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ADDRESSES

THE MURDER OF FATHER JAMES COYLE, THE PROSECUTION OF EDWIN STEPHENSON, AND THE TRUE CALLING OF LAWYERS

WILLIAM H. PRYOR JR.*

More than eighty years ago, in Birmingham, Alabama, there was an infamous murder and prosecution that involved a talented defense lawyer who would later rise to the highest levels of law and politics. This historical event is a sordid story of religious and racial bigotry and the once formidable power of the Ku Klux Klan. This event has been studied by several historians[1] and by a law student in a recent comment in the *Alabama Law Review*.[2] This story raises substantial questions about legal strategy, professional ethics, and morality.

I will discuss several aspects of this story. I will first address the murder and the events leading to the murder. I will then describe the lawyers and the criminal trial. I will address the later fame of the lead defense lawyer and a few lessons from this history regarding the calling of lawyers. I will end by addressing recent criticisms of my perspective that were published last year

* Circuit Judge, United States Court of Appeals for the Eleventh Circuit. On January 24, 2006, Judge Pryor delivered a version of this Address to the Notre Dame Law School's student chapter of the Federalist Society for Law & Public Policy Studies. He is grateful to Dean Sharon Davies, Professor Glenn Feldman, and Professor Michael DeBow for their review and helpful comments about an earlier draft of this Address.

1. *See, e.g.*, GLENN FELDMAN, POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915–1949, at 58–59, 66–67 (1999); VIRGINIA VAN DER VEER HAMILTON, HUGO BLACK: THE ALABAMA YEARS 85–93 (1982); DIANE MCWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION 35–36 (2001); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 71–88 (1994); WILLIAM ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 449 (1994); PAT BOYD RUMORE, LAWYERS IN A NEW SOUTH CITY: A HISTORY OF THE LEGAL PROFESSION IN BIRMINGHAM 40–41(2000); STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION 333–65 (2005).

2. Jamie Lynn Cowley, State of Alabama v. Stephenson*: The State's Futile Fight Against Hugo Black and the Ku Klux Klan*, 55 ALA. L. REV. 1125 (2004).

by a biographer of the defense lawyer and why I reject his criticisms.

I. THE MURDER OF FATHER JAMES COYLE

In 1921, Birmingham, a relatively young city, fifty years old, was already the primary urban community in Alabama.[3] Birmingham was comparable in size to Atlanta and boasted the tallest skyscrapers in the South.[4] It was also booming in population and economic growth.[5]

It was, of course, a city of racial segregation with the highest composition of black residents (38.2 percent) of any major American city,[6] but bigotry in Birmingham was not only a matter of race. According to the most authoritative history of Alabama, "[b]y 1920 anti-Catholicism was rampant, and the Ku Klux Klan exercised tremendous influence."[7] Charles Sweeney of *The Nation* magazine wrote that Birmingham was "the American hotbed of anti-Catholic fanaticism."[8]

On the evening of August 11, 1921, Father James Coyle, a Catholic priest and the pastor of seventeen years of St. Paul's Church in Birmingham, was on the front porch of the rectory reading his breviary,[9] a collection of prayers and Scripture recited throughout every day by all priests, religious, and many other Catholics. A Methodist minister named Edwin Stephenson approached Father Coyle.[10] Stephenson fired three shots of a pistol at Father Coyle and killed him.[11]

Although both were ministers, Coyle and Stephenson led different lives. A native of Ireland, James Edwin Coyle was ordained in Rome in 1896, at the age of twenty-three, and began his work as a priest in Mobile, first in parish missions and then at McGill Institute for Boys as a teacher and later rector.[12] In 1904, after the untimely death of his predecessor, Father O'Reilly, Father Coyle was appointed by the Bishop of Mobile as the pastor

3. ROGERS ET AL., *supra* note 1, at 447.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 448; *see also* SUITTS, *supra* note 1, at 333–34.
8. Charles P. Sweeney, *Bigotry Turns to Murder*, THE NATION, Aug. 31, 1921, at 232.
9. NEWMAN, *supra* note 1, at 72.
10. *Id.* at 73.
11. *Id.*; *see also* SUITTS, *supra* note 1, at 337, 339–40.
12. *St. Paul's Cathedral to Celebrate 100th Anniversary of Fr. James Edwin Coyle's Arrival in Birmingham*, THE CATHOLIC WEEK, Nov. 19, 2004, at 12; *see also* JOHN WRIGHT JR., THE FATHER JAMES E. COYLE MEMORIAL PROJECT, http://www.fathercoyle.org (last visited Feb. 12, 2006).

of St. Paul. Father Coyle was a poet and prolific writer who often defended the Catholic Church and his native Ireland in letters to the editors of the newspapers in Birmingham.[13] Stephenson was a former barber whose "church" was the Jefferson County Courthouse,[14] which was next door to the St. Paul rectory. Stephenson's ministry was to perform wedding ceremonies and assist couples in obtaining marriage licenses.[15] He was called the "marrying parson."[16] Stephenson also hated Catholics and was a member of the Ku Klux Klan.[17]

