LAWYERING IN THE AGE OF LYNCHING

*By Brigitte Meyer**

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CONTENT WARNING

The following article engages critically with issues of racism and racial terror and includes descriptions of violent and traumatic events. This content has the potential to be difficult and/or acutely affect our readers. Throughout this article, racial slurs used in historical primary sources were redacted or replaced. The Law Review and the author acknowledge that the usage of racial slurs by a non-Black author, regardless of the academic nature of the work, is inappropriate.

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INTRODUCTION

Lawyers concerned with justice must confront the social environment in which their legal decisions are made. This was never clearer than in the case of those tasked with defending Black men accused of capital crimes in the lynching-era South. There, formal law stood in tension with what some have termed underlaw: the belief that the benefits of law and the social contract belong only to some, namely white "persons," and that those benefits depend on the subordination of others, particularly Black "subpersons." Under this concept, Black racial subjugation stands not in opposition to America's law, social contract, or ideals but as their necessary foundation. As formal law began to step away from explicit racial subordination by the early twentieth century, the requirements of law and the demands of underlaw diverged. Fearful that law would no longer ensure Black racial subjugation, whites often resorted to public acts of torture and murder as a means of reinforcing the "subpersonhood" and subjugation of Black persons. Even where formal legal proceedings took place, underlaw often infected the process.

When Black men stood accused of crimes against whites, attorneys and other legal actors stepped into the tension between law and underlaw. This article explores that tension and the responses of legal actors through the story of John Henry Sloan, a Black man accused of murdering a white youth in Colquitt County, Georgia, in 1935. Part I defines underlaw and its historical relationship to lynching. Part II recounts the story of John Henry Sloan and explores the effects of underlaw on his community, the legal proceedings leading to his eventual execution, and the legal actors involved. Part III discusses the difficulty of fully assessing the effects of underlaw when extrajudicial violence gives way to proceedings having the appearance of legitimacy under law. Part IV examines the backlash against the Black Lives Matter movement as a contemporary manifestation of underlaw.

I. Law and Underlaw: Overview

Some scholars argue that law, as it is officially codified and expressed in constitutions, statutes, rules, and ordinances, is shadowed by underlaw, a system of racial subordination that undergirds formal law.[1] In this concept, law embodies a community's express social contract: the agreement among the community's members concerning the freedoms, rights, and protections attendant to membership in that community.[2] Our mythology teaches that the American social contract is built on the truth that all people have equal rights and equal value.[3] In reality, only those who the community considers "persons" benefit from the social contract, and the benefits have historically depended upon the exclusion, subjugation, and exploitation of "subpersons" who fall outside of the contract's protection.[4] Underlaw, the belief that this reality reflects the proper state of society is, therefore, not a rejection of principles of law such as the right to life, liberty, and due process; it is the belief that these principles cannot survive in the absence of subordination. Thus, where underlaw holds sway, the subjugation of "subpersons" is not a failure of law; it is the bedrock upon which law and the social contract are built.

From the United States' earliest days and throughout its history, the distinction between "persons" and "subpersons" has been racial.[5] Initially, the law explicitly distinguished between white persons and Black "subpersons," and freedoms, rights, and protections were bestowed or

1 *See, e.g.*, Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?, in* From Lynch Mobs to the Killing State: Race and the Death Penalty in America 21, 33 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

2 *See* Charles W. Mills, The Racial Contract 53–57 (1997).

3 *See* Exec. Order No. 13950, 85 Fed. Reg. 60,683, 60,683–89 (Sept. 22, 2020); *see also* David Cole, *No Equal Justice*, 1 Conn. Pub. Int. L.J. 19, 24 (2001).

4 *See* Daniel Kato, Liberalized Lynching: Building a New Racialized State 13–14 (2015); Mills, *supra* note 2, at 53–57. Historically, "subpersonhood" has been conceived of as a rational or cognitive inferiority intrinsically linked to some characteristic such as gender, ethnicity, culture, or religion. Because, under this conception, "subpersons" lack the defining "human" characteristic of rationality, they cannot be fully human and cannot enjoy the rights and liberties attendant to personhood. Mills, *supra* note 2, at 56, 59. *See also* Barack Obama, A Promised Land 398 (2020) ("[T]he basis of our nation's social order had never been simply about consent . . . it was also about centuries of state-sponsored violence by whites against Black and [B]rown people . . . .").

5 Kaufman-Osborn, *supra* note 1, at 24; *see also* Mills, *supra* note 2, at 53–55, 57–58. So-called subpersons are seen as "humanoid entities who, because of racial phenotype/genealogy/culture are not fully human and therefore have a different and inferior schedule of rights and liberties applying to them. In other words, it is possible to get away with doing things to subpersons that one could not do to persons, because they do not have the same rights as persons." Mills, *supra* note 2, at 56.

withheld on the basis of race.[6] Law and underlaw were in harmony, and there was little need to go outside the formal system of law to reinforce the white supremacy upon which the social contract was seen to depend. The end of slavery moved formal law toward a color-blind social contract and an understanding that freedom could be had without exploitation. However, this did not eliminate white communities' belief that the benefits they enjoyed depended on racial subjugation, or their strongly-felt need for a racially-defined subordinate class.[7] Although Jim Crow laws would enshrine Black "subpersonhood" in civil law for decades to come,[8] criminal law in Georgia had dropped explicit racial distinctions by the 1930s. Even this limited legal color-blindness unsettled those who had always enjoyed the benefits of the racialized social contract. Many held fast to the conviction that their security and well-being—even their very identities[9]—depended on the subjugation and exploitation of nonwhite "subpersons."[10] As the law moved away from this notion, those unwilling to divorce the social contract from racial subordination became uneasy about the law's ability to secure their rights, and they increasingly utilized other methods of reinforcing white supremacy.[11]

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6 *See* A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 975 (1992). For example, the Naturalization Act of 1790 made only "free white person[s]" eligible to become naturalized American citizens. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795). In its infamous *Dred Scott* decision, the United States Supreme Court declared that Black persons had "no rights which the white man was bound to respect." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

7 *See* MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 92–93, 96 (2011).

8 *See, e.g.*, GA. CODE ANN. §§ 18-206, 18-208, 18-201 (1933) (requiring racial segregation on passenger trains and authorizing railroad employees to eject passengers who refused to remain in assigned cars); GA. CODE ANN. § 35-225 (1933) (requiring racial segregation in hospitals); GA. CODE ANN. §§ 53-9902, 53-9903 (1933) (anti-miscegenation laws); KATO, *supra* note 4, at 7; LESLIE V. TISCHAUSER, JIM CROW LAWS xi–xii (2012).

9 The link between Black racial subjugation and white identity can be seen in William Faulkner's short story *Dry September*. In this fictional account, five white men sit in a barber shop in an unnamed Southern town and discuss rumors that a Black man has sexually assaulted a local white woman. When a white barber, a lifelong resident of the town, expresses doubt about the rumors and attempts to dissuade the others from lynching the Black man, the others immediately question his whiteness and his Southern-ness. *See generally* WILLIAM FAULKNER, DRY SEPTEMBER (1931), *reprinted in* THESE THIRTEEN (Random House 2012) (1931).

10 *See* TISCHAUSER, *supra* note 8, at xi–xii.

11 Kaufman-Osborn, *supra* note 1, at 26; *see also* BERG, *supra* note 7, at 92–93; Anne S. Emanuel, *Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle*, 5 WM. & MARY BILL OF RTS. J., 215, 218 (1996) ("[L]ynchings were not

Lynchings, particularly gruesome public spectacle lynchings, served the underlaw of white supremacy by stripping their victims of their literal and figurative humanity.[12] By employing burning and other forms of torture, lynchers sought to deny their victims any semblance of personhood, to emphasize their "subhuman" status, and to drive the message of subjugation home "in the most graphic way possible."[13] Lynching marked Black bodies as belonging to a uniquely subordinate class, outside the protection of formal law, subject to savage and dehumanizing treatment at the hands of the dominating white class.[14] The fact that perpetrators and white communities considered this treatment to be consistent with—or even required by—the law is evident in the tendency of lynch mobs to imbue the grisly proceedings with the trappings of fairness and due process.[15] Contemporary accounts often emphasized the calm, orderly, and dispassionate manner in which the mob carried out its task.[16]

By 1935, Georgia's criminal law required color-blind equality and a state monopoly on lethal violence. Under this law, a person could not be put to death without due process—a dispassionate formal proceeding subject to laws written in the light of day by men who had ostensibly given form to humanity's best impulses.[17] A Black criminal defendant sentenced to death under this system would die, but he would die by electrocution in a state penitentiary, away from the public eye. Early-twentieth-century white communities where underlaw held sway struggled with the question of whether these formal legal proceedings were sufficient to meet the underlaw's demand for Black subjugation. Communities often acquiesced to law only when reasonably assured that that law would guarantee the death of Black defendants.[18] Yet underlaw often demanded more than death. Even where

simply the spontaneous venting of a thirst for retribution. Instead, lynchings were a brutal method of social control that was sanctioned by much of society.").

12 Kaufman-Osborn, *supra* note 1, at 33.

13 *Id.* at 30; Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 Law & Ineq. 263, 282 (2003).

14 *See* Kaufman-Osborn, *supra* note 1, at 33. Although white persons were also lynched, they were rarely killed in spectacle lynchings, and almost never subjected to the kind of torture or mutilation that characterized lynchings of Black persons. *Id.* at 29.

15 *See* Berg, *supra* note 7, at 93–94; Jeffrey L. Kirchmeier, Imprisoned by the Past: Warren McCleskey and the American Death Penalty 135 (2015); Margaret Vandiver, Lethal Punishment: Lynchings and Legal Executions in the South 10–11 (2005).

16 *See, e.g, Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, Thomasville Times-Enter. (Thomasville, Ga.), June 18, 1921, at 1.

17 *See* Kaufman–Osborn, *supra* note 1, at 32.

18 This tension can be seen in early-twentieth-century debates surrounding abolition of the death penalty. Colorado abolished the death penalty in 1897 and reinstated it in

the law guaranteed a Black defendant's death, a community's commitment to the law could be swept away in the face of underlaw's demand for a more violent, public exhibition.

In 1935, John Henry Sloan was accused of killing a white youth in Colquitt County, Georgia. The white community's response demonstrates the power of underlaw, the interaction between law and underlaw, and the effect of underlaw on the legal proceedings that followed.

1901. John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 541, 560 (1992). When lynchings occurred during the intervening years, the Rocky Mountain Daily News editorialized that the legislature "might as well face the fact that in the absence of capital punishment, under the law it is inflicted through the angry mob violence . . . . To prevent the recurrence of such horrors the death penalty should be restored in [Colorado.]" *Id.* at 560–61. "A jury may be relied upon to fix the penalty at death," the editorial continued, "and the certainty that it will do so will stop the blackening of [the state's] name with lynchings." *Id.*

II. Law and Underlaw in Colquitt County, Georgia, 1935: The Story of John Henry Sloan

A. *Prologue: The Lynching of John Henry Williams*

In June 1921, the body of a twelve-year-old white girl was found in a swamp outside Autreyville, Colquitt County, Georgia.[19] John Henry Williams, a Black man, was arrested and charged with the murder. Immediately, a white mob formed, bent on lynching him.[20] Colquitt County Sheriff Tom Beard managed to elude the mob and delivered Williams to authorities in neighboring Thomas County for safekeeping.[21] Its fury unsated, the mob rampaged through the countryside the following night.[22] When a search party looking for Williams descended on the home of Black Autreyville resident, Everet Hill, Hill responded by firing a shotgun at the men.[23] The men returned fire, shooting "scores of shots" into the home occupied by Hill and his family, wounding Hill in the head.[24] Meanwhile, gangs spread out to search jails in nearby Bainbridge, Cairo, and Thomasville, and officials managed to evade the mob only by moving Williams between four county jails over two days.[25]

With the county embroiled in violence, Colquitt County Superior Court Judge W.E. Thomas convened an extraordinary session of the grand jury to investigate the charge against Williams, promising a trial immediately after the almost-certain indictment.[26] The mob, in turn, assured that it would not interfere when Williams was returned for trial to the courthouse in Moultrie, the seat of Colquitt County.[27] The grand jury indicted Williams, and he was tried the next day.[28] Judge Thomas appointed local attorney William Alonzo Covington to defend the accused.[29] After deliberating for less than five minutes, the jury declared John Henry Williams guilty of assault and murder, and Judge Thomas sentenced him to be hanged three

19 *Colquitt Grand Jury Is Called*, Thomasville Times-Enter. (Thomasville, Ga.), June 16, 1921, at 7.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*; *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.
27 *Colquitt Grand Jury Is Called*, *supra* note 19.
28 *Id.*
29 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

weeks later.[30]

Meanwhile, a crowd of about 500 gathered outside the courthouse, and about 20 officials stood ready at the courthouse doors to keep order.[31] Despite this law enforcement presence, when Sheriff Beard escorted Williams from the courthouse, the mob surged forward, "overpower[ing]" him and the other officers.[32] They seized Williams and placed him into a car, and within five minutes, 100 cars or more were streaming from the Moultrie courthouse toward the Autreyville swamp where the young girl's body had been found.[33] There, before a semi-circle of 500 people, Williams allegedly confessed to the murder and assault in an "unconcerned, unemotional manner."[34] The mob then chained Williams to a tree trunk and surrounded him with gasoline-soaked wood.[35] Newspapers reported that Williams calmly smoked a cigarette as the fire was lit but cried aloud as the flames rose.[36] Spectators claimed he sang the hymn "Nearer My God to Thee" as he died.[37]

According to reports, the crowd stood about quietly as Williams's body burned and dispersed without further excitement when he was dead.[38] The lynching was "orderly," one newspaper account reported, with "no noise nor excitement."[39] There was "[n]ot a drop or a smell of whiskey," or a "single gun . . . in evidence."[40] Hundreds returned to the scene to view Williams's remains over the next several days.[41] No attempt was made to

30 *Id.*

31 *Id.*; *Georgia Lynch Hounds Raise Savage Record: Two Southern States Stage Human Sacrifices in One Week*, CHI. DEFENDER, June 25, 1921, at 1.

