THE MUDDLED METTLE OF JURISPRUDENCE: RACE AND PROCEDURE IN ALABAMA'S APPELLATE COURTS, 1901-1930[*]

The South at the turn of the twentieth century was a world where substance hid beneath coded social practices. Ralph Ellison highlighted this in his novel *Invisible Man* when the dying patriarch and black man implored his family to "[l]ive with your head in the lion's mouth [and] to overcome 'em with yeses, undermine 'em with grins, agree 'em to death and destruction, let 'em swoller you till they vomit or bust wide open."[1] This deferential practice of blacks sublimating to whites became so ingrained that any deviance by blacks was met with swift retribution from whites.[2] While some whites may have believed black deference a substantive prostration of an inferior race to the dominant white race, it is almost certain that blacks, like Ellison's dying patriarch, saw it only as a social and procedural mechanism to achieve their goals and to appease whites.[3] Conversely, whites relied on highly structured formal and customary procedures to achieve their substantive racist purposes.[4] Key examples of this were the thinly coded legal procedures—including poll taxes, the grandfather clause, white juries, and literacy tests—that southern state legislatures utilized to effectuate their substantive goal of black disfranchisement.[5]

This Comment examines how the Alabama Supreme Court and the Alabama Court of Appeals[6] viewed African-Americans between the years of 1901-1930 and how these views were perpetuated or confined within legal

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1. RALPH ELLISON, INVISIBLE MAN 16 (Vintage Books ed., Random House 1972) (internal quotation marks omitted).
2. *See generally* Jacquelyn Dowd Hall, *"The Mind That Burns in Each Body": Women, Rape, and Racial Violence*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328, 329-31 (Ann Snitow et al. eds., 1983). Hall notes that the South "maintained order through a system of deference and customary authority in which all whites had informal police power over all blacks." *Id.* at 329. The need to lynch arose from lack of law enforcement, but after law and courts were established, it was institutionalized into those systems. *See id.* at 329-30. *See generally* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 284 (1998) (noting whites' need to enforce deference among African-Americans in the years between 1890 and 1917 was openly homicidal).
3. *See* LITWACK, *supra* note 2, at 184-85 (recognizing that whites, following the Civil War, created an idealized version of the Negro subordinate to counteract the wave of Negro individualism).
4. *See id.* at 249.
5. *See id.* at 225-26, 249.
6. The Alabama Court of Appeals was created in 1911 at the urging of the State Bar Association, and the court in and of itself could be considered a "new" procedure. John Crawford Anderson, *Chief Justice Anderson's Memoirs*, 19 ALA. LAW. 275, 282 (1958).

procedure. The importance of the years 1901-1930 lies in the fact that they follow the adoption of the 1901 Alabama Constitution, coincide with both the rise of Progressivism and the rise and decline of the age of lynching, and finally, they serve as a frontispiece to the infamous trials of the "Scottsboro Boys."[7]

Structurally, this Comment divides into four parts. The first describes and lays out the underlying social, political, and structural forces creating and driving jurists and the legal system in Alabama during the first three decades of the twentieth century. The second part traces the rise and fall of a heightened proceduralization that the Alabama Supreme Court and Alabama Court of Appeals developed to forbid direct race-baiting by counselors and judges in civil and criminal proceedings that, while perhaps not intended, granted some substantial gains to black parties in the Alabama judicial system. The third part explores how justices and judges in both of the Alabama appellate courts, despite their doctrines that insulated race from judicial decisions, inserted their own racial beliefs and how they reconciled these beliefs with their procedural and formalistic decisions. The fourth part gives a brief conclusion on how the courts' proceduralization and racial beliefs over this time period worked for or against the ever-rising edifice of Jim Crow and the white supremacy Jim Crow sought.

I. RACE AND IDEOLOGY IN ALABAMA: 1901

At the beginning of the twentieth century, Alabama stood at the nexus of two political and social currents that uneasily converged. The first was race radicalism, as embodied in the 1901 constitution, and the second was Progressivism. Progressivism sought the creation of an infrastructure that included hospitals, prohibition of child labor,[8] state supported pensions, education reforms, and other progressive institutions.[9] Race radicalism created a wall to separate the races and refused blacks access to most of these progressive initiatives.[10] While on the surface this paradox appears beyond reconciliation, both systems sprang from similar core concerns—especially in the minds of progressives. That is, they accepted an organic view of the

7. The trials and tribulations of the "Scottsboro Boys" serve as the seminal indictment of the Alabama judicial system and judiciary in the first half of the twentieth century. *See* Powell v. Alabama, 287 U.S. 45 (1932); *see also* MARK S. WEINER, BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE 246-73 (2004) (explaining the events surrounding *Powell v. Alabama* and the case itself). *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979).

8. *See generally* SHELLEY SALLEE, THE WHITENESS OF CHILD LABOR REFORM IN THE NEW SOUTH (2004) (explaining that the child labor reform needed to be tailored to whites before it could be palatable to the white middle class).

9. *See also* SHELDON HACKNEY, POPULISM TO PROGRESSIVISM IN ALABAMA 230-54 (1969). *See generally* SALLEE, *supra* note 8.

10. *See* RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 103-143 (2003) (discussing notions of supremacy and the black reaction to it in the early nineteenth century).

nature of society, culture, and, of course, race. For these divisions to flower, they demanded separation and nurturing.[11]

The movement termed "Volksgeistian Conservatism" serves a useful guide to understand this concept.[12] This philosophy "presumed that God had implanted in Southern white folk a unique and valuable spirit."[13] Conversely, blacks were imbued with their, as of yet undiscovered, distinct spirit.[14] One of the chief advocates for this philosophy, Edgar Gardner Murphy, argued "that segregation was not degradation."[15] Instead, "[i]t answered the needs of both races."[16] In essence, while whites may have received the greatest support from state taxes, blacks were not in need of the programs that state governments advocated.[17] Thus, he argued, blacks must be left to their own accord to find their special "spirit."[18] To mingle the races would not only destroy blacks attempts to find there *geist* but would also hurt whites.[19]

Through this lens, the amalgamation of progressivism and segregation is not as hard to understand. Under Volksgeistian philosophy, segregation became another progressive, pseudoscientific attempt to better society. Whether southern whites and Alabama jurists believed this notion is not important. The important distinction is that intellectuals sought to justify segregation as good for both whites and blacks. C. Vann Woodward noted:

> At home and abroad biologists, sociologists, anthropologists, and historians, as well as journalists and novelists, gave support to the doctrine that races were discrete entities and that the "Anglo-Saxon" or "Caucasian" was the superior of them all. It was not that Southern politicians needed any support from learned circles to sustain their own doctrines, but they found that such intellectual endorsement of their racist theories facilitated acceptance of their views and policies.[20]

The contour of this interplay is important to understand race as a construct in the mind of Alabamian judges.

11. This Comment does not intend to serve as a comprehensive exploration of the Progressive movement. As such, it does not address all of the inherent diversities found in the Progressive movement. For a full discussion of that diversity, see WALTER T. K. NUGENT, FROM CENTENNIAL TO WORLD WAR: AMERICAN SOCIETY 1876-1917 (1976).
12. *See generally* JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 414-58 (1984).
13. *Id*. at 414.
14. *Id.* at 418-19.
15. *Id.* at 419.
16. *Id.*
17. *Id.*
18. *See id.* at 418-19.
19. *See id*.
20. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 74 (commemorative ed. 2002).

II. THE POLITY AND STRUCTURE OF THE ALABAMA JUDICIARY: 1901-1930

A. Structure as Reflected in the 1901 Constitution

To understand how these appellate judges saw, expressed, and dealt with race, it is imperative to understand the 1901 Alabama State Constitution. The primary motivation for Alabamians to draw a new constitution was to "ensure[] that blacks could not vote."[21] Noting the centrality of disfranchisement to the whole proceeding, a Montgomery commentator found that "[t]he committee which 'towers above all others is the Committee on Suffrage and Elections.'"[22] For this most central of tasks, the convention tapped Judge Thomas W. Coleman as chairman.[23] The committee, along with the convention itself, consisted overwhelmingly of lawyers.[24] The result of the committee's deliberations and the delegation's ratification was a document that instituted "[r]esidency requirements, cumulative poll taxes, literacy requirements and property ownership requirements [that] placed significant burdens on the right to vote."[25] In the end, the constitution had whittled 181,000 registered, black, Alabama male voters in 1900 down to less than 5,000 three years later.[26]

The committee, its actions, and its legal result had several implications for the appellate judges that were to follow. First, the committee, as a collection of lawyers and judges, gave a baseline understanding for how the polity of the legal community viewed blacks in 1901. By circumcising blacks from the franchise, the members of the suffrage committee, and the constitutional delegation as a whole, implicitly declared that blacks were not deserving of a voice within government. In endorsing this logic, James "Cotton Tom" Heflin, a convention delegate, state legislator, and future Congressional Senator said, "I believe as truly as I believe that I am standing here that God Almighty intended the Negro to be the servant of the White man."[27] This sentiment found support in white minds in some part

21. *See* Glory McLaughlin, Comment, *A "Mixture of Race and Reform": The Memory of the Civil War in the Alabama Legal Mind*, 56 ALA. L. REV. 285, 307 (2004). For a complete treatment of the discussion leading up to the 1901 Constitutional Convention, the convention itself, and its implications, see MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM (The Reprint Co. 1978) (1955).

