

International Society of Barristers

Volume 52

Number 2

**ATTICUS FINCH: THE BIOGRAPHY—HARPER LEE, HER
FATHER, AND THE MAKING OF AN AMERICAN ICON**
Joseph Crespino

**TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK
M. JOHNSON JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS**
Jack Bass

**TOMMY MALONE: THE GUIDING HAND SHAPING ONE OF
AMERICA'S GREATEST TRIAL LAWYERS**
Vincent Coppola

THE INNOCENCE PROJECT
Barry Scheck

Quarterly

Annual Meetings

2020: March 22–28, The Sanctuary at Kiawah Island,
Kiawah Island, South Carolina

2021: April 25–30, The Shelbourne Hotel, Dublin, Ireland

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Donald H. Beskind, *Editor*

**ATTICUS FINCH: THE BIOGRAPHY—
HARPER LEE, HER FATHER, AND THE MAKING OF AN
AMERICAN ICON ***

Joseph Crespino **

ABOUT THE SPEAKER

Atticus Finch, the lawyer in the books To Kill a Mockingbird and Go Set a Watchman by Harper Lee, is the lawyer many of us believe represents the ideal of what a lawyer should be. But many may not know that Harper Lee modeled Atticus Finch on her father, A.C. Lee, a self-educated, avid reader who became a lawyer primarily through reading the law, and eventually became a newspaper editor and a politician in Monroeville, Alabama.

As Mr. Crespino writes in his book, Atticus Finch: The Biography—Harper Lee, Her Father, and the Making of an American Icon, A.C. Lee would be an inspiration for his daughter's fiction not because he was ahead of his time, as the character of Atticus Finch of Mockingbird might imply, but rather because he was of his time and of his place and yet still aspired to be worthy of ideals and noble values.

Joseph Crespino is the Department Chair and Jimmy Carter Professor of American History at Emory University, specializing in the history of the American South and of the United States in the twentieth

* Address delivered at the Annual Convention of the International Society of Barristers, Tucson, Ariz., 28 March 2019.

** Jimmy Carter Professor of American History, Emory University. Author of *Atticus Finch: The Biography—Harper Lee, Her Father, and the Making of an American Icon* (2018), *Strom Thurmond's America* (2012), *In Search of Another Country: Mississippi and the Conservative Counterrevolution* (2007); coeditor, with Michael Lassiter, *The Myth of Southern Exceptionalism* (2010).

century. He received his undergraduate degree from Northwestern University, a master's degree from the University of Mississippi, and another master's and his PhD from Stanford University. He has written three books, including the one he is here today to talk about, Atticus Finch: The Biography. He was recently profiled in How Stuff Works, focusing particularly on the class he teaches at Emory called Right-Wing America, which examines our country's history of right-wing ideology. Joe is married to Caroline, a singer and songwriter who has released eight albums. They have two children, Carrie and Sam. In his spare time, Joe is a mountain biker and plays bluegrass music with his son.

I

INTRODUCTION

Many of us read *To Kill a Mockingbird* because it was assigned in class, particularly if you're around my age. It is still assigned, year after year, usually to eighth graders or ninth graders, and it's usually one of the first "serious books" that children are assigned.

And why do we assign it, year after year? Well, I think it's because we want children at that impressionable time of their lives to think about the lessons of the novel. Here in this multiracial, democratic society we live in, we want kids at that age, young adults, to start thinking about the novel's lessons of tolerance, of empathy, and of understanding across racial lines. It's such an important aspect of what that novel teaches us.

To Kill a Mockingbird, the novel, came out in 1960. This book endures because of the values that it imparts to us. Even as recently as January of 2017, President Barack Obama—a historic figure in American history, the nation's first African American President—invoked the novel in his Farewell Address, the speech that he gave ending his eight years in office, when he's reflecting on the unfinished business of his presidency. One of the things he's talking about in that Farewell Address, despite his own historic achievement in breaking the color line of the White House, is that race continues to be such a divisive factor in American life. And he calls on Americans to be more

empathetic and to be more understanding of people who are different from themselves. And whom does he invoke in calling and making this call to empathy? He invokes the character of Atticus Finch. He said, “[I]f our democracy is to work in this increasingly diverse nation, then each one of us need[s] to try to heed the advice of a great character in American fiction—Atticus Finch[,] who said[,] ‘You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.’”¹ That of course was the famous advice that Atticus gives to his daughter, Scout.

But we might have asked President Obama, “But Mr. President, which Atticus Finch are you talking about?” Because it would seem that now we have two Atticus Finches.



In the movie *To Kill a Mockingbird*, made in 1962, we have the figure of Gregory Peck, the noble Atticus Finch, the great father and lawyer, the defender of the downtrodden, the man who defended Tom Robinson.² Everybody knew Tom Robinson was innocent, and Atticus knew it, but he was still found guilty.

1. President Obama’s Farewell Address, Jan. 10, 2017, <https://obamawhitehouse.archives.gov/farewell>.

2. Source of photo: https://commons.wikimedia.org/wiki/File:Atticus_and_Tom_Robinson_in_court.gif.

But we have this other figure, this character from *Go Set a Watchman*. Harper Lee actually wrote *Go Set a Watchman* before *To Kill a Mockingbird*, and for years—for decades—it was squirreled away in a safety deposit box in Monroeville, Alabama; nobody knew it was there. It was discovered and published in 2015.

For those of you who haven't read it, let me tell you what's in it. The story of *Go Set a Watchman* has many of the same characters as in *To Kill a Mockingbird*, but it tells the grown-up life of those characters. Scout is now a grown person, Jean Louise. And Jean Louise comes home from New York to Macon, Alabama, and she discovers there that her beloved father Atticus, a man so kind that he wouldn't hurt a ground squirrel, has fallen in with the small-minded, racist, reactionary forces of the Citizens Council. The Citizens Council was an actual organization that existed in the Deep South in the mid-1950s, and the Atticus Finch of *Go Set a Watchman* is not the kindly, open-minded, fair-minded defender of the downtrodden. He's exactly what you would think a seventy-year-old, arthritic white man in southwest Alabama in the mid-1950s and at the cusp of the civil-rights revolution would be. He's condescending towards his daughter. He's a political reactionary, he's racist, and he's racially condescending.

So all those people who had named their son Atticus or named their dog Atticus, they now read *Go Set a Watchman*. Well, what are they going to do now? Because now Atticus Finch is not who we thought he was. How do you make sense of this?

At the time *Go Set a Watchman* came out, I'd been interested in *To Kill a Mockingbird* for many years. I'm largely a political historian. That's what my other books are about. But I had been interested in this book for so long because of the role it plays in our culture, because it's a way people learn about the history of racial injustice for the first time and because of how Atticus Finch persists in our culture as this touchstone of decency and empathy. But *To Kill a Mockingbird* was hard to write about because all you had was that one book Harper Lee had written back in 1960, and she stopped talking about it. She stopped talking to reporters. The last interview she ever gave was in March of 1964. So how do you write about it? I didn't have a way, but once *Go Set a Watchman* came out, it was a goldmine to me because it

started me on a trail where I could begin to unravel this question: How to make sense of these two different characters? How can the figure of Atticus be so different in these two novels that Harper Lee is writing? And that's what I tried to do—to address that question.

A lot of people didn't think much of *Go Set a Watchman*. It's not a great read. But it's also hard to write novels. A lot of people try to write novels, and their first effort at a novel doesn't go well, and they have a manuscript that's tucked away in a corner or a safety deposit box. And that's what happened to Harper Lee. But whatever you think about *Go Set a Watchman* as a work of fiction, it is fascinating as a historical document, as a document that gives us insight into what Harper Lee was struggling to get down on the page when she first attempted writing this piece of fiction.³

So that set me on this journey, and I started to find other historical documents to help me unravel this puzzle of who Atticus Finch is. I ended up trying to write this biography of a fictional character. A biography of a fictional character, what does that even mean? She was just making it up, you know? But the great thing about writing a biography of a fictional character is there's no right way to do it, so there's no wrong way to do it either, and that was the philosophy I followed in doing it.

II HISTORY INFORMS FICTION

I went back, first of all, to look at this man, Harper Lee's father, A.C. Lee, Amasa Coleman Lee. The last time Harper Lee spoke on the record about her fiction—then, as far as we knew, just *To Kill a Mockingbird*—was in March of 1964. She said then that her father wasn't exactly Atticus Finch, but that he had had the same disposition, that he had inspired the character. We knew that A.C. Lee, like Atticus Finch, was a small-town lawyer and state legislator. But he was also the co-owner and sole editor from 1929 to 1947 of the *Monroe Journal*,

3. See Joseph Crespino, *Atticus Finch Offers a Lesson in Southern Politics*, N.Y. TIMES, July 16, 2015, <https://www.nytimes.com/2015/07/16/opinion/atticus-finch-offers-a-lesson-in-southern-politics.html>.

published in Monroeville, Alabama. So I wanted to go back and dip into those newspapers and see what was there.

Now, I myself grew up in a small town in Mississippi, and I know that newspapers in small towns in the Deep South don't necessarily have editorial pages. The newspaper in my town of Macon, Mississippi, where I grew up in the '70s and '80s, ran the obituaries on the front page. That's the kind of newspaper it was. So I didn't know what I would find in the *Monroe Journal*. But what I found was a goldmine because not only did A.C. Lee have an editorial page, but he had an active and ambitious editorial page. He was writing about not just state politics but about the evolution of the New Deal. He was writing about the rise of fascism in Europe by the late 1930s. And it was remarkable to see this, because the highest grade of education A.C. ever had was eighth grade. He became a lawyer not by going to fancy law schools; he read for the bar in early twentieth-century Alabama. So he was like Lincoln in his reading habits and habits of self-education. And he brought the world to his readers there in small-town Alabama in the 1930s and '40s.

Those editorials revealed that A.C. Lee was the inspiration not only for the noble figure of Atticus Finch in *To Kill a Mockingbird*, but also for the reactionary figure in *Go Set a Watchman*. When you read all eighteen years' worth of those editorials, you see both characters. You see in the 1930s how A.C. Lee was speaking out against the political demagoguery that was rampant in the South in the 1930s. He couldn't stand Louisiana's Huey Long. He was constantly writing about Huey Long. He'd write about Huey Long five, six weeks in a row. In his seventh week, he would begin his editorial by saying, "I know some of my readers might be getting a little tired of hearing about Huey Long," but then he'd charge right in and talk some more about Huey Long. Even years after Long was assassinated in Baton Rouge in 1935, A.C. was still talking about the baleful influence that Long had had on Southern and American politics. He was also writing against Georgians like Eugene Talmadge. He spoke out against mob violence and the lynching that was still common in Southern politics and life in the 1930s.

