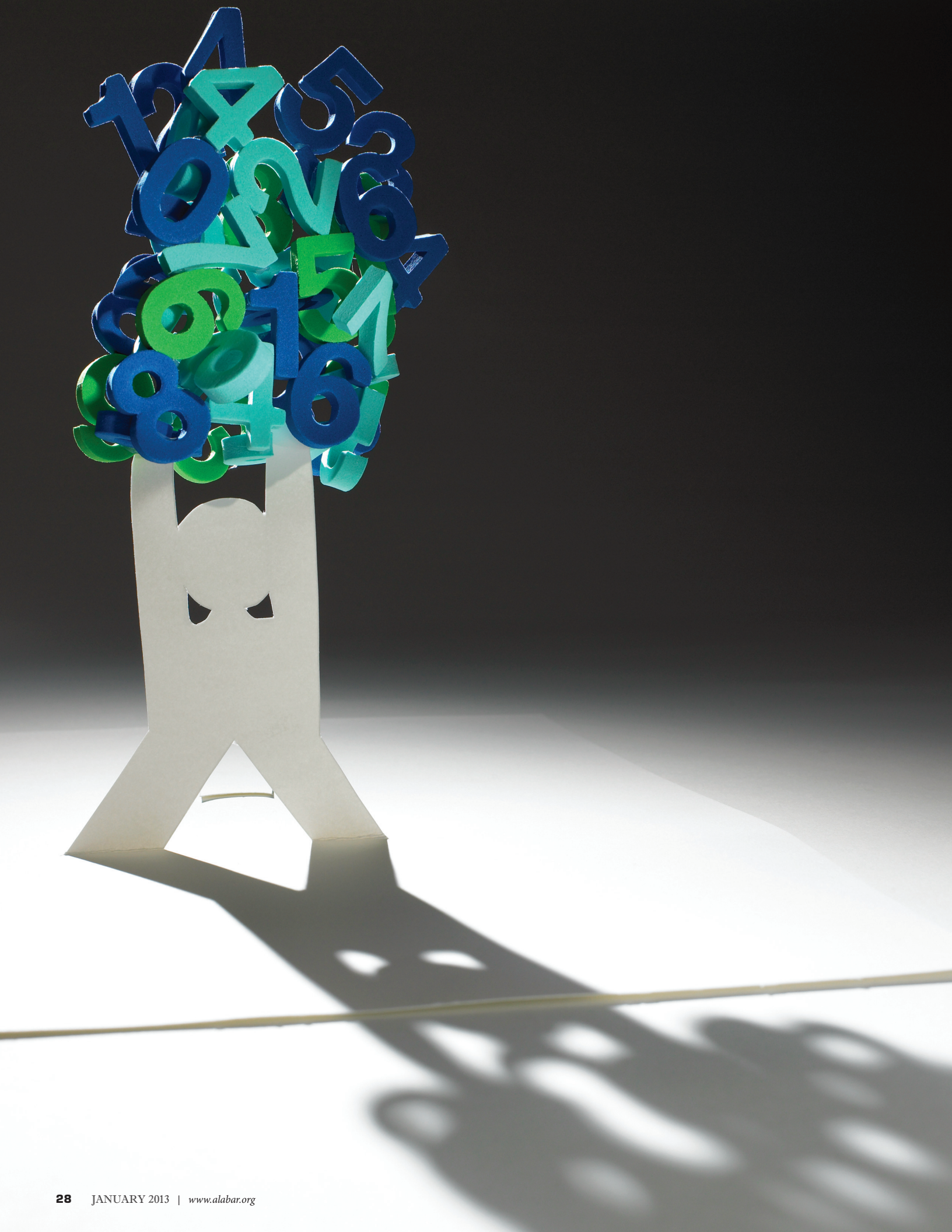

COUNTERPOINT:

Limitations on Measuring Appellate Justice with Statistics And Inference

By Marc James Ayers

The "rule of law," rather than the "rule of men," is a notion of paramount importance in Alabama. Indeed, it is expressly enshrined in our constitution and is the basis for our strong doctrine of separation of powers.[1] The justices of the Alabama Supreme Court take a solemn oath to support that principle, and are directly accountable to the citizens of the state of Alabama in that regard. Accordingly, members of our judiciary–like all of our public officials–should (and do) welcome honest, constructive criticism concerning adherence to the rule of law, as long as that criticism is properly supported with facts and analysis.