22. MCMILLAN, *supra* note 21, at 267 (quoting MOBILE REGISTER, July 16, 1901).

23. *Id*. Judge Coleman graduated from Princeton, had been a slaveholder, and was a Civil War veteran. *Id*. Equally important is the fact that he was a former legislator and member of the state supreme court. *Id*.

24. *Id*. at 263, 267. McMillan notes that "[t]wenty-one of the twenty-five members of the committee were lawyers." *Id*. at 267. Included in this list were notables such as former Governor Oates, former Associate Justice Richard Wilde Walker, and the former President of the University of Alabama, Richard Channing Jones. *Id*. The constitutional delegation, as a whole, was made up of 155 delegates, of which 96 were lawyers. *Id*. at 263. This prompted the *Montgomery Advertiser* to refer to the convention "as 'the lawyer's convention.'" *Id*.

25. McLaughlin, *supra* note 21, at 308.

26. *Id*. at 308-09.

27. Ralph Melvis Tanner, James Thomas Heflin: United States Senator, 1920-1931, at 8 (1967) (unpublished Ph.D. dissertation, University of Alabama) (on file with author) (quoting OFFICIAL

due to a perceived increase in black crime in urban areas that indicated a "deteriorat[ion] in morals and manners, in health and efficiency"[28] among blacks that demonstrated they were "losing out in the struggle for survival."[29] Based on this, "[t]hey resolved that the Negro was incapable of self-government [and] unworthy of the franchise."[30] While the 1901 constitution may not have declared blacks servants like "Cotton Tom" advocated, it went a long way towards that goal and undeniably made them subservient to white Alabamians.

Second, the calling of the convention itself asserted the patriarchal role whites assumed in regard to blacks. The 1901 constitution took this patriarchal notion and instituted a formalized white political world that lauded over the now politically impotent blacks.[31] This new political order, while commenting on the inferiority of blacks, reinforced the supreme role of government and the whites who wielded its power as patriarchs. Williamson noted this structure by asserting:

> The perpetual duty of the patrician is to bless the good publicly, and to disapprove of the bad, to smile upon conformity to social ideals and to frown upon its lack. The patriciate then becomes a secular priesthood, defining the civil theology, observing and leading the rituals, administering the sacraments at graduations, at militia musters . . . in the courts . . . in the schools, churches, and newspapers . . . and in the streets. Individuals were the bricks, institutions were the mortar, and patricians were masons who brought them skillfully together into the stout building of the church social, the only shelter under which civilization could survive.[32]

Lastly, the constitution delivered the death knell to any connection between blacks and whites and destroyed any possibility of cooperation be-

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PROCEEDINGS OF THE ALABAMA CONSTITUTIONAL CONVENTION 2841 (Brown Printing Co., 1901)) (internal quotation marks omitted).

28. WOODWARD, *supra* note 20, at 94-95.

29. *Id.* at 95.

30. *Id*.

31. Prior to the 1901 constitution, blacks throughout the state were effectively removed from political participation through means of coercion, intimidation, and bribery. *See* MCMILLAN, *supra* note 21, at 218-19 (noting that theft, illegal arrest, ballot fraud, and bribery were commonly used to disenfranchise blacks). The "Redemption" election of 1874 was a seminal turning point in the removal of blacks from politics through white, Democratic corrupt practices. *See* George Ewert, *The New South Era in Mobile, 1875-1900*, *in* MOBILE: THE NEW HISTORY OF ALABAMA'S FIRST CITY 127, 128 (Michael V.R. Thomason ed., 2001). Violence ensued throughout the state, and in Mobile "[a]rmed gangs roamed the streets, threatening voters . . . [;] [m]obs gathered around polling places . . . [;] [b]allot boxes were stuffed and counts altered as the Democrats tried to steal the election." *Id.* at 129. In reaction, Congress empowered a committee to investigate the fraud to determine if the election should be voided. *Id*. Despite these acts, blacks were able to maintain political involvement in "enclaves heavily populated by blacks" and "as allies of white splinter movements." WILLIAMSON, *supra* note 12, at 226. As a result, the distaste of corruption in Alabama elections and the fear of black/white alliances became two major factors discussed in support of the 1901 Convention. *See* MCMILLAN, *supra* note 21, at 230-32.

32. WILLIAMSON, *supra* note 12, at 237.

tween the two races. This separation had been widening since the end of the Civil War.[33] Before the end of the Civil War, a commentator noted that "blacks and whites lived side by side, sharing the same premises if not equal facilities and living constantly in each other's presence."[34] While the commentator's gloss on "equal facilities" is clearly self-serving, the intimacy of blacks and whites in the age of slavery is apparent. Though based on a servant/master paradigm, "the result of this and other conditions . . . promoted a familiarity and association between black and white that challenged caste taboos."[35] After the Civil War and the end of slavery, there was "a simultaneous withdrawal of both races from the enforced intimacy" of that period.[36] The advent of Jim Crow "laws did not countenance the old conservative tendency to distinguish between classes of the race, to encourage the 'better' element, and to draw it into a white alliance."[37]

While the old order could be just as inhuman as the new regime, it at least left open the possibility for growth, improvement, or connection. The caste society that was Alabama in 1901 had no such connective possibility. In this world and under this new document, the judiciary began formulating how Alabama's twentieth century judicial institution would be structured and where black Alabamians would fit in this system.

B. Jurists' Background

Any discussion of how Alabama jurists saw and dealt with race during the first third of the twentieth century depends on how the jurists saw themselves. Stated another way, only by understanding the backdrop from which these jurists saw themselves can one pull out the pigments, depth, and perspective that shaped their assessments of blacks. When dealing with a political body that spans thirty years and includes numerous and diverse personalities, such discernment can be quite a task.[38] Despite this difficulty, there are some uniform factors that many of these jurists shared.

First, Alabama jurists at the turn of the century were almost exclusively Democrats.[39] In the first part of the twentieth century, several factions within the Alabama Democratic Party emerged that included Conservatives, Progressives, Prohibitionists, and the Ku Klux Klan.[40] The judiciary, while

33. *See* WOODWARD, *supra* note 20, at 12-14.
34. *Id*. at 14 (internal quotation marks omitted).
35. *Id*. at 15.
36. *Id*. at 22.
37. *Id*. at 107.
38. This Comment recognizes the same problems as Winthrop Jordan who, in commenting on his masterpiece *Black and White*, noted in his pursuit to discover "the attitudes of white men toward Negroes" was "explaining how things actually were while at the same time thinking that no one will ever really know." WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at vii (Penguin Books 1969) (1968). In the end, he noted, and I concur, that this view is only one opinion. *Id*.
39. Robert J. Norrell, *Law in a White Man's Democracy: A History of the Alabama State Judiciary*, 32 CUMB. L. REV. 135, 138 (2001).
40. *Id*. at 142.

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primarily grouped with the Conservatives, found homes in all four of these factions.[41] While these groups held vastly differing views in many areas, in regard to race "[t]he factions rarely divided."[42] It comes as no surprise that these views were for continued white supremacy.[43] Beyond political leanings and racial solidarity, the majority of Alabama jurists of the early twentieth century were Alabama natives, and a large number of them were educated at the University of Alabama.[44] Finally, and almost without question, the entire body of Alabama's judiciary was white by the turn of the century.[45] As such, Alabama's judiciary was politically, socially, and intellectually highly homogenized in the first third of the twentieth century.

