' of the Indians to unwanted lands West of the Mississippi" (Gubler, 1963: 207). Meanwhile, "the Indians improved daily and wonderfully by their intercourse with whites. They took to drinking rum, they learned to cheat, to lie, to swear, to gamble, to quarrel, to cut each other's throat, in short to excel in all that marked the superiority of their Christian visitors" (Peak, 1989: 394).

Two important factors inherent in these earlier "treaties" should be noted: "the imprecise legal definition of Indian territory for criminal definition and prosecution," and the lack of a precise legal definition of "Indian" for the same purposes (Gubler, 1963: 209-210). In earlier times, everyone knew what an Indian was, but with blurred bloodlines, "eyeball" definitions and other methods of defining Indians rapidly became inadequate. As we shall later see, if an Indian cannot "prove" his or her heritage, it is difficult, if not impossible, to claim ancestral rights. By the same token, it has recently become popular for Euro-Americans to claim "Indian blood" and the benefits that might accrue to that status.

The criminal injustice of being kidnapped from one's native country, transported hundreds of miles under horrendous conditions like cattle, and enslaved, marks the origins of the unequal treatment experienced by African Americans¹ that resulted in a dual system of justice which continues to exist in America on the basis of skin color. Forced to work on plantations, these African slaves first encountered "law" as "plantation justice," typified in the 1690 slave codes. "These codes, a group of laws designed specifically for the discipline and control of the slave, clearly delineated the social and legal relationship of the black man to the white man. . . . They all were generally designed to prevent slaves from carrying weapons, owning property, and having rights or legal protection" (Owens and Bell, 1977: 7).

More important, since these slavery laws gave the Euro-American plantation owners and overseers (or any "white" man, for that matter) enormous power "to determine and give meaning to the situation of the inferiority of the black man, there was no real need to justify nor be concerned with equal justice and treatment" (Mann and Selva, 1979: 171). The dispenser of "plantation justice" specified the punishments to fit the "crimes" of the slaves, punishments that were cruel and brutal—whipping, hanging, branding, castration, and death.

Castration and death were frequently used for such crimes as attempted rape or rape of a white woman, and sometimes just for striking a white person (Owens and Bell, 1977; Jordon, 1974). Early eighteenth-century laws in Pennsylvania and New Jersey prescribed castration of African American men solely for the attempted rape of a white woman, while Virginia's provision for castration covered a variety of serious offenses. Although repealed in 1769, the Virginia statute maintained the provision that castration of African American men might still be applied in the attempted rape or rape of a white woman (Jordon, 1974).

During one period of time, sexual mutilation was almost exclusively reserved for blacks and Indians accused of interracial sex crimes (Burns, 1973: 160).

THE CONSTITUTIONAL ERA THROUGH THE CIVIL WAR

The General Crimes Act, enacted in 1817, provided a system of criminal justice for the American population, Indian and non-Indian alike. This act gave to federal and state courts concurrently the jurisdiction to try cases involving offenses committed on Indian lands—such offenses “would be adjudicated the same as offenses committed anywhere under the exclusive jurisdiction of the United States” (Peak, 1989: 394).

Meanwhile, the United States Constitution and the laws following it continued to sustain racial inequality, compromise African American rights, and ensure white dominance and control. While not explicitly alluding to race or slavery, by considering a black slave as equal to only three-fifths of a human being, in effect the Constitution sanctioned slavery in the states upholding the practice (Miller, 1966), and “the false principle of the inferiority of black people because of their race or color, which over the years had become imbedded in our national consciousness, now became part of our country’s fundamental law” (Crockett, 1972: 7). Once established by law and internalized in the national mind, the results of such legislation persisted, and as Miller (1966: 63) accurately notes,

Americans simply have a double standard of judgment as to rights of white persons as contrasted to those of Negroes. To them, white persons are born vested with that vast array of rights and privileges vaguely thought of as natural rights. Negroes, on the other hand, are regarded as entitled to such rights as the white majority grants them. It is commonly said that Negroes must “earn” the rights they would enjoy. That attitude is deeply rooted in our history (1966: 63)

