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"NEGRO BLOOD IN HIS VEINS":* THE DEVELOPMENT AND DISAPPEARANCE OF THE DOCTRINE OF DEFAMATION PER SE BY RACIAL MISIDENTIFICATION IN THE AMERICAN SOUTH

Samuel Brenner**

After losing a 2003 election for New York City Council for the 49th District (Staten Island), Independent Party candidate Dr. John Johnson brought suit against the Staten Island Advance, alleging, among other complaints, that the newspaper had defamed him by publishing a picture of a different “Reverend John Johnson” above his name, and so presumably had lowered him in the eyes of his community. The picture the newspaper published was that of a white man; Dr. Johnson, the candidate, is black. Writing the opinion on the case, Judge Philip S. Straniere seemed incredulous. “Is plaintiff asserting that labeling a black man a white man is ‘defamation’?” Straniere asked rhetorically.

“In a year when this country celebrated the 50th anniversary of Brown v. Board of Education of Topeka, plaintiff would

*Deese v. Collins, 133 S.E. 92 (N.C. 1926); see also infra note 231.


2. See id.

3. Id. at *3.

4. Id. at *6.
seek the Court to adopt a standard of libel that was prevalent in the Southern part of the United States before the civil rights movement of the last half century.\(^5\)

In 1989, over a decade before Johnson lost his election on Staten Island, a woman in Georgia elicited a similarly indignant response from a state appellate court in *Thomason v. Times-Journal* when she sued a newspaper for mistakenly publishing an obituary of her and falsely stating that her funeral arrangements were being handled by a funeral home known to cater to blacks.\(^6\) In Georgia, the publication of a false obituary is not libelous per se absent special circumstances.\(^7\) Thomason was arguing that the newspaper had created special circumstances leading to her being "ridiculed and held in contempt" because the funeral home "serves primarily black people whose customs at death are different than whites."\(^8\) Labeling this argument "indecorous," the court pointed out that Thomason had not demonstrated any racial distinctions in funerary customs and noted acerbically that it would "not speculate regarding [her] evidentiary deficiency."\(^9\)

While seemingly unconnected, *Johnson* and *Thomason*\(^10\) both stand as attempts to resurrect what was once a standard—and morally egregious—tort in American jurisprudence: defamation per se by racial misidentification (DPSRM).\(^11\) Between the first years after the ratification of

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5. Id.
8. Id.
9. Id. at 553–54.
10. Thomason might arguably be said to stand as an attempt to resurrect the related tort of tortious injury by racial misidentification. These sorts of cases (defamation by racial misidentification and tortious injury by racial misidentification) overlapped, see, e.g., Lee v. New Orleans Great N. R.R. Co., 51 So. 182 (La. 1910); Ex parte Plessy, 45 La. Ann. 80 (1893), but differed in that the defamation cases implicated only utterances and written publications. See infra note 205.
the United States Constitution\textsuperscript{12} and the middle of the twentieth century,\textsuperscript{13} state courts in the American South and West (and in at least one state in the North\textsuperscript{14}) repeatedly found defendants in tort actions liable for having uttered per se defamatory (either slanderous or libelous) statements by falsely or mistakenly identifying individuals as "Mulattos,"\textsuperscript{15} "Colored,"\textsuperscript{16} "Negros,"\textsuperscript{17} or "Niggers."\textsuperscript{18} The trend, which had seemingly arisen out of nowhere in violation of Anglo-American common law traditions, picked up speed in the first years of the twentieth century,\textsuperscript{19} with state courts deciding cases of defamation by racial misidentification (DRM) with a claim from a white winemaker that his business had been harmed when comedian Robin Williams made a joke unknowingly linking the winemaker's name with African Americans. Williams, the plaintiff argued, had associated "Rege" brand wines "with Blacks, allegedly 'a socio-economic group of persons commonly considered to be the antithesis of wine connoisseurs,' who 'harbor obviously unsophisticated tastes in wines.'" \textit{Id.} at 261, \textit{discussed in} Lyrisa Barnett Lidsky, \textit{Defamation, Reputation, and the Myth of Community}, 71 \textit{WASH. L. REV.} 1, 32 (1996).


14. In 1914, a New York judge rejected a theory of slander per se by racial misidentification, but explicitly stated that the court \textit{would} have recognized the doctrine of libel per se by racial misidentification. \textit{See} MacIntyre v. Fruchter, 148 N.Y.S. 786 (Sup. Ct. 1914). In 1935, a media corporation asked a New York court to reconsider a lower court's refusal to dismiss a complaint from William R. Monks, a white man who alleged that the newspaper described him as a "negro" and falsely quoted him. Monks v. Orange County Indep. Co., 277 N.Y.S. 992, 992 (App. Div. 1935). The court upheld the lower court's order denying dismissal, agreeing that the complaint stated facts sufficient to support a cause of action; the court issued no opinion, and might have been acting on either the racial misidentification claim or the claim that the newspaper intentionally misquoted Monks. \textit{Id.}

15. \textit{See, e.g.}, Atkinson v. Hartley, 12 S.C.L. (1 McCord) 203, 204 (Const. Ct. App. 1821); King v. Wood, 10 S.C.L. (1 Nott & McC.) 184 (Const. Ct. App. 1818); \textit{Eden}, 1 S.C.L. (1 Bay) 171. In this article, capitalizations of racial descriptions generally follow the style used in individual cases. Otherwise, racial descriptions, when capitalized, signal a legal description of an individual's race, and when not capitalized, suggest instead a physical description.


17. \textit{See, e.g.}, Upton v. Times-Democrat Publ'g Co., 28 So. 970 (La. 1900); Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888); Spencer v. Looney, 82 S.E. 745 (Va. 1914).


through the mid-to-late 1950s. Then, after the South Carolina Supreme Court's 1957 decision in *Bowen v. Independent Publishing Co.*, such cases seem simply to have vanished from the state and federal reporters—with the exception of a very few modern fringe examples, such as *Thomason* and *Johnson*. Although neither the United States Supreme Court nor any state supreme courts actually reversed these precedents or repudiated these decisions, after the 1950s such suits apparently no longer reached the upper levels of the court system. While defamation per se cases persist in the modern era, and while numerous scholars have weighed in, in recent years, on the propriety or importance of sexual orientation defamation per se decisions, scholars have generally not examined how and why racial defamation decisions, or even cases, disappeared from the American judicial record. Those scholars who have examined the subject of DRM have been left to make ultimately unsatisfying arguments. The reason for the disappearance

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20. See, e.g., Natchez Times Publ'g Co. v. Dunigan, 72 So. 2d 681 (Miss. 1954); Bowen v. Indep. Publ'g Co., 96 S.E.2d 564 (S.C. 1957). In an amicus brief in *Brown v. Board of Education of Topeka*, the American Jewish Committee explicitly invoked this history, citing cases from Louisiana, Oklahoma, South Carolina, Georgia, Illinois, and Texas. Brief of American Jewish Congress as Amicus Curiae at 12 n.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (No. 1).


22. Cases in which plaintiffs alleged slander per se over the use of disparaging racial terms when plaintiffs agree that their races have been correctly identified have continued to reach the courts. See, e.g., Bradshaw v. Swagerty, 563 P.2d 511 (Kan. Ct. App. 1977) (holding that a complaint alleging that the Black plaintiff had been called a "nigger," "bastard," and "knot-headed boy" failed to allege actionable slander per se). "The term 'nigger' is one of insult, abuse and belittlement harking back to slavery days. Its use is resented, and rightly so. It nevertheless is not within any category recognized as slanderous per se." *Id.* at 514. See also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

23. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (discussing the history of racial equality in the courts without including any reference to cases of defamation by racial misidentification); Royal Dumas, Commentary, *The Muddled Mettle of Jurisprudence: Race and Procedure in Alabama's Appellate Courts, 1901–1930*, 58 ALA. L. REV. 417 (2006) (failing to discuss tortious racial misidentification in the Alabama courts and ignoring *Jones*, 67 So. at 577, a case in which the court upheld the judgment for the defendant, holding that in order to constitute defamation, racial misidentification must include an element of malice).

24. See, e.g., Watson, *supra* note 11, at 104 ("Defamation cases based on
of such cases thus remains a historical mystery—a mystery that perhaps cannot be solved without a full understanding of the strange and tortured career of the doctrine of DPSRM between the late eighteenth and mid-twentieth centuries.

This article argues that, after at least one false start in the late eighteenth and early nineteenth centuries, the doctrine of tortious defamation per se by racial misidentification: (1) entered the common law through the mistaken or misapplied decisions of a single state supreme court; (2) was continually confused and in turn misapplied by courts throughout its lifespan; and (3) even in its heyday (the first half of the twentieth century) was never as monolithic or cohesive as it might today appear. This article then examines why adjudicated allegations of racial defamation or libel per se largely vanished after the mid-to-late 1950s after another decision by that same supreme court, and argues that the doctrine may have disappeared in the American South and West not because of any specific judicial precedent, but rather because (apart from the changing nature of Equal Protection doctrine) three judicial and societal developments intersected to shrink enormously the potential universe of DPSRM cases, and so to essentially cut off the judicial food supply of the doctrine. These developments comprised (1) the judicial move away from the slander per se element of the doctrine, often in favor of the libel per se element of the doctrine and with an added malice component; (2) the societal and statutory move away from official acceptance or endorsement of racism; and (3) the Supreme Court’s move in cases such as New York Times Co. v. Sullivan and Curtis Publishing Co. v. Butts toward applying First Amendment doctrine to limit tort liability for defamation in cases involving public figures or matters of public concern. Part I discusses the evolution of

racial identification have become virtually nonexistent because courts have come to realize that countenancing such claims presumes racial inferiority and court action on the issue is tantamount to government sanctioning of discrimination in violation of the Fourteenth Amendment."). While Watson is likely correct about what courts think about this tort today, in support of his point he cites to only two Supreme Court cases: one decided in 1948 and one decided in 1984. Given that the tort demonstrably existed into the 1950s, long after the Court's ruling in Shelley v. Kraemer, 334 U.S. 1 (1948), but disappeared long before the Court's ruling in Palmore v. Sidoti, 466 U.S. 429 (1984), Watson's argument lacks explanatory value.

the general doctrine of defamation per se and examines the existing scholarly work on the subject of tortious racial misidentification, both defamatory and otherwise. Part II examines the rise, historical development, and eventual disappearance of the tort of DPSRM in various states and jurisdictions between the late eighteenth century and mid-twentieth century, and suggests that the modern doctrine arose only after the South Carolina Supreme Court, in a questionable legal move, applied Louisiana precedent to obviate the need for plaintiffs alleging racial misidentification to prove special damages. Part III argues that this disappearance can, in large part, be explained by the intersection of three legal and societal circumstances that had the effect of shrinking the universe of potential DPSRM claims, and so starved the doctrine at its source by ensuring that DPSRM cases could no longer make it into the courts.

PART I: DEFAMATION PER SE AND TORTIOUS RACIAL MISIDENTIFICATION SCHOLARSHIP

A. Defamation Per Se Defined

The tort of defamation, whether libel or slander, and the concomitant doctrine of defamation per se, developed in critical ways in the nineteenth and early twentieth centuries. It has served an important function during the twentieth century for those who believe that they have been injured by being falsely labeled as holding a particular creed, belonging to a particular organization, or having a specific sexual orientation.27

27. During the Red Scare, for instance, those alleged to be Communists used the doctrine to try to rescue their reputations from the blacklist. E.g., Michael J. Tommaney, Community Standards of Defamation, 34 ALB. L. REV. 634, 63940 (1970). See generally Cases Noted, Accusation of Communist Party Membership as Defamatory Per Se, 50 COLUM. L. REV. 526, 526–29 (1950). In more recent years, and with varying results, several individuals sued on the theory that falsely being labeled "homosexual" constitutes defamation per se. See, e.g., Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004), affd Amtrak Prod., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005) (holding that while false allegation of homosexuality would, after the Massachusetts legalization of same-sex marriage, no longer constitute defamation per se, Madonna's former bodyguard was not able to state sufficient evidence to support a claim); Murphy v. Pizarrio, No. 94 Civ. 0471 (JFK), 1995 WL 565990, at *3 (S.D.N.Y. Sept. 22, 1995) (holding that a published statement imputing homosexuality to another is defamatory per se under New York law); see also Daniel Wise, NY Judge: Being
At common law, written, spoken, or gestural communications either may or must constitute one of the elements of the four torts William L. Prosser, one of the deans of American tort law, identified as making up the law of privacy. Writing in 1960, Prosser suggested that these four torts included:

(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

In various ways, Prosser added, these torts intersect with the tort of defamation—which he defined as "an invasion of the interest in reputation and good name." Traditionally, defamation consists of the publication of a false statement about an individual, which statement lowers that individual in the eyes of the community and deters others from dealing with the individual. Defamation encompasses both slander, which is the spoken or gestural publication of false statements, and libel, which is the written or permanent publication of such statements. While some jurisdictions see no distinction between libel and slander, the general rule is that the scope of libel is broader than the scope of slander, such that "all slanderous statements would be libelous if written, [but] not all libelous statements would be slanderous if spoken." Generally, in order to recover, a plaintiff alleging defamation must demonstrate that he or she has suffered some form of damages. Some sorts of publications,
however, whether allegedly slanderous or libelous, are actionable per se, in which case “all that need be proved is the utterance of the words, and because of their character the law will presume damages and dispense with the showing of actual special damages as a necessity for recovery.”

Traditionally, common law courts recognized four categories of words that were actionable in themselves, or that constituted defamation per se: imputations of criminal misconduct, sexual misconduct, loathsome disease, or imputations affecting business, trades, or one’s office.

Despite the seeming clarity of the common law tort of defamation, in fact defamation doctrine was for much of the eighteenth, nineteenth, and twentieth centuries confused and illogical. “It must be confessed at the beginning,” Prosser and Robert E. Keaton wrote in 1984, “that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer has ever had a kind word . . . .”

One area of confusion was in the precise distinction between slander and libel. As Comment "b" to Section 568 of the Restatement (Second) of Torts, of which Prosser was the Reporter, notes:

It is impossible to define and difficult to describe with precision the two forms of defamation, slander and libel. Oral defamation is tortuous if the words spoken fall within a limited class of cases in which the words are actionable per se, or if they cause special damages. Written defamation is actionable per se. For two centuries and a half the common law has treated the tort of defamation in two different ways on the basis of mere form. Yet no respectable authority has ever attempted to justify the distinction on principle . . . .

As a common law tort, defamation varied widely between states, with different jurisdictions applying different definitions of “slander per se” and “libel per se.” By 1939,

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36. Crabb, supra note 11, at 1287.
however, at least some state courts (including, for example, the Mississippi courts) were depending on the Restatement (First) of Torts for a coherent definition of defamation per se (or defamation that was “actionable per se”) as “any written or printed language which tends to injure one’s reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community.”

B. Scholarly Analysis of Tortious Racial Misidentification

Relatively few scholars have written about tortious per se defamatory racial misidentification, and of those few, most wrote prior to the 1950s. Generally, modern scholars and commentators have barely touched on the subject, or have mentioned it in passing, while discussing issues of either race

40. Restatement (First) of Torts § 569 (1938) (“One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom.”).

41. Conroy v. Breland, 189 So. 814, 815 (Miss. 1939) (citing Hodges v. Cunningham, 135 So. 215 (Miss. 1931); Wrought Iron Range Co. v. Boltz, 86 So. 354 (Miss. 1920)); see also Restatement (First) of Torts § 569 (1938). In the context of tortious racial misidentification, the Mississippi court in the key case Natchez Times Publishing Co. v. Dunigan, 72 So. 2d 681, 684 (Miss. 1954), appeared to conflate libel and slander, identifying the more expansive definition offered in Conroy simply as the definition of “libel per se.”

42. See, e.g., Charles S. Mangum, Jr., The Legal Status of the Negro (Johnson Reprint Corp., 1970) (1940); Gilbert Thomas Stephenson, Race Distinctions in American Law 26–34 (1910); Gilbert Thomas Stephenson, Race Distinctions in American Law, 43 Am. L. Rev. 29 (1909). Most pre-1950 references came in quick citations in early treatises. See, e.g., Francis H. Bohlen, Cases on the Law of Torts 830 n.1 (1915) (mentioning that in the Southern states, it is libelous to misidentify an individual as Negro, and citing cases); Thomas M. Cooley, A Treatise on the Law of Torts 215 nn.31–32 (John Lewis ed., 1907) (including four DPSRM cases in a long chapter examining libel liability); Martin L. Newell, The Law of Defamation, Libel and Slander in Civil and Criminal Cases 86 n.14 (1890) (identifying two DPSRM cases in a short paragraph); Thomas Starkie, A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours 21 n.1 (1826) (referring to early DPSRM cases in a footnote); John Townshend, A Treatise on the Wrongs Called Slander and Libel 157 n.1 (4th ed. 1890) (citing a Louisiana DPSRM case in discussing the difference between words actionable in themselves and words not actionable in themselves).

43. But see Watson, supra note 11; see also J. Reese Daniel, Defamation—Calling a White Person a Negro in Print, 7 S.C.L.Q. 472 (1954–1955); W. Swan Yerger, Recent Decisions, Libel—Publishing That A White Woman is a Negro is Libelous Per Se, 26 Miss. L.J. 195 (1954–1955).
or current defamation law more broadly.  
Gilbert Thomas Stephenson, the first author to address
the issue of DPSRM at any length in a major
treatise, identified and discussed a number of important cases
applying the doctrine, but ultimately offered unsatisfactory
explanations of how the doctrine had developed and was
being applied. Stephenson published in 1910, prior to the
spate of decisions rendered by Southern courts in the first few
decades of the twentieth century, but even in analyzing pre-
1910 cases he could not find, ignored, or glossed over a
number that would have helped him construct a more
complete model of how the doctrine of DRM had been shaped
over the previous century. "From early times," Stephenson
wrote, "it has been held to be slander, actionable per se to say
of a white man that he is a Negro or akin to a Negro." While this was true in South Carolina, and perhaps
Louisiana depending upon how one interprets "early times",
Stephenson's attempt to explain away two of the
contravening decisions seems strained. In describing an
1818 Ohio decision in which the court held that charging a
white man with being "akin" to a Negro was not slander per
se, for instance, Stephenson noted that "the only explanation,
apparently, of this conflict between the decisions of South

44. See, e.g., Delgado, supra note 222; Lidsky, supra note 111; Tommaney,
supra note 277, at 639. The larger question of causes of action arising from
racial misidentification, in contrast, has spawned a large and complex body of
scholarship. See, e.g., Daniel J. Sharfstein, The Secret History of Race in the
United States, 112 YALE L.J. 1473 (2003). After Plessy, many white plaintiffs
brought claims of tortious injury against rail and streetcar conductors who had
ushered those plaintiffs into Jim Crow cars or seats. Id. at 1500-01.
45. In his 1910 Race Distinctions in Modern Law, Stephenson included a
short chapter entitled "Defamation to Call a White Person a Negro." See
STEPHENSON, supra note 42, at 26-34.
46. See, e.g., Johnson v. Brown, 13 F. Cas. 734 (C.C.D.C. 1832) (No. 7375);
Boullemet v. Philips, 2 Rob. 365 (La. 1842) (reversing a finding for a plaintiff in
a DPSRM case on the grounds that the evidence at trial was insufficient to show
malice); Dobard v. Nunez, 6 La. Ann. 294 (1851); Scott v. Peebles, 10 Miss. (2 S.
47. STEPHENSON, supra note 42, at 26-27.
48. Stephenson also failed to identify or discuss the third pre-Civil War
contravening case. See Johnson, F. Cas. 734.
49. See Barrett v. Jarvis, 1 Tapp. 244 (5th Cir. Ohio 1818). A note on
sources: Barrett is not included in the Ohio reporters because Ohio did not
officially begin reporting its cases until 1824. Benjamin Tappan, Chief Judge of
the Ohio 5th Circuit, gathered a number of the cases he had decided between
1816 and 1819 and published them as Tappan's Reports in 1831.
Carolina and Ohio is that in the latter State it was not considered as much an insult to impute Negro blood to a white man as in the former. In other words, Stephenson's explanation for the different outcomes rested solely upon what he believed were different perceptions of race in South Carolina and Ohio in 1818. Whether or not perceptions in South Carolina and Ohio varied all that much in 1818 (and, given the historical record concerning the development of racism in the North and West during the nineteenth century, it seems unlikely), Stephenson's reasoning regarding these 1818 cases suggests that he subscribed to the "community standards" theory of DRM—which was developed after the Civil War. In describing an 1860 North Carolina case in which the court held that calling a white man a "free Negro" was not actionable per se, Stephenson did not even attempt to offer an explanation of the court's reasoning, and simply labeled the decision "surprising."