32 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16. One newspaper account reported that no weapons were present and "no effort was made to injure the officers." *Id.* This report indicates that an officer was slightly injured and his clothing torn as he attempted to fight off the crowd but does not report that Sheriff Beard resisted the mob. *Id.* Another account reported that "the officers gave up the man without a struggle." *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee,"* BALT. AFRO-AM., June 24, 1921, at 1.

33 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

34 *Id.* at 1, 8.

35 *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee," supra* note 32.

36 *Ne[***] Murderer Burned to Death*, *supra* note 16; *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee," supra* note 32.

37 *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee," supra* note 32.; *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

38 *Ne[***] Slayer of Girl Is Burned to Death: Convicted of Murdering Lorena Wilkes, Aged 12, Black Taken from Guards*, ATLANTA CONST., June 19, 1921, at A8; *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

39 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

40 *Id.*

41 *Hundreds View Remains of Body Burned at Stake*, NORFOLK J. & GUIDE (Norfolk, Va.), July

apprehend or punish the persons responsible.[42]

Colquitt County's response to John Henry Williams revealed the tension between law and underlaw and the community's uneasiness with the law's outcomes. Initially, the community demonstrated some commitment to the law. When suspicion landed on Williams for the assault and murder of a white girl, the mob acquiesced to a trial. However, this commitment was fragile and ultimately did not withstand the community's fear that the law would fail to uphold the system of racial subordination. Although the law guaranteed Williams's death, the underlaw of racial subordination demanded not only his death but the annihilation of his personhood. For that, Colquitt County's white residents concluded, a lynching was required. Yet even in the most brutal moments of Williams's lynching, the Colquitt County mob, like many such mobs, paid a distorted homage to the law. Williams's lynchers allegedly extracted a confession from him before burning him, and newspaper accounts emphasized the calm, orderly, dispassionate manner in which the mob carried out its task, a gruesome approximation of the atmosphere of a courthouse.

Fifteen years later, a young intellectually disabled Black man was accused of murdering a white youth, and Colquitt County once again stepped into the tension between law and underlaw, with the life of a Black man hanging in the balance.

B. *The Killing of Ottis Gay and the Hunt for John Henry Sloan*

i. October 15, 1935: The Killing of Ottis[43] Gay

On the morning of October 15, 1935, John Henry Sloan, a young Black farm laborer[44] living in Colquitt County, Georgia, borrowed a shotgun

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2, 1921, at 8.

42 *Chief's Hearing Friday*, Atlanta Const., Jan. 12, 1922, at 3. The following year, taxpayers in Colquitt County petitioned for the removal of J.O. Stewart, chief of the Colquitt County police, on grounds including that he had participated in Williams' lynching. *Id.* A grand jury was convened to investigate the accusations, but the petitioners did not go before the grand jury to present their evidence, and the grand jury declined to summons them. *Colquitt Chief Is Vindicated by Grand Jury*, Atlanta Const., Feb. 1, 1922, at 4.

43 Gay's name is variously spelled "Otis" and "Ottis" in contemporaneous accounts. I have used the spelling that appears on Gay's death certificate. Death Certificate of Ottis Gay (Oct. 15, 1935) (Ga. Dep't of Pub. Health, Registered No. 24794).

44 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors* (NAACP Branch Files I-G43-F4 (GA)); Brief of the Evidence at 7, Sloan v. State, 187 S.E. 670 (Ga. 1936) (No. 11468) [hereinafter Brief of the Evidence].

from a white neighbor to go hunting.[45] After a successful hunt, he made his way to return the gun and encountered a group of white men, who chased him down the road for some distance.[46] This was nothing new for Sloan. The young man had been tormented by white people for as long as he could remember.[47]

That same night, three young white couples went out driving along the same road that Sloan had traveled earlier.[48] They were Ottis Howell Gay, his fiancée Mary Smith, Mary's two cousins Ouida and Janie Smith, and the girls' dates, Ottis's brother, Wallace, and Rossie Lysle.[49] After grabbing some Coca-Colas and cruising around in the car for some time, the couples parked the car on the side of Thigpen Trail and separated.[50] Ottis Gay and Mary Smith walked up the road, away from the others, and sat on an embankment to discuss their upcoming wedding.[51] According to Smith, a Black man approached them while they were talking, pointed a shotgun at them, and pulled the trigger.[52] The others, hearing the shot, ran toward the sound.[53] As they did so, they saw a Black man with something in his hand running past them in the opposite direction.[54] Wallace Gay asked the man to stop, but the man said nothing and kept running.[55] The others ran on and discovered Ottis and Mary "shot all up."[56] They rushed them to a nearby house and from there headed to the hospital. Ottis Gay died in Janie Smith's arms as they carried him to town.[57] None of the white youths identified the shooter.[58]

A farmer who lived nearby heard the gunshot and the women's screams, and he rushed to the scene.[59] He found no one there but saw car tracks and "blood-signs" leading from the location of the shooting to the

45 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.
46 *Tensity at Trial Is Told by Juror*, MACON NEWS (Macon, Ga.), Jan. 28, 1936, at 1, 2; Frank Hawkins, *John Henry Doesn't Know He Is to Die for Slaying*, MACON TEL. (Macon, Ga.), Nov. 18, 1935, at 10.
47 Hawkins, *supra* note 46.
48 Brief of the Evidence, *supra* note 44, at 8.
49 *Id.* at 8–9.
50 *Id.* at 8.
51 *Id.* at 8, 16.
52 *Id.* at 16.
53 *Id.* at 9.
54 *Id.* Gay testified that the moon was bright enough on that night to distinguish a Black man from a white man. *Id*. at 10.
55 *Id.* at 9.
56 *Id.*
57 *Id.* at 9, 14.
58 *Id.* at 7–14.
59 *Id.* at 14–15.

car.[60] He also found a shotgun shell by the side of the road, which he gave to a Colquitt County deputy sheriff.[61] Soon after, Colquitt County Sheriff Tom Beard arrived on the scene. He observed the blood on the ground and then went to the nearby home of Monroe Jackson.[62] As Sheriff Beard knew, there was a young Black man working for and living with Jackson—John Henry Sloan.[63] Sheriff Beard learned that Sloan had borrowed a shotgun from a neighbor that morning and had returned the gun and a single shell shortly after eleven o'clock that night.[64] He organized a manhunt for Sloan.[65]

ii. The Search Begins; The Killing of Bo Brinson

With John Henry Sloan now presumed to be Ottis Gay's killer, law enforcement and the local community quickly mobilized to find him. Posses roamed the countryside the following night, eventually arriving at a rural home where several men were keeping watch.[66] One of these men was a Black farm laborer named Bo Brinson.[67] When the posse arrived to search the farmhouse where he was staying, Brinson allegedly ran into the open and grappled with one of the armed men.[68] Members of the posse beat Brinson, shot him several times in the head and chest, and left.[69] One of the other men in the house covered Brinson with a quilt until he could be carried to the hospital, where he died the next morning from a rifle shot to the head.[70]

60 *Id.* at 15.

61 *Id.* at 15.

62 *Id.* at 17.

63 *See id.* at 5–6, 17. It is unclear whether Mary Smith or the other youths had identified the shooter as a Black man to Sheriff Beard when he went to Monroe Jackson's home.

64 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.

65 *Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, Thomasville Times-Enter. (Thomasville, Ga.), Oct. 16, 1935, at 1.

66 *See Ne[***] Sought for Death of Moultrie Man Apprehended*, Thomasville Times-Enter. (Thomasville, Ga.), Oct. 29, 1935, at 1; *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, Thomasville Times-Enter. (Thomasville, Ga.), Mar. 24, 1936, at 1.

67 Letter from W.A. Covington, to Commission on Interracial Cooperation (Mar. 27, 1936), *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l).

68 *Coroner's Jury Probes Death of Ne[***] Shot by Colquitt Posse*, Thomasville Times-Enter. (Thomasville, Ga.), Oct. 18, 1935, at 1.

69 NAACP, Lynching Record for 1935: Supplement No. 17 to Thirty Years of Lynching in the United States, 1889-1918 (on file at Yale Univ.), https://collections.library.yale.edu/catalog/2077126; *Ne[***] Is Slain by Georgia Posse*, Decatur Daily (Decatur, Ga.), Oct. 17, 1935, at 1.

70 Death Certificate of Bo Brinson (Oct. 17, 1935) (Ga. Dep't of Pub. Health, Registered No. 24802); *Coroner's Jury Probes Death of Ne[***] Shot by Colquitt Posse*, *supra* note 68.

Sheriff Beard was notified of Brinson's death, and he made arrangements for a coroner's inquest that afternoon.[71] However, the witnesses to the killing were unwilling or unable to identify Brinson's killers, and the coroner's jury returned a verdict that he had "come to his death 'through parties unknown to this body.'"[72] With this, the community ended its efforts to bring to justice those responsible for Brinson's death.

iii. John Henry Sloan's Arrest and Indictment

In the wake of Brinson's death, the hunt for John Henry Sloan continued, and no effort was spared in the attempt to find him. Armed civilian posses scoured the area for the alleged "slay[er]" for two weeks following Brinson's murder.[73] They tore through Colquitt and surrounding counties, eventually ranging as far south as Tallahassee, Florida.[74] Officials from Macon, 130 miles distant, were enlisted to join the hunt.[75] On October 28, 1935, local officials located John Henry Sloan near Havana, Florida, and delivered him to Sheriff Beard.[76] When Sheriff Beard brought Sloan back to Georgia, the mob that had killed Brinson attempted to lynch him; Beard was only able to thwart their efforts by moving Sloan forty miles away to a jail in Albany.[77]

With the mob held at bay for the time being, Judge W.E. Thomas of the Colquitt County Superior Court convened a grand jury, which quickly indicted Sloan.[78] Judge Thomas set Sloan's trial to take place in Moultrie on November 14, 1935, less than three weeks later.[79] He appointed William Alonzo Covington to represent the defendant, as he had fifteen years earlier

71 *Ne[***] Shot to Death by Colquitt County Posse Last Night*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Oct. 17, 1935, at 6. A coroner's inquest is "[a]n inquiry by a coroner or medical examiner, sometimes with the aid of a jury, into the manner of death of a person who has died under suspicious circumstances, or who has died in prison." *Inquest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

72 *Coroner's Jury Probes Death of Ne[***] Shot by Colquitt Posse*, *supra* note 68.

73 *See Ne[***] Sought for Death of Moultrie Man Apprehended*, *supra* note 66.

74 *Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, *supra* note 65; *Ne[***] Shot to Death by Colquitt County Posse Last Night*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Oct. 17, 1935, at 6.

75 *Half-Witted Killer Is Sought by Police*, MACON TEL. (Macon, Ga.), Oct. 23, 1935, at 5.

76 *Ne[***] Sought for Death of Moultrie Man Apprehended*, *supra* note 66.

77 *See id.*; *Demented Man, Twice Saved from Mob, to Die*, PITTSBURGH COURIER, Apr. 4, 1936, at 7.

78 Brief of the Evidence, *supra* note 44, at 2–4.

79 *Ne[***] Is Found Guilty Today at Moultrie*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Nov 14, 1935, at 1.

with John Henry Williams.[80] Covington, Judge Thomas, and the other legal actors charged with the task of upholding the law and ensuring justice would once again have to navigate the relationship between law and underlaw in Colquitt County.

iv. Accepting the Appointment

From the moment Judge Thomas appointed him to represent Sloan, the tension between law and underlaw created difficult decisions for Covington, including the decision of how vigorously to defend his client. Fears of social opprobrium, loss of business, and even physical harm often kept Southern attorneys from willingly representing Black clients in inflammatory cases.[81] When white mobs clamored after a lynching, their community might condemn the accused's attorney not only for preventing the speedy resolution sought by the lynch mob but for disparaging the community's chosen form of justice.[82] White attorneys who took up the defense of such clients could be perceived as traitors to their race and culture, bringing threats of violence against them.[83] In this climate, many attorneys preferred to avoid these cases altogether, with some even refusing to take appointments.[84] Others demanded that judges appoint more than one attorney so as to diffuse the stigma of representing Black criminal defendants.[85]

Covington chose to accept the task of defending Sloan and to take it on alone, a choice that may have been a function of his circumstances, his beliefs, or both. For one, Covington may not have anticipated much harm to his career or reputation. By 1935, Covington was sixty-six years old and had enjoyed decades of professional, political, and social success in Colquitt County and across South Georgia.[86] Within four years of arriving in Moultrie as a newly-minted attorney, he had been appointed the first judge of the

80 Letter from W.A. Covington to Harry S. Strozier, Commission on Interracial Cooperation (Nov. 30, 1935), *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l).