So that's the evidence for A.C. Lee as the noble Atticus Finch that we see in *To Kill a Mockingbird*. But by the late 1930s, he was beginning to turn. His conservatism became more ideological and more hardened. He was strongly opposed to labor unions that were coming into the South and playing such an important role in national Democratic Party politics. By the World War II years, which were such a time of tumult and change in Southern society, A.C. began to write for the first time defending the position of the South. He was concerned about the role that national civil-rights organizations were playing in the national Democratic Party. All the defenses you hear in the voice of Atticus Finch in *Go Set a Watchman*—the defense of states' rights and lauding accommodationist African American leaders like Booker T. Washington over the NAACP's newer, louder agitation for African American rights⁴—could be taken right from A.C. Lee's editorial page by the 1940s and into the mid-1940s. In fact, what's fascinating is that by the mid-1940s, you can put Harper Lee's writings in college alongside some of her father's writings and begin to reconstruct the dinner-table conversations that might have happened around the table in Monroeville in the mid-1940s; you can begin to see the arguments that play out fictionally on the page in *Go Set a Watchman*.

Another important set of sources for this biography come from the late 1950s. These include letters that Harper Lee wrote from Monroeville to friends back in New York while she was at home caring for her father in 1956. This was when he had his first serious health crisis. I also gained access to letters in the files of Harper Collins, Lee's long-time publisher, and they make clear the relationship between *Go Set a Watchman* and *To Kill a Mockingbird*. It's been said that *To Kill a Mockingbird* is a highly revised version of *Go Set a Watchman*, but that's not true. Those letters in the Harper Collins file make clear that Harper Lee herself always imagined them as two separate novels. And for my purposes, it's important that the character of Atticus Finch in *Go Set a Watchman* is the same character in *To Kill a Mockingbird*. It's the same person seen from two different perspectives.

4. See JOSEPH CRESPIANO, *ATTICUS FINCH: THE BIOGRAPHY* 45–46 (2018).

To understand the change in that single character, it is important to understand the historical and political context of the Deep South in the late 1950s—roughly 1957 to 1960. I used to refer to this period as the most productive period in Harper Lee’s literary career, when she wrote these two novels, but that’s not accurate. It’s the *only* productive period in her literary career. It’s the only time she’s writing something that would go on to be published. And it’s fascinating to think about the fact that she’s writing these two novels in the midst of the Deep South’s massive resistance to desegregation, starting with the *Brown v. Board of Education* decision in 1954 and moving into the ’60s. But this is the late 1950s, and particularly in Alabama, these were truly the crazy days in Southern politics.

This was when politicians, who just a few years earlier had been dismissed as jokes or nobodies, were winning the highest offices in the land. It happened in my home state of Mississippi with Ross Barnett in 1959. Ross Barnett had run twice for governor before and hadn’t even gotten close. He was considered a joke. It happened in Harper Lee’s home state of Alabama in 1958 when John Patterson won. John Patterson had been a nobody. His daddy had been somebody. His daddy had cracked down on mob interests in Phenix City, Alabama, and gotten assassinated because of it. Young John ran in his stead, was elected attorney general, and then ran in 1958 for governor with the explicit backing of the Citizens’ Councils and the Ku Klux Klan. In fact, his racially moderate opponent was George Wallace—a man we don’t remember today as a racial moderate because of the way he became the face of reactionary politics in the South and in the nation in the 1960s. But George Wallace lost that race to John Patterson. It’s a marker of how strong the militant segregationist vote was in a state like Alabama in 1958—that John Patterson beat George Wallace. It was in the aftermath of that election that George Wallace allegedly made his Faustian bargain: that he would never be “out-segged” again.⁵

5. *E.g., George Wallace and History*, CHIC. TRIB., Sept. 15, 1998, <https://www.chicagotribune.com/news/ct-xpm-1998-09-15-9809150023-story.html>.

So Harper Lee's changing Atticus in this way reflects what's going on in the novel *Go Set a Watchman*, and it reflects in many ways the kind of conventional wisdom of Southern politics at that time. The South was in crisis, and if the South was going to change, that wisdom was that it would be the decent, conservative, sober-minded leaders in these organizations like the Citizens' Councils that would keep down the Klan and the hotheads and allow the region to change. But that wasn't happening in Alabama and Mississippi and Georgia in the late 1950s. It was exactly the opposite. It wasn't the Councils who were moderating the Klan, but rather the militant segregationists who were radicalizing the Councils. The normally decent white leaders were either falling in line with the reactionaries or slinking into a cowering silence.

This is the essential political-historical context for understanding the change in the character of Atticus Finch. Instead of writing a book like *To Kill a Mockingbird* pitched to "the North," explaining that there are still some decent folks like Atticus Finch down Alabama way, Harper Lee instead writes a book that is pitched to her own people, to the white South, to her own tribe, to those otherwise decent white Southerners who are caught up in the madness of massive resistance and who need to be reminded of their own best impulses and of their own better angels.

Now, I've got to admit, I've got some problems with Atticus Finch. Atticus Finch in *To Kill a Mockingbird* is too good to be true. He's oftentimes an example of what the literary scholars would call the hero in a white-savior narrative, where the square-jawed white guy plays the hero and the African American characters, the characters of color, are just stock figures. It's also true that *Mockingbird* doesn't match up with the history of the South in some ways. There's a delicious historical irony in that in April 1963, the same month that Gregory Peck wins his Oscar for best actor in portraying Atticus Finch, Martin Luther King gets arrested in Birmingham, Alabama, and is sent to the Birmingham jail. It's from there that Martin Luther King writes his *Letter from Birmingham Jail*. One of the unforgettable passages of that letter is his critique of the white moderate, of folks like Atticus Finch, who prefer order over justice. Remember, *Letter from*

Birmingham Jail is a letter to eight white ministers who signed a letter saying that now is not the time; Birmingham was changing; King shouldn't be there. And King gives a withering critique of the white moderate. He says, "I've almost come to the conclusion that it's not the Klansmen or the Citizens' Councilor, but it's the white moderate who's the biggest stumbling block to progress for African Americans in the South."⁶

Now, Martin Luther King was writing that to those ministers and he was trying to galvanize his fellow members of the cloth to get off the sidelines and to take a stand. It was too easy just to sit on the sidelines and be moderate. But what's fascinating about *Letter from Birmingham Jail* is that King revised that letter and included it in a book published in 1965 called *Why We Can't Wait*. *Letter from Birmingham Jail* is the middle chapter. It's chapter three. But earlier, in chapter two, King makes a defense for why nonviolence is still relevant and still important, and he's having to make it at a time when a segment within the African American community says, We've had enough with nonviolence. This isn't working. We need another strategy. In one amazing passage King talks about this and says, "[T]here is something in the American ethos that responds to the strength of moral force."⁷ Now, I don't know that I believe that, but Martin Luther King did. And whom did he use as an example of

⁶ ". . . I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizens' Councilor or the Ku Klux Klanner, but the white moderate who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, 'I agree with you in the goal you seek, but I can't agree with your methods of direct action'; who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time; and who constantly advises the Negro to wait until 'a more convenient season.'"

MARTIN LUTHER KING, *Letter from a Birmingham Jail*, in *WHY WE CAN'T WAIT* 85, 96-97 (1963).

⁷ MARTIN LUTHER KING, *The Sword that Heals*, in *WHY WE CAN'T WAIT* 21, 34 (1963).

someone responding to the strength of moral force but Atticus Finch? He said,

I am reminded of the popular and widely respected novel and film *To Kill a Mockingbird*. Atticus Finch, a white southern lawyer, confronts a group of his neighbors who have become a lynch-crazed mob, seeking the life of his Negro client. Finch, armed with nothing more lethal than a lawbook, disperses the mob with the force of his moral courage, aided by his small daughter, who, innocently calling the would-be lynchers by name, reminds them that they are individual men, not a pack of beasts.⁸

In the end it's not Atticus who defends Tom Robinson, but Scout, when she comes along and says, "Hey, Mr. Cunningham; hey, Mr. Cunningham," and thereby shames the mob.

But what is important was King's enduring faith in the strength of moral force. This, it must be remembered, was always the counterbalance to any skepticism about white moderates that he voiced in letter. In his nod to Atticus Finch, King signaled his belief that within the oppressor race were people with a modicum of decency and empathy without which nonviolent democratic change is impossible.

Now, King didn't know in 1964 when he wrote his book—this was before Congress broke the South's filibuster for the first time in American history, and it was before Lyndon Johnson signed the 1965 Civil Rights Act—King didn't know whether there were enough moral, decent white people in America to join with Americans of other races to defeat the legalized subjugation of black southerners through peaceful, nonviolent, legislative means. But he believed that there were. He believed that hearts could be changed and minds could be convinced, and through his belief and the belief of millions of others inspired by him, it became true.

⁸ *Id.* at 34–35.

III CONCLUSION

We would do well today to remember Martin Luther King's faith in the power of moral force and the essential role that it plays in democratic society. And we should remember, too, the strange way that Harper Lee's novel and the character that she created, Atticus Finch, emerged as a token of that faith. All the dispiriting things that we face today in our own politics—impulses that seek to drive people back into narrow tribal identities, extreme partisanship that turns political opponents into mortal enemies—all of these things are things that Martin Luther King and Harper Lee faced in their own day. Yet they never lost their faith in the power of moral force. I hope we don't lose ours today.

**TAMING THE STORM: THE LIFE AND TIMES OF JUDGE
FRANK M. JOHNSON JR. AND THE SOUTH'S FIGHT OVER
CIVIL RIGHTS ***

Jack Bass **

ABOUT THE SPEAKER

Jack Bass is a preeminent scholar, prolific author, and expert on the history of the Civil Rights Movement and how that movement was affected by race relations in the South, southern politicians, and our federal courts. He was born in Columbia, South Carolina, and received his bachelor's and master's degrees from the University of South Carolina. He studied at Harvard as a Nieman Fellow and received his PhD from Emory University. He worked as a newspaper reporter and journalist for many years and was twice named South Carolina's "journalist of the year." He was a Journalism professor at Ole Miss for eleven years and then became Professor of Humanities and Social Sciences at the College of Charleston, where he is now recognized as an emeritus professor.

One of the most important of Jack's many books is his biography of the legendary Alabama federal judge Frank Johnson Jr., for which he was awarded the 1994 Robert Kennedy Book Award. Judge Johnson played an instrumental role in the civil-rights movement. He also heard many cases argued by our fellow barrister, Fred Gray, who is also a legend in the civil-rights arena.

* Address delivered at the Annual Convention of the International Society of Barristers, Tucson, Ariz., 26 March 2019.

** Professor of Humanities and Sciences Emeritus, College of Charleston; journalist; author of a number of books about the American South, including *Unlikely Heroes* (1981), *Taming the Storm: The Life and Times of Judge Frank M. Johnson Jr.*, and *the South's Fight over Civil Rights* (1993).

I INTRODUCTION

Two books I've written tell the central role a handful of federal judges played for more than two decades in transforming the American South: *Unlikely Heroes* and *Taming the Storm*. The latter is a biography of Judge Frank M. Johnson, but there are thirty-two references in the index of *Unlikely Heroes* to Judge Johnson, so he's covered a great deal in that book, as well. *Unlikely Heroes* shows the role the Fifth Circuit played in quickly giving full effect to Judge Johnson's opinions.

