

## CRIMINAL TRIALS AS MORALITY PLAYS: GOOD AND EVIL

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### INTRODUCTION

It is trite, but true, that criminal trials function as morality plays. This helps explain the enduring popularity of the various iterations of Law and Order. The police almost always identify a guilty suspect and the prosecution almost always manages to get a conviction. The guilty are brought to justice. But famous trials are often vessels for a more complicated moral message. What exactly was the message sent by the Loeb and Leopold trial? Was it Clarence Darrow's determinist claim that they were not to blame because their impulses were produced by forces outside of their control? Nature, he argued to the judge, "works in her own mysterious way, and we are her victims."<sup>1</sup> Or was the message the one sent by the sentence—life plus ninety-nine years—that no one is above the law?<sup>2</sup> Or perhaps the judge's decision not to impose the death penalty was a partial vindication of Darrow's determinist claim.<sup>3</sup>

Was the message of the O.J. Simpson trial that famous, wealthy defendants have a much better chance to confuse the jury about the meaning of the State's evidence? Or was it that the State could not cover up the racism of some LAPD officers, causing the jury to doubt that the evidence presented was actually found at the scene of the crime? Or was the message a deeper and more profound one—juries are prone to acquit when a black man persuades the jury that the white justice system has chosen a famous black man to be the scapegoat or fall guy for a terrible, unsolved crime?

Professor Friedman's excellent Childress Lecture gives us a large canvas with complex images and interactions.<sup>4</sup> He provides multiple insights into the

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1. CLARENCE DARROW, *Plea of Clarence Darrow*, in CLARENCE DARROW ON CAPITAL PUNISHMENT 3, 70 (Chicago Historical Bookworks, reprinted 1991).

2. Edward J. Larson, *An American Tragedy: Retelling the Leopold-Loeb Story in Popular Culture*, 50 AM. J. LEGAL HIST. 119, 143 (2008–2010).

3. *Id.*

4. See Lawrence M. Friedman, *Front Page: Notes on the Nature and Significance of Headline Trials*, 55 ST. LOUIS U. L.J. 1243 (2011).

relationship between high profile criminal trials and media coverage, both of which help shape the very culture that produced them. I want to focus on one corner of Friedman's canvas—the category that asked whether justice was done in particular cases.<sup>5</sup> Within that category, I want to show how the culture shapes the meaning of criminal trials to fit its emerging morality.

My point today is that popular culture smoothes out the complexities of famous trials to tell a story with a simple message that best suits the moment of the re-telling. In effect, the smoothed-out story produces a morality play that fits the culture that does the re-telling. As we will see, a 1906 rape trial in Chattanooga, Tennessee is filled with complicated, conflicting moral messages that have been smoothed out over time to present a simple morality play. But the creation of a cultural message has variables beyond time. The message can be different in different parts of the country. As we will see, one story was told in Chattanooga and a quite different one in Washington, D.C.

The 1906 story is about Nevada Taylor, a young, white rape victim in Chattanooga.<sup>6</sup> It is also the story of Ed Johnson, a black man who was probably innocent, but who was convicted, sentenced to death, and then lynched when the United States Supreme Court issued an order staying his execution.<sup>7</sup> The story told today about Johnson's case, and Wikipedia is a good source, is about racism, uncontrollable fury, and injustice.<sup>8</sup> All those elements are in the full account, to be sure, but Wikipedia has effaced the tensions and complexities at the heart of the story of how Ed Johnson died. I think Wikipedia is the best source for the popular understanding of the Johnson trial and lynching because of the way it is put together and edited by the public. If, however, you want a more "authoritative" source, *The New York Times* ran a story in 2000 that is almost identical to the Wikipedia account. Both accounts miss most of the details that this essay will offer.<sup>9</sup>

What is even more striking about popular treatments of Johnson's case is that an excellent book about the case appeared in 1999, authored by Mark Curriden and Leroy Phillips.<sup>10</sup> The exhaustive account offered by Curriden and Phillips made plain how much goodness co-existed with evil in the events leading to Johnson's death. For example, it covered in detail the outburst from the jury demanding that the victim be more certain of her identification of the

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5. *Id.* at 1253–56.

6. *Brutal Crime Of Negro Fiend*, CHATTANOOGA NEWS, Jan. 24, 1906, at 5.

7. Emily Yellin, *Lynching Victim Is Cleared Of Rape, 100 Years Later*, N.Y. TIMES, Feb. 27, 2000, at 24.

8. See *Lynching Of Ed Johnson*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Lynching\\_of\\_Ed\\_Johnson](http://en.wikipedia.org/wiki/Lynching_of_Ed_Johnson) (last modified Mar. 24, 2011).

9. Yellin, *supra* note 7.

10. MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM* (3d prtg. 1999).

defendant as the rapist.<sup>11</sup> *The New York Times* story that ran in 2000 mentioned the book, but the reporter either did not read the book or chose to ignore the moral complexities.<sup>12</sup>

I have also written about the Johnson case—a chapter and a half in my 2008 University of Michigan Press book and an essay in the *Buffalo Law Review*.<sup>13</sup> I used the Johnson case to illustrate different themes in these earlier accounts. In my book, I argued that the Johnson trial and lynching started the Supreme Court on its voyage toward greater regulation of state criminal processes. Prior to *Johnson*, the Supreme Court had never invalidated a state criminal conviction for errors committed at trial.<sup>14</sup> The *Buffalo Law Review* essay dealt with several famous criminal trials where bigotry caused justice to go off the tracks. My point there was that the Supreme Court, for institutional and structural reasons, was unable to nullify, or even ameliorate, the effect of bigotry on justice.

Today I ignore the effect that the Johnson case had on the Court and the Court's relative impotence to effect fundamental change in state justice systems. Instead, I want to highlight the conflicting moral complexities that Wikipedia and *The New York Times* chose to ignore.

#### ACT ONE: THE CITY AND THE CRIME

Begin with racism in Chattanooga, itself a complicated story. Located in mountainous East Tennessee, Chattanooga “overwhelmingly favored Lincoln” in the election of 1860 and “strongly supported the Republican Party,” which, of course, was then the party of racial equality.<sup>15</sup> In 1861, all of East Tennessee voted against secession from the Union—indeed, the county

11. *Id.* at 108–09.

12. Yellin, *supra* note 7.

13. GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 117–43 (2008) [hereinafter THOMAS, SUPREME COURT ON TRIAL]; George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFF. L. REV. 947, 948–52 (2007) [hereinafter Thomas, *Bigotry, Jury Failures*].

14. THOMAS, SUPREME COURT ON TRIAL, *supra* note 13, at 140. Indeed, the Court had invalidated only a single state criminal conviction and that was because a West Virginia statute forbade participation by blacks in grand juries. See *Strauder v. West Virginia*, 100 U.S. 303, 310, 312 (1879).

15. CURRIDEN & PHILLIPS, *supra* note 10, at 21.

containing Chattanooga voted three to one to remain in the Union<sup>16</sup>—but East Tennessee was outvoted by the rest of the state.<sup>17</sup>

By 1906, as Reconstruction faded into the background, “black-owned businesses in Chattanooga were thriving. . . . [T]here were an unusually high number of black lawyers, doctors, and other professionals practicing in Chattanooga, compared with other Southern cities.”<sup>18</sup> “But Chattanooga is only a mile or two up Route 27 from Georgia,”<sup>19</sup> a state that seceded from the Union by a mere vote of the legislature without a referendum of the people.<sup>20</sup> In 1906, Chattanooga was very much a divided city when it came to racial attitudes.

The crime that begins the morality play took place around 6 P.M. on January 23, 1906, as Nevada Taylor returned home from work on one of the city’s “new electric trolleys.”<sup>21</sup> She lived with her father, who was the keeper of the Forest Hills cemetery, in a cottage inside the cemetery at the foot of Lookout Mountain.<sup>22</sup> “The lights of her home could be seen from the point where she left the car . . . . She heard footsteps behind her and turned only to be caught in the powerful arms of a negro man, whom she cannot identify.”<sup>23</sup> When she screamed and tried to fight back, he placed a leather strap around her throat and drew it tight “to hush her screams.”<sup>24</sup> He also “warned her not to scream again or to make any noise, threatening to cut her throat if she disobeyed.”<sup>25</sup> He then “hurled her over the fence into the marble yard” of the cemetery, where “he accomplished his terrible purpose and there he left his victim unconscious, choked into insensibility . . . .”<sup>26</sup> Taylor was not able to give the authorities a “lucid description of the fiend who assailed her” but said

16. 2 ZELLA ARMSTRONG: THE HISTORY OF HAMILTON COUNTY AND CHATTANOOGA TENNESSEE 3 (OVERMOUNTAIN PRESS 1993) (1940) (noting that in a January vote, 445 Hamilton County residents voted for “separation,” while 1,445 voted against).