81 *See* Emanuel, *supra* note 11, at 226 nn. 65–66, 236; *see also* Alex Heard, The Eyes of Willie McGee 82 (2010). Covington's life was apparently threatened as a result of his defense of Sloan. *Witnesses Tell of Sloan's Trial*, Macon Tel. (Macon, Ga.), Jan. 28, 1936, at 1–2.

82 Emanuel, *supra* note 11, at 236.

83 *See* Heard, *supra* note 81, at 161, 167, 178.

84 *See* Michael J. Klarman, *Scottsboro*, 93 Marq. L. Rev. 379, 383 (2009).

85 *See* Emanuel, *supra* note 11, 226–27.

86 *See Death Claimed Judge Covington at Moultrie Home*, Thomasville Times-Enter. (Thomasville, Ga.), June 25, 1945, at 4. Covington was born on January 19, 1869. W.A. Covington, History of Colquitt County 104, 242–43 (1937).

Moultrie City Court, a role in which he was described as "uncommonly able."[87] He resigned his judgeship in 1904 to campaign for a seat in the state legislature, where he eventually served four terms.[88] He was elected to two non-consecutive terms as mayor of Moultrie in 1919 and 1921, and although unsuccessful, he ran for seats in both the United States Senate and House and was at least once put forth as a potential candidate for governor.[89]

As a lawyer and a legislator, Covington believed in the law's ability to bring about justice. He spent years in the Georgia legislature fighting for laws to address what he saw as the greatest concerns of the time—intoxicating liquors, convict leasing, child labor, and women's suffrage.[90] He advocated for changes to the law to address lynching.[91] He spent decades defending clients in courts of law.[92] At the same time, he recognized that law could be an imperfect tool and even a means of perpetuating injustice.[93] As for Covington's view of the Colquitt County community, he saw them as "the most law-abiding in the world" (as long as they remained sober) and believed

87 W.A. COVINGTON, *supra* note 86, at 104, 243; *Death Claimed Judge Covington at Moultrie Home*, *supra* note 86, at 4; *Letters of Congratulation Pour In on Bishop Candler*, ATLANTA CONST. (Atlanta, Ga.), Sept. 15, 1903, at 6.

88 *Judge W.A. Covington Resigns*, ATLANTA CONST. (Atlanta, Ga.), Mar. 19, 1904, at 2. Covington served two terms in the Georgia legislature from 1905 to 1908, and two more in 1919–20 and 1923–24. W.A. COVINGTON, *supra* note 86, at 243.

89 *Elected Mayor*, ATLANTA CONST., Oct. 6, 1921, at 4; *Covington Announces to Run for Congress*, ATLANTA CONST., Oct. 4, 1913, at 5; *Governor Smith Elected Senator by Big Majority*, ATLANTA CONST., July 13, 1911, at 1; *Covington for Governor if Hoke Smith Wants Toga*, ATLANTA CONST., Aug. 4, 1907, at B5.

90 *See The Chairman Broke the Tie*, ATLANTA CONST., July 8, 1919, at 8; *Laborer Worthy of Hire; In a Sense Responsible for Wrongs He Suffers*, ATLANTA CONST., Sept. 7, 1909, at 12; *Lease System Is Condemned*, ATLANTA CONST., July 27, 1908, at 3; *Will Introduce Prohibition Bill*, ATLANTA CONST., July 13, 1905, at 9.

91 Covington believed that giving the governor authority to remove sheriffs who refused to resist lynch mobs and to send National Guard troops on his own initiative would prevent nine-tenths of lynchings. W.A. Covington, *A Way to Stop Lynchings*, ATLANTA CONST., Mar. 14, 1918, at 8; W.A. Covington, *To Stop Lynchings, Give the Governor More Power*, ATLANTA CONST., Feb. 8, 1916, at 8.

92 *See Death Claimed Judge Covington at Moultrie Home*, *supra* note 86, at 4.

93 In a 1909 Labor Day speech, he proclaimed: "The laboring man in America has been plundered under forms of law. His burdens have been placed upon him by the assistance of government, state and national . . . I can recall to mind no demand made by organized labor in any form in Georgia not in harmony with the plainest mandates of justice." *Laborer Worthy of Hire; In a Sense Responsible for Wrongs He Suffers*, *supra* note 90, at 12. Later that year, in a letter to the editor of the Atlanta Constitution, he denounced "government favoritism," which created two classes of citizens, the specially-privileged and "the class that is plundered under forms of law." *New Line Up, Says Covington, Letters from People*, ATLANTA CONST., Nov. 18, 1909, at 8.

lynching was the act of a small, contemptible minority of the population.[94]

v. Change of Venue

Upon choosing to proceed as Sloan's counsel, Covington had to decide whether he could trust his community to deliver justice for his client, in essence divining the ultimate outcome of the tension between law and underlaw. The Code of Georgia of 1933 allowed criminal defendants to move for a change of venue if they believed an impartial jury could not be empaneled in the county where the crime was alleged to have been committed.[95] A judge was obligated to grant such a motion upon a reasonable showing that danger of lynching or other violence existed in that county.[96] Given that posses searching for Sloan had already killed another man and a lynch mob had forced officials to move Sloan out of the county,[97] Covington easily could have supported a motion for change of venue. Yet he chose not to, opting instead to place Sloan's fate in the hands of a Colquitt County jury—an extraordinary gamble for any attorney seeking justice for a client in Sloan's situation.

Covington evidently believed the white residents of Colquitt County would permit the law to take its course. Perhaps this reflected Covington's deep confidence in the community he loved, bolstered by a white attorney's blindness to how deep and strong the currents of the underlaw ran.[98] It is also possible Covington saw a prompt local trial as the only way to forestall the continued violence endangering his client.[99] For a white Southern community, the promise of a speedy trial for a Black defendant often formed a negotiation of sorts between the law and the underlaw: the mob would agree to abandon lynching efforts if the law guaranteed the defendant's execution.[100] But the truce was tenuous; any indication that the accused's

94 *A Way to Stop Lynchings*, *supra* note 91; *Letters of Congratulation Pour In on Bishop Candler*, *supra* note 87.

95 Ga. Code Ann. § 27-1201 (1933).

96 *Id.*

97 *Demented Man, Twice Saved from Mob, to Die*, *supra* note 77.

98 Many years before, before John Henry Williams's lynching, Covington had declared that "[o]ur people, white and black, are the most law-abiding in the world when sober." *Letters of Congratulation Pour In on Bishop Candler*, *supra* note 87, at 6. Even after Sloan's trial he expressed a belief that there were "plenty of folks" in the community who deplored the idea of lynching Sloan. Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.

99 Covington may have also feared for his own safety. At least one lynching-era attorney reported receiving death threats as a result of moving for a change of venue. Heard, *supra* note 81, at 82.

100 In 1919, an Arkansas town erupted into violence after a group of white men attacked

death was uncertain or would be delayed could result in reignited violence. Perhaps Covington sensed that Colquitt County's commitment to the law was fragile in this way—that it would hold only insofar as the law promised to deliver Sloan's death. He may have realized Sloan was almost certainly doomed and, by ensuring a swift trial, sought only to increase his client's chances of a comparatively sterile death in the electric chair over a grislier end.

vi. National Guard Protection

Another decision that required Covington and Judge Thomas to assess Colquitt County's relationship with law and underlaw was whether to seek National Guard protection at Sloan's trial. Georgia statute provided that a judge or city official who anticipated an outbreak of violent opposition to the enforcement of the law could petition the governor for assistance from the National Guard.[101] The Georgia National Guard had prevented lynchings before,[102] but seeking Guard involvement was not without risk. Calling out the Guard could inflame tensions and set up a standoff that put white citizens at risk in a way that a lynch mob did not.[103] Attempts to avert a lynching could also bring hatred and threats of violence down on white

and fired on a group of Black people who had gathered to discuss the extortionary practices of local landowners. Moore v. Dempsey, 261 U.S. 86, 87–88 (1923). In the aftermath, a white man was killed. *Id.* at 87. Several Black men were arrested for the murder, and according to these men, a governor's committee appointed to investigate the violence kept a lynch mob at bay by promising to execute the accused. *Id.* at 88–89. The committee "whipped and tortured" Black witnesses into implicating the men, who were then tried and convicted of murder in a trial lasting less than one hour. *Id.* at 89. The convicted men alleged that "no juryman could have voted for an acquittal and continued to live in [the county], and if any prisoner by any chance had been acquitted by a jury, he could not have escaped the mob." *Id.* at 89–90. When it seemed some of the defendants' sentences might be commuted, the local American Legion appealed to the governor in anger, saying that "a solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." *Id.* at 90. The local Rotary Club and Lions Club, purportedly representing dozens of leading industrial and commercial enterprises, passed resolutions supporting the statement. *Id.*; *see also* Downer v. Dunaway, 1 F. Supp. 1001, 1002 (M.D. Ga. 1931); Emanuel, *supra* note 11, at 228–29.

101 GA. CODE ANN. § 86-1302 (1933).

102 For example, concerted efforts by the Georgia National Guard prevented the lynching of six Black men accused of raping and assaulting a young woman in Elberton, Georgia in 1931. Emanuel, *supra* note 11, at 223–26.

103 *A Just Judge*, N.Y. AGE (N.Y.C., N.Y.), July 6, 1911, at 4.

guardsmen.[104] These threats to white citizens factored into white officials' decisions to request Guard presence at trials, and some judges were hesitant to call on troops, preferring to sacrifice the lives of Black citizens than to risk a confrontation that would potentially endanger whites.[105] A white person's death at the hands of the law's efforts to protect a Black "criminal" would be abhorrent to the conception of the social contract in a community whose need to satisfy the underlaw had brought it to the brink of a lynching. Such an outcome might lead to a total rejection of the law. Furthermore, a request for National Guard presence signaled officials' mistrust of the local community. This could be perceived as skepticism about the community's willingness to abide by the law or a repudiation of its chosen form of so-called justice. In either case, the implication could breed resentment, and resentment could poison a jury.

Covington and Judge Thomas had to weigh these concerns—along with their memory of what had happened to John Henry Williams—and decide whether they trusted Colquitt County to follow through with a fair trial and to accept the outcome. Ultimately, the "serious and alarming" threat of disorder led the men to appeal to the governor for National Guard protection at Sloan's trial.[106] Governor Talmadge granted the request and sent two companies of the Georgia National Guard under the command of Adjutant General Lindley Camp to avert possible mob violence against Sloan.[107]

C. *John Henry Sloan's Colquitt County Trial*

On the morning of November 14, 1935, a six-truck convoy of the 122nd infantry of the Georgia National Guard delivered John Henry Sloan from the Dougherty County jail in Albany to the Colquitt County

104 After guardsmen prevented a lynching in Elberton, Georgia in 1931, local whites threatened to kill a soldier who had shot and wounded a local white man in the fracas. Emanuel, *supra* note 11, at 223–26.

105 Georgia judge and future United States Senator Charles Hillyer Brand proclaimed in 1911 that he "would not imperil the life of one white man to save the lives of a hundred Ne[***] rapists." He would never forgive himself, he said, if he called out the militia and some young soldier or white citizen were killed. *A Just Judge*, *supra* note 103, at 4.

106 George D. W. Burt, *Troopers Guard Ne[***] at Trial in Moultrie*, Thomasville Times-Enter. (Thomasville, Ga.), Nov. 14, 1935, at 1. Sheriff Beard, for his part, considered the National Guard unnecessary; he believed he and a squad of deputies could keep order. This was not like what happened with John Henry Williams, he claimed—this time there was no organized plan to lynch the accused. *Witnesses Tell of Sloan's Trial*, Macon Tel. (Macon, Ga.), Jan. 28, 1936, at 1.