As some of you may know, recently—twenty-five years after publication—*Taming the Storm* has received some national attention. During his Senate confirmation hearings, Justice Kavanaugh was speaking to Senator Dick Durbin of Illinois. He had visited the senator in his office the previous week, and Senator Durbin had given him a copy of the book. Justice Kavanaugh held it up and, on national television, thanked Senator Durbin for his copy of the book and said he had read it the previous weekend, praising it. Whether or not he really did read the book in one weekend, I don't know, but it was a pleasant surprise. I called Senator Durbin to thank him, and he told me he gave a copy to every Supreme Court nominee.

If you've ever attended the investiture of a federal judge—and my hunch is that many of you have—the high point of course is taking the oath of office. The job description in that oath is “to administer justice.” The six judges I primarily wrote about in both books took that oath literally. They came to define justice as the absence of injustice. An entire course that has been taught for more than two decades at Stetson University School of Law in Florida is built entirely around *Unlikely Heroes*. The Florida Supreme Court has used it as required reading for a seminar that includes all lower-court judges.

II *UNLIKELY HEROES*

The book begins with the story of how four attorneys—Elbert Tuttle of Atlanta, John Minor Wisdom of New Orleans, John R. Brown of Texas, and Richard Taylor Rives of Montgomery, Alabama—became judges on the old Fifth Circuit Court of Appeals that then stretched across six former confederate states: Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. Much later, the Fifth Circuit was split in two, with Mississippi, Louisiana, and Texas remaining in the Fifth, and Alabama, Florida, and Georgia in the new Eleventh Circuit. The leader of the six-state Fifth Circuit was Chief Judge Elbert Tuttle of Atlanta, for whom the Eleventh Circuit Courthouse in Atlanta is named (and I had the honor of making the dedication speech there). The scholar of that court was Judge John Minor Wisdom of New Orleans.

Unlikely Heroes tells of the early lives of both men. They and fellow judges John Brown and Richard Rives became known as “The Four.” This sobriquet came from fellow judge Ben Cameron of Mississippi in a stinging dissent that made it clear he was referring to the Four Horsemen of the Apocalypse.¹ Cameron also made sure the press was aware it got wide media coverage.² It reflected Cameron’s response to the end of the complicated world of racial segregation in his native state. It also created a crisis that the full court resolved with difficulty in a special conference that lasted three days.

Tuttle, Wisdom, and Brown had played key roles in their state delegations at the 1952 Republican National Convention, which was highly contested and ended with Dwight Eisenhower winning the nomination over Senator Taft of Ohio and California governor Earl

1. See *Armstrong v. Bd. of Educ.*, 323 F.2d 333, 353, n.1 (1963) (“These four Judges [Chief Judge Tuttle and Judges Richard T. Rives of Montgomery, Alabama, John Minor Wisdom of New Orleans, and John R. Brown of Houston] will hereafter sometimes be referred to as The Four.”).

2. For the full story, see chapter 12 (“Cameron’s Assault”) in JACK BASS, *UNLIKELY HEROES* (1981).

Warren. What would follow launched the beginning of a two-party political system in the south.

Judge Rives possessed his own special quality. Unlike the other three who had graduated from quality law schools, Rives came from an old Alabama family that lost its plantation holdings at the end of the Civil War. He attended only one year of college at Tulane University. He passed the bar after studying law in an attorney's office in Montgomery. He later became president of the State Bar Association and served as an early campaign manager for Senator and later Supreme Court Justice Hugo Black.

Rives had planned to practice law with his son, who attended Exeter and Harvard after serving as a Navy lieutenant in the Pacific. The son soon enrolled at the University of Michigan Law School, and his father opened his own law firm, planning to bring his son in as a partner. But in the summer of 1949, when he was in law school, the son had been a front-seat passenger in a head-on collision and died shortly afterwards in the hospital. Two years later Rives was appointed to the Fifth Circuit Court of Appeals.

Herbert Brownell, Eisenhower's campaign manager and subsequently his administration's attorney general, played a key role in judicial selections. While writing the book, I developed a strong relationship with Brownell. Although viewed generally as a somewhat stuffy Wall Street lawyer, at one point Brownell mentioned to me with a sense of pride that his cousin was Susan Brownell Anthony. He had grown up mostly in Nebraska with Senator George Norris, known as the Prairie Populist, his boyhood hero.

Brownell also told me the inside story about how Earl Warren became chief justice. To my knowledge, that little-known story has been fully told only in *Unlikely Heroes*. Here's the gist: As governor of California at the 1952 Republican National Convention, Warren finished third on the first ballot behind Senator Robert Taft and World War II General Dwight Eisenhower. In the runoff vote, Warren's endorsement played a key role in Eisenhower's getting the nomination. As he and Brownell neared the end of choosing cabinet members, Eisenhower told him, You know, we haven't done anything for Earl Warren. Only one minor cabinet post remained open. After consulting

with Warren, Brownell reported that Warren had expressed interest in a Supreme Court appointment if there became a vacancy. Eisenhower replied, "Sounds good to me. Let's call him."³ On September 8th, 1953, when Warren was crossing the Atlantic Ocean to represent the United States at the coronation of the new Queen of England, Chief Justice Fred Vinson unexpectedly died. According to Brownell, the President decided not to appoint any sitting member. He had never had Chief Justice in mind when he promised Warren an appointment to the Supreme Court. He told Brownell, "You'd better talk to him."⁴ Brownell flew to California on a secret mission in the presidential plane and asked Warren, "Do you think the president would be violating his pledge if you didn't get Chief Justice?"⁵ Brownell told me that Warren had made it very clear he thought it would be a violation. "There was no hesitation," Brownell said, and this he told Eisenhower. "He said he thought first vacancy meant first vacancy. I told Eisenhower and he said, 'Well, that's it.'"⁶

The Vicissitudes of Desegregation

None of Judge Wisdom's opinions on the Fifth Circuit would have more impact than *United States v. Jefferson County Board of Education*,⁷ which transformed the law of public-school desegregation. It provided the historical and philosophical foundation that placed desegregation within a larger issue. Judge Wisdom spent almost a year in formulating the opinion, which helped shape new constitutional doctrine that would lead to affirmative-action programs and other extensions necessary to overcome the effects of past discrimination. Early in the opinion, Judge Wisdom emphasized

3. JACK BASS, TAMING THE STORM 86 (1993) (quoting interview with Herbert Brownell, Oct. 17, 1979).

4. *Id.*

5. *Id.*

6. *Id.*

7. 372 F.2d 836 (1966).

that “[t]he only school desegregation plan that meets constitutional standards is one that works.”⁸

For months, judges worked with the school boards and superintendents throughout those six states to implement the plan. One of the most compelling chapters in *Unlikely Heroes* involves District Judge Skelly Wright of New Orleans in implementing integration of public schools in New Orleans. For almost five years he battled almost the entire state legislature, the governor, and city officials. By the end of 1960, he had become the most hated man in the city, with John Minor Wisdom his only friend.

After a three-judge federal district court struck down the state segregation laws, Wright became the first judge in the Fifth Circuit to do so. On a Sunday morning at home, while still drafting his order, Judge Wright picked up a program from a Mardi Gras ball and began writing on the back,

The problem of changing a people’s mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God.⁹

Almost a quarter century later, those words from his 1956 order, encased in glass, adorned the desk of Chief Judge J. Skelly Wright’s chambers in the United States Court of Appeals for the District of Columbia.

Burke Marshall, who became a law professor at Yale University after serving as Assistant Attorney General in charge of the Civil Rights Division in the Kennedy Administration, would later say of Tuttle, Wisdom, Brown, and Rives, “Those four judges I think have

8. *Id.* at 847.

9. *Bush v. New Orleans Parish Sch. Bd.*, 138 F. Supp. 337, 342 (1956).

made as much of an imprint on American society and American law as any four judges below the Supreme Court have ever done.” If it hadn’t been for judges like that on the Fifth Circuit, *Brown* would have failed in the end. The Four played a central role in expanding the Supreme Court’s unanimous opinion in its implementation order in *Brown v. Board of Education*.¹⁰ Chief Justice Earl Warren wanted a unanimous opinion, and the Supreme Court, in its implementation order, essentially said that lower federal courts should implement it by applying “equitable principles.” The Warren court would provide solid support of Fifth Circuit rulings on racial issues. That would eventually change after Richard Nixon’s appointment of four justices to the Court.

Looking back, it had been a much different Supreme Court, one whose rulings by the end of the nineteenth century had ended the promise of Reconstruction following ratification of the post-Civil War Thirteenth, Fourteenth, and Fifteenth Amendments. I expect many of you here are familiar with Justice John Marshall Harlan’s lone dissent in *Plessy v. Ferguson*.¹¹ He had also dissented earlier in an 1883 opinion that ruled the Civil Rights Act of 1875 unconstitutional. That Act had outlawed race-based discrimination in all forms of public accommodations. But in the barely known 1898 case of *Williams v. Mississippi*,¹² the Supreme Court unanimously ruled that disfranchising provisions of that state’s 1890 constitution were constitutional.

Other states throughout the South quickly followed Mississippi in establishing the Democratic white primary—statewide primary elections in which only whites could participate. While this was going on, of course, African American political participation had all but vanished in those states. That’s when the Democratic White primary quickly became the only election that mattered. Because juries would be selected from the pool of registered voters throughout the former confederacy, it distinctly meant that for more than a half century that

10. 347 U.S. 483 (1954).

11. 163 U.S. 537 (1896).

12. 170 U.S. 213 (1898).

followed, virtually all trials of African America defendants in the South would be conducted before all-white juries. African American children would attend racially segregated schools with far less funding than those for white children. African Americans in the South had become second-class citizens. Those changes would lead to the great migration north and, to a lesser extent, west.

III *TAMING THE STORM*

The Biography

Taming the Storm, the Frank Johnson biography, came about almost by accident. While a recently hired professor of journalism at the University of Mississippi, I became a summer professor intern at the *Philadelphia Inquirer*. To pay for airfare to attend a weekend academic event on the twenty-fifth anniversary of former Governor George Wallace's stand in the schoolhouse door at the University of Alabama, I wrote a magazine article about how history would judge George Wallace.

After interviews with historians such as Arthur Link at Princeton and John Hope Franklin at Duke, I called Judge Johnson. He and Wallace had double-dated while undergraduates at the University of Alabama. They later became bitter enemies, with Wallace once saying that Johnson "needed a barbed-wire enema."¹³ Fully aware of such of Wallace's verbal attacks on Johnson, I called the judge and asked how he thought history would look at Governor Wallace. He said—and this is the way Judge Johnson would have said it—"You just don't know. You just don't know."