In her article on page 18, "POINT: *Justice Must Satisfy the Appearance of Justice–A 10-Year Review of the Alabama Supreme Court's Treatment of Jury Verdicts in the Plaintiffs' Favor*," Rhonda Chambers–an excellent, experienced appellate attorney–offers some thought-provoking inferences and statistics concerning the decision-making practices of the Alabama Supreme Court over the last 10 years. The focus of Chambers's argument is that certain practices–or inferred practices–of the court might lead the public to perceive that the court has been attempting to hinder the work of plaintiffs' counsel over that time. However, her analysis raises questions concerning her use of raw statistics–as opposed to a case-by-case, rationale-by-rationale analysis–in measuring "justice," and concerning the proper remedy if there ever is something of a crisis in the public's perception of Alabama's appellate courts.

Chambers's article, however, presents no valid basis to conclude that the court has in any way acted with bias toward any group, and the use of statistics, such as raw reversal rates, provides little, if any, basis to support such inferences and conclusions. If the Alabama Supreme Court is to be criticized, then that criticism should be based on a case-by-case basis, where the particular facts and legal rationales can be analyzed.

There is no basis to infer misuse of the "no-opinion" affirmance.

The Chambers article begins with a helpful discussion of the history and

proper use of Alabama Rule of Appellate Procedure 53, which, beginning in 1993, allowed the Alabama Supreme Court and Court of Civil Appeals to affirm a judgment without opinion under certain circumstances. While she concedes that there are no recorded statistics regarding the Alabama Supreme Court's use of the no-opinion affirmance, Chambers clearly feels that that device *could* be misused to "conceal" otherwise helpful published decisions–such as decisions favorable to plaintiffs in Alabama–from view. Chambers presents no evidence that this has been done by the court, but, instead, focuses on stressing the various merits of published decisions as compared to the no-opinion device.

There is no doubt that published opinions often provide many benefits to the bench, bar and the general public, as Chambers correctly observes. Indeed, many of us who primarily practice before the appellate courts have had cases where we would have rather had a published opinion instead of a no-opinion affirmance. However, the value of published opinions must be balanced with, among other things, the equally well-established notion that "justice delayed is justice denied." Especially given the large caseload carried by Alabama's appellate courts, many have welcomed the use of the no-opinion affirmance in moving cases through the court's docket, as that practice makes a significant difference in the time it takes for an appeal to wind its way to conclusion. Even though Alabama's appellate courts generally do an excellent job in moving cases through their dockets, parties sometimes grumble that it takes too long to get a decision. The appellate courts, therefore, are sometimes unfairly caught between two sets of conflicting complaints. (This dynamic is also often seen with criticisms that the appellate courts do not hear oral argument in a sufficient number of cases, which competes with the notion that clients and counsel often want a decision more quickly and at less cost.)

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Again, there are no statistics concerning the use of the "no opinion" affirmance from which any kind of analysis might be done. However, even if such general statistics were available, it is unlikely that such raw data would, by itself, allow for many valid conclusions, because that data would not provide the kind of case-specific detail required to inform that analysis. There are often numerous factors that go into the decision to affirm without opinion, some of which the parties are not contemplating. Regardless, case-specific criticism is clearly the most–and perhaps the only–helpful or informative criticism available, because without case-specific details there is almost no way to determine whether a no-opinion affirmance was truly appropriate.

Even if it could be shown that appeals from jury verdicts have a higher rate of no-opinion affirmances, that would not, by itself, support any negative inferences about the court's practices, as there are any number of reasons why a no-opinion affirmance is proper in particular kinds of cases. For example, some appeals from jury verdicts may be, upon further review, simply efforts to reweigh the evidence or second-guess credibility determinations. In many such cases, no-opinion affirmances might be more appropriate. For example, our firm, Bradley Arant Boult Cummings, recently defended against an appeal of a judgment on a *defense* verdict in a medical malpractice case, where, in our view, the appellant essentially asked the court to reweigh the evidence in a manner contrary to the proper standard of review, and the court affirmed without opinion. *Rutherford v. University of Ala. Health Servs. Found., P.C.*, [Ms. 1100837, Apr. 6, 2012] (table).