17. NOEL C. FISHER, WAR AT EVERY DOOR: PARTISAN POLITICS AND GUERRILLA VIOLENCE IN EAST TENNESSEE, 1860–1869, at 4 (Gary W. Gallagher ed., Civil War Am. Ser., 1997).

18. CURRIDEN & PHILLIPS, *supra* note 10, at 24.

19. THOMAS, SUPREME COURT ON TRIAL, *supra* note 13, at 118.

20. See David Williams, *Georgia*, in 2 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 820, 820 (David S. Heidler & Jeanne T. Heidler eds., 2000).

21. CURRIDEN & PHILLIPS, *supra* note 10, at 25.

22. Thomas, *Bigotry, Jury Failures*, *supra* note 13, at 952; *Brutal Crime of Negro Fiend*, *supra* note 6.

23. *Brutal Crime of Negro Fiend*, *supra* note 6.

24. *Id.*

25. *Awful Crime at St. Elmo*, CHATTANOOGA DAILY TIMES, Jan. 24, 1906, at 8.

26. *Brutal Crime of Negro Fiend*, *supra* note 6.

that “her impression of him was that he was a black negro about her own height . . . .”<sup>27</sup>

Even before an arrest was made, there were predictions of mob violence. The *Chattanooga Daily Times* was a moderate newspaper in a Republican part of a border state, a paper that supported “liberal political and social ideals as well as equal rights and equal treatment for black people.”<sup>28</sup> Yet the *Chattanooga Daily Times* predicted, without criticism, that the perpetrator would be lynched when caught:

It was acknowledged by everybody, including officers of the law, that no power could save the criminal from summary vengeance in case he should be caught. The humor of the citizens . . . was one of quiet determination to deal punishment to the negro which would be a warning to others of his stamp to abandon the present tendency toward outlawry in this community. Neither is there any likelihood of any dying out of public sentiment along these lines. The crime was so horrible in every particular and the victim so popular in her neighborhood that any mention of the affair, it is stated, will stir up the wrath of the citizens for weeks and months to come.<sup>29</sup>

This, then, was the hostile, poisonous atmosphere that existed when Ed Johnson was arrested. Would the authorities be able to protect him? The answer, surprisingly, is that the sheriff, who had been a captain in the Confederate Army, was instrumental in protecting him from mob violence as he awaited trial.

#### ACT TWO: MOB IS DISPELLED

Ed Johnson was arrested on January 25, two days after the rape.<sup>30</sup> A laborer, he had most recently worked on the St. Elmo church, which would make him familiar with the area where Taylor was raped; the *Chattanooga Daily Times* described him as a “hanger on at various saloons in South Chattanooga.”<sup>31</sup> That evening, it was overcast, windy, and barely above freezing<sup>32</sup> when a mob of “more than 3,000 men” gathered ominously around the county jail.<sup>33</sup> The leader was “a man fresh from some mill with a face

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27. *Awful Crime at St. Elmo*, *supra* note 25.

28. CURRIDEN & PHILLIPS, *supra* note 10, at 36.

29. *Feeling at High Pitch*, CHATTANOOGA DAILY TIMES, Jan. 25, 1906, at 3.

30. *Law and Order Victorious over Overwhelming Odds*, CHATTANOOGA DAILY TIMES, Jan. 26, 1906, at 1.

31. *Id.*

32. *The Weather*, CHATTANOOGA DAILY TIMES, Jan. 26, 1906, at 10.

33. *A Fierce and Frenzied Mob Foiled by Brave and Determined Officers*, CHATTANOOGA NEWS, Jan. 26, 1906, at 1 [hereinafter *Fierce and Frenzied*]. The *Chattanooga Daily Times* put the size of the mob between 500 and 1,500 men. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

begrimed with soot and dirt . . . .”<sup>34</sup> As the *Chattanooga Daily Times* put it the next morning, the mob was “[f]ierce in its determination to wreak vengeance upon some negro, and not caring to any great extent what one . . . .”<sup>35</sup>

While the mob gathered, Circuit Judge Samuel D. McReynolds asked Tennessee’s governor to call out the National Guard “to aid in suppressing the riot and restoring order.”<sup>36</sup> One of the jailers told the mob that Johnson was not in the jail, but the mob did not believe him and stormed the brick structure.<sup>37</sup> Some fired their guns; others threw stones or bricks, but the mob was stopped by the big iron door and by “determined” deputies who stood their ground despite the guns pointed at them.<sup>38</sup> When the mob threatened to kill the deputies, one said if “any person tried to pass through the door, it would be over his dead body.”<sup>39</sup> These deputies, “for three long hours gave unmistakable evidence of nerve, [and] stood there immovable.”<sup>40</sup> According to the *Chattanooga News*, “[t]oo great praise for their bravery in a time of great trial can not be given the deputies” who defended the jail.<sup>41</sup>

In the midst of the mob attacks, Judge McReynolds arrived at the jail and, after finally getting the mob’s attention, sought to persuade them to disperse by telling them that Johnson was not on the premises:

He has been sent away to Knoxville. You might search the jail all night and you would not find him. I appeal to you as a friend, and I am sure you are all friends of mine, to quietly disperse to your homes and refrain from violence. The accused rapist is not here—he is in Knoxville.<sup>42</sup>

The judge was telling the truth, or at least the relevant truth. As soon as suspicion had settled on Ed Johnson, a “hurried conversation between the sheriff, Judge McReynolds and Attorney General Whittaker” produced agreement that Johnson “must be spirited out of town” by Sheriff Shipp and, thus, “taken beyond the reach of possible mob violence.”<sup>43</sup> But the judge lied when he said Johnson was in Knoxville. Instead, he was at a jail in Nashville.<sup>44</sup> The Knoxville story intended to mislead in case a mob might form in Knoxville.

34. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

35. *Id.*

36. *Id.*; see also CURRIDEN & PHILLIPS, *supra* note 10, at 40.

37. *Fierce and Frenzied*, *supra* note 33.

38. *Id.*

39. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

40. *Id.*

41. *Fierce and Frenzied*, *supra* note 33.

42. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

43. *Id.*

44. *Wheels of Justice Turn Fast in St. Elmo Assault Case*, CHATTANOOGA SUNDAY TIMES, Jan. 28, 1906, at 10 [hereinafter *Wheels of Justice Turn Fast*].

The mob greeted the judge's announcement with "jeers and insulting epithets," and "the crowd again became uncontrollable."<sup>45</sup> The judge responded with a creative proposal: the mob could appoint three men to accompany the judge and the jailers into the jail to search for Ed Johnson.<sup>46</sup> The mob counter-offered that ten men should accompany the jailers, and the judge agreed.<sup>47</sup>

The arrival of a "large detachment of police" allowed the authorities to "clear the lobby" of the jail, so that the mob's "committee" could search for Johnson.<sup>48</sup> When the men reached the "negro department," the "inmates were found to be in a state of most abject terror. They were nearly all on their knees praying with upturned, ashen faces, and gave every evidence that they believed their hour had come."<sup>49</sup> Ed Johnson was not to be found. "The obstreperous members of the committee were disarmed and locked up, fear being entertained as to their possible action."<sup>50</sup>

But there was still the problem of dispensing a mob of perhaps one thousand men. The police made a "heroic effort to clear the street," but it proved "to be beyond their power."<sup>51</sup> At this point, "a combined detachment of [National Guard] artillery and infantry, all equipped with rifles" arrived on the scene.<sup>52</sup> "Sullenly and slowly the mob began to back away down the street and at about 10:50 the danger point was past."<sup>53</sup>

The "county jail save for its solid brick walls was a wreck, everything breakable having been broken . . ."<sup>54</sup> Sledge hammers and a long, hollow, heavy steel post had been used to reduce some of the wooden doors to "mere heaps of splinters."<sup>55</sup> The jail's steel front door frame and part of the adjoining brick wall "had been knocked in."<sup>56</sup> "Details of the National [G]uard were stationed at the jail and at various points in the city after the mob had dispersed, with orders to patrol the city during the night."<sup>57</sup>

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45. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Fierce and Frenzied*, *supra* note 33.