Then, without forethought, I said, "Judge, I might want to write your biography someday." I really hadn't planned to say it; it just sort of came out. And he responded, "Well, I wish you would." When I next

13. BASS, *supra* note 4, at 3 (quoting interview with George Wallace, Jan. 31, 1990) (re federal judges generally); Adam Cohen/Montgomery, *A Governor with a Mission*, TIME, (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,134640,00.html>.

met him after driving to his judicial quarters in Montgomery, his first question was, "Who's going to edit this book?" Then after I expressed doubt that Simon & Schuster would be interested, to my total surprise, his voice dropped, and he said Jacquelyn Onassis would like to edit this book. Jackie was a first-rate editor at Doubleday. I called my agent in Washington, and he arranged a book contract with Doubleday. When I once asked how she became interested in Judge Johnson, Jackie looked up for a moment then said, "I guess it goes back to hearing Jack and Bobby talk about him at the White House."

When I first submitted the manuscript to her, I received a heartwarming response. Although 600- and 700-page books on big subjects were being printed by other publishers, she emailed me that the then-publisher of Doubleday believed no book should exceed 400 pages. That would require my cutting out one-fourth of the manuscript. I worked diligently and managed to cut seventeen percent. The book got no promotion from Doubleday. Looking back, it only recently occurred to me that I should have asked my editor if she could cut the remaining eight percent.

I did buy the remainder copies and almost all of the ones left have been sent to the Frank M. Johnson District Courthouse in Montgomery, Alabama. At my request, they agreed to send a copy to the library of all fully certified law-school libraries in the country.

The Judge

Judge Frank Johnson grew up in Winston County in the Appalachian foothills of Northern Alabama. It grew the least amount of cotton and had the fewest number of slaves. On the eve of the Civil War, Winston County's delegate at the State Convention to Secede cast the only vote against secession. During the Civil War, two of Johnson's forebears served in the First Alabama Cavalry Regiment of the United States Army.

After serving in combat and getting two Purple Hearts as an infantry officer in World War II and getting his law degree at the University of Alabama, Johnson served as state chairman of Veterans for Eisenhower in the 1952 presidential election. Herbert Brownell

also played the key role in selecting Johnson for a court vacancy in Alabama.¹⁴

Months later, as the nation's youngest federal judge, on his third try, Johnson got the then-Chief Judge of the Fifth Circuit Court of Appeals to appoint a three-judge federal district court to hear the Montgomery-bus-boycott case.¹⁵ That case had begun with the arrest of Rosa Parks on December 1st, 1955, who, after a long day of work, was arrested for refusing to give up her seat on a public bus to a white man, then jailed, then released on bail. A twenty-six-year-old, new African American minister in Montgomery, Martin Luther King Jr., would soon lead the successful launch of a African American boycott of local buses. He helped organize large numbers of private drivers to deliver people to work and later return them home.

Years later, in an interview with Bill Moyers on PBS, Johnson described what had happened in the conference after the hearing by the three-judge court. After the hearing, Judge Rives says, "Frank, what do you think about this case?"¹⁶ Speaking first as a junior judge—a practice to prevent the senior member of the panel from influencing the junior member's vote—he recalled saying, "I don't think segregation in *any* public facilities is constitutional. Violates the Equal Protection Clause of the Fourteenth Amendment, Judge."¹⁷ He then told Moyers, "That's all I had to say. It didn't take me long to

14. Brownell, Eisenhower's campaign manager, was already aware of Fred Johnson Jr. through Johnson's work on the campaign. When Johnson was offered the position as U.S. Attorney for the Northern District of Alabama, Brownell said of Johnson, "He was the only fellow I wanted in Alabama as U.S. Attorney." BASS, *supra* note 4, at 80 (citing interview with Herbert Brownell, May 8, 1989). Fred Johnson was later the first in the twentieth century to successfully prosecute a peonage case, a performance that Brownell praised as "very much admired." BASS, *supra* note 2, at 67. The case was tried before Judge Lynne, with whom Judges Johnson and Rives later sat to hear the Montgomery-bus-boycott case, *Browder v. Gayle*. See *infra* p. 23.

15. *Browder v. Gayle*, 142 F. Supp. 707 (1956).

16. BASS, *supra* note 4, at 110 (1993).

17. *Id.*

express myself. The law was clear. The law will not tolerate discrimination on the basis of race.”¹⁸

Judge Seybourn Lynne, who had spoken next at the hearing, saw it differently. Erudite and patrician in bearing, he believed a doctrine should not be overturned unless done so explicitly by the Supreme Court. He cited a recent opinion by Rives to support his argument. Johnson at that time knew little about Rives, who had been Hugo Black’s campaign manager for the U.S. Senate. Johnson later said he had no idea at the time how Rives would vote. When Moyers asked him what Judge Rives said, Johnson responded, “When it came to Judge Rives’s time to vote, he says, ‘I feel the same way [as Judge Johnson].’”¹⁹ And that was it.

Such special courts as the three-judge panel of Judges Rives, Lynne, and Johnson heard constitutional challenges to state law, and appeals went straight to the Supreme Court. The hearing had been in May, the decision issued in June. In November, the Supreme Court unanimously affirmed the panel’s decision.²⁰ And at six a.m. a month later, King boarded a bus and was warmly greeted by the driver who said, “I believe you are Reverend King, aren’t you? We are glad to have you this morning.”²¹

Soon thereafter Judge Johnson was working one night in his office when his wife called, telling him some hooded Ku Klux Klansmen had placed a burning, gasoline-inflamed cross in the yard. For more than fifteen years, federal marshals guarded Judge Johnson twenty-four hours a day. But he never lost a night of sleep.

Judge Rives did not fare well after the Rosa Parks decision. A lifelong active Presbyterian, he was shunned by society. No one would sit beside him or his family at church. Judge Johnson was one of his few friends.

18. *Id.*

19. *Id.*

20. *Gayle v. Browder*, 352 U.S. 903 (1956).

21. *BASS*, *supra* note 4, at 117.

The Selma March

Dr. King led a group protesting the policies of Governor George Wallace in Alabama. He and his group were met by state troopers, and many were beaten, including future Congressman John Lewis. The question was whether the march could continue, and that was to result in a ruling by Judge Johnson. His law clerk later told me that he paced the floor. Do you have the right to close half of a public highway so that people can express their grievances? The judge finally “reached a point of serenity,”²² and his clerk knew the judge had come to a decision. And he issued the opinion that allowed the Selma march.

By the time the march ended, 25,000 people were marching into Montgomery, and as they approached and got to the edge of the federal courthouse, Judge Rives, whose office was two floors higher than Judge Johnson’s, called Johnson on the phone and asked him to come up. He said, “Now I want you to come up to my floor and view it. Because you ordered it, you ought to at least be able to see it.”²³ Johnson went upstairs and stood quietly alone besides Rives to watch the march from Selma, fifty miles west of Montgomery. The march symbolized the end of seven frustrating years of struggle, centered in the Fifth Circuit, to make real the Fifteenth Amendment’s promise of democratic rule of the government without racial discrimination. Judge Johnson’s order allowing that march was totally unprecedented. Recognizing “the rights by other citizens to use the sidewalks, streets and highways,” and “the competing interests of society” exercising those rights aroused, he wrote, “This Court has the duty and responsibility . . . of drawing the ‘constitutional boundary line.’”²⁴ In language that seemed to echo with the moral resonance of the Old Testament, he asserted,

In doing so, it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and

22. *Id.* at 249.

23. *Id.* at 236.

24. *Id.* at 250.

march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against those wrongs should be determined accordingly.²⁵

The march dominated national media. It created the climate for President Lyndon Johnson to lead Congress to pass the 1964 Civil Rights Act. The 1965 Voting Rights Act that followed represented a merging of all three branches of government in uprooting the entrenched obstacles to political equality in the American South. Judge Johnson later became a close friend of Chief Justice Warren Berger, who had come down on a private plane, and the two of them would go fishing in the Gulf of Mexico. At one point, Berger called to tell Johnson he would be nominated to a Supreme Court vacancy. It didn't happen. Years later his local congressman, whose office was two floors below in the same courthouse, came up to Johnson's office and explained what had happened. He said he had been afraid of not getting reelected if Johnson was named and had called Attorney General John Mitchell and got him to block it. He apologized.

Acclaim

When, years later, President Bill Clinton selected Johnson as a recipient for the Presidential Medal of Freedom, Johnson was ill and unable to attend. He requested that I represent him at the ceremony. Ramsey Clark, LBJ's last attorney general, said the Fifth Circuit had done something the Supreme Court couldn't do. They had brought racial integration to the Deep South a generation sooner than the Supreme Court could have done it. The courthouse in Montgomery is named for Judge Johnson, the courthouse in New Orleans was named for Judge Wisdom, and the courthouse in Atlanta, for Judge Tuttle.

Long after Johnson had passed on, Judge Rives still came to the courthouse every day. The clerk of the court, knowing the story, took him to lunch every day. In 1980, after Myron Thompson was

25. *Id.*

appointed to become chief judge, the clerk asked Judge Thompson to lunch with him and Rives. When the clerk retired, Judge Thompson stepped in to take Rives to lunch every day. Later, Judge Thompson said he didn't think Rives had any idea of who he was, but they went to lunch every day until Rives passed on. "How could I not," Judge Thompson said, "after what he did for us all?" Judge Thompson was one of the organizers of a celebration of Frank Johnson's 100th birthday in Montgomery, Alabama, a few months ago. Andy Young, Howell Raines, former editor of the New York Times, and I were among the speakers to honor Frank Johnson at Martin Luther King's church in Montgomery where they have formed a Civil Rights Trail in honor of the efforts of Rosa Parks, Martin Luther King, Judge John Frank Johnson, and others who initiated, led, and effectuated the recognition of civil rights for African Americans.

TOMMY MALONE: THE GUIDING HAND SHAPING ONE OF AMERICA'S GREATEST TRIAL LAWYERS*

Vincent Coppola**

ABOUT THE SPEAKER

*Great trial lawyers know that they are the message—that their words, if they have impact, must be felt, not simply spoken. Great writers do the same thing. It's not just reporting that motivates the reader, but the way the words come together to touch us, to invite us to think differently, to suspend judgment that would otherwise immediately reject, and to open ourselves to new possibilities. Great writing, to borrow a phrase, "afflicts the comfortable and comforts the afflicted."¹ Today we have a fortunate confluence: the coming together of a great writer with a great subject, a trial lawyer. Vince Coppola's journalistic career spans more than forty years. He spent ten of those years at Newsweek. He was lead reporter for Newsweek with the early coverage of the AIDS epidemic, and the loss of the space shuttle Challenger. He has contributed stories to Esquire, Rolling Stone, Men's Journal, and Worth. Other works include cowriting *A Purpose Under Heaven*, an information-age allegory that casts truth about a world in*

* Address delivered at the Annual Convention of the International Society of Barristers, Tucson, Ariz., 26 March 2019.