The intersection of their lives involved Stephenson's only daughter, Ruth. On the day of Coyle's murder, Coyle had served as priest for the marriage of Ruth and Pedro Gussman, a Puerto Rican.[18] "Stephenson had long been having trouble with the literarily-inclined Ruth,"[19] and several months earlier, Ruth had informed Stephenson that she had become a Catholic,[20] and a member of Our Lady of Sorrows parish.[21] When Ruth disappeared on August 11, Stephenson first tried to obtain a search warrant for the rectory of St. Paul, but could not find a judge, so Stephenson went home and retrieved his pistol.[22] When Stephenson arrived at the rectory, he asked Father Coyle about the whereabouts of Ruth, and Coyle informed Stephenson that Coyle had that afternoon presided at Ruth's marriage.[23] Stephenson said Coyle then hit him and appeared to reach for a pistol, but Stephenson then fired his own pistol.[24] There is no evidence that Father Coyle had a pistol.

II. THE PROSECUTION OF EDWIN STEPHENSON

After a grand jury returned an indictment against Stephenson on the charge of second-degree murder, the responsibility for prosecuting the case rested with the circuit solicitor who had presented the matter to the grand jury, while the Klan raised funds for a team of five defense lawyers, four of whom were members of the Klan.[25] The exception was the lead defense attorney,

13. SUITTS, *supra* note 1, at 333.
14. *Id.* at 340; *see also* NEWMAN, *supra* note 1, at 71–72.
15. SUITTS, *supra* note 1, at 340; *see also* NEWMAN, *supra* note 1, at 72.
16. NEWMAN, *supra* note 1, at 72.
17. *Id.* at 74.
18. NEWMAN, *supra* note 1, at 73; *see also* SUITTS, *supra* note 1, at 339.
19. NEWMAN, *supra* note 1, at 72.
20. *Id.*; *see also* SUITTS, *supra* note 1, at 339.
21. SUITTS, *supra* note 1, at 339.
22. NEWMAN, *supra* note 1, at 72.
23. *Id.* at 73.
24. *Id.*
25. *Id.* at 74.

who was the former county solicitor.[26] In the days following the murder, Catholic friends of Father Coyle had hoped to employ the services of the former county solicitor as a special prosecutor, but his partner reached him first, on behalf of the defense of Stephenson.[27]

There was animosity between the circuit solicitor and the former county solicitor who would now represent Stephenson. In 1916, the Legislature had consolidated county and circuit solicitor offices, which created a power struggle between the Jefferson County solicitor and the Birmingham circuit solicitor.[28] The circuit solicitor won, and the popular county solicitor entered a lucrative private practice.[29] "Rumors circulated that he was planning to run for 'every office in the state from constable to governor.'"[30]

While he served as a county solicitor, Stephenson's attorney had gained statewide notoriety as a crusader against bootleggers in Girard, Alabama, now known as Phenix City, across the Chattahoochee River from Columbus, Georgia.[31] By the appointment of the Attorney General of Alabama, the county solicitor had obtained an indictment of a ring of bootleggers who then fled the jurisdiction.[32] The county solicitor then obtained an order of the destruction of more than half of a million dollars' worth of whiskey and beer by pouring it into the streets of Girard, which was reported with photographs on the front page of the *Birmingham News*, which called him the "man of the hour."[33]

Two important developments occurred before the trial. First, the trial judge was changed from Judge Abernathy to Judge William Fort, an old friend of Stephenson's lead attorney.[34] Second, after he "took charge of the defense strategy,"[35] Stephenson's lead attorney supplemented the earlier plea of not guilty by reason of self-defense by adding a plea of not guilty by reason of temporary insanity.[36]

> According to [Birmingham] Press reports, this second line of defense "would throw the gates wide open for introduc-

26. *Id.*
27. *Id.* at 71.
28. *Id.* at 46–47.
29. SUITTS, *supra* note 1, at 216–21.
30. NEWMAN, *supra* note 1, at 48.
31. *Id.* at 44–45.
32. *Id.* at 45.
33. *Id.*; *see also* SUITTS, *supra* note 1, at 200–08.
34. NEWMAN, *supra* note 1, at 74–75.
35. *Id.* at 74.
36. SUITTS, *supra* note 1, at 346.