It is commonly believed that the original Constitution and the Bill of Rights protected the rights and liberties of all Americans. However, “in truth, the equalitarian guarantees explicit and implicit in the Constitution and amplified in the Bill of Rights offered absolutely no protection to the approximately 700,000 persons held in slavery at the birth of the nation and, as the Supreme Court was to hold later, little more protection for some 60,000 free Negroes of the North and South” (ibid.: 64). On the contrary, the Constitution protected slavery in those states which practiced it by the inclusion of a fugitive clause providing for the return of slaves who escaped to other states (“Justice Thurgood Marshall’s Dissenting Opinion,” 1979: 57). Further, it provided legal provisions for preserving the “migration or importation” of slaves until 1808 (Hindelang, 1969: 306), and prohibited Congress from “taxing slavery out of existence” for the same period of time (Long, Long, Leon, and Weston, 1975: 31). In essence, “the writers of the United States Constitution reduced blacks to the level of chattel” (Marshall, 1979: 57). To defend their slave property interests, individual states passed the Slave Codes, a notion of the African slave as property that was later reinforced by the United States Supreme Court in the *Dred Scott* decision.

The benchmark decision in *Dred Scott v. Sandford* in 1857 demonstrates early

racist interpretations of the precarious relationships between the races by reflecting the dogma held by society and the law that blacks should not be accorded equal rights with whites. The question asked in *Dred Scott* was:

Can a Negro whose ancestors were imported into this country as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? (Todd, 1979: 65)

The Court answered:

We think they are not, and that they are not included, and were not intended to be included, under the word “citizen” 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 . . . had not rights or privileges but such as those who held power . . . might choose to grant them. . . . (Stamp, 1970: 17)

Accordingly, since African Americans had no rights which the Euro-American needed to respect, their “less than human status,” and thus unequal justice, was secured.

Constitutionally, racial classification is suspect, and in fact, it was later forbidden by the Civil War Amendments, which were to eliminate “all invidious racial distinctions tolerated by the original Constitution, as interpreted by the Supreme Court, and to provide a new constitutional basis for congressional action to establish equality whenever states or individuals were laggard or insisted on imposing racial disabilities” (Miller, 1966: 66). But, as we will later see, the Supreme Court revised the meanings of those amendments.

The Constitution did little for the Indians, either, since only three provisions referred directly to them—Article 1, Section 2, clause 3 and Section 8, clause 3, and the Fourteenth Amendment, Section 2—and these stipulations left “untouched the general field of national authority to assert criminal jurisdiction over Indians and Indian territory” (Gubler, 1963: 207); instead, “the new Constitution contained four important statutes that invoked federal authority over Indian matters. They included the power to make war, to govern territories, to make treaties, and to spend money” (Peak, 1989: 394). The Emancipation Proclamation (1863), which was issued in the midst of the Civil War, freed the slaves, but it did not relate to the Indians.

THE POSTBELLUM PERIOD TO WORLD WAR I

In the immediate post-Civil War period, two significant amendments to the Constitution were ratified: the Thirteenth Amendment (1865), which abolished slavery and involuntary servitude, and the Fourteenth Amendment (1868), which provided citizenship to the former slaves and guaranteed them equal protection

of the law previously extended to other citizens (Vetter and Silverman, 1986: 452). Although they were no longer in slavery, the oppression of African Americans, which was rooted in economic self-interest, did not abate with their new "freedom." They were still subjected to a different measure of justice: since "total control through the institution of slavery could no longer be effected, more subtle forms of coercion and control were needed" (Mann and Selva, 1979: 171).

The first Civil Rights Act (1866) was enacted by Congress after the ratification of the Thirteenth Amendment as a response to the Black Codes which threatened to reduce African Americans to a status of semi-slavery. These codes, initiated by the provisional legislatures of many southern states, were similar to the earlier Slave Codes and included restrictions: limiting the rights of African Americans to own or rent property, providing imprisonment for breach of employment contracts, and denying African Americans the right to testify in court against Euro-Americans. Under the Black Codes, in some towns African Americans could not be on the streets after dark, and they could hold only menial jobs (Miller, 1966; Todd, 1979).

