The Birth of Jim Crow in Alabama 1865-1896

I. INTRODUCTION

It was April 25, 1902 when Glenny Helms and two friends were traveling across Alabama on their way to Columbus, Georgia.[1] Their journey stalled in Goodwater, Alabama, where the night marshal, John G. Dunbar, stopped and arrested all three young Black men for vagrancy.[2] These men, who were just passing through town, were taken before the mayor and fined $6.60 each. They could not pay the fine so the night marshal locked them up and went in search of someone who might purchase their services and pay their fine. It was lawful at the time for those in charge of prisoners to sell the prisoners' services in payment of fines.

After talking to several White men the marshal found an "employer," one J. Fletcher Turner, who would pay $40.00 for the services of the three Black men for four and one-half months of work, which was also the jail sentence. The night marshal then went back to the mayor and paid the fines but kept the profit of $20.20 himself. The "employer" was then free to work the three Black men until their sentences expired.

All three Black men were worked long hours, practically naked, under guard and were beaten on occasion. By some fortuitous event Glenny Helms was able to get word to his father that he was being held. His father was able to persuade a retired Georgia merchant to go and attempt to procure their freedom. The merchant was able to free the young Black men, but only after paying $46.00. The "employer" had already worked the three Black men four months and now received all his money back plus $6.00.

In 1908 a young Black agricultural worker named Alonzo Bailey was jailed for violating a labor contract.[3] H.C. Borden, a White manager of a company, had Alonzo arrested by complaining that he had signed a one year contract and was paid a $15.00 advance on his $12.00 a month wage. Alonzo worked a little over a month and then quit. Under the law the act of leaving his work before complete repayment of his debt was prima facie evidence of intent to defraud and no explanation of why he left the work was permitted.[4] Physical abuse or hardship on the worker were not defenses or mitigating factors to this crime.

Sadly these situations were typical in Alabama at this time.[5] Booker T. Washington lamented "that any White man, who cares to charge that a Colored man has promised to work for him and has not done so, or who has

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1. This actual event was published in the work PETE DANIEL, THE SHADOW OF SLAVERY 54-55 (1990).

2. The statute which was possibly applicable here is found at ALA. CODE § 5628 (1896). Relevant portions are as follows: "Any person who having no visible means of support, or being dependent on his labor, live without employment, . . . or being an able-bodied person, if found begging; . . . must, on conviction for the first offense, be fined . . . ."

3. *See* DANIEL, *supra* note 1, at 68-69.

4. *Id. See also* ALA. CODE §§ 6845, 6846 (1907).

5. *See* DANIEL, *supra* note 1, at 68. Alonzo Bailey had his case heard before the U.S. Supreme Court and the contract-labor law was declared unconstitutional under the Thirteenth Amendment. Bailey v. Alabama, 219 U.S. 23 (1911). *See also* Note, 60 U. PA. L. REV. (1912); Note, 11 HARV. L. REV. 391 (1911).

gotten money from him and not paid it back, can have the Colored man sent to the chain gang."[6]

These actual events serve to illustrate acutely how Alabama's law was used to suppress, humiliate and terrorize Blacks.[7] This Note examines the birth of Jim Crow laws which established second class citizenship for Blacks.[8] More specifically, I will examine Alabama's law from 1865 until 1896. The Alabama Jim Crow system was well established in 1896 when the Court decided *Plessy v. Ferguson*.[9] In the conclusion, I propose an argument for Black reparations to speed social and political development.

II. THE BLACK CODES: 1865-1866

In 1861 the population of Alabama consisted of 526,431 Whites, 2,690 free Blacks, and 435,080 slaves.[10] The economy was largely based on agriculture. Slave labor had suited the Alabama economy well, but the end of the Civil War changed this labor system.[11] The Thirteenth Amendment was ratified in 1865 providing for the end of the Constitution's protection of slavery.[12] The Southern provisional legislatures, appointed by President Andrew Johnson, responded with laws designed to control the Black labor force called the Black codes.[13] Congress tried to nullify the Black Codes with the Civil Rights Act of 1866[14] which provided that ". . . all persons born in the United States . . . are hereby declared to be citizens of the United States . . ." and had all the rights and benefits enjoyed by White citizens.

Newly freed Blacks were faced with bleak prospects after the Civil War as they found themselves with no land, capital, or profitable work. The Southern planters found themselves without a stable work force as most of their slaves left their plantations being understandably "quite adverse to labor immediately after liberation . . . ."[15] However, even before the war had ended, a

6. DANIEL, *supra* note 1, at 67.

7. It was not until the Supreme Court decision in United States v. Reynolds, 235 U.S. 133 (1914), that the practice of allowing an employer to pay a man's fine and then working him as a prisoner was held unconstitutional.

8. Jim Crow is a practice of separation of the races for the purpose of excluding Blacks from contact or association with Whites. The idea was to keep the Negro in "his place." *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 17-22 (3d ed. 1974); DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 28-29 (2d ed. 1980).

9. 163 U.S. 537 (1896). *Plessy* provided a constitutional foundation for the separate but equal doctrine.