C. The Politicization of the Jurist

Since the beginning of the nineteenth century, the Alabama judiciary had been "politically sensitive."[46] While remnants of this direct control continued, by the turn of the twentieth century, judges, especially appellate judges and state supreme court justices, were shielded from direct populous voting by the state Democratic convention.[47] This process secured that "a small number of like-minded men selected the party nominees" who would serve as judges.[48] Further, once a judge received the party nomination, he was almost assured that he would win the general election.[49] Beyond this, the Alabama State Bar Association along with "[r]epresentatives of the conservative and progressive factions of the Democratic political establishment . . . agreed that corrupt legal institutions undermined their vision of a good society."[50] To erase corruption and to insulate the justices, the Alabama Bar Association helped to introduce reforms such as increased salaries, a reform of the jury system, a reformed code of procedures, and the introduction of a code of ethics to increase independence in the state judiciary.[51]

Despite these changes, lower state judges "were at the center of a[n] . . . extensive network of political and social influences, which . . . weakened the independence and professionalization of judicial administration."[52] Sit-

41. *See id*. at 142-44.
42. *Id*. at 142.
43. *See id.*
44. *Id.* at 138.
45. *See id.* Robert Norrell notes that there might have been one African-American serving as a judge in the state during the period of Reconstruction. *Id*. at 137.
46. *Id.* at 136.
47. *Id*. at 138-39.
48. *Id*. at 139.
49. *See id*.
50. TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1994, at 123 (1995).
51. *Id*. at 74.
52. *Id*. at 70. An illustrative example of the political pressures that many local judges and justices of the peace faced, especially in the Black Belt, is the system of peonage. Peonage "was a confusing mass of customs, legalities, and pseudo-legalities." PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969, at 25 (Illini Books ed. 1990). Central to this system was a triangle of large land owners/turpentine producers, local police, and local justices of the peace. *See id*. at 25-26. A typical

ting in Montgomery, the Alabama Supreme Court and the Alabama Court of Appeals, perhaps due to this new philosophical separation of the judiciary and their geographical separation from voters and party heads, were shielded from local involvement and oversight that plagued circuit judges and justices of the peace.[53] The interesting result of this protected election process, local pressure, and legal reform was a dichotomy where the local judiciary was still susceptible to social and political influences and the higher courts began to break free from these social and political constraints and were imbued with a heightened "professionalism" and structured or scientific view of the legal system.[54] This new understanding of the higher courts manifested itself directly and interestingly in regards to legal matters concerning race.

III. THE APPELLATE JUDICIAL MIND

A. Procedure Over Race

A series of cases involving direct appeals to race by solicitors display how the Alabama appellate courts introduced heightened procedural restraints on the trial courts. These procedural limitations derivatively, and most probably unintentionally, created some substantive gains for blacks. In *James v. State*,[55] the solicitor asserted "that 'if the negro [sic] was taken out

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peonage system would usually involve a black worker who either left work or was arrested for vagrancy or similar charge. *Id*. at 26-32, 50-52. From there, the court would impose a fine. *Id*. To pay for that fine, the black prisoner would negotiate a contract with the plantation/turpentine factory owner. *Id*. Once employed, these wayward peons could find themselves actually losing money as the contract continued and would never be able to rise out of the peonage. *Id*. Moreover, during the late nineteenth century and into the twentieth century, the effectiveness of local courts was marred by "the close association between a community's lawyers and the local courts." FREYER & DIXON, *supra* note 50, at 73. This resulted in favoritism, unwarranted delays, and juries with personal ties with lawyers and judges. *Id*.

53. *See* Norrell, *supra* note 39, at 148 (noting that even though appellate judges were subject to popular election they "were rarely challenged once they were on the bench").

54. FREYER & DIXON, *supra* note 50, at 123.

55. 54 So. 494 (Ala. 1911). It should be noted that prior to *James*, the court considered a similar question in *Williams v. State*, 30 So. 484 (Ala. 1901). In that case, the court took to task the solicitor's comments that the defendant, a white man, was well within his rights to kill a black man because he was defending the virtue of his wife and child, and that the defendant's killing of the black man saved the county the time and expense of having to try and hang him. *Id.* at 487. In an admonition against the solicitor, the court upheld the sanctity of procedure and the science of the law by commenting:

> It is much to be regretted that counsel, who are officers of the court, and under a special and solemn duty to support and uphold the law . . . should . . . forget their duties to the courts and to organized society as in effect to call upon jurors to disregard their oaths, to trample under foot the law . . . and to try and determine this cause upon considerations which the experience and wisdom of the ages have demonstrated to be subversive of all order and authority, and logically leading to the substitution of private vengeance, the retribution of the assassin, and the terrors of anarchy, for the law of the land and its ministers.

Id. Interestingly, the issue was not the appropriateness of the comments, but instead whether the judge was appropriate in reprimanding the solicitor. *Id.* at 488. The court concluded that the trial judge, even absent an objection, was well within his discretion to "clear[] the skirts of justice of these alien and baneful contentions." *Id*. This strongly worded admonition is instructive of the procedural tact of the Alabama Supreme Court leading into the adoption of the 1901 constitution and laid the framework for the cases to follow, including *James*.

of court there would not be much left.'"[56] This statement implied that African-Americans were responsible for all the crime in that court's jurisdiction.[57] Based in part on this language, the district court convicted Mr. James.[58] The inference from the trial court was that the use of racially derogatory language and allusions to racial violence were acceptable in the prosecution of a black male. The Alabama Supreme Court overturned on appeal,[59] and Chief Justice Anderson,[60] writing for the court, contended that the direct racial appeal "was not warranted by any evidence in the case, nor is it a fact of which this or any other court can take judicial knowledge."[61] He then found that:

> It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men. Courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the remarks; but at least it is error, as held by our own courts, for such remarks, stating facts that are not in evidence before the jury, to be allowed.[62]

On the surface, Anderson's comments and their use to overturn a black man's conviction implies that Anderson advocated for racial equality or, at least, race neutrality. In fact, Anderson goes so far as to conclude that even if "the negro [sic] [was] eliminated . . . they are not the only lawbreakers in the state."[63] However, a closer inspection destroys this argument. The key to

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56. *James*, 54 So. at 494.
57. *See id*.
58. *Id*.
59. *Id*.
60. Chief Justice Anderson was elected to the court in 1904. Anderson, *supra* note 6, at 275. His memoirs depict a longing for his home, in Greene County, where "the men were college graduates and the women had the best advantages the country then afforded." *Id*. at 275. Despite this, he noted that his home was "practically destroyed by the result of the Civil War" and that now there is no longer "a happy and prosperous aristocracy." *Id*. at 276. Anderson was insightful in describing his early education, where he and forty other students undertook a curriculum that included Latin and Greek. *Id*. At fifteen, after the death of his father, Anderson went to the University of Alabama where he ultimately began the study of law and received his LL.B. *Id*. at 277.
61. *James*, 54 So. at 494.
62. *Id*. (quoting Tannehill v. State, 48 So. 662, 662 (Ala. 1909)). *Tannehill* was an appeal to the Alabama Supreme Court concerning the appellant's murder conviction. *Tannehill*, 48 So. at 662. In closing arguments the solicitor stated:

> The only defense to these confessions of the defendant . . . is the alibi set up by a lot of negro [sic] witnesses. Why, gentlemen, if you acquit this man on such an alibi as this, you can never expect to convict another negro [sic] of crime in this country. You know the negro [sic] race—how they stick up to each other when accused of crime, and that they will always get up an alibi, prove it by perjured testimony of their own color, and get their accused companion clear if they can.

Id. (internal quotations omitted). The Alabama Supreme Court, quoting the language noted above, overturned the decision. *Id*.
63. *James*, 54 So. at 494. For a thoughtful and persuasive discussion on the contours of pro-minority

understanding the nature of the remarks lies in Anderson disallowing the solicitor from "stating facts that are not in evidence before the jury."[64] This realigns the focus away from the protection of the defendant to the protection of the court. Hypothetically, if there was evidence before the jury that there would not be a crime in Alabama if blacks were eliminated, the evidence would be allowed. Instead, Anderson is setting a procedural limitation that the solicitor must have presented a fact into evidence before making the assertion.[65] Nowhere does Anderson question the validity of the claim. He only finds that the established procedures for allowing the racist testimony must be followed.

This procedural limitation reflected the purpose and aim in establishing the 1901 constitution. The Democrats' main purpose in drawing up and ratifying that constitution was, through a formalized racist procedure, to stop the blatant corruption whites employed to win elections.[66] In no way was the constitution a vehicle to curb racism. Contrarily, it institutionalized racism, but it freed whites from having to resort to corruption to win elections.[67] These multifaceted motivations were synthesized by 1902 in the Progressive mantra for "good government, white supremacy and honest elections."[68]

That these themes should permeate Alabama's supreme court is not surprising. Under a legal system that placed blacks in an inferiorly prescribed position, dishonest elections were unneeded, and, by extension, the court began to realize that a dishonest court was likewise unneeded. Just as in elections, this procedure did not empower blacks. Instead, it further empowered whites by allowing them to maintain clean hands and their noble character, uncorrupted by acts of illegality.[69] In line with this rubric, Chief Justice Anderson's opinion highlighted that the nature and integrity of the courts must be maintained—even if it indirectly helped blacks.[70]

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decisions and racist ideology, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986). Kennedy convincingly deconstructs the argument that the United States Supreme Court was racially progressive in the beginning of the twentieth century. *See id*. Instead, Kennedy finds that the Supreme Court's decisions that helped blacks' legal rights only occurred in the most egregious of cases, and its decisions were in line with other governmental bodies. *Id*. at 1649-51.