In his historical review of punishment for rape in Virginia, Donald Partington highlights one of the more ingenious means of ensuring control of African American men. Prior to 1866, the Virginia Code contained a rape punishment disparity—African American men could be put to death; Euro-American men could not be sentenced to more than twenty years in prison. After 1866, purportedly the statutes were amended to eliminate this racial disparity—a person convicted of rape could be punished either by confinement in prison for not more than twenty years, or by death. Such a determination under the altered statute included this provision—at the discretion of the jury—which, considering the prior racial discriminatory track record of the rape statute, in effect continued the old policies (Partington, 1965: 50-56).

Another subtle form of control was found in the laws concerned with the sexual relationships of African American men and Euro-American women. In the South, laws enacted to "prevent intercourse between the Black man and the white woman were specially legislated at an early date and in language reflecting the white man's abhorrence toward this mix" (Johnston, 1970, cited in Mann and Selva, 1979: 172). There were also situations where a Euro-American woman who married an African slave became the property of the slave's master—in essence, a slave herself.

Challenges to statutes which prohibited interracial marriages and statutes providing more severe sanctions for illicit interracial sexual intercourse than for illicit intercourse indulged in by persons of the same race suggest that such laws "contravened the equal protection guarantee of the Fourteenth Amendment" to the U.S. Constitution (Mann and Selva, 1979: 172). In *Pace v. Alabama* (1883),² the Court held constitutional an Alabama statute that imposed two to seven years' punishment for fornication between a black and a white, but only six months when fornication was committed by persons of the same race. The Court found that since whites and blacks were punished, equal protection was

provided, and further, relied on the grounds that it was "a legitimate exercise of the state's police power" (Mann and Selva, 1979: 172). Similar discriminatory laws existed in this country until the 1960s. The extraordinary legal powers of the individual states over the lives of U.S. minorities have not been emphasized in most legal analyses, yet

in every generation, state laws on race have been of crucial significance—laws that not only defined who is a Negro and then determined his status, but also controlled the Negro's relationship to all important social and political institutions within the society and even entered into the most intimate recesses of his personal life. . . .

Those who argue that it is not proper for state governments to intervene in race relations conveniently forget that from the end of the Reconstruction period many states enacted laws requiring the rigid segregation of the races in nearly every aspect of public life, including public accommodations, schools, jury trials, housing, suffrage, transportation, and, in some instances, as in South Carolina, employment. (Hill, 1965: 95)

The ratification of the Fifteenth Amendment in 1870 gave African Americans the vote.³ Congress had the right to enforce the Thirteenth, Fourteenth, and Fifteenth amendments through legislation; thus, during the Reconstruction era a great deal of legislative activity took place, which culminated in the Civil Rights Act of 1875. This act was an attempt to use federal power to prevent racial discrimination by specifying that there were only "citizens," not "blacks" or "whites" (Miller, 1966: 67).

Beginning with the *Slaughter-House Cases* in 1873,⁴ and over the next few years, through a series of racist decisions the Supreme Court managed to declare the Civil Rights Act of 1875 unconstitutional (1883) and gut each of the constitutional amendments. As Long et al. note,

The lawmakers of the federal government who had supported the anti-slave movement through the Civil War years and the Reconstruction labored diligently on the explicit language of the Civil War Amendments. The 1873 decision of the Supreme Court in the *Slaughter-House Cases* contradicted the legislative intent to prevent racial discrimination, and the judicial double-talk in the majority opinion over who were citizens and whether United States or state citizenship protected the basic right to work was an insult. (1975: 35)