10. *See Proclamation of Gov. L.E. Parson*, ALA. CODE § 74 (1867).

11. *See* ALA. CODE Ordinance No. 6, at 53 (1867). *See also* Ordinance 29. In fact, the state legislature on September 22, 1865 proclaimed in Ordinance No. 6 that ". . . the institution of slavery has been destroyed in the State of Alabama" and that "[i]t shall be the duty of the legislature, at its next session, to pass such laws as will protect the freedmen of this State in the full enjoyment of all their rights of person and property, and guard them and the State against any evils that may arise from their sudden emancipation."

12. U.S. CONST. amend. XIII.

13. *See* WOODWARD, *supra* note 8, at 23. Some of the Black Codes were designed to reinstate a form of slavery.

14. 14 Stat. 27 (1866). It should also be noted that a civil rights act was passed in 1870 as well but it was basically a reenactment of the 1866 act. *See* JOHN E. NOWAK, RONALD D. ROTUNDA, & J. NELSON YOUNG, CONSTITUTIONAL LAW § 15.1, at 802 (3d ed. 1986).

15. WILLEMINA KLOOSTERBOER, INVOLUNTARY SINCE THE ABOLITION OF SLAVERY 57 (1960).

contract labor system emerged as one way to create a stable labor force.[16] This system was desirable to Whites because "both the Southern planters and the federal government believed that Blacks needed close supervision."[17] The labor contract did not allow the Black to quit. Performance was required and enforced.

Many Blacks felt they had little or no choice as they faced their uncertain future, so they would sign contracts requiring them to work for a year at meager wages. Blacks who ran away from their employer were returned by federal soldiers who, ironically, were present in the South to protect Blacks.[18] Slavery had ended but the control Southern planters again had over Black labor was often hard to distinguish from slavery.[19]

Alabama did not enact Black codes as did some Southern states.[20] After seeing the commotion raised by many in the North when states like South Carolina enacted Black codes, Alabama became cautious about using such an obvious method of retaining dominion over Blacks.[21] Nonetheless if it were not for Christmas, Alabama probably would have passed a Black Code.

Several acts which referred to "Negroes" were passed prior to the Christmas of 1865. One act extended to Blacks the rights to sue and be sued, as well as plead and implead.[22] One law directed at newly freed Blacks expanded the definition of vagrancy to include " 'any runaway, stubborn servant or child,' and 'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term or service without just cause.' "[23] Offenses against property contained increased penalties for theft and arson, with a minimum of five years in prison and up to the death penalty. These changes were based upon ". . . the White man's belief that the Negro race had a predilection for theft and arson."[24]

As the Christmas of 1865 approached, Blacks showed little interest in contracting for work during 1866. This made the Alabama legislators nervous as their constituents might become angry if Blacks did not sign new contracts and there was no law to compel them to work. Christmas interrupted the legislative session and upon return from the break legislators noted that a majority of Blacks had made contracts. This took away the pressure of hastily assembling a series of laws in one code.[25] However, the legislature still passed an act regulating the labor contracts of Blacks. It did not become law, though,

16. *See* DANIEL, *supra* note 1, at 19.

17. *Id.* at 19.

18. *See id.* at 20.

19. *See id.* at 20-21; *see also* BELL, *supra* note 8, at 85; and WOODWARD, *supra* note 8, at 23.

20. *See* THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 76 (1965).

21. *See id.* at 76; *see also* KLOOSTERBOER, *supra* note 15, at 58. The purpose of South Carolina's Black Code was ". . . to retain the former slaves as plantation laborers . . ." by restricting their choice of work to plantation labor or domestic work and not as a temporary measure but permanently. These measures stirred violent opposition in the North.

22. *See* WILSON, *supra* note 20, at 76, *citing* Alabama Acts (1865-66). The Civil Rights Act of 1866 was not yet federal law and the Fourteenth Amendment was not ratified until 1868.

23. WILSON, *supra* note 20, at 76. The laws appeared race neutral but they were obviously directed at newly freed Blacks.

24. WILSON, *supra* note 20, at 76. This law was not expressly directed at Blacks but the sudden change in the law which coincided with the new status of Blacks was not a coincidence.

25. *See* WILSON, *supra* note 20, at 76. The legislators' fear of their constituents led them to set a very short deadline for completing a code to regulate Blacks.

as Governor Patton vetoed the act because he considered it class legislation.[26] The legislature repealed openly discriminatory provisions of the 1852 Penal Code, but did leave a provision prohibiting racial intermarriage.[27]

With the Black codes no longer a consideration, the Alabama Legislature in this same session pursued the discrimination of Blacks through scattered enactments which appeared race neutral. One act prohibited enticement of a laborer away from his contract, another increased punishment for receipt and concealment of stolen property, and a third defined the duties between master and apprentice. This last act provided for the involuntary apprenticing of Black children apparently in an effort to resolve the problem of abandonment of Black children.[28]

