Washington and Lee Journal of Civil Rights and Social Justice

Volume 29 | Issue 1 Article 5

Fall 2022

Revisiting *The Ox-Bow Incident*: The Almost Forgotten Western Classic About the Lynching of Three Innocent Men is as Relevant as Ever

Marc Bookman
Atlantic Center for Capital Representation, mbookman@atlanticcenter.org

Revisiting *The Ox-Bow Incident*: The Almost Forgotten Western Classic About the Lynching of Three Innocent Men is as Relevant as Ever

Marc Bookman*

Abstract

The concept of lynching, several hundred years old and unclear in its origins, has never really left the lexicon. The word itself, however, has taken on different meanings over the years, from a mob's taking the law into its own hands, to an organized utilization of racial violence as a means of societal control and intimidation; and finally to the more casual and defensive use of the word ("high tech lynching") by current Supreme Court justices Thomas and Kavanaugh and others after being questioned about their past behaviors. Many academics have opined that the modern system of capital punishment is an offspring of lynching. This essay examines that idea through the parallel lenses of the classic and almost forgotten western novel The Ox-Bow Incident, and the travails of Henry Lee McCollum, a low-functioning man who spent more than three decades in a North Carolina prison and came close to execution. In the simple and direct language of the Old West, The Ox-Bow Incident dissects a lynching from its nebulous beginnings

* Marc Bookman is the Executive Director of the Atlantic Center for Capital Representation, a small non-profit based in Philadelphia whose mission is to support capital defense teams via litigation, training, and consultation. From 1993 to 2010 he was in the Homicide Unit of the Defender Association of Philadelphia. He has published essays on various aspects of capital jurisprudence and criminal justice in The Atlantic, Mother Jones, VICE, Slate and other magazines, and his first book, A Descending Spiral: Exposing the Death Penalty in 12 Essays, was published by the New Press in May 2021. He received a B.A. from the University of Pennsylvania, and his law degree from the University of North Carolina. The amazing work of Ken Rose and Gerda Stein, in achieving freedom for Henry McCollum and assuring the accuracy of this article, cannot be overstated.

to its predictable denouement. The McCollum case has virtually all of the same attributes as its fictional counterpart, and its outcome is just as predictable. Whether in art or life, the root causes of injustice turn out to be the same.

The thirtieth anniversary of the "Central Park Five" provoked extensive media coverage of the crime and its aftermath, including Donald Trump's 1989 call, via a full-page ad in the *New York Daily News*, to bring back the death penalty in New York. Published ten days after a vicious rape and beating of a female jogger and the arrests of five young black men, the ad decried the "reckless and dangerously permissive atmosphere which allows criminals of every age to beat and rape a helpless woman and then laugh at her family's anguish," and condemned the impotent justice system that would "soon, very soon" return the criminals to the streets "to rape and maim and kill once again—and yet face no great personal risk to themselves."[1] Three decades later, the media focused on the president's refusal to back off his claim that the five men were guilty[2], in the face of DNA evidence that proved them innocent and implicated a serial rapist as the perpetrator; and in that light, Trump's ad reads like a tirade by a misanthrope mired in his own intransigence. But reading the ad without the benefit of hindsight is far more frightening: twenty-seven years before becoming president, he was pleading for an end to civil liberties as the cost for law and order, using the death penalty to inflame fear and hatred, and unshackling the police from any accusations of brutality. While there is no mention of the race of the criminals Trump assails, or even of the Central Park Five at all, it is impossible to read his diatribe through anything other than a racial lens. There is an ineffable sense that he would gladly bypass the irrelevance of trials and move directly to executions.

Lynching, as a historical reality and a political metaphor, has found its way back into the public eye; or perhaps it never left. The

1. N.Y. DAILY NEWS, May 1, 1989, at 9.

2. A sixth man was also arrested, but he struck a deal with prosecutors just before his trial two years later to avoid the more serious rape charge, instead pleading guilty to robbery of a male jogger. He was exonerated on July 25, 2022. For more information, see Jonah E. Bromwich, *Sixth Teenager Charged in Central Park Jogger Case is Exonerated*, N.Y. TIMES (July 25, 2022) [https://perma.cc/V9HU-ALEL].

Legacy Museum and the National Memorial for Peace and Justice, only minutes apart in Montgomery, Alabama, are shocking and compelling reminders of the practice that bordered on ritual in some parts of the country. The politics of the phrase, made famous by Clarence Thomas's claim that during his Supreme Court confirmation he had been subjected to a "high-tech lynching" for sexual improprieties, resurfaced among supporters of Brett Kavanaugh, the now-Supreme Court justice who faced sexual misconduct claims as well but without the racial implications of the Thomas hearing.[3] Others claiming the same victimization over the past few years were Linda Tripp, a central figure in the Clinton-Lewinsky scandal, Roger Stone, a close Trump associate convicted for lying to Congress, and Bill Cosby after his conviction for three counts of sexual assault.[4] Such casual use of the phrase has no doubt lessened its impact for an entire generation, substituting partisan bravado for a concept originally infused with

---

3. *See* Michael S. Rosenwald, *'A High-Tech Lynching': How Brett Kavanaugh Took a Page From the Clarence Thomas Playbook*, WASH. POST (Sept. 27, 2018) (quoting Clarence Thomas) [https://perma.cc/BBS3-7BKY].