64. *James*, 54 So. at 494 (quoting *Tannehill*, 48 So. at 662) (internal quotation marks omitted).

65. *Id.*

66. *See* MCMILLAN, *supra* note 21, at 230-32.

67. *Id*.

68. HACKNEY, *supra* note 9, at 231 (quoting Charles M. Shelley to J.W.A. Sanford, Nov. 19, 1901, Sanford Papers, ADAH) (internal quotation marks omitted).

69. *See* MCMILLAN, *supra* note 21, at 230-32; *see also* WILLIAMSON, *supra* note 12, at 414-58.

70. The substantive gain for blacks was probably largely ephemeral. Once the cases went back to the trial courts, the procedures were so slanted against blacks that another conviction would probably follow. Leon Litwack noted that "[t]he entire machinery of justice . . . was assigned a pivotal role in enforcing [control of black lives], in exercising social control, in underscoring in every possible way the subordination of black men and women of all classes and ages." LITWACK, *supra* note 2, at 249. The legalized racist procedures still left to the trial court included all white juries, *see id*. at 254-55, and denial of counsel among numerous other possibilities, *id*. at 249.

Two years later, Justice de Graffenried visited the issue of a judge making racial remarks.[71] During trial and in front of the jury, a lower court judge remarked: "I wouldn't believe a nigger any quicker than a pink-eyed rabbit."[72] In a poetically direct statement, Justice de Graffenried found these comments "ran a hot iron into appellant's case," and despite a supplemental comment by the judge to disregard the testimony, the harm had not been removed.[73] The court took great care to note the claimant's counsel failed to object to the comments and, as such, relief could not be given.[74] Nevertheless, the opinion clearly delivered the message that racially disparaging comments and their procedural implications would not be tolerated if properly brought before the court.[75]

The Alabama Court of Appeals revisited racial appeals by solicitors again in 1916 when it considered *Simmons v. State*.[76] At the trial level, the solicitor stated, "[Y]ou must deal with a negro [sic] in the light of the fact that he is a negro [sic], and applying your experience and common sense."[77] Relying on *James v. State*[78] and *Tannehil v. Statl*,[79] the court found that the assertion was "improper and [was] calculated to prejudice the defendant before the jury."[80] Subsequently, the court of appeals found that the defendant's objection should have been sustained and the failure to do so constituted reversible error.[81] The court concluded that "[t]he fact that the defendant was of the negro [sic] race did not deprive him of the equal protection of the law, or necessarily discredit his testimony, and should not have been used in argument as a means of arraying the prejudices of the jury against him."[82]

Again, as in *James*, this comment has two readings. The first is that the court is calling for equality in the eyes of the law for the defendant, and in fact, it does rely on an equal protection claim.[83] While this is true, there is no advocacy in the judge's language. He makes no argument for the nobility or value inherent in African-American males. Instead, he finds that being a "negro" does not "necessarily discredit his testimony."[84] This closer reading confirms the notion that the courts are trying to assert procedural limitations.

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71. *See* Rogers v. Smith, 63 So. 530 (Ala. 1913) (involving a case of conversion).
72. *Id*. at 531.
73. *Id*.
74. *Id*.
75. *See id*.
76. 71 So. 979 (Ala. Ct. App. 1916).
77. *Id*. at 979.
78. 54 So. 494 (Ala. 1911).
79. 48 So. 662 (Ala. 1909).
80. *Simmons*, 71 So. at 979.
81. *Id*.
82. *Id*.
83. *See id*.
84. *Id*.

The following year, the Alabama Supreme Court considered the murder conviction of a black male, Andrew Moulton.[85] While Moulton might have been glad that he was not lynched and was able to see trial, the scales of justice at the trial level were greatly tipped against him. Following his trial, an objection came before the Alabama Supreme Court because the assistant solicitor, in his opening arguments, stated, "If you do not hang this negro [sic], you will have a similar crime in this county in six months."[86] An objection by the defense was overruled.[87] In a further comment, the assistant solicitor asserted that "[u]nless you hang this negro [sic], our white people living out in the country won't be safe; to let such crimes go unpunished will cause riots in our land."[88] A further, unobjected to, racial claim occurred in closing arguments. There the assistant solicitor said, "I hope to God the day will never come in this country when the heel of the Ethiopian will be on the neck of the Caucasian."[89]

In defense of the trial judge, he did order the jury to ignore "the several remarks made by the solicitor for the state in reference to the white and black races, as I do not think they will help you in the consideration of the evidence."[90] Despite this instruction, the trial judge did not feel that the comments were "of such a character as would tend to inflame or arouse the passions of any ordinarily intelligent person."[91]

The supreme court overturned the conviction based on the appeals to racial animus,[92] but imbedded within the decision was a disclaimer:

> In a different atmosphere the reference to defendant as a negro [sic] and the statement that, unless the defendant should be hanged, the county would have a similar crime in six months might be permitted to pass as belonging to that class of hasty or exaggerated statements of opinion, not facts, counsel often make in the heat of debate, which do not, and are not expected to, become factors in the formulation of the verdict, and which, while improper, are usually valued at their true worth.[93]

By the 1920s, this language would prove vital in trimming back procedural protections for African-Americans.[94]

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85. *See* Moulton v. State, 74 So. 454, 454 (Ala. 1917).
86. *Id*. at 454 (internal quotation marks omitted).
87. *Id*.
88. *Id*. (internal quotation marks omitted).
89. *Id*. (internal quotation marks omitted).
90. *Id*. (internal quotation marks omitted).
91. *Id*. (internal quotation marks omitted).
92. *Id*. at 456.
93. *Id*. at 455. The court found this could occur depending on "the general atmosphere of the particular case." *Id*. (quoting Birmingham Ry. v. Gonzalez, 61 So. 80, 84 (Ala. 1912)) (internal quotation marks omitted). The court's finding was based in principle on *Cross v. State*, 68 Ala. 476, 484 (Ala. 1881), which held that a prosecutor transcending established facts and stating opinion as fact was not reversible error if only happening once.
94. *See infra* Part B.

Despite the inroads that the *Simmons* majority foreshadowed, even into the early 1920s, the Alabama Supreme Court and the Alabama Court of Appeals still maintained the procedural separation of race-baiting in the courts. The most interesting of these cases is *Walker v. State*.[95] Walker, despite a claim of self-defense, was convicted for murder.[96] While this might have been a paradigm situation for lynching, actual or legal, Walker's case made it to the Alabama Supreme Court. The stress between the "bestial marauder" preying upon whites versus the court's established doctrine of race-baiting stood front and center.

While the court's instructions regarding self-defense were cited as part of the reversal, it also ruled that many of the questions in the case "were of such character as to arouse race prejudice and passion."[97] While Walker still faced severe obstacles in finding his freedom or even surviving, the Alabama Supreme Court took their procedural approach against race-baiting far enough to reverse the conviction of a black man accused of killing a white law enforcement official.[98] This decision displays that, at least for a moment, the wave of proceduralization submerged even the greatest of concerns in whites' psyches—the "bestial" black male who kills and rapes whites—and prostrated white bloodlust and need for absolute social control over African-Americans.[99]

The next year, the court of appeals went so far as to say that "[t]he law knows no color, nor draws any distinction on account thereof, and it can never serve any good purpose for either counsel or the court, to make reference to such facts."[100] Amazingly, this case revolved around a white man

95. 87 So. 833 (Ala. 1921). While complicated, the seed for *Walker* was a verbal altercation between Walker, a black man, and a "young white boy." *Id*. at 835. In response, a car full of white men chased Walker. *Id*. Walker then fled to his father's house in a neighboring town, and after several threats from different whites, a town marshal of another town arrived on Walker's father's property. *Id*. In reaction to an assault by the marshal, Walker shot the law official. *Id*.

96. *Id*.

97. *Id.* at 836.