The Freedmen's Bureau which was established by Congress in 1865 to protect newly freed Blacks, was also useful as a tool of the Southern planters.[29] The chief of the Bureau stated that he would use all his power to press the Black population into labor and would gather up all those Blacks who had no visible means of support and put them to work.[30] The assistant commissioner promised the Alabama planters that any Black man would be treated as vagrant if his White boss would swear that he had gone from work unnecessarily only three days out of a month.[31] This would cause imposition of a fine and, if not paid, the vagrant could be hired out to an employer.[32]

Alabama law during this period was designed to retain control over the Black labor force, but the laws also reflected the difficulty Whites had in adjusting their attitudes and practices toward Blacks. The Thirteenth Amendment to the U.S. Constitution and Section 1 of the Civil Rights Act of 1866 attempted to prevent slavery and discrimination, but arguably one effect of these enactments was to simply require Whites to find different methods of treating Blacks the same way as before. There was certainly not unanimous support from the federal government in requiring a change in the treatment of Blacks as both the federal army and the Freedmen's Bureau encouraged the enactment of special laws affecting Blacks.[33] Nonetheless the state actions were wrong and they restrained Black social, economic, and political advancement.

III. 1866-1875

The Civil Rights Act of 1866 was very displeasing to the Southern states. Questions were raised regarding the constitutionality of this act, so Congress began the ratification process of the Fourteenth Amendment only one week

26. *See* WILSON, *supra* note 20, at 77. "The Governor's expressed opposition to further 'class legislation,' added to altered public feeling and, doubtless, knowledge of how federal authorities reacted to the Black Codes of Mississippi and South Carolina, resulted in the legislature's abandonment of further efforts in the direction of openly discriminatory legislation."

27. *See* WILSON, *supra* note 20, at 77.

28. *See id.* at 77; *see also* Kloosterboer, *supra* note 15, at 58. Parental approval was not required before a Black child was removed from the family and placed with an employer who was preferably a former slave holder.

29. *See* BELL, *supra* note 8, at 85.

30. *See* WILSON, *supra* note 20, at 58. Idleness was not tolerated among Blacks only.

31. *See* WILSON, *supra* note 20, at 58.

32. *See* KLOOSTERBOER, *supra* note 15, at 58.

33. *See* WILSON, *supra* note 20, at 58.

after passing the Civil Rights Act of 1866.[34] By 1868 ratification was completed and the Fourteenth Amendment reiterated that all persons born in the United States were citizens. It further provided that states could not ". . . make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[35] As with the Thirteenth Amendment, the Fourteenth Amendment also permitted Congress to enact legislation under the amendment.[36]

The Fifteenth Amendment to the U.S. Constitution was adopted in 1870 and provided that federal and state governments could not deny or abridge the right to vote because of race, color, or previous condition of servitude.[37] Unfortunately, many states made this amendment one of little consequence for nearly one hundred years by outright disobedience and circumvention of its prohibition.[38]

By 1870 it was clear that Congress stood firm on its belief that the Black man did have rights which the White man, or at least the state, was bound to respect. This was in stark contrast to Chief Justice Taney's remarks on the rights of Blacks only thirteen years before.[39] Alabama and the rest of the South had notice of their duty toward Black citizens.

Economic and political suppression of Blacks was not the only concern of Congress by 1871. Numerous lynchings and violent acts against Blacks had been reported.[40] Congress sought further legislation to stop the violence and secure the equality guaranteed by the Constitution. The Civil Rights Act of 1871, which was known as the Ku Klux Klan Act, was passed providing both civil and criminal actions against those depriving Blacks of their rights.[41] The Civil Rights Act of 1875 provided that all persons were entitled to full and equal enjoyment of public accommodations.[42] However this act endured only until 1883 when it was declared unconstitutional in the *Civil Rights Cases*.[43]

With a provisional government in place, Alabama amended its constitution on September 12, 1865. Article I, Section 1 established "That no man, and no set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services."[44] This section could be read to mean that no special monetary awards or privileges were to be conferred on Whites or Blacks unless as payment for public service. The remaining portions of the constitution did not support this meaning. In Article I,

34. *See* NOWAK et al., *supra* note 14, § 11.2, at 337.

35. U.S. CONST. amend. XIV, § 1.

36. U.S. CONST. amend. XIV, § 5. Section five is known as the Enabling Clause and states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

37. U.S. CONST. amend. XV, § 1.

38. *See* BELL, *supra* note 8, at 33.

39. In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857), Chief Justice Taney stated that Blacks were ". . . so far inferior that they had no rights which the white man was bound to respect."

40. *See* BELL, *supra* note 8, at 28-29. Bell cites Professor Litwack who recounts the commonplace murders of Blacks as well as the mutilations and beatings endured by Blacks.

41. 17 Stat. 13 (1871); *see* NOWAK et al., *supra* note 14, § 14.7, at 562. Also note that this section is commonly referred to now as Section 1983.

42. 18 Stat. 335 (1875).

43. 109 U.S. 3 (1883).

44. ALA. CONST. art. I, § 1 (1865). This constitution was based on the 1819 constitution.

Sections 5 and 8 it was made clear that only White males could be senators or representatives. In Article VIII, Section 1 only White males were qualified to vote, and in Article IV, Section 31 interracial marriages were void and subject to criminal penalties.