> This is a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kow-tow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree.

4. *See* Helena Andrews-Dyer, *Linda Tripp Says She Was the Victim of 'A Real High-Tech Lynching' in First Public Address Since 2000*, WASH. POST (July 30, 2018) ("Borrowing a line from Supreme Court Justice Clarence Thomas, Tripp said she knew what 'a real high-tech lynching feels like.' Her reputation was dragged by a newly emerging 24-hour news cycle, she said, while Clinton was reimagined as the victim of a conspiracy.") [https://perma.cc/Y3X4-REK7]; *see also* Press Release, White House, Statement from the Press Secretary Regarding Executive Grant of Clemency for Roger Stone, Jr. (July 10, 2020) ("Roger Stone is a victim of the Russia Hoax that the Left and its allies in the media perpetuated for years in an attempt to undermine the Trump Presidency.") [https://perma.cc/5J4T-4ZW3]; Daniel Victor, *Bill Cosby's Publicist Invokes Emmett Till to Discredit Accusers*, N.Y. TIMES (Apr. 27, 2018) ("Bill Cosby's publicist . . . compared his sexual assault conviction to the plight of Emmett Till, the black teenager who was lynched and disfigured in Mississippi in 1955 after he was wrongfully accused of flirting with a white woman.") [https://perma.cc/CNB3-5LFT].

terror; but the history of the idea cannot be fully diminished by a spurious politicization of the word.

The origin of the term "lynching" is not entirely clear. Most sources attribute the word to the behavior of Charles Lynch, a Virginian who ran an extrajudicial court during the Revolutionary War to punish British loyalists without concern for the niceties of due process.[5] By the mid-1880s the expression had taken on its modern-day association with racial violence as a means of societal control and intimidation, a very intentional act with a very intentional purpose; and many academics have opined that the modern death penalty came into being as racial lynching faded away. But the word's original meaning is equally frightening if far less purposeful – the decision by a mob to take the law into its own hands to punish supposed transgressors. It was this denotation of the word that Walter Van Tilburg Clark tackled in *The Ox-Bow Incident*,[6] an eighty-two-year-old novel that detailed an 1885 Nevada lynching from the earliest rumors of a crime to the inevitable denouement of disastrous judgment and injustice. While the work has faded from modern curricula and is barely remembered, its narrative is still relevant in today's criminal justice climate. Certainly Henry Lee McCollum, an intellectually disabled man who spent thirty-one years on North Carolina's death row, would agree.[7]

The Ox-Bow Incident begins with a rush of information: Larry Kincaid has been shot in the head and killed, maybe by cattle rustlers because some of his cattle are missing. There is some confusion about when it happened, but agreement among the

5. *See* Gordon Godfrey Fralin, Charles Lynch, Originator of the Term Lynch Law, 58–59 (July 1, 1955) (M.A. Thesis, University of Richmond) (noting that "lynching" likely originated from Charles Lynch, a Virginia judge who approved the hangings and whippings of British loyalists and referred to such torture as "Lynch's Law") [https://perma.cc/WK9G-5NE6].

6. WALTER VAN TILBURG CLARK, THE OX-BOW INCIDENT (Modern Library 2004).

7. *See North Carolina Man Exonerated and Released After 30 Years on Death Row*, EQUAL JUST. INITIATIVE (Sept. 4, 2014) (describing Henry Lee McCollum's case and exoneration from North Carolina's death row) [https://perma.cc/WN5M-5ARS].

townspeople of Bridger's Wells about the consequences: they "would go a long way, and all together, to get the guy that had killed Kinkaid."[8] Although there is very little information about the crime or the perpetrators, a posse forms at once, and its intent comes under immediate debate:

> Men, let us not act hastily; let us not do that which we will regret. We must act, certainly, but we must act in a reasoned and legitimate manner, not as a lawless mob . . . We desire justice, and justice has never been obtained in haste and strong feeling.[9]

But the voices of reason are quickly drowned out, and the posse's objective is clarified:

> [I]t's not just a rustler we're after, it's a murderer. Kinkaid's lying out there now, with a hole in his head, a Goddamned rustler's bullet hole. Let that go, and I'm telling you, men, there won't be anything safe, not our cattle, not our homes, not our lives, not even our women. I say we've got to get them. I have two sons, and we all know how to shoot; yes, and how to tie a knot in a rope, if that's worrying you, a knot that won't slip.[10]

Now there is no question—this is a lynch mob. With high emotion but very little information and no investigation, every man and one woman from Bridger's Wells sets off to hang those responsible for the murder of Larry Kinkaid.