In attempting to describe the current state of the doctrine in 1910, Stephenson called upon both the "community standards" model of DRM and the traditional common-law understanding that statements might constitute defamation if the statements harm individuals in business. "The courts have placed this [the doctrine that it is actionable per se to say of a white man that he is a Negro or akin to a Negro] under the second class—that is, words disparaging to a person in his trade, business, or profession," Stephenson argued. "It will have been noticed that all the courts which have held it actionable per se to call a white person a Negro have been in Southern States," he added, suggesting that states in other regions would be less likely to adopt the doctrine. "The attitude of the court," he concluded, "depends upon whether it is the consensus of opinion among the people of the community that it is injurious to a white man in his business and social relations to be called a Negro."

Stephenson's explanation of the development of tortious

50. STEPHENSON, supra note 42, at 27.
51. See, e.g., Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888); infra Part II.B.
52. STEPHENSON, supra note 42, at 27.
53. Id.
54. Id. at 32.
55. Id. at 32.
DRM fails in two ways: first, Stephenson seizes upon an explanation, business relations, that simply was not the governing logic behind many of the cases; and second, Stephenson, perhaps because he was a product of his time and his Southern heritage, ignored the prevalence of racism and lack of objectivity in the judiciary and throughout the United States. Stephenson apparently believed that it was possible for courts to weigh objectively the question of whether within a particular jurisdiction it would be “injurious to a white man in his business and social relations to be called a Negro.” Under Stephenson’s formulation, the doctrine should (given the prevalent racism of the early 1900s) have been good everywhere. The fact that it was not suggests that at least some courts viewed the situation differently than did Stephenson himself. In the end, Stephenson’s arguments, while useful in identifying the views of a legal scholar in 1910, are too simplistic to explain the true development of this tort.

In 1940, writing with the benefit of being able to view and analyze the many cases on DRM decided by courts in the first few decades of the twentieth century, Charles S. Mangum of the University of North Carolina School of Law provided a more nuanced and far more convincing explanation of how the doctrine had developed over the previous two centuries. Mangum argued that whether defamation of this kind is actionable “is complicated by certain technical differences between libel and slander which developed with the common law.” In analyzing the early

57. STEPHENSON, supra note 42, at 32.
58. See, e.g., infra Part II.E.
59. See MANGUM, supra note 42, at 18–25. Mangum identified most of the pre-1940 cases discussed in this article, including the pre-1910 cases Stephenson had overlooked or ignored. See id.
60. Id. at 18. Mangum, however, concluded his long paragraph on this question by noting:

[It] may be difficult to convince the southern white man that there is any logical distinction between libel and slander in this respect, as a person can be hurt just as much, and possibly more, by malicious gossip of this sort as he can by a malevolent statement contained in a newspaper or other publication.

Id. at 20.
South Carolina, Arkansas, and Mississippi holdings that mistakenly calling a white man a "Negro" or "Mulatto" constituted defamation, or defamation per se, for instance, Mangum, citing Arkansas and Mississippi statutes which can be interpreted as enlarging upon the common law rule, noted correctly that "[s]ome of the states . . . have had special reasons for doing so."61 The Louisiana decisions, Mangum also noted, can be explained by the fact that Louisiana operates under civil, rather than common, law.62 As Georgia followed Louisiana's lead, while Virginia incorrectly cited to South Carolina's idiosyncratic statute-based reasoning, Mangum concluded, "[a]ll this would lead one to believe that a holding that such language is slanderous per se is not in accordance with the accepted principles of the common law."63 Identifying, as Stephenson did, with the community standards model, Mangum remarked that "it may be stated that southern courts take judicial cognizance of the attitude of the white man toward the Negro."64 Southern courts, he added, would therefore consider as defamatory "certain statements which would not be actionable if this attitude did not exist."65

Mangum's analysis, while legally nuanced and sophisticated, is nonetheless neither complete nor entirely sufficient. He devotes very little space to discussing an extremely complicated topic and seems to be more interested in explaining the state of the doctrine in 1940 than in analyzing the unusual historical development of the doctrine.66 Mangum is also possibly too caught up in the spirit of 1930s North Carolina to sense the absurdity and inequality inherent in the "community standards" model and the possibility that judges were making decisions in these cases not only on the basis of established doctrine and precedent, but also on the basis of simple bigotry or predilection.67 The way the doctrine of DRM emerged from

61. Id. at 19.
62. Id. at 19–20; see infra Part II.C.
63. MANGUM, supra note 42, at 20; see infra Part II.C.
64. MANGUM, supra note 42, at 25.
65. Id. at 25.
66. See id. passim.
67. See, e.g., id. at 18 ("There can be no doubt that the term 'Negro' or 'colored person,' when applied to a person who is wholly of Caucasian blood, carries with it a certain degree of opprobrium."). At the same time, Mangum


the idiosyncratic South Carolina and Louisiana courts into the common law in the early twentieth century demonstrates how important race was in solidifying the law in the American South, and how the absence of justifiable legal doctrine was ignored in the move towards tearing down the social and legal status of Blacks. Like Stephenson, Mangum of course also wrote at a time when the doctrine was strong, and so had no opportunity to step back and view the development (and disappearance decades later) of tortious DRM as a whole.

The most extensive recent analysis of the tort of DRM is that published by John C. Watson in 2002. Watson's work, while contributing to a sociological understanding of the DPSRM doctrine in the context of American and Southern racism, does not complete or correct the historical record referenced by Stephenson and Mangum. Watson is less concerned with analyzing the historical development or disappearance of the doctrine, and is most concerned with examining "the social values that were imbedded in the determinations of when and where it was libel or slander per se, to incorrectly identify a white person as black." In analyzing these cases, Watson calls upon the historical and sociological work of Joel Williamson to try to explain the effect these doctrines had on Southern society during the period of the 1860s through the 1950s, and perhaps to explain changes in judicial rhetoric from Southern judges during the same period. While he is concerned with the "evolution and regression of the law of racial misidentification, particularly in the South," Watson is more concerned with analyzing the societal forces leading to and deriving from tort liability for racial misidentification than he is with explaining how and why the doctrine entered the common law and how it shifted

recognizes that this prejudice "is ingrained and cannot easily be conquered even by those who believe that no real racial inferiority exists." Id. Mangum also notes that while the prejudice is particularly strong in the South "as a result of historic factors and anti-Negro social attitudes which are taken judicial notice of by the southern courts," even in the North and West "the imputation of Negro blood is deeply resented in most instances." Id.

68. Watson, supra note 11.
69. Id. at 78.
71. Watson, supra note 11, at 90–94, 97–100.
72. Id. at 78.
and developed throughout the nineteenth and twentieth centuries.\(^7\)

**PART II: THE RISE AND FALL OF TORTIOUS DEFAMATION PER SE BY RACIAL MISIDENTIFICATION**

Part II of this article traces the historical emergence, development, rise, and eventual downfall of defamation per se by racial misidentification. Analysis of the development of the DPSRM doctrine suggests that the modern doctrine (that which was in force between the late 1800s and mid-1900s) was created almost by accident, in a state (Louisiana) that did not adhere to common law distinctions between words actionable "in themselves" and words not actionable in themselves.\(^7\) While states other than Louisiana did not accept Louisiana’s unique decision that it was not bound by "the technical distinctions of the common law as to words actionable per se and not actionable per se, and allowing, for the latter, only actual pecuniary damages specially proved,"\(^5\) other Southern states, led by South Carolina, did adopt the derivative doctrine that racial misidentification constituted defamation per se in any state or community in which such social habits, customs, and prejudices made it obvious that calling a white man “black,” “negro,” “colored,” or “mulatto” was insulting and injurious.\(^6\) It was this doctrine, at least concerning published (or permanent) rather than oral material, that survived and governed cases in a number of Southern states through the late 1950s.\(^7\)

The history of the doctrine of defamation per se by racial misidentification demonstrates the complex connections between race, geography, society, and the law in the American South and West. Section A traces the rise of the “rights deprivation” theory of defamation (specifically slander) per se by racial misidentification in South Carolina between 1791 and 1821, and discusses the two identifiable cases outside of South Carolina embracing something like a

\(^73\). Watson presents an ideological description of the cases, but offers no explanatory force. See id.

\(^74\). See Spotorno v. Fourichon, 4 So. 71 (La. 1888).

\(^75\). Id. at 71.


\(^77\). See infra Part III.A.
similar rule. Section B discusses how three states and jurisdictions rejected the DPSRM doctrine as not fitting into any of the traditional common law categories of words “actionable in themselves.” Section C describes how Louisiana, a state that, because it adhered to the Napoleonic Civil Code, rejected the traditional common law distinction between words actionable in themselves (defamatory per se) and words not actionable in themselves (not defamatory per se), developed the alternative “community standards” model for use in DPSRM cases. Section D argues that South Carolina inappropriately (or perhaps even mistakenly) created the modern “community standards” common law DPSRM doctrine by mistakenly or incorrectly using Louisiana’s Civil Code (rather than common law) decisions as non-binding precedent. Section D also traces how, over the decade between 1900 and 1910, Louisiana and South Carolina together evolved and perhaps clarified the doctrine of DPSRM as it could be used in the common law. Section E focuses on how, in the years after 1910, other Southern states embraced or rejected various elements of the Louisiana/South Carolina doctrine, ultimately generally accepting a strong doctrine of libel per se by racial misidentification (LPSRM), but a weak doctrine of slander per se by racial misidentification (SPSRM). Section F examines the two great last gasps of the DPSRM doctrine, and suggests that in the absence of judicial reversal, these decisions would have remained good law in at least some Southern states for a measurable time, even though both cases suggest that there was at least some interest even in Southern states in limiting or abolishing the doctrine.

A. The Rise and Application of the Statutory “Rights Deprivation” Theory

Liability for tortious defamation by racial misidentification\(^{78}\) seems to have its antecedents in the

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78. It is important here to distinguish between later theories of defamation per se, under which plaintiffs did not need to prove any special damages in order to recover, and the South Carolina theory of slander per se by racial misidentification, which seemed to be based on the notion that no special damages needed to be proven because they were obvious given the South Carolina Negro Act of 1740. See JOHN BELTON O’NEALL, THE NEGRO LAW OF SOUTH CAROLINA (1848).
United States in a trio of South Carolina slander cases, beginning with the late-eighteenth-century case of Eden v. Legare, in which the highest court of South Carolina established (or simply recognized) the rights deprivation theory of slander per se. Chief Justice John Rutledge of the Court of Common Pleas and General Sessions of the Peace of South Carolina (who four years later took office as the Chief Justice of the United States Supreme Court) held actionable falsely calling a plaintiff a “mulatto,” concluding that under South Carolina’s “Negro Act” of 1740, such an allegation, if true, would result in the plaintiff being deprived of all civil rights and the privilege to trial by jury. The court carefully noted that the words “in themselves were, in this country, actionable”—an earlier way of saying that the language constituted slander per se, and that plaintiffs would not need to prove any special damages in order to recover. Following Eden v. Legare, South Carolina courts consistently either held or observed that the general rule was that misidentifying a white man or woman as a “Negro” or a “Mulatto” was

79. Eden v. Legare, 1 S.C.L. (1 Bay) 171 (Ct. Com. Pl. & Gen. Sess. 1791); Atkinson v. Hartley, 12 S.C.L. (1 McCord) 203, 204 (Const. Ct. App. 1821); King v. Wood, 10 S.C.L. (1 Nott & McC.) 184 (Const. Ct. App. 1818). These early South Carolina cases deal with slander, rather than libel; given later decisions indicating that the laws of libel were more stringent than the laws governing slander, this suggests that the South Carolina cases may be read as establishing a broader defamation (rather than simply slander) doctrine.

80. Eden, 1 S.C.L. (1 Bay) 171; see also Axton Fisher Tobacco Co. v. Evening Post, 183 S.W. 269 (Ky. 1916).

81. Eden v. Legare is the first case that can be found in the reporters, but in the opinion “RUTLEDGE, Ch. J. mentioned several cases where it had been formerly held that an action lay for [these sorts of words].” Eden, 1 S.C.L. (1 Bay) at 171.

82. See, e.g., Williams v. Riddle, 140 S.W. 661, 663 (Ky. 1911) (“We are not entirely without precedents, however . . . . In some of the early cases in South Carolina . . . it was held to be actionable to call a white person a mulatto . . . .”); Recent Important Decisions, Libel—Publishing of a White Man that He Is "Colored," 3 Mich. L. Rev. 662, 673–74 (1905) (noting incorrectly that “[t]his point was settled in South Carolina by very early cases and does not seem to have arisen there since the year 1818”).

83. See Eden, 1 S.C.L. (1 Bay) at 171; see also 7 Statutes at Large of South Carolina 379–417 (David J. McCord, ed., 1840) (reprinting “An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province,” often referred to as the “Slave Act” or “Negro Act” of 1740). In his decision, the Chief Justice “mentioned several cases where it had been formerly held that an action lay for them . . . . Any words therefore, which tended to subject a citizen to such disabilities, were actionable.” Eden, 1 S.C.L. (1 Bay) at 171.

84. See Eden, 1 S.C.L. (1 Bay) at 171.
actionable per se, with (for a time) the general argument appearing to be that such racial misidentification harmed the misidentified individual by stripping civil and legal rights from that individual.

When, thirty years after *Eden v. Legare*, the South Carolina Supreme Court next considered whether falsely labeling a white man a “Mulatto” constituted slander, the court confirmed the *Eden v. Legare* rule that “an action might be maintained for those words, without laying any special damage,” but also hinted at a desire to recognize a theory of defamation allowing recovery for emotional, rather than simply rights-based, harm. In *King v. Wood*, Justice Nott of the Constitutional Court of Appeals of South Carolina confirmed that under South Carolina law, calling a white man a “Mulatto” was actionable per se. In reaching this decision, Justice Nott seemed oddly conflicted. On the one hand, he announced that the court had adopted the rule primarily because of the precedential decision in *Eden*, and that otherwise (had that precedent not existed) the question of whether this characterization should be actionable might deserve some consideration. On the other hand, Nott noted, in his view the tort of slander should be expanded “to

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85. See, e.g., Smith v. Hamilton, 44 S.C.L. (10 Rich.) 44, 48 (Ct. App. 1856) (“To call a man a mulatto, has been held, from an early period in the history of our jurisprudence, actionable per se.”). In Smith v. Hamilton, the South Carolina court, appealing to the *Eden v. Legare* line of cases, addressed a technical pleading issue in a case in which a jury had awarded damages to a woman whom the defendant said had a mulatto child. See id. at 44. The defendant appealed, arguing that in order to sustain an action for slander, the plaintiff should have included in her pleading a statement that she was white. *Id.* The court, however, found that in such slander cases the burden of proving status, should it become relevant, lies on the defendants. *Id.* This is not a clear DPSRM case, as the court noted that the allegation that the plaintiff was unchaste would have sufficed for an action as well as would an allegation regarding the race of her child, *id.*, but it demonstrates the acceptance in South Carolina courts of the general *Eden v. Legare* rule.


88. *Id.*

89. See *id.* (“It is a little extraordinary, that while the law, in every other respect, is undergoing continual changes to accommodate itself to the modern state of society, the rules of law by which actions of slander are governed, and which were established in the most barbarous ages, still remain the same.”).
embrace cases where the greatest injury may be done to the reputation and feelings of an individual," since if words were thought slanderous in the context of a past, more barbaric age, "much more ought they in an age of refinement and civilization, when the injury done to the feelings constitutes the greatest part of the offence."\footnote{90}

With the third case in the South Carolina trio, the South Carolina high court narrowed and focused the rights deprivation theory it had established in \textit{Eden}. However reluctantly, it affirmed the rule Nott had stated in \textit{King} by insisting that plaintiffs present proof that the defendants had used the \textit{specific} words necessary (here, a claim that the plaintiff was actually "mulatto") to trigger a threat of rights deprivation.\footnote{91} In \textit{Atkinson}, the defendant appealed after a jury awarded damages to a plaintiff who claimed that the defendant had called him a "damned mulatto son of a bitch."\footnote{92} The court, with Justice Johnson writing, found that the plaintiff had in fact gone into his house to get a gun to fire on the defendant's son, at which point the defendant, challenging the plaintiff to come and out and shoot, \textit{either} called the plaintiff "a damned mulatto son of a bitch" \textit{or} "a damned mulatto looking son of a bitch."\footnote{93} The court, while acknowledging that falsely calling a white man a mulatto was certainly actionable, held that because the witnesses could not decide which of the two statements the defendant had made, the jury verdict should therefore be set aside.\footnote{94} While the court appropriately cited the rule in \textit{Eden v. Legare}, Justice Johnson seemed anxious to find a way to overturn the jury verdict—perhaps because he simply sensed that there was something absurd about the events surrounding the case, perhaps because he shared some of Justice Nott's unease with the basic rule, or perhaps because he was interested in maintaining the logical rigor of the rights deprivation theory—and so, given that there was no clear evidence in the judicial record of what had happened, refused to grant the jury the discretion to determine what had actually been

\footnote{90. \textit{Id}.}
\footnote{91. See \textit{Atkinson v. Hartley}, 12 S.C.L. (1 McCord) 203, 204 (Const. Ct. App. 1821).}
\footnote{92. \textit{Id}.}
\footnote{93. \textit{Id}.}
\footnote{94. \textit{Id}.}
Apart from the trio of South Carolina cases, there were only two other reported cases in the antebellum South establishing a cause of action like a per se rule of DRM, neither of which provided additional support for a general common law rule establishing the doctrine, and one of which (the only one decided in a common law state) was similarly decided on the basis of an unusual and idiosyncratic statute.