Through its decision in the *Slaughter-House Cases*, the Court restored the *Dred Scott* doctrine of two classes of citizenship, national and state, thus threatening the privileges and immunities clause of the Fourteenth Amendment; in *United States v. Cruikshank* (1875),⁵ the Court restored control of civil rights to the states; the Fifteenth Amendment granting voting rights was restricted in *United States v. Reese* (1875),⁶ and *Virginia v. Rives* (1879)⁷ "validated the indictments and verdicts of all-white juries," which led to "extensive discrimination in jury selection" and racial exclusion on juries (Miller, 1966: 67). But the death blow to the Civil War Amendments and African American equality

came in *Plessy v. Ferguson* (1896),⁸ when the Court upheld a Louisiana railroad law requiring "separate but equal" accommodations for African and Euro-Americans. This single case provided an extensive constitutional basis for segregationist state laws (Hill, 1965: 96) and "made lawful for over fifty years the doctrine that black Americans could be denied equal protection of the laws by compelling racial segregation and forcing blacks to accept separate accommodations" (Long et al., 1975: 35). Thereafter, separate but equal became the law of the land, and Jim Crowism—"the pervasive segregation laws and discriminatory practices"—flourished (Sowell, 1981: 72).

The Jim Crow laws regulated every dimension of social contact between blacks and whites. Separate building entrances and exits, seating arrangements in theatres (or separate theatres), public transportation, waiting rooms in railroad stations (and later, separate bus stations and airports), toilets, drinking fountains, hotels, restaurants, and other accommodations were required for blacks. (Long et al., 1975: 35)

In the two previous decades, the Indians had been steadily pushed westward; thus, when the railroad opened up the West in 1870, in their efforts to take Indian lands, Euro-Americans totally ignored previous treaties (Washburn, 1976). Congressional law (1830) authorized the president to move any eastern tribe west of the Mississippi by military force, if required. When, in 1830 (*Cherokee Nation v. Georgia*), the Cherokee nation petitioned the U.S. Supreme Court to intervene and prohibit state agents from "harassing them and taking possession of their lands," the Court rejected their plea, and like all the other tribes they were ousted from their lands and escorted west (Long et al., 1975: 21).

The alleged federal paternalism was vividly expressed through another act of Congress: the Appropriations Act of March 3, 1871, which stated that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty" (Gubler, 1963: 212).

Stripped of their lands, segregated on reservations, and with their previously promised sovereignty removed by the elimination of treaty making, Native Americans found Congress assuming the legal power of legislating directly for them (Gubler, 1963; Long et al., 1975). It is no wonder the Indians fought back—during this period of American history, the Indian battles of 1870-1880 were waged, and lost.

The ultimate blow came in the *Kagama* decision of 1886, when the Court ruled that the national government would have authority over "these remnants of a race once powerful, now weak and diminished in numbers," for their own protection, thus making the Indians wards of the federal government while simultaneously declaring that they "owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies" (Hall, 1979: 50).

Two outstanding critical reviews of the status of the Chinese during this period masterfully depict the plight of Asian Americans in the West: Paul Takagi

and Tony Platt's (1978) examination of the Chinese in California, and Charles Tracy's (1980) treatise on the Chinese in Oregon from 1871 to 1885. Takagi and Platt (1978: 4) remind us that since the average Chinese laborer could not pay the passage to this country, he came under a signed three-to-ten-year labor contract, and his servitude, like that of the African slave in the South, was auctioned off by commission merchants. The Chinese laborers who worked the gold mines until they panned out and undertook the back-breaking labor of laying the Central Pacific Railroad tracks were victims of harassment that ultimately turned into violence and massacre. In addition to racial discrimination at the hands of Euro-Americans, the legal system also became harsh toward the Chinese, who had once been welcomed as a source of labor the Euro-American had shunned.

Laws which discriminated against the Chinese were similar to the Slave Codes and Black Codes experienced by African Americans in the South. In many instances, since the Chinese were "free," the laws were especially oppressive. Both California and Oregon, the states where Chinese were most numerous, prohibited a Chinese person from testifying against a Euro-American, a status that frequently left them helpless victims of robberies and beatings. Interestingly, in Oregon, although not permitted to bring legal action against "whites," Chinese could, and did, press charges against African Americans and other Chinese in city, county, and state courts (Tracy, 1980: 14).