107 Burt, *supra* note 106.

Courthouse in Moultrie.[108] Thousands gathered on the courthouse square,[109] and over 100 guardsmen took up positions in and around the courthouse.[110] Sloan was escorted to his trial between lines of guardsmen.[111]

i. Trial Testimony

With the threat of violence looming outside, the trial lasted only hours.[112] In an effort to minimize mob violence and "complete all details as hurriedly as possible," Judge Thomas started the trial at nine thirty in the morning and ordered that it continue straight through the noon recess without a break.[113] Solicitor General George Lilly of Georgia's Southern Circuit prosecuted the case.[114] By all accounts, the most dramatic moment of the trial was Mary Smith's testimony of the events surrounding her fiancé's death, but no transcript of the trial survives, and accounts differ as to the details of this testimony. According to several newspapers, Smith claimed no words were exchanged between the couple and the gunman before the gunman fired his shot.[115] Another paper reports Smith testified that when she and Ottis Gay looked up and saw a man standing before them with a gun, Gay said, "Don't do that," and the gunman replied, "Yes, I will, too."[116] The same author later reported that Smith claimed the gunman told them, "I'm gonna shoot you both."[117]

The prosecution also called the other four white youths who had been with Ottis Gay and Mary Smith on the night of October 15. They all corroborated the story that they had taken a car ride that night and that Ottis Gay and Mary Smith were sitting alone, out of sight of the others, when they were shot.[118] They testified that they had heard a shot and "saw a Ne[***] run past them," but none saw the shooting or were able to identify

108 *Id.*

109 *Soldiers Rout Mob with Gas*, WASH. POST, Nov. 15, 1935, at 1; *Witnesses Tell of Sloan's Trial*, *supra* note 106.

110 *Slayer Gets Death Ballot in Moultrie*, MACON TEL. (Macon, Ga.), Nov. 15, 1935, at 1.

111 Burt, *supra* note 106.

112 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.

113 *Id.*

114 *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

115 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44; Burt, *supra* note 106. This is consistent with accounts of the police interview of Smith on October 16, the day after the shooting. *Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, *supra* note 65.

116 George D. W. Burt, *Untitled*, MACON TEL. (Macon, Ga.), Nov. 15, 1935, at 8.

117 *Id.*

118 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.

the man who ran past.[119] Sloan's neighbor testified that Sloan had borrowed a shotgun and two shells from him that morning and returned the gun and a single shell shortly after eleven o'clock that night.[120] Sloan's employer Monroe Jackson testified that Sloan had borrowed shells from him as well and had returned late that night for his clothes.[121]

As a criminal defendant, Sloan was prohibited by law from testifying under oath.[122] In an unsworn statement given on the stand, he stuttered, "I didn't aim to hit nobody with the shot[.]"[123] He stated that some white men in an automobile had chased him on the same road earlier on the day of the murder, so when he encountered two persons sitting by the road later that evening and heard one of them say, "There goes a Ne[***]," he feared for his life.[124] He said he shot because he was "afraid they were going to do something to [him.]"[125] After firing the shot, he said he returned the gun to his neighbor, got his clothes, and went to a party with a companion.[126] He then went to Cairo, Georgia, to visit his sick mother, and from there to Havana, Florida, where he was apprehended.[127]

ii. Defense Strategy

Covington did not argue that Sloan had not killed Ottis Gay.[128] Instead, he chose to focus on Sloan's limited mental capabilities, introducing testimony by the county health officer that Sloan was a "moron" with "the mental capacity of a twelve-year-old."[129] By doing so, he may have been attempting to argue that Sloan was not of sound mind and thus could not be held criminally responsible for Gay's killing. Alternatively, he may have been arguing that Sloan lacked the capacity to distinguish right from wrong, a necessary condition for criminal liability. No surviving record illuminates Covington's reasoning for this approach. It is possible he hoped that, by focusing on Sloan's identity as a "moron," he could shift focus from his

119 *Id.*
120 *Id.*
121 *Id.*
122 "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it." GA. CODE ANN. § 38-415 (1933).
123 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.
124 *Guardsmen Disperse Georgia Mob*, ATLANTA DAILY WORLD, Nov. 15, 1935, at 6.
125 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.
126 *Id.*
127 *Id.*
128 Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.
129 *Id.*

identity as a Black man, thereby casting him as a "special case" rather than a Black everyman whose death was required to reinforce Black subjugation.

Whatever Covington's motivation, even absent the exacerbating factor of racial animus, a mental incapacity defense was unlikely to succeed. Under the Georgia Code of 1933, so-called "idiots" (as well as "lunatics" and "persons insane") were deemed to be of unsound mind, and consequently, these persons could not be found guilty of any crime or misdemeanor.[130] All others, including so-called "morons," were presumed to be of sound mind.[131] Rebutting the presumption required a defendant to show by a preponderance of the evidence that he lacked the ability to distinguish right from wrong.[132] By introducing testimony that Sloan had the mind of a child, it appears Covington may have been attempting to prove this.[133]

However, whether Covington sought to prove that Sloan was categorically of unsound mind by virtue of being a "moron," or that as an individual, he lacked the capacity to distinguish between right and wrong, he stood little chance of succeeding. Just a few years earlier, a Georgia jury had convicted and sentenced to death an eighteen-year-old white man, despite testimony from a University of Georgia psychology professor that he had a "mental age" of no more than nine or ten.[134] In another case where "[t]he

130 GA. CODE ANN. §§ 102-104, 26-301, 26-303 (1933). In the early twentieth century, terms like "moron" and "idiot" had quasi-scientific significance. The eugenics movement of the late nineteenth and early twentieth century had brought the advent of IQ testing and the development of an IQ-based classification of persons with intellectual disabilities. The terms "idiot," "imbecile," and "moron" were terms used to identify three levels of disability, with IQ-cutoff scores of 25, 50, and 75, respectively. This scale was also considered to correspond with a person's "mental age." "Idiots" were those with a mental age of up to two years, "imbeciles" had a mental age between three and seven, and "morons" had a mental age of eight to twelve years. At the time of Sloan's trial, the term "idiot" had legal significance—denoting those who were totally ignorant or lacked the use of reason—but "imbecile" and "moron" did not. *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots*," 124 YALE L.J. 2746, 2764 (2015); Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 438 (1939); *see* GA. CODE ANN. § 38-1610 (1933). The early-twentieth-century enthusiasm for IQ theory, craniology, phrenology, and other pseudoscientific methods of measuring intelligence was driven in part by the desire to confirm the purported nonwhite intellectual inferiority that justified racial subjugation. *See* Mills, *supra* note 2, at 60.

131 *See* Murray v. State, 39 S.E.2d 842, 846–47 (Ga. 1946); Summerour v. Fortson, 164 S.E. 809, 814 (Ga. 1932).

132 *See Murray*, 39 S.E.2d at 847; *Summerour*, 164 S.E. at 814.

133 *See* Letter from W.A. Covington to Harry S. Strozier, *supra* note 80. No transcript of this trial has survived, and the exact nature of the defense strategy is unclear from the available record.

134 *See Summerour*, 164 S.E. at 814. In affirming the trial court's denial of a new trial, the Georgia Supreme Court held that proving a "degree of mentality [no] greater than

evidence amply authorized a finding that [the defendant] was an idiot (and a dangerous one at that)," a jury nonetheless found he had sufficient ability to distinguish right from wrong and convicted him.[135] Two years after Sloan's trial, a Georgia jury convicted a white man of burglary despite a physician's testimony that, although the defendant could distinguish right from wrong, he lacked the mental stability to keep from doing the wrong thing.[136] In fact, juries nationwide consistently rejected defendants' efforts to show a lack of criminal responsibility with evidence of low IQ or young "mental age."[137]

iii. Race and Perceptions of Intellectual Capacity

Furthermore, whether Covington intended it to or not, race and underlaw infected discussion of Sloan's mental capacity. Even before the trial began, Covington found potential witnesses thinning out, unwilling to testify to their assessment of Sloan's mental capacity for fear of the "lynching element" in Colquitt County.[138] "Oh, yes, he knows enough to keep from killing a white man," they told Covington as they faded away.[139] Even those who did testify did not go as far as Covington would have liked in describing Sloan's lack of mental capacity, and there was a racial cast to much of their testimony.[140] The county health officer, a physician who had talked with Sloan but not conducted a formal assessment, concluded that Sloan was a "moron" whose mental capability was "a little below the average mentality of a Ne[***]."[141] Another physician who had spoken with Sloan and examined the shape of his head agreed that Sloan had the mentality of a twelve-year-old but testified that he was a "moron" of the

that of a child" would not relieve a defendant of responsibility of a crime unless the defendant also proved he was unable to distinguish between good and evil. *Id.*

135 *See* Bridges v. State, 158 S.E. 358, 358 (Ga. Ct. App. 1931).

136 Johnson v. State, 189 S.E. 386, 386 (Ga. Ct. App. 1937).

137 "Following the popularization of intelligence tests early in [the twentieth century], defendants frequently sought to use the 'mental age' component of test results to seek exculpation based on analogy to the legal rules governing children whose chronological age compared with the defendant's mental age. These attempts were universally unsuccessful." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 435 (1985) (citing illustrative cases from New Jersey, Arkansas, Illinois, Massachusetts, Vermont, and Pennsylvania, decided between 1919 and 1931); *see also* Woodbridge, *supra* note 130, at 441–48.

138 Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.

139 *Id.*

140 Although no detailed record of the testimony at Sloan's first trial survives, a summary of the testimony given at his second trial is revealing on this point. There is no indication that testimony materially changed between the first and second trials.

141 Brief of the Evidence, *supra* note 44, at 20.

type who would know the difference between right and wrong if confronted with a dangerous situation.[142] "I think he ought to know it is wrong to kill a man," he concluded.[143]

The prosecution's witnesses also may have weighed in on Sloan's intellectual capacity. Sloan's employer testified later that Sloan "had as much sense as the average Ne[***] farmer" and could differentiate right and wrong.[144] Sheriff Beard, who had spoken to Sloan on several occasions after his arrest, concluded that Sloan was "short mentally" and "not . . . a normal Ne[***]," but had enough sense to tell right from wrong in a circumstance of surprise and fright.[145]

As these witnesses' testimony shows, to win an acquittal for Sloan on the basis of his diminished intellectual capacity, Covington would have had to overcome not only a law that failed to give special solicitude to the intellectually disabled but a widespread assumption that "low mentality" was simply normal for Black people. The comments of the trial witnesses reveal that, when assessing Sloan's abilities, they compared him not to themselves, to their social peers, or to a universal standard of intelligence, but to a lower "Ne***" standard. Sloan may have possessed limited mental abilities, they reasoned, but he was at most a small step below any other Black man in the community, and other Black men certainly understood enough not to shoot a white man. Not only this, but to conclude that a man "a little below the average mentality of a Ne[***]" lacked the capacity to be held criminally responsible would come perilously close to saying that Colquitt County's thousands of other Black residents, over a quarter of the population, were similarly incapacitated.[146] In a world where Blackness and criminality were inexorably linked in the minds of whites, this conclusion was inconceivable.[147]

142 *Id.* at 21.

143 *Id.*

144 *Id.* at 5, 7.

145 *Id.* at 19. The solicitor general also agreed that Sloan was "not all there," but nonetheless refused to accept a plea for a life sentence. Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.

146 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FIFTEENTH DECENNIAL CENSUS OF THE UNITED STATES: 1930, POPULATION, VOLUME III, PART 1, at 481 (1932), https://www.census.gov/library/publications/1932/dec/1930a-vol-03-population.html.

147 Whites' unwillingness to allow Black criminal defendants to escape death through diminished capacity arguments can be seen in the case of Willie McGee, a Black man accused of raping a white woman in Laurel, Mississippi in 1945. During McGee's trial he had been portrayed as an "imbecile," barely able to speak. Following McGee's conviction and death sentence, newspapers reported that McGee had attempted a violent escape from the county jail. These reports, potentially fabricated, sought to undermine the claim that McGee suffered from any mental incapacity that would

In focusing on Sloan's mental capacity, Covington may have sought to convince the jury that Sloan was not of sound mind and could not be held criminally liable. It is more likely that he understood his community, and his hopes reached no further than a recommendation of mercy. A murder conviction carried a death sentence, but a jury could recommend mercy, in which case the defendant would be sentenced to life imprisonment.[148] The recommendation was at the discretion of the jury, and any evidence introduced during the guilt or innocence phase of the trial could potentially influence sentencing. By introducing evidence of Sloan's limited mental capabilities, Covington's strategy may have been to convince the jury to conclude that it was unjust to execute a man with the mind of a child. Here, however, Covington fought a losing battle. The men deciding Sloan's sentence were also the men that heard Mary Smith's tearful account of her young fiancé's death, a testimony unlikely to incline their hearts toward mercy. Furthermore, the demands of the underlaw—the need to make an example of Sloan and drive home the message of white supremacy—might have easily overwhelmed any mercy the jury felt toward him as an individual, especially with a lynch mob gathering in the courthouse square.

iv. The Verdict and the Mob's Response

Outside the courthouse, the day had begun quietly, but tension mounted as the trial progressed.[149] One newspaper reported that murmurs of "lynch him" began in the crowd while the jury was deliberating.[150] These murmurs grew to shouts when a rumor began circulating that Mary Smith had collapsed while testifying.[151] This display of a young white woman's suffering strained, nearly to the breaking point, whatever commitment to the law the community had felt to that point. Shouts of "[t]ake him out and lynch him and save expense" were heard from the crowd, and "[t]ake him away in spite of the troops—they have instructions not to shoot[.]"[152] Covington's son reported hearing persons in the crowd calling for his father's death, as well as for Sloan's.[153]

Inside the courthouse, Sloan's case went to the all-white jury at

stand between him and the electric chair. HEARD, *supra* note 81, at 63–64.