** Journalist and author of *Uneasy Warriors: Coming Back Home: The Perilous Journey of the Green Berets* (1995); *Dragons of God—A Journey through Far-Right America* (1996); *The Sicilian Judge: Anthony Alaimo, an American Hero* (2009); *The Serpent's Egg* (2013); *The Big Casino: America's Best Cancer Doctors Share Their Most Powerful Stories* (2014); and, most recently, *Tommy Malone: The Guiding Hand Shaping One of America's Greatest Trial Lawyers* (2018).

1. Finley Peter Dunne (1902) (of newspapers).

which we no longer know our neighbors. Vince also cowrote with Atlanta's first board certified oncologist a book entitled Grandfathered In. That book today is now part of the curriculum for first year medical students. His nonfiction works include The Sicilian Judge: Anthony Alaimo, An American Hero; Uneasy Warriors: The Perilous Journey of the Green Berets; and Dragons of God: A Journey Through Far-Right America. These books have taught us about subjects we did not know much, if anything, about. But once we learned of them, they wove themselves into the tapestry of our lives. Vince is here today to talk about his fourth book, Tommy Malone: Trial Lawyer. Many of us know Tommy. I've known him for over thirty years. His story is fascinating, instructive, and inspiring. As William D. Underwood, president of Mercer University and a trial lawyer himself, suggests, "[t]he core question of this book: how a great lawyer who comes to represent important causes emerges out of the racist, paternalistic, and self-perpetuating establishment of rural Georgia in the 1950s? What about Tommy Malone led him to take on the power structure in his community and begin representing people who were injured against prominent doctors and hospitals?" Vince is here to tell us about that.

I

INTRODUCTION

Think of this book as a creation story, a story that seems as if it occurred a long time ago in a galaxy far, far away. Yet it happened in the span of one man's lifetime, a man who sat among you many times and was so proud to be here. I'm here because I've written a biography of the great trial lawyer, Tommy Malone, a member of this organization, whom many of you know personally or by reputation. Some of you know that Tommy was diagnosed with a terminal illness and given six months to live. He went through all the sacrifices, decisions, and indecisions we make when we must confront our mortality. He sold his beloved airplane, his sport-fishing yacht, *Justice*. That was three years ago. Two days ago Tommy told me that he

wished he could be here. And he sends his best. He still looks forward to a bump or two of Crown Royal with dinner every night.²

II DEDICATION, DETERMINATION, COURAGE

Ten years ago Griffin Bell, the U.S. Attorney General under Jimmy Carter, asked me to write a biography of his personal hero, U.S. District Court Judge Anthony Alaimo. Both of these honorable men have since passed on. Judge Alaimo was one of those greatest generation guys, a Sicilian immigrant, he shined shoes to support his family. He was a Golden Gloves boxer in college. He joined the Army Air Forces the day after Pearl Harbor. He became a B-26 pilot. He was shot down over Holland, the sole survivor when his plane crashed into the sea. Alaimo was captured by the Nazis. He spent three years as a POW in Stalag Luft III. Alaimo took part in the Great Escape. He escaped again on his own, made his way into Italy, posing as a peasant, and then into Switzerland. Alaimo never mentioned any of these things for forty years to anyone beyond his family. He said he was only doing his duty. That's how this man lived. As a federal judge in Georgia he bucked the governor, the legislature, the bureau of prisons, and the newspapers. He cleaned up Georgia's medieval prison system. For that he was labeled "Ayatollah Alaimo." Today he is revered. Even in his eighties, Judge Alaimo was intimidating. I found myself pulling in to a highway restroom and changing into a dark suit every time I drove the 300 miles from Atlanta to coastal Georgia where he had his courthouse. It was always 100 degrees and humid. I didn't dare loosen my tie.

Tommy Malone has taken that fierce dedication, that courage, those blessings and virtues, and extended them to reach what the Bible terms "the least of us." Tommy says—and I guess he came to this realization in this critical moment—"I've come to believe I was put on earth to make a meaningful difference in the lives of others, those who

2. Tommy died of stomach cancer on October 1, 2019.
<https://www.law.com/dailyreportonline/2019/10/03/legendary-ga-trial-lawyer-tommy-malone-dead-at-76/>.

have had their lives turned upside down . . . the catastrophically injured and the families whose loved ones needlessly lost their lives and futures due to the failures of others.”³

I’d like to begin with a story. In 1966, Tommy Malone, a twenty-four-year-old, just out of law school, took a call from James “Taxi” Smith, a prominent attorney in Albany, Georgia, a small city 200 miles southwest of Atlanta. Albany has a reputation—and keep this in mind—as a troublesome place. Smith fancied himself every man’s lawyer. He was famous for riding the elephants when the circus came to town. He told Tommy that he had a client who wanted to file a malpractice action against a local internist. The case would never go to trial, Smith promised. “He told me to file the lawsuit,” Tommy remembered, “and [the insurance company would] pay us \$100,000 straightaway.”⁴ In rural Georgia, suing a doctor, or an employer, for that matter, after a workplace injury was unheard of. Doctors were a protected species, like preachers and teachers, part of the fabric of the community, making house calls when the kids were sick, ministering to the gravely ill, supporting their families. “Nobody dared sue them, especially in South Georgia,” one of Tommy’s contemporaries remembered. “It would be like saying something against the Church or the Lord. . . . If a doctor cut your father’s head off down there, you wouldn’t consider suing him and you couldn’t find a lawyer to do it.”⁵

Taxi’s client was a fourteen-year-old-girl, Carol Bitterman, a cheerleader, diagnosed with colitis. She had been prescribed a regimen of a sulfa-based drug, literally over the protests of her mother and despite the fact that her medical records clearly indicated she was allergic to the drug. The doctor told the mother he was using a new kind of sulfa. Two weeks later, the girl was hospitalized, her body covered with blotches that grew into huge, hanging water blisters. Her flesh peeling, her nails, eyelashes falling off. Her agony was such that the nurses, at a loss as to what to do to ease her pain, applied corn

3. VINCENT COPPOLA, TOMMY MALONE: THE GUIDING HAND SHAPING ONE OF AMERICA’S GREATEST TRIAL LAWYERS 83 (2018).

4. *Id.*

5. *Id.* at 85.

starch to the sheets to keep the girl's skin from sticking to her bed. She was transferred to Emory University Hospital in Atlanta, and later to Massachusetts General Hospital in Boston. No one could do anything to help her.

Tommy filed a lawsuit and the insurance company blew the family off. At this point, Taxi Smith informed Tommy that he wanted his name off the lawsuit, as well as the names of his law partners. Tommy was in the middle of a bear of a lawsuit. He did his due diligence and enlisted well-regarded expert witnesses from outside the South. No local doctor would testify in the girl's behalf. The Bittermans were Jewish. As the trial was getting underway, Tommy turned and saw a procession of Baptist, Methodist, and Presbyterian ministers enter the courtroom, walk up to the defendant, pat him on the back, and nod to the jury. They did this for five days. The doctor was acquitted, and the girl and her devastated family left to twist in the wind. This was Tommy's hometown. His father was a lawyer.

I believed in justice and truth and fairness and all that. I could have understood losing the case in front of the rail, though this was a case nobody should lose. I lost it *behind the rail* with all those people who came to court. I was brought up in the Baptist church, and I have always been a devout believer in God, but when those preachers came to influence the jury, to hurt that Jewish girl, I was fed up with modern-day Christianity. I have seldom been in a church since, unless [it was] to honor someone at a funeral service.⁶

He refiled the case and won a small settlement, so small the local newspapers made him a figure of ridicule. Then he somehow convinced the renowned trial lawyer Melvin Belli to come on board. That, in itself, was a circus. They eventually sued the New Jersey-based company that manufactured the drug. They reasoned a big Yankee corporation would be an acceptable defendant in small town Georgia. Now she'd be the local girl who was paralyzed by the

6. *Id.* at 90.

negligence of a New Jersey drug company. After six days, the drug company's lawyers threw in the towel and moved to settle. They got something like \$650,000 at a time when a \$60,000 verdict would be considered a good one. A few months later, Tommy noticed that physicians' attendance in the Dougherty County chapter of the American Heart Association meetings had tailed off radically. Tommy was the chairman. When he asked about this he was told, "[T]hey ain't coming back as long as you have anything to do with this organization."⁷ There were rumors that no doctor would even treat his wife and children. And Tommy eventually pulled up stakes and moved to Atlanta. As I said, it sounds like a story from a different galaxy.

Tommy dedicated his life to trying to understand why such catastrophic injuries occur, often in state-of-the-art medical facilities overseen by dedicated doctors and medical practitioners. And where there was evidence that a doctor, healthcare system, insurance company, or manufacturer of drugs or consumer products had failed utterly in its responsibilities, indeed had sown pain and suffering rather than promised benefits, Tommy sought redress for lives that had been irrevocably damaged or destroyed. He was passionate and unrelenting in this quest, a true believer in the words of his peers. Over the next decades, Tommy and a handful of other malpractice attorneys blazed a path through legal and ethical thickets, set important precedents, and won great victories for their clients. Malone's jury awards read like Mega-Millions lottery jackpots. He's donated millions of dollars to his alma mater, millions more to charity. Among the charities is the Shepherd Center, which treats patients with spinal and other catastrophic injuries, a number of them Malone's clients. Tommy bucked the legal establishment in other ways, too: early in his career, Malone began to represent African American plaintiffs, and went out of his way to associate cases with black attorneys. And neither practice harmed his reputation. Today, Tommy is a perennial vote-getter in the peer-reviewed Super Lawyers rating service. There are 30,000 lawyers in Georgia, and every year

7. *Id.* at 131.

from 2009 through 2017, Tommy ranked among the top ten Super Lawyers in the state.⁸

Family, History, Tradition

So how does such a lawyer emerge from the racist, paternalistic, self-perpetuating society that was Southwest Georgia in the 1960s? To answer that question you'll have to allow a Brooklynite to pontificate about the South. More than most of their countrymen, Southerners define themselves by family, history, and tradition while the rest of us are increasingly rootless, willing, even eager, to leave the past behind and reinvent ourselves. Faulkner's depiction of the South is no cliché. "The past is never dead. It's not even past."⁹ The past is also prologue, and often bleeds far into the future. Like the seasons that nourish and ravage the soil, life in the South is cyclical. Malone's family roots run deep in southwest Georgia. Rosser Malone, Tommy's father, was shaped by searing familial events that began unfolding before his birth, events whose impact he could not fully comprehend and spent his whole life determined to ignore. Young Tommy would also be shaped by forces he couldn't explain—those of his own assiduously guarded nature and, later, by the social and political climate in south Georgia in the '50s and '60s, against which he became an iconoclast.¹⁰

He was born innocent, like all of us, into a world defined by unspoken verities and the overpowering, even suffocating, rhythms of a privileged life in a small Georgia city at the dawn of an era of great social upheaval and racial awakening. Tommy was never poor. His parents were part of the Albany establishment—the bankers, the businessmen, the newspaper owners, the old families, the wealthy men who converted the antebellum plantations into private hunting preserves. "Establishment" has a very particular meaning in South Georgia, more like "ruling class." Tommy's father was a lawyer, and

8. <https://www.superlawyers.com/georgia/toplists/>.

9. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 80 (Garland Pub. 1987).

10. See COPPOLA, *supra* note 3, at 9.

later a judge. His mother, a college graduate, was a member of the Junior League and the DAR. The family socialized at the country club. His parents lavished every blessing on him. Cars, boats, and horses to ride. Tommy respected his father and wanted to follow him into the law.

These might seem advantages for any young man, but in the '50s and '60s, Albany was a through-the-looking-glass world where reality, morality, and truth itself constantly clashed with the evidence of his senses. A century after the Civil War, descendants of the plantation owners and the collaborators slavery had relied upon—lawmen, legislators, and functionaries, clergy, and the mercantile class—still controlled the great-grandchildren of slaves. Tactics had changed. Lynchings—at least 120 public lynchings have been documented in South Georgia—had ceased. Jim Crow laws were eroding. But the white ruling class, a tiny fraction of the population, was determined to cling to mastery consciously and unconsciously in polite whispers or fierce exhortations. That belief was communicated from one generation to the next.

Tommy was of a particular generation: middle-class white Southerners who'd grown up on one side of the racial divide, as insulated as caterpillars in a cocoon. It was a thing inexplicable to outsiders but undeniable to those who lived through it. Racism was endemic. African Americans were isolated purposefully by a white establishment that denied them even the meager political and economic progress being made in Atlanta and elsewhere. For a black man living in the South in the early '60s, Martin Luther King Jr.'s dream was as insubstantial and unreachable as a cirrus cloud over a field of cotton. It was easier to touch the sky. Doctor King actually had a campaign to register voters in Albany, Georgia. He traveled there with Andrew Young and his other civil-rights leaders. It failed. Albany was the only place it failed, and Martin Luther King had to move on. "My father and all the white people I knew in Albany were segregationists, you might even say racists, but they didn't think they were," Tommy said.

My father would have slapped my face if I used the n-word, but he wasn't about to call a black female a lady or "Missus." I believed our community was run the way it should be because my father and his patriarchal friends felt that our way of life was the appropriate way of life and that everybody treated everybody honorably.¹¹

This was the era of Elvis, James Dean, and Marlon Brando, of bored teens chugging beer and circling aimlessly around small-town squares and big-city parks in flathead Mercs and chopped Ford coupes, searching for something elusive and inexpressible to give meaning to their lives. Dislocation and rebellion blared nonstop from Albany's "Johnny Reb" radio.

Tommy's angst was unnoticed in the zeitgeist. But it was there, nameless and unsettling, just below the surface of a seemingly carefree existence. A therapist, had one existed in Albany, might have recognized cognitive dissidence, stress generated by having to constantly reconcile contradictory impulses, thoughts, beliefs, and attitudes. In Tommy it triggered rebellion. At first it was inchoate and unconscious—drinking, gambling, carousing, wrecking cars, causing trouble in and out of school—the familiar and permissible alpha-male misbehaviors of the era. When Tommy began to ask the inevitable questions of his father: Why aren't there any black students at school? Wouldn't we have a better football team with them? Why are the streets south of Olgethorpe Boulevard broken and unpaved? Why are the defendants in the courtroom overwhelmingly black, the juries never? In an overwhelmingly black county, in a majority black city, why are there no black officials? His father would hem and haw and finally cut him off. "Ain't nothing to tell, son. Ain't nothing to tell."

There was a lot to tell, and a lot for a sensitive young man to absorb and remember. The county sheriff, "Cull" Campbell (all the sheriffs in south Georgia seemed to have names like "Cull" and "Gator" and so on) kept a framed photograph of a lynching on his office wall. Six black men hanging from a tree. Tommy walked past it 100 times on his way to his daddy's law office. When he asked about it, Rosser

11. COPPOLA, *supra* note 3, at 42.

Malone put down his newspaper and explained that one of the men had raped a white farmer's wife while her husband was out in the fields. The sheriff had roused his dogs and deputies and chased the assailant to a cabin. There they rounded up six black males. The dogs couldn't identify who was the guilty man, so they hung all six. This is the truth. "White farmers out in the fields need to know that their wives are safe. They had to do it."¹² "I accepted the things my daddy told me to be true," Tommy told me. "I learned later that a lot of what he said wasn't the way it was."¹³

The Establishment Shaken

In January 1961, Tommy was beginning his second semester at the University of Georgia when U.S. District Court Judge William Bootle stunned southern segregationists by ordering the university's admission of two African American students, Hamilton Holmes and Charlayne Hunter, ending 170 years of segregation. Like tumbling dominoes, other institutions of higher learning throughout the South fell open. All this might have happened on another planet. Tommy's scholastic interest ran to drinking, dancing, shooting pool. The gangly 6'3" freshman was in his fraternity house when the calls came pouring in from the governor's mansion and the statehouse. Governor Ernest Vandiver, who campaigned under the slogan "No, not one"—meaning that no black child would ever sit next to a white student in a Georgia public school—was saying that the more people get arrested, the better. In the fraternity, the upperclassmen began passing out cherry bombs. Tommy Malone was swept up in what today would be a flash mob. Outside Charlayne Hunter's dorm, one of the seniors thrust a hand-painted sheet into Malone's hand. "I'll tell you why it hurts," Tommy said more than fifty years later. "It's just one word: 'Nigger go home.'"¹⁴ Tommy was arrested. A riot ensued. Bricks and bottles were thrown, cars overturned, hateful epithets shouted, tear gas floated

12. *Id.* at 45.

13. *Id.*

14. *Id.* at 61.

across the campus. Ultimately, the charges against Malone were dismissed. But the incident demolished Tommy's faith in everything he'd been taught and replaced it with a furious determination that no, not ever, would he participate or tolerate such inhumanity. He recalled returning to Albany later that fall: "I was crossing the street with my daddy—he always parked behind the courthouse—and it took me twenty or thirty minutes to shake hands with everybody congratulating me like I was a hero."¹⁵

Tommy graduates from law school. "When I came back, I was not a kid who had to accept what I was told. I was a man. And not just a man, but a lawyer-man who could make up own mind about what cases to accept and reject."¹⁶ His father was now the state commissioner of fish and game, living in Atlanta. Tommy pivoted the firm from bread-and-butter divorce work to what he called "new business."¹⁷ Tommy would show up at the county courthouse each morning, volunteering to represent indigent defendants.

I'd get them all to sign a \$50 note not expecting anybody to ever pay me but I'd get whatever I could, \$10 or an old car. I represented folks charged with everything from rape to child abuse to murder. It really was *pro bono*, but the *bono* was the trial experience I got handling these cases and dealing with people.¹⁸

On the civil side he bumped up against the harsh realities of south Georgia. Only a tiny fraction of Albany's African American population was registered to vote. There were no black jurors. An employee who suffered a workplace injury would never consider suing for compensation. He'd lose the case and he'd lose his job. A juror who dared vote on the—let's say on the rapacious landlord or a negligent business—would have his mortgage pulled at the local bank.

15. *Id.* at 61–62.

16. *Id.* at 74.

17. *Id.* at 72.

18. *Id.* at 72–73.

Tommy charged ahead, finding, researching, and making good cases and losing them. In his first major wrongful-death case, he represented Billy and Helen Jennings Black, the parents of a five-year-old boy who had been struck and killed by a speeding motorist in the middle of the Albany State campus, a historically black university. The child's father was a professor and later president of the school. The defendants, both white, were a car salesman and the owner of the Albany Cadillac dealership whose vehicle the salesman was driving. The evidence clearly indicated the driver had been speeding, never swerved to avoid striking the child, never blew his horn, and left 300 feet of skid marks before finally stopping the car. He shouldn't even have been traveling on that road. It was a private road, off limits.

The jury pool was all white. Tommy had been warned by his father and others never to press prospective jurors too closely in *voir dire*, lest they feel you were putting them on trial. So he didn't. Sure enough, Tommy later learned that the jury foreman was the dealership's insurance broker. The defendants were exonerated, but the thing that stayed with Tommy was not the pain of losing a well-argued, fact-based case. He'd lose many. But the fact that Billy and Helen Jennings Black, whose lives had been shattered by the death of their little boy, had never had any expectation of winning. "I never did think racially until I lost that first case," Tommy said. "This was the way they treated the African American community."¹⁹

Despite the imprecations of his father and the outrage of the white establishment, a day came when Tommy walked into the office of a very leery C.B. King, the only African American lawyer practicing south of Atlanta, and proposed they associate on cases. C.B., a legendary civil-rights attorney with a near-photographic knowledge of the law, endured every indignity at the hands of the courts and his fellow lawyers. If he asked for a drink of water in a courtroom, they brought him a bucket and a ladle. He eventually agreed, and it became a financially rewarding collaboration. And a generation later, Tommy Malone was happily associating cases with C.B.'s son, a pattern that repeats itself again and again in Tommy's career. Using his

19. *Id.* at 77.

prominence, political clout, and good heart to ensure that no one else endure what the black residents of South Georgia went through, Tommy convinced even his father, then a magistrate court judge with the authority to name associate judges, to appoint a young African American attorney named Herbert Phipps. Judge Phipps went on to become the chief justice of Georgia's Court of Appeals. And to this day he credits Tommy Malone for his friendship and career success.

So how does this great lawyer who comes to represent important cases emerge out of this background? What about Tommy Malone led him to be willing to take on the power structure in his community and begin representing people against prominent doctors and hospitals? It wasn't the money because there wasn't any money to be made at that time. There's nothing specific in his background that would cause us to predict that he would become one of the first white lawyers in the Deep South representing his African American community members. A kid who grew up in the Jim Crow era in South Georgia who goes off to college—not an especially progressive young man—comes back home after he finishes law school and begins representing the black community against the establishment at a time when it just wasn't done. The answers are as wide and deep and varied as the human experience. As far as can be determined, there was no climatic moment, no Saul-on-the-road-to-Damascus conversion in young Tommy Malone's life, though certainly there were sign posts. The young Malone sensed a guiding hand directing him to the good, but there was no teacher or mentor to illumine the path forward. Just the gradual accretion of experience, knowledge, insight, and pain on a sensitive soul, kindling a fierce passion and righteous anger. Through this lens we can understand Thomas W. Malone as a very important figure in the history of his region, and in some respect, the history of our country. Tommy's is the story of the growth and development of the South. God bless him and keep him.

QUESTIONS & ANSWERS

Q: So what do you think was the turning point for Tommy, [from representing the African American community to medical malpractice]?

A: That's a really good question. Slowly, slowly black voters began to register to vote. Today the mayor and most of the political establishment down there is African American. So that certainly was a factor. I think Tommy moved to Atlanta where there are a lot of doctors, to put it simply. And it wasn't like you were going against God and the church to bring a malpractice suit, which is the way it was when he was a young man.