55. *Id.*

56. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

57. *Id.*

Sheriff Joseph F. Shipp enlisted in the Confederate Army as a private when he was seventeen years old and rose to the rank of a captain.<sup>58</sup> He was wounded three times while serving in the Fourth Georgia Regiment as a boy.<sup>59</sup> Reflecting on his efforts to save Johnson from the mob, Shipp said, "I have heard that the fact of my having taken away the negro Johnson, in order to save him from Thursday night's mob, would cost me a defeat in my race for re-election."<sup>60</sup> But he said he had taken "an oath to enforce the law" and that if he had not taken Johnson to Nashville, "no one knows how many negro prisoners, innocent and guilty, would have been hanged without authority."<sup>61</sup> Shipp devoted all his energies to capturing Johnson but said that "[a]fter [Johnson] was in my hands as a defenseless prisoner I was as energetic to save him from violence at the hands of a mob as I had been to detect and capture him."<sup>62</sup>

Sheriff Shipp arranged for Nevada Taylor and her brother to take the train from Chattanooga to Nashville two days later, a Friday.<sup>63</sup> At the jail, Johnson and a suspect named James Broaden were brought into a room where Taylor "closely scrutinized" them for fifteen minutes before "they were taken away."<sup>64</sup> When Shipp asked "whether either of the two was the guilty party," she said that "[f]rom that negro's general figure, height and size; from his voice, as I can distinctly remember it; from his manner of movement and action, and from the clothing he wears," Johnson "was like the man as she remembered him."<sup>65</sup> She concluded her identification with words that would become hauntingly familiar before Ed Johnson is murdered: "it is my best knowledge and belief" that Johnson was the man who raped her.<sup>66</sup>

Today, the weakness of eyewitness identification is well known.<sup>67</sup> We will never know whether Sheriff Shipp recognized the tepid nature of Taylor's identification. One of the city's newspapers, which undoubtedly wanted very

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58. CURRIDEN & PHILLIPS, *supra* note 10, at 28. He enlisted at age sixteen but that enlistment ended when Confederate officials discovered that he had run away from home and did not have his parents' permission to enlist. *Id.*

59. *Id.*

60. *Wheels of Justice Turn Fast*, *supra* note 44.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Broaden was the first suspect arrested for the crime and was, for a time, considered a better suspect than Johnson. See *Grand Jury Indicts Ed Jonhson* [sic] *Today*, CHATTANOOGA NEWS, Jan. 27, 1906, at 5.

65. *Wheels of Justice Turn Fast*, *supra* note 44.

66. *Id.*

67. For my thoughts on the myriad problems with eyewitness identification, see George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169 (2005); George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575 (2010).



much to report that the rapist had been captured, described her original identification of Johnson as “almost positive.”<sup>68</sup> We do not know whether Taylor saw her attacker’s face because the newspapers did not publish any details about how the rape was accomplished. She said that the assailant attacked her from behind, but once he had the strap around her throat, he could have turned her to face him before raping her. In any event, Taylor’s identification at the jail in Nashville mentioned nothing about his facial features and was limited to his clothing, general figure and size, voice, and “manner of movement and action.”<sup>69</sup> What was distinctive about his “manner of movement and action” was not identified in the news accounts.<sup>70</sup> And the conclusion that it was her “best knowledge and belief” signals at least some uncertainty.<sup>71</sup> Perhaps also indicating uncertainty, she said “to different parties” that she wanted Johnson to “be given a trial and if hanged that it be done legally.”<sup>72</sup> She told Sheriff Shipp that she was glad both suspects had been taken away before the mob attacked the jail “because she did not want an innocent man’s blood shed on her account.”<sup>73</sup>

Shipp immediately telegraphed Judge McReynolds from Nashville: “Nevada Taylor has identified suspect.”<sup>74</sup> The judge convened a grand jury on a Saturday; it indicted Johnson in just under two hours.<sup>75</sup> Five days later, still in the Nashville jail, Ed Johnson released a statement to the *Nashville Banner* declaring his innocence and giving the names of several people who could provide him an alibi.<sup>76</sup> He said at one point that he had never seen the woman who was brought to the jail. “No, sir, I never done what they charged me with. If there’s a God in heaven I’m innocent.”<sup>77</sup>

So far, we have seen no evidence of racism, malfeasance, or even incompetence among the Chattanooga authorities. The judge, the sheriff, the police department, the National Guard, and the governor all acted to protect not only the prisoner but also the integrity of the justice process. But changes, some subtle and some not so subtle, began to appear as the trial approached.

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68. *Wheels of Justice Turn Fast*, *supra* note 44.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Wheels of Justice Turn Fast*, *supra* note 44.

74. CURRIDEN & PHILLIPS, *supra* note 10, at 55.

75. *Wheels of Justice Turn Fast*, *supra* note 44.

76. *Says He Is Not Guilty*, CHATTANOOGA DAILY TIMES, Feb. 2, 1906, at 2.

77. *Id.*

## ACT THREE: TRIAL

A quarter-century later, an Alabama trial judge appointed the entire county bar to represent nine Scottsboro rape defendants.<sup>78</sup> The United States Supreme Court characterized this appointment as “little more than an expansive gesture, imposing no substantial or definite obligation upon any one”<sup>79</sup> and held that the judge had failed to provide the defendants with due process of law.<sup>80</sup> By contrast, Judge McReynolds bent over backwards to be fair to Ed Johnson. The disadvantages to any defense lawyer who accepted appointment were obvious.<sup>81</sup> McReynolds first appointed Robert Cameron, a young lawyer who had never handled a criminal case and whose only trial experience involved simple divorces and real estate disputes.<sup>82</sup> Cameron accepted the appointment “with great reluctance,” agreeing “to do the best he could under the circumstances.”<sup>83</sup>

The judge mulled over the choice of a second lawyer until Lewis Shepherd, “a former [circuit-court] judge” and “possibly the most prominent member of the local bar,” told McReynolds that “[t]his is a very important case. . . . You need to have one of the older members of the criminal bar involved.”<sup>84</sup> McReynolds asked Shepherd if he would work with Cameron.<sup>85</sup> Shepherd agreed on the condition that the judge persuade another seasoned lawyer, W.G.M. Thomas, to join the defense team.<sup>86</sup>

Thomas, a graduate of Vanderbilt University School of Law, was a very successful civil practitioner and was “shocked” that the judge would appoint him in a criminal case.<sup>87</sup> The judge “was unmoved,” pointing out that he had the authority to appoint any lawyer to represent an indigent defendant and he was doing so.<sup>88</sup> He also told Cameron and Thomas that Lewis Shepherd, who “knew criminal-law procedures better than any attorney or judge in Chattanooga,” would be part of their team.<sup>89</sup> But, they would have only a week to prepare their case.<sup>90</sup>

Thomas soon made public his reluctance to accept appointment to represent Johnson. On the Friday before jury selection was to begin on

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78. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).

79. *Id.* at 56.

80. *Id.* at 71.

81. CURRIDEN & PHILLIPS, *supra* note 10, at 60.

82. *Id.*

83. *Wheels of Justice Turn Fast*, *supra* note 44.

84. CURRIDEN & PHILLIPS, *supra* note 10, at 61–62.

85. *Id.* at 62.

86. *Id.*

87. *Id.* at 62–63.

88. *Id.* at 63.

89. CURRIDEN & PHILLIPS, *supra* note 10, at 63.

90. *Id.*

Monday, he released a statement to the press that sought to explain that the defense team was “obeying the hard appointment of Judge McReynolds.”<sup>91</sup> He declared, “[Johnson had been] accused of committing the most awful crime capable of being imagined by the human mind. I would avoid the task if I could honorably do so. I didn’t want it. I didn’t ask it.”<sup>92</sup> Noting the constitutional right to a lawyer, he pointed out that Judge McReynolds had the duty “to select some lawyers from the Chattanooga bar, and his lot has fallen on me, and I shall not dodge or shirk the hard duty thus imposed.”<sup>93</sup> He concluded, “I am not a criminal lawyer. I have never sought a criminal practice. . . . What I am trying to do in this case is conscientiously, and as thoroughly as I know how to find out whether the accused man is guilty or innocent.”<sup>94</sup>

As Thomas was trying to distance himself from his client, it also seems that Judge McReynolds began to view his job as more than just being a fair-minded jurist. Though this is speculation on my part, it appears that he began to think about what would be best for the city, and that would be would be to have a trial in Chattanooga, and to have it quickly. There was always the risk of another mob attack and the sooner the crime was avenged, the better.<sup>95</sup> What we know for certain is that the defense did not request a change of venue,<sup>96</sup> and we can be pretty sure that a different venue would have been beneficial to Johnson. We will never know whether the failure to make the motion was because the defense lawyers felt it was good for the city or because Judge McReynolds publicly “expressed the opinion that he himself will try the negro brute in Hamilton county court house,” as he was quoted in the *Chattanooga News*.<sup>97</sup> McReynolds later denied discouraging “outside of my court room” a change of venue motion, a comment that was perhaps directed at the *News*.<sup>98</sup>

We also know that the grand jury indicted Johnson on January 27, and his trial began ten days later, a week and one day after McReynolds appointed Shepherd and Thomas to join Cameron in defending Johnson.<sup>99</sup> No transcript exists of the trial because the Hamilton County courthouse burned after being

91. *Court Will Do Its Part*, CHATTANOOGA NEWS, Feb. 2, 1906, at 6.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Will Hold Trial Here*, CHATTANOOGA NEWS, Jan. 29, 1906, at 2.