148 GA. CODE ANN. § 26-1005 (1933).

149 *Guardsmen Disperse Georgia Mob*, *supra* note 124.

150 *Dixie Lynch Mob Routed by Soldiers,* N. Y. AMSTERDAM NEWS (N.Y.C., N.Y.), Nov. 23, 1935, at 11.

151 *See id.*

152 *Witnesses Tell of Sloan's Trial, supra* note 81.

153 *Id.*

about one o'clock in the afternoon, and the jury deliberated for nearly two hours.[154] Perhaps Covington felt hopeful about what was an unusually long deliberation for a Black defendant in a capital case—after all, Williams's jury had been out for only five minutes.[155] However, any such hopes were ill-placed; the jury returned a verdict of guilty without a recommendation of mercy.[156] Judge Thomas sentenced Sloan to die by electric chair three weeks later, on December 10.[157] Sloan allegedly "exhibited no emotion . . . when the verdict was read and sentence pronounced."[158]

Sloan was taken from the courthouse in manacles, and the crowd surged toward the lines of guardsmen shouting, "Get him!"[159] As the guardsmen struggled to bring Sloan to a waiting convoy of vehicles, a melee broke out.[160] Guardsmen used fists, rifle butts, and tear gas to subdue the mob as they attacked with sticks and stones.[161] Several persons were beaten by gun butts and another cut by a bayonet.[162] Sloan was eventually brought through the fray unharmed and rushed by motor convoy to the Bibb County jail in Macon.[163]

154 *Guardsmen Disperse Georgia Mob*, *supra* note 124; Letter from E. Sprye, President, Albany Georgia NAACP, to Walter White (Nov. 22, 1935) (NAACP Branch Files I-G43-F4 (GA)). Although it had been established for more than fifty years that systematic exclusion of Black citizens from a jury violated a criminal defendant's right to equal protection, six months before Sloan's trial, the United States Supreme Court in *Norris v. Alabama* lowered a defendant's burden to show that Black jurors were wrongfully excluded. Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880). However, even under *Norris*, a defendant had to prove that there were Black citizens eligible for jury service in the county, and that they were excluded from the jury rolls. Such a challenge was likely to inflame a jury (the motion in *Norris's* trial provoked open death threats on his attorney) and would place at substantial risk any Black resident who dared testify to his exclusion from the rolls. Such a motion would also almost certainly fail. Black people were excluded from the jury rolls in Colquitt County, but Covington never challenged the exclusion of Black people from Sloan's jury, perhaps for these reasons. *See* Emanuel, *supra* note 11, at 239–40.

155 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville, supra* note 16. *See also* Emanuel, *supra* note 11, at 231–32.

156 *Soldiers Rout Mob with Gas*, *supra* note 109; *Guardsmen Disperse Georgia Mob*, *supra* note 124.

157 *Dixie Lynch Mob Routed by Soldiers*, *supra* note 150.

158 *Guardsmen Disperse Georgia Mob*, *supra* note 124.

159 *Dixie Lynch Mob Routed by Soldiers*, *supra* note 150.

160 *Troops Save Ne[***] from Georgia Mob*, N.Y. TIMES, Nov. 15, 1935.

161 *Id.*; *Dixie Lynch Mob Routed by Soldiers*, *supra* note 150.

162 *Soldiers Rout Mob with Gas*, *supra* note 109; *Guardsmen Disperse Georgia Mob*, *supra* note 124.

163 *Ga. Convict, Unaware of Death Sentence, Feels Safer in Pen.*, BALT. AFRO-AM., Nov. 30, 1935, at 1.

v. Post-Trial Motion: Judge W.E. Thomas, Law, and Underlaw

Covington submitted a motion for a new trial, but Judge Thomas prematurely adjourned the court two days after Sloan's trial and refused to file the motion.[164] Judge Thomas's communications with Covington around this time reveal his understanding that the Colquitt County community's commitment to the law was tenuous in situations like these. He wrote that he seriously doubted the propriety of keeping the court open under the circumstances, as doing so would only invite "postponements and delays which impair confidence in the law and the court's procedure."[165] Earlier, he had refused to participate in making an application to the governor for a commission to examine Sloan's mental capacity and advised Covington against doing so himself.[166] If Covington did wish to make such an application, Judge Thomas warned, he should do so quickly because "[t]he unrighteous delay of cases tried in Courts frequently causes some people to undertake to justify an attempt to lynch people charged with crime."[167] "I am trying to handle these cases in a way to avoid justification for anybody to claim that the court failed in the discharge of its duty," he wrote.[168]

Judge Thomas's actions demonstrated that he was willing to bend the legal apparatus to the breaking point, maintaining a veneer of legal legitimacy while in reality sacrificing Sloan's rights (and his life) to the demands of the lynch mob. As his words to Covington the week after the trial show, Judge Thomas believed that delivering Sloan's death was the only way to avoid violence and maintain the community's confidence in the law and the courts; a tacit recognition that the only way law was permitted to operate at all in Colquitt County was in subjugation to the underlaw.

vi. Sloan in Prison

Sometime in the weeks after his conviction, Sloan was interviewed in the "mob-proof" Bibb County jail in Macon, Georgia.[169] Although he

164 *Tensity at Trial Is Told by Juror*, *supra* note 46. Customarily, the judge would have allowed the term of court to run until five days before the beginning of the following term, which in this case would have been in April 1936. *Deaver Grants Stay for Sloan*, Macon News (Macon, Ga.), Dec. 6, 1935 at 1, 8.

165 *Witnesses Tell of Sloan's Trial, supra* note 81.

166 Letter from W.E. Thomas, to W.A. Covington (Nov. 25, 1935) *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l).

167 *Id.*

168 *Witnesses Tell of Sloan's Trial, supra* note 81.

169 *Ga. Convict, Unaware of Death Sentence, Feels Safer in Pen.*, *supra* note 163; *Hancock Ne[***es]*

remained visibly shaken from the memory of the mob on the day of his trial, he expressed gratitude for the National Guardsmen who protected him.[170] As his execution date drew near, Sloan was evidently unaware that he had been sentenced to death.[171] Trembling, he expressed relief that his "days of being chased by white folks . . . [had] finally ended."[172] When asked if he knew why he was in prison, he said, "I thinks I'm in here for a life sentence."[173] No one corrected him.[174]

D. *Next Steps: Harry S. Strozier and Orville A. Park*

Meanwhile, Sloan's conviction had caught the attention of prominent Macon attorneys Harry S. Strozier and Orville A. Park, and the two men contacted Covington.[175] Strozier considered Covington to be "a high class man" with "advanced social ideas" who nevertheless was too frightened to move forward with Sloan's case.[176] Although Covington remained convinced that Sloan had acted out of the "fears of an imperfectly developed intellect" and that the jury would have recommended mercy had the "lynching element" not cowed those in the community who deplored killing him, he believed he had done all he could do and was ready to leave Sloan's fate to "[t]he good Lord."[177]

Strozier, for his part, believed attorneys still had a role to play. In assessing the case, Strozier demonstrated his understanding of the relationship of law and underlaw: "I think it is a crime against civilization to execute this man under these circumstances," Strozier wrote. "It isn't a thing in the world but a lynching under form of law to try a weak-minded Ne[***] under the protection of the military in order that a court may kill him instead

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Removed to City, MACON TEL. (Macon, Ga.), Nov. 20, 1935, at 9.

170 Hawkins, *supra* note 46.

171 *Ga. Convict, Unaware of Death Sentence, Feels Safer in Pen.*, *supra* note 163.

172 *Id.*

173 Hawkins, *supra* note 46.

174 *Id.*

175 Ann Wells Ellis, The Commission on Interracial Cooperation, 1919-1944: Its Activities and Results 121 (1976) (Ph.D. dissertation, Georgia State University) (on file with author).

176 Letter from Harry S. Strozier, to R.B. Eleazer, Commission on Interracial Cooperation (Nov. 30, 1935) *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l) [hereinafter Strozier I].

177 Letter from W.A. Covington to Harry S. Strozier, *supra* note 80. Covington reported to Strozier that, at the end of Sloan's trial, he told Judge Thomas: "The good Lord made this man; you and I have done our best for him; I now feel that it is His time to move." *Id.*

of a mob."[178] Believing that Southern judges must be made to understand that convicting a man under such circumstances was unacceptable, Strozier was unwilling to let Sloan's conviction go unchallenged.[179] He encouraged Covington to continue with the case with his and Parks's help.[180]

After an all-night session weighing their options, the three attorneys decided to file a writ of habeas corpus in the United States District Court for the Middle District of Georgia.[181] By doing so, Strozier said, he hoped to send a message that "the courts of the United States would not countenance a trial where the army is necessary to keep a mob from lynching the defendant."[182] "[T]he time is coming when that sort of thing is going to stop," Strozier declared.[183] He had little hope that that day would come in time for Sloan, however. "[T]he sickening thing about the whole matter," he said, "is that after everything is done, the Ne[***] will finally be executed."[184]

E. *John Downer, Judge Bascom Deaver, and Underlaw*

i. John Downer

Sloan's attorneys had good reason to believe that the federal court would grant Sloan's petition for a writ of habeas corpus. Less than five years earlier, the same federal judge who would hear Sloan's petition, Judge Bascom Deaver, had granted John Downer, another of Harry Strozier's clients, a writ of habeas corpus under very similar circumstances.

On May 26, 1931, a Georgia jury sentenced John Downer, a Black man, to death for raping a white woman.[185] In the days before the trial, a mob of 1,500 had stormed the jail where Downer was kept, undeterred by National Guard troops guarding the building with a machine gun. They fired shots into the building, smashed windows, threw dynamite, and threatened to blow up the structure.[186] Downer escaped and survived to stand trial only

178 Strozier I, *supra* note 176.
179 *Id.*
180 *Id.*
181 Letter from Harry S. Strozier, to R.B. Eleazer, Commission on Interracial Cooperation (Dec. 6, 1935) microformed on The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191) (Univ. Microforms Int'l) [hereinafter Strozier II].
182 *Id.* In 1923, the Supreme Court had held that allegations of mob dominance of a trial authorized a federal district court to proceed with a hearing on a habeas corpus petition. Moore v. Dempsey, 261 U.S. 86 (1923).
183 Strozier II, *supra* note 181.
184 Strozier I, *supra* note 176.
185 Downer v. Dunaway, 53 F.2d 586, 588 (5th Cir. 1931).
186 *Id.*

with the assistance of the National Guard, who disguised him in one of their uniforms.[187] During Downer's trial, a large unruly crowd gathered outside the courthouse, and two hundred National Guardsmen were required to keep order.[188] Downer's habeas petition averred that an atmosphere of mob violence had continued from the time the crime was committed until after the trial and that it would have been impossible to hold the trial without the National Guardsmen present.[189] It also alleged that the fear of mob violence prevented Downer's counsel from moving for a continuance, for a change of venue, or for a new trial.[190]

Judge Deaver initially denied Downer's petition for a writ of habeas corpus.[191] On appeal, the Fifth Circuit reversed, holding that the petition sufficiently alleged that the threat of violence surrounding the trial had reduced the proceedings to a sham.[192] Relying on the United States Supreme Court's decisions in *Frank v. Mangum* and *Moore v. Dempsey*, the Fifth Circuit held that if the trial truly had been held under the conditions alleged, the proceedings had been reduced to "the form of a court under the domination of a mob," depriving Downer of his constitutional right to due process.[193] The Fifth Circuit remanded the case for a hearing to determine whether the allegations in the petition were true, holding that the writ should issue if

187 *Id.*
188 *Id.* at 589.
189 *Id.*
190 *Id.*
191 Downer v. Dunaway, 53 F.2d 586, 588 (5th Cir. 1931).
192 *Id.* at 589–91.
193 *Id.* at 589. The *Frank* Court held that:

> [I]f a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

Frank v. Mangum, 237 U.S. 309, 335 (1915). Subsequently, the Court in *Moore* held:

> [I]f the case is that the whole proceeding is a mask— that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

Moore v. Dempsey, 261 U.S. 86, 91 (1923).

they were.[194]

Judge Deaver heard Downer's petition again on remand. After hearing witnesses' testimony, he found that there could be "scarcely . . . any doubt that the petitioner was denied due process of law in violation of the Fourteenth Amendment of the Constitution."[195] Judge Deaver's opinion acknowledged that no serious violence had taken place on the day of trial but gave credence to witnesses who testified that a lynching would have occurred had it not been for the National Guard.[196] In accordance with the Fifth Circuit's instruction, Judge Deaver granted the writ.

ii. Judge Bascom Deaver, Law, and Underlaw

Judge Deaver's opinion in Downer's case demonstrated his keen understanding of law and underlaw, as well as a desire to throw light on the relationship between the two. He addressed the belief held by some that Downer's death sentence should be carried out, whether the trial was legal or not, because the trial had prevented a lynching.[197] He also addressed the belief that if lynch mobs had reason to believe that the law would allow their intended victims to escape death, they would simply "take the law into their own hands."[198] Judge Deaver rejected this argument, claiming that the people of Georgia understood the importance of "preserving inviolable the due process clause of the Constitution."[199]

Notwithstanding this faith in the citizens of Georgia, Judge Deaver dedicated a substantial portion of his opinion to extolling the virtues of law.[200] In doing so, he pushed against the idea that the protection of life, liberty, and property required racial subjugation and warned that depriving certain persons of rights would instead erode the rights of all. He concluded by saying:

> The Constitution says that no person shall be deprived of life, liberty, or property without due process of law. It contains no provisos, limitations, or exceptions. It does not say that no person shall be deprived of life, liberty or property without due process of law, except when a mob will not permit the courts to afford due process, or unless courts, by dispensing with due process, can prevent a lynching, or provided due process can be had without

194 *Downer*, 53 F.2d at 590.
195 Downer v. Dunaway, 1 F. Supp. 1001, 1003 (M.D. Ga. 1931).
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *See generally id.*

> any harmful attendant circumstances. . . . There is more involved in this case than the life of one lowly citizen. The people of this country have declared that no person shall be deprived of life, liberty, or property without due process of law, and the loyal, law abiding citizens expect that provision to stand as a protection to each one of them. If it may be ignored in one case, it may be ignored in any other case; and, when it becomes ineffective through disregard or evasion, one of the most important rights of the people is destroyed.[201]

Judge Deaver's decision in Downer's case and his understanding of the forces at play in situations like Sloan's likely gave Sloan's attorneys confidence that filing the writ in Deaver's court would lead to a favorable outcome for their client.