In the 1844 case of *Scott v. Peebles*, the Mississippi Supreme Court held that Alpha Peebles had slandered James Scott by alleging in a conversation with a third party that Scott "had negro blood in him." Although Peebles' attorney argued on appeal that "the words are not actionable at common law, and no special damage is laid," all parties to the case agreed that the question of whether Peebles had slandered Scott needed to be decided under Mississippi's slander statute rather than under the common law. The statute in question eliminated the need for a plaintiff alleging slander to prove either malicious intent on the part of the speaker or damages on his own part. Instead, according to the statute, "[a]ll words, which from their usual construction and common acceptations, are considered as insults, and lead to violence and breach of the peace, shall hereafter be actionable." Writing for the court, Chief Justice William Lewis Sharkey (later Provisional Governor of Mississippi

95. Id.
97. MISS. CODE ANN. § 1059 (1942); see also Huckabee v. Nash, 183 So. 500, 501–02 (Miss. 1939) (describing the same statute as "Section 11 of the Code of 1930" and citing to Scott, 10 Miss. (2 S. & M.) at 546, for a proper interpretation); Landrum v. Ellington, 120 So. 444, 445 (Miss. 1929) (noting that the same statute "has been in force in this state since 1822, and is generally known as the 'anti-duelling statute' (Hemingway's Code 1927, § 882 et seq.), the purpose of which is to induce citizens who are maligned and whose honor is impugned to resort to the courts of the country for redress by money judgment as a salve for wounded honor rather than to the old-time method of 'pistols and coffee for two').
98. Scott, 10 Miss. (2 S. & M.) at 546.
99. Id. at 547. Scott's attorney thought that there was so little merit to this objection that he refused even to address the point. Id. at 550.
100. See, e.g., id. ("This, however, is not an action at the common law." (Scott's attorney speaking)).
101. See id. (citing H. & H. Dig. 547, § 6); MISS. CODE ANN. § 1059 (1942).
102. Scott, 10 Miss. (2 S. & M.) at 556–57 (citing H. & H. Dig. 547, § 6).
after the Civil War) focused almost entirely on whether the plaintiff had pled properly and whether the defendant could hide behind the fact that he was simply repeating what he had heard from two out-of-state residents. While the attorneys for both Peebles and Scott addressed the question of how the action might have fit into the common law, Sharkey seemed uninterested in the common law implications—or even common law precedent. The result of Scott was that Peebles was held liable despite there being no showing of malice on his part or (more importantly for the per se questions) of damages suffered on Scott's part, but the case stands more as evidence of the interpretation of the Mississippi slander statute than as evidence of an intent to create a common law DPSRM doctrine.

Like the Mississippi Supreme Court in Scott, in the 1851 case of Dobard v. Nunez the Louisiana Supreme Court, which was not governed by common law precedent, concluded that words of racial misidentification could constitute slander, even though the speaker uttered the words without malice and the plaintiff could prove no special damages. In Dobard, the defendant Vincente Nunez repeated an allegation he had heard that "the families of Martin and Lafrance are colored people." While Nunez admitted that he had uttered the words, he claimed that he did not originate the allegation and had uttered the words without malice. Despite Nunez's defense, there was a judgment against him for $500, which he appealed. Writing for the court, Judge Pierre Adolphe Rost noted that the evidence

103. See id. at 555–61.
104. See id. at 555–62. Sharkey did not, for instance, cite any cases regarding this sort of defamation.
105. See, e.g., Natchez Times Publ'g Co. v. Dunigan, 72 So. 2d 681, 683 (Miss. 1954) (distinguishing Scott from a later case in which the Mississippi Supreme Court decided, for the first time, that publishing of a white person that he or she was colored constituted libel per se).
107. Id. at 294. It is not clear how Luc Dobard, the plaintiff, was related to the "families of Martin and Lafrance." See id. (emphasis omitted). The role played in this case by a defendant with a Hispanic name is especially interesting, as it may suggest that the conflicts over racial defamation in the South were not limited to Caucasians and African Americans.
108. Id.
109. Id.
110. Judge Rost was not a native Southerner, but was instead a French-born veteran of the Napoleonic wars. As such, he might have been more wedded to
on the merits was conflicting.\footnote{111} "[O]n the principle that has uniformly guided our decisions in such cases," Rost added, presumably referring to the Louisiana Supreme Court's desire not to overturn a lower-court factual decision unless the evidence on the merits was clear and compelling, "we cannot reverse the judgment."\footnote{112} Still, he concluded, the court thought that Dobard was entitled only to nominal damages, as Nunez did not originate the slander and acted without malice, and (more importantly) as "there is nothing in the record to show that the plaintiffs were in any manner injured by what he said."\footnote{113} 

Dobard thus may stand for the proposition that, in Louisiana, words of racial misidentification could, even in the absence of malice on the part of the speaker or the showing of special (or any) damages, constitute slander—in effect, a per se defamation rule. The Louisiana Supreme Court here did not, however, seem particularly anxious to create doctrine or announce a general rule. Given the nature of the Louisiana Civil Code,\footnote{114} Dobard should not be read as somehow embracing a common law rule or bringing into the common law any rule establishing such a doctrine.

The four antebellum cases in which courts in South Carolina and Mississippi found it slanderous to say of a white man that he was colored, Mulatto, or "had Negro blood" demonstrate that these courts had essentially created a statutory doctrine of defamation per se by racial misidentification.\footnote{115} The words at issue in \textit{Eden, King},

\footnotesize
the principle of equality and less wedded to the Southern views on race and slavery than were his fellow judges—although he did marry into one of the most prominent families in Louisiana. During the Civil War, Rost served as the Confederacy's ambassador to Spain. See Michael F. Knight, \textit{The Rost Home Colony, St. Charles Parish, Louisiana}, PROLOGUE MAG., Fall 2001, at 214–20, available at http://www.archives.gov/publications/prologue/2001/fall/rost-home-colony.html. Upon his return to the United States after the war, Rost obtained a pardon from Andrew Johnson and successfully recovered his property, the famous Destrahan Plantation. See \textit{id.}; Destrahan Plantation, http://www.destrehanplantation.org/ (last visited Sept. 12, 2009).

112. Id.
113. Id.
114. See infra Part II.D.
115. What is most surprising about these cases is that there were only four (or perhaps five) of them. It is possible that—as C. Vann Woodward, the great historian of the South, argued—race relations were actually less contentious in the antebellum South, because social and racial lines were more clearly
Atkinson, and Scott would not have been actionable in themselves under the common law. Under the unusual and idiosyncratic law codes of South Carolina and Mississippi, however, such words were actionable without any showing of malice on the part of the speaker or of damages on the part of the target, and so were in effect defamatory per se. Courts in the late nineteenth century and throughout the early twentieth century would repeatedly refer back to the Eden line of cases (though less often to the Mississippi decision in Scott) in supporting or considering DPSRM decisions. In the antebellum period, however, jurisdictions without South Carolina’s or Mississippi’s unusual statutory provisions (and without the freedom from precedent afforded by Louisiana’s idiosyncratic relations with the common law) proved unwilling to embrace this statutory DPSRM doctrine, and instead relied on traditional common law categories of words “actionable in themselves.”

B. Antebellum Rejection of the Statutory “Rights Deprivation” Theory

In the antebellum period, jurisdictions other than South Carolina, Mississippi, and Louisiana (which was not bound by common law precedent) were unable or unwilling to adopt either South Carolina’s Slave-Act-based rights deprivation theory or Mississippi’s slander-statute-based rule effectively creating a DSPRM doctrine. By the end of the Civil War,
with the abolition of slavery (and so necessarily of South Carolina's Slave Act of 1740), the rights deprivation doctrine of DPSRM was clearly no longer viable under the common law (as opposed to statutory law) in any state in the Union. 118 The doctrine would therefore require the creation of a new theory of defamation and an act of legal sleight-of-hand or a simple legal error 119 to bring the doctrine into being once more. 120

While the few cases of tortious racial misidentification arising in South Carolina (and Mississippi) before the Civil War clearly established important precedent for later Southern courts considering whether racial misidentification should establish tort liability, at least three courts—one federal, one a Southern state court, and one a Western state court—in the antebellum period rejected, ignored, or perhaps danced around South Carolina's contention that referring to a white man as "mulatto" or presumably "non-white" was defamatory per se. 121 In the earliest of these cases, Barrett v.

118. The abolition of South Carolina's Slave Act of 1740, of course, had no effect on Mississippi's slander statute. Even after the rejection by other Southern states of the rights deprivation theory of defamation per se by racial misidentification, states with similar slander statutes (i.e., statutes that did not require that plaintiffs show that they had suffered any sort of damages as a result of the uttered or written words) might have adopted Mississippi's reasoning. At least two other states (West Virginia and Virginia) had statutes that were identical to Mississippi's. See William L. Prosser, Insult and Outrage, 44 CAL. L. REV. 40, 46 (1956) ("It is only under the old statutes in Mississippi, Virginia, and West Virginia, which had their origin as part of an antidueling code, and which provide an action for 'all words which ... are considered as insults, and lead to violence and breach of the peace,' that such an action will lie.") (footnote omitted); see also MISS. CODE ANN. § 1059 (1942); VA. CODE ANN. § 8-630 (1950); W. VA. CODE § 55-7-2 (1955). A number of states, including Arkansas and Oklahoma, had similar statutes. See, e.g., Morris v. State, 160 S.W. 387 (Ar. 1913); Collins v. Okla. State Hosp., 184 P. 946 (Okla. 1916). Courts in Virginia, Arkansas, and Oklahoma did not use these statutes to consider DSPRM decisions until the early twentieth century. See infra Part II.E.

119. See, e.g., MANGUM, supra note 42, at 20 ("All this would lead one to believe that a holding that such language is slanderous per se is not in accordance with the accepted principles of the common law.").

120. See infra Part II.C.

121. See, e.g., Barrett, 1 Tapp. at 244-47; Johnson, 13 F. Cas. 734; McDowell, 53 N.C. (8 Jones) 184. Perhaps the most unusual fact is that the North Carolina court simply ignored the South Carolina doctrine. It is possible, though it seems unlikely, that the North Carolina court in McDowell was simply unaware of South Carolina's Eden v. Legare line of cases. It is also possible that this decision was part of a desperate attempt on the North Carolina court's part to try to forestall the coming interstate conflict.
Jarvis, decided by the Fifth Circuit of Ohio in 1818, Thomas Barrett brought suit against John Jarvis, alleging that Jarvis had slandered him by saying to a third person: “I understand that you are going to marry one of Barrett’s daughters; I am sorry you should, for they are akin to negroes.” 122 After considering the common law rule for slander, 123 and without citing Eden v. Legare, Chief Judge (and later United States Senator) Benjamin Tappan of the Ohio Fifth Circuit Court of Common Pleas engaged in what seems to modern eyes to be a highly moralistic and even patriotic argument. 124 “If the action does not lie for imputing a want of moral virtue,” Tappan asked rhetorically, “can it lie for imputing a consanguinity for any particular race of men?” 125 There could be no action specifically because members of the “negro race” were slaves, Tappan concluded, for “who can be sure that no one of his ancestors was bought and sold like the cattle of a feudal Lord?” 126 Similarly, he suggested, it could not lie simply because a Negro was black, because then an action would lie for suggesting that individuals are kin to Brazilians, Californians, Laplanders, and Greenlanders, “who are all of a swarthy hue.” 127 Finally, Tappan concluded that action could not lie simply because blacks and mulattoes are subject to legal disabilities—even though one of Barrett’s arguments had been that Jarvis’s comments had effectively disenfranchised Barrett. 128 “[I]f the law of slander is to be

122. Barrett, 1 Tapp. at 244.
123. Under the laws of Ohio, an action for slander would only lie against a person who “falsely and maliciously” spoke of another “words which directly charge him with any crime, for the commission of which, the offender is punishable by law, or with having any contagious disorder, the imputation of which may exclude him from society.” Id. at 245 (citing 2d Selwyns N.P. 1157). Slander did not, however, lie for “an imputation of the mere defect or want of moral virtue.” Id. (citing 3d Wils. 177–5 Johns. 191).
124. “We live under a government, which recognizes the natural equality of man, which by a fundamental law, hath preserved us from the dangers and the curse of slavery,” Tappan wrote, “and, as a magistrate in a free commonwealth, I will never sanction any doctrine which directly or indirectly contravenes that principle on which our Government rests, that all men are created free and equal.” Id. at 247.
125. Id. at 245.
126. Id. at 246.
127. Id.
128. In failing to subscribe to a rights deprivation theory Tappan might have been acting incorrectly in a legal sense. While Ohio did not have South Carolina’s antebellum Slave Act of 1740, Ohio law did apparently provide for the disenfranchisement of Blacks. See Barrett v. Jarvis, 1 Tapp. 244, 246 (5th
thus extended,” Tappan observed, directly attacking the sort of reasoning that judges in Louisiana and other Southern states would later use to justify finding racial misidentification to be defamatory per se, “I do not see where we are to stop; we may have actions of slander for calling persons Irish, or French, or Yankees, if persons who are so called, feel their pride and self-importance wounded by the imputation.”

Barrett should not be read too broadly, however; despite his stirring rhetoric, and despite his own clear predilection against such an inherently racist doctrine, Tappan may not have been explicitly rejecting the DSPRM doctrine, and might instead have been dancing around the issue. A close analysis of Tappan’s opinion suggests that he rejected any sort of rights deprivation argument because the plaintiff in this case alleged that he had been defamed because his daughters were described as being “akin” to Negros. Even if it were true that Barrett’s daughters were akin to Negros, under the laws of Ohio Barrett’s own status as an elector would have been unaffected provided that he himself was White. Put another way, Tappan’s opinion suggests that in a different case, in which the plaintiff alleged that he himself had been falsely described as non-white, Tappan would have, however reluctantly, had to reach a different conclusion.

In Johnson v. Brown, decided in 1832, the famed Chief Judge William Cranch of the Federal Circuit Court for the District of Columbia rejected the DSPRM doctrine when he announced, after considering the South Carolina trio of Eden,

Cir. Ohio 1818) (“Is it because blacks and mulattoes, are subject to legal disabilities that a person must be a free white male to be an elector?”).

129. Id. Gilbert Thomas Stephenson offered an unconvincing explanation for Tappan’s decision, noting that “the only explanation, apparently, of this conflict between the decisions of South Carolina and Ohio is that in the latter State it was not considered as much an insult to impute Negro blood to a white man as in the former.” Stephenson, supra note 42, at 27.

130. Barrett, 1 Tapp. at 244.

131. Id. at 246 (“Is it because... the imputation of being of kin to negroes might tend to deprive a man of the elective franchise? [I]t cannot be; because it is no slander to say of a man that he is not a qualified elector, as it would be to say of a woman that she is not a free white male.”).

132. Cranch was the nephew of John Adams, and the defining figure in the early history of the Circuit Court for the District of Columbia. He served on the court for fifty-four years, forty-nine of them as Chief Judge. While Chief Judge, he swore in two presidents, John Tyler and Millard Fillmore, each of whom assumed the presidency upon the deaths of his predecessor.
King, and Atkinson,\textsuperscript{133} that a statement that the plaintiff was "a yellow negro, son of a bitch, a villain, and a liar" did not constitute defamation per se because, unlike in the South Carolina cases, saying so "does not subject him [the plaintiff] to any arrest to which a white man is not equally liable."\textsuperscript{134} The words "contain no imputation of crime, nor of moral turpitude," Cranch noted, "and mere words of disgrace, unless written and published, are not actionable."\textsuperscript{135} Cranch distinguished \textit{Eden v. Legare} and its fellows on the grounds that "by the laws of South Carolina, a mulatto is deprived of all his civil rights, and liable to be tried, in all cases, without a jury."\textsuperscript{136} By concluding that no similar principle governed \textit{Johnson}, Cranch explicitly rejected the notion that the South Carolina cases had brought the doctrine of DSPRM into the common law.\textsuperscript{137}

With \textit{Barrett v. Jarvis} decided by an Ohio court and \textit{Johnson v. Brown} decided by a Federal circuit court, it was not until the 1860 North Carolina case of \textit{McDowell v. Bowels}, decided almost on the eve of the Civil War, that a Southern state supreme court held that under the common law it was \textit{not} actionable per se to say of a white man that he was a "free Negro."\textsuperscript{138} In \textit{McDowell}, the plaintiff, a Baptist minister and "clear blooded white man," claimed that at an election the defendant said that the plaintiff, being a "free negro," had no right to vote.\textsuperscript{139} The lower court ordered a nonsuit, holding that the words did not constitute slander per se, and the plaintiff appealed.\textsuperscript{140} In a per curiam ruling, the court noted that words actionable per se usually fell into three categories: "(1) words that impute a crime or a misdemeanor, punishable by an infamous penalty; (2) words that impute a contagious

\textsuperscript{133} See \textit{Johnson v. Brown}, 13 F. Cas. 734 (C.C.D.C. 1832) (No. 7375).
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} Cranch decided \textit{Johnson} before either \textit{Scott v. Peebles}, 10 Miss. (2 S. & M.) 546 (1844), or \textit{Dobard v. Nunez}, 6 La. Ann. 294 (1851), and so could not have taken those decisions into account.
\textsuperscript{138} The ruling irritated at least one early twentieth century Southern scholar. \textit{STEPHENVSON}, supra note 42, at 27 ("In North Carolina, in 1860, there was the surprising decision that it was not actionable \textit{per se} to call a white man a free Negro, \textit{even though} the white man was a minister of the gospel." (emphasis added)).
\textsuperscript{139} \textit{McDowell v. Bowels}, 53 N.C. (8 JJones) 184 (1860).
\textsuperscript{140} \textit{Id.}
disease, by which the party impugned would be excluded from society; and (3) words derogatory to one in respect of his office, profession, or calling. As calling a white man a "free negro" obviously did not constitute either a crime or a disease "of a loathsome or pestilential nature," the only remaining possibility was that the words would fall into the third category. The court held that they did not because the offensive language was not spoken of the plaintiff "in respect to his calling," as the words bore no relationship to the plaintiff's position as a minister.

By rejecting or ignoring South Carolina's line of cases regarding DRM (or something like DPSRM), North Carolina signaled that South Carolina's rights deprivation theory might find little support outside the context of South Carolina's unique antebellum law stripping all civil rights from non-whites. At the end of the short ruling in *McDowell*, Judge Manly noted that the three categories he had described comprised all of defamation per se, and that in order to prove any other claim of defamation, plaintiffs would otherwise need to show special damages. *McDowell*, while it appeared to Gilbert Thomas Stephenson to be an anomaly in light of the *Eden v. Legare* line of cases and the later Louisiana and South Carolina cases, actually serves to clarify the state of the doctrine. South Carolina had been acting imprecisely and confusing common law distinctions between words actionable in themselves and words not

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141. *Id.* at 185.
142. *Id.*
143. *Id.*
144. See *O'NEALL*, supra note 78.
145. *McDowell*, 53 N.C. (8 Jones) at 185 ("Thus stands the law, as we conceive, in respect to words alleged to be actionable of themselves; with respect to all other disparaging words, outside of the limitation prescribed, special damage must be alleged and proved."). Interestingly, at the beginning of his opinion, Judge Manly suggested that the court was not entirely clear about which classes of words were actionable per se, and that to answer this question the court needed to turn to "elementary books." *Id.* ("We are not aware of any class of defamatory words, which are held to be actionable, that would embrace the language complained of in this case. The three classes most usually found in elementary books, are . . . .").
146. *STEPHENSON*, supra note 42, at 27.
147. *McDowell* was not an aberration: in 1926, the North Carolina Supreme Court explicitly followed its holding in finding that the defendant was not liable for slander per se for alleging that the plaintiff had "negro blood in his veins." *Deese v. Collins*, 133 S.E. 92 (N.C. 1926).
actionable in themselves by referring to the potentially defamatory words in *Eden, Atkinson*, and *King* as "actionable in themselves." In fact, the South Carolinian rights deprivation theory did not create new categories of words actionable in themselves, but effectively codified—within South Carolina—one method of proving special damages (showing that the Negro Act would strip civil rights from non-whites). As North Carolina had no statute equivalent to the Negro Act of 1740, a rights deprivation theory should have had no effect on the outcome of any action for slander in the North Carolina courts. In other words, both the North Carolina Supreme Court and the South Carolina Supreme Court correctly applied precedent in reaching their respective rulings, even though the courts reached opposite conclusions, and even though the South Carolina courts unnecessarily confused their legal terms.