> tion of testimony of the most varied nature" including testimony about Stephenson's "views on Catholicism, his alleged troubles with his daughter, his opposition to her marriage, and the other things which, the defense may claim, caused him to become temporarily insane."[37]

The Stephenson trial started on October 17, 1921, and that day the *Birmingham News* called it "the biggest criminal trial from many angles ever held in Alabama."[38] The crowd of spectators overflowed into the hallway.[39] Representatives of national newspapers and wire services were present to report.[40]

"The Klan was well represented at the trial."[41] Not only were four of the five defense lawyers members of the Klan, but the trial judge, William Fort; the Birmingham police chief, Thomas Shirley, who was a star witness for the defense; and most of the jurors, including the foreman, were members of the Klan.[42] The police chief was even a national officer, and the jury foreman was a field organizer.[43] Two weeks before the trial, the Klan circulated the list of the jury venire to check for Klan members.[44]

The prosecution never had a chance in a trial that was riddled with appeals to racial and religious prejudice. The State called only five witnesses in its case in chief, and from three of the witnesses, Stephenson's attorney elicited, on cross-examination, that they were Catholics.[45] For one of those witnesses, Stephenson's attorney saved for his last question, "You are a Catholic, aren't you?"[46] When the witness responded in the affirmative, Stephenson's attorney ended with "[t]hat's all."[47]

The climax of the defense attorney's appeal to religious bigotry occurred during his closing argument when, after he accused the State of injecting the religion of Father Coyle into the trial, Stephenson's attorney made the following pitch:

> Because a man becomes a priest does not mean that he is divine. He has no more right to protection than a Protes-

37. *Id.* at 346–47.
38. VAN DER VEER HAMILTON, *supra* note 1, at 87 (citation omitted).
39. NEWMAN, *supra* note 1, at 74.
40. *Id.* at 75.
41. *Id.* at 86.
42. *Id.*; *see also* VAN DER VEER HAMILTON, *supra* note 1, at 93.
43. NEWMAN, *supra* note 1, at 86; VAN DER VEER HAMILTON, *supra* note 1, at 93.
44. NEWMAN, *supra* note 1, at 86.
45. SUITTS, *supra* note 1, at 348.
46. NEWMAN, *supra* note 1, at 76. Newman states that Black, the lead defense attorney, saved this question for last to ask three witnesses, but the trial transcript shows that Black asked this question of one witness.
47. *Id.*

> tant minister. Who believes Ruth Stephenson has not been proselytized? A child of a Methodist does not suddenly depart from her religion unless someone has planted in her mind the seeds of influence.[48]

As one historian explained, "These were code words to a jury in a southern, Protestant city like Birmingham in the 1920s."[49] Stephenson's attorney called prosecution witnesses "brothers of falsehood as well as faith."[50]

The most dramatic appeal to racial prejudice occurred during the direct testimony of Stephenson. His lead attorney wanted to bolster Stephenson's assertion that Pedro Gussman appeared to be black, not Hispanic.[51] Stephenson testified that he told Coyle, "You have ruined my home. That man is a nigger."[52] During Stephenson's testimony, his attorney asked that the blinds be drawn, and he arranged to have floodlights shone on the face of Gussman.[53] The attorney then said, "That will do. . . . I just wanted the jury to see that man."[54] After Gussman testified that his parents were natives of Spain, Stephenson's attorney showed the jury a newspaper photograph of Gussman.[55] Stephenson's attorney said, "I just wanted the jury to see this picture taken before the witness had his hair worked on. . . . You've had the curls rubbed from your hair since you had that picture taken."[56] In his closing argument, Stephenson's attorney responded to the prosecution assertion that Gussman was of "proud Castillian descent" by saying "he has descended a long way."[57]

The Klan left nothing in the trial to chance. "It was a rare moment" when the ruling of the trial judge on an objection did not favor the defense.[58] During his closing argument, Stephenson's attorney read from the official prayer of the Ku Klux Klan.[59] Klansmen in the courtroom communicated with hand gestures.[60] Years later, the head of the Klan in Alabama, who raised the funds for the defense team, bragged that the defense

48. *Id.* at 83; VAN DER VEER HAMILTON, *supra* note 1, at 91.
49. NEWMAN, *supra* note 1, at 83.
50. *Id.*; VAN DER VEER HAMILTON, *supra* note 1, at 90.
51. NEWMAN, *supra* note 1, at 81.
52. *Id.* at 73; SUITTS, *supra* note 1, at 352.
53. NEWMAN, *supra* note 1, at 81.
54. *Id.* at 82.
55. VAN DER VEER HAMILTON, *supra* note 1, at 89.
56. *Id.*
57. *Id.* at 90; NEWMAN, *supra* note 1, at 83.
58. NEWMAN, *supra* note 1, at 77.
59. *Id.* at 83.
60. *Id.* at 86.

"didn't have much trouble winning that verdict."[61] After his acquittal, Stephenson was given a seat of honor at Klan rallies throughout Alabama, before he returned to his role as the marrying parson.[62] One historian has concluded that the Klan was later successful in destroying all copies of the official trial transcript save for partial ones at the Cathedral of St. Paul and the Archdiocese of Mobile.[63]

The most significant outcome of the trial was the assistance it provided to the later career of Stephenson's lead attorney, Hugo Lafayette Black. On September 13, 1923, Hugo Black, like the other four members of his team before him, became a member of the Klan.[64] As one of his biographers described the event, Black "placed his left hand over his heart, palm downward in a fascist-like salute, raised his right straight to heaven, and repeated the Klan oath," at a rally attended by a crowd of twenty-five thousand.[65] The Klan later became the center of a political organization that elected Black to the U.S. Senate in 1926. He became a populist New Dealer in the Southern tradition.[66] In 1937, President Franklin Roosevelt appointed Hugo Black to be an associate justice of the Supreme Court of the United States.