F. *Sloan's Habeas Petition*

i. Habeas Hearing

Sloan's attorneys filed the writ of habeas corpus in the United States District Court at Macon on December 6, 1935, arguing that due process was not observed in Sloan's trial.[202] Adopting language from *Moore*, the petition alleged that "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion in the belief that the immediate conviction of the petitioner was the only way of avoiding an immediate outbreak by [the] mob."[203] Judge Deaver stayed Sloan's execution until the writ could be heard.[204] In jail, Sloan had difficulty taking in the new development, but with the help of a fellow prisoner, he was finally made to understand that he could have another chance at trial.[205] He stated that he was glad.[206]

Judge Deaver presided over a two-day hearing that revealed the underlaw's possible influence over the jury in Sloan's trial.[207] One citizen testified that he saw jurors looking out the windows of the jury room at the

201 *Id.* at 103.

202 *Condemned Colquitt County Ne[***] Given Stay of Execution*, THOMASVILLE TIMES-ENTER., (Thomasville, Ga.), Dec. 6, 1935, at 4; Strozier II, *supra* note 181; *Court Order Gives Doomed Ne[***] Chance*, MACON TEL. (Macon, Ga.), Dec. 7, 1935, at 1.

203 *Court Order Gives Doomed Ne[***] Chance*, *supra* note 202; *see* Moore v. Dempsey, 261 U.S. 86, 91 (1923).

204 *Deaver Grants Stay for Sloan*, *supra* note 164.

205 *Court Order Gives Doomed Ne[***] Chance*, *supra* note 202.

206 *Id.*

207 *Hearing on Sloan Case Is Delayed*, MACON NEWS (Macon, Ga.), Jan. 6, 1936, at 10; *Convicted to Die as Lynch Orgy Loomed*, PITT. COURIER, Feb. 8, 1936, at A8.

"dense throng" on the square.[208] J.L. Baxter, a Moultrie lumberman who had been the last of five jurors to hold out for a life sentence, testified to his belief that it was "more expedient for one Ne[***] to die than for 20 or 25 white people to be killed by the troops."[209] Baxter also believed that the guardsmen at Sloan's trial had prevented a lynching and that Judge Thomas had been scared.[210] His testimony suggests that at least one juror understood that the mob's demand for Sloan's life would not yield to a law that allowed a Black man to live at the risk of white lives. It also suggests that the jury ultimately capitulated to underlaw, regardless of what it believed about the law.

Others disavowed any improper influence over the trial proceedings. Several jurors testified that there had been no great atmosphere of tension at the trial.[211] Although they had seen the crowd outside the courthouse, they heard nothing and claimed they had arrived at their verdict without fear or outside influence.[212] Adjutant General Lindley Camp and other guardsmen testified that the atmosphere had been "serious but not necessarily dangerous," and Sheriff Beard doubted that calling in the National Guard had been necessary at all.[213] He guessed that he and a squad of special deputies might have been able to keep order.[214] He said there was no great amount of disorder, and what there was had been caused by a handful of men who had been drinking.[215] On cross-examination, Sheriff Beard was asked about John Henry Williams's lynching fifteen years earlier.[216] He stated his belief that Sloan's case was different; unlike what occurred with Williams, there had been no organized plan to lynch Sloan, he claimed.[217] He asserted Sloan was taken to Albany after his arrest "merely as a precautionary measure."[218]

On the stand at the hearing, Covington spoke vigorously in Sloan's defense for more than two hours.[219] He argued that Sloan had not had a

208 *Witnesses Tell of Sloan's Trial*, *supra* note 81.

209 *Juror's Remark at Trial of Ne[***] Brought into Habeas Corpus Hearing*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Jan 27, 1936, at 2; *Ne[***] Is Fighting for Second Trial*, MACON NEWS (Macon, Ga.), Jan 27, 1936, at 1; *Trial of Ne[***] Held as Unfair*, MACON NEWS (Macon, Ga.), Jan 29, 1936, at 6.

210 *Tensity at Trial Is Told by Juror*, *supra* note 46.

211 *Id.* at 2.

212 *Id.*; *Witnesses Tell of Sloan's Trial, supra* note 81.

213 *Deaver Holds Sloan's Trial Was Unfair*, MACON TEL. (Macon, Ga.), Jan. 29, 1936, at 10; *Witnesses Tell of Sloan's Trial, supra* note 81.

214 *Witnesses Tell of Sloan's Trial, supra* note 81.

215 *Id.*

216 *Id.*; *Southern Mob Couldn't Wait for Hanging*, *supra* note 32.

217 *Witnesses Tell of Sloan's Trial, supra* note 81.

218 *Id.*

219 *Id.* Covington was widely recognized as an exceptionally skilled orator. *See* James A.

fair trial or opportunity to seek review of the case and concluded with a "diatribe against Georgia justice."[220] Surviving excerpts of this speech provide a glimpse into his perception of the case. He proclaimed:

> In all the years of this state's existence there never has been a rich man to have his neck broken on the gallows or burn in the electric chair. I am opposed to capital punishment because it is undemocratic. In practice it applies only to the poor whites and ne[***es]. Any man in Georgia worth as much as $30.00 can escape the electric chair.[221]

Newspaper accounts report that during these proceedings, Sloan "dozed peacefully in [the] corner of the courtroom," surrounded by sheriff's deputies.[222]

ii. Judge Deaver's Decision

On January 29, Judge Deaver granted Sloan's petition, finding that he had been denied due process of law.[223] The testimony of juror J.L. Baxter, in particular, had impressed upon Deaver that it was likely there would have been a recommendation of mercy had it not been for the threat of mob violence.[224] The state court officials had acted with integrity and had done the best they could, he found, but nevertheless, "some other people over whom they had no control created an influence that affected the court machinery."[225] Judge Deaver granted the writ of habeas corpus, setting aside Sloan's conviction.[226] Sloan evidently understood little of what happened at the hearing, but he seemed to grasp that he had another chance at life, and he left the courthouse grinning.[227]

Hollomon, *In the Trend of Events*, ATLANTA CONST., July 26, 1919, at 8.

220 *Juror's Remark at Trial of Ne[***] Brought into Habeas Corpus Hearing*, *supra* note 209.

221 *Id.*

222 *Ne[***] Is Fighting for Second Trial*, *supra* note 209.

223 *Trial of Ne[***] Held as Unfair*, *supra* note 209; *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

224 *Trial of Ne[***] Held as Unfair*, *supra* note 209.

225 *Id.*; *Deaver Holds Sloan's Trial Was Not Fair*, *supra* note 213. Judge Deaver also held that the district court had no power to review Judge Thomas's decision to adjourn the term of the Colquitt County Court and that the legality of the adjournment had no bearing on the case. The only important question, Judge Deaver said, was the influence created by the threatened or expected violence. *Deaver Holds Sloan's Trial Was Not Fair*, *supra* note 213.

226 *New Trial Sought for John Henry Sloan, Doomed Ne[***]*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), July 20, 1936, at 4.

227 *Deaver Holds Sloan's Trial Was Not Fair*, *supra* note 213.

G. *Re-Trial: Dougherty County Superior Court*

Following the grant of the writ of habeas corpus, Sloan enjoyed about twelve hours of "technical freedom" in the Bibb County jail before a new warrant was issued and he was re-arrested.[228] A week later, Solicitor General George Lilly announced that the state would re-try Sloan and that Sloan's second trial would be held in "a county where the names of ne[***es] are placed on the jury rolls."[229] His decision was likely motivated by the Supreme Court's recent decision in *Norris v. Alabama*, one of the famous Scottsboro Boys cases.[230] Because Black jurors were excluded from the rolls of Colquitt County and in each of the other four counties in Georgia's Southern Circuit, Judge Thomas transferred Sloan's case out of the circuit to the Dougherty County Superior Court in Albany.[231] Sloan remained in jail until his second trial, though at some point, he was moved from Bibb County to a "secret prison" elsewhere.[232] All this "shuffl[ing] back and forth," Covington said, was "because of the sadistic tendencies of certain people who wanted to protect civilization."[233]

On March 24, 1936, without previous publicity, Sloan was re-tried before Judge B.C. Gardner of the Dougherty Superior Court in Albany.[234] Covington once again represented Sloan.[235] The sole Black man in the jury venire asked to be excused, a request that was "readily granted."[236] The testimony appears to have been largely the same as in the first trial, although there are indications that Mary Smith's account took on new details. Earlier, some accounts reported that she had claimed that no words were exchanged between herself, Ottis Gay, and the shooter.[237] Now, she testified that the

228 *Convicted to Die as Lynch Orgy Loomed*, *supra* note 207.

229 *State Completes Plans to Try Moultrie Ne[***] Again*, Thomasville Times-Enter., Feb. 5, 1936, at 1.

230 *Sloan May Face Retrial in Bibb*, Macon News (Macon, Ga.), Feb. 5, 1935, at 5. *See generally* Norris v. Alabama, 294 U.S. 587 (1935); Klarman, *supra* note 84, at 407–08. In *Norris v. Alabama*, the Court had reversed a Black boy's rape conviction, holding that the systematic exclusion of Black persons from the jury pool in the Alabama county where he was tried had denied him equal protection of law. *Norris*, 294 U.S. at 596–99.

231 *Ne[***es] Missing on Lowndes Jury*, Macon News (Macon, Ga.), Feb. 24, 1936, at 12.

232 *Demented Man, Twice Saved from Mob Sentenced to Die*, *supra* note 77; *Sloan Being Held in Secret Prison*, Macon News (Macon, Ga.), Feb. 9, 1936, at 9.

233 *New Trial Asked for John Sloan*, Macon News (Macon, Ga.), July 20, 1936, at 1.

234 *Sloan Is Placed on Second Trial*, Macon News (Macon, Ga.), Mar. 24, 1936, at 1; *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

235 *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

236 *See Demented Man Twice Saved from Mob Sentenced to Die*, *supra* note 77; *Sloan Is Placed on Second Trial*, *supra* note 234.