Beginning at least by 1791, and continuing well into the nineteenth century, South Carolina's courts recognized that words falsely or mistakenly alleging racial identification constituted words "actionable in themselves." Despite the development of this South Carolina doctrine (and despite similar cases from Mississippi and Louisiana), however, as Ohio, District of Columbia, and North Carolina courts demonstrated, the logic of the South Carolina Supreme Court was so idiosyncratic, and so dependent upon the existence in South Carolina of a unique statute (the Negro Act of 1740), that other Southern courts applying traditional common law understandings of defamation per se were unlikely to follow in South Carolina's footsteps. The nascent tort doctrine of DPSRM might have lost all legal legitimacy at this point, especially after the post-Civil War Reconstruction Amendments granted equal political and legal rights to African Americans, had not Louisiana, in a radical move, used the "community standards" theory of defamation once again to find (outside of the context of special defamation statutes) racial misidentification to be defamatory—at least

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C. Struggling with Equality: Establishing the “Community Standards” Model

After the Civil War, Louisiana resurrected the doctrine of defamation per se by racial misidentification by abandoning the rights deprivation theory and developing a “community standards” theory of DRM, under which words might be deemed defamatory if, given a particular community’s “social habits, customs, and prejudices,” the words lowered the target in the eyes of that community. Louisiana would not have been able to adopt this different standard for defamation were it, like North Carolina, operating under English and American common law. Because Louisiana was operating under the Napoleonic or Civil Code, however, the Louisiana Supreme Court was free to ignore traditional common law distinctions between words actionable in themselves (defamatory per se) and words actionable only upon a showing of special damages (not defamatory per se), and so ignore the North Carolina Supreme Court’s common law logic in *McDowell*.

Even after the end of the Civil War, the Louisiana Supreme Court was apparently in no rush to create a doctrine resembling the DSPRM rule. In the 1869 case of *Toye v. McMahon*, the Louisiana Supreme Court affirmed a lower court’s decision on narrow factual grounds, and so sidestepped the question of whether a defendant had slandered the plaintiff by falsely informing the Hackmen’s Benevolent Association of New Orleans, an association which the plaintiff hoped to join, that the plaintiff “was a colored man.” Louis Toye, a “British subject of pure white, or Caucasien [sic] blood,” claimed that he had suffered the loss of five thousand dollars by being “disgracefully expelled from the association” as a result of Thomas McMahon’s false allegation. McMahon countered that at a preliminary organizing meeting setting up the Association other members

150. See, e.g., Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888).
152. *Id.* The Louisiana Supreme Court, in deciding later cases, generally did not cite to or consider *McDowell*.
154. *Id.*
had encouraged him to call attention to the plaintiff's race, because eight years earlier Toye had been denied entry into the then Hackmen's Association for being colored. In reaching its decision, the Louisiana Supreme Court essentially decided to defer to the District Judge, noting that the lower court judge's opinion might have been influenced by the fact that the plaintiff was simply denied entry into (rather than expelled from) the association. The record, moreover, the court explained, did "not seem to prove conclusively that the defendant uttered the language complained of and with the intent charged." Judge Howe's extremely narrow opinion for the court is, in the end, remarkable for its lack of legal analysis regarding slander or defamation, though the facts in this case certainly seemed to call for discussion of these issues. In the aftermath of the Civil War, the Supreme Court of Louisiana had perhaps not yet fully decided how to handle the doctrine of DRM—an indecision it rectified within two years of sidestepping the issue in Toye.

With its 1888 decision in *Spotorno v. Fourichon*, the Louisiana Supreme Court, while referring to its opinion in *Toye*, established the basic "community standards" doctrine of DRM that would continue to govern cases through the middle of the twentieth century. In *Spotorno*, the court was considering the defendant August Fourichon's appeal from a judgment for $500 resulting from a suit by Louis Spotorno, who alleged that Fourichon had "falsely and maliciously assert[ed] and circulat[ed] the report that [Spotorno] was a negro." Writing for the court, Judge Fenner first made the vital point that Louisiana courts were "not bound by the technical distinctions of the common law as to words

155. See id.
156. Id.
157. Id. (emphasis added).
158. It would be equally appropriate to refer to this as a DSPRM case, as in Louisiana there was no distinction between defamation per se and simple defamation.
159. The case proved important both as a window into how the Louisiana courts viewed race and as a reflection of the views of Judge Fenner, the author of the opinion, who went on in 1893 to write the Louisiana Supreme Court opinion in what would come to be the far better known case of *Plessy v. Ferguson*, 163 U.S. 537 (1897). See Thomas J. Davis, More Than Segregation, Racial Identity: The Neglected Question in Plessy v. Ferguson, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 1, 13–14 (2004).
160. Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888).
actionable per se and not actionable per se, and allowing, for the latter, only actual pecuniary damages specially proved.161 Here, Fenner was explicitly refusing to use the sort of point-by-point analysis of defamation per se that the North Carolina Supreme Court had used when deciding McDowell in 1860.162 Having made this point, Fenner turned to the question of whether Fourichon’s words should be considered defamatory: in Louisiana, Fenner concluded, it was sufficient that words be “false, injurious, and made maliciously or malo animo.”163 The injury and the maliciousness, he added, could be inferred from the nature and falsity of the words, and from the circumstances under which they were uttered without the necessity of special proof. In this case, the court held that there was no need to go any further than considering the fact that the statement was actually uttered. “Under the social habits, customs, and prejudices prevailing in Louisiana,” Fenner noted:

[It cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage. We are concerned with these social conditions simply as facts. They exist and, for that reason, we deal with them. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious, and without intending to injure.164

Despite Fenner’s observation that the Louisiana court was unconcerned with the distinction between words that were actionable per se and those that were not, this opinion reads instead like a straightforward claim that malicious racial misidentification could always be actionable per se in Louisiana. In other words, had Fenner been writing within the context of the sort of logic demonstrated by the North Carolina Supreme Court’s opinion in McDowell, then, rather than abandoning the three traditional categories described in McDowell, he might simply have been expanding defamation

161. Id. Put another way, Fenner was reminding his audience that Louisiana, which was governed by the Civil Code, was not subject to the rules and precedents of common law.
162. See McDowell v. Bowles, 53 N.C. (8 Jones) 184 (1860). The Louisiana Supreme Court in Spotorno did not cite to McDowell explicitly, but clearly sought to avoid the difficulties imposed by contending with common law categories of words actionable in themselves. See Spotorno, 4 So. at 71.
163. Spotorno, 4 So. at 71.
164. Id.
per se into a fourth category—words which, under the social habits, customs, and prejudices prevailing in a particular state, were calculated to inflict injury and damage. Such a reading ignores the crucial fact that Fenner, working within the confines of the Louisiana Civil Code, was not functioning as a common law judge when he wrote the opinion, and so should have had no more effect on common law definitions of per se liability than would a French judge deciding a similar issue. Despite this crucial fact, Fenner's pseudo-per se community standards theory of tortious defamation by racial misidentification was later adopted by numerous Southern courts, even in states that had no case on point. In doing so, these courts—following the example of South Carolina—were arguably making a significant legal error by incorporating into the common law a Louisiana decision, reached under the logic not of the common law but rather of Louisiana's idiosyncratic Civil Code.

Having firmly established the community standards theory of effective DPSRM in Spotorno, in 1900 the Louisiana Supreme Court moved to clarify what exactly it meant by suggesting that injury for racial misidentification would depend upon the social habits, customs, and prejudices of a particular community and could be inferred from the circumstances. In Upton v. Times-Democrat Publishing Co., the Louisiana Supreme Court affirmed a lower court decision limiting the plaintiff, Thomas J. Upton, to actual damages of fifty dollars suffered as a result of libel by racial

165. As a result of the confusion engendered by interaction between the common law and civil code systems, it is not always clear whether the Louisiana courts were talking about the doctrine of DRM or the more stringent doctrine of DPSRM. For the purposes of this article, Louisiana's theory as of Spotorno will be referred to as "effective DPSRM."

166. See, e.g., O'Connor v. Dallas Cotton Exch., 153 S.W.2d 266, 268 (Tex. Civ. App. 1941) (citing Spotorno, 4 So. at 71) ("Although we have no Texas case [on point,] . . . in view of the social habits, customs and prejudices prevalent in this state, in regard to the status of whites and blacks, we think such a charge would be slanderous.").

167. See infra Part II.D.

168. While Fenner's opinion in Spotorno is normatively repellant to modern sensibilities, this article does not contend that Fenner made any particular legal error in building his community standards theory. Instead, this article suggests that other states, led by South Carolina, erred by failing to account for Louisiana's different legal system when using Spotorno to justify later defamation per se by racial misidentification decisions.

169. See Spotorno, 4 So. at 71.
misidentification. Upton had brought suit for $5,000 against the Times-Democrat after the paper published what purported to be a telegraph message from one of its correspondents in which the correspondent stated that "the Rev. Thos. J. Upton is a negro." In fact, the correspondent—reporting on a speech Upton had given—had noted complimentarily in his report that Upton was "a cultured gentleman," and that Upton's arguments were eloquently presented. "The word 'cultured,' as written by this correspondent," explained the court, "was changed to 'colored'; and the dispatch read that a 'colored gentleman,' instead of a 'cultured gentleman,' had presented the petition." The Times-Democrat, upon receiving the incorrect telegraph message, changed "colored gentleman" to "negro," as was its editorial policy. Upton immediately complained, and the newspaper printed a retraction two days later, on September 15, 1900, stating that Upton "was of the purest Caucasian race" and had held respected positions in the community. While explicitly not discounting in any way the damage or injury caused by the publication, the Louisiana Supreme Court, basing its decision on the conclusion that the newspaper had not acted maliciously, agreed with the lower court that Upton should be restricted to recovering actual damages. The mistake, the court concluded, was one for which the defendant was in no way responsible; the newspaper had merely changed "colored" to "negro," and "one expression . . . was as objectionable as the other." Without malicious intent, there was "no question of

170. Upton v. Times-Democrat Publ'g Co., 28 So. 970, 972 (La. 1900).
171. Id.
172. In this speech, Upton advocated that the parish of East Baton Rouge hold an election to determine whether the parish should institute prohibition. Id. at 970.
173. Id.
174. Id.
175. Id. at 970–71.
176. See Upton v. Times-Democrat Publ'g Co., 28 So. 970, 971 (La. 1900) ("The word complained of was provoking, to an extreme degree. Inserted as it was in one of the daily papers, it was enough to arouse the most profound indignation of the most patient man.").
177. See id. at 972.
178. Id. at 971. It was the telegraph company, unnamed in this suit, which had committed the (in the court's eyes) far more egregious error of changing "cultured" to "colored." Id.
exemplary damages”; the only remaining question was what amount of actual damages Upton deserved as a result of the injury to his reputation. In other words, the only remaining question was how much of an injury, given the social habits, customs, and prejudices of Upton’s community, the Louisiana Supreme Court thought racial misidentification had inflicted.

Upton is more interesting for the reasoning the court used to limit the actual damages to fifty dollars than it is for its legal analysis, as it does not signal any change from the basic “community standards” model of DRM the Louisiana Supreme Court established in Spotorno. In Spotorno, the court had signaled that the injury caused by racial misidentification should be judged by “social habits, customs, and prejudice.” In Upton, however, the court concluded that in its view, the real injury sustained must have been “very inconsiderable.” Applying questionable logic, the court noted:

The untruth published could not have had the least effect, even for a moment. To illustrate: [i]f one who has marked moral character, great prestige, and austere probity is accidentally charged with having committed an improper act, the charge, as relates to actual damages, would have no great effect, or if, as in the case before us for decision, the name of one of well-known lineage should, by the merest accident, be characterized untruthfully, the actual damages would be inconsiderable.

The court might have been depending upon its belief that Upton’s being of the “purest Caucasian race” was so well known, that no reader perusing the Times-Democrat could possibly have believed otherwise. This seems less than fully persuasive, however, especially given the court’s statement that “the word complained of was provoking, to an extreme degree.” Judge Breaux, writing the opinion, may in fact have not believed that mistaken racial misidentification truly constituted much of an injury under any circumstances.

In the aftermath of the Civil War, and in light of the

179. Id.
180. Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888).
181. Upton, 28 So. at 971.
182. Id. at 971–72.
183. Id. at 971.
North Carolina Supreme Court's ruling in *McDowell*, Louisiana reconsidered, resurrected, and then clarified the doctrine of effective DPSRM by establishing a community standards model and test for the tort. With its decision in *Upton*, the Louisiana Supreme Court established that, within Louisiana, racial misidentification constituted an automatic tort, provided that the social habits, customs, and prejudices of the injured party's community suggested that non-whites were socially lower than were whites. To this point, these post-Civil War rulings were confined to Louisiana; in the early years of the twentieth century, however, the South Carolina Supreme Court seized upon the Louisiana court's logic, and so erroneously brought the community standards doctrine of defamation per se by racial misidentification firmly into the common law.

**D. South Carolina and Louisiana: Developing the "Community Standards" Model**

In the early twentieth century the South Carolina Supreme Court erroneously or improperly brought the community standards doctrine of DSPRM into the common law184 by using the Louisiana Supreme Court's decision in

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184. In making this point, it is important to remember Justice Holmes's famous dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (Holmes, J., dissenting):

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notion of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. . . . The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what may have been in England or anywhere else. . . . But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. . . . Louisiana is a living proof that it need not be adopted at all. . . . Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide.

*Id.* at 533–34. *See also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)
Spotorno as precedent for finding words falsely identifying whites as non-whites actionable in themselves (and thus defamatory per se) in any community in which the prevailing social habits, customs, and prejudices suggested that non-whites were somehow socially lower than were whites. In three cases between 1900 and 1910—Upton, Flood v. News & Courier Co., and May v. Shreveport Traction Co.—the Louisiana and South Carolina Supreme Courts jointly advanced and perhaps clarified the doctrine of defamation per se by racial misidentification.

In 1905, the South Carolina Supreme Court effectively brought the doctrine of DSPRM (actually libel per se in this case) firmly into the common law when it erroneously called upon the Louisiana Supreme Court's decisions in Spotorno and Upton to justify a community standards theory of the tort. In the 1905 case of Flood v. News & Courier Co., the South Carolina Supreme Court held that the Reconstruction Amendments had no effect on the social (as opposed to legal or political) status of African Americans, and therefore in no

("There is no federal general common law."). Despite Holmes's well-founded observation, it is reasonable to argue that South Carolina's Supreme Court acted in a questionable fashion by finding a common law rule holding racial misidentification libel per se, when it did so by looking solely or primarily to Louisiana precedent. In other words, South Carolina's Supreme Court might have had a stronger argument had the court looked to "standard practice," "tradition from time immemorial," or the like. Instead, Supreme Court specifically and improperly looked to Louisiana Civil Code precedent.

185. Upton, 28 So. 970.
188. During the same period, the newly-created Georgia Court of Appeals also weighed in with a judgment that calling a white man a negro, or intimating that a white man is of African descent may, under certain circumstances, be actionable per se. See Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 903 (Ga. Ct. App. 1907). Wolfe implicates racial misidentification in places of public accommodation more than it does racial misidentification in a defamation context, because the issue in the case dealt with the humiliation that the plaintiff felt at being treated as a non-white, rather than being directly called non-white. The ruling regarding directly calling a white man black was thus essentially dicta. But see, e.g., S. Ry. Co. v. Thurman, 90 S.W. 240, 241 (Ky. 1906) ("When a mistake is made, the carrier is not liable in damages simply because a white person was taken for a negro, or vice versa. It is not a legal injury for a white person to be taken for a negro."). Also during the same period, at least one Northern court, in finding that saying of a woman that she was "only a low woman" and "half negress" did not imply unchastity to her, essentially rejected the claim that such allegations constituted slander per se. See Kenworthy v. Brown, 92 N.Y.S. 34, 35 (App. Div. 1904).
way interfered with the continued viability of the tort of DRM. Augustus M. Flood had sued the *News and Courier Co.* after the newspaper published an article reporting on a lawsuit by Flood against the Charleston Consolidated Railway, Gas & Electric Company. In describing the action, and giving Flood's name, the newspaper began by noting that “Augustus M. Flood, colored, through attorneys” had filed the suit. Flood alleged that through this language the newspaper had injured him in his reputation and had hurt him in his feelings. The district judge sustained the defendant's demurrer that under the Thirteenth, Fourteenth, and Fifteenth Amendments the use of the word “colored” could not be libelous or defamatory. The South Carolina Supreme Court thus took up the sole question of whether it was “libelous per se to publish a white man as a negro.”

In answering this question, whether racial misidentification constituted defamation per se, Chief Judge Pope appealed directly to and built upon the “community standards” theory laid out by the Louisiana Supreme Court in *Spotorno and Upton*. Pope first reached back to the United States Supreme Court's 1880 opinion in *Strauder v. West Virginia*, in which the Court, while holding that preventing African Americans from serving on juries violated the Equal Protection clause, held that the Reconstruction amendments were “designed to accord the members of the negro race the

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189. See Flood v. News & Courier Co., 50 S.E. 637. See also Flood v. Evening Post Publ'g Co., 50 S.E. 641 (S.C. 1905). This case was handed down on the same day and simply restated the result of *Flood v. News & Courier Co.*


191. Id.

192. See id.

193. Id.

194. Id. at 639.

195. See, e.g., id. at 639–40 (citing Spotorno v. Fourichon, 4 So. 71 (La. 1888)) (discussing its “social habits, customs, and prejudices” analysis). See also id. (citing Upton v. Times-Democrat Publ'g Co., 28 So. 970 (La. 1900)). In *Flood v. News & Courier Co.*, while Chief Judge Pope wrote a powerful opinion supporting the community standards theory, his three fellow judges simply concurred “in the result, as the complaint alleges that the publication was willful and malicious.” Id. at 641. This later became an important issue when a lower-court judge in South Carolina in the 1950s read *Flood* narrowly as rejecting the doctrine of defamation per se by racial misidentification. The South Carolina Supreme Court in that case rejected the lower-court judge's reasoning entirely. Bowen v. Indep. Publ'g Co., 96 S.E.2d 564, 565 (S.C. 1957).

same protection in life, liberty, and property which were already enjoyed by the white race."197 Citing Justice Strong's contention in *Strauder* that "[t]he colored race, as a race, was abject and ignorant, and that condition was unfit to command the respect of those who had superior intelligence,"198 Pope argued dismissively199 that the amendments did not touch social conditions. "What does 'society' mean in this connection?" Pope asked rhetorically. "Does it not mean the class with which he mingles; the class from which, if a man marries, he selects his wife; the class of people with whose children his children go to school?"200 Holding that that was the case, Pope then summarized various decisions from the South Carolina courts upholding laws banning miscegenation, railroad employees permitting passengers to occupy cars other than those designated for their own race, and school desegregation.201 Once again reaching back to a vital United States Supreme Court precedent, Pope quoted some of the key language in *Plessy v. Ferguson*: “If the two races are to meet upon terms of social equality, it must be the result of natural affinities—a mutual appreciation of each other's merits and a voluntary consent of individuals.”202 Referring to the “radical distinction subsisting between the white man and the black man,” Pope stated that to “impute the condition of the negro to a white man would affect his (the white man’s) social status . . . [and] would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man to his fellow white men.”203 The Reconstruction amendments, he concluded, had not destroyed the common law of the state making it libelous per se to call a white man a “negro.”204

198. Id. (citing *Strauder*, 100 U.S. at 306).
199. See id. at 640 (“All take pleasure in bowing to the authority of the United States in regard to these three amendments, but we would be very far from admitting that the social distinction subsisting between the two races has been in any way affected.”).
200. Id. at 639.
201. See id.
202. Id. at 640–41 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1897)).
204. Id. at 641. Perhaps erroneously, Pope actually said that the three amendments “have not destroyed the law of this State, which makes the publication of a white man as a negro anything but libel.” Id. (emphasis added).
In the first two decades of the twentieth century, the doctrine of DPSRM developed alongside and was affected by the related doctrine of tortious racial misidentification in places of public accommodation (RMPPA), in which white plaintiffs sued railroads or building owners for being forced to ride in Jim Crow cars or elevators designated for non-whites. These suits drew doctrine from the line of cases dating back to Eden v. Legare, but at the same time were pointed at a different phenomenon than were the tortious defamation cases. In these tortious RMPPA cases, courts could reasonably hold that being forced to ride in a Jim Crow car did not necessarily constitute an injury—but, as the doctrine of DSPRM had been firmly set on its way by the Louisiana Supreme Court’s decision in Spotorno—with South Carolina’s decision in Flood v. News & Courier Co., courts were beginning to hold that simply the allegation of having African blood was injurious depending upon community standards.