97. *Id.*

98. *Johnson May Appeal to U. S. Supreme Court*, CHATTANOOGA SUNDAY TIMES, Mar. 11, 1906, at 1.

99. *See Grand Jury Indicts Ed Jonhson [sic] Today*, *supra* note 64; *Johnson’s Trial Is Progressing Rapidly*, CHATTANOOGA NEWS, Feb. 6, 1906, at 10.

struck by lightening in 1910.<sup>100</sup> The facts about the trial that follow are drawn from newspaper accounts or from the Curriden and Phillips book.

The State presented one witness who testified that he saw the defendant in the vicinity of the rape at roughly the right time, but his testimony was undermined by Cameron's "decidedly searching" cross-examination.<sup>101</sup> The line of questions suggested that he had told a different story before he learned that there was a reward for information leading to the arrest of the rapist.<sup>102</sup> Thus, the State's case was built almost exclusively on the victim's identification of Ed Johnson as the man who raped her. But Taylor's identification was never completely positive. When Taylor was "asked to look at Ed Johnson as he sat trembling, listening to the tragic story, she said she 'believed he was the man.'"<sup>103</sup> Thomas approached the cross-examination of Taylor delicately; he "prefaced his first question with a reminder to the witness that it was painful to him to ask her even one question."<sup>104</sup> When he asked her whether Ed Johnson was the man who raped her, she repeated her testimony that "she 'believed' Johnson to be the guilty man."<sup>105</sup>

Johnson testified as the first defense witness, asserting "his innocence in strong terms" and setting out an alibi in detail.<sup>106</sup> The alibi, that Johnson was drinking from 4:30 in the afternoon until 10:00 at the prophetically-named Last Chance Saloon, was substantiated by at least seven witnesses.<sup>107</sup> According to the *Chattanooga News*, all but one of the witnesses "were colored and habitues of the Last Chance saloon."<sup>108</sup> The *Times* described three of the alibi witnesses as white,<sup>109</sup> but both newspapers reported that the alibi testimony had gaps of time that would have permitted Johnson to leave the bar for "a half-hour or more."<sup>110</sup>

Yet the defense must have been stronger than the newspapers implied, or perhaps, Taylor's testimony was even weaker when witnessed in the court room than it appeared from the news stories. A remarkable spectacle occurred near the end of the trial. There was an "air of oppressive solemnity" in the courtroom, and the "nerves of every man in the court room were at high

100. *History of the County Courthouse*, HAMILTON CNTY. TENN., <http://www.hamiltontn.gov/courthouse/Default.aspx> (last visited June 12, 2011).

101. *Law Taking Its Course in Case of Ed Johnson*, CHATTANOOGA DAILY TIMES, Feb. 7, 1906, at 5.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Law Taking Its Course in Case of Ed Johnson*, *supra* note 101.

107. *Johnson Trial Hinges on Alibi for Defendant*, CHATTANOOGA NEWS, Feb. 7, 1906, at 10.

108. *Id.*

109. *Law Taking Its Course in Case of Ed Johnson*, *supra* note 101.

110. *Id.*; see also *Johnson Trial Hinges on Alibi for Defendant*, *supra* note 107.

tension.”<sup>111</sup> When a witness was leaving the stand, one of the jurors, an architect named C.E. Bearden, “threw his hands above his head, exclaiming, ‘I can’t stand it. I can’t stand it.’”<sup>112</sup> As court personnel and other jury members “went to his assistance,” Bearden “sat with his face working, his eyes streaming tears, so strained were his nerves after the harassing events of the trial, which has lasted two long days and is now on the third.”<sup>113</sup>

The jury was led “away from the court room for a brief space of time.”<sup>114</sup> When it returned, “Mr. Bearden was more composed.”<sup>115</sup> Another member of the jury, J.L. Wrenn, then asked the judge to have Taylor “recalled to the stand”<sup>116</sup> and to have Johnson placed before her so that “the jury could look at them both.”<sup>117</sup> Remarkably, the judge agreed, and the defendant was ordered to stand before Taylor as the jury watched with rapt attention. “Johnson’s eyes shifted from side to side as Miss Taylor looked at him.”<sup>118</sup> Juror Wrenn asked, “Miss Taylor, can you state positively that this negro is the one who assaulted you?”<sup>119</sup> She responded: “I will not swear that he is the man, but I believe he is the negro who assaulted me.”<sup>120</sup>

Bearden then “became more and more nervous and began to weep, and almost rising to his feet, cried, ‘Miss Taylor, as God sees you, can you say that that is the negro, the right negro?’”<sup>121</sup> The other jurors sought to console Bearden.<sup>122</sup> “Miss Taylor looked the jury full in the face, gathered her composure, which was beginning to show traces of disturbance . . . and said: ‘Listen to me: I would not take the life of an innocent man. But before God, I believe that is the guilty negro.’”<sup>123</sup> Nevada Taylor then

raised her right hand toward heaven in the attitude of assuming an oath, her tears came, her voice quivered and she was led trembling from the witness stand.

111. *Dramatic Incidents at Johnson’s Trial*, CHATTANOOGA NEWS, Feb. 8, 1906, at 10.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Ed Johnson Jury Stands 8 to 4 for Conviction*, CHATTANOOGA DAILY TIMES, Feb. 9, 1906, at 5.

117. *Dramatic Incidents at Johnson’s Trial*, *supra* note 111.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Dramatic Incidents at Johnson’s Trial*, *supra* note 111.

123. *Ed Johnson Jury Stands 8 to 4 for Conviction*, *supra* note 116.

The effect was electrical. One of the jurors collapsed from his emotion and leaned forward in his chair choking with sobs. Attorneys on both sides were speechless. Evidences of weeping were heard on every side.<sup>124</sup>

The judge and the lawyers “leaned forward or stood in their places watching this scene, which in their memory had never had a precedent in the criminal court room of Hamilton county.”<sup>125</sup>

This is not evidence of evil, of a white Southern jury callously convicting a black man without regard to probable guilt. This is, instead, evidence of a jury angered by a violent crime, filled with sympathy for the victim, but searching for proof that the man whose fate they held in their hands was guilty. The defense lawyers sought to build on juror skepticism with effective and, in one case, brilliant closing arguments. Lewis Shepherd, the former judge, accused Judge McReynolds of making rulings “biased in favor of the state.”<sup>126</sup> Then, for an hour, he “delivered a most impassioned plea to the jury in behalf of the negro.”<sup>127</sup> The young lawyer, Cameron, “excoriated” the witness who said he saw Johnson near the scene of the crime, denouncing him as a “liar” and “perjurer.”<sup>128</sup> But the final closing argument, by Thomas, was the finest. The *Chattanooga Daily Times* described it as “a most remarkable plea” that his client was innocent:

Were I not convinced of the absolute innocence of that negro sitting over there I would be there silent in my chair or over on the other side aiding the attorney-general to fasten the guilt upon him. Log chains couldn’t pull me and make me stand before twelve men of my home and say a word for that man if I did not believe in his innocence. . . .

. . . .

. . . In the face of twelve good men from my own home . . . I could not stand here and ask the acquittal of a man I believed to be guilty. . . . I could not be so false to the womanhood dear to me and to the mothers, wives and sisters dear to you, as to stand here and ask you to acquit this man if there were any reasonable certainty of his guilt.<sup>129</sup>

The prosecutor pleaded “for the womanhood and girlhood of the country and rebuked the defense for asking the jury to believe the perjured testimony of a lot of ‘thugs, thieves and sots—the off-scourings of hell.’”<sup>130</sup> Unspoken, but

124. *Id.*

125. *Dramatic Incidents at Johnson’s Trial*, *supra* note 111.