On September 25, 1983, eleven-year-old Sabrina Buie was discovered missing when her father came home from working the midnight shift at a nearby business. The next day she was found raped, murdered, and left naked in a soybean field in the little town of Red Springs, North Carolina; her body showed evidence of having been dragged, her panties and a stick had been shoved down her throat, and her bra had been pulled over her head. Beer cans and a cigarette butt littered the crime scene.

There were no immediately apparent suspects, and the police began asking the locals if there was anyone from "out of town" they

8. CLARK, *supra* note 6, at 31.
9. *Id.* at 35.
10. *Id.* at 37–38.

should be looking at. Two days later, they heard about nineteen-year-old Henry Lee McCollum via a hunch passed along from a high school girl. She didn't have any personal knowledge that he had been involved in the crime, nor had she received any information that he was. But she suspected him nonetheless "because he is crazy . . . he just does not act right . . . he stares at people, mostly women . . . and he rides up the road on a bicycle looking." And there was a rumor that he had "stolen some money from a pimp in New Jersey."[11] Based on this, the police decided to take a hard look at McCollum.

He had already spoken to the police at his home shortly after Buie's disappearance; in a routine questioning of everyone in the area, he told them he had seen Sabrina only once, when she was walking to a convenience store around noon. But subsequent to the new speculation he was questioned again, this time at the police station from 10:20 PM until well after two in the morning; and this time he told a very different story, implicating himself, his half-brother Leon, and two others in a gruesome gang rape and murder. A day after that, fifteen-year-old Leon confessed as well. There wasn't any evidence against either of them other than their confessions, but was any more proof really needed? What innocent person would confess to such a barbaric crime? For the state, the answer was simple: only a guilty murderer would acknowledge that he played any role at all.

Both were arrested. The law in the state at the time mandated a capital prosecution for a case like the killing of Sabrina Buie. Indeed, it wasn't until 2001 that North Carolina provided the prosecutor discretion not to seek the death penalty, the last state in the country to do so and likely the reason North Carolina was near the top in per capita death sentencing during the 1990s. Not that any of this mattered. The District Attorney of Robeson County was not a man inclined to use such discretion even had it been given to him.

11. *See* Testimony of Kevin Snead, Trial Transcript at 1045, State v. McCollum (Robeson Cnty. N.C. Super. Ct. Oct. 8, 1984) (showing there was a suggestion made at McCollum's trial that he had stolen money from a pimp).

The posse in search of Larry Kinkaid's killers make no pretense of lawfulness; indeed, the mob sets out precisely because of its disdain for the law. This is the triangular tension of *The Ox-Bow Incident*—the desire for process to ensure fairness, the failure of the system to deliver justice, and the need for order to prevent crime. A fourth strain—the irrational urge to see someone punished simply because a crime has been committed—surfaces later in the novel, but as the predictable climax of the plot rather than a theme to be wrestled with.

The moral center of *Ox-Bow* is Arthur Davies, an old man with haunting blue eyes and silky white hair who owns the general store. His defense of law as an essential element of civilization is as uncluttered as the old west itself: "If we go out and hang two or three men without doing what the law says, forming a posse and then bringing in the men for trial, then by the same laws, we're not officers of justice, but due to be hanged ourselves."[12]

When confronted with the possibility that all of Bridger's Wells will be in on the lynching, leaving no one to enforce the law, Davies draws the honest conclusion: "Then our crime's worse than a murderer's. His act puts him outside the law, but keeps the law intact. Ours would weaken the law."[13] Against the possibility that his "law" might let the murderers off, Davies responds that "they probably ought to be let go. At least there'll be a bigger chance that they ought to be let go than that a lynch gang can decide that they ought to hang."[14]

Davies is not talking about the murder of Larry Kinkaid, but he might as well be—from the earliest report of the killing, there is confusion about what has actually happened. It's not clear what time the crime occurred, how many men are involved, or which way they have gone; and upon close examination it turns out that the source of information about the killing is hearsay. The only thing everyone seems certain about is that whoever did it, it wasn't one

---

12. *See* CLARK, *supra* note 6, at 51 (alluding to the story's central theme).

13. *See id.* at 51 (continuing, Davies states, "And it's infinitely more deadly when the law is disregarded by men pretending to act for justice then when it's simply inefficient, or even when it's elected administrators are crooked").

14. *Id.* at 52.

of the townspeople: it may have been "some miserable greaser," or a "thieving Mex and Indian and runaway Reb," though no one knows for sure.[15] Ultimately Davies persuades the townsfolk that they simply don't have enough to go on, and they are ready to disband when a new character appears on the scene. Major Tetley.