This statement, as written, is entirely at odds with both the thrust and decision of the opinion.

205. See, e.g., Lidsky, supra note 111, at 32; Sharfstein, supra note 44, at 1500–01 n.157. Plessy itself was, of course, a case about a passenger prosecuted and convicted for insisting “on going into a coach or compartment to which by race he [did] not belong.” Plessy, 163 U.S. at 541; see, e.g., May v. Shreveport Traction Co., 53 So. 671, 674 (La. 1910); Ex parte Plessy, 45 La. Ann. 80 (1893). The author of this article has created the term “tortious racial misidentification in places of public accommodation” (RMPPA) to distinguish those cases from cases alleging defamation per se by racial misidentification (DPSRM).

206. See, e.g., Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 901 (Ga. Ct. App. 1907); S. Ry. Co. v. Thurman, 90 S.W. 240, 241 (Ky. 1906); May, 53 So. at 671 (holding a streetcar company liable when a conductor suggested that a passenger belonged in the section of the car reserved for blacks); Lee v. New Orleans Great N. R.R. Co., 51 So. 182, 184 (La. 1910) (affirming the dismissal of a suit by two teenage girls, whose maternal grandfather was of mixed blood, who were forced to ride in the Jim Crow car), discussed in Sharfstein, supra note 44, at 1500–01 n.157.

207. See, e.g., BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, 357–58 (2001); Sharfstein, supra note 44, at 1500–01 n.157 (“Some courts, however, were unwilling to recognize such causes of action. In Southern Railway Co. v. Thurman, the Kentucky Supreme Court held that ‘[w]hat race a person belongs to cannot always be determined infallibly from appearances, and mistakes must inevitably be made. . . . It is not a legal injury for a white person to be taken for a negro. It was not contemplated by the statute that the carrier should be an insurer as to the race of its passengers.’” (alteration in original) (citing Thurman, 90 S.W. at 241));

208. An additional key distinction between the cases alleging racial misidentification in public accommodations and early twentieth century cases
After the South Carolina court's decision in Flood v. News & Courier Co., the Louisiana court in May v. Shreveport Traction Co. suggested that the doctrines of RMPPA and DPSRM were centrally linked and could lead to different results. By the early 1900s, it was clear that Louisiana and South Carolina were together developing the doctrine of DPSRM; almost all of the important cases advancing the theory that calling a white man a "negro" or "colored" in speech or print was actionable per se had emerged from just two state supreme courts.

Five years after Flood v. News & Courier Co., the Louisiana Supreme Court took the lead back from South Carolina in pushing the doctrine of DPSRM just a bit further. Just as the South Carolina Supreme Court had cited the Louisiana Supreme Court's decisions in Spotorno and Upton in its decision in Flood v. News & Courier Co., the Louisiana Supreme Court did the same in its decision in May v. Shreveport Traction Co.

alleging defamation by racial misidentification was that most of the latter such cases after 1900 involved libel, rather than a tort as transitory as slander. Presumably, ushering a white man into a Jim Crow railway car, regardless of how injurious, would have been more akin to slander than to libel.

209. May, 53 So. at 674–75.

210. "Important" as was determined by which cases were reported in state or federal reporters.

211. The only case on this question decided by a state supreme court not to arise in either South Carolina or Louisiana was McDowell v. Bowles, 53 N.C. (8 Jones) 184 (1860), in which the court held that referring to a white man as a negro was not actionable per se because the language did not fit within one of three traditional categories. The 1907 decision of the Georgia Court of Appeals in Wolfe v. Georgia Railway & Electric Co., 58 S.E. 899 (Ga. Ct. App. 1907), while a case of racial misidentification in public accommodation, might also be considered a decision of similar importance. The Georgia Court of Appeals was created in 1907, and its decisions were final and not reviewed by the Georgia Supreme Court for the first ten years of the existence of the Court of Appeals. Court of Appeals of Georgia, History of the Court of Appeals, http://www.gaappeals.us/history (last visited Jan. 2, 2008). In Wolfe, the Georgia court delivered a drawn-out screed on the inferiority of Blacks and mixed-race individuals. Wolfe, 58 S.E. at 901 ("It is a matter of common knowledge, that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record . . . from the dawn of historic time denies equality."). Citing Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905), and Upton v. Times-Democrat Publishing Co., 28 So. 970 (La. 1900), the court also concluded, "after the most mature consideration of every phase of the question," that it was an insult "to seriously call a white man a negro, or to intimate that a person apparently white is of African descent." Id. Interestingly, even while citing Flood v. News & Courier Co. and Upton, Judge Richard Brevard Russell (later Chief Justice of the Georgia Supreme Court) steered away from any discussion of defamation, focusing instead only on "injury." See id.
Supreme Court now turned around and cited Flood v. News & Courier Co. to support its ruling in May. In the decision, Judge Monroe explicitly conflated the tortious RMPPA cases and the tortious DPSRM cases. Emma May, an extremely poor lady, had boarded the streetcar reserved for whites and had paid her fare when she was asked by the conductor whether she belonged “over there”—meaning the section of the car reserved for colored passengers. May, who was hard of hearing, waited until the conductor had taken two more fares, and then asked him what he had said. The conductor repeated the question, now in a louder voice, so that other people in the car could hear. May, deeply offended, immediately left the train and brought a charge against the conductor in city court, after which he was arrested. After considering two cases holding transport companies and their agents liable for misdirecting passengers into the wrong racial cars, Judge Monroe decided to apply the doctrine of effective DPSRM to hold the conductor in this case liable for his actions. Monroe, however, then noted that the court had not found that the conductor had specifically referred to the plaintiff as a “negro,” and held that the question “don’t you belong there,” when the questioner points to the seats reserved for African Americans, “is sufficient to wound the feelings of the white person to whom it is addressed.” With this announcement, Monroe moved the case back out of the realm of effective DPSRM and into the realm of RMPPA. Monroe, oddly, then announced that the court was of the opinion that the plaintiff “was not injured

212. May, 53 So. at 671, 674–75.
213. Id. at 674 (“We now apply to the case another doctrine, which is also well established, to wit, that, to charge a white person, in this part of the world, with being a negro, is an insult, which must, of necessity, humble and may materially injure, the person to whom the charge is applied.”).
214. Id. at 672.
215. Id.
216. See id. at 672–73.
217. See id. at 673. The fact that the conductor was arrested suggests this was a criminal case, though the final action was in tort and as the court ultimately awarded damages.
219. See id.
220. Id. at 675.
in the estimation of her friends and acquaintances or of the public at large," but that she was still entitled to $250 for her injury.\footnote{221} By awarding damages even though May was not lowered in the eyes of anyone through the conductor's statements, and so not requiring proof of injury in order to allow recovery, the court confirmed that both DPSRM and RMPPA cases in Louisiana would be decided on an effective per se basis.\footnote{222}

With the decisions in \textit{Upton}, \textit{Flood v. News \\& Courier Co.}, and \textit{May}, the Louisiana and South Carolina Supreme Courts together resurrected and clarified the doctrine of defamation per se by racial misidentification. Oddly, this resurrection was in large part the result of the South Carolina court's questionable action in applying Louisiana precedent to develop a common law category. By 1910, however, the doctrine was sufficiently well-developed for other Southern courts to use and apply it in deciding common law questions of defamation per se.

\textbf{E. Assessing the "Community Standards" Model on a Regional Scale}

Despite twentieth-century views of the DPSRM doctrine as monolithic,\footnote{223} after \textit{Spotorno}, \textit{Upton}, \textit{Flood v. News \\& Courier Co.}, and \textit{May}, courts reacted in a confusing variety of ways to the Louisiana/South Carolina community standards theory of DPSRM. Between 1910 and the early 1940s, Courts in Virginia,\footnote{224} Alabama,\footnote{225} Arkansas,\footnote{226} Oklahoma,\footnote{227} Tennessee,\footnote{228} Texas,\footnote{229} and Georgia\footnote{230} indicated that they in

\footnote{221. Id.}
\footnote{222. See id.}
\footnote{223. See, e.g., Natchez Times Publ'g Co. v. Dunigan, 72 So. 2d 681, 684 (Miss. 1954) (citing 53 C.J.S. Libel and Slander § 10 (2005); 33 AM. JUR. 2D Libel and Slander § 76 (2006); 50 A.L.R. 1413 (2008)).}
\footnote{224. See Mopsikov v. Cook, 95 S.E. 426 (Va. 1918); Spencer v. Looney, 82 S.E. 745 (Va. 1914).}
\footnote{225. See, e.g., Jones v. R.L. Polk & Co., 67 So. 577 (Ala. 1915).}
\footnote{226. See Morris v. State, 160 S.W. 387 (Ark. 1913).}
\footnote{227. See Hargrove v. Okla. Press Publ'g Co., 265 P. 635 (Okla. 1928); Collins v. Okla. State Hosp., 184 P. 946 (Okla. 1916).}
\footnote{228. See Stultz v. Cousins, 242 F. 794 (6th Cir. 1917).}
\footnote{229. See O'Connor v. Dallas Cotton Exch., 153 S.W.2d 266 (Tex. Civ. App. 1941); Express Publ'g Co. v. Orsborn, 151 S.W. 574 (Tex. Civ. App. 1912).}
\footnote{230. In the only existent Georgia case (actually, two bundled cases) from this period directly discussing the issue of DPSRM, the Georgia Court of Appeals seemed to imply that it might be libelous to publish of a white person that he or}
some way accepted the doctrine of DPSRM. In Virginia, Arkansas, and Oklahoma, however, the courts based their decisions on local defamation statutes rather than on a common law rule, and in Kentucky, New York, and Illinois, courts simply rejected the doctrine of slander per se by racial misidentification outright while adhering (sometimes in dicta) to the doctrine of libel per se by racial misidentification. In other words, while courts were citing she was a negro but held that a newspaper publication referring to a white man as a negro, but not referring to his parents, was not libel on his parents. Atlanta Journal Co. v. Farmer, 172 S.E. 647 (Ga. Ct. App. 1934); see also Bagwell v. Rice & Hutchins Atlanta Co., 143 S.E. 125 (Ga. Ct. App. 1928) (holding that a claim by a white woman against a shoe salesman, who allegedly said to her "You infernal negroes will put yourselves among white people, get over with the negroes where you belong," was barred by a one-year statute of limitations).

231. At least one other state court explicitly avoided the question. In Jones v. Gill, the Supreme Court of Kansas reversed a decision holding the defendant (the plaintiff's step-foster-grandmother) liable for alleging that the plaintiff, who had been adopted by the defendant's adult step-son and his wife, was a half-breed on the grounds that the trial judge had allowed improper evidence. Jones v. Gill, 66 P.2d 1033 (Kan. 1937). "We are not called upon to determine whether what defendant said at that time might form the basis of an action for damages," the court noted, "for this question is not before us, and we mention this only because of argument on this point in appellee's brief." Id. at 1035. In a 1919 Louisiana case, Berot v. Porte, the Supreme Court of Louisiana rejected the plaintiff's claim that he had been slandered by being incorrectly described as being of "negro" blood. Berot v. Porte, 81 So. 323 (La. 1919). In that case, the plaintiff applied to become a member of the George Washington Grove of Druids. Id. at 323. The court ruled that the defendant, who was a member of the Investigation Committee looking into the plaintiff's background, had a duty to report to his organization, and so—as he was speaking in good faith—could not be liable for slander. Id. at 323-24. Given the Louisiana Supreme Court's earlier opinions, it seems likely that Berot did not represent abandonment of the community standards model of DPSRM. In the 1926 case of Deese v. Collins, the North Carolina Supreme Court explicitly followed its earlier decision in McDowell and held that saying that a man had "negro blood in his veins" was not actionable per se. Deese v. Collins, 133 S.E. 92 (N.C. 1926). In Deese, however, the North Carolina court also distinguished words "actionable in themselves" from words not actionable in themselves, and suggested that, provided that the plaintiff could prove damages, a false racial misidentification could still be found defamatory. Id. ("In order to maintain an action for damages resulting from such words, the plaintiff must allege and prove special damages.").

232. See Morris v. State, 160 S.W. 387 (Ark. 1913); Hargrove, 265 P. at 635; Collins, 184 P. at 946; Mopsikov v. Cook, 95 S.E. 426 (Va. 1918); Spencer v. Looney, 82 S.E. 745 (Va. 1914).

back to the critical South Carolina and Louisiana decisions and often speaking in the language of the community standards theory, during the first half of the twentieth century the doctrine of DPSRM was actually far less cohesive than it might at first appear.

During this period between 1910 and the early 1940s, only four courts—two Texas courts, one Alabama court, and the Sixth Circuit, applying Tennessee law—seemed to accept the community standards theory of the DPSRM doctrine wholeheartedly. Both the Sixth Circuit and one of the Texas courts apparently simply followed the Louisiana and South Carolina reasoning as described in the American Law Reports. In the 1941 case of O'Connor v. Dallas Cotton Exchange, for instance, the Dallas Court of Civil Appeals noted that, “[a]lthough we have no Texas case holding that, to falsely charge a white person with being a negro would be slanderous,” in view of “the social habits, customs, traditions and prejudices prevalent in this state... such a charge would be slanderous.” Similarly, in considering the case of a white railroad worker who had been expelled from membership in the Brotherhood of Locomotive Firemen and Enginemen after an investigation into allegations that he was mulatto, the Sixth Circuit Court of Appeals concluded simply that “the authorities establish that the publication of a writing containing such a statement in respect to a white man is libelous per se, at least in a community in which marked social difference between the races are established by law or custom.”

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234. See O'Connor, 153 S.W.2d at 266–69 (reversing on jurisdictional grounds and remanding for trial a case in which a husband alleged that his wife had been injured by being forced to ride an elevator reserved for Negros and so racially misidentified); see also Express Publ'g Co., 151 S.W. at 574–75 (holding that two news stories, published on different days, should be read together where one wrongly referred to a criminal suspect as a “negress” but provided no identifying information and the other contained no information on race, but fully identified the suspect).


238. O'Connor, 153 S.W.2d at 268.

239. Stultz, 242 F. at 796.

240. Id. at 797 (citing Axton Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269 (Ky. 1916); Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905); Spencer v. Looney, 82 S.E. 745 (Va. 1914)).
plaintiff’s former Brotherhood published a letter identifying the plaintiff as a mulatto. While the Sixth Circuit’s language makes it clear that the district court had been leery of enforcing the general community standards rule too strictly, it is ironic that it was a federal court applying state law that was one of the only three courts in this period strongly adhering to the “general” common law rule.

While the Texas Court of Appeals and the Sixth Circuit, however reluctantly in the case of the latter, simply applied the common law rule developed after Spotorno, Flood v. News & Courier, Upton, and May, the Alabama Supreme Court in the 1915 case of Jones v. R.L. Polk & Co. applied the common law rule. Yet, the Alabama Supreme Court seemingly added an element by holding that whether a publication was libelous per se in any particular case depends upon the circumstances, including whether there was malice on the part of the speaker. In Jones, Mary A. Jones sued R.L. Polk & Company alleging that Polk maliciously slandered her by publishing an asterisk (indicating that she was colored) next to her name in the Selma City Directory. “The general statement that a person is ‘colored’ imputes no crime, . . .” wrote Judge Anthony Dickinson Sayre (the father, incidentally, of Zelda Fitzgerald, F. Scott Fitzgerald’s wife), “and yet in the peculiar social conditions prevailing in this jurisdiction, to publish of and concerning a white woman that she is colored . . . is libelous within the definition of libel

242. Id. at 797 (suggesting the non-viability of the doctrine of slander per se by racial misidentification by referring to “whatever be the rule as to spoken words”). The Sixth Circuit also noted that the trial judge acted correctly in refusing to instruct the jury that the charge was libelous per se:

While the trial judge might have taken judicial notice of the racial situation in eastern Tennessee, and based thereon might have instructed the jury that the charge was libelous per se, he gave the defendants an opportunity to persuade the jury that the statement made in that particular section of Tennessee might not be libelous per se . . .

Id. at 798.
243. See, e.g., Natchez Times Publ’g Co. v. Dunigan, 72 So. 2d 681 (Miss. 1954).
244. Jones v. R.L. Polk & Co., 67 So. 577, 577 (Ala. 1915). The question of malice had arisen before, as in Upton v. Times-Democrat Publishing Co., 28 So. 970 (La. 1900), and there had limited Upton’s recovery to actual damages. The “general rule,” however, dealt with the per se question and the malice issue.
245. Jones, 67 So. at 577.
commonly found in the books.” Judge Sayre did not explicitly discuss the nature of per se liability, but in citing Flood v. News & Courier Co. and speaking in the language of community standards, he suggested that under the social conditions in Alabama, such language would constitute defamation per se. Then, however, Sayre noted that “whether, then, such a publication is libelous in any particular case depends upon circumstances. Here then is room for innocent mistakes.” Sayre sought to distinguish Flood v. News & Courier Co. on the grounds that in Flood the court had concluded that the publication was willful and malicious, whereas in Jones the publisher had simply made a mistake in misidentifying one individual in the long list of “Joneses”. The effect of this decision, however, was seemingly to alter the common law doctrine of DPSRM in Alabama by requiring that plaintiffs prove additional elements—here, that the defendants acted maliciously and not accidently by publishing the offending material.

While in a number of cases in the 1910s and 1920s, the Virginia, Arkansas, and Oklahoma Supreme Courts, citing back to Spotorno, held that to call a white person a negro was per se actionable, either as slander or libel. These three courts in fact decided these cases upon “very broad and comprehensive” defamation statutes rather than upon the common law doctrine of DPSRM. In the 1913 Arkansas case of Morris v. State, for example, the state prosecutors used a broad criminal statute to prosecute Bill Morris for alleging that “Mrs. [James] Holt’s father was a thief, . . . her mother a negro, and she a half-breed.” Under Arkansas’s statute, “it [was] deemed slander to falsely use, utter, or publish words which, in their common acceptation, shall

246. Id. (emphasis added) (citing Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905)).
247. See id.
248. Id.
249. Id.
251. Id. This citation refers only to the Arkansas statute, but the statutes in Virginia, Mississippi, West Virginia, and Oklahoma were similarly broader than the general common law rule of defamation.
amount to . . . bring into disrepute the good name or character of such person so slandered.” Citing both Flood v. News & Courier Co. and Spotorno, Judge Hart concluded that “under our social conditions, . . . it cannot be disputed that charging a white man with being a negro is calculated to bring into disrepute his good name or character.” The Arkansas Supreme Court, however, actually cited Spotorno for the Louisiana Supreme Court’s sociological reasoning rather than its legal reasoning (and the legal reasoning of the following cases of Flood v. News & Courier Co., Upton, and May). Ultimately, the Arkansas Supreme Court based its decision not on the general rules of defamation discussed in these cases, but rather on the Arkansas criminal slander statute.