126. *Ed Johnson Jury Stands 8 to 4 for Conviction*, *supra* note 116.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

hanging like the oppressive, foul winter air of Chatanooga,<sup>131</sup> was the fact that most of the defense alibi witnesses were black.<sup>132</sup>

“Judge McReynolds began charging the jury at 5:28 o’clock” on Thursday afternoon “and twenty minutes later twelve solemn men filed into the jury room to deliberate upon the negro’s fate. Shortly after six o’clock it was announced that an immediate agreement could not be reached . . . .”<sup>133</sup> The jury retired at midnight without reaching a verdict and “it was learned . . . that the jury stood eight for the death sentence to four against.”<sup>134</sup> Four white men, one third of the jury, believed that the State had not proved its case beyond a reasonable doubt.<sup>135</sup> More significantly, they were willing to act on that belief and hold out for four hours of what must have been extreme pressure from the eight who believed that Johnson was guilty. They must have known that their obstinance would anger their community, as well as their fellow jurors.

But after only a few minutes of deliberation the next morning, the jury unanimously voted guilty.<sup>136</sup> No one knows what moved the four dissenters to change their vote. Curriden and Phillips claim, without citing a single authority, that the judge, sheriff, and prosecutor got together for a bottle of whiskey and were somehow involved in the changed jury vote.<sup>137</sup> And there is always the possibility that the dissenters were paid a visit by the Ku Klux Klan. I think it more likely, however, that pressure from their friends and family moved the dissenters to vote guilty. If this is correct, the judge was partly to blame. Rather than sequester the jurors overnight, he allowed them to go home.<sup>138</sup> I don’t know what the rule or norm was in 1906, in Chattanooga, about sequestering juries, but this is a case that called for sequestration.

The pressure on the four who voted not guilty must have been enormous. It was one thing for a lawyer of that day and place to represent a client charged with rape, even a black man charged with raping a white woman. It was quite something else to disbelieve the young, traumatized victim and let the man go free when she said, to the best of her knowledge, that he was the man who had raped her. Where Southern womanhood was involved, there was simply no

131. See *Air Pollution: Chattanooga, Tennessee*, WORLD RES. INST., <http://archive.wri.org/page.cfm?id=2790&z=?> (last visited June 20, 2011).

132. *Johnson Trial Hinges on Alibi for Defendant*, *supra* note 107; *Juror Has To Leave Court*, CHATTANOOGA DAILY TIMES, Feb. 8, 1906, at 5.

133. *Ed Johnson Jury Stands 8 to 4 for Conviction*, *supra* note 116.

134. *Id.*

135. CURRIDEN & PHILLIPS, *supra* note 10, at 118.

136. *The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime*, CHATTANOOGA NEWS, Feb. 9, 1906, at 1. This story is dated the same as the *Chattanooga Daily Times* story reporting that the jury was deadlocked and dismissed because the *News* was an afternoon newspaper. See *Ed Johnson Jury Stands 8 to 4 for Conviction*, *supra* note 116.

137. CURRIDEN & PHILLIPS, *supra* note 10, at 118.

138. *Id.*

room for doubt. Her belief was enough for the community and, ultimately, I think, for the four who initially voted not guilty.

Judge McReynolds predictably sentenced Ed Johnson to hang for the rape of Nevada Taylor, at approximately 3:30 on Friday afternoon after the jury had found him guilty in the morning.<sup>139</sup> He told Johnson “the day of his death and the manner of it,” and Johnson in an “embarrassed and slightly excited [manner], said ‘Thanks’.”<sup>140</sup> The news account speculated that Johnson “thought something was required of him and he could think of nothing else to say.”<sup>141</sup>

The glass is half full here. The headline in the *Chattanooga News* the afternoon of the verdict proclaimed: “The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime; Given the Full Benefit of Law, a Human Brute Is Convicted. Announcement Calmly Received in Court Room.”<sup>142</sup> The headline makes plain that the community had pre-judged Johnson. On the face of that statement how remarkable was it for the jury of white Southern men to challenge the State’s case, for the jury to demand more certainty, and for four members initially to vote not guilty? The headline in that morning’s *Chattanooga Daily Times*, after all, had been “Ed Johnson Jury Stands 8 to 4 For Conviction.”<sup>143</sup> That, it now seems to me, is the more remarkable headline. The glass is half full here, and the story is far more complicated than that found in today’s popular accounts.

But the glass is only half full. After the verdict, the defense lawyers “conferred together in a corner of the courtroom and then returned to announce that they would make a motion for a new trial on next motion day, which will probably be tomorrow.”<sup>144</sup> But the next day, the day of sentencing, the *News* announced: “No motion for a new trial was made or will be made, and no appeal to a higher tribunal will be made.”<sup>145</sup> In the hours before Judge McReynolds sentenced Johnson, the defense lawyers met with three lawyers appointed by the judge, to evaluate their performance and decide whether to seek post-verdict relief.<sup>146</sup> Then they met with Johnson in the jail, obtaining his purported agreement that “they would stand by the decision of Judge McReynolds, into whose hands the final settlement of the case rested.”<sup>147</sup> Just

139. *Ed Johnson Sentenced*, CHATTANOOGA NEWS, Feb. 10, 1906, at 3.

140. *Id.*

141. *Id.*

142. *The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime*, *supra* note 136.

143. *Ed Johnson Jury Stands 8 to 4 for Conviction*, *supra* note 116.

144. *The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime*, *supra* note 136.

145. *Ed Johnson Sentenced*, *supra* note 139.

146. *Id.*

147. *Id.*



prior to sentencing, Thomas stated in open court that it was the judgment of the lawyers who reviewed the case that

Judge Shepherd, Mr. Cameron and I had performed our duty to your honor, to this court, and to this defendant, and that if your honor approved the verdict which the jury has rendered, we ought to acquiesce in the finding and conclusion reached by the twelve men composing that jury.<sup>148</sup>

In sum, the defense lawyers were abandoning Johnson to the gallows with the judge's tacit approval. One imagines they acted out of a host of reasons. They were not being paid for their work,<sup>149</sup> though that was probably the least of their objections to the assigned task. According to Curriden and Phillips, the community reacted with hostility to the defense lawyers' appointment. One of the best clients of Cameron's law firm withdrew his business; Thomas's secretary quit because she didn't want to work for a man who defended black men who rape white women; and "Thomas's mother refused to cook dinner for him when she learned he was handling the case."<sup>150</sup> One night, vandals threw rocks and broke the windows in Thomas's home, while he was getting ready to go to bed and his elderly mother was already asleep.<sup>151</sup>

I could not verify the specific Curriden and Phillips account of community hostility toward the defense lawyers, but the news stories, and Thomas's statement to the public, demonstrate that the defense lawyers were operating in a hostile environment, one that they surely wished to end sooner rather than later. The reason they gave for abandoning Johnson, of course, was more altruistic. In a statement to "the People of Chattanooga," Thomas said that the three reviewing lawyers, Judge McReynolds, and the three defense lawyers met for an hour and a half just prior to sentencing.<sup>152</sup>

We discussed the recent mob uprising and the state of unrest in the community. It was the judgment of all present that the life of the defendant, *even if the wrong man*, could not be saved—that an appeal would so inflame the public that the jail would be attacked and perhaps other prisoners executed by violence. In the opinion of us all . . . where the defendant . . . must die by the judgment of the law, or else, if the case were appealed, he would die by the act of an uprising of the people. . . .

. . . .

. . . Judge Shepherd, Mr. Cameron and I [then] went to the jail and spent a half hour with [Johnson]. We asked him if he felt that we had performed our duty in his defense, and he answered that he didn't know what more we could have done for him. I said: "Ed, we don't know whether you are the guilty man or

148. *Id.*

149. CURRIDEN & PHILLIPS, *supra* note 10, at 63.

150. *Id.* at 70.

151. *Id.* at 71.

152. *Ed Johnson Sentenced*, *supra* note 139.

not: but you and God know. The jury says you are the man.” His reply was: “Yes, they have put it on me, and I guess I have to take it, but I ain’t guilty.” I then said to him: “Ed, your life has been saved up to this time, but the people . . . are outraged against you *and even if you are innocent, as you say you are, we do not believe that we can save your life.*” . . .

Without giving all that occurred at the jail, he said to us that he did not want to die by a mob; that he would do as we thought best.<sup>153</sup>

By pre-judging the result on appeal, and by playing up the threat of mob violence, the defense lawyers were able to persuade themselves and their client that it was better for Johnson to submit to a legal hanging as soon as possible. Looking back more than a century, and without knowing first-hand the grim reality of mob violence, the decision of the lawyers seems indefensible. Indeed, we will shortly see that one of the defense lawyers came to regret the decision almost immediately. If we could believe that Johnson actually chose to submit to the state sanctioned hanging, then perhaps we could excuse the lawyers. But as Johnson’s new lawyers argued four days later, “[T]he statement made by one of the attorneys for Johnson that the negro had been given his choice to either die on the gallows or at the hands of a mob is sufficient evidence that he had been abandoned.”<sup>154</sup> It is difficult to deny that charge. N.W. Parden and G.W. Hutchins, “two well-known colored attorneys,” were now in charge of the appeal.<sup>155</sup> It is to that story that I now turn.