98. *Id.*

99. Prior to *Walker*, the appellate court considered testimony by African-Americans in *Perdue v. State*, 86 So. 158 (Ala. Ct. App. 1920). Key to Perdue's defense was testimony of witnesses that he was at the home of Mr. Belle De Jarnette, which was a quarter of a mile from the crime scene, when the assault and attempted robbery occurred. *Id*. at 158-59. The trial court's solicitor, in an attempt to refute Perdue's alibi witnesses, argued, "Yes, gentlemen, you all know as a matter of common knowledge that when one negro[sic] gets into trouble all the balance flock together and will swear lies to get him out." *Id*. at 158 (internal quotation marks omitted). While this statement was apparently acceptable to the trial court judge, the appellate court found it "a direct appeal to the prejudice of the jury against the witnesses who testified for defendant." *Id*. In reversing the trial court's decision, the court noted:

> [P]eople of the same class or race mingle and associate together, and in this instance the defendant earnestly insists that he was with those people of his own race when the offense was committed, and in this insistence he is corroborated thoroughly by several witnesses of that race of people. It would indeed be a harsh and unjust rule to hold that, merely because a man associates with his own race of people, and because these people in response to due process of law appear in court and testify in his behalf, they cannot be believed simply because they are of the same race of people to which the defendant belongs.

Id. at 159.

100. Roberson v. State, 94 So. 132, 133 (Ala. Ct. App. 1922).

convicted of the manslaughter of a black man.[101] Throughout the trial, the defense attempted to assert race as the defining point for the jury to consider.[102] In response, the prosecution pled for equality in right and justice for both whites and blacks.[103] The defense objected to the prosecution's pleas for equality.[104] The court, looking to procedure and the fact that these comments were aimed to alleviate prejudices that the defense hoped to array, affirmed the conviction.[105] However, while the courts' procedural doctrine against race-baiting appeared well established and functional, it would soon collapse.

B. Race over Procedure: 1922-1932

The Alabama Supreme Court's trend to subrogate race to procedure crested in the early 1920s. In 1922, the court of appeals considered the issue in *James v. State* (*James II*).[106] At its heart, the appellate issue was a statement by the solicitor: "Are you gentlemen going to believe that *nigger* sitting over there (pointing at the defendant), with a face on him like that, in preference to the testimony of Andrew Jackson's deputies?"[107] Here the court of appeals was asking whether such a statement caused irreversible prejudice and should be disallowed.[108] In contradiction to the Alabama Supreme Court's prior rulings against race-baiting, the court found that there was no reversible error.[109] Instead the court held that:

> There was no error in the ruling of the court in overruling the defendant's objection to the argument of the solicitor. It probably would be better if trial judges would eliminate as far as possible this character of argument, yet, when analyzed in this case, the facts stated were within the evidence, and it was a question as to whether the jury would believe the defendant's testimony or that of the state.[110]

The court did not find the term "nigger" inflammatory, and it instead implied that the use of the word is a proven and given fact.[111] The question for the court, as noted in earlier cases, was whether the facts presented were within the evidence.[112] In a remark of pseudo-gallantry the court noted:

101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. 92 So. 909 (Ala. Ct. App. 1922). In this case, Frank James was prosecuted for being a moonshiner. *Id*. at 909.
107. *Id*. at 909 (emphasis added) (internal quotation marks omitted).
108. *Id*.
109. *Id*.
110. *Id*. at 910.
111. *See id.*
112. *See id*.

> It would create, however, a better respect for law and order if counsel for both the state and defendant would in the trial of cases make reference to the state's and defendant's evidence, and of the witnesses giving the testimony, as such, rather than that one or the other was of a particular race or color.[113]

The court noted both *James v. State*[114] and *Simmons v. State*[115] as support for this statement.[116] While the court relied on these previous cases, its analysis was flawed. The cited cases set out clearly that the use of race, and more specifically maligning race, created reversible error.[117] In contrast, the *James II* court concluded that it would be better that lawyers not resort to this type of race-baiting, but they were not compelled to refrain from it.[118]

The Alabama Supreme Court implicitly upheld the court of appeals decision and logic the following year.[119] In that year, the Alabama Supreme Court, in an opinion penned by Justice Sayre, affirmed the conviction of a black man, Will Davis, for second degree murder.[120] At the trial, the solicitor essentially argued, "that no doubt defendant's brutal instincts, as shown by his savage deed in taking the life of deceased, had come down to him from his ancestors in the jungles of Africa."[121] The court distinguished these comments from *Moulton* and found that the remarks were not meant "to array race against race."[122] Sayre conceded "that the prosecuting officer laid too great stress on defendant's ancestry as indicating the need of punishment[,]" but found that this was alleviated by "the court appropriately caution[ing] the jury."[123] After a long series of decisions disallowing racial appeals from the solicitor, the court now narrowed the prohibition to appeals that specifically attempted "to array race against race."[124]

Three years later in *Owens v. State*,[125] Justice Sayre again addressed racial remarks. *Owens* involved the conviction of a black man for the robbery of a white man.[126] The case included a confession obtained through legally extraneous means and involved concerns of a lynching.[127]

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113. *Id*.
114. 54 So. 494 (Ala. 1911).
115. 71 So. 979 (Ala. Ct. App. 1916).
116. *James II*, 92 So. 2d at 910.
117. *See James*, 54 So. at 494 (stating that the solicitor's statement that "'if the negro was taken out of court there would not be much left,' was not warranted by any evidence in the case," and thus constituted reversible error); *Simmons*, 71 So. at 979 (holding that the solicitor's statement to the jury, "'[y]ou must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense,' was improper and calculated to prejudice the defendant before the jury").
118. *See James II*, 92 So. at 910.
119. *See* Davis v. State, 96 So. 187, 188 (Ala. 1923).
120. *Id.*
121. *Id*.
122. *Id*.
123. *Id*.
124. *See id*.
125. 109 So. 109 (Ala. 1926).
126. *Id*. at 110.
127. *See id*. at 111. The court dismissed the claim that the threat of mob violence necessitated a

The solicitor's remark that brought the appeal was his claim concerning "the white man's blood."[128] This comment, along with the appeal to "[s]top the hand of the axe wielder[,]" was accompanied by cautions from the trial judge "that no race feeling should be allowed to affect their deliberation."[129] Sayre further curtailed the *Moulton* prohibition against race-baiting by finding that *Moulton* and, by implication all the cases from *Tannehill* forward, only applied to "specific, deliberate, and persistent appeal[s] to race."[130] The court specifically noted that any lesser rule would be too restrictive because "the privilege of discussion might be unduly curtailed and every conviction of heinous crime subjected to the hazard of some unconsidered remark made by attorneys in the heat of argument."[131]

This statement clearly highlights that procedure had finally fallen beneath the weight of substance. Specifically, no longer could the court reverse convictions on procedural matters when the "heinous" transgressions were being committed by the inferior race.[132] While the prior holdings of *Jones*, *Moulton*, and their progeny had been strictly curtailed, the court of appeals did maintain that if the trial judge refused to give an instruction to the jury that the racial remarks were improper, the decision would be overturned.[133]

The backtracking of the Alabama appellate system on its early, more progressive stance is not surprising. By the 1920s, and especially as the decade gave way to the 1930s, the number of lynchings began to decline—in part because of initiatives by the National Association for the Advancement of Colored People and the Association of Southern Women for the Prevention of Lynching.[134] At the same time, the courts could achieve "[w]hat could no longer be accomplished 'at the hands of parties unknown.'"[135] As the courts began to assert more authority to keep "blacks 'in their place,'"[136] the procedures needed to be more flexible to ensure the justice that was no longer meted out at the end of the rope could still be ham-

change of venue. *Id*. The court, in obtuse logic, found that the new venue was properly not granted because there was "no storming of the jail, no mob seeking to execute vengeance on defendant, [and] no necessity for the attendance of the military forces to protect him." *Id*. The court failed to realize that if those things had occurred there would be no need for appeal because Owens would have most likely been lynched.

128. *Id*. at 113 (internal quotation marks omitted). There appears to be some problem with the trial transcripts because the court could not put the statement in complete context. *See id.*

129. *Id*. at 113 (internal quotation marks omitted).

130. *Id*.

131. *Id*.

132. *Id.*; *see also* Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1210-12 (1999) (reviewing PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA (1997)) (arguing that judges historically change law in reaction to changes in society).

133. *See* Harris v. State, 113 So. 318, 319-20 (Ala. Ct. App. 1927) (holding that when a prosecutor attempts to arouse race prejudice and the court does not take "prompt measures" to undo the effect, the Alabama Supreme Court will overturn the decision).

134. WEINER, *supra* note 7, at 252.

135. *Id*.

136. *Id*.

mered home by the gavel. As mentioned earlier, the loss of this protection was probably of minimal concern to blacks since the majority could not seek redress through the appellate system due to expense, political pressures, intimidation, or death.[137] Despite this, these procedures lend insight into how an Alabama quasi-progressive institution could collapse into the radicalism that would later become evident in the "Scottsboro Boys" trials.