I don't want to paint his father as a villain. There were many, many interactions in the book where you come to get an appreciation for Rosser Malone, whose own father had in fact murdered somebody. I mentioned how history had covered it up and how Rosser would never deal with his own past. And he tried his best to teach Tommy what he thought, and completely wrongly, what life should be like and what community should be like. He was an interesting character, in a way. He was a lawyer who went to work during hunting season in his fatigues and camouflage. It was not what the buttoned-down, white-shoe-lawyer law firms were familiar with.

THE INNOCENCE PROJECT*

Barry Scheck **

ABOUT THE SPEAKER

This speech honors John Reed in that it, like John's speeches to this Society, is about professionalism. To John, the search for professionalism was a lawyer's constant search for justice. In his speech to us in 2007 when we were in Costa Rica, he closed with this story: He said, "I ask you to recall with me the clichéd story of three masons working at a construction site. A bystander asked each one what was he doing. One said, 'I'm laying bricks.' The second said, 'I'm putting up a wall.' And the third one said, 'I'm building a cathedral.'" And then John added, "I put it to you that that simple little story is a metaphor of the trial bar. One lawyer says, 'I'm examining a witness.' The second says, 'I'm trying a case.' And the third says, 'I'm seeking justice.' John's last words to us at that meeting were, "I hope you are building a cathedral to justice."¹

Barry Scheck has been building that temple of justice all of his life. He did that work as a trial lawyer in public defense in the Bronx. His trial work seeking justice continued on behalf of clients, many of whom you have heard—Louise Woodward and, of course, O.J. Simpson. Along with Peter Neufeld, Barry founded the Innocence Project, born of his expertise in scientific evidence and the availability of DNA testing. Since its formation, the project has obtained justice for the wrongfully

* Edited transcript of address delivered at the Annual Convention of the International Society of Barristers, Tucson, Ariz., 29 March 2019.

** Professor of Law, Benjamin N. Cardozo School of Law; partner Neufeld, Scheck & Brustin, LLP; co-founder and Special Counsel at the Innocence Project.

1. John Reed, *Addicted to Justice*, 42 INT'L SOC'Y BARRISTERS Q. 376, 383 (2007).

incarcerated innocent. He will talk to you about one of those cases today.

Today our courts continue to admit unreliable eyewitness and scientific testimony. They continue to allow the exclusion of minorities from juries. Yet despite that, in capital cases we see fewer death sentences. That small piece of justice, I suggest, is due in no small measure to the fact that jurors know of people on death row who did nothing wrong and yet were sentenced to die and who have since been exonerated. One day soon when the death sentence is abolished, I suggest to you that one builder of that edifice of justice will be our next speaker, Barry Scheck.

I

INTRODUCTION

The Innocence Project, which the ISOB has supported for quite some time, started as a clinical program at the Benjamin N. Cardozo School of Law because my colleague Peter Neufeld and I got in on the ground floor of understanding something about DNA technology. We now have fifty-seven innocence organizations across the country, mostly at law schools, because we chose to organize them in law schools. And we have, I think, thirteen organizations across the world, including Taiwan, Latin America—lots of places. We're dividing them up into regions. So in two weeks when we have our twelfth Innocence Network meeting in Atlanta, we'll have hundreds of exonerees there, and their families, and lawyers from all across the globe.

II

ARCHIE WILLIAMS

We started in 1992, and we were just three people. We got some exonerations and we went on the Phil Donohue Show. You wouldn't believe how many letters we started getting from people after that. One letter came in 1995 from Archie Williams: "Dear Barry, my name is Archie Williams, I'm 35 years old. I'm serving a life sentence for rape and attempted murder of a Baton Rouge woman I know I didn't commit."

Now, right away, why is he—or anyone—getting life—for rape? How many of you have ever been to Angola Prison? How many of you have ever seen these movies—two movies were made about Angola, called “The Farm.” Everybody in Angola is either on Death Row or there for life. If you get convicted of rape in Louisiana—which has the highest per capita incarceration of any place on the planet—they send you to the Farm, Angola, and you’re there for life.

So the first part of this story is that Archie’s down for life.² His letter goes on,

As the years go by, I sit here year after year, it’s like no one cares. You have no outside help. People let you down, give up on you after about the first two years, then all you have is prison life. By the grace of God I’m still holding on, hoping and praying that someone will answer my letter and help me. I have mailed my case to many places for help but no response. Talked with everybody I can think of. I know if only one of the person[s] picks up my case and read it, they would know that I’m not guilty. I’m innocent. If I could get a DNA test, it would prove my innocen[ce]. It’s all about the rape of a woman, wife of a big-time Baton Rouge attorney[—] that’s why no one wants my case in Baton Rouge because everyone knows the man. I was last denied in Middle District Court. I’ve

Stiles

Dear Mr. Barry,

My name is Mr. Archie C. Williams
I'm 35 years old, I'm serving a life sentence
for a rape and attempt murder of a Baton Rouge
woman that I know I didn't commit.
As the years go by I sit here year after
year, it's like no one cares. You have no
outside help, people let you down and
give up on you after about the first 2
two years. Then all you have is prison
life. But by the Grace of God I'm
still holding on, hoping and praying for
faith that someone will answer my letter
and help me. I have mailed my case to
many places for help but no response.
Talked with everybody I could think of.
I know if only one of the person pick up
my case and read it they would know
that I'm not guilty. I'm innocent.
If I could get a DNA test it would
prove my innocence. It's all about the
rape of a woman, wife of a Big Time
Baton Rouge Attorney that's why no
one wants my case in Baton Rouge because
EVERYBODY KNOWS THE MAN I WAS LAST
DENIED IN MIDDLE DISTRICT COURT.
I've been here in LA State Prison for
12 years. No one want help me because
I don't have any money, I'm trying so
hard because I know I'm innocent.

I found you by talking to a friend.
I know that people must write you a
lot this time but if you could or would please find
it in your heart to help me, I would
appreciate any help that you could
give. It's only you reading my case.
In closing is a closing argument of
my case.

Thanks,
May God Bless you and your family
Archie C. Williams

2. Text of Archie’s letter is available at <https://www.innocenceproject.org/archie-williams-heartbreaking-letter-to-barry-scheck-its-like-no-one-cares/>.

been in here in the L[ouisian]a State Prison for 12 years. No one won't help me because I don't have any money. I'm tr[y]ing hard so hard because I know I'm innocent. I found you by talking to a friend. I know that people must write you all the time. But if you could or would[,] please find it in your heart to help me. I would appreciate any help that you could give, if it's only you reading my case. In closing is a closing argument of my case. Thanks. May God bless you and your family.
Mr. A. Williams.

Now, I'll never forget: I read the closing argument, which was by a woman named Kathleen Richey. The trial took place in 1982. Kathleen Richey was citing Elizabeth Loftus's book, *Eyewitness Testimony*. Elizabeth is one of the leading cognitive psychologists in the world, and she was one of the first to start looking scientifically at the problem of eyewitness misidentification. And this public defender in Baton Rouge, Kathleen Richey, was citing that book.

The transcript tells the story: This poor woman is in her house in a wealthy section of Baton Rouge when a man breaks in, in the morning, and attacks her with a knife and attempts, or did, sexually assault her. An African American man. She struggles with him. She's cut in the stomach. There's blood on the bottom of a door where she was struggling with the assailant as the sexual assault was going on. All of the sudden her good friend, a lawyer, is coming back to the house with the victim's—call her Ann's—daughter and the friend's daughter. They come into the house while the sexual assault is going on, they go upstairs because they hear a ruckus, and the perpetrator pulls them in, attempts to get car keys from them, locks them in the room, and flees.

When finally they give descriptions to the police, they're of a man about five foot, nine inches tall, African American, and an approximate age. The police then decided to show photographs to the victim in this case, Ann. First they showed her a photo array of six people. She picked one of the photos and said, "That person looks like the individual that raped me, but it's not him. Go out and find somebody that looks like that." They then show her a second photo

array—all in profile—and again she says, “That guy, that’s the one who looks like the perpetrator. It’s not him; go out and find somebody that looks like him.” Now, of course, the photo that she was selecting was Archie Williams.

So what do the police do? This is how they handle eyewitness-identification cases. They have a tip that someone thought Archie Williams might have been a person who was breaking into houses and committing robberies and sexual assaults in this whole area. That’s how his picture got in the array. They show the victim a third photo array, again repeating Archie Williams’s picture. They don’t want to take no for an answer. Now, when you actually start looking at all the applied psychology on the science of eyewitness identification, and Elizabeth Loftus will tell you, when a witness picks a photo of a “filler,” a person you know is not the perpetrator, or someone else, and says that looks like the person, that’s one of the great clues you can get. When people are making eyewitness errors, ordinarily they are picking somebody from a photo array that looks most like the real perpetrator even if that individual is not the real perpetrator. So this was a great clue, but they kept on repeating the photo again and again. And it’s just common sense, but the science also shows that if you keep on repeating the display of photos or a person in a lineup, eventually they’ll pick that person because they think the police know things that they don’t know.

Eventually they show Ann a live lineup. She picks out the fellow whose photo she’s now seen three previous times—Archie Williams. Then they bring the friend in. The friend had had a very good look, and the friend looks at all the people in the live lineup and she says it looks kind of like one of the fillers, but not Archie. She’s very clear about that. So you can see right away, this is not the world’s greatest eyewitness case. And, of course, Archie Williams is five foot, four; the perpetrator is five foot, nine. All these factors combined make it a bad case. And Kathleen Richey, the public defender, I later learned got this case one day before the trial. But she’s a very, very smart woman and did a great job in putting this case together.

So, I’m reading this transcript and I’m thinking, Oh my God, it’s the situation Elizabeth Loftus describes. This lawyer knows what

she's doing and this case still looks terrible. So let's get a DNA test, okay? So we go to Baton Rouge, Louisiana. Now, this is all true: The district attorney in Baton Rouge, Louisiana, is a guy named Doug Moreau who played for LSU, the Miami Dolphins, the self-proclaimed Rush Limbaugh dittohead, and I walk into his office and I have a copy of a National Institute of Justice report with all kinds of police and prosecutors recommending that for certain kinds of cases, the DA should consent to a DNA test. At this time there were only two states that had a post-conviction DNA statute, and in states like Louisiana and most of the country you did not have a statutory right to go into court after a conviction and get a DNA test. So we said, "Look, this could be definitive; you've got to do it." And Doug Moreau—my hand to God—looks at me and says, "You know what? If I give Archie Williams a DNA test, I'm going to have a shitload of innocent people from Angola Prison asking for more DNA tests. And I'm going to have to give it to them, and look at all the people we get out of jail." That's what he said to me.