The first Constitution of the Oregon Territory (1857) prohibited African and Asian Americans from voting and banned nonresident African Americans from even entering the Territory (Tracy, 1980). In California the legislature denied citizenship to the Chinese through its rejection of the Fifteenth Amendment, and simultaneously excluded Chinese children from public schools (Takagi and Platt, 1978). A flurry of local ordinances were enacted in both states to prohibit Chinese ownership of land, exclude their entrance into certain occupations, and rigidly tax them out of entrepreneurship. As Takagi and Platt (ibid.: 3) comment, "Race and racism are parts of this history and cannot be separated from the transformation of labor process that channeled the Chinese into particular occupations."

The West Coast Chinese were damaged economically by such racially discriminatory laws as the 1857 statutes in Oregon that required every Chinese miner to pay a monthly tax to the local sheriff for property protection. If it was not paid, the result was seizure and sale of all property within the hour. Other laws prohibited Chinese immigrants from owning real estate or working a mining claim (Tracy, 1980). California ordinances even more precisely structured the occupational choices for the Chinese: business and occupation licenses were denied to "any alien ineligible for citizenship"; laundry deliveries by foot (the Chinese method) were taxed at the rate of fifteen dollars a quarter, while deliveries by a horse-drawn vehicle required the payment of a two-dollar license fee; aliens were not permitted to catch fish for sale in any state waters; laundries had to be of stone or brick construction and, according to another municipal ordinance, could not operate between 10:00 P.M. and 6:00 A.M. (Takagi and Platt,

1978). At the national level, the Chinese Exclusion Act of 1882 effectively prohibited Chinese immigration to this country through repeated renewals for fifty years, until its repeal in 1943. Thus, the expansion of the "Chinese Menace" was temporarily halted.

The Japanese, who were also located predominantly on the West Coast, received similar discriminatory treatment because of their racial/color status, but did not suffer these early injustices for as long a period of time as the Chinese, since the Japanese did not begin to arrive in the United States in sufficient numbers to pose a threat until 1869. Japanese contract laborers who went to work on the plantations of Hawaii in 1868 faced many of the hardships indicative of coolie labor, but it was on the mainland where the law impacted them most negatively. Just as racist legislation had been directed at the Chinese for decades anti-Japanese laws affecting property ownership and school segregation were passed in California. The final degradation against the Japanese Americans was not to come until World War II, with laws designed to ensure their internment in relocation camps.

Although no specific statutes were enacted against Mexican Americans during this period of time, they were exploited for their "stoop labor," kept in poverty and primitive living conditions, and otherwise maltreated because of their color, language deficiency, and "differentness." Thus, at this time in American history, the status of Mexican Americans was essentially the same as that of African Americans, Asian Americans, and Native Americans—an oppressed minority.

FROM THE WORLD WARS TO TODAY

Federal legislation, state statutes, and municipal ordinances up to this time appeared to be a response to the perceived economic threat posed by the racial minority sector. But there were clear indications that American law functioned just as fiercely against other levels of social interaction between the majority (white) and minority (peoples of color) groups. Of all the segregationist laws that had ensured the power of states' rights resulting from *Plessy v. Ferguson*—or those laws related to schools, colleges and universities, public halls and theaters, hospitals, transportation, and penal facilities—the laws indicating the most fear on the part of Euro-Americans were the ones against mixed marriages.