IV. THE EXPRESSION OF RACISM

While the appellate judges and justices imposed procedural barriers to racial appeals, it does not follow that they divorced their racial beliefs when deciding cases. Judge Edward de Graffenried—who would become a state supreme court justice the same year that the following statement was made—[138] found that "[t]he law draws no distinction between the negro [sic] and the members of the white race as to what is or what is not a good character. There is but one standard, and all men must measure up to it."[139] While this may have been the legal ideal, courts did not follow it in practice.[140] Instead, appellate judges and justices would still express their substantive views on race and then hide them behind the façade of procedure.[141]

A clear example of this was *Allen v. Scruggs*,[142] in which Justice Thomas C. McClellan considered both the nature of blacks and whites.[143] The central issue in *Allen* was the contested will of L. Ryal Noble,[144] "a white man . . . from an entirely respectable family of people."[145] Shortly after the Civil War, Noble "began a meretricious association with Kit Allen, a negro woman."[146] The relationship lasted a number of years in which Allen "lived on Noble's plantation," they had five children, Noble supported them, and he helped with the children's education and discipline.[147] The "meretricious" qualities of the relationships are not expanded upon and appear completely lacking.[148] Needless to say, the relationship drew McClellan's moral

137. *See supra* note 70.
138. A History of the Alabama Judicial System, at 3, http://www.judicial.state.al.us/documents/judicial_history.pdf (last visited Dec. 11, 2006). Judge de Graffenried was also a delegate for the state constitution where he was aligned with the Progressive Party. HACKNEY, *supra* note 9, at 353.
139. Cook v. State, 59 So. 519, 525 (Ala. Ct. App. 1912).
140. *See generally* ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 1-23 (2002) (noting the disconnect between Oklahoma courts' superficial claims of equality and the lawlessness their decisions propagated).
141. *Id.* at 15-18.
142. 67 So. 301 (Ala. 1914).
143. *See id.* Thomas Cowan McClellan was an associate justice on the Alabama Supreme Court from 1907-1923. Augustus Benners, *Chief Justice McClellan*, 8 ALA. LAW. 356, 360 (1947). He was the nephew of Thomas N. McClellan, who served as chief justice of the Alabama Supreme Court from 1898-1906. *Id.* at 356. While the politics of T.C. McClellan are not known, one commentator labeled Chief Justice McClellan a "liberal" judge. *Id.* The McClellan family came from Limestone County in the Tennessee Valley. *Id.*
144. *Allen*, 67 So. at 302.
145. *Id.* at 304.
146. *Id.*
147. *Id.*
148. *See id.*

ire. In a damning statement, he asserted: "It is not to be doubted, as upon the whole evidence, that Noble's reprehensible manner of life, boldly maintained and sustained, effected to at least raise about him, *as was natural*, a degree of ostracism from those with whom he was related by ties of blood."[149]

McClellan's blatant distaste for inter-racial relationships did not belie his and the court's judicial tact. After venting his racial ire, McLellan began a systematic, and largely impartial, analysis of the events leading up to the creation of Mr. Noble's will, the loss of the will, and the attestations for and against the will.[150] Central to Allen proving her case was the utilization of testamentary evidence of the events surrounding the will being drawn and of subsequent parties who actually saw the will and its contents.[151] The opposition's aim was to discredit witnesses present at the signing of the will.[152] Not remarkably, the battle at the trial and appellate court was drawn along racial lines with the defense attacking the two white men, O.H. Watson and W.A. Callis, who were at the house at the time the will was prepared.[153] Scruggs's attack on Watson involved witness testimony that claimed Watson asserted "that there was no mention of personal property in the paper he wrote; that he wrote the paper, but that it had no attesting witnesses."[154] Regarding Callis, the defense argued that he would not have agreed to be a witness due to later hostilities with Noble.[155]

McClellan, in opposition to his demeaning social commentary, utilized similar procedures as were developed in the area of solicitor's appeals to race to find for Allen.[156] Important in understanding the court's trust in these procedures was that McClellan's judgment was based almost entirely on the testimony of black witnesses.[157] Beyond this, the court discounted the

149. *Id*. (emphasis added).

150. *Id*. at 304-08. The sequence of events leading up to Ms. Allen's claim concerning the execution of Mr. Noble's will are lengthy and complicated. The complicating factor in the tale was that Noble's will, at some point, was lost. *Id*. at 307. To determine the exact wishes of Mr. Noble, the court began a prolonged fact finding determination. The story began July 1900, when, on his supposed death bed, Mr. Noble summoned O.H. Watson, a justice of the peace, to prepare his will. *Id*. at 304. Mr. Watson prepared the will; Mr. Noble signed the writing; and Mr. Watson prepared a certification of the will. *Id*. The court then considered whether "the paper [was] attested by two witnesses." *Id*. In determining this, McLellan noted that Watson, the justice of the peace, as well as "a number of negroes [sic] were likewise present," including Noble's longtime mistress, Kit Allen, and several of Noble and Allen's children. *Id*. Beyond the approximately "half dozen negroes [sic]" present at the house while the will was being prepared, McClellan concluded that Mary Ross, a black woman, and William A. Callis, a white man and partner to one of Noble and Allen's daughters, Lucy Allen, was present. *Id*. at 305. The court, due to several factors, including testamentary evidence by African-Americans, concluded that Mr. Callis and Ms. Ross were witnesses on the will. *Id*. Upon Mr. Noble's death, Ms. Allen discovered the will missing. *Id*. at 307.

151. *See id*. at 304-08.

152. *See id.* at 305-06.

153. *See id*.

154. *Id*. at 306.

155. *See id*. at 305-06. In fact, the later hostilities resulted in Noble taking Mr. Callis's life—to which Noble was acquitted. *Id*. at 305. Scruggs's position, based on the testimony of Callis's brothers, was that Callis would not have extended this kindness since the two "were 'carrying guns for each other.'" *Id*.

156. *Id*. at 305-08.

157. *Id*. at 305-06.

testimony of the white witnesses who attempted to discredit Watson.[158] The court also found the white brothers of Callis to be "mistaken *as to the time (the period)* during which, if at all, there was enmity between their brother and Noble."[159] Instead of giving credence to this testimony, McClellan and the majority of the Alabama Supreme Court found that "[t]he testimony of the negroes [sic] then present of what took place is direct, clear, and without any degree of unnaturalness or improbability."[160]

The factors that McClellan stated as determinative were that "[t]hey did not testify as if by rote,"[161] the testimony was not "abnormal" or "invoke belief . . . which would not reasonably be expected,"[162] and that the testimony was within standard variations based on the time between the evidence and the testimony.[163] While this type of scrutiny seems natural, it must be remembered that this was in relation to African-Americans. By going beyond a race-based decision, a choice seemingly natural based on his previous racial barrage, McClellan summarily dismissed the testimony of eleven witnesses testifying against O.H. Watson[164] and almost stated that Noble's brothers were lying.[165] All of this was done beneath the cloak of procedure.

A. The Disgraced White Man

The fact that Noble, as a white man, chose to have a black companion, raised his mixed-race children, and associated with blacks should not be overlooked as a mitigating factor in the court's determination to legally empower a black claimant and to value black testamentary evidence. Noble's choices, in the mind's of the justices, may have forfeited his status as a white person and, in turn, the legal protections that whiteness afforded him.[166] James Davis, in *Who is Black?*, noted that in the world of Jim Crow, factors beyond blood made someone black.[167] In fact,

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158. *See id.* at 305.
159. *Id*.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id.* at 306. In fact, the testimony was given twelve years after the will was executed. *Id* at 305-06.
164. *Id*. at 305-06.
165. *Id*. at 305. What is most telling about the sentence of the opinion where McClellan states that Noble's brothers must have been "mistaken *as to the time*," *id*., is that McClellan chose to put this in italics, suggesting that the stated reason was mere code for something else—mainly that the brothers were lying. A statement McClellan, much less any other Alabama court, would not dare assert when it involved a contest between blacks and whites.
166. Whiteness is a historical and sociological field of study that attempts to discern:

> [A] social system which binds all economic, racial, and social situations especially in America, but also throughout the world to a lesser degree. Created through a long history of white or, better yet, Euro-centric dominance, it defines how different races, usually constructed within a binary paradigm of white versus other, relate. Beyond this it also helps explain how inner-race relations occur both in the white and minority communities. These relations comprise a system in which minorities realize social limitations in reference to occupation, hous-

> [c]oncern about people passing as white became so great that even behaving like blacks or willingly associating with them were often treated as more important than any proof of actual black ancestry. Then, not even one drop of "black blood" was needed to define a person as a "white nigger"—and race became entirely a social category with no necessity for any biological basis.[168]

McClellan illustrated this phenomenon in *Allen* by finding that, as a natural consequence of his lifestyle, Noble would have "realized [that] his voluntarily established immoral status"[169] created a withdrawal "from that social association and relation normally to be expected and observed between kindred and friends."[170]

More specifically, in 1928, the court of appeals declared that "[i]t is also competent to prove a man's race by his admissions, either verbally or by his acts."[171] This racial designation through acts could be discerned "[i]f he associates with negroes [sic], in his social intercourse, attending negro [sic] churches, sending his children to negro [sic] schools, and otherwise voluntarily living upon terms of equality socially."[172] Noble had fulfilled all of these criteria absent a record that he attended a black church.