#### ACT IV: THE APPEAL

The first step in an appeal is a motion for a new trial. Parden and Hutchins filed a notice for a new trial on February 13 and then argued the motion on February 14.<sup>156</sup> Parden played his strongest cards in his argument. On February 13, he argued that the evidence was insufficient to convict and that the conduct of Juror Bearden in becoming “almost hysterical” was an “irregularity.”<sup>157</sup> On February 14, he argued that his employment at “a late hour” should give him “the privilege of applying for a motion for a new trial” outside the normal time limits.<sup>158</sup>

Judge McReynolds “refuse[d] to entertain a motion for a new trial” in the Ed Johnson case, on the ground that state law required notice for a new trial to

153. *Id.* (emphasis added).

154. *Negro Attorneys Turned Down: Court Refuses to Entertain Motion for New Trial*, CHATTANOOGA NEWS, Feb. 14, 1906, at 6 [hereinafter *Negro Attorneys Turned Down*].

155. *Efforts to Save Johnson’s Neck: Colored Attorneys File Motion for New Trial*, CHATTANOOGA NEWS, Feb. 13, 1906, at 6 [hereinafter *Efforts to Save Johnson’s Neck*].

156. *Id.*

157. *Id.*

158. *Negro Attorneys Turned Down*, *supra* note 154.

be made on the day of the verdict.<sup>159</sup> The district attorney also argued, and the judge agreed, that “three of the best attorneys at the local bar had done all in their power for Johnson,” that he “had been given the benefit of one of the most impartial trials he had ever known,” and that “the jury was one of the strongest which ever sat in a jury box in this county.”<sup>160</sup> In effect, Judge McReynolds relied on a combination of substance—what else could have been done?—and the procedural error of not filing a notice of appeal before Parden and Hutchins had even entered the case.

The glass is mostly empty here. Notice the perversity of scheming with the defense lawyers to avoid a motion for a new trial from them, and then, when Johnson got new counsel, imposing a rule that made it impossible for substitute counsel to appeal. The newspaper account noted that “[i]t will be remembered” that Johnson’s appointed lawyers “refused to make a motion for a new trial,” as if that should have been the end of the matter.<sup>161</sup> One can even concede that Judge McReynolds’s motives were pure—to avoid further mob violence—and still denounce his conduct. After all, he had heard the evidence, he had seen the agonized jurors, and he knew that the defense lawyers believed Johnson probably innocent. To sacrifice Ed Johnson, without a review of the trial, seems gross judicial misconduct to our twenty-first century eyes.

The next step was a writ of certiorari in the Tennessee Supreme Court.<sup>162</sup> But Judge McReynolds refused to authenticate the transcript or to sign the order overruling the motion for a new trial.<sup>163</sup> According to Curriden and Phillips, McReynolds told Parden that “he would do nothing to condone their efforts, which he described as a waste of time and as a personal rebuke to himself and to the three attorneys who had defended Johnson.”<sup>164</sup> Again, according to Curriden and Phillips, the Tennessee Supreme Court refused to rule on the writ of error because the record contained no authenticated transcript and because the motion for a new trial “was not acted on by the trial judge.”<sup>165</sup>

“Grasping at Last Straw,” as the *News* put it, Johnson’s lawyers moved to federal court where they filed a writ of habeas corpus.<sup>166</sup> An ancient writ that permits a court to review a conviction for certain kinds of errors, federal writs

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159. *Id.*

160. *Id.*

161. *Efforts to Save Johnson’s Neck*, *supra* note 155.

162. *Will Petition Supreme Court: Attempt to Stay Johnson’s Execution on Writ of Error*, CHATTANOOGA NEWS, Feb. 17, 1906, at 3.

163. CURRIDEN & PHILLIPS, *supra* note 10, at 145.

164. *Id.*

165. *Id.* at 149. I checked with the office of the Tennessee Supreme Court and found no recorded order in the Ed Johnson case. The clerk said that perhaps Curriden and Phillips found a newspaper reference; they cite no authority.

166. *Grasping at Last Straw*, CHATTANOOGA NEWS, Mar. 7, 1906, at 10.

in 1906 were almost never granted when a state criminal conviction was at issue. The *News* predicted “that this plan will fail on the ground that [federal District] Judge Clark will not receive it in his court.”<sup>167</sup> Indeed, Judge Clark did deny the petition for habeas corpus, but not before some surprises in his court room.<sup>168</sup> The first surprise was that Lewis Shepherd took the lead in arguing in favor of the habeas corpus petition.<sup>169</sup> Apparently, he had experienced a change of heart from a few days earlier when he went along with the plan not to appeal Johnson’s conviction. The *Chattanooga Daily News* noted “[c]onsiderable surprise” was occasioned by Shepherd’s appearance.<sup>170</sup>

The second surprise was that “almost . . . every allegation was directed” to Judge McReynolds’s “judicial character,” and he was in the courtroom listening to the reading of the habeas petition.<sup>171</sup> There were “wondering looks cast” in McReynolds’s direction as Parden read the petition.<sup>172</sup> The petition apparently claimed, for example, that the threat of mob violence hung over the proceedings; part of the proof was that McReynolds and the prosecutor had caused an article to be placed in the *Chattanooga Daily Times* as a way of restraining the mob.<sup>173</sup> The prosecutor stated that the claim about the newspaper article was “utterly false” and made with “a wicked heart.”<sup>174</sup>

The habeas petition also claimed that Judge McReynolds told defense counsel that he would deny any motion for a change of venue or continuance and that he refused admission to the court room for Johnson’s parents.<sup>175</sup> Judge McReynolds testified that some of the statements were “maliciously false. Any one can make infamous and slanderous statements like those in the petition but it is a different matter to prove them.”<sup>176</sup> He said, in an obvious reference to Shepherd, that “the man that wrote it knew it was false when he wrote it.”<sup>177</sup> It would appear that the cordial relationship between the men that led Shepherd to accept appointment to Johnson’s defense team had not survived the strain of the trial, the sentence, and the habeas petition.

After hearing four hours of testimony,<sup>178</sup> at “almost upon the stroke of midnight [on] Saturday night,” March 12, federal district judge Clark orally

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167. *Id.*

168. CURRIDEN & PHILLIPS, *supra* note 10, at 168.

169. *Johnson May Appeal to U. S. Supreme Court*, *supra* note 98.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Johnson May Appeal to U. S. Supreme Court*, *supra* note 98.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Now Up to Last Court*, CHATTANOOGA DAILY TIMES, Mar. 16, 1906, at 5.

rejected the petition for habeas corpus.<sup>179</sup> But Judge Clark granted a stay of execution to give Johnson's lawyers ten days to appeal his ruling to the United States Supreme Court.<sup>180</sup> Such was the power of federalism at the time that Judge McReynolds doubted that "Judge Clark had a right to grant a stay of execution" in a state case without granting the petition for habeas corpus.<sup>181</sup> Judge McReynolds thus asked the Tennessee governor to grant a stay of execution because a "life now hangs in the balance."<sup>182</sup> Governor Cox granted a stay, ordering Shipp not to execute Johnson's sentence, but for a week, rather than the ten days Clark had ordered.<sup>183</sup>

Parden secured an audience with Justice John Marshall Harlan, who was responsible for hearing emergency petitions from the circuit that included Tennessee.<sup>184</sup> The goal was a stay of execution until the full Court could rule on the merits of the writ of error alleging violations of Johnson's rights at trial.<sup>185</sup> Johnson was lucky to draw Harlan, who had been the lone dissenter ten years earlier in *Plessy v. Ferguson*,<sup>186</sup> upholding the "separate but equal" doctrine that permitted states to bar blacks from railroad cars designated "white only."<sup>187</sup> In his dissent, Justice Harlan argued that:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed [sic] by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.<sup>188</sup>

Curriden and Phillips offer an intriguing account of Parden's audience with Justice Harlan,<sup>189</sup> which is apparently based on "writings, letters, and memos

179. *Ten More Days for Johnson*, CHATTANOOGA NEWS, Mar. 12, 1906, at 2.