Tetley is an important man in the valley. He lives in a fenced-in mansion on the edge of the town, and he continues to carry himself as the Confederate cavalry officer that he was, going so far as to wear his officer's uniform when he approaches the mob on horseback. He is a man so sure of himself that anything he says sounds important; and, not surprisingly, he immediately takes control of the situation. There is no reason to disband, he explains; indeed, the posse must act quickly before the snow falls, or the perpetrators may be lost forever. And Tetley backs up his claim with new evidence—a hired hand of his has seen three men with Kinkaid's cattle. When asked why he has taken so long to bring this new evidence to the posse, Tetley explains that he wanted his son to go along, and that he had been on the range. His son, red-faced from the explanation, says nothing.

Davies continues to push for calm deliberation, but there's nothing he can do. Everyone understands that Tetley is now in charge, and that his presence means a lynching of these three men. Since the sheriff is out of town, his less than reputable deputy steps in and deputizes every member of the mob; and under cover of law, they head out after the rustlers who killed their friend. "We shall observe order and true justice," Tetley announces.[16] The night is frigid and snowy, and their goal is clear. They have brought rope with them, and "it will have to be thawed out before it's fit to use."[17]

Capital punishment had undergone considerable transformation by the time of the McCollum trial. From the earliest days of the colonies through the mid-1800s, death

15. *See id.* at 37–38 (describing potential suspects as outsiders and not as part of the community).

16. *Id.* at 103.

17. *See id.* at 136 (illuminating the group's intention from the earliest moment to kill their friend's murder).

sentences were mandatory for a variety of crimes. By the time of the Civil War, states had begun letting juries decide who got the ultimate punishment and who didn't; but it turned out that juries, left to their own devices, weren't very good at divining who deserved a death sentence, assigning them mainly by the race of the accused or the race of the victim. The Supreme Court had seen enough by 1972, when death rows across the country emptied and Justice Stewart famously compared getting a death sentence to being struck by lightning. In the years that followed, the majority of states passed laws purporting to provide guidance to jurors about making life and death decisions in a rational manner. Methods of capital punishment morphed as well, from hangings to gas chambers to firing squads to electrocutions to lethal injections. And, of course, prosecutorial attitudes about capital punishment varied from state to state and county to county, depending on the elected District Attorney. In Henry McCollum's case, that was Joe Freeman Britt.

By the time of Sabrina Buie's murder, Britt was a legend—dubbed the nation's "deadliest prosecutor" by the Guinness Book of World Records in 1978,[18] he had already secured dozens of death sentences before the McCollum trial, including one for Roscoe Artis just a month earlier. But his many successes had not dulled his acumen before a jury, nor his passion for the death penalty. It was not just the accused who had rights, he said: "Other people have rights, too. There is the right of society to be safe. What is the most precious right that any of us have? The right to live. We all have that right, unless we forfeit it by our conduct."[19] In his opinion, Henry McCollum had forfeited his right to live by killing Sabrina Buie, and he sought death with great zeal. Here he was, holding what he referred to as a "flat, two-dimensional picture," a photo of the dead victim:

> It is the reality of young death. That, ladies and gentlemen of the jury, is not the figment of someone's imagination. That is

18. *See* Kathy Sawyer, *Tears Might Have Eased Penalty*, WASH. POST (Oct. 21, 1984) ("Britt is listed in the Guinness Book of World Records as the 'world's deadliest prosecutor' for winning 23 death verdicts in 28 months, at the same time putting 13 defendants on death row.") [https://perma.cc/9MLG-KU94].

19. *Prosecutors Wins Death Sentences*, N.Y. TIMES (Dec. 25, 1985) [https://perma.cc/74ME-K96V].

> reality. That is what happened to an 11-year-old child out there in the dark woods on the 24th of September, 1983 . . . We're talking about Sabrina Buie, human, female child, 11 years old, like you or like me, who wanted to live and who has now gone forever to eternity.[20]

Like any good prosecutor, Britt spent considerable time discussing the horror that the victim had lived through and died through. But his overriding point, the point he wanted the jury to understand, was that the real victims in the case were the jurors themselves:

> [D]id you ever stop and wonder when we're ever going to be concerned about the rights of victims in society? What is the most precious right that any of us have, any of us in the courtroom have? The right to live, to live in nature's way and die in nature's way, and these defendants sitting at the next table denied Sabrina Buie that right. She was denied the protection of the laws. She was denied—all of society was denied the rights of protection of the laws when Sabrina Buie was killed and murdered.[21]

For a prosecutor like Britt, there was only one thing to do when the law had failed and society had suffered as a consequence, and the jury did it: on October 25, 1984, they sentenced Henry Lee McCollum and his half-brother to death.