In 1949, thirty states and our national capital continued to forbid the marriage of a "white" and a "black" or "mulatto"; five states banned "white" and Indian marriages, and fifteen states legislated against mixed marriages between "whites" and "Orientals" (Murray, 1950). As late as 1957, twenty-two states still had such miscegenation laws, some with penalties of up to ten years in prison, while Maryland and Nevada continued to legislate against fornication between the races (Greenberg, 1959). The Maryland law, which was not declared unconstitutional until 1957 in *State v. Howard*, was not only racist but also sexist, finding that any "white" woman "who shall suffer or permit herself to be got with child" as a result of fornication with a "negro" had committed a felony which carried a penalty of not less than eighteen months or more than five years in the penitentiary (Murray, 1950: 206). The Nevada anti-fornication statute was

even more racist, since it prohibited sexual activity between "whites and blacks, mulattos, Indians, Malayan or Mongolian persons" at the risk of a \$100 to \$500 fine, six months to one year in jail, or both (ibid.: 266).

Recall that this all began with the U.S. Supreme Court's decision in *Pace v. Alabama* (1883), when anti-fornication statutes banning sexual intercourse between "whites" and "blacks" were upheld. The *Pace* decision was not overruled by the Court until 1964 in *McLaughlin v. Florida*, when it was judged a violation of individual rights.¹⁰ Anti-miscegenation statutes were determined unconstitutional, as well as morally abhorrent, three years later by the Court in a case ironically named *Loving v. Virginia* (1967).¹¹

The various segregationist states' legal definitions of "Negro" patently indicate the racist attitudes of this country extant in 1949; for example, "any blood of African race" (Tennessee), "any person who has in his or her veins any negro blood whatever" (Arkansas), "all persons with an appreciable mixture of negro blood" (Louisiana), or the most common measure, "one-eighth or more of African or Negro blood," which was the established "amount" among those fifteen states which attempted to define "Negro" (Murray, 1950).¹²

The first fifty years of the twentieth century were replete with national and state legislation directed against racial minorities—the California Alien Law Act of 1913 denied Japanese ownership of land; legislation excluding Japanese immigration was passed in 1924; immigration laws of the 1930s prohibited Mexican entry into the United States; a 1942 presidential executive order interned Japanese Americans in veritable concentration camps; and there were racial segregationist statutes and laws denying the right to vote—no person of color was spared.

As minority legal oppression became increasingly unbearable, particularly when minority members were literally denied control of their own communities, many rebelled. The ensuing racial protests, or, as they were viewed by the dominant majority, "riots," and their suppression led to a shocking series of brutal, violent, and lawless acts perpetrated by law enforcement representatives throughout the country. It is at this point in history that racist applications of the criminal law and the resultant incapacitation of minorities through imprisonment became the intensified means of minority control—the current practice.

It is not suggested that the consistent discriminatory application of the criminal law in a fashion that results in the abuse of peoples of color in this country is solely a recent phenomenon; quite the contrary. American federal, state, and local governments have always enacted and enforced criminal laws which were custom-made for specific racial minority groups. When the more flagrant, systemic means of economic and political control of minorities used in the past were no longer feasible or morally acceptable, particularly in the eyes of the rest of the world, criminal law began to be used to warehouse American minorities and maintain their unequal status. The employment of this method introduced an expanded new industry—the criminal justice enterprise—which created more jobs for the majority group as law enforcers, probation officers, lawyers, judges, clerks, prison guards, and numerous other occupations supplemental to the

criminal justice system. Nor can we overlook the enhanced capitalistic (ruling-class) opportunities: the construction industry that builds jails and prisons; private entrepreneurs who benefit from the cheap (slave) labor in the production of their products through prison industries; and the profiteers who function as suppliers to this multi-billion-dollar business. The criminalization of minority peoples supplies the human fuel to maintain this constantly expanding enterprise.

American Minorities and Criminal Law

In their discussion of the developmental stages of law, Vetter and Silverman (1986: 15) describe the last stage as occurring when the state assumes the obligation to punish wrongdoing to protect the citizenry; thus, crimes become offenses against the state, and the domain of the state is enlarged to prevent them. Once the state has obtained this control, according to Sheley (1985: 67), "the acts and people we call 'criminal' and our concern with crime at any given time reflect the work of various interest groups within society's current power structure. The ebb and flow of law is the ebb and flow of interest groups." There is substantial historical evidence that racial minorities in this country have consistently been exploited for the economic benefit of the majority (or Euro-American) group through such measures as slavery, bonded labor, forced labor, "coolie" labor, and other forms of cheap wage labor. In fact, an abundance of documentation suggests that this country was built through such forms of minority labor. Needless to say, the fruits of their labors have not been fully realized by the minority members. It is through the domination by the majority (white) economic interest groups that the rewards have been effected, and it is these groups who have consistently profited from minority labor.