Like the Arkansas Supreme Court in Morris, the Virginia Supreme Court in both Spencer v. Looney and Mopsikov v. Cook spoke in the language of the community standards model of the DSPRM doctrine, but in fact decided both cases under a specific local defamation statute. In both cases, moreover, the Virginia Supreme Court demanded that the jury find that the words had been uttered with malice—thus, as in Alabama, adding another layer to DPSRM liability. In the first of these cases, George Spencer sued George Looney for libel, alleging that Looney had “in the presence and hearing of . . . divers other good and worthy citizens” announced that Spencer, his wife, and their children “are

254. Id. at 388 (citing section 1856 of Kirby’s Digest).
255. Id.
256. Id.
257. Id.
258. See also Cook v. Patterson Drug Co., 39 S.E.2d 304, 305–06 (Va. 1946). In Cook, the defendant, a seventeen-year-old soda jerk, identified the plaintiff as a “negro” and insisted that the plaintiff’s hair looked like the hair of a black man. Id. at 306. As was the custom of the store, the defendant accordingly refused to serve the plaintiff a Coca-Cola in a glass, and instead served the plaintiff Pepsi-Cola in a paper cup. Id. The court, holding that juries deliberating in cases involving Virginia’s slander statute should not consider the intent of the defendants, reversed the judgment for the defendant and remanded for retrial. Id. at 308. By eliminating consideration of the defendant’s intent (here, lack of intent to insult), Cook thus reinforced the per se nature under the Virginia anti-dueling slander statute of liability for any racial misidentification.
nothing but God damned negroes, and I can prove that they are God damned negroes." Looney, angry because Spencer's brother had killed his (Looney's) brother, repeated the claim numerous times and eventually succeeded in having Spencer's son ejected from the free white public schools. Looney's attorney conceded that "to speak of one or more persons as negroes, if untrue and they be white persons as a matter of fact, is scandalous and defamatory," but argued that the adoption of the Reconstruction Amendments had made such words not actionable. Writing for the court, Judge Richard Henry Cardwell concluded: "Upon the soundest reasoning, founded on common knowledge and authority, this contention is wholly without merit." Citing Strauder and Flood v. News & Courier Co., Cardwell explicitly invoked Judge Fenner's community standards model in Spotorno. "What was said in that case with respect to social habits, customs, etc., prevailing in Louisiana," Judge Cardwell concluded, "applies with equal force to any state or locality in which the white and negro races are established as citizens." In Mopsikov, the court reiterated the arguments it had made in Spencer by citing Spencer in place of cases such as Spotorno and Flood v. News & Courier Co. In the case, Benjamin E. Cook sued Jacob Mopsikov, alleging that Mopsikov's young daughter routinely referred to Cook's young daughter as "a nigger doll." Despite concluding that the words alleged in the declaration "were actionable per se under the statute in Virginia on the subject," and possibly even "actionable per se at common law also" because they affected the plaintiff's business, Judge Sims reversed and remanded on the basis of a number of errors made by the trial judge.

261. Spencer, 82 S.E. at 746.
262. Id.
263. Id. at 746-47 (noting that this was the same argument the Louisiana Supreme Court had rejected in Spotorno v. Fourichon, 4 So. 71 (La. 1888)).
264. Id. at 747.
265. Id.
266. Id.
268. Id. at 427.
269. This legal theory would have fit into one of the established categories of defamation per se, and does not indicate that the court was considering the broader DSPRM doctrine.
270. See Mopsikov, 95 S.E. at 428.
Like both the Arkansas and Virginia Supreme Courts, the Oklahoma Supreme Court was deciding cases on the basis of a local defamation statute while citing to broader cases establishing the common law doctrine of DPSRM and speaking in the language of the community standards theory. In the 1916 case of *Collins v. Oklahoma State Hospital*,\(^{271}\) for instance, the Oklahoma Supreme Court, while finding *against* a plaintiff whose daughter, a resident in a hospital for the insane, had been mistakenly assigned to a colored ward (and had her charts flagged with the word "colored"), nonetheless concluded that writing of or about a white person that he is a negro constitutes defamation.\(^{272}\) "In this state," Judge Hooker wrote, with its "reasonable regulation of the conduct of the races, . . . and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored."\(^{273}\) Despite this language, and despite citing to numerous cases establishing and utilizing the community standards model,\(^ {274}\) Hooker noted that in order to determine the question, "we must refer to section 4956 of the Revised Laws of 1910," the general libel statute.\(^ {275}\) Similarly, in its 1928 decision in *Hargrove v. Oklahoma Press Publishing Co.*, the Oklahoma Supreme Court apparently ruled on the basis of this same statute while citing to its earlier decision in *Collins* in sweeping terms.\(^ {276}\) In *Hargrove*, the wife of William Hargrove, a convicted bootlegger, sued the Oklahoma publisher of the *Muskogee Phoenix* for printing a story claiming that her husband was a Negro.\(^ {277}\) "Does the published article contain libel actionable per se?" asked Judge

\(^{271}\) Collins v. Okla. State Hosp., 184 P. 946 (Okla. 1916) (noting that the case was later reheard and confirmed in 1919).

\(^{272}\) Id. at 947.

\(^{273}\) Id.

\(^{274}\) Id. (citing Jones v. R.L. Polk & Co., 67 So. 577 (Ala. 1915); Upton v. Times-Democrat Publ'g Co., 28 So. 970 (La. 1900); Spotorno v. Fourichon, 4 So. 71 (La. 1888); Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905); Spencer v. Looney, 82 S.E. 745 (Va. 1914)).

\(^{275}\) Id. ("[A]nd by that we see that any false or malicious unprivileged publication by writing, printing, etc., which exposes any person to public hatred, contempt, etc., is libelous.").

\(^{276}\) See Hargrove v. Okla. Press Publ'g Co., 265 P. 635, 636 (Okla. 1928).

\(^{277}\) Id. at 635–36.
Mason, writing for the court.\textsuperscript{278} “There are, perhaps, some parts of the United States in which a publication describing a white man as a negro would not tend to disgrace or degrade or render him odious in the estimation of his friends and acquaintances,” concluded Mason, but all such debate in Oklahoma “has been definitely settled” by Collins.\textsuperscript{279} Despite Mason’s invocation of Collins, it seems clear that the ultimate decision in Hargrove depended upon the defamation statute—and the fact that it was Hargrove’s wife, rather than Hargrove himself, who was suing.\textsuperscript{280}

Perhaps because of the confusion inherent in mixing the statutorily-based decisions in Virginia, Arkansas, and Oklahoma with the common law community standards rule created in South Carolina, it was the courts in other states, including Kentucky, New York, and Illinois, that signaled an important shift in the doctrine of DPSRM between 1911 and 1935 by distinguishing between and rejecting the doctrine of slander per se while retaining the doctrine of libel per se.\textsuperscript{281} In 1911, for instance, in the important case of Williams v. Riddle, the Court of Appeals of Kentucky held that it was not slander per se to say of a white man that he was a “damn negro, and his mother was a mulatto.”\textsuperscript{282} “There is a marked distinction, probably the result of some historical accident, between slander and libel,” wrote Judge Shackelford.

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278. Id. at 636. Mason went on to define the term “per se,” noting:
\begin{quote}
[In connection with slander and libel, the term is applied to words which are actionable because they, of themselves, without anything more, are opprobrious. In other words, a publication is actionable per se when the language used therein is susceptible of but one meaning, and that an opprobrious one, and the publication on its face shows that the derogatory statements, taken as a whole, refer to the plaintiff, and not to some other person.\footnote{Id. (citing Rowan v. Gazette Printing Co., 239 P. 1035 (Mont. 1925)).}
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279. Id. (citing Collins v. Okla. State Hosp., 184 P. 946, 948 (Okla. 1916)).
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280. Id. at 637 (affirming the trial court’s judgment by concluding that “[w]e believe it would be stretching the rule of libel too far to say that a false imputation that a man is a negro is a libel upon his wife”).
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281. See, e.g., Wright v. F.W. Woolworth Co., 281 Ill. App. 495 (App. Ct. 1935) (holding that a woman customer was not entitled to recover from store owner for slander, in that store employees stated that she was a “nigger” and therefore could not be served, in absence of showing of a special damages or a detailed showing of nature of woman’s business rendering such word injurious to her business); Axton Fisher Tobacco Co. v. Evening Post, 183 S.W. 269 (Ky. 1916); Williams v. Riddle, 140 S.W. 661 (Ky. 1911); MacIntyre v. Fruchter, 148 N.Y.S. 786 (Sup. Ct. 1914).
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282. Williams, 140 S.W. at 664.
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It is only when "oral charges of dishonesty, rascality, or general depravity are uttered or spoken of a person in his business or employment, or impute to him the commission of a crime, that they are actionable per se," Miller explained. Miller then embarked on a long analysis of numerous cases concerning the per se defamation rule of racial misidentification. Given the logic in these cases, and especially in McDowell, regarding slander, Miller concluded, the words used in Riddle were simply not actionable per se.

Five years later, in Axton Fisher Tobacco Co. v. Evening Post Co., Judge Carroll echoed Miller by noting that "[t]he words used in Riddle were simply not actionable per se.

Like the Kentucky Supreme Court in Riddle and Axton Fisher, one New York court and one Illinois court deciding cases involving the doctrine of DPSRM strongly distinguished between slander per se and libel per se—and so avoided enforcing the doctrine while ostensibly adhering to it.

In the first of these cases, the 1914 New York case of MacIntyre v. Fruchter, the defendant allegedly stated to the plaintiff: "You are a dirty bitch; you are a dirty lousy blackguard and a swindler. You are only fit for niggers to associate with and only worked for niggers in the South." Concluding that

283. Id. at 661 (describing the five classes of words slanderous per se, as recognized in Pollard v. Lyon, 91 U.S. 225 (1875)).

284. Id. at 662 (citing Brooker v. Coffin, 5 Johns. 188 (N.Y. Sup. Ct. 1809)).

285. Id. at 663-64 (citing Johnson v. Brown, 13 F. Cas. 734 (C.C.D.C. 1832) (No. 7375); Upton v. Times-Democrat Publ’g Co., 28 So. 970 (La. 1900); Spotorno v. Fourichon, 4 So. 71 (La. 1888); McDowell v. Bowles, 53 N.C. (8 Jones) 154 (1860); Barrett v. Jarvis, 1 Tapp. 244 (5th Cir. Ohio 1818); Eden v. Legare, 1 S.C.L. (1 Bay) 171 (Ct. Com. Pl. & Gen. Sess. 1791); King v. Wood, 10 S.C.L. (1 Nott & McC.) 184 (Const. Ct. App. 1818); Atkinson v. Hartley, 12 S.C.L. (1 McCord) 203, 204 (Const. Ct. App. 1821); Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905)). It is this comprehensive analysis that made Riddle such an important case.

286. Id. at 664.

287. Axton Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269, 274 (Ky. 1916). In Axton, the tobacco company sued a newspaper that published an article alleging incorrectly that the company placed negro foremen over white girls. Id. at 270-74. While the words would not have been slanderous per se had they been spoken, concluded the court, the fact that they were written and published made them libellous per se. Id. at 274-76.


289. MacIntyre, 148 N.Y.S. at 786. MacIntyre is distinguishable from other
only words that “charge[d] or import[ed] the commission of a crime by the plaintiff [or] . . . impute unchastity to her” constitute slander per se. Judge Tompkins of the Supreme Court of Orange County held that the words in this case were simply not defamatory. Had the words been written or printed, however, he baldly stated, with no legal analysis, the words would have been libelous per se.

In the second of these cases, over twenty years later, the Appellate Court for the Fourth District of Illinois similarly held that words that would have constituted libel per se were not slanderous in themselves. In *Wright v. F.W. Woolworth Co.*, Edna Wright claimed that when she entered the F.W. Woolworth’s in Mt. Vernon to purchase a root beer, one of the store’s employees announced that “[w]e can’t serve you because you are a nigger.” “In considering whether a defamatory charge is actionable or not,” noted the court, “the distinction between oral and written words must be kept in mind, as the same rules of law do not apply to libel, as to slander, the law of the former being wider than that of the latter.” As the words in this case did not fall into any of the five common law classes of spoken words constituting slander per se, Presiding Judge Edwards, citing *McDowell*, noted, the language was not defamatory. Wright nonetheless insisted that the common law of slander per se by racial misidentification had been expanded by the South Carolina cases. After considering numerous precedents, including *Eden, Riddle, Scott, Dobard, Spencer*, and *Spotorno*, the court observed cogently that the cases had been misinterpreted. “The authorities which hold such spoken words are not, per se, slanderous, are found, upon examination to rest upon the principles of the common law . . . ,” Edwards concluded.

cases in that it was not dealing with a direct allegation that white woman was in fact black, but rather dealt with a claim that the court thought might have imputed unchastity. See *id.* at 787.

290. *Id.* at 786.
291. *Id.*
292. *Id.*
293. See *Wright*, 281 Ill. App. 495.
294. *Id.* at 497.
295. *Id.* (citing *Williams v. Riddle*, 140 S.W. 661 (Ky. 1911)).
296. *Id.* at 599.
297. *Id.* at 501–03.
298. *Id.* at 503.
or local statutes, or rendered at a time when the colored race was without civil rights.”

While the court’s holding in Wright was limited to concluding that the words were not slanderous per se, and while the court explicitly noted that the words would have constituted libel per se, this sort of reasoning could have established a foundation for challenging the entire community standards model of defamation per se by racial misidentification. Within twenty years, an Appellate Court of Illinois in Mitchell v. Tribune Co. rejected a plaintiff’s claim that he had been identified in a newspaper as “Isaiah ‘Chink’ Mitchell, ‘Negro.’” Mitchell’s race is unclear from the opinion, which is most notable for its brevity. The fact that the court cited Wright, however, suggests that the court had in mind at least the question of racial misidentification. The complaint, the court concluded, “fail[s] to state a cause of action in libel. The reference to plaintiff was not libelous per se . . . .” The complaint otherwise, the court added, “is insufficient to make the alleged articles libelous where no special damages are properly alleged.” Put another way, Mitchell seems to stand for the principle, in Illinois, that even published written material wrongly (and here, seemingly maliciously) labeling an individual a “Negro” did not constitute libel per se.

F. Full Circle: The Last Gasps of Defamation Per Se by Racial Misidentification

This Section examines what now appear to be the two great “last gasps” of the judicially-supported doctrine of defamation—actually only libel—per se by racial misidentification: the 1954 Mississippi decision in Natchez

300. See id. at 497–500.
302. Id. at 397 (citing Wright, 281 Ill. App. 495, “and cases there cited”).
303. Id.
304. While this article is focused on DPSRM cases involving whites and blacks, Mitchell demonstrates how the DPSRM doctrine at times implicated other racial identifications. In some states, plaintiffs brought (or attempted to bring) DPSRM cases arguing that they had been mistakenly identified as “Mexican.” See, e.g., Davis v. Meyer, 212 N.W. 435 (Neb. 1927) (holding that an allegation that the plaintiff was a “half-breed Mexican” did not constitute slander per se, in part as peoples of many different backgrounds were Mexicans, and “[t]he Mexicans are not of the black or yellow race”).
Times Publishing Co. v. Dunigan and the 1957 South Carolina decision in Bowen v. Independent Publishing Co.\textsuperscript{305} These cases suggest that the doctrine of \textit{libel} per se by racial misidentification was still quite powerful in the 1950s, at least in Mississippi and South Carolina, even though courts had been moving away from recognizing \textit{slander} per se by racial defamation. This Section also argues, however, that while there is little in the outcomes of these two cases to suggest that the Mississippi and South Carolina Supreme Courts were considering completely abandoning the doctrine of defamation per se by racial misidentification, there is some evidence to suggest that in Mississippi even the Supreme Court was interested in limiting the full scope of the per se rule, especially as applied to slander, and that in South Carolina, the traditional structure of the per se doctrine was under attack from at least one influential lower-court judge.

In 1954, for the first time, the Mississippi Supreme Court in \textit{Natchez Times} explicitly determined that asserting in print that a white woman was a Negro was libelous per se.\textsuperscript{306} Mary Dunigan sued \textit{The Natchez Times}, which on December 19, 1951, reporting on an automobile accident involving Dunigan, had described her (in the words of the court) as “a Negro woman travelling in the company of two Negro men.”\textsuperscript{307} Dunigan (whose name was misspelled as “Dungan” by the newspaper) and both of the men were in fact white.\textsuperscript{308} After Dunigan recovered a judgment for $5000, the newspaper appealed.\textsuperscript{309} “It does not appear that this Court has ever decided whether it is libelous per se to write of a white woman that she is a Negro,” noted Presiding Justice William G. Roberds.\textsuperscript{310} In holding that such writing did constitute libel per se, Roberds did not attempt to create new doctrine, but instead appealed explicitly to “the general rule” as

\textsuperscript{305} See, e.g., Natchez Times Publ’g Co. v. Dunigan, 72 So. 2d 681 (Miss. 1954); Bowen v. Indep. Publ’g Co., 96 S.E.2d 564 (S.C. 1957).

\textsuperscript{306} See \textit{Natchez Times Publ’g Co.}, 72 So. 2d at 684.

\textsuperscript{307} Id. at 683.

\textsuperscript{308} The \textit{Natchez Times} reporter who took the information for the article from a police report had somehow injected numerous racial descriptions into his writing, though there was no mention in the police report of the races of any of the detainees. \textit{Id.} According to the \textit{Natchez Times Publishing Co.} court, for example, the article ran under the headline “Negroes Arrested After Hit and Run Accident.” \textit{Id.}

\textsuperscript{309} Id.

\textsuperscript{310} Id.
established in various legal treatises and in cases such as *Flood v. News & Courier Co.*, *Spotorno*, and *Upton*. In Mississippi, Roberds noted, the general definition of libel per se was "any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community." Publishing that a white woman is a Negro, Roberds concluded, met this requirement, and so constituted libel per se.

Even while holding that writing that a white woman was a Negro was libelous per se, the Mississippi Supreme Court simultaneously explicitly rejected the argument that *saying* that a white woman was a Negro constituted slander per se. Roberds distinguished the 1844 case of *Scott*, in which the court had held that orally alleging that a white individual had Negro blood constituted slander under Mississippi's *Actionable Words* Statute. "It is noted, in this connection," Roberds added, "that generally to orally call a white person a Negro is not actionable per se, but it may be actionable in certain sections of the country under the social habits and customs prevailing in those sections." This comment in *dicta* suggests both that Roberds had no intention of opposing the community standards model of DPSRM and that Roberds was attempting to distinguish between the doctrine of slander per se and the various judicial decisions from Southern states holding such language to be slander not needing proof of special damages *because* of the community standards. Put another way, Roberds might have been attempting to draw a line between the common law doctrine of defamation per se and the manner in which some Southern states had been conflating that doctrine with the community standards model of defamation.