As I now enjoy the tremendous privilege of serving on the U.S. Court of Appeals for the Eleventh Circuit, my main chambers are in Birmingham. It is a city that I love, and I have a strong interest in the newly formed Father James Coyle Memorial Project. It was formed in 2004 to mark the one-hundredth anniversary of Father Coyle's appointment as rector of St. Paul. My first child was baptized at the Cathedral of St. Paul, and I often attend Mass there; my family belongs to Our Lady of Sorrows Church, where Stephenson's daughter, Ruth, became a Catholic; and my high school alma mater in Mobile is the school where Father Coyle, decades earlier, taught and served as rector. So when I go to work each day in the Hugo Black courthouse and see the bust of that judge in the rotunda, I cannot help but say the prayer for Father Coyle that he used as the title of a poem: "*Requiescat in pace.*"[67]

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61. *Id.*; VAN DER VEER HAMILTON, *supra* note 1, at 93.

62. NEWMAN, *supra* note 1, at 88.

63. *Id.* at 87.

64. *Id.* at 91.

65. *Id.* at 92.

66. *Id.* at 195–204.

67. JAMES E. COYLE, *Requiescat in pace*, *in* ROSEMARY AND VIOLETS: POEMS 55 (1922) (published by friends of Father Coyle on the anniversary of his murder).

III. A LESSON FROM HISTORY: THE CALLING OF A LAWYER

I do not offer this historical account to condemn the career of Justice Black, whose service on the Supreme Court was, in several respects, distinguished, but Black's representation of Stephenson was not marked by professionalism and honor. Many of Black's trial tactics were despicable, even evil. The lessons of *State v. Stephenson*,[68] without regard to the personalities involved, are timeless.

A lawyer's call is not to win at any cost. Whether you can get away with a tactic that might benefit your client is not the sole measure of its propriety. Some winning tactics are simply wrong.

The true calling of a lawyer is noble, as expressed in the Rules of Professional Conduct. A lawyer owes a duty of zealous representation to his client, but that duty is tempered by moral and ethical responsibilities. A lawyer must pursue meritorious claims, but he must not abuse the legal process.[69] An advocate owes a duty of fairness to opposing counsel and parties.[70] A lawyer owes a duty of respect to the impartiality and decorum of the court so that every case may be decided according to law.[71] A lawyer also owes respect to the rights of third persons.[72] Through it all, a lawyer must maintain professional independence as an officer of the court.[73]

In addition to the questions raised about Black's trial tactics, there is a debate among those who have studied the Stephenson trial whether the prosecutors performed their ethical duty in good faith. The conventional perspective, based on the opinion of a newspaper reporter who witnessed the trial, is that the prosecutors did not want to obtain a conviction of Stephenson.[74] A student at the University of Alabama, in the law review comment I mentioned at the beginning of my remarks, last year challenged that view and made a compelling argument, based on her review of the transcripts of the grand jury and the trial and newspaper reports, "that the Klan's reach stopped short of the Solicitor's office."[75]

What is clear is that the prosecutors had a special responsibility in that trial: "A prosecutor has the responsibility of a minis-

68. #1123-21 (Ala. Trl. Ct. 1921).
69. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004).
70. *Id.* R. 3.4.
71. *Id.* R. 3.5.
72. *Id.* R. 4.4.
73. *Id.* R. 5.4.
74. NEWMAN, *supra* note 1, at 86.
75. Cowley, *supra* note 2, at 1146.

ter of justice and not simply that of an advocate."[76] The prosecutor, above all, must seek the truth.

IV. My Response to the Criticisms by Steve Suitts

In June 2005, I spoke about this topic at a meeting of the St. Thomas More Society in Atlanta, and the following month, Steve Suitts, an author of a new biography of Hugo Black, wrote an op-ed in a legal newspaper that condemned my account as "misjudging Hugo Black."[77] Apparently Mr. Suitts read an article about my speech and concluded, without having read or requested the entire speech, that I was "dead wrong: wrong facts, wrong ethics and perhaps wrong motives."[78] Suitts's biography had been published a couple of months earlier, but I was not yet familiar with it.