237 Brief of the Evidence, *supra* note 44, at 16; *see Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, *supra* note 65.

gunman had used profanity and announced, "I will kill you both."[238] After he shot, she said, the shooter told them, "if he had not killed us, he would kill us."[239]

Sheriff Beard testified to some of the events surrounding Sloan's arrest and his alleged confession—information missing in accounts of the first trial.[240] He testified that once officials had located Sloan in Havana and brought him back to Georgia, he "had a talk with him as to his connection with the shooting."[241] According to Sheriff Beard, Sloan first said that another man had borrowed the gun from him and said he was going to shoot somebody.[242] Sloan told Beard he tried to get the other man not to do it.[243] Beard testified that he told Sloan that the story "did not connect up well" and asked if it was really the truth.[244] He reckoned that this prodding "laid the foundation" for Sloan to tell the truth.[245] Beard further testified that Sloan then told him that he was going along the road and "all at once he saw somebody sitting side the road." Sloan said that he heard this person say, "[t]here goes a Ne[***]; let's do something to him."[246] According to Beard, Sloan claimed he then "throwed up and shot," reloaded the gun and ran on down the road.[247] Sheriff Beard testified that Sloan's statement was made "freely and voluntarily," with no threat or "offer of reward."[248] On cross-examination, he could not recall whether he had mentioned Sloan's initial statement about another man shooting Gay at the first trial.[249] He also testified that Sloan was "short mentally" but that he had the sense to tell "right from wrong."[250]

The defense again argued that Sloan had "the mentality of a 12-year-old."[251] For this argument, they relied again on testimony by doctors who had examined Sloan in the weeks prior to his first trial.[252] Sloan gave largely the same account of the events that he gave at the first trial.[253] After

238 Brief of the Evidence, *supra* note 44, at 16–17.
239 *Id.* at 17.
240 *Id.* at 17–19.
241 *Id.* at 17–18.
242 *Id.* at 18.
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.* at 19.
250 *Id.*
251 *Id.* at 20–21.
252 *Id.*
253 *Id.* at 27.

deliberating a mere twenty-eight minutes, the Dougherty County jury convicted Sloan of first-degree murder and sentenced him to die less than six weeks later, on May 1, 1936.[254]

H. *Sloan's Second Motion for Re-Trial and Other Post-Conviction Remedies*

Following the Dougherty County trial, Sloan was delivered to the Dougherty County jail in Albany, where he remained seemingly unaware of his fate.[255] A newspaper account quoted him again, saying, "[a]ll of my life I have been running from white folks, but when I am put in the State prison, my running days will be over. They can't touch me there."[256]

Sloan's attorneys continued to seek justice for Sloan, relying on increasingly technical legal arguments. They moved for a retrial on the basis of statements Solicitor General Lilly made during closing arguments.[257] Lilly allegedly told the jury that if they recommended mercy, Sloan would "spend the remainder of his life in the penitentiary unless he is pardoned."[258] This remark, the motion argued, was highly prejudicial and "held out to the jury that the thing to do was to kill this man before some governor turns him out."[259] The motion contended that this comment was sufficient to destroy Sloan's chances of a recommendation of mercy from the jury.[260] Whether intentionally or not, the prosecutor's statement seemed designed to appeal to underlaw; a reminder that death was the only acceptable outcome for Sloan and that any possible obstacle to that outcome must be avoided. The court denied the motion, and Sloan was again sentenced to be executed.[261] Sloan appealed, and the Georgia Supreme Court upheld the trial court's denial of the motion.[262]

254 *Sloan Sentenced to Die on May 1,* Macon News (Macon, Ga.), Mar. 25, 1936, at 7.
255 *Demented Man, Twice Saved from Mob Sentenced to Die*, *supra* note 77.
256 *Id.*
257 Amendment to Motion for New Trial at 34, Sloan v. State, 187 S.E. 670 (Ga. 1936) (No. 11468).
258 *Id.*
259 *Id.*
260 *Id.* at 35.
261 *See id.* at 42.
262 *Sloan*, 187 S.E. at 671.

I. *Execution*

Following the unsuccessful appeal to the Georgia Supreme Court, Sloan's execution was set for October 16, 1936.[263] On October 15,[264] attorneys Park and Strozier filed a writ of habeas corpus in the Superior Court in Greensboro,[265] alleging, among other things, that the trial judge "in resentencing Sloan . . . did not notify his counsel."[266] The Superior Court judge granted a stay of execution pending the outcome of a hearing on the writ and set aside Sloan's second conviction on the grounds that Sloan's attorneys had not been present when it was imposed.[267] He "remanded the case to the Dougherty Superior Court for further action."[268] "After 'making some investigations' that '[he did] not care to divulge,' Judge Gardner re-sentenced Sloan to death, his execution now set for December 31, 1936."[269]

The Georgia Prison Commission and Governor Talmadge rejected Sloan's petitions for clemency, and by mid-December, his attorneys had run out of options.[270] The day before Sloan's scheduled execution, the prison announced that the execution might have to be delayed due to the electrician's illness.[271] The Prison Commission consequently put out a request for a qualified electrician.[272] "For preparing the condemned for the chair, fixing the electrodes on his body and seeing that everything is in readiness for the three switches . . . to be pulled," the request said, "the electrician receives $75."[273] People from all over the country wrote to volunteer for the job.[274]

263 *Ne[***] Is Saved for Third Time*, MACON TEL. (Macon, Ga.), Oct. 31, 1936, at 2.

264 *Id.*

265 *Sloan Execution Halted by Court*, MACON TEL. (Macon, Ga.), Oct. 16, 1936, at 5. They brought the writ in Georgia Superior Court of the Ocmulgee Judicial Circuit because the circuit included Baldwin County, where the electric chair was located. *Ne[***] Is Saved for Third Time*, *supra* note 263; *Doomed Man Receives Stay of Execution*, ATLANTA DAILY WORLD, Oct. 16, 1936, at 1.

266 *Doomed Man Receives Stay of Execution*, *supra* note 265.

267 *Id.*; *Judge Gardner Delays Sentencing Sloan as Investigation Made*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Nov. 16, 1936, at 8.

268 *Ne[***] Is Saved for Third Time*, *supra* note 263.

269 *Judge Gardner Delays Sentencing Sloan as Investigation Made*, *supra* note 267; *Fourth Death Sentence Is Passed Upon Slayer*, MACON TEL. (Macon, Ga.), Dec. 20, 1936, at 25.

270 *John Henry Sloan Must Die on Last Day of This Year*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Dec. 21, 1936, at 1; *State Executioner Ill; Sloan Death May Be Delayed*, ATLANTA DAILY WORLD, Dec. 31, 1936, at 1.

271 *State Executioner Ill; Sloan Death May Be Delayed*, *supra* note 270.

272 *Commission Needs an Electrician*, MACON NEWS (Macon, Ga.), Dec. 30, 1936, at 3; *State Executioner Ill; Sloan Death May Be Delayed*, *supra* note 270.

273 *Commission Needs an Electrician*, *supra* note 272.

274 *John Henry Sloan Electrocuted at the State Prison*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Dec. 31, 1936, at 1.

On December 31, 1936, Sloan arrived in the execution chamber at the Milledgeville State Prison.[275] He was weak and tired; "prison officials claimed he had been 'starving himself for weeks.'"[276] In a death chamber statement, Sloan allegedly admitted to killing Ottis Gay but again claimed he acted in self-defense.[277] After receiving two electric shocks, John Henry Sloan died.[278] He is buried in the Georgia State Penitentiary Cemetery.[279]

275 *Id.*
276 *Id.*
277 *Id.*
278 *Colquitt Ne[***] Pays for Murder*, Macon Tel. (Macon, Ga.), Jan. 1, 1937, at 10.
279 *John Henry Sloan (1911-1936)*, Find a Grave (Feb. 25, 2014), https://www.findagrave.com/memorial/125611687.

III. JOHN HENRY SLOAN: UNANSWERED QUESTIONS

The influence of the underlaw, manifested in the angry mob surrounding the courthouse, rendered John Henry Sloan's Colquitt County trial and conviction illegitimate under the law, despite the veneer of legal legitimacy created by the proceedings. Ultimately, however, Sloan was not executed as a direct result of this trial. The federal court recognized that the atmosphere of violence violated Sloan's right to due process and set aside his conviction, leaving him to be re-tried and re-convicted four months later and fifty miles away in Dougherty County. Did this second trial rectify the injustice of the first? In the end, was it the fair and impartial application of the law that sent Sloan to the electric chair, or was it the demands of white supremacy and Black subjugation? Did the law ultimately prevail over underlaw for John Henry Sloan?

This question cannot be answered with certainty. There are no reports of violence or threats thereof in Dougherty County during the weeks or months preceding Sloan's trial there. No mob gathered outside the courthouse, and the National Guard was not present. On the other hand, although Sloan's trial was held in Dougherty County at least in part because Black persons were on the jury roll in that county, the judge and attorneys readily agreed to excuse the single Black venireman, leaving Sloan once again to face an all-white jury. One can only speculate about the Black venireman's reasons for stepping away and whether the trial's outcome would have differed if he had been seated on the jury. As in the first trial, the prosecution's case rested on Sloan's confession, witnesses' testimony that the shooter was a Black man, and testimony that Sloan had borrowed a shotgun earlier in the day. If Covington's suspicions that "the lynching element" deterred Colquitt County residents from testifying for Sloan in the first trial, this remained true in the second: no new witnesses stepped forward for Sloan. Perhaps an impartial jury would have sentenced an intellectually disabled white man to death on this evidence, perhaps not. It took the Dougherty County jury less than thirty minutes to determine it was sufficient to condemn John Henry Sloan, despite the serious questions raised about his mental capacity. A judge today likely would have granted a new trial on the basis of Solicitor General Lilly's prejudicial remarks to the jury, but would Sloan's trial have ended differently absent those remarks? Perhaps the greatest unknowable question is the extent to which the underlaw's demands permeated the minds of the legal actors in Sloan's Dougherty County trial and subsequent proceedings; demands not overtly displayed in an angry mob or shouts of "lynch him!," yet still bending the machinery of the law inexorably toward John Henry Sloan's death.

IV. Underlaw Lives On

A. *Evidence of Underlaw in the Modern Criminal Justice System*

Public spectacle lynchings and courthouses surrounded by lynch mobs appear to be a thing of the past in American society. Such activity was declining by the time of John Henry Sloan's trials and had largely disappeared by the end of the 1940s.[280] Some attribute the disappearance of public lynchings to a shift in public attitude.[281] Others dispute the proposition that white society's felt need for Black racial subjugation subsided in the mid-twentieth century, arguing that society abandoned spectacle lynchings not because it came to disavow racial subjugation but because it accepted that the law could be trusted to deliver substantially the same outcome without the need for public acts of extrajudicial violence.[282] Modern-day evidence supports the latter.[283]

Racial disparities persist in the criminal justice system, despite the

280 William I. Hair & Amy Louise Wood, *Lynching and Racial Violence*, in 24 The New Encyclopedia of Southern Culture 91 (Thomas C. Holt et al. eds., 2013).

281 *Id.*

282 *See* Kirchmeier, *supra* note 15, at 136 ("With the decline of lynching, many southern whites renounced the inhumanity of the mob, preferring instead to rely on the harsh justice of the state."); Vandiver, *supra* note 15, at 13–15; Stuart Banner, The Death Penalty: An American History 229 (2003) ("The line between a lynching and an official execution could be thin . . . . Official trials and executions in the South could take place astonishingly fast, so fast as to closely resemble lynchings, when a case carried racial implications."); Carol S. Steiker & Jordan M. Steiker, *The Racial Origins of the Supreme Court's Death Penalty Oversight*, 42 Hum. Rts. 14, 14 (2016) ("One of the strongest predictors of a state's propensity to conduct executions today is its history of lynch mob activity starting more than a century ago."); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 439 (1995) ("The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America.").

283 "The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color." The Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance 1 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (click "Download PDF"). "Despite its formal adherence to the principle of colorblindness, the contemporary U.S. criminal justice system has been described as a 'system of racial control.' This control is not merely legal, it is political. Major expansions of the criminal justice system have their roots in campaigns to reverse the political gains made by Black Americans in the Reconstruction and Civil Rights eras." Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 Perspectives on Pols. 400, 401 (2018).

system's formal color-blindness.[284] Black Americans are more likely than white Americans to be arrested and convicted and more likely to experience lengthy prison sentences and harsh incarceration.[285] Black Americans make up 13.4% of the population but 22% of fatal police shootings and 35% of executions.[286] When death sentences are examined, 47% of persons found to have been wrongfully convicted are Black. The disparate application of the death penalty is particularly clear when the race of victims is accounted for: between 1977 and 2019, 295 Black defendants were executed for murders involving a white victim.[287] Only 21 white defendants were executed for murders involving a Black victim.[288]

B. *Underlaw and the Backlash to Black Lives Matter*

i. Black Lives Matter

On August 9, 2014, in Ferguson, Missouri, police officer Darren Wilson shot and killed Michael Brown, an unarmed Black eighteen-year-old.[289] In the wake of Brown's killing and a grand jury's failure to indict Wilson, a broad and largely decentralized protest movement coalesced, adopting the name Black Lives Matter (BLM).[290] Although BLM is a complex and nuanced movement, media coverage has framed it primarily as a movement opposing the treatment that Black Americans experience at the hands of police—treatment that BLM activists have characterized as excessive, brutal, and the product of a "virulent anti-black racism that

284 THE SENTENCING PROJECT, *supra* note 283.

285 *Id.*; Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ (last visited Feb. 6, 2021).

286 Inman, *supra* note 285.

287 NGOZI NDULUE, THE DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 29 (Robert Dunham ed., 2020).

288 *Id.*

289 Larry Buchanan et al., *Q&A: What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html.

290 Barbara A. Biesecker, *From General History to Philosophy: Black Lives Matter, Late Neoliberal Molecular Biopolitics, and Rhetoric*, 50 PHIL. & RHETORIC 409, 410 (2017). The popularization of the phrase "Black Lives Matter" originated with activists Alicia Garza, Patrisse Cullors, and Opal Tometi's response to the death of Black teenager Trayvon Martin and acquittal of his killer George Zimmerman in 2013. Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement.

permeates our society."[291] On May 25, 2020, George Floyd, a forty-six-year-old Black man, was killed when a Minneapolis police officer used his knee to pin Floyd's neck to the ground for over eight minutes.[292] His death sparked a new wave of BLM protests, with thousands of demonstrations occurring in all fifty states and Washington D.C., as well as all over the world, between May and August 2020.[293]

ii. Blue Lives Matter

The backlash against the BLM movement frequently casts the movement as an existential threat to law and order and to American society. This response belies a belief that, for many Americans, the treatment of Black people that BLM opposes is not, in fact, anathema to American ideals but is necessary to the American way of life. In this, the continued salience of underlaw is apparent.