180. *Johnson May Appeal to U.S. Supreme Court*, *supra* note 98.

181. *Ten More Days for Johnson*, *supra* note 179.

182. *Grasping at Last Straw*, *supra* note 166.

183. *Johnson Granted a Reprieve*, CHATTANOOGA NEWS, Mar. 13, 1906, at 2.

184. CURRIDEN & PHILLIPS, *supra* note 10, at 12–13; *see also Day of Doom is Very Near*, CHATTANOOGA SUNDAY TIMES, Mar. 18, 1906, at 5.

185. *Now Up to Last Court*, *supra* note 178.

186. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

187. *Id.* at 552.

188. *Id.* at 559 (Harlan, J., dissenting).

189. CURRIDEN & PHILLIPS, *supra* note 10, at 12–17.

written to and by” Harlan.<sup>190</sup> They also offer an account of how Harlan persuaded a majority of the Court that a stay was in order.<sup>191</sup> Even though Harlan had the authority to issue the stay on his own motion, he wanted the Court to back him, and it did.<sup>192</sup> Harlan issued the stay on March 19, 1906 and had a telegram sent to Sheriff Shipp notifying him of the stay.<sup>193</sup> About two o’clock in the afternoon of March 19, Judge McReynolds informed Shipp of the stay and that Johnson was now a federal prisoner.<sup>194</sup> On that day, the evening newspaper, the *Chattanooga News*, ran a story about the stay.<sup>195</sup>

#### ACT V: THE STAY, THE LYNCHING, AND THE BLAME

As we saw earlier, the sheriff, the judge, and the governor had labored to prevent Johnson’s lynching while he awaited trial.<sup>196</sup> When the United States Supreme Court ordered a stay of execution for Johnson,<sup>197</sup> however, the sheriff’s support for the rule of law weakened, and he looked the other way, literally—leaving only a single jailer on duty the night after the Supreme Court granted the stay. Another mob took Johnson from the jail that night and lynched him from the Walnut Street Bridge that spans the Tennessee River.<sup>198</sup> For those with strong stomachs, I recommend the account of that night’s activities found in my University of Michigan book, most of which is taken verbatim from one of the Chattanooga newspapers.<sup>199</sup> The headline in the *Chattanooga Daily Times* will suffice as a summary here: “Johnson Hanged On Bridge With Rope From Trolley Car; Body Of Negro Riddled With Bullets By Frenzied Rioters. Mob’s Defiance Of Law’s Majesty Was Fierce, Deliberate, And Unflinching.”<sup>112</sup>

Stung by the act of defiance, the Supreme Court found the sheriff and five others guilty of contempt of court.<sup>200</sup> They served short sentences in the

190. *Id.* at 377.

191. *Id.* at 193–96.

192. *Johnson Granted Appeal by Whole Supreme Court*, CHATTANOOGA NEWS, Mar. 19, 1906, at 10.

193. See CURRIDEN & PHILLIPS, *supra* note 10, at 195–96; Douglas O. Linder, *The Supreme Court Intervenes in the Ed Johnson Case*, FAMOUS TRIALS, <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/SCtintervenes.html> (last visited June 12, 2011).

194. Linder, *supra* note 193.

195. *The Johnson Case Again*, CHATTANOOGA NEWS, Mar. 19, 1906, at 4.

196. *Law and Order Victorious over Overwhelming Odds*, *supra* note 30.

197. *Justice Harlan Allows Appeal of Ed Johnson*, CHATTANOOGA DAILY TIMES, Mar. 19, 1906, at 5.

198. “God Bless You All—I Am Innocent”, CHATTANOOGA DAILY TIMES, Mar. 20, 1906, at 1.

199. THOMAS, SUPREME COURT ON TRIAL, *supra* note 13, at 135–37.

200. *United States v. Shipp*, 214 U.S. 386, 386–87 (1909); Douglas O. Linder, *The Shipp Case: A Chronology*, FAMOUS TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/shipp/chronology.html> (last visited June 12, 2011).

federal jail in the District of Columbia.<sup>201</sup> By all accounts, the sheriff was welcomed home as a hero, his train met by 10,000 cheering supporters.<sup>202</sup>

I will now assess the culpability of the actors who were involved in the arrest, trial, appeal, and lynching of Ed Johnson. The mob that lynched him, of course, is culpable without any shades of gray. But the other actors present more complicated cases.

Sheriff Shipp's greatest failing was to leave a single night jailer on duty, only hours after the news broke that the Supreme Court had ordered Johnson not to be executed.<sup>203</sup> Compare that to his reaction the day after the lynching when he apparently feared reprisals from the black community and appointed over two hundred special deputies and others to disperse crowds and guard streets leading to county buildings.<sup>204</sup> But even the sheriff's act of defiance, even his complicity in the death of Ed Johnson, is not the kind of pure racism that one might have imagined from a man who had served in the Confederate Army.<sup>205</sup> His decision to turn his back on Johnson was not based wholly on racism. If it had been, he would have allowed the first mob to take him.

Though difficult for us to comprehend today, Shipp told the newspapers that it was the Supreme Court's fault, that the Court was about to undermine a verdict obtained after a fair trial before "as good" a jury "as ever sat in a jury box."<sup>206</sup> This in no way justifies or excuses his failure to protect Johnson, but it is a more complicated moral failing than letting Johnson die because he was a black man. Indeed, even the Tennessee governor blamed the federal courts for Johnson's lynching: "He greatly deplored the affair, and said he was confident no lynching would have occurred had the case not been taken from the Tennessee courts into the federal courts."<sup>207</sup> So even the man who acted with dispatch in calling out the National Guard to prevent the first attempt at a lynching was caught in the snare of federalism and the need to shift the blame from the mob to the federal courts.

There were other honorable acts, though in most cases the "honor" glass is only half full. The defense lawyers who put on a vigorous defense were honorable men. But these were also the men who abandoned Johnson after the guilty verdict and made his appeal procedurally impossible under state law. Shepherd later had a change of heart and helped Parden and Hutchins in the

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201. *Id.*

202. *Id.*

203. "God Bless You All—I Am Innocent", *supra* note 198 (explaining in a subsequent headline that "[o]nly the [n]ight [j]ailer [was] [p]resent [w]hen the [m]ob [made] the [o]nslaught on the [c]ounty [p]rison").

204. *All Uniting in Reign of Reason*, CHATTANOOGA NEWS, Mar. 21, 1906, at 5.

205. CURRIDEN & PHILLIPS, *supra* note 10, at 28.

206. *United States v. Shipp*, 214 U.S. 386, 417, 418 (1909).

207. *Gov. Cox's Opinion as to Cause of Last Night's Lynching*, CHATTANOOGA NEWS, Mar. 20, 1906, at 10.

federal habeas hearing.<sup>208</sup> Yet two days after that hearing, he told the newspapers that his representation was at the request of the federal district judge and of Parden and Hutchins so that “the condemned prisoner might not lack for good representation.”<sup>209</sup> And he stressed that the habeas hearing ended “all of my connection with the matter” and “I am not now employed in the Johnson case.”<sup>210</sup> It appears that, in the end, he preferred not to be known as the white man who helped the United States Supreme Court spare Johnson from the noose.

Also, honorable up to a point, was the judge who saved Johnson from the initial lynch mob and then appointed three able lawyers to defend him. But on some accounts, he discouraged a motion to change venue<sup>211</sup> and permitted an atmosphere of “mob law” in his court room where witnesses and defense counsel were intimidated.<sup>212</sup> Moreover, once the verdict was in, he actively discouraged appeal and apparently even refused to sign the order denying the motion for a new trial or the transcript that would have accompanied the writ of error in the state supreme court.<sup>213</sup> To be sure, even at this juncture, it’s complicated. As an un-named justice on the United States Supreme said, McReynolds discouraged appeal out of “fear that if any such consideration was shown, the mob would lynch the prisoner.”<sup>214</sup>

Honorable, at least up to a point, were the jurors who begged Taylor to be more certain in her identification. Yet complications arise here, too. After Taylor said in a quivering voice that she believed Johnson was the “guilty negro,” raised her right hand to heaven, and was “led trembling from the witness stand,” the newspaper reported that an un-named juror “spoke so as to be heard by many near him and said: ‘If I could get at him I’d tear his heart out right now.’”<sup>215</sup> Indeed, this was one of the grounds raised in the federal habeas corpus hearing before Judge Clark.<sup>216</sup> In response to that claim, the State named the juror in question, C.E. Bearden, but argued that he did not say “If I could get at him” but, rather, “If I knew he was [guilty], I would tear his heart out.”<sup>217</sup> On either account, though, it suggests a less than honorable approach to judging guilt.