When the posse catches up to the three men with Kinkaid's cattle, they are sleeping in the glow of a fire in the middle of a snowstorm. The leader of the group, Donald Martin, is a skinny young man from nearby Pike's Hole—when confronted by a member of the posse who lives there and has never seen him, he claims to have moved in three days prior. "Is it so far to Pike's that you can't go over there and look?"[22] Martin says, but the posse is intent on wrapping up the investigation on the spot. "This is

20. State's Final Argument, Trial Transcript at 1950, State v. McCollum (Robeson Cnty. N.C. Super. Ct. Oct. 8, 1984).

21. *Id.*

22. *See* CLARK, *supra* note 6, at 170 (juxtaposing Martin, the alleged murder's fair sense of justice, with the group's demand for retribution).

murder, as you're going at it," Martin tells Tetley.[23] "Even in this God-forsaken country I've got a right to be brought to trial, and you know it. I have, and these men have. We have a right to trial before a regular judge."[24] Tetley's response substitutes irony for justice: "You're getting the trial with twenty-eight of the only kind of judges a murderer gets in what you call this God-forsaken country."[25] The case against Martin gets worse when he is forced to reveal that he has no bill of sale for the fifty head of cattle he has with him on the trail; and again, the posse denies his request to speak to the seller and confirm the sale.

With Martin is a very confused old man and a middle-aged Mexican man who responds *no sabe* to all questions put to him. Brief questioning makes it clear that the old man has dementia, and Martin appeals to the mob to at least spare him; but rather than garnering mercy, the old man's babbling is simply an irritant. As for the Mexican, he remains silent and sullen until suddenly he attempts an escape and is shot in the leg. Upon his capture, a member of the posse discovers on him the gun of Larry Kinkaid, a gun that Martin now claims they found on the side of the trail after purchasing the cattle. For everyone but Davies, the gun clinches their guilt.

"I think we'd better get this settled," Tetley says.[26] "We must act as a unit in a job like this. Then we need fear no mistaken reprisal. Are you content to abide by a majority decision, Davies?"[27] Davies does not respond, but there is general assent to a vote. Only five of the twenty-eight, including Tetley's son Gerald, stand apart for "putting this thing off and turning it over to the courts."[28]

"I suppose it's no use telling you again that we're innocent?"[29] Martin cries after the die is cast, and when Tetley says "no good" he makes a final claim against mob justice: "You don't care for justice. You don't even care whether you've got the right men or

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 200.

27. *Id.*

28. *See id.* (showing a considerable amount of doubt among the group members that they were doing the right thing).

29. *Id.* at 203.

not. You want your way, that's all. You've lost something and somebody's got to be punished; that's all you know."[30] Again, however, it's to no avail. And so, without investigation or counsel or process, guilt is established and death sentences are handed down. All that remains is the actual infliction of the penalty.

It is reasonable to assume that a death sentence is the end of the story; but for Henry McCollum and his half-brother, it was just the beginning. Four years after the trial the North Carolina Supreme Court declared that the jury had been improperly instructed, and three years after that McCollum was convicted and sentenced to death again – Brown, convicted only of rape in his second trial, went off to serve a life sentence. Once more McCollum went to the North Carolina Supreme Court, but this time he lost and headed to the rarefied air of the United States Supreme Court. In a typical year only three percent of the cases that try get the attention of that court, and McCollum was not lucky enough to win that lottery. Indeed, he was sufficiently unlucky to achieve a certain level of ignominy from his attempt to appeal.

In 1994, in the case of *Callins v. Collins*,[31] Justice Harry Blackmun announced a position that would soon adorn progressive posters everywhere: "From this day forward, I no longer shall tinker with the machinery of death."[32] He went on to condemn the Court's jurisprudence, and he concluded by stating that the "path the Court has chosen lessens us all."[33] Perhaps it was that inclusive last thought that drove Justice Antonin Scalia to criticize Blackmun's highly personal decision, or perhaps it was simply his deep-seated belief in the constitutionality of the death penalty.

---

30. *Id.* at 203–04.

31. *See* Callins v. Collins, 50 U.S. 1141, 1141 (1994) (denying writ of certiorari from the United States Court of Appeals for the Fifth Circuit).

32. *See id.* at 1145 (Blackmun, J., dissenting) ("Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.").

33. *See id.* at 1159 (arguing that the Court should have heard the case to develop procedural rules for consistency, fairness, and reliability in capital sentencing).

Whatever the cause, Scalia decried Blackmun's conclusion, pointing out that the case he had chosen to announce his momentous decision was "one of the less brutal of the murders that come before us."[34] It was then that he elevated Henry McCollum's case to a level of infamy:

> [Death by injection] looks even better next to some of the other cases before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. See *McCollum v. North Carolina* . . . How enviable a quiet death by lethal injection compared to that![35]

Had a clarion call for execution ever been more clearly sounded?