Ordinance No. 6 was passed the same day the Alabama Constitution was amended. It required the legislature to pass laws to protect Blacks in the enjoyment of all their rights of person and property.[45] Coupled with Article I, Section 1 of the state constitution it would appear that the rights and privileges of Black men were on a par with White men. However this was not the case as Black men were denied the right to vote, the opportunity to seek legislative office, and the freedom to marry. The conflicting laws here reflect the failure of the state to change the attitudes and practices Whites had toward Blacks. The law sanctioned the subordinate status Whites imposed on Blacks.

After the passage of the Fourteenth Amendment to the U.S. Constitution, as well as various national legislation, Alabama ratified a new constitution in 1868. In Article I, Section 1 it stated that "all men are created equal . . . endowed by their Creator with certain inalienable rights . . . [including] life, liberty, and the pursuit of happiness."[46] Section 2 continued by declaring that all citizens of the United States and those intending to be citizens of Alabama had equal civil and political rights as well as public privileges.[47] This provision was omitted from the 1875 constitution.[48]

The 1868 constitution also removed race qualifications for senators and representatives[49] and race qualifications for voting.[50] There was even an oath all voters were required to take which in part said ". . . I accept the civil and political equality of all men; and agree not to attempt to deprive any person(s) on account of race, color, or previous condition, of any political or civil right, privilege, or immunity, enjoyed by any other class of men. . ."[51]

The Alabama Code for this decade continued to be the law as enacted under the 1865 constitution. It defined the term "Negro" in Section 2 to include a mulatto.[52] "The term "mulatto" or "person of color," was defined as a person of mixed blood, descended, on the part of the father or mother, from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a White person."[53]

Only Whites could hold public office according to Section 144. Since Whites are not defined, and Negro is defined quite broadly it is apparent that only those Whites who did not have a Negro parent or grandparent could hold office. In fact one elected constable who was White but "tainted" with Negro

45. ALA. CODE Ordinances and Resolutions 53 (1867).

46. ALA. CONST. art. I, § 1 (1868). This language is similar to language found in the Declaration of Independence. This language is not in the federal constitution.

47. ALA. CONST. art. I, § 2 (1868).

48. This Author believes that this provision was omitted because the federal government had diminished its supervision of the state. Alabama did not desire to retain this provision any longer than required. *See* Bell, *supra* note 8, at 27. Bell states that the federal government had been either "unwilling or unable to halt the violence and terrorism by which Southern whites regained political control in most Southern states."

49. ALA. CONST. art. IV, §§ 4, 5 (1868).

50. ALA. CONST. art. VII, § 2 (1868).

51. ALA. CONST. art. VII, § 4 (1868). No doubt this oath made many White men dishonest.

52. ALA. CODE § 2 (1867).

53. *Id.*

blood had the validity of his acts questioned. The state supreme court deemed his acts valid as an officer de facto.[54] The apparent reason behind this enactment, which was obviously not related to competency, was to prevent any person with Black blood from holding political power. It also furthered the idea of Black subordination and demoralized Blacks so that they would not get ideas about leaving the contract labor force.

During this time there was concern over Blacks selling drugs or having a license to sell liquor. One provision threatened a $100.00 fine if an employer let a Negro ". . . sell or assist in the sale of drugs or medicines sold by retail . . . ."[55] Another provision allowed an arrest and various penalties for allowing a Negro to be licensed to keep a tavern or sell liquor.[56] The effect of these laws was to close markets to Blacks as well as limit their economic opportunities. They also sanctioned the subordinate status forced upon Blacks.

Blacks had the right to sue and be sued during this time, but their right to be a witness was limited when compared to Whites. First of all Blacks could not testify by deposition while Whites could.[57] Second, Blacks could only testify in cases involving at least one Black party or when there was a prosecution for injuries to a Black person or property of a Black regardless of whether a Black was a party.[58] Whites could testify in any lawsuit.

The code also reiterated the constitution's prohibition of interracial marriage. A prison term of two to seven years hard labor was the penalty for violating the law.[59] The penalty for those issuing a marriage license to such a couple or for one performing the marriage ceremony was a $1000.00 fine and a possible jail term of six months hard labor.[60] Another provision at Section 2345 required a mandatory minimum fine or $1000.00 against a person who solemnizes the rites of matrimony with knowledge that one person is White and the other Black. The law was a tool of separation which assisted in keeping Blacks subordinate.