Despite my alleged errors, Suitts admitted, in his op-ed, three key facts: (1) Black asked two witnesses at trial if they were Catholic; (2) Black drew the courtroom blinds to show that Pedro Gussman appeared to be a black man; and (3) Black ridiculed Gussman's ancestry.[79] In his biography of Black, Suitts also states that Black accused Gussman of having had curls removed from his hair;[80] Black elicited testimony from three, not two, State witnesses that they were Catholic;[81] Black argued in closing that a priest is not divine or entitled to more protection than a Protestant minister and Ruth Gussman had been wrongly proselytized;[82] and Black referred to two State witnesses as "'Siamese twins' whose testimony was perjured simply because two Catholic brothers believed their priest was a better man than Stephenson."[83]

Suitts also reaches, in his new biography of Black, an unconventional conclusion about Black's membership in the Ku Klux Klan.[84] Suitts concludes that Black's membership in the Klan was a decision of choosing the lesser of two evils, because the Klan had been on what Suitts considers to have been the progressive side of labor in disputes with corporate leaders of Birmingham.[85]

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76. Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2004).
77. Steve Suitts, Op-Ed., *Misjudging Hugo Black: Pryor Restraint Needed*, Fulton Daily Rep., July 18, 2005, at 10.
78. *Id.*
79. *Id.*
80. Suitts, *supra* note 1, at 354.
81. *Id.* at 348.
82. *Id.* at 357.
83. *Id.*
84. *Id.* at 433.
85. *Id.* at 424–33.

In Suitts's words, "Faced with a rough choice, Hugo Black preferred a Klan town to a company town."[86] Suitts describes Black's decision to join the Klan as governed by "ethics of responsibility as well as conviction."[87] He concludes, "Although, in retrospect, his decision was a hazardous moral judgment in a misbegotten society, Hugo Black did not suspend his moral compass when he decided, once and for all, to become a Klansmen."[88]

Suitts's disagreement with me and, more significantly, the accounts of Hugo Black biographers Roger Newman and Virginia Van Der Veer Hamilton involves two matters: (1) whether the Ku Klux Klan rigged Stephenson's trial; and (2) whether Black's trial tactics were honorable. On both points, I find Suitts's case unpersuasive. I will address each in turn.

Many of the Klan connections to the Stephenson trial depend on the veracity of the Klan cyclops, James Esdale, who told sources for years that the Klan rigged the trial.[89] Esdale is the source for members of the jury, including the foreman, being members of the Klan; the pretrial circulation of the jury venire list to check for Klan members; the Klan involvement in the defense fund; the use of hand gestures by Klan members; and Black's reference to the Klan prayer in his closing argument.[90] If Esdale told the truth about these matters, then it is fair to say that the Klan rigged the trial.

Suitts speculates that, disbarred and "reduced to operating a bail bond office, . . . [w]hen historians caught up with him, beginning in the 1960s, Esdale had every temptation to rebuild his self-esteem by remembering a past larger than life."[91] Suitts concludes breathlessly, "No real evidence of Klan control exists for this trial from sources other than Esdale."[92] There are several problems with Suitts's conclusion.

The first problem is that the Stephenson trial was considered to be rigged by the Klan long before the 1960s when Esdale, according to Suitts's speculation, told tall tales. As Suitts admits in an endnote of his book, as early as 1937, Esdale was the source for what Suitts calls the "rumor" that Black repeated the Klan prayer or oath in his closing argument.[93] Suitts asserts that "[t]here is no circumstantial or corroborating evidence for these

86. *Id.* at 432.
87. *Id.*
88. *Id.*
89. NEWMAN, *supra* note 1, at 83–84; SUITTS, *supra* note 1, at 359.
90. NEWMAN, *supra* note 1, at 83–84.
91. SUITTS, *supra* note 1, at 359.
92. *Id.*
93. SUITTS, *supra* note 1, at 579–80 n.42.

claims,"[94] but Suitts never acknowledges Roger Newman's conclusion:

> [so great was] the Klan's power at the time . . . that no public record of the trial survives. . . . There is no record of the case in the Jefferson County criminal courts. Records of all other cases tried in 1921 remain. But that of *State v. Stephenson*, #1123-21, was apparently destroyed, long ago and almost certainly by the Klan.[95]

The only remaining trial transcripts are in the custody of the Catholic Church in Alabama, and those transcripts do not have the closing arguments for either the prosecution or the defense.

Other sources described the Stephenson trial as influenced by the Klan long before the 1960s. In 1937, Ray Sprigle wrote an article in the *Pittsburgh Post-Gazette* that described the Stephenson trial as one with Klan connections and, in another article in 1949, Sprigle described a "jury packed with Klansmen."[96] Both Roger Newman and Virginia Hamilton relied on these articles in their biographies of Black, but Suitts discounts the articles in passing in another endnote of his book.[97]