The concept that someone white could lose white status and the property and social protections attendant to it had already been directly addressed by Justice McClellan in *Story v. State*.[173] In *Story*, Clarence Story, a black man, had been convicted of carnal knowledge of a white woman without consent.[174] McClellan's opinion began by asserting that in rape and

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> ing, and a host of other endeavors. For white society it fosters a sense of entitlement and racial superiority [and reinforces white dominance over the "other"].

Royal Dumas, Presentation at the Phi Alpha Theta National Conference (New Orleans): Knights in White Psyche 3 (Jan. 16, 2004) (transcript on file with author); *see also* DAVID R. ROEDIGER, COLORED WHITE: TRANSCENDING THE RACIAL PAST (2002). *See generally* VRON WARE & LES BACK, OUT OF WHITENESS: COLOR, POLITICS, AND CULTURE (2002). This whiteness at times was legally turned into a property interest. In *Jones v. R.L. Polk & Co.*, 67 So. 577 (Ala. 1915), a Selma, Alabama woman brought an action for libel against a publisher who listed her as black in the "Selma City Directory." *Id*. at 577. The court in summation, without any scientific discussion, found that she was "of pure Caucasian decent [sic]." *Id*. The court recognized the property interest by finding that even though:

> The general statement that a person is "colored" imputes no crime, no misconduct, no mental, moral, or physical fault for which one may be justly held accountable to public opinion; and yet in the peculiar social conditions prevailing in this jurisdiction, to publish of and concerning a white woman that she is colored, meaning that she is a negro [sic], or has negro [sic] blood in her veins, is libelous within the definition of libel commonly found in the books.

Id. It is interesting to note that the trial judge in this case, Charles W. Ferguson, was one of the framers of the 1901 Constitutional Convention. HACKNEY, *supra* note 9, at 351.

167. F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION 56 (1991).

168. *Id.*

169. *Allen*, 67 So. at 304.

170. *Id*.

171. Weaver v. State, 116 So. 893, 895 (Ala. Ct. App. 1928) (dealing with a claim of miscegenation).

172. *Id*.

173. 59 So. 480 (Ala. 1912).

174. *Id*. at 481. At the trial level, Story had been charged with rape, which he was not convicted of, and this second charge. *Id*. The full wording of the statute Story was convicted under read:

its "kindred proceedings," the character of chastity could only be shown through reputation and "not by proof of particular acts of unchastity."[175] Despite this assertion, in the present situation, where a white woman was accused of prostituting herself with a black man, the court found that specific act testimony was appropriate.[176]

McClellan then entered into an extensive discourse on the current and past state of race relations within Alabama.[177] The analysis divided into two specific parts: (1) McClellan laid out the social and moral philosophy that undergirded Jim Crow;[178] and (2) he noted that there were differing "moral" and legal ramifications between a white woman prostituting herself with a black man as opposed to a white man.[179] In outlining the nature, purpose, and need for Jim Crow, McClellan noted that within "this state [it] is universally known . . . [that] [t]he general relation of the races . . . is kind and cordial to a most marked and gratifying degree."[180] Against this background, the "dominant" white race attended the "inferior" black race through "commendable guardianship and abundant generosity, inspired by motives not only of fundamental justice but of sentiment engendered by the earlier legal dependence and subjection of the slave to the master."[181] Within this patriarchal system, "in the interest of [his] civilization as well as in expression of the natural pride of the dominant Anglo-Saxon race and of its preservation from the degeneration social equality, between the races,

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> Any person who has carnal knowledge of any woman above fourteen years of age, without her consent, by administering to her any drug or other substance which produces such stupor, imbecility of mind, or weakness of body, as to prevent effectual resistance, must, on conviction, be punished at the discretion of the jury, by death or by imprisonment in the penitentiary for not less than ten years.

Id. (quoting Ala. Code § 7698 (1907)).

175. *Id.* at 481.

176. *See id*. at 482. Specifically, Story, in the lower court, attempted to enter evidence "that the woman bore the reputation of having practiced her lewdness with negroes [sic]; and, also, that on one occasion in a neighboring state she was caught in bed with a negro [sic] other than the defendant." *Id*. at 481. For a demonstration of how rape or attempted rape of a white woman by a black man, if he survived a possible lynch mob, was treated, see *Pumphrey v. State*, 47 So. 156 (Ala. 1908). In that case, a white woman claimed that, while she was asleep, an unknown person entered her window. *Id* at 157. She then sprang from the bed and the supposed assailant left through the same window. *Id*. The court, in affirming the lower courts verdict, ruled that because the proposed victim was virtuous, "any idea or expectation of permissive intercourse could not have been entertained by the defendant at any time." *Id*. at 158. Regarding intent to "ravish" by the black defendant, the court noted "along with the other circumstances in evidence, 'social customs, founded on race differences,' and the fact that Mrs. Crimm was a white person and the defendant a negro [sic], we doubt not, might properly be taken into consideration." *Id*. (quoting Jackson v. State, 18 S.E. 132, 133 (Ga. 1893)). Picking up on this language, the appellate court ruled in *Richardson v. State*, 123 So. 283 (Ala. Ct. App. 1929), that "[w]hat would be a caress or a mere assault as between persons of the same or similar social standing would become of much graver moment as between persons of a different social status and of different races." *Id*. at 284; *see also* Kelly v. State, 56 So. 15, 15-16 (Ala. Ct. App. 1911) (finding that, among other things, "the differences in their social life and customs" could lead a jury to find that defendant had intent to rape).

177. *Story*, 59 So. at 482-83.

178. *Id*. at 482.

179. *Id*. at 482-83.

180. *Id*. at 482.

181. *Id*. For a full discussion of these paternalistic remarks, see *infra* IV.B.

would inevitably bring, imperatively necessitated and created immutable rules of social conduct and social restraint."[182]

This racial separation, McClellan maintained, was "conceived in nature and is nurtured by a social pride and self-respect that only ignorance or unholy purpose can question or assail."[183] Implicitly, McClellan found that transgressions against Jim Crow statutes were not only illegal but also "immoral."[184] Any "immoral" transgression across racial lines prompted "a severer condemnation than is visited upon those who, of the same race, practice a like moral violation."[185] McClellan, in this short treatment set out the five basic factors considered in racial ideology: the dominant/inferior relation, Anglo-Saxon superiority, a cultural divide between the races, a temperamental difference regarding "white stewardship," and the prospect of "societal degradation" if the races mixed.[186]

After setting out Jim Crow's general "moral" separation, McClellan extracted the reasoning that there is "a universal public opinion, prevalent in both races, [that] recognizes at least two grades of depravity among those . . . white women who practice prostitution among members of their own race, [and] those *few white women (if such there be)* who may practice their lewdness among negroes [sic]."[187] As might be expected based on McClellan's prior statements, the latter holds "little, if any, hope" for reclamation, where in the former there is a possibility.[188] This conclusion led to the ultimate distinction that there is a nearly conclusive presumption that a white woman, even if a prostitute, would not yield "to commerce with a negro [sic] charged with an offense against her person."[189] Conversely, white women who prostitute with black men "entirely forfeit respect by the barter of their very characters."[190]

McClellan's comments obliquely address the centrality that white female chastity and purity held in white society. Driven by "black rapist" theories, whites believed black males exhibited heightened libidos with inferior intellect, and the two coupled together created a maniacal beast.[191] These theories of black men as roadside marauders stealing the virginal purity of southern womanhood drove the Age of Lynching between the late 1880s and late 1910s.[192]

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182. *Story*, 59 So. at 482.
183. *Id*.
184. *Id*.
185. *Id*.
186. DAVIS, *supra* note 167, at 23-25 (noting that "[t]he content of racist ideologies consist of five key beliefs[:] . . . [(1)] some races are physically superior to others[;] . . . [(2)] some races are mentally superior [;] . . . [(3)] race causes culture[;] . . . [(4)] race determines temperamental dispositions of individuals[;] . . . [(5)] racial mixing lowers biological quality")
187. *Story*, 59 So. at 482 (emphasis added).
188. *Id*.
189. *Id*.
190. *Id*.
191. WILLIAMSON, *supra* note 12, at 180-89.
192. *Id*.