During this decade a system called peonage was instrumental in keeping stable labor force and restraining Black advancement.[61] A peon did farm work but "[p]eonage occurred only when the planter forbade the cropper to leave the plantation because of debt."[62] Sharecropping existed with the peonage system, but was different since a sharecropper was his own farmer who

54. 36 Ala. 273 (1867).
55. ALA. CODE § 1233 (1867).
56. ALA. CODE § 1237 (1867).
57. ALA. CODE §§ 2680, 4231 (1867).
58. ALA. CODE § 2680 (1867).
59. ALA. CODE § 3602 (1867).
60. ALA. CODE § 3603 (1867).
61. *See* DANIEL, *supra* note 1, at 19-21.
62. *Id.* at 24. The convict-lease system was also used to supply black labor. Alabama's vagrancy statute, Section 3630 of the Alabama Code, was often used for this purpose. It stated that "[a]ny person who, having no visible means of support, or being dependent on his labor, lives without employment, or habitually neglects his employment; or who abandons his family, and leaves them in danger of becoming a burden to the public; or who, being an able bodied person is found begging . . . must each, on conviction for the first offense, be fined not less than ten, nor more than fifty dollars; and on a second conviction within six months after the first, must be fined, not less than fifty, nor more than one hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months." Though neutral in its wording Section 3630 was intended to control Blacks and assure that Blacks were working somewhere. *See also* KLOOSTERBOER, *supra* note 15, at 58.

shared his crop with the landowner. He did much the same work as a peon and often became indebted to the landowner, however he was not bound to stay with the landowner.

In addition to peonage, the Southern planter's contract system remained and was enhanced by laws that penalized anyone who hired or enticed a laborer to break his contract or leave his employment.[63] A prima facie case of enticement was made when the laborer was found working under the employment or another who had knowledge of the previous contract or refused to discharge the laborer when the previous contract was made known to him.[64] These provisions remained in the Code of Alabama beyond 1896.

The laws favoring the peonage system and the earlier mentioned convict-lease system[65] could have applied to Whites as well as Blacks. However, history shows that in Alabama they were almost exclusively used against Blacks.[66] If Blacks were seen not working local police would often arrest the Blacks on the assumption that they must be employed somewhere and then hold them until a Southern planter came to claim them.[67]

Slavery gave Blacks no choice as to work and advancement. Freedom should have changed that but the law confined the choices available. In Alabama Blacks could work for the planters for little or nothing, and they could not leave this employment unless they wished to continually hide from the police. If Blacks did not work they would face arrest which meant forced labor under harsh conditions. The early success of the planters in utilizing the law led to its expanded use in the next decade and encouraged the development of other means of control and subordination.[68] The law again was a tool to deny Black social and political advances. It also sanctioned the attitudes and practices of Whites who believed in the inferiority of Blacks.

Things did change toward the end of this decade as the state began to industrialize. Southern planters began to share their power with merchant bankers and businessmen involved in factories, mines, and railroads.[69] In appearance things began to look better for some Blacks as new power groups formed loose alliances with Blacks in return for their votes.[70] Some Blacks were even able to win elections.[71]

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63. ALA. CODE § 3691 (1867).

64. ALA. CODE § 3693 (1867).

65. The events about Alonzo Bailey at the beginning of this Note are an example of peonage, while the events about Glenny Helms are and example of the convict-lease system.

66. *See* DANIEL, *supra* note 1, at 46. Negroes were arrested on usually baseless charges and convicted. Unable to pay the fine, a businessman would step forward, pretending to be the Negroes' friend, and offer to pay the fine in return for a contract to work. Negroes had the choice of the chain gang or the contract.

67. *See* DANIEL, *supra* note 1, at 24.

68. *See id.* at 24-25.

69. *See* BELL, *supra* note 8, at 85.

70. *Id.* at 85. Bell describes the relationship as a bargain in which Blacks gave their vote to these elite groups and in return the elites would make paternalism comments against the segregation laws.

71. Some of the Blacks elected to represent Alabama were: Jeremiah Haralson was a state representative in 1870 who went on to win a national Congressional seat in 1874, James Thomas Rapier became a Congressional Representative in 1872 by defeating the popular White William C. Oates, and Benjamin Sterling Turner was a Congressional Representative in 1870. BRUCE RAGSDALE AND JOEL TREESE, BLACK AMERICANS IN CONGRESS, 1870-1889 (1990).

IV. 1875-1886

In 1875 Alabama was changing politically at a very rapid pace. Many still resented national control over state matters as well as the status given Blacks. Throughout Reconstruction the Southern planters saw the gradual decline of their stable work force as Blacks resisted employment and as industrialization took their political power. Politicians began to see the Black vote as an important factor in retaining their power. At first Republicans tried to garner Black votes. The Democrats however preyed on the ill feelings of many Whites towards foreign control and declared that a revolution was necessary to throw off the Republican yoke of federal oppression and return Blacks to their prior status.[72]

The objections to foreign control grew louder with time. Some objections were well founded as the carpetbag governments were widely reputed to be dishonest.[73] The Democrats desired to run the carpetbagger Republicans out of the state and thus redeem the state for themselves. This period became known as Redemption.[74] The Democrats boasted of the honesty of their officeholds in contrast to the carpetbagger officeholders, but this would prove to be a short-lived self-acclamation. For example, in 1882 the state treasurer disappeared when over $232,000 in state funds were found to be missing.[75]

In attempting to win the Black vote and prevail over Republicans other factions, some Democrats, toned down the racist rhetoric and pretended to be proponents of equality and freedom. They were called the Conservative-Democrats. At first many Blacks did not know which party or faction to trust and many simply did not choose sides. As a result the Republicans eventually gave up on Blacks, leaving factions of the Democratic party to compete for the Black vote.[76]

White factions among the Democratic party caused the party to struggle to keep solid control of its members. Economic issues could easily divide the party. Therefore a unifying strategy was necessary. The Democrats decided to forget the Black vote and emphasize race and tradition rather than economics. The new tactic was to constantly remind all Whites of the recently ousted foreign control and the national government's continued threat to the "superiority" of Whites over Blacks.[77] "Party discipline was . . . dependent upon keeping vividly alive the memories of these menaces. They were the only reliable bases for White solidarity. Almost any other issue ran the risk of dividing

72. *See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, at 67 (1951).