Over the many decades when Native Americans, African Americans, Hispanic Americans, and Asian Americans were denied ownership of land and property or what they thought they owned was seized, various legal measures were effected to ensure the subordination of each of these groups. The laws, statutes, and local ordinances that once were effective are no longer efficacious today; therefore, to maintain its hegemony, the majority group has turned to the criminal law as a final means of legal control. Richard Quinney succinctly describes this process:

Criminal law is used by the state and the ruling class to secure the survival of the capitalist system, and, as capitalist society is further threatened by its own contradictions, criminal law will be increasingly used in the attempt to maintain domestic order. The underclass, the class that must remain oppressed for the triumph of the dominant economic class, will continue to be the object of crime control as long as the dominant class seeks to perpetuate itself, that is, as long as capitalism exists. (1977: 86)

Since the American "underclass" has always had a disproportionate share of racial minorities within its ranks, it is reasonably argued not only that many American criminal laws were devised expressly for these minorities, but also that criminal laws not specifically addressed to them were more frequently applied to them. This is not to deny that there are not "real" criminals among the minority underclass, although how they became criminals is debatable, since "criminal behavior can be comprehended as a rational response of persons who are exploited by the way capitalistic society is organized" (Selva, 1985: 341).

FEDERAL LAWLESSNESS

The role played by the federal government in the oppression of American minorities through the use of criminal law is unique. For the most part, in earlier decades the federal role could be called "law by omission," since federal agents tended not to support the guarantee of individual rights to peoples of color. Greenberg (1959: 313) describes how the law can be used as a "weapon of persecution" through such elements as rules about lynchings and police brutality. Whenever the topic of lynching is broached, the victim viewed immediately in the mind's eye is an African American male hanging grotesquely from a cottonwood tree. Excluding the lynching violence in the nation's frontier period and the antebellum period following the Civil War, two and a half times as many African Americans as Euro-Americans were executed by lynching between 1882 and 1951 (Long et al., 1975: 8). This pattern became fixed during Reconstruction, with the southern states responsible for over nine-tenths of the lynchings; more than 80 percent of the victims were African American (Myrdal, 1944: 64).

One study reports that approximately five thousand African Americans were lynched by mobs between 1865 and 1955 (Demaris, 1970: 115). But as Joel Kovel (1970: 68) notes, "before there were lynchings in the South, there were laws to do what mobs took upon themselves to perform after the Civil War." The intensely violent treatment of the Chinese at the hands of mobs and the decimation of Native Americans in the lust for their tribal lands are further indications that the federal government and its "treaties" and laws did not protect minorities in America, but instead contributed to their systematic genocide.

The Civil Rights Act (1866) passed after the Civil War was an attempt by Congress to protect minorities from such lawless, violent actions, but the laws were not enforced. Section 241 of the act covered mobs which seize a prisoner from a federal marshal or kill a prisoner in public custody and contained a fine of \$5,000 and/or ten years for the offense. The other principal federal sanction against "willful acts committed under color of law which deprive inhabitants of any state or territory of rights protected by the Constitution and the laws of the United States," found in Section 242 of the Civil Rights Act, applied to state officers and private citizens in collusion with officials (Greenberg, 1959: 316). Being "tried by ordeal" was (and still is) a risk that a member of an unpopular minority accused of a crime might face, i.e., "third-degree" pressure or beatings to obtain a confession. This section of the Civil Rights Act was ignored and virtually unapplied from Reconstruction until 1945, when in *Screws v. United*