Chambers states that the Alabama Supreme Court "has indicated that it does not appreciate criticism about its no-opinion affirmances." However, that conclusion does not seem to follow from the two decisions cited as examples of such non-appreciation: *S.B. v. St. James Sch.*, 959 So. 2d 72 (Ala. 2006), and *Dennis v. Northcutt*, 923 So. 2d 275 (Ala. 2005). Instead, in those decisions, the court actually responded to the parties' criticisms by issuing opinions. Furthermore, in *S.B.*, the court made clear that a major factor in the decision to issue a no-opinion affirmance was to spare the party embarrassment, given the "sensitive nature of the facts of this case" (a seemingly commendable decision under the circumstances). 959 So. 2d at 79. If anything, those cases indicate that the court is willing to revisit the decision to affirm without opinion, even when being criticized for reasons it may not find persuasive.[2]

As a contrast to Alabama's practice, Chambers praises the federal practice of releasing "unpublished" decisions. This approach is not unfamiliar to Alabama's appellate courts–in fact, it is somewhat commonly used by the court of criminal appeals. This is an idea worthy of further discussion, and one that the Alabama

appellate courts could consider, if the additional costs and time were outweighed by the overall benefits. One consideration, however, is that releasing "unpublished" opinions could lead to difficulties determining the precedential weight of those decisions. For instance, most federal courts regard unpublished opinions as non-precedential.[3] Thus, while Alabama could certainly consider moving to an "unpublished opinion" scheme, that would not necessarily assist the bench and bar, as such opinions might still lack the precedential effect that Chambers suggests would be useful. In short, one should not quickly assume that, when all relevant considerations are balanced, the implementation of the federal practice would be superior to the current use of no-opinion affirmances.

What can be "seen" from raw reversal rates of jury verdicts? Not much

Another aspect of Chambers's argument is her statistical analysis of reversal rates of judgments entered on jury verdicts for plaintiffs. The fundamental problem with this kind of analysis, however, is that it begs the question: What is a "proper" or acceptable reversal rate for plaintiffs' jury verdicts in any particular year or time frame–Ten percent? Fifty percent? One hundred percent? Of course, there is no answer to this question because there is no "proper reversal rate." It all depends on the particulars of the cases at issue. In year X, perhaps none of the cases should be reversed, while in year Y, perhaps half or all of them should be. Without a case-specific analysis, examining reversal rates is simply not helpful.

Another issue is the selected time frame. Why examine only the last 10 years? What is the "correct" time frame to analyze in order to determine whether there is a lack of "perceived justice"–Ten years? 25, 50 or 75 years? In any event, examining reversal rates in 10-year (or other time frame) blocks–and perhaps comparing those rates to earlier time frames–would also not shed much light, for the same reason. For example, if reversal rates go up, what does that mean? Does it mean that the court has now adopted a skewed philosophy of appellate jurisprudence and is acting contrary to its proper role? Or, perhaps, does it mean that the court utilized the wrong standard 10 years ago and is now remedying that error?[4] Of course, it might not mean either of those things, as the change in reversal rates might simply be connected to new developments in the law (for example, the court might be responding to a change in the law stemming from new United States Supreme Court precedent), new legal theories of liability, philosophical changes among the *trial* court bench or any number of other possible causes. The only way to reach any valid conclusions would be through a case-by-case, rationale-by-rationale analysis.

Accordingly, unless specific decisions and rationales are identified and analyzed, one should be hesitant to make inferences or reach conclusions about what one "sees" in the current practices and philosophy of the Alabama Supreme Court–especially inferences of some kind of coordinated effort to undermine or hinder the plaintiffs' bar. While admittedly easy to state here, such a notion is completely contrary to our experiences over several years (some of which were within the last 10 years) as judicial staff at the Alabama Supreme Court.