73. *See id.*

74. *See* WOODWARD, *supra* note 8, at 4. Southern leaders who overthrew the carpetbaggers were known as the Redeemers.

75. *See* WOODWARD, *supra* note 72, at 67-68. The Conservative-Democrat party was proud of its reputation for honesty. However in 1882, Robert McKee a secretary and mentor of two Alabama governors, noted that the party had no " '. . . order, system, plan, design, or purpose; without method, or checks, or safeguards other than the personal integrity of the several heads of departments and the clerks themselves. . . . Looseness invites corruption. At any moment a scandal might overthrow the party.' Within a year McKee saw his prophecy materialize at very close quarters." In 1883 Isaac H. Vincent, state treasurer of Alabama, disappeared after speculating in cotton futures with public funds causing a default of $232,980,79 in public funds. This same year the state superintendent reported that county superintendent's had defalcated over $40,000.00.

76. *See* WOODWARD, *supra* note 72, at 51.

77. *See id. See also* BELL, *supra* note 8, at 85-86.

the Whites and was hushed whenever possible."[78] This tactic would resurface repeatedly during the 1880s and 1890s as well.

The 1875 Constitution of Alabama proclaimed that all men were equal[79] and that all state citizens enjoyed equal civil and political rights. Notably missing was a guarantee of equal public privileges which the Civil Rights Act of 1875 provided. The voting oath required of all voters in 1868 was now removed.[80] In Article I, Section 33 it was reiterated that no form of slavery or involuntary servitude, unless for a criminal punishment, could legally exist.[81] As to educational facilities, this constitution included a new section which provided separate schools "for children of citizens of African descent."[82]

In Section 2 of the Alabama Code the identifying terms "negro" and "mulatto" were again defined so that these individuals could be separated from Whites when the law deemed it necessary to do so.[83] The educational provision, Section 1157 of the code, was more lenient than future provisions. It provided that "[i]n no case shall it be lawful to unite in one school both colored and White children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate schools for both White and colored children."[84] The 1875 constitution left room for this waiver provision while future laws and constitutions did not.

According to Sections 1111 and 1136 of the Alabama Code, the poll tax which was due on November 1 of each year was a means of maintaining public education. The taxes were collected by race and provided to schools of the same race from which the tax was collected.[85] Because Blacks were economically deprived, many Black schools did not exist where they were needed. If there were no schools for Blacks the law could still prohibit Blacks from attending a White school.[86]

State school funds also existed which were sent to the school districts based upon the latest official enumeration of students in the district. However, the superintendent of education also had discretion to further apportion this money by race within the school district.[87]

The Offenses Against Public Morality section of the 1876 code included identical versions of the earlier code's miscegenation provisions.[88] All parties connected with an interracial marriage or consummating interracial sex could be fined and sent to jail. An identical version of the 1867 vagrancy statute was also codified in Section 4218 of the 1876 code.[89] It served the same purposes as the earlier version as well.

78. WOODWARD, *supra* note 72, at 51. The MONTGOMERY ADVERTISER, in a July 6, 1881, issue praised as patriotic the fact that discussion of issues was not important as long as the next governor was a Conservative-Democrat.

79. ALA. CONST. art. I, § 1 (1875).

80. *See* ALA. CONST. art. VIII (1875).

81. ALA. CONST. art. I, § 33 (1875).

82. ALA. CONST. art. XII, § 1 (1886).

83. ALA. CODE § 2 (1886).

84. ALA. CODE § 1157 (1886).

85. ALA. CODE §§ 1111, 1136 (1886).

86. ALA. CODE § 1179 (1886).

87. ALA. CODE §§ 1132, 1133 (1886).

88. ALA. CODE §§ 4189, 4190, 4430 (1886).

89. ALA. CODE § 1157 (1886).

The demands for racial separateness found in the 1876 code extended to prisons. A jailor or sheriff who imprisoned Blacks and Whites together before their convictions and when separate accommodations were available could be fined $50.00 to $100.00.[90] Absent from the 1876 code are the competency provisions excluding Blacks from testifying in certain cases, the deposition provisions excluding Blacks, and the provisions regarding drug sales and liquor licenses which also excluded Blacks.