Although he asserts that there is "no real evidence" that the Klan rigged the trial, Suitts admits in his book that "some of Stephenson's lawyers and the Jefferson County sheriff were Kluxers."[98] He does not state whether *all* of the defense lawyers, except Black, were members of the Klan, as Newman concluded. Suitts's reference to the sheriff appears to be about Thomas J. Shirley, the Police Chief of Birmingham, who was an important witness for Stephenson's defense, a national officer of the Klan, and only later became the Sheriff of Jefferson County.[99] Suitts admits that five years after the trial, one of the jurors became an "Alabama Klan official," and "a decade later, one of Stephenson's character witnesses was a Kluxer in Virginia."[100] Suitts even admits that there is evidence that the trial judge, William Fort, later became a Klansman;[101] but Ray Sprigle reported in 1937 that Judge Fort "presided over a Klan meeting" in June after the Stephenson trial,[102] which would suggest that Fort was a member well before then. Suitts also does not mention the parading of

94. *Id.*
95. NEWMAN, *supra* note 1, at 87 n.*.
96. SUITTS, *supra* note 1, at 579 n.41.
97. *Id.*
98. *Id.* at 360.
99. *Id.* at 350; NEWMAN, *supra* note 1, at 72, 79, 86, 91.
100. SUITTS, *supra* note 1, at 359–60.
101. *Id.* at 360.
102. NEWMAN, *supra* note 1, at 86 n.*.

Reverend Stephenson at Klan rallies following his acquittal. Perhaps these facts and omissions explain why Suitts asserts in an endnote, "The counting of Kluxer connections is a misguided, misleading exercise for evidencing Klan involvement or control in a trial."[103]

Some of Suitts's downplaying of the potential Klan involvement in the Stephenson trial is hard to comprehend. Suitts asserts, for example, "[D]espite a general history of Klan illegality, no evidence suggests that in 1921 most Kluxers in Birmingham were willing to ignore their lawful duty in a courtroom."[104] Suitts does not mention the conclusion of Newman that "[i]n the early 1920s the Klan controlled Birmingham. . . . Juries dominated by the Klan 'routinely' acquitted members or sympathizers of 'a variety of crimes, the only requirement being that the victim must have been (a) Negro, (b) Catholic, (c) an immigrant, (d) or an idle boozer.'"[105]

Later in his book, in reference to another trial in Birmingham in 1923, Suitts makes a fine distinction between "bias" and "a rigged jury."[106] Suitts states that the Dowling trial in 1923 suggested "some Kluxers seemed willing to stand behind their brethren in court despite evidence of guilt."[107] He then explains that one of the reasons Hugo Black joined the Klan was "to make certain that opposing lawyers did not get the upper hand with Klansmen on the juries simply because they were fraternal brothers."[108] Suitts then reasons, "If a juror believed a fellow Klansmen more truthful than someone else, no specific law was violated by that act of personal judgment."[109] I submit that a trial where the accused is a Klansmen, some members of the jury are Klansmen, and the victim is a Catholic immigrant is unfair regardless of Suitts's distinction between a biased jury and a rigged trial.

The final theory of Suitts that the Klan did not rig the Stephenson trial rests on two propositions. First, Suitts asserts that the Klan was not yet a powerful organization in Birmingham in 1921. As evidence for that proposition, Suitts states, without further explanation, that a Klan Wizard said in January of that year that the membership rolls had only 1600 in a county of

103. SUITTS, *supra* note 1, at 580 n.43.
104. *Id.*
105. NEWMAN, *supra* note 1, at 90–91.
106. SUITTS, *supra* note 1, at 425.
107. *Id.* For a description of the Dowling trial, see *id.* at 580 n.45.
108. *Id.*
109. *Id.*

310,000,[110] but Suitts fails to mention that, in contrast with Klansmen, a substantial majority (at least eighty percent) of the total population of Jefferson County were women, blacks, immigrants, minors, and others who were ineligible for service on a jury.[111]

The trial also occurred nine months later in October, and even Suitts admits in his book that the growth of the Klan in the early 1920s was "phenomenal."[112] The most authoritative history of Alabama states, "By 1920 anti-Catholicism was rampant, and the Ku Klux Klan exercised tremendous influence."[113] Newman explains, in his biography of Black, that, after Esdale became a Klan recruiter in 1920, Esdale "quickly built the membership up to several thousand."[114] Newman also concluded,

> In the early 1920s the Klan controlled Birmingham. White-robed men and cross burnings; whippings and lashings; floggings and abductions; tarrings, featherings and brandings; flashing lights into parked cars, closing dance halls and beating people in the name of morality—all were common sights in the Magic City. . . . [Citizens] were urged to patronize only those shops whose windows displayed T.W.K. (Trade With a Klansman) signs.[115]

Suitts's theory is also at odds with a respected history of the Alabama Klan in the early twentieth century.[116] Professor Glenn

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110. *Id.* at 360.