311. *Id.* at 684 (citing 53 C.J.S. *Libel and Slander* § 27 (2005); 33 AM. JUR. 2D *Libel and Slander* § 76 (2006); 50 A.L.R. 1413 (1986)).
312. See *Natchez Times Publ'g Co. v. Dunigan*, 72 So. 2d 681, 684 (Miss. 1954).
313. *Id.* (citing *Conroy v. Breland*, 189 So. 814, 815 (Miss. 1939)).
314. See *id*.
315. *See id*.
316. See *id.* (citing MISS. CODE ANN. § 1059 (1942)).
317. *Id.* at 683-84.
318. See, e.g., *supra* Part II.A.
Three years later, with its relatively short decision in the 1957 case of Bowen v. Independent Publishing Co., the South Carolina Supreme Court similarly affirmed its adherence to the doctrine of DPSRM—or at least the doctrine of libel per se by racial misidentification—and reversed a lower court that had narrowly read the court's 1904 decision in Flood v. News & Courier Co. as seriously restricting the doctrine and overturning the precedential legacy of Eden v. Legare.\textsuperscript{319} In Bowen, as in Natchez Times, the only question before the court was whether it was libelous per se to identify a white person as a Negro in print.\textsuperscript{320} In South Carolina, however, unlike in Mississippi, this question had arguably already been decided by the state Supreme Court in 1904 in Flood v. News & Courier Co.\textsuperscript{321} Fifty years later, on March 11, 1954, the Anderson Daily Mail published, under a picture of a colored soldier and the heading “Negro News,” the note that Maudie Bowen’s son had been transferred to a government hospital.\textsuperscript{322} At trial, the presiding judge, James M. Brailsford, Jr., after analyzing Flood v. News & Courier Co., directed a verdict in favor of the newspaper, and Bowen appealed.\textsuperscript{323} In deciding this question, Acting Associate Justice E.H. Henderson traced the full history of South Carolina decisions on defamation by racial misidentification, beginning with Eden v. Legare, and running through King, Atkinson, and finally concluding with Flood v. News & Courier Co.\textsuperscript{324} Like Justice Roberds in Mississippi, Henderson, in Bowen, affirmed that such publication constituted libel per se and ruled that the case needed to be returned to the jury, thus explicitly invoking the community standards model of defamation.\textsuperscript{325}

In its decision in Bowen, the South Carolina Supreme Court was moving directly to counter a decision by Judge

\textsuperscript{319} See Bowen v. Indep. Publ’g Co., 96 S.E.2d 564 (S.C. 1957).
\textsuperscript{320} See id. at 564.
\textsuperscript{321} See, e.g., Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905)
\textsuperscript{322} See Bowen, 96 S.E.2d at 564.
\textsuperscript{323} See id.
\textsuperscript{324} See id. at 564-65.
\textsuperscript{325} “The earlier cases were decided at a time when slavery existed, and since then great changes have taken place in the legal and political status of the colored race,” Henderson observed. Id. at 565. “However, there is still to be considered the social distinction existing between the races, since libel may be based upon social status.” Id.
Brailsford (later a long-time member of the South Carolina Supreme Court), who had apparently interpreted Flood v. News & Courier Co. as redefining, and perhaps effectively eliminating, the per se nature of libel by racial misidentification.\textsuperscript{326} Brailsford had focused on the fact that in Flood v. News & Courier Co., while Chief Justice Pope wrote the opinion finding that a newspaper had committed libel per se when it described a white man as “colored,” the other three members of the court had simply concurred “in the result, as the complaint alleges that the publication was willful and malicious.”\textsuperscript{327} Brailsford read Flood v. News & Courier Co. as holding that it was \emph{not} actionable per se to publish of a white person that he or she was a Negro, unless such publication was done willfully and maliciously.\textsuperscript{328} “We do not think that interpretation is the correct one,” Henderson concluded.\textsuperscript{329} Rather than as evidence that the court had overturned Eden v. Legare, King, and Atkinson, he explained, Flood should be read to show that the other three members of the court had decided that in Flood that they did \emph{not} need to address the question of whether willfulness and maliciousness were necessary elements of any per se libel case, as the defendant in the case \emph{had} acted maliciously.\textsuperscript{330} “[We] think that the long established rule [that saying of a white man that he is a Negro is defamatory per se] is not changed . . . and is still the law of this State,” Henderson declared.\textsuperscript{331}

While there is little in Natchez Times or Bowen to suggest that the Mississippi and South Carolina Supreme Courts were interested in striking a blow against racism by eliminating the tort of LPSRM, there is clearly some evidence in these cases that the doctrine of DPSRM was being limited at the margins and perhaps even directly challenged by lower court judges. In Natchez Times, for instance, the Mississippi Supreme Court, in dicta (and with no citations), noted that in Mississippi “to orally call a white person a Negro” was \emph{not} actionable per se, even though Mississippi clearly subscribed

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{326} See \textit{id}.
\item \textsuperscript{327} \textit{id.} (citing Flood v. News & Courier Co., 50 S.E. at 641).
\item \textsuperscript{328} See Bowen v. Indep. Publ'g Co., 96 S.E.2d 564, 565 (S.C. 1957).
\item \textsuperscript{329} \textit{id}.
\item \textsuperscript{330} See \textit{id}.
\item \textsuperscript{331} \textit{id}.
\end{enumerate}
\end{footnotesize}
to the community standards model of defamation and Judge Roberds acknowledged that “it may be actionable in certain sections of the country under the social habits and customs prevailing in those sections.” 332 Roberds, in other words, was staking out a clear position on the absence of the doctrine of slander per se by racial misidentification, even as he was explicitly supporting “the general rule” 333 regarding the existence of the doctrine of libel per se by racial misidentification. In Bowen, the South Carolina Supreme Court was reacting specifically to Judge Brailsford's decision, fifty years after the fact, to read Flood v. News & Courier Co. as overturning South Carolina precedent and starkly limiting the doctrine of DSPRM, despite the fact that in Flood, Chief Judge Pope had spoken about the doctrine in an expansive way, and that the three concurrences in the case made no mention of disagreeing with Pope's legal reasoning. 334 Such a challenge to a well-understood and general doctrine in a profoundly racist state such as South Carolina in the 1950s, however carefully cloaked in narrow reading of precedent, is shocking and may indicate that at least some Southern judges were reacting to Cold War pressures (and the international embarrassment of American racism), the worldwide response to Hitler's racial theories, or even the changing American judicial tone signaled in the 1950s by Brown v. Board of Education of Topeka.

PART III: THE SHRINKING UNIVERSE: EXPLAINING THE DISAPPEARANCE OF THE DOCTRINE OF DEFAMATION PER SE BY RACIAL MISIDENTIFICATION

Part III of this article addresses the historical mystery represented by the disappearance of the doctrine of defamation per se by racial misidentification after the late 1950s, and argues that this disappearance can, in large part, be explained by the intersection of three legal and societal trends or developments that had the effect of shrinking the available and traditional universe of potential DPSRM cases to almost nothing. 335 Obviously, there are many reasons why

332. Natchez Times Publ'g Co. v. Dunigan, 72 So. 2d 681, 683–84 (Miss. 1954).
333. See supra note 311.
335. While the final identifiable reported DPSRM case was decided by the
prospective plaintiffs choose not to bring cases, or why cases, once brought, are either settled or fail to appear in the court reporters. These three trends—the judicial move away from the 

slandering per se element of the doctrine; the societal and statutory move away from official, state-sponsored racism; and the Supreme Court move toward using First Amendment doctrine to limit tort liability in libel cases involving public figures or matters of public concern—chipped away at the traditional universe of prospective DPSRM cases, such that by the 1970s almost all of the cases that had served as the bread and butter of the DPSRM doctrine between the late 1700s and mid-1950s could any longer have represented a viable claim. Of all the identifiable reported DPSRM cases, approximately one-third to one-half involved allegations of slander per se under non-statutory slander regimes, almost

South Carolina Supreme Court in 1957, see Bowen, 96 S.E.2d 564, in examining the disappearance of DPSRM cases, it is probably incorrect to focus on 1957 as the critical year. Given the relative scarcity of DPSRM cases—there were, for example, only three decided in the 1950s, and there were at least two periods after the Civil War when reported cases were separated by seven years—and the possibility that there were numerous DPSRM cases being decided at lower or unpublished levels through the late 1950s, it seems more useful to examine the changes that arose in the decade after the decision in Bowen. In other words, it would be unusual to expect there to be another important (and thus reported) DPSRM decision in the 1950s or perhaps even in the 1960s. There were clearly important legal developments in 1957, especially implicating speech and the First Amendment. On June 17, 1957, for example, a day anti-Communists called "Red Monday," the Supreme Court, in four decisions, essentially gutted the Smith Act and protected the rights of individuals to discuss and even espouse communism. See, e.g., Yates v. United States, 354 U.S. 298 (1957); ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY (1999). Nonetheless, the key question in examining the disappearance of DPSRM decisions is why such decisions vanished from the court reporters during the whole period from the late 1950s through, perhaps, the early 1970s.

336. Almost all DPSRM cases decided between 1791 and 1957 are swept in by these three developments. There are seven exceptions—the cases decided under the highly protective defamation statutes of Virginia, Mississippi, and Oklahoma, see infra note 365, and Stultz v. Cousins, 242 F. 794 (6th Cir. 1917). In Stultz, a railroad worker sued after he was ejected from the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood issued a letter claiming that Stultz was "mulatto." 242 F. at 796. While affirming the ruling, the Sixth Circuit held that the judge had not erred by refusing to instruct the jury that the publication of the letter necessarily constituted defamation per se. Id. at 798. The defendant was ultimately held liable under a non-statutory, defamation per se system for a libelous publication distributed by a private organization. Id. at 797–98.

337. See infra note 356–57.
one-third involved allegations of defamation brought under statutory or societal regimes that had largely vanished by the mid-twentieth century, and one-third involved allegations of libel per se brought against media outlets for accidental racial misidentification. With the development of these three trends, the only remaining viable DPSRM claims would have come in cases in which, for example, a media outlet misrepresented in a knowing or reckless manner the race of those on whom it reported, or in which a private individual racially misidentified another in some sort of permanent medium such as print. Given the increasing reluctance of judges after the 1960s to embrace racist doctrines, along with the fact that reported DPSRM cases were always fairly rare, it thus comes as no surprise that plaintiffs stopped pursuing such claims in the courts—or that, if plaintiffs did pursue such claims, that the claims were ultimately laughed out of the courtroom. Section A examines the judicial move away from the slander per se element of the DPSRM doctrine. Section B discusses the effects of changing societal attitudes towards race, disappearing idiosyncratic statutes such as South Carolina's Slave Act of 1740, and passing of legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Section C focuses on the Supreme Court's move in the 1960s and 1970s to apply the First Amendment to limit tort liability in libel cases, which move helped shield media outlets reporting on public figures or matters of public concern.

A. Judicial Limitations on the Doctrine of Slander Per Se

This Section examines the effect of the judicial move during the twentieth century, even in states that continued to recognize and apply the DPSRM doctrine, away from the slander per se element of the doctrine (often in favor of the libel per se element of the doctrine), and the concurrent trend

338. See infra notes 364–65, 368.
339. See infra note 376.
in some states towards incorporating a malice component into the doctrine. Over half of all reported DPSRM cases involved slander rather than libel; between half and one-third of all reported DPSRM cases involved slander and were not governed by an idiosyncratic statute. This shift away from SPSRM, which might have arisen out of judicial concern over the dependence in slander cases on testimony of subjective witnesses or over the exact nature of the damage done by slanderous racial misidentification, had the effect of severely shrinking the universe of potential DPSRM cases, and removed from viability many of the most common sorts of traditional DPSRM claims.

During the twentieth century, judges in Illinois, Kentucky, Mississippi, New York, and (arguably) Tennessee moved away from the doctrine of SPSRM, often in favor of the doctrine of LPSRM. In 1911, for example, in Williams v. Riddle, Judge Shackleford Miller of the Court of Appeals of Kentucky rejected the SPSRM doctrine, but noted that "there is a marked distinction, probably the result of some historical accident, between slander and libel." In terms of slander, Miller explained, it is only when "oral charges of dishonesty, rascality, or general depravity are uttered or spoken of a person in his business or employment, or impute to him the commission of a crime, that they are actionable per se." Three years later, in MacIntyre v. Fruchter, New York Judge Tompkins similarly rejected the theory of SPSRM, but without discussion noted that the court would accept a theory of LPSRM. The words "would have
been libelous per se, had they been written or printed,” explained Judge Tompkins, “but, having been spoken only, are not slanderous per se, because they do not charge or import the commission of a crime by the plaintiff, and do not impute unchastity to her.” Three years after *MacIntyre*, the Sixth Circuit in *Stultz*—even as it affirmed the “general rule” regarding LPSRM—in dicta seemed to suggest that the SPSRM doctrine might no longer be viable in Tennessee. In the 1935 Illinois case of *Wright*, Presiding Justice Edwards was far more explicit in explaining his rejection of the doctrine of SPSRM on the grounds that racial defamation did not constitute one of the traditional four categories of slander per se:

In considering whether a defamatory [sic] charge is actionable or not, the distinction between oral and written words must be kept in mind, as the same rules of law do not apply to libel, as to slander, the law of the former being wider than that of the latter. Defamatory matter, printed and published, may be actionable *per se*, while the same words, orally spoken, would not be so, except they occasion special damage.

The reasons given for such rule are that words written or printed are in more permanent form, are susceptible of wider circulation, and hence capable of inflicting greater injury than those merely spoken; also, that a defamation made in script or print necessitates some measure of deliberation, and so, of itself, imputes an evil intention to constitute slander per se).

347. *Id.*
349. *See id.* at 797 (referring to “whatever be the rule as to spoken words” while affirming the *per se* libel rule for printed words).
350. *See Wright v. F.W. Woolworth Co.*, 281 Ill. App. 495 (App. Ct. 1935) (holding that a woman customer was not entitled to recover from the store, the employees of which informed her that she was a “nigger” and that therefore they would not serve her). The four classes of spoken words giving rise to *per se* liability include:

(1) [W]ords imputing to the party the commission of a criminal offense; (2) words which impute that the party is infected with some contagious disease, where, if the accusation be true, it would exclude the party from society; (3) defamatory words which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment; and (4) defamatory words which prejudice such party in his or her profession or trade.

*Id.* at 498–99.
the writer, as a person who reduces a defamation to writing, is, by law, presumed to have convinced himself of its truth, and to have acted accordingly. 351

In one of the last reported DPSRM cases, the 1954 Mississippi decision in Natchez Times, Presiding Justice Roberds similarly seemed to highlight in dicta the difference between slander per se and libel per se, and indicated clearly that Mississippi would not recognize the doctrine of SPSRM—even as he held that publishing of a white woman that she was black constituted libel per se. 352

At the same time that judges in Illinois, Kentucky, Mississippi, and New York were increasingly moving away from the doctrine of SPSRM in favor of the doctrine of LPSRM, judges in Alabama, Louisiana, and possibly Virginia were also acting to incorporate malice components into the general defamation doctrine, and so raise the burden of proof on prospective plaintiffs in both libel and slander cases. As early as 1842, the Louisiana Supreme Court in Boullemet v. Philips reversed a finding for the plaintiff where the defendant alleged that the plaintiff’s family was not white and that the plaintiff’s mother was a colored woman, on the grounds that the plaintiff had failed to demonstrate actual malice. 353 In 1914, the Virginia Supreme Court in Spencer held that a defendant was liable for saying of the plaintiffs that they “are nothing but God damned negroes.” 354 The next year, the Alabama court in Jones v. R.L. Polk & Co. held that the defendant had not libeled Jones by accidently placing an asterisk by her name in the Selma City Directory and so falsely indicating that she was “colored.” 355

351. Id. at 497–98.
352. See Natchez Times Publ’g Co. v. Dunigan, 72 So. 2d 681 (Miss. 1954); supra notes 332–33 and accompanying text. “It is noted, in this connection,” Roberds explained, “that generally to orally call a white person a Negro is not actionable per se, but it may be actionable in certain sections of the country under the social habits and customs prevailing in those sections.” Natchez Times Publ’g Co., 72 So. 2d at 683–84.
353. See Boullemet v. Philips, 2 Rob. 365 (La. 1842).
354. Spencer v. Looney, 82 S.E. 745 (Va. 1914). While the defendant might have had qualified immunity, the court explained, insomuch as the defendant was seeking to test the plaintiff’s right to have children educated at a white public school, the defendant had nonetheless forfeited his qualified immunity by speaking with malice. Id. at 746.
355. Jones v. R.L. Polk & Co., 67 So. 577 (Ala. 1915). “[I]n the peculiar social conditions prevailing in this jurisdiction,” publishing that a white woman is
With their gradual move away from the SPSRM doctrine, and the occasional concomitant move towards requiring that words be spoken with actual malice in order to qualify as per se defamatory, judges effectively removed from the universe of potential DPSRM claims exactly the sorts of fact patterns that had constituted over half of all reported DPSRM cases since the late 1700s. Of the approximately thirty-five to forty-four DPSRM cases decided or discussed by courts between 1791 and 1957, approximately twenty-five involved claims of something like slander per se by racial misidentification. Of these twenty-five cases, sixteen colored "is libelous within the definition of libel commonly found in the books," explained Judge Sayre. Id. at 577. At the same time, "whether, then, such a publication is libelous in any particular case depends upon circumstances. Here then is room for innocent mistakes." Id.

356. Of these twenty-two cases, sixteen involved slander claims under either a straight community standards per se law model or under Louisiana's effectively per se model. See Johnson v. Brown, 13 F. Cas. 734 (C.C.D.C. 1832) (No. 7375) (holding that a statement that the plaintiff was "a yellow negro, son of a bitch, a villain, and a liar" did not constitute defamation per se because of the absence of a statute stripping rights from non-whites); Bagwell v. Rice & Hutchins Atlanta Co., 143 S.E. 125 (Ga. Ct. App. 1928) (holding barred by a statute of limitations a woman's slander claim against a shoe salesman who allegedly told her that "you infernal negroes will put yourselves among white people, get over with the negroes where you belong"); Wright, 281 Ill. App. 495; Jones v. Gill, 66 P.2d 1033 (Kan. 1937) (reversing on evidentiary grounds a decision holding the defendant liable for alleging that the plaintiff, who had been adopted by the defendant's adult step-son and his wife, was a "half-breed"); Williams v. Riddle, 140 S.W. 661 (Ky. 1911) (holding that, given the traditional common law rule of slander per se, it was not slander per se to say of a white man that he was a "damn negro, and his mother was a mulatto"); Boullemet, 2 Rob. 365; Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888) (holding a defendant liable for saying that the plaintiff "was a negro"); Toye v. McMahon, 21 La. Ann. 308 (1869) (affirming on evidentiary grounds a ruling that the defendant had not slandered the defendant by allegedly informing the Hackmen's Benevolent Association of New Orleans that the defendant was "a negro"); Dobard v. Nunez, 6 La. Ann. 294 (1851) (limiting the plaintiff to nominal damages where the defendant repeated, without evidence of malice and apparently without injuring the plaintiff, the allegation he had heard that "the families of Martin and Lafrance are colored people"); Berot v. Porte, 81 So. 323 (La. 1919) (rejecting the plaintiff's claim that he had been slandered by being incorrectly described as being of "negro blood," on the grounds that the speaker had a duty to report allegations of race to the society to which the plaintiff had applied); MacIntyre v. Fruchter, 148 N.Y.S. 786 (Sup. Ct. 1914); Kenworthy v. Brown, 92 N.Y.S. 34 (App. Div. 1904) (rejecting the claim that the defendant had slandered a woman by saying that she was "only a low woman" and "half negress," and so implied that the woman was unchaste); Deese v. Collins, 133 S.E. 92 (N.C. 1926) (rejecting the doctrine of defamation per se and holding that a statement that a man "has negro blood in his veins" does not constitute slander absent proof of special damages); McDowell v. Bowles, 53 N.C. (8 Jones)
involving claims of slander were not governed by idiosyncratic statutes stripping rights from non-whites or establishing highly protective defamation regimes. \(^{357}\) Of these sixteen remaining slander cases, six involved defendants who were, for various reasons, found not liable; \(^{358}\) four arose in states that later moved away from the doctrine of SPSRM in favor of the doctrine of LPSRM; \(^{359}\) and six arose in states in which courts had arguably added the requirement that plaintiffs in DPSRM cases prove that defendants had acted with actual malice. \(^{360}\) This means that by the mid-1950s, the judicial shift in many states away from the doctrine of SPSRM or toward importing a malice requirement into the DPSRM doctrine had removed from the universe of viable DPSRM claims (absent actual malice) every one of the slander cases decided after 1791 in which courts had found defendants liable under non-statutory DPSRM theories. If courts in the few remaining states embracing the DPSRM rule were, by the middle of the twentieth century, similarly drawn more toward the doctrine of libel per se than to that of slander per se, then after the 1950s the cases that had formed the majority of the DPSRM doctrinal corpus no longer represented viable DPSRM claims.