In summary some forms of discrimination in Alabama's race law during this period vanished, such as the right to testify, and some Black rights met less discrimination, as in the voting rights area. However as these forms of state discrimination vanished or decreased, in their place sprung up laws requiring separation of the races as noted in education and in prisons. Jim Crow was on his way.

V. 1886-1895

The Conservative-Democrats were still struggling to retain power. The conservative philosophy was that Negroes were a subordinate class but that they did not need to be ostracized, segregated, or publicly humiliated.[91] This philosophy was not as harsh as the White supremacy philosophy of other groups and allowed the party to garner many Black votes. However, an event occurred which changed the Conservative-Democratic philosophy.

In the 1880s and 1890s an agrarian depression struck which caused economic discontent among the populace.[92] This forced the conservatives to go on the defensive as many poor people became upset with the policies of the conservatives. Farmers, in particular, were angry over the state's continued favoritism to corporate, industrial, and railroad interests.[93] In response, conservatives began to assent to demands of the Farmers Alliance, verbally anyway, in order to save their party. However, many promises were not kept and a Populist third party was formed. As Blacks began to see some appeal in the Populist movement, Conservative-Democrats became concerned and determined to use racism as one tactic to defeat the Populist movement. For a time Blacks and poor Whites worked together trying to oust the Conservative-Democrats.[94]

The Conservative-Democrats responded to the threat of the Populists by charging that Blacks were taking political power from Whites. They convinced themselves that the South had to be redeemed again just as it had been redeemed from the carpetbaggers. Blacks were seen as the key to the Populists success so Negrophobic claims such as the rising Negro supremacy and betrayal of the White race were repeatedly publicized in order to create suspi-

90. ALA. CODE § 4321 (1886).

91. *See* WOODWARD, *supra* note 8, at 48-49. "A blunt and artless statement of the conservative position is found in the words of Governor Thomas G. Jones, leader of the conservative wing of the Democratic party of Alabama in the 'nineties. 'The Negro race is under us,' said the Governor. 'He is in our power. We are his custodians . . . . If we do not lift them up, they will drag us down.' "

92. *See* WOODWARD, *supra* note 8, at 77.

93. *See id.*

94. *Id.* at 78-79. " 'I call that particular change a revolution' wrote the Alabama historian William Garrot Brown, who lived through it, 'and I would use a stronger term if there were one; for no other political movement-not that of 1776, nor that of 1860-1861 ever altered Southern life so profoundly.' "

cion and distrust between the races.[95] The political ethics of this time justified any means of maintaining political control. The result of this struggle was the demise of the Populist party as Conservative-Democrats used fraud, intimidation, bribery, violence, and terror against the Populists as had been used against the carpetbaggers three decades earlier.

Blacks and poor Whites alike were victimized. " 'I told them to go to it, boys, count them out,' admitted conservative Governor William C. Oates of Alabama. We had to do it. Unfortunately, I say it was a necessity. We could not help ourselves.' "[96] Their tactics succeeded. One historian noted:

> The Populist experiment in interracial harmony, precarious at best and handicapped from the start by suspicion and prejudice, was another casualty of the political crisis of the 'nineties. While the movement was at the peak of zeal the two races had surprised each other and astonished their opponents by the harmony they achieved and the goodwill with which they cooperated. When it became apparent that their opponents would stop at nothing to divide them, however, and would steal the Negro's votes anyway, the biracial partnership of Populism began to dissolve in frustration and bitterness.[97]

Neither party succeeded in controlling the Black vote and as a result Blacks were excluded from political power altogether.[98]

The code during this decade had some additions which signaled that Jim Crow was a permanent reality for years to come. In section 1154 the Alabama Code mandated separate depot conveniences.[99] Provisions concerning miscegenation, mandating separation of prisoners by race, and separate educational facilities remained the same as the previous decade.[100]

Customary practices of treating Black laborers poorly and in an inferior manner continued during this decade. The debt practices of previous years grew increasingly popular with White businessmen.[101] Poor Blacks entering labor contracts would receive an advance of pay usually at an exorbitant interest rate. The debt could be used to extend the contract of the worker often past the term of service for the contract. When a worker realized that his hard work was not getting him anywhere he would leave. Section 3812 of the Alabama Code made it a crime to leave work promised under a contract without paying back money or personal property obtained under that contract.[102] This was considered false pretenses punishable as if a theft had occurred. In addition there were penalties in Sections 3757 and 3758 for enticing or hiring laborers under contract away from their work which made search for new work difficult. Section 3832[103] allowed Blacks charged with a misdemeanor to contract to work in order to pay off the fine. This was a variation of the convict-lease system mentioned earlier, but the results were often the same.[104]

95. *See* WOODWARD, *supra* note 8.
96. *Id.* at 79; *see also* BELL, *supra* note 8, at 85-86.
97. WOODWARD, *supra* note 8, at 80.
98. *See* BELL, *supra* note 8, at 86.
99. ALA. CODE § 1154 (1886).
100. ALA. CONST. art. XIV, § 256 (1901). In 1901 the 1875 constitution was changed to mandate the separation of races in public schools.
101. *See* DANIEL, *supra* note 1, at 22.
102. ALA. CODE § 3812 (1886).
103. ALA. CODE § 3832 (1886).
104. *See* DANIEL, *supra* note 1, at 46.