The Ox-Bow Incident, at its base, is a philosophical novel whose plot acts as a vehicle for broad discussions about the nature of law and justice, and what constitutes civilization when the usual edifices are stripped away. If there is any psychological intrigue to be found, it is in the impulses of a lynch mob; and most specifically, the motivations of the man who single-handedly leads the mob to its inevitable behavior, Major Tetley.

Tetley has a singular goal, and that is to make a man out of his son Gerald. His vision of manhood is outdated even for a Nevada posse in 1885, but the author's point is not to establish standards for masculinity so much as to probe the contours of retribution. Tetley cannot stand that he has failed as a father, even if it is only in his own eyes; and as he drives the mob to lynch the three men, it becomes clear that he is doing so not because justice requires the hanging, but because he requires his son to be a part of the ugliness.

Gerald is far from a willing participant, however, and is vocal in his opposition: "You can't go hunting men like coyotes after rabbits and not feel anything about it. Not without being like any

34. *See id.* at 1142 (Scalia, J., concurring) (describing the sudden and unexpected nature of the murder).

35. *Id.* at 1142–43.

other animal. The worst animal."[36] Yet he finds himself running with the pack, and his only explanation seems drawn from the same animal parallel: "I'm here because I'm weak," he says, "and my father's not."[37] Nonetheless, Gerald is strong enough to vote with the minority against the hanging, and that is the last straw for the major. "I'll have no female boys bearing my name. You'll do your part, and say nothing more," Tetley commands, appointing Gerald one of the three to whip the horses out.[38]

The very concrete horror of death comes next. Gerald is unable to hit his horse, and while the other two men die instantly from broken necks, Martin slides off the horse and dangles, "choking to death, squirming up and down like an impaled worm, his face bursting with compressed blood."[39] Tetley strikes his son with the butt of his pistol, dropping him where he stands, and orders another man to shoot Martin, who finally settles "into the slowing pendulum swing of the others."[40] The mob has just witnessed a botched execution.

Scalia's war of words with Blackmun did not end with the *Callins* opinion. When the Court got around to denying the *McCollum* appeal, Blackmun addressed his fellow justice's concerns in dissent. Pointing out that McCollum was intellectually disabled, had no significant criminal history, and was not at all the most culpable of the four alleged perpetrators, Blackmun wrote: "That our system of capital punishment would single out [Henry] McCollum to die for this brutal crime only confirms my conclusion that the death penalty experiment has failed."[41] Eight years later,

36. CLARK, *supra* note 6, at 110.

37. *Id.* at 118.

38. *Id.* at 203.

39. *Id.* at 207.

40. *Id.* at 208.

41. *See* McCollum v. North Carolina, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting) ("Our system of capital punishment simply does not accurately and consistently determine which defendants most 'deserve' to die.").

in the 2002 case of *Atkins v. Virginia*,[42] the Supreme Court ruled that those with intellectual disability were precluded from the death penalty; and shortly thereafter, McCollum's lawyers filed another appeal on his behalf, believing that the *Atkins* decision would remove their client from death row. But what about McCollum's claim of innocence? After decades on death row, had the debate boiled down to whether or not he should be executed?

An appeal from 1995 referenced other "actual or potential suspects in the case," and one name seemed particularly interesting—Roscoe Artis, the man District Attorney Britt had put on death row only one month before McCollum. Artis's crime bore striking similarities to the murder of Sabrina Buie: the murder of a young woman, occurring only twenty-seven days after the death of Buie, and with the same cause of death, asphyxiation. Both victims had been found naked, and both had been sexually violated. Artis himself had a lengthy history of sexual violence against women. And then there was this—Artis had committed his murder in Red Springs, and in fact lived adjacent to the soybean field where Sabrina Buie had been found. Finally, both McCollum and Artis had been represented by the same attorney, Earl Strickland; and both cases had been investigated by several of the same law enforcement officers. Yet there was no indication from a single witness or scrap of police paperwork that Artis had ever been investigated for the Buie murder. Was it possible that Britt and Strickland and several police officers from the State Bureau of Investigation and the local sheriff's department, prosecuting and defending and testifying in both cases back-to-back, had missed the parallels between them?

Certainly, the evidence against McCollum and Brown merited a closer look even without the shocking resemblance to the *Artis* case. While both had confessed to the crime, their statements were markedly different from each other and from the facts of the crime itself. McCollum had told the police that one of the participants had stabbed the victim, but the autopsy revealed no stab wounds. Indeed, a number of the other participants named in the statements, having clear alibis, had never even been arrested for

42. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (stating that executions of the intellectually disabled constituted cruel and unusual punishment prohibited by the Eighth Amendment).

the crime. Given that McCollum and Brown had each been diagnosed with intellectual disability, it would not be a far cry to imagine that they might have been easily manipulated by interrogators. As Justice Blackmun had noted in his dissent, McCollum's jury had found that "he had difficulty thinking clearly under stress:"[43] was there any situation more stressful than being accused of a terrifying rape/murder?