111. In 1921, an Alabama statute categorically excluded women and all persons under twenty-one and over sixty years of age. ALA. CODE § 7239 (1907). The statute also provided considerable leeway for commissioners to exclude members of other classes by charging commissioners to select potential jurors "as in [the commissioners's] opinion are fit and competent to discharge the duties of grand and petit jurors with honesty, impartiality, and intelligence, and are esteemed in the community for their integrity, good character, and sound judgment." *Id.* As the Alabama Supreme Court stated, jurors in Alabama were "a selected class," *Green v. State*, 73 Ala. 26, 41–42 (1882), and jury commissioners in Alabama and throughout the South in the first half of the twentieth century selected potential jurors who were almost always white. *See, e.g.*, Norris v. Alabama, 294 U.S. 587, 590–91, 593 (1935); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 149, 223 (Vintage Books ed. 2004) (1976); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 323, 329 (1978). Suitts provides no reason to think that, in 1921, white Klansmen would not have served on juries in Jefferson County in numbers far exceeding their percentage of the overall population.

112. SUITTS, *supra* note 1, at 360.

113. ROGERS ET AL., *supra* note 1, at 448.

114. NEWMAN, *supra* note 1, at 90.

115. *Id.* at 90–91.

116. FELDMAN, *supra* note 1, at 58–59.

Feldman of the University of Alabama at Birmingham describes the operation of an active Klan in Birmingham even before 1920, and he states that the activities of the Klan were certainly hostile to the Catholic Church.[117] He explains that in 1916 the Klan burned a Catholic church and school in Pratt City, and "Klansmen encouraged people to boycott stores with Catholic owners or employees, pressured businesses to fire their Catholic employees, and protested the construction of one church simply because it was Catholic."[118] Feldman also explains that these activities of the Klan coincided with the success of politicians running anti-Catholic campaigns for the Birmingham city commission in 1917 and the governorship of Alabama in 1919.[119]

Suitts's second proposition is that another and better established anti-Catholic organization called the True Americans was more likely "lurking in the shadows" of the Stephenson trial, but he writes "even they were not an all-pervasive, secret society that could easily fix a jury verdict in Alabama's largest county."[120] Suitts's speculation about the True Americans, which no member of that group ever revealed, tells us nothing about whether the Klan was involved, but the existence of the True Americans evidences that Birmingham was a community infected by bigotry against Catholics. That bigotry also explains, in part, why I continue to disagree with Suitts's view that "by man's justice [Stephenson] was not clearly guilty."[121]

That brings me to Suitts's criticism of my description of Black's trial tactics as dishonorable, even evil. Suitts concludes in his book:

> If Black's methods in pursuing this defense offend modern sensibilities and standards, they were not outside the bounds of courtroom tactics during the early 1920s nor were they questioned at any time by prosecutors who failed to object even when Black pulled the courtroom blinds to darken Gussman's appearance. . . . In a society sustained by the fear of interracial marriage, the use of Gussman's physical appearance was relevant, plausible, and potentially explosive in pursuing a claim of temporary insanity—and merging it with a claim of self-defense.[122]

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117. *Id.*
118. *Id.*
119. *Id.* at 59.
120. SUITTS, *supra* note 1, at 360.
121. *Id.* at 365.
122. *Id.* at 362.

In his op-ed about my perspective, Suitts challenged my view that a lawyer must measure his work based on standards of morality. Suitts wrote:

> Perhaps it is not surprising that Pryor, a devout Catholic from Mobile, would repeat the incorrect conventional wisdom of a footnote in the Catholic Church's annals of religious bigotry, but his hyperbole about Black as an example of evil is a disturbing view about a lawyer's ethics. Pryor suggests that criminal defense lawyers have a higher calling than to use "a tactic that might benefit your client. . . ." As Black knew well and Pryor ought to appreciate, when trial lawyers start measuring their duty in court by standards other than representing their own clients to the best of their ability, within the legitimate rules of the courtroom, the American legal system begins to fail.[123]

I reject Suitts's criticism on two grounds. First, Hugo Black's trial tactics were objectively wrong. Second, Suitts's model of a lawyer guided by moral relativism is not likely to serve well the American legal system. Allow me to explain.

Leaving aside what Suitts calls the "incorrect conventional wisdom" that Hugo Black was involved in a Klan conspiracy to rig the Stephenson trial, there is still plenty of reason to criticize Black's blatant appeals to racial and religious bigotry during the trial. After he murdered Father Coyle, Stephenson immediately walked to the courthouse and told a law enforcement officer that he should be put in jail because he was "in trouble."[124] Stephenson then told interrogators that "[i]t was purely a case of self-defense."[125] The defense that Stephenson was not guilty by reason of insanity was concocted after Hugo Black became involved.[126] Suitts writes in his book that "Black devised [the] legal strategy,"[127] which allowed the use of appeals to racial and religious bigotry. According to Suitts, "[A]n Alabama jury of white men in 1921 could easily believe that a fundamentalist white Methodist minister would go 'crazy' if he discovered suddenly that his only daughter, who had flirted with Catholicism, converted and married a Negro man."[128] The most fundamental