**B. The Changing Social and Statutory Context**

This Section examines the effect on the universe of

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184 (1860) (holding, under the common law definition of words actionable in themselves, that it was not actionable per se to say of a white man that he was a “free Negro” and so could not vote); Barrett v. Jarvis, 1 Tapp. 244 (5th Cir. Ohio 1818) (holding a defendant not liable where the defendant announced that a family was “akin to negroes,” possibly on the grounds that the comment had been made about the plaintiff's daughters rather than about the plaintiff himself); Spencer, 82 S.E. 745. Eight or nine cases, which are perhaps better included in the discussion of societal and statutory change, see infra Part III.B, involved either slander claims ultimately determined by the unusual and highly protective defamation statutes of Mississippi, Virginia, Arkansas, and Oklahoma, or under the rights deprivation model, which was built around the idiosyncratic South Carolina Slave Act of 1740. See infra notes 364–65.

357. See supra note 356. The remaining eight or nine claims are discussed infra, Part III.B.

358. See Johnson, 13 F. Cas. 734; Bagwell, 143 S.E. 125; Jones, 66 P.2d 1033; Deese, 133 S.E. 92; McDowell, 53 N.C. (8 Jones) 184; Barrett, 1 Tapp. 244.

359. See Wright, 281 Ill. App. 495; Williams, 140 S.W. 661; Kenworthy, 92 N.Y.S. 34; MacIntyre, 148 N.Y.S. 786.

360. See Boullemet, 2 Rob. 365; Spotorno, 4 So. 71; Toye, 21 La. Ann. 308; Dobard, 6 La. Ann. 294; Berot, 81 So. 323; Spencer, 82 S.E. 745.
DPSRM cases of changing societal notions of proper race relations, developing statutory proscriptions on official, state-sponsored racism, and legislative rewriting of overly protective defamation statutes. Quite apart from any effect increasing rights consciousness and racial tolerance had on the plaintiffs, attorneys, and judges who might have been involved in (and embarrassed by) DPSRM cases, the abolishment of Jim Crow and other changes in society and statutes had the effect of choking off most or all potential DPSRM cases alleging official racial misidentification and many potential DPSRM cases historically brought under idiosyncratic statutory regimes. Put another way, if the state was no longer in the business of categorizing or identifying individuals by race in official documents or directories, then there was no chance that the state would racially misidentify any individuals. If places of public accommodation could no longer maintain separate rail cars, water fountains, or elevators for whites and non-whites, then there was no chance that employees in these places would incorrectly require whites to use the non-white facilities. Approximately one-third of all reported DPSRM cases were brought under statutory and societal regimes that had vanished by the middle of the twentieth century. Thus the societal and statutory changes by that time had the effect of severely shrinking the universe of potential DPSRM cases—particularly all claims which involved any related element of racial misidentification in places of public accommodation.

Between the middle of the nineteenth century and the middle of the twentieth century, social and legislative changes made obsolete two statutes or regimes—the South Carolina Slave Act of 1740 and the Jim Crow system of legalized racism—under which plaintiffs had pursued almost one-third of all DPSRM cases between 1791 and 1957. South Carolina’s Slave Act of 1740, which stripped all civil rights from non-whites and so fostered the rights deprivation DSPRM theory, was the first to go, as it was invalidated by the Union victory in the Civil War and the Thirteenth Amendment, which outlawed slavery. By far the most sweeping societal change affecting DPSRM cases, however,

361. See infra notes 364-66.
362. See supra note 118 and accompanying text.
came with the legislative abolition in the 1960s of the Jim Crow system of legalized racism.\textsuperscript{363} Together, these developments meant that by the middle of the 1960s state, federal, and local governments were not permitted to discriminate on the basis of race and places of public accommodation were not permitted to maintain separate facilities for whites and non-whites.

With the societal and statutory moves away from legalized racism by state and local governments or in places of public accommodation, many of the traditional DPSRM fact patterns were no longer viable prospective DPSRM claims. Of the thirty-five to forty-four reported DPSRM cases between the end of the eighteenth century and the middle of the twentieth century, three or four were brought under South Carolina's idiosyncratic Slave Act of 1740,\textsuperscript{364} six were brought under the enormously protective anti-dueling defamation statutes in states such as Virginia, Oklahoma, and Mississippi,\textsuperscript{365} and at least five were brought under the


\textsuperscript{364} See Smith v. Hamilton, 44 S.C.L. (10 Rich.) 44, 48 (Ct. App. 1856) (holding that a plaintiff bringing suit against a defendant who had allegedly said that the plaintiff had a mulatto child did not need to plead that she herself was white); Atkinson v. Hartley, 12 S.C.L. (1 McCord) 203, 204 (Const. Ct. App. 1821) (finding a defendant not liable where it was unclear whether the defendant had called the plaintiff a "damned mulatto son of a bitch" or a "damned mulatto-looking son of a bitch"); King v. Wood, 10 S.C.L. (1 Nott & McC.) 184 (Const. Ct. App. 1818) (reaffirming the rights deprivation model of DPSRM in South Carolina); Eden v. Legare, 1 S.C.L. (1 Bay) 171 (Ct. Com. Pl. & Gen. Sess. 1791) (establishing the rights deprivation model and finding a defendant liable for calling the plaintiff a "mulatto"); supra note 83.

\textsuperscript{365} Six cases involved slander claims ultimately determined under the unusual and highly protective defamation statutes of Mississippi, Virginia, Arkansas, and Oklahoma. See Morris v. State, 160 S.W. 387 (Ark. 1913) (finding Bill Morris guilty under Arkansas's criminal defamation statute for alleging that Mrs. James Holt's "father was a thief, her mother a negro, and she was a half-bred"); Scott v. Peebles, 10 Miss. (2 S. & M.) 546 (1844) (holding Alpha Peebles liable for slandering James Scott under Mississippi's slander statute where Peebles alleged in a conversation with a third party that Scott "had negro blood in him"); Hargrove v. Okla. Press Publ'g Co., 265 P. 635 (Okla. 1928) (restating and embracing the general DPSRM rule, but nonetheless finding a newspaper not liable for defaming a woman when it published an article identifying her husband as a Negro because liability in such a case would be "stretching the rule of libel too far"); Collins v. Okla. State Hosp., 184 P. 946 (Okla. 1916) (finding, despite referring to the correctness of the DPSRM doctrine, a defendant hospital not liable where the plaintiff's daughter, a resident in a hospital for the insane, had been mistakenly assigned to a colored ward and had her charts flagged with the word "colored"); Cook v.
With the Union victory in the Civil War, cases such as "Eden v. Legare, Atkinson, King, and Smith v. Hamilton ceased to represent even potential DPSRM claims. More importantly (and more recently), the move away from the Jim Crow regime of legalized racism had the immediate effect of removing from the universe of potential DPSRM claims all instances in which the state somehow misrepresented an individual's race—as, for example, the city of Selma had mistakenly misidentified a plaintiff as non-white in the city directory in "Jones". With the societal and statutory changes between the end of the Civil War and the middle of the twentieth century, the universe of potential DPSRM cases thus shrank to exclude most official cases of racial misidentification and all cases brought under the now-obsolete slavery statute that

Patterson Drug Co., 39 S.E.2d 304 (Va. 1946) (holding that juries considering defamation cases under Virginia's defamation statute should not consider the intent of the speaker, in a case in which a soda jerk refused to serve a white man whom the soda jerk believed was non-white, and so holding open the possibility of liability); Mopsikov v. Cook, 95 S.E. 426 (Va. 1918) (reversing on technical grounds, while affirming the liability rule under the Virginia statute, a finding for the plaintiff in which the defendant's daughter routinely referred to Cook's young daughter as "a nigger doll"); supra note 118. In other words, of these six cases, the courts in three (Collins, Hargrove, and Mopsikov) found that, for various reasons, the defendants were not liable under the relevant statutes. Mopsikov was decided on technical grounds, but the decisions in Collins and Hargrove seem to demonstrate that Oklahoma courts were reluctant to find liability in these sorts of cases.

366. See, e.g., Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899 (Ga. Ct. App. 1907) (holding that the lower court had erred by dismissing a defamation complaint by a white man who was ordered by a conductor to sit in the section of the car designated for non-whites); S. Ry. Co. v. Thurman, 90 S.W. 240 (Ky. 1906) (holding that it was not a legal injury "for a white person to be taken for a negro" where a woman was forced by a train brakeman to leave a railroad car reserved for whites); Lee v. New Orleans Great N. R.R. Co., 51 So. 182 (La. 1910) (affirming the dismissal of a suit by two teenage girls, whose maternal grandfather was of mixed blood, who were forced to ride in the Jim Crow car); May v. Shreveport Traction Co., 53 So. 671 (La. 1910) (holding a streetcar company liable when a conductor suggested that a passenger belonged in the section of the car reserved for blacks); O'Connor v. Dallas Cotton Exch., 153 S.W.2d 266 (Tex. Civ. App. 1941) (reversing on jurisdictional grounds and remanding for trial a case in which a husband alleged that his white wife had been injured by being forced to ride an elevator reserved for Negroes). This article does not fully examine the many cases brought under the doctrine of RMPPA that did not directly overlap with the doctrine of DPSRM. See, e.g., Sharfstein, supra note 44.

had helped nurture the DPSRM doctrine in South Carolina.\textsuperscript{368}

\textbf{C. First Amendment Constraints on Libel Cases Against Media Outlets}

The Supreme Court's application, in the mid-to-late twentieth century, of First Amendment doctrine to tort liability necessarily limited the liability of media outlets covering public figures or matters of public concern, and so had the effect of further shrinking the universe of potential DPSRM cases. Almost one-third of all reported DPSRM cases involved media outlets.\textsuperscript{369} By limiting liability for media outlets to cases involving negligence, or possibly even actual malice, the Supreme Court effectively removed from the universe of potential DPSRM cases every single reported fact pattern involving media outlets that courts had seen since the late eighteenth century.

Beginning in the mid-1960s, the United States Supreme Court began severely limiting tort liability in cases involving claims of defamation and libel, such that by the 1970s plaintiffs seeking to win such cases against media outlets generally had to prove actual malice—that the newspapers

\textsuperscript{368} Statutory changes alone cannot explain the disappearance of cases such as \textit{Morris}, 160 S.W. 387, \textit{Scott}, 10 Miss. (2 S. & M.) 546, and \textit{Cook}, 39 S.E.2d 304, in Virginia, Arkansas, Mississippi, and perhaps Oklahoma. The anti-dueling “actionable words” and “insulting words” defamation statutes remained in effect through the middle of the twentieth century, and in fact remain in effect today. \textit{See} MISS. CODE § 95-1-1 (2008) (“Certain words actionable: All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials, as in other cases.”); VA. CODE. § 8.01-45 (2009) (“Action for insulting words: All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.”); W. VA. CODE §§5-7-2 (2009) (“Insulting words: All words which, from their usual construction and common acceptation, are construed as insults and tend to violence and breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon.”); \textit{see also} S.J.B., \textit{The Actionable Words Statute in Virginia}, 27 VA. L. REV. 405, 407 (1941); \textit{supra} notes 97, 118. Either the doctrine of DPSRM remained statutorily alive and well in these states throughout the middle of the twentieth century, or (more likely, given the absence of later reported cases in these jurisdictions) perhaps the general societal move away from state-sponsored racism helped make it socially impossible for judges to find liability in DPSRM-like cases.

\textsuperscript{369} \textit{See infra} note 380.
had been acting with reckless disregard of the truth—in order to recover more than actual damages, or often to recover anything at all.\footnote{370} The Court began expanding protections for media outlets with the 1964 decision in *New York Times Co. v. Sullivan*, in which the Court held that public officials cannot recover damages for defamatory falsehood relating to official conduct unless those public officials can prove that the false statements were made with actual malice.\footnote{371} Three years later, in *Curtis Publishing Co. v. Butts*, the Court extended this standard to cover public figures as well as public officials.\footnote{372} Seven years after *Curtis*, the Court in *Gertz v. Robert Welch, Inc.*, held that while states may freely establish their own standards of liability for defamatory statements made about private individuals (provided that the states do not impose liability without fault), if any state sets a standard lower than actual malice, then plaintiffs may recover only actual (rather than punitive) damages.\footnote{373}

Together, *New York Times Co.*, *Curtis*, and *Gertz* effectively required that anyone bringing a per se defamation claim against a media outlet prove actual malice. Per se defamation is, by definition, defamation in which the plaintiffs need not demonstrate any actual damages. *New York Times Co.* and *Curtis* explicitly required that all public officials and public figures bringing defamation cases against media outlets prove that those outlets have acted with actual malice.\footnote{374} *Gertz*, meanwhile, effectively required that (depending on state defamation laws) private figures bringing defamation cases against media outlets either prove actual malice, or else prove actual damages.\footnote{375} Put another way, together *New York Times Co.*, *Curtis*, and *Gertz* raised the standard in true per se defamation cases against media outlets to actual malice; in any other sort of case, in which

\footnote{370} See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1044–55 (3d ed. 2006).
\footnote{374} CHEMERINSKY, supra note 370, at 1045–49.
\footnote{375} After *Gertz*, private individuals bringing defamation claims against media outlets will either bring such claims in states that have set the defamation standard at actual malice, or else will bring such claims in states in which the standard is lower than actual malice—in which case, in order to recover anything, the plaintiffs must prove actual damages.
private individuals have to prove actual damages, the concept of "per se" liability, rather than non-per se liability, essentially vanished.

With its application of First Amendment doctrine to tort liability for defamation effectively limited the per se liability of media outlets in libel cases to those instances in which the plaintiffs could prove actual malice, the Supreme Court removed from the universe of potential DPSRM claims the sorts of fact patterns that had constituted almost one-third of all reported DPSRM cases since the late 1700s. Of the approximately thirty-five to forty-four DPSRM cases decided or discussed by courts between 1791 and 1957, somewhere between ten and eleven involved claims that media outlets (always, in those days, newspapers) had misidentified in print whites as non-whites.\textsuperscript{376} Judges in two of these cases (and thus two of the seven states in which such cases were

\textsuperscript{376} See Atlanta Journal Co. v. Farmer, 172 S.E. 647 (Ga. Ct. App. 1934) (holding that a newspaper publication describing a white man (but not his parents) as "negro" did not constitute libel against his parents); Mitchell v Tribune Co., 99 N.E.2d 387 (Ill. App. 1951) (holding that a plaintiff's contention that he had been identified in a newspaper as "Isaiah 'Chink' Mitchell, 'Negro'" failed to state a cause of action for libel); Upton v. Times-Democrat Publ'g Co., 28 So. 970 (La. 1900) (affirming a judgment awarding actual, but not punitive, damages to a plaintiff who was misidentified as non-white in a newspaper after the telegraph office changed the word "cultured" to "colored" as it transmitted a reporter's article); Natchez Times Publ'g Co. v. Dunigan, 72 So. 2d 681 (Miss. 1954) (holding that it is libelous per se in Mississippi for a newspaper to misidentify a white woman as "Negro" in an article); Monks v. Orange County Indep. Co., 277 N.Y.S. 992 (App. Div. 1935) (overturning a lower court decision to dismiss a DPSRM claim as not stating a sufficient cause of action); Bowen v. Indep. Publ'g Co., 96 S.E.2d 564 (S.C. 1957) (affirming the DPSRM rule where a newspaper published the name of a white soldier under the picture of a black soldier); Flood v. News & Courier Co., 50 S.E. 637 (S.C. 1905) (holding a newspaper liable where an article accidently misidentified a plaintiff in an ongoing case as "colored"); Flood v. Evening Post Publ'g Co., 50 S.E. 641 (S.C. 1905) (restating the holding in Flood v. News & Courier Co., 50 S.E. at 637); Express Publ'g Co. v Orsborn, 151 S.W. 574 (Tex. Ct. App. 1912) (holding that for the purpose of determining liability the lower court should read together two separate newspaper stories, one identifying the plaintiff by name, but not race, and the other misidentifying the plaintiff by race but not identifying the plaintiff by name). Johnson v. Staten Island Advance Newspaper Inc., No. 38480/03, 2004 WL 4986754 (N.Y. Civ. Ct. July 23, 2004), which was essentially laughed out of court by a New York judge, might also constitute a DPSRM case. Hargrove v. Oklahoma Press Publishing Co., 265 P. 635 (Okla. 1928), would constitute an eleventh DPSRM media case, except that the Hargrove court, despite its language regarding the community standards model, ultimately based its decision on the local Oklahoma defamation statute. See supra note 365.
decided) ultimately rejected the DPSRM doctrine outright, while the judges in two others found that there was no liability under the facts alleged and the judge in a fifth case found that the newspaper, while liable, had not misrepresented the plaintiff's race with malicious intent. The remaining six cases all involved situations in which newspapers had apparently mistakenly or accidently racially misidentified the plaintiffs; there was no suggestion in any of these cases that the newspaper defendants had acted so recklessly as to meet the modern conception of actual malice. This suggests that after New York Times Co., Curtis, and Gertz, not one of the ten or eleven reported cases implicating the DPSRM doctrine in relation to the media would have represented a viable claim. The Supreme Court thus effectively removed from the universe of potential DPSRM claims any instance in which the plaintiffs could not prove actual malice on the part of the newspapers racially misidentifying prospective plaintiffs.

CONCLUSION

The eagerness or willingness of some judges in the American South and West to accept and even advance the doctrine of defamation per se by racial misidentification between the last years of the eighteenth century and the middle of the twentieth century, even when conflating disparate and unrelated doctrines, helps to demonstrate the insidious power of racism in United States history. The DPSRM doctrine had a strange and tortured history: introduced into the common law either by accident or by improper design, the doctrine was routinely cited incorrectly by courts reaching similar results but with vastly different reasoning. In the end, this seemingly powerful (and, to modern sensibilities, horrible) racial tort vanished with barely a trace during a time of enormously heightened racial consciousness—arguably in great part because major societal,

379. See Upton, 28 So. 970.  
380. In Upton, for example, the court determined that it was the telegraph company that had mistakenly transmitted the word "colored" instead of "cultured," and that the newspaper had not done any greater harm by changing "colored" to "Negro." See id.
jurisprudential, and legislative trends helped to shrink the universe of potential DPSRM claims and so choke off the doctrine at its source. Apart from standing merely as one more reminder of this country's racist past, then, this doctrine also stands as one more example of the interesting, varied, and complicated interweaving of American society, law and jurisprudence.