Meanwhile, as the appeals plodded through the justice system the McCollum case reentered the headlines. It seemed that Justice Scalia wasn't the only one who saw Henry McCollum as a poster boy for the death penalty. In 2009 North Carolina had passed the Racial Justice Act, a law that allowed death row inmates to challenge their sentences if they could show that race was a significant factor in the decision to seek or impose the death penalty.[44] The law, distinctly unpopular among certain segments of the electorate, became a cudgel against legislators who had voted for it; and in 2010 McCollum's face appeared on political flyers that falsely claimed death row inmates would be "moving into Your neighborhood sometime soon" if the Act weren't repealed. "Get to know Henry McCollum," the flyer read. "He RAPED AND MURDERED AN 11 YEAR OLD CHILD." It was twenty-six years since he had been sentenced to die, and the drumbeat to kill him had never been louder.

It is not decades, or even days, but minutes before the lynching party realizes that it has made an unimaginable mistake. As they ride back to Bridger's Wells, they are met by the sheriff, the town judge, and Larry Kinkaid, "with a bandage on his head, and a bit peaked, but otherwise as usual."[45] The judge, who with Davies had urged the posse to wait until the sheriff returned and a lawful process could be observed, now makes the consequences plain:

---

43. *See McCollum*, 512 U.S. 1254, 1255 (Blackmun, J., dissenting) (noting that the sentencing jury found several mitigating circumstances).

44. *See* North Carolina Racial Justice Act, N.C. GEN. STAT. § 15A-2010 (2009) ("No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.").

45. *See* CLARK, *supra* note 6, at 210 (alerting the posse to the fact that they had just executed three innocent men for a murder that never happened).

> You all heard us; you were all warned. You wanted justice, did you? Well, by God, you shall have it now, real justice. Every man of you is under arrest for murder. We'll give you a chance to see how slow regular justice is when you're in the other chair.[46]

But while law, order, and morality call for their arrests, practicality dictates otherwise: "I haven't recognized anybody here," says the sheriff. "We passed in a snowstorm, and I was in a hurry.[47] Go on about your business . . . . You can't stop the talk, but there'll be a lot less fuss if you keep out of it. Nobody knew these men."[48] To the judge he apologizes: "It'll have to be that way."[49]

Nobody knew these men. This is the justice of the old West, of miles on horseback to find law enforcement and the improbability of locking up an entire town. But such a resolution lacks satisfaction, and perhaps that is why it is changed three years later when the novel is adapted into a critically acclaimed movie of the same name. The Hays Office, which served as a conservative censor for the film industry at the time, insists that the sheriff arrest the mob for their crime, thus serving up a more palatable form of justice: "God better have mercy on you," the sheriff says in the movie. "You won't get any from me."

Even in the novel, however, the act of hanging three innocent men has consequences. Early on, when the posse is still searching, Gerald Tetley shares his thoughts about the goal of their mission: "I know this, if we get those men and hang them, I'll kill myself. I'll hang myself. I tell you I won't go on living and remembering I saw a thing like this, was part of it myself. I couldn't. I'd go really crazy."[50]

Then he does just that. His father had locked him out of the house, and he goes into the barn and hangs himself from a rafter. But the ripples of the lynching don't end there. When Major Tetley hears what his son has done—what he has done to his son—he

---

46. *Id.*

47. *Id.*

48. *Id.* at 211–12.

49. *Id.* at 212.

50. *See id.* at 118 (foreshadowing his eventual suicide compelled by the guilt of the lynching).

locks himself in his library and jumps on his cavalry sword. When they find him, it is sticking up through his back.

In the end, it was a cigarette butt that set Henry McCollum free. Two decades after a death sentence had been initially imposed, a new prosecutor agreed to DNA testing on the evidence left at the crime scene; yet even that proved to be slow going for McCollum. DNA from the butt was tested and excluded him and his half-brother; but that wasn't nearly enough to exonerate him, as his own confession had claimed that another perpetrator was smoking at the time of the killing.

Slowly but surely, however, the claim of innocence started rolling downhill. In 2012 a former death row inmate named Sonny Craig, recently released from three decades of incarceration, came forward with an affidavit—he knew both Henry McCollum and Roscoe Artis in prison, and had numerous conversations with both of them. While McCollum continually claimed innocence, Artis's conversations were more probative:

> It appeared that Mr. Artis wanted to talk about Mr. McCollum's case, and get something off his chest. It seemed to be weighing on his heart, and he needed to tell somebody, so he told me. Mr. Artis knew a lot about the victim. He knew some obscure facts about the crime, including the victim's underwear and how she was killed. I understood Mr. Artis to be admitting his own involvement in the crime . . . he seemed burdened by living with guilt for so long.[51]

Maybe it wasn't a home run, but the affidavit at least served to focus attention on Roscoe Artis. In the meantime, the North Carolina Innocence Inquiry Commission, brought into the case at the request of Brown, had been doing the heavy lifting. Convinced after speaking with Artis that he was lying, Innocence Inquiry staff returned to interview him several more times, finally obtaining a DNA sample from him. Shortly after that the home run came: DNA confirmed that the man smoking the cigarette had indeed been Roscoe Artis.