123. Suitts, *supra* note 77, at 10.

124. NEWMAN, *supra* note 1, at 73; SUITTS, *supra* note 1, at 340.

125. SUITTS, *supra* note 1, at 340.

126. NEWMAN, *supra* note 1, at 74–75; SUITTS, *supra* note 1, at 361–62.

127. SUITTS, *supra* note 1, at 361.

128. *Id.* at 361–62.

problem with this theory is that it was false, but Hugo Black did not care whether it was false.[129]

Hugo Black, Reverend Stephenson, and many others must have either known or strongly suspected that Pedro Gussman was not black. In all of the Birmingham newspaper reports of the Coyle murder and the Stephenson trial that I can find, every reference to the race of Pedro Gussman states that he was a Puerto Rican. I cannot find a single article in the mainstream press from this era of segregation and extreme race consciousness that refers to Pedro Gussman as a Negro.

Had anyone thought that Gussman was black, the response would have been severe. Recall that in 1921, an interracial marriage was more than abhorrent; it was illegal. If Stephenson thought that Coyle had performed an illegal wedding, then the obvious response would have been to report the priest to the police and have the marriage declared void. There is also little reason to believe that either Father Coyle or Stephenson's daughter, Ruth, would have wanted anything to do with a criminal marriage of a white woman and a black man in Alabama in 1921.

Although this defense was false, Hugo Black did not care to prove its truth. Hugo Black wanted to change the subject of the trial from an implausible argument of self-defense to a terror about race and religion. Whether other Alabama lawyers would have employed this tactic in 1921 is beside the point. There are plenty of aspects of the Alabama legal system then that were evil, including the exclusion of women and blacks from the jury venire. It was one thing for a lawyer to represent his client in a flawed system of justice, but it was something else to rely either deliberately or recklessly on a falsehood to make the defense an appeal to bigotry.

Suitts speculates in his op-ed that perhaps my real motivation for speaking about the Stephenson trial has to do with discrediting Black because of his church and state jurisprudence, but my motivation was exactly what I have already explained: that is, because of several personal coincidences, I find this bit of history fascinating. Had Suitts read my entire speech, he would have known that I said I have no interest in condemning Black. I find Black's courage in signing the decision in *Brown v. Board of Education*,[130] for example, to be admirable, as well as his adherence to text in constitutional interpretation. I have no doubt

129. I am grateful to Dean Sharon Davies for her insights about whether Black believed Gussman was a Negro. Any errors in this analysis are mine.

130. 347 U.S. 483 (1954).

that Black was an outstanding trial lawyer who represented his clients superbly.

But I will admit that I do not view Hugo Black as a role model. I do not sympathize with Suitts's defense of Black's decision to join the Klan. I also am not an admirer of either Black's deep-seated hostility to the Catholic Church or his liberal populist career as a politician.

At the end of the day, I still believe that a lawyer or judge is morally accountable for his professional work. In 1921, the Code of Ethics for Alabama lawyers acknowledged, "The attorney's office does not destroy a man's accountability to the Creator . . . ."[131] Thirteen years before the Stephenson trial, the American Bar Association stated in Canon 32 of the Canons of Professional Ethics the lawyer's final duty: "[H]e advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law."[132]

It is easy to say, with the hindsight of eighty years, that the tactics of the Stephenson defense team were wrong, but we should not deceive ourselves with the belief that the temptation to corrupt the rule of law has been since eliminated. That temptation will always be with us. The question is how well will we avoid it.

I reject Suitts's view that we will avoid well future temptations by having lawyers employ situational ethics in the representation of clients. Lawyers and judges must adhere to their professional responsibilities, but that adherence does not require any compromise of conscience. The legal system will be better served by having lawyers and judges remember that their calling is a moral enterprise.

When Catholic lawyers and judges confront evil in our fallen world, we are called to follow the example of our role model and patron saint, Sir Thomas More. After King Henry VIII left his wife, Catherine, for relations with Anne Boleyn, and the clergy surrendered the property of the Church in England to the King, St. Thomas More resigned as Lord Chancellor. When the English parliament passed the Act of Succession, which made Anne Boleyn's issue first in succession to the Crown, St. Thomas More said he would swear to the succession for it was the law of

131. NEWMAN, *supra* note 1, at 86–87.

132. CANONS OF PROFESSIONAL ETHICS Canon 32 (1908), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 15 (6th ed. 1995).

the land, but he refused to declare the supremacy of the King over the Church. More recognized clearly his duty to render to God what belongs to Him, while rendering to Caesar what belongs to him.[133] As More succinctly explained a moment before his execution, he "died the King's good servant and God's first."[134] We should strive to follow More's example.

133. *Matthew* 22:18–22.

134. JOHN FARROW, THE STORY OF THOMAS MORE 227 (1954); Matthew Mehan, *Getting to Know Thomas More*, NAT'L REV. ONLINE, Aug. 25, 2005, *available at* http://www.nationalreview.com/comment/mehan200508250824. asp.