BLM's protests and demonstrations against systemic police violence against Black persons have sparked a "Blue Lives Matter" counter-movement.[294] On one level, Blue Lives Matter "supports police officers and the dangers that they experience every day in the conduct of their work."[295] On another level, it represents "a more antagonistic response to police critics" and "a pushback against the imagined breach of white racial order."[296]

The meaning behind the "Thin Blue Line," the symbol most commonly associated with the Blue Lives Matter counter-movement, particularly demonstrates currents of underlaw running through the counter-movement.[297] The "Thin Blue Line" represents the idea that police

291 Biesecker, *supra* note 290, at 411, n.1.

292 Dhaval M. Dave et al., *Black Lives Matter Protests, Social Distancing, and Covid-19* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 27408, 2020).

293 Grace Hauck et al., *"A Fanciful Reality": Trump Claims Black Lives Matter Protests Are Violent, but the Majority Are Peaceful*, USA Today (Oct. 25, 2020), https://www.usatoday.com/in-depth/news/nation/2020/10/24/trump-claims-blm-protests-violent-but-majority-peaceful/3640564001/.

294 Johanna Solomon et al., *Expressions of American White Ethnonationalism in Support for "Blue Lives Matter,"* Geopolitics 4 (July 23, 2019), https://www.tandfonline.com/doi/abs/10.1080/14650045.2019.1642876?journalCode=fgeo20.

295 *Id.*

296 *Id.*; Yuanyuan Liu, Blue Lives Matter? An Analysis of Blue Lives Matter News Comments 7 (2019) (M.A. dissertation, North Carolina State University) (on file with North Carolina State University Libraries).

297 Solomon et al., *supra* note 294, at 5; Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the 'Thin Blue Line' American Flag*, Marshall Project (June 8, 2020), https://www.themarshallproject.org/2020/06/08/the-short-fraught-history-of-the-thin-blue-line-american-flag.

are the dividing line between order and chaos, between law and savagery: the primary force that secures liberty, security, and law.[298] The "Thin Blue Line" characterizes those who conflict with police as "not merely transgressors of positive law," but as inhuman beasts and enemies of humanity.[299] It casts police as both the arbiters of who is human and who is not and as the protectors of the human from the inhuman.[300] Often, this line between human and inhuman is seen as fundamentally racial, and the dehumanization of the populations with whom police engage helps justify "exterminating violence against racialized subjects" in the name of preserving humanity.[301]

The prominence of the "Thin Blue Line" imagery within the Blue Lives Matter counter-movement betrays an ideology rooted in underlaw: the belief that law, order, and the very survival of society require the brutal subjugation of a racialized class of "subhumans." In this modern manifestation of underlaw, police—the embodiment of the law on the streets—ensure that the demands of underlaw are met.[302] BLM's challenge to that system calls into question the law's ability to meet those demands, giving rise to strong opposition.

iii. Former President Donald Trump's Response to Black Lives Matter

The persistent power of underlaw is also apparent in the words of former President Donald Trump. As BLM protests and demonstrations against police brutality swept across the country in the summer of 2020, Trump gave voice to the backlash in public addresses aimed squarely at casting the movement as an existential threat to American society. In a Fourth of July speech before a majority-white crowd at Mount Rushmore, Trump began by representing the United States as "the culmination of

298 Joe DiFazio, *Dividing Line: Thin Blue Line Flag Source of Division on South Shore*, ENTER. (Aug. 21, 2020), https://www.enterprisenews.com/story/news/crime/2020/08/21/dividing-line-thin-blue-line-flag-source-of-division-on-south-shore/42908185/ ("It simply represents the police officer's role of separating the good from the bad while creating order from the chaos. This is what separates the world from them."); *see* Tyler Wall, *The Police Invention of Humanity: Notes on the "Thin Blue Line,"* 16(3) CRIME MEDIA CULTURE 319–21, 328 (2020); *The Thin Blue Line*, FLAGS OF VALOR, https://www.flagsofvalor.com/blogs/news/the-thin-blue-line (last visited Dec. 6, 2020); *Mission*, THIN BLUE LINE FOUND., https://thinbluelinefoundation.org/read-me (last visited Dec. 6, 2020).

299 Wall, *supra* note 298, at 321.

300 *Id.* at 320, 323.

301 *Id.* at 323, 327–29.

302 *Id.* at 327 ("The law of the police really marks the point at which the state can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.") (internal quotation marks omitted).

thousands of years of western civilization."[303] Alluding to the ongoing protest movement, he claimed our nation was facing a "merciless campaign to wipe out our history, defame our heroes, erase our values, and indoctrinate our children."[304] He spoke of angry mobs attempting to strip the American people of their values, history, and culture and of a radical assault on liberty and the American way of life.[305] He railed against the "left-wing cultural revolution . . . designed to overthrow the American Revolution."[306] Alluding to BLM's targeting of statues and monuments to Confederate soldiers, slave owners, and other historical figures whose legacies the movement maintained were tainted by racist acts,[307] Trump denounced the "destruction of [our] resplendent heritage" and warned that the ideology underlying those acts would demolish justice and society.[308] The movement's goal, he claimed, was not a better America, but the end of America.[309]

Trump again took aim at the BLM movement in remarks at the White House Conference on American History on Constitution Day, September 17, 2020.[310] Alluding to the ongoing protests, he characterized protestors as "left-wing mobs" who had "launched a vicious and violent assault on law enforcement—the universal symbol of the rule of law in America."[311] These protestors would "burn down the principles enshrined in our founding documents, including the bedrock principle of equal justice under law," he claimed.[312] He went on to decry the New York Times' 1619 Project and critical race theory[313] as hateful lies, toxic propaganda, and ideological poison

303 Donald Trump, President of the United States, Remarks at South Dakota's 2020 Mount Rushmore Fireworks Celebration (July 4, 2020).

304 *Id.*

305 *Id.*

306 *Id.*

307 *Thomas Jefferson Statue Toppled in Portland, Oregon*, CBS News (June 15, 2020), https://www.cbsnews.com/news/thomas-jefferson-statue-toppled-in-portland-oregon/.

308 Remarks at South Dakota's 2020 Mount Rushmore Fireworks Celebration, *supra* note 303.

309 *Id.*

310 *President Trump Remarks at White House History Conference*, C-SPAN (Sept. 17, 2020), https://www.c-span.org/video/?475934-1/president-trump-announces-1776-commission-restore-patriotic-education-nations-schools.

311 *Id.*

312 *Id.*

313 The 1619 Project "aims to reframe the country's history by placing the consequences of slavery and the contributions of Black Americans at the very center of our national narrative." *The 1619 Project*, N.Y. Times Mag., https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited Nov. 27, 2020). Critical race theory is "a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power." Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 3 (2d ed. 2012).

aimed at "repression of traditional faith, culture, and values."[314] Again, he warned that such thinking would destroy America. Trump concluded by announcing the creation of the National Garden of American Heroes, "a vast outdoor park that will feature the statues of the greatest Americans who have ever lived."[315] One such statue, Trump declared, would be of Caesar Rodney, a signer of the Declaration of Independence and slave owner whose statue had been removed from a public square in Wilmington, Delaware, amidst controversy over his legacy.[316] Trump promised to restore this "very brave man, who was so horribly treated[, to] the place of honor he deserves."[317]

With BLM widely understood as a movement challenging acts of police brutality against Black Americans, the President's strident condemnation of that movement implies that to challenge such action is to challenge the foundations of American law, values, and society. It is worth noting that, while many of those who condemn BLM purport to oppose only the alleged violence committed by the movement—the riots, looting, and arson[318]—Trump's statements are largely devoid of reference to any such violence. They focus instead on the threat posed by BLM's ideology, challenging not merely the means by which BLM seeks to convey its message but the very ends the movement hopes to achieve. These statements betray an adherence to the ideology of underlaw: that the racially-disparate criminal justice system challenged by BLM, particularly acts of police violence against Black persons, is not a failure of American law to live up to American ideals; it is the embodiment of America's true values.

The views expressed by Trump and Blue Lives Matter are not fringe views. They are views supported by millions of voters, by those who make law, enforce law, and practice law. President Trump's Twitter attacks

314 Ishaan Tharoor, *Trump Joins Dictators and Demagogues in Touting 'Patriotic Education,'* WASH. POST (Sept. 21, 2020), https://www.washingtonpost.com/world/2020/09/21/trump-patriotic-education-china-orban/.

315 *President Trump Remarks at White House History Conference*, *supra* note 310.

316 Jacob Owens, *Wilmington Removes Columbus, Rodney Statues Amid Threats*, DELAWARE BUS. TIMES (June 12, 2020), https://delawarebusinesstimes.com/news/wilmington-columbus-rodney; *President Trump Remarks at White House History Conference*, *supra* note 310.

317 *President Trump Remarks at White House History Conference*, *supra* note 310.

318 *See* Kevin Roberts, *'Mostly Peaceful' Lets Black Lives Matter Off the Hook for Real Violence*, WASH. EXAMINER. (Sept. 24, 2020), https://www.washingtonexaminer.com/opinion/mostly-peaceful-lets-black-lives-matter-off-the-hook-for-real-violence; James S. Robbins, *Opinion: Rioting Is Beginning to Turn People off to BLM and Protests While Biden Has No Solution*, USA TODAY (Aug. 31, 2020), https://www.usatoday.com/story/opinion/2020/08/31/riots-violence-erupting-turning-many-away-blm-and-protests-column/5675343002/.

threatening "law and order" measures against BLM activists have been echoed by devoted supporters, and over 70 million Americans voted to re-elect him in November 2020.[319] The National Fraternal Order of Police, the largest police union in the United States, proclaims on its Facebook page: "We are the #ThinBlueLine—the only thing standing between Order and Anarchy. We protect the prey from the predators, the good from the bad."[320] Legislators in four states have passed "Blue Lives Matter" laws, calling for police to be included as protected victim categories in hate crime statutes.[321] In June 2020, Missouri attorneys Mark and Patricia McCloskey achieved notoriety when they pointed guns at BLM protestors marching through their well-to-do St. Louis neighborhood.[322] The couple received the support of then-President Trump and were ultimately rewarded with an opportunity to speak at the 2020 Republican National Convention.[323] They used the opportunity to paint BLM protestors as violent revolutionaries who would bring anarchy and chaos into American communities. Mark McCloskey concluded the couple's remarks with a warning that "if you stand up for yourself and for the values our country was founded on, the mob . . . will try to destroy you."[324] The ideology of underlaw has not been purged from American society; its influence remains, reaching far and wide and to the highest levels of government. We ignore it at our peril.

319 Brigitte L. Nacos et al., *Donald Trump: Aggressive Rhetoric and Political Violence*, PERSP. ON TERRORISM, Oct. 2020, at 2, 4; Claudia Deane & John Gramlich, *2020 Election Reveals Two Broad Voting Coalitions Fundamentally at Odds*, PEW RSCH. CTR., (Nov. 6, 2020), https://www.pewresearch.org/fact-tank/2020/11/06/2020-election-reveals-two-broad-voting-coalitions-fundamentally-at-odds/.

320 National Fraternal Order of Police, *We Are the Thin Blue Line*, FACEBOOK (Sept. 15, 2020), https://www.facebook.com/watch/?v=3239842919426028.

321 Gail Mason, *Blue Lives Matter and Hate Crime Law*, RACE & JUST. (forthcoming 2021) (manuscript at 2), https://journals.sagepub.com/doi/abs/10.1177/2153368720933665.

322 Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went On in St. Louis That Day?*, BBC NEWS (Aug. 25, 2020), https://www.bbc.com/news/election-us-2020-53891184.

323 *Id.*

324 ABC News, *The McCloskeys Speak at 2020 RNC*, YOUTUBE (Aug. 24, 2020), https://www.youtube.com/ watch?v=UJ62o7TGQlw (last visited Dec. 5, 2020).

CONCLUSION

The trials and execution of John Henry Sloan demonstrate that underlaw was a powerful force in Colquitt County in 1935. Its ever-present demands influenced legal actors' decisions and constrained their actions, resulting in a legal process tainted by the belief that the law should deliver not impartial justice but Black subjugation. Evidence indicates that underlaw still holds sway for a significant portion of Americans in 2020. Achieving justice in this environment requires awareness of this reality, just as it did for our counterparts nearly one hundred years ago. Like Covington, Judge Thomas, Harry Strozier, and Judge Deaver, we must determine when to trust our communities and when and how to challenge them. We must learn to see where underlaw taints our legal processes, bending the formally color-blind law toward outcomes that are anything but. Only if we recognize and eradicate the powerful, insidious influence of underlaw can we hope to accomplish what the law promises—true justice for all.