Honorably, four jurors initially voted not guilty despite what must have been intense pressure from fellow jurors. But after an evening at home with

208. *Johnson May Appeal to U. S. Supreme Court*, *supra* note 98.

209. *Last Effort for Johnson*, CHATTANOOGA DAILY TIMES, Mar. 14, 1906, at 10.

210. *Id.*

211. *Johnson May Appeal to U. S. Supreme Court*, *supra* note 98.

212. *All Uniting in Reign of Reason*, *supra* note 204.

213. *Johnson May Appeal to U. S. Supreme Court*, *supra* note 98.

214. *All Uniting in Reign of Reason*, *supra* note 204.

215. *Ed Johnson Jury Stands 8 to 4 for Conviction*, *supra* note 116.

216. *Johnson May Appeal to U. S. Supreme Court*, *supra* note 98.

217. *Id.*



their families, the four hold-outs quickly changed their votes, producing a unanimous verdict at 9:24 the next morning.<sup>218</sup> Once again the culpability point is complicated. The plain truth is that jurors are less likely to discharge their fact-finding function accurately when they are trapped within a racist culture. At the time, blacks were portrayed as savage brutes who violated Southern womanhood rather at will. In describing the Southern white attitude toward blacks in conjunction with the Scottsboro rape case from Alabama in 1931, James Goodman wrote: "Blacks were [viewed as] savages, more savage, many argued (with scientific theories to support them), than they had been as slaves. Savages with an irrepressible sex drive and an appetite for white women. They were born rapists, rapists by instinct; given the chance, they struck."<sup>219</sup>

Given the background belief structure of Southern white men, and almost all juries consisted only of white men, juries would convict innocent black men far too often. Miss Taylor believed Ed Johnson was the black man who raped her. That was enough for the jury, even for the four who went home the first night with doubts about guilt.

Completely honorable were politicians and judges in Washington, D.C. President Theodore Roosevelt said the lynching was "contemptuous of the Court."<sup>220</sup> According to the *Chattanooga Daily Times*, the lynching in defiance of the Supreme Court's order "has shocked the members of the court beyond anything that has ever happened in their experience, on the bench."<sup>221</sup> "'The fact was,' said one of the members of the supreme court tonight, 'that Johnson was tried by a little better than mob law before the state court.'"<sup>222</sup> Justice Oliver Wendell Holmes told reporters, "In all likelihood, this was a case of an innocent man improperly branded a guilty brute and condemned to die from the start."<sup>223</sup> According to sources in Washington, "[A]ll who participated in the lynching will be punished by heavy fines and also be put on trial for murder."<sup>224</sup> As we will see, the notion of murder trials died aborning when translated from Washington to Chattanooga.

Nevada Taylor died a year later. News accounts attributed her death to "nervous prostration incidental to the crime committed under the very shadow of the historic Lookout Mountain."<sup>225</sup> One wonders about the effect on her of

218. *The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime*, *supra* note 136.

219. JAMES GOODMAN, *STORIES OF SCOTTSBORO* 15 (Vintage Books 1995) (1994).

220. Linder, *supra* note 200.

221. *All Uniting in Reign of Reason*, *supra* note 204.

222. *Id.*

223. Linder, *supra* note 200.

224. *All Uniting in Reign of Reason*, *supra* note 204.

225. Thomas, *Bigotry, Jury Failures*, *supra* note 13, at 952.

Ed Johnson's brutal lynching, given her earlier protestation that "she did not want an innocent man's blood shed on her account."<sup>226</sup>

The two Chattanooga newspapers condemned the lynching. The *Chattanooga Daily Times* sub-headlines included "Majesty of the Law Outraged by Lynchers," "Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant," "Terrible and Tragic Vengeance Bows City's Head in Shame," "Johnson . . . Hung While Red Rioters Complete Their Hideousness By Riddling Body With Bullets," "Night of Wickedness and Woe," "Practically No Resistance Offered the Lynchers," and "Only the Night Jailer Present When the Mob Makes the Onslaught on the County Prison."<sup>227</sup> The *Chattanooga News*, which was generally more provocative in its approach to the crime, the trial, and race relations was far less critical, but one sub-headline did note "Mob's Defiance of Law's Majesty Was Fierce, Deliberate and Unflinching."<sup>228</sup>

The *Chattanooga Daily Times* published several articles that, in one way or another, condemned the lynching of Ed Johnson. It noted that a "number of the men and boys who were active in the violence are said to [have] left town . . . ."<sup>229</sup> The *Times* reported that a careful reading "of the leading journals" led one to conclude that "with very few exceptions the action of the mob has been severely condemned."<sup>230</sup> The *Times* also reported that "[i]t is understood that several of the ministers will discuss the mob from their pulpits this morning."<sup>231</sup> The sermon delivered the Sunday after Johnson's murder by Dr. Howard E. Jones, a white Baptist minister in Chattanooga, was an eloquent, poetic condemnation of the work of the mob. The *Daily Times* described Jones as another minister speaking "so manfully and fearlessly . . . against the mob and the nerveless authorities who permitted it to have its way . . . ."<sup>232</sup> Here are a few excerpts from Jones's sermon:

"Whatsoever a man soweth, that shall he also reap."

. . . .

. . . [F]or two hours, [the mob] toiled at the steel bolts which were more loyal to Chattanooga's interest than all of her [citizens]. But where are the police and where are the thousands who should have and could have defended us against an unspeakable disgrace? . . .

. . . .

226. *Wheels of Justice Turn Fast*, *supra* note 44.

227. "God Bless You All—I Am Innocent", *supra* note 198.

228. *Johnson Hanged on Bridge with Rope from Trolley Car*, CHATTANOOGA NEWS, Mar. 20, 1906, at 1.

229. *Aftermath of Lynching*, CHATTANOOGA SUNDAY TIMES, Mar. 25, 1906, at 10.

230. *The Mob and the Law*, CHATTANOOGA SUNDAY TIMES, Mar. 25, 1906, at 12.

231. *Aftermath of Lynching*, *supra* note 229.

232. *Anonymity and Lynchers*, CHATTANOOGA DAILY TIMES, Mar. 29, 1906, at 4.

The worst elements among the white men of this community took over the reins of government. Was this disgrace ever rebuked? Has any arrest of those men who unsheathed their keen blades and struck deadly blows at the very heart of our civilization ever been effected? . . .

. . . .

Ah, no. "Whatsoever a man soweth that shall he also reap."

We had but sown the wind, and were yet to reap the whirlwind. We had cast pearls before the swine, who were presently to trample them in the mire and turn and rend us. We had given the sacred and holy trust of law to dogs, who . . . would presently be fixing their vicious fangs in the throat of our civilization.

. . . .

. . . I maintain that that mob struck more terrible blows at the heart of our civilization than it inflicted upon Ed Johnson. . . .

. . . .

. . . Tell me not, with the pages of history open before me, that a mob ever helps civilization. . . .

. . . .

"Whatsoever a man or a community soweth, that shall he also reap."

Lawlessness begets lawlessness. It always has and always will. Sow an act of lawlessness and you will get a harvest of lawless conditions.<sup>233</sup>

Four days after Dr. Jones gave this sermon, his house was set on fire.<sup>234</sup> No arrests were made in the arson case. No arrests were ever made for the murder of Ed Johnson.<sup>235</sup>

Yet there are moments of moral behavior, even bravery, in the unexpurgated version of Ed Johnson's case, and I have sought to highlight those in this Article. My deeper claim is that when humans tell a story about a complicated event with moral implications, they tend to ignore the parts that make it complicated. We want morality plays that display moral clarity. The unspeakable treatment of blacks in 1906 in America, and particularly in the South, is the story that dominates today, and for good reason. We should always be attentive to the story of how humans treat those whom they have cast in the role of "the other." We saw it in the Holocaust. We see it today in

233. Douglas O. Linder, *A Chattanooga Sermon*, FAMOUS TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/shipp/sermon.html> (last visited June 13, 2011) (sections reordered from original).

234. Linder, *supra* note 200.

235. I searched the newspapers but found no evidence of arrests either for arson or murder. Curriden and Phillips mention no evidence.

the Sudan.<sup>236</sup> It is an inextricable part of the Ed Johnson story. But it is not the full story of the Ed Johnson case.

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236. See *The Darfur Genocide*, UNITED HUMAN RIGHTS COUNCIL (May 26, 2009), <http://www.unitedhumanrights.org/2009/05/darfur-genocide/> (concluding that genocide has killed 400,000 and displaced 2,500,000 since 1993).