How would we know whether there is a "crisis of perception" concerning the Alabama appellate courts, and what would be the solution?

Chambers's criticism regarding the current practices of, and treatment of plaintiffs' jury verdicts by, the Alabama Supreme Court stems from a concern that, in the words of Justice Frankfurter, "justice must satisfy the appearance of justice." (Or, stated another way in the words of Chief Judge Markey, "[i]t simply is not enough that justice be actually done. It must be seen to have been done."). In other words, the concern is that there might arise something of a crisis of perception among the citizens of Alabama that their appellate judges are biased or are otherwise not correctly doing their jobs. This concern raises the question as to what is the proper remedy in the event that the general public ever believes that appellate judges are not taking seriously their constitutional and moral duty to judge cases fairly and to treat all parties equally so that the rule of law will be properly maintained.

As stated above, there has been presented no actual evidence that our supreme court justices have engaged in any such misconduct over the past 10 years, and no statistics have been offered that could

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The appellate courts cannot control whether observers correctly perceive and understand any of the court's operations, standards of review, etc. Indeed, even where the courts write full opinions, those opinions are often criticized by some person or group as being wrong or unjust in some way, often based upon numerous misunderstandings of law, fact or both.

possibly support such an inference. As previously stated, raw statistics about the use of no-opinion affirmances and reversal rates tell us nothing about the propriety of the court's actions in individual cases. It is beyond dispute that there are numerous factors that go into the use of the no-opinion affirmances, the decline in the number of jury trials and the affirmance/reversal rates in any particular year.

Furthermore, the principle that *actual* justice without the *perception* of justice is not good enough has its merits, but also has its limits. The appellate courts cannot control whether observers correctly perceive and understand any of the court's operations, standards of review, etc. Indeed, even where the courts write full opinions, those opinions are often criticized by *some* person or group as being wrong or unjust in some way, often based upon numerous misunderstandings of law, fact or both. What is of *primary* importance is, of course, *actual* justice.

In any event, assuming for the sake of argument that the general public ever perceived the appellate courts as being biased (in any direction), those citizens directly hold the remedy: the vote. Unlike some other states, in Alabama the vote of the citizens is not only a powerful tool to bring immediate change to any perceived bias, it also is a helpful barometer in determining whether there *actually is* any "crisis of perception" among the citizens (the relevant group here) that has percolated in any given time period.[5] Accordingly, if the concern is with the Alabama citizens' perception of their appellate judges, then one should be able to look to the voting trends of those citizens to determine where their confidence lies. | AL

Endnotes

1. *See* Art. III, § 43, Ala. Const. 1901.
2. The court did not change its ruling by reversing the judgment in either *Northcutt* or *S.B.*; it merely published those decisions as written opinions.
3. *See, e.g.*, 11th Cir. R. 36-2 ("Unpublished opinions are not binding precedent but they may be cited as persuasive authority"); *Suntree Techs., Inc. v. Ecosense Intern., Inc.*, 693 F.3d 1338, 1349 n.1 (11th Cir. 2012); 9th Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent"); *M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1086 (9th Cir. 2005).
4. Raising, perhaps, a more interesting philosophical question: What was the "golden age" of the Alabama Supreme Court–the Livingston Court, the Torbert Court, the Cobb Court, etc.?
5. Reliance on the vote to test whether such "crises" concerning the judiciary are being felt among the general public is not only intuitive, it is not new. For example, studies have often been cited showing "concern" among some majority of citizens about the effect of money raised and spent in their state's judicial elections. However, when asked, typically those same groups strongly supported holding on to the right to elect their judges, notwithstanding the candidates' need to raise and spend money in those elections. In other words, there may have been a general concern that fundraising in judicial elections could result in some discomfort or problems, but that concern did not create a "crisis of perception" in their system of electing judges such that the public was willing to give up the right to elect their judges. Such public sentiment, whether right or wrong, appears to parallel Churchill's famous line about democracy: "Democracy is the worst form of government, except for all those other forms that have been tried from time to time."