Richard Dyer addressed this hypervigilance in his study of the cinematic classic *Birth of a Nation*.[193] Dyer noted that the white psyche needed to believe that white supremacy prevailed in all cases even without thought or planning.[194] Illustrative of this, in *Birth of a Nation*, Elsie, the white pseudo-aristocrat, was abducted by a "bestial" mulatto who happened to be her former fiancé.[195] In the climactic scene that both vindicated Elsie and the South, the Ku Klux Klan, fully clothed and upon horses, without even being told, arrived to save her and, more importantly, save her purity.[196] The symbol alluded to in the Klan arriving without notification was that the white race must always protect its righteousness through perpetual vigilance.[197]

While white female purity may have been the most important concern in the psyche of whites and white judges, McClellan found the salvation of purity was "entirely forfeit" by women who chose to debase themselves by sleeping with black men.[198] In essence, by entering into the commerce of prostitution with black males, white females were no longer afforded the same legal protections as other white females, and whites in general, and definitely lost the hyper-protection of white female purity generally. As such, Story's nature need not be discussed or weighed. After all, he was acting upon an equal—a morally depraved woman who had lost her "white" purity. In this way, the actions of both Story and the white prostitute are the same.

The court of appeals discussed the opposite situation, i.e., a white male with a black female, in *Erskine v. State*.[199] In *Erskine*, Ben Erskine, while being arrested for alcohol possession, was found in the woods with a black woman.[200] Evidence was presented that tended to show that the two were engaged in sexual relations.[201] The appellate court found that "[t]he undisputed evidence tended to show that the situation or environment of this appellant at the time . . . was reprehensible and disreputable."[202] Consistent with the general deference to white males, the court delineated the sexual implications of his arrest and ruled that "the usual presumption of innocence attended the accused which the law provides in all criminal cases."[203] While procedure may have cut both ways and to some extent helped blacks, *Erskin* makes clear that procedure more frequently worked to protect whites.

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193. Richard Dyer, *Into the Light: The Whiteness of the South in The Birth of a Nation*, *in* DIXIE DEBATES: PERSPECTIVES ON SOUTHERN CULTURES 165-76 (Richard H. King & Helen Taylor eds., 1996).
194. *Id*. at 174-76.
195. *Id*.
196. *Id*.
197. *Id*.
198. Story v. State, 54 So. 480, 482 (Ala. 1912).
199. 107 So. 720 (Ala. Ct. App. 1926).
200. *Id*. at 721.
201. *Id*. The evidence was described as showing that Erskine "was lying down with his coat off." *Id*.
202. *Id*.
203. *Id*.

B. Paternalism

It goes without saying that paternalism was a major dynamic in defining how these judges saw blacks and how the role between the judiciary and blacks was defined. At some level, it still was the "dominant" race's duty to protect blacks in certain situations. This dynamic was nothing new in Alabama culture and was in fact a residual construct from the last generation of slavery.[204] During that period, whites pieced together "a stereotypical image of the black person as simple, docile, and manageable."[205] It is important to note that this homogenization of the black male as a "docile" character in the white mind only occurred towards the end of slavery.[206] This "Sambo" image served as both a warning and a burden to white society.[207] If whites mistreated the "Sambo," "he became bestial."[208] On the other hand, if they were properly managed, they were "like a white child."[209] While this may have been the white's view of black males,[210] blacks were able to use the image towards their own good.[211] By using the Sambo "mask[,] . . . black people might survive the holocaust."[212]

At the turn of the century and through the first three decades of the twentieth century, this image was reinforced and accepted by the Alabama Supreme Court and somewhat effectively utilized by black claimants. Again McClellan, writing for the majority in *Harrison v. Rodgers*, gives insight into how the judiciary saw this role.[213] Like *Allen v. Scruggs*,[214] the centerpiece of this action was land.[215] The appellee sought a cancellation of an inter vivos transfer.[216] While the fiduciary interest the white appellant owed to the black appellee may have been enough to decide the case, McClellan shaped the problem as being a dispute between "a prominent, intelligent, and influential member of the dominant race" and "an illiterate negro [sic] . . . in failing health."[217] By doing this, the court, absent its logic that the law makes no distinction on race,[218] instituted a decision based in no small part

204. WILLIAMSON, *supra* note 12, at 22.
205. *Id*.
206. *Id*. Williamson noted that "slave traders and buyers had closely marked the differences between Africans because the traits, real or imagined, of various peoples were directly related to their prices as slaves." *Id*.
207. "Sambo" was a popular name among slaves and was traditionally given to the second son. *Id*.
208. *Id*. at 23.
209. *Id*.
210. *Id*. (noting that the image of "Sambo was a creature purely of the white mind, a device by which white slaveholders day by day masked a terror that might otherwise have driven them over the edge of sanity").
211. *Id*.
212. *Id*.
213. 50 So. 364 (Ala. 1909).
214. 67 So. 301 (Ala. 1914).
215. *Harrison*, 50 So. at 364.
216. *Id*. at 364-65.
217. *Id*. at 365.
218. *See* Cook v. State, 59 So. 519, 525 (Ala. Ct. App. 1912).

on race—one in which the black appellee won.[219] This scenario played out many times in Alabama appellate courts during the first third of the twentieth century.[220] The parameters of this paradigm were limited to situations where the aggrieved black person was "poor, hard-working, [and] humble."[221] By implication, when the particular black person was not threatening, the court would step in to protect some of his interests.

This paternalistic dynamic was not lost on African-American parties or their lawyers. Several times in opinions from 1901 to 1930, black parties couched themselves in this nonthreatening, subservient nature to invoke the paternal protection of the court. One African-American complainant showed "to the court that he [was] an ignorant, weak-minded negro [sic]; that he had no education, and had had no business experience whatever."[222] Contrarily, the white party was "educated, shrewd, and has a great deal of business experience."[223] Another McClellan case overturned the lower courts, in part, because the "complainant [was] an ignorant negro [sic], unacquainted with the formalities and usages of law."[224] Another complainant's bill alleged that he "was a weak-minded and ignorant negro [sic], and in necessitous circumstances."[225] Jim Crow legislation in Alabama asked African-Americans to be ignorant, docile, and unthreatening. If a black party couched himself in that vein, the higher courts of the state were more inclined to steward his legal rights. In light of this prospect, African-Americans of the period were able to use this procedural deference to gain substantive rights, but these gains would be short-lived.

V. CONCLUSION

The paradox of Alabama in the first three decades of the twentieth century is that the Alabamian polity was too successful in separating whites and blacks. As a result of these efforts, embodied in the 1901 constitution and Jim Crow legislation, white Alabama appellate judges were free to focus on the system of law. Left to this pursuit, the judges and justices of the appellate system sought to reflect the progressive ideals of efficiency and science in the courts.

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219. *Harrison*, 50 So. at 365.

220. *See, e.g.*, Easley v. State, 88 So. 194 (Ala. Ct. App. 1921) (involving a sixteen-year-old who accidentally shot his mother).

221. *Harrison*, 50 So. at 364 (quoting appellant's answer) (internal quotation marks omitted).

222. Broughton v. Walker, 72 So. 529, 530 (Ala. 1916) (internal quotation marks omitted).

223. *Id*. (internal quotation marks omitted).

224. Ellis v. Drake, 89 So. 388, 388 (Ala. 1921). *Ellis* was another case that claimed misrepresentation concerning the sale of land. *Id*. An interesting aspect of this case is that the white seller was female. *Id*. at 388. The court gave no deference to this female and chose to side with the black complainant. *Id*. at 388-89.

225. Morgan v. Gaiter, 80 So. 876, 878 (Ala. 1919). This language appears to have become canonical during this period. *See, e.g.*, Pearsall v. Hyde, 66 So. 665, 668 (Ala. 1914) (employing the "weak-minded[,] . . . ignorant . . . , and . . . necessitous" language in regards to a mortgagor).

These procedural constructs, while aiming to increase the effectiveness of the courts—perhaps in a benign way—began to erode the underlying policy of white supremacy that had constructed the Alabama court system of the early twentieth century. In the years between 1901 and 1922, there was a fleeting possibility that the nobility of procedure could overcome the draconic system of white supremacy. In the end, however, the court stepped in to fill the vacuum that arose when mob rule through lynching subsided. By the mid-1920s, the primacy of procedure had collapsed and the thin veil of racism was lifted. Not until the last third of the century would procedural possibility, spurred by federal legislation, emerge again to give African-Americans even a glimpse of hope to succeed in Alabama courts.

Royal Dumas