The vagrancy statute was quite similar to previous versions under the Alabama Code, except that a new statute, Section 4048, provided an easier burden of proof for the prosecution. In that section a person was considered a tramp if he was visibly able to do manual labor and had requested food or clothing of anyone in a county in which the violator had not lived for six months.[105]

The subordination of Blacks by Whites and the separation of Blacks from Whites was sanctioned by the United States Supreme Court in *Plessy v. Ferguson*.[106] *Plessy* firmly established the validity of the method of discrimination known as separate but equal. States and individuals could imply that Blacks were inferior by separating the races in nearly every conceivable manner, as long as there was some semblance of equality imputed into the situation.[107] Separation of the races was now lawful in spite of the fact that it " . . . bred suspicion and hatred, fostered rumors, and misunderstanding . . .".[108] Jim Crow had been born.

VI. CONCLUSION

A survey of the law and history in Alabama between 1866-1896 indicates that the rule of the law was used to deny the social, political, and economic advancement of Blacks. In a society that is allegedly held together by a respect for the rule of law, Blacks have had few reasons to respect the law. The law was used to terrorize, humiliate, and desecrate the humanity of generations of Blacks.

The law also sanctioned racist attitudes and practices of Whites. The beliefs of a few White supremacists might not have endured long, but when the state sanctioned those beliefs they became more widely accepted. Customs, practices, and attitudes developed which have been difficult to remove from society.[109]

There are steps which individuals may take and steps which the state of Alabama might consider taking in remedying the harm caused to Blacks during the birth of Jim Crow. It is important to recognize that the exploitation of any race is deplorable and too often the majority is insensitive to ongoing exploitation whether express or implied. Any existing remnants of restraints on Black advancement in our laws should be carefully sought out and removed. For instance, there are still examples of unequal funding of public school districts especially in poor and primarily Black districts in Alabama. Businesses which discriminate by race should be opposed. Golf courses and private clubs may still exclude Blacks in many areas. Candidates for political office who are insensitive to any race should be opposed. Elected officials should serve as examples of racial sensitivity and not as encouragers of insensitivity.

Private discrimination and racist speech should be the target of vigorous protests and objections. People who wish to express their racism do not have a right to feel comfortable in doing so. A cause of action for extreme racist actions or speech which tends to enrage or disturb the peace might be consid-

105. ALA. CODE § 4051 (1886).
106. 163 U.S. 537 (1896).
107. *See* BELL, *supra* note 8, at 84.
108. *Id.*
109. *Id.* at 39.

ered. It could be based upon the element of intentional infliction of emotional distress but with a lower evidentiary standard for damages.

In order to foster respect for the law and heal wounds caused by generations of harm from the law, Alabama and other states with similar circumstances, should officially recognize that its laws have been used to restrain advancement and permit exploitation of Blacks. These laws lent themselves to the formation of attitudes, practices, and customs in the minds of Alabama's citizens which continue to exist. The legacy of Jim Crow should be publicly recognized and destroyed. As a part of the healing process it is good to recognize that harm was inflicted by the state and that it is now regrettable.[110]

This official recognition could be accompanied by several other policies. A prohibition of flying the Confederate flag over the Alabama State capitol could be an appropriate first step. Though this flag may evoke fond memories of the old South for some, it is a symbol of restraint, terror, and exploitation to many. Another fitting endeavor might be a monument honoring particular Blacks such as Glenny Helms who suffered during the Jim Crow era. The State could also waive its legal defenses and allow Blacks or descendants of Blacks who were exploited or harmed by the state to sue the state for damages. While a host of legal problems are associated with this suggestion of reparations,[111] a symbolic settlement would promote the State's desire to recognize wrongful conduct and proclaim unequivocally that all races are equal. It would foster respect for the law. Finally the State could require that all public schools teach an Alabama history segment describing the negative effects of restraining the advancement of a race and the positive effects of equal opportunity.

This Author hopes that the people of Alabama and other states, which used the law as a tool to harm a race, will recognize the past and present wrongful uses of the law. After this recognition, it is further hoped that the people will use the law to guarantee equal opportunity for all so that the law can command the respect of all.

BY DAVID MARTIN*

110. *See Luke* 13:3; *Luke* 17:3; *Proverbs* 14:34.

111. The decision City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), has substantially cut back the types of remedial action which a state may use to remedy past wrongs. The Court in this case disallowed a 30% minority set aside program in part because the remedy was not narrowly tailored to the injury which was not supported with proper findings. This does not prohibit the state from taking action necessary to remedy past discrimination but requires proper proof of the actual injuries. The suggestions for remedial action here avoid many of the problems posed by this decision. *See also* BELL, *supra* note 8, at 46-47. Bell provides a noteworthy discussion of reparations and reviews the work of Professor Boris Bittker which also explores reparations.

* Mr. Martin is a 1992 graduate of The University of Alabama School of Law and is currently practicing law in Tuscaloosa, Alabama.