---

51. Affidavit of Sonny Craig at 1, State v. Henry McCollum, 83 CRS 1506, 1507 (Robeson Cnty. N.C. Sept. 2, 2014).

Then the dam broke. A record surfaced that a police officer from Red Springs had requested a fingerprint recovered from one of the beer cans at the Buie crime scene be compared to Roscoe Artis three days before the beginning of the McCollum/Brown trial in 1984, and even listed Artis as a suspect—but there was no evidence that the comparison was ever done. Somehow the request had never made it to the prosecutor's file; or at least that was the claim decades later when the paperwork finally came to light. A handwritten note canceling the request was also found, but no explanation for why the cancellation had been ordered. Surely the water had long since passed under the bridge, but at least the correspondence served to confirm the obvious: that what was apparent three decades later had in fact been just as apparent three days before trial, when an injustice might have been avoided entirely.

There is an aftermath to every injustice, and there was an aftermath to the 31-year wrongful incarcerations of Henry McCollum and Leon Brown. After then-Governor McCrory pardoned the men in 2015, each collected the maximum $750,000 in compensation from North Carolina. But in a matter of months, both intellectually disabled men had been victimized. As *The Marshall Project* and the *New York Times* put it, "Mr. McCollum, 54, and Mr. Brown, 50, proved virtually helpless as hundreds of thousands of dollars of state compensation were siphoned off by their supposed protectors: a sister back home; a lawyer from Orlando, Fla.; a self-proclaimed advocate from Atlanta, and her so-called business partner, a college instructor from Brooklyn . . . By the time a federal judge intervened in the spring of 2017, no trust had been set up for the brothers and money intended for their care had been spent on predatory loans, exorbitant legal fees, multiple cars, women's jewelry and children's toys."[52] A lawsuit against Robeson County, North Carolina and various members of law enforcement followed, however, and in May 2021 a federal jury

52. *See* Joseph Neff, *They Did 30 Years for Someone Else's Crime. Then Paid for It.*, N.Y. TIMES (Apr. 7, 2018) (stating that much of the $750,000 settlements from the state were signed off by their supposed protectors) [https://perma.cc/9EWU-7DR7]; *see also* Joseph Neff, *The Price of Innocence*, MARSHALL PROJECT (Apr. 7, 2018, 12:10 PM) (describing how McCollum and Brown were targeted by friends, family, and scammers for their settlement money) [https://perma.cc/L54Y-9VST].

awarded the two brothers a million dollars for each year they'd spent wrongly incarcerated, raising a question that no one had ever had reason to ask before: could thirty-one million dollars possibly make up for thirty-one years of lost freedom?[53]

And what of Joe Freeman Britt, the "deadliest prosecutor" who put both McCollum and Artis on death row only months apart? He died in 2016, but he spoke out against the exonerations shortly after they occurred. Undaunted by the DNA results, the similarity of the cases, or the contradictory evidence in the confessions, he condemned the prosecutor who handled the innocence inquiry: "I thought the D.A. just threw up his hands and capitulated, and the judge didn't have any choice but to do what he did. No question about it, absolutely they are guilty."[54]

No flyers circulated proclaiming Henry McCollum's exoneration; indeed, the Racial Justice Act was repealed two years before the governor pardoned him. No North Carolina court promulgated new rules to avoid the repetition of such an injustice. And Justice Blackmun passed away before the irony of his argument with Justice Scalia became clear. Yet he anticipated the failure of the McCollum case twenty years before it happened, in the same opinion in which he renounced capital punishment:

> Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court . . . has engaged in a futile effort to balance these constitutional demands.[55]

Or, as Walter Van Tilburg Clark said more colloquially in *The Ox-Bow Incident*, "Hanging is any man's business that's around."[56]

---

53. *See* Bryan Pietsch, *Cleared of Murder, Brothers Are Awarded $75 Million*, N.Y. TIMES (May 17, 2021) (stating that a North Carolina jury "awarded each [brother] $31 million in compensatory damages — $1 million for each year they spent wrongfully imprisoned. They were also awarded a total of $13 million in punitive damages.") [https://perma.cc/GL6B-Z3ML].

54. *See* Richard A. Oppel, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 7, 2014) (describing Britt's response to the jury's ruling) [https://perma.cc/Q836-SJBL].

55. *See* Callins v. Collins, 510 U.S. 1141, 1144–45 (Blackmun, J., dissenting) (suggesting the Court has "virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty").

56. CLARK, *supra* note 6, at 175.