Now, what Archie mentioned in the letter is true—that the husband of the victim in this case was a very prominent lawyer in Baton Rouge. And I knew a lot of lawyers in Baton Rouge. I have a very dear friend from college who was a prominent lawyer there. Everybody I knew was conflicted out of the case because they were friendly with this family. They did refer me to somebody—he's dead now—who had a big drinking problem. He was standing right next to me when Moreau said this, and I'm going, "Did you hear that, Anthony?" And he just shakes his head. Years later, when Peter Neufeld and I and Jim Dwyer, a two-time Pulitzer Prize-winning author who writes now for the *New York Times*, were writing a book called *Actual Innocence* that was all about these cases, I wanted to put that Doug Moreau story in the book. But I learned a lot from a libel lawyer. She said, "First of all, who was with you?" I said, "Anthony. Big drinking problem. That's not so great." But then she said, "You know what? Here's your problem. If you had triple hearsay in a newspaper, we could survive summary judgment, right? But if we put that in the book and he sues you for saying he made that statement, well, we

wouldn't be able to get the case dismissed." So I couldn't put it in the book, but I'm telling you all now. That's what happened.

So despite the Justice Department recommendations, the DA won't give us a DNA test. We've got a client in what looks like a terrible eyewitness case. We think he must be innocent. So what do we do? We have no way to get back into court. So we file a federal civil-rights case and federal habeas corpus and we ask for two things: Number one, we want a DNA test because there should be a constitutional right to prove you're innocent with a DNA test; number two, there are these fingerprints in blood near the bottom of the door and on the door frame that don't match anybody from the household—not her husband, not the victim, not anybody—and they're in very, very probative places. And they were just beginning to develop what's known as an AFIS—an Automatic Fingerprint Identification System—where they could try to identify fingerprints to people. So I said, "Let's do a DNA test, and let's run the fingerprints in an AFIS database because they're in probative places." We filed a § 1983 action and a federal habeas. We got Archie out last Thursday. When we got him out, those two applications were still pending. We parked them in a court. We couldn't get a ruling on them.

At the same time, we finally got a statute passed in Louisiana—it took us eleven years—that created a statutory right for a post-conviction DNA test. Sixteen years after we got Archie's case, we were finally able to get the DNA test pursuant to the statute. And the DNA came back identifying the husband. That happens. He was the last consensual partner. And whoever committed this crime either didn't ejaculate or used a condom or something. So we're back to square one.

But we still are pursuing the fingerprints. We go back first to the state courts in another effort to get the fingerprints tested. We bring in all these fingerprint experts. In the blood at the bottom of the door is a palm print in blood. And the experts look at it and say Archie's excluded from the palm print in blood. So that's pretty good evidence. But the police claim they no longer have the elimination prints from the husband and other members of the family, so even though we can exclude Archie, maybe it's a member of the family. They had originally looked and had those elimination prints, but they no longer had them.

And we said, “Can you get them?” And they say, “No, we’re not going to get them and we’re not going to run this in any kind of an AFIS database.” And we were stuck in the lower courts in Baton Rouge, Louisiana, for another nine years.

We didn’t want to move the federal cases forward because we had already come in second in the United States Supreme Court in a case called *Osborne v. Alaska*, where the Supreme Court said there’s no constitutional right to a post-conviction DNA test. There’s an argument about state-created liberty interests that’s still viable, which they gave us in the opinion. But we knew it would be a risky place to go with the fingerprint argument—that we had a right to get a fingerprint-database search. So we were still waiting.

I must tell you, there’ve been quite a number of cases in the history of the Innocence Project in which we just wait for the judges to change. And the judges did change in Baton Rouge, Louisiana: all of the sudden, there were two African American judges (one’s the judge and the other is the commissioner—like a federal magistrate judge). And a month and a half ago, Vanessa Potkin, who was our first senior staff lawyer, shows up in court with Emily Maw, who runs the Innocence Project of New Orleans. This judge looks at the prosecutors and says, “I’m looking at this case and I’m telling you that if you don’t—you’re not consenting, I understand, to the fingerprint database search—but you’ve got to get those elimination prints, because if [Archie Williams] can establish that it’s not his palm print in blood and these fingerprints in other places, I’m going to give that serious consideration. And if you don’t find those elimination prints, I’m going to bring in this prominent family and we’re going to print them all.” That’s what she said.

And guess what happened? They found the elimination prints before the next court appearance. And we brought up a fingerprint expert, Ron Smith, from Alabama. He’s perfect for this because he speaks with a really good Southern accent. He came up and he looked at the prints, eliminated Archie, of course, from the fingerprint in blood and he eliminated the other people in the family. Then they put it into the fingerprint-database system and—guess what?— we got a hit. Who was it to? It was to a man named Stephen Forbes. And if you

do a diagram of Baton Rouge, you have the home where this victim was, and then, all around it are a series of rapes, vicious rapes, that this guy committed with exactly the same kind of MO, using a knife, trying to steal the keys from the victims afterwards, all surrounding the victim's home. And when he was finally caught, they interviewed him and he said he'd been raping women for fourteen years. God knows how many crimes he committed after they convicted Archie Williams.

And that is something we find in our work at the Innocence Project. I think we're up to something like 367 post-conviction DNA exonerations in the United States. Nobody argues with a DNA exoneration. But for forty-seven percent of those cases we've been able to identify the person who really committed the crime, who went on to commit other rapes and murders and serious violent crimes. This is why I think the innocence movement has captured the imagination of everyone, left and right, in the country. It's very simple. It's a public-safety issue. Because if you can start fixing the junk science, the eyewitness misidentifications, the false confessions, the police misconduct, the prosecutorial misconduct, the lousy work of defense lawyers, the principal contributing factors to wrongful convictions, not to mention the intractable problem of race, if you can begin to do that, you not only prevent the innocent from being convicted, but you can prevent the guilty from being free and committing more crimes. And who can be against that?

Now, of course, Doug Moreau, the Baton Rouge DA, was against that, and all the people who followed him in his office who as first-assistant DAs prevented us from running those fingerprints in the database all those years were against that. You know, we found out something else that was utterly disgusting. They said, "We think Archie was a serial rapist, and there are these other unsolved rapes that we think he committed." So at one point we went into court and said, "If you think that's true, go get the rape kits in those other unsolved rapes and test those and see if they come back to Archie." And they never said a word. But when we got this exoneration and we started looking through his files, we found out they had in fact done that, and they'd excluded him and never even mentioned it. One

prosecutor, a first assistant named Prem Burns, so hated us, so hated the efforts we were making, they literally said in that police report of the lab test, "This will stop Archie Williams from trying to become free." So that's what we were up against. But it was quite extraordinary to leave that courtroom in Baton Rouge last week.

III ARCHIE FREE

Archie has an incredible family. I mean, they are all over the country, they're literally beautiful people. And Archie himself, if you go to our website you'll actually hear, is a great singer. In one of those Farm movies they have him singing, leading all the inmates in Angola, in a celebration of Barack Obama's inauguration. He's singing a spiritual. He got out. All he wanted was to go on the Steve Harvey Show and sing, so we're trying to arrange for that. And he'll be singing at the Innocence Network conference next week.

IV CONVICTION-INTEGRITY UNITS

We have these innocence organizations all across the United States, and we've inspired law students and lawyers to voluntarily come in and take on these cases, one after another. It took us a quarter century to get this guy out of jail, and you have to build institutions that have that kind of staying power, and all these places do. Last week, we convened a number of prosecutors in what we call Fair and Just Prosecution. This is a group of progressive prosecutors who were elected with the help of national donors in races all across the United States, in places that you might not necessarily expect. It's not just my District Attorney, Eric Gonzalez, in Brooklyn, but it is Melissa Nelson, who is a Republican in Jacksonville, Florida. Many, many years ago, Melissa did an innocence case with me and Nina Morrison, one of our staff attorneys who has spoken to this group. She helped a group of prosecutors decide to exonerate Chad Heins, who'd been wrongly convicted in Jacksonville. And when Melissa got elected, she decided

she was going to start a conviction-integrity unit. Other prosecutors in the group are Aramis Ayala in Orlando, Florida, and Adam Warren in Tampa, Florida.

A group of progressive district attorneys from Alabama and from all across the country, twenty-four of them, sat in a room with us, and we talked about how they should form conviction-integrity units like that Melissa decided to start in Jacksonville. In 2006 the Innocence Project was able to work with the district attorney from Dallas, Texas, an African American who was elected that year—nobody saw him coming—named Craig Watkins, and we started a conviction-integrity unit in Dallas. In these alliances, innocence organizations and the prosecutors worked together to reinvestigate old cases and see if we could prove people innocent, whether by DNA testing—there was a lot of stuff we could test in Dallas—or fingerprint-identification systems or any other means of reinvestigation that you could imagine.

When Melissa Nelson formed a conviction-integrity unit, she got letters right away from two people who said that they had been wrongfully convicted in 1976. As she began to investigate the case with her assistant, Ms. Tibodeau, who was running the conviction-integrity unit, they realized that one of the most prominent lawyers in Jacksonville, Hank Coxe, who helped us start the Innocence Project in Florida, had prosecuted this case. They realized that they had ignored the forensic evidence—that a single bullet that came through the window, just one, had killed the victim, not two bullets from two individuals, who, according to an eyewitness misidentification, had come into the house. And then they realized that the two convicted individuals, who were proclaiming they were innocent, could establish that they were at a birthday party down the street. They had forty alibi witnesses, but they had lawyers who just didn't do the job. And the police had just made assumptions and hadn't even looked at the forensic evidence; they just relied on the identification. Yesterday, Melissa let the two convicted individuals go. She brought in the Innocence Project of Florida to help represent them at the end, but she really did it herself with this conviction-integrity unit.

There are now about forty-five of these units across the country, working with innocence organizations and defense lawyers, and more people are getting out of jail than ever before. So it's quite an extraordinary time; a lot of criminal-justice reform is going on in this country.

QUESTIONS & ANSWERS

Q: Does the Innocence Project take this situation to the next level with regard to civil liability for malicious prosecution? It seems like that's a hammer that should be used more often.

A: Oh, God. The number-one reform I believe to help pass is compensation laws, and we've done that across the country. What state are you from?

Q: I'm from Florida, and I know Melissa Nelson and Hank Coxe. In fact, what was ironic about that is that Hank Coxe is the one who talked Melissa Nelson into running for state's attorney.

A: I know.

Q: It's interesting. Hank's a very good lawyer.

A: He's a wonderful guy. He really helped us set up the whole Innocence Project there.

Q: Florida has a compensation plan, assuming the exoneree doesn't have past felonies on their record.

A: One of these two does.

Q: Fifty thousand dollars a year, up to a cap of two million dollars.³

A: But if you're in since 1976

Peter Neufeld and I never expected to wind up doing federal civil-rights work. But we did have a small firm. We represented Abner Louima in New York City. We sued the police union as well as the city. We won that case. We started doing some racial profiling cases. But we could not get anybody to do a wrongful-conviction case. John Grisham wrote a book called *The Innocent Man* about one of the cases we did, Ron Williamson, who came within five days of execution, and

3. See Fla. Stat. § 961.06 (a), (e) (2017).

Dennis Fritz. We went to Gerry Spence. We went to everybody, every plaintiff's . . . —we couldn't get anybody to take this wrongful-conviction case. So eventually we wound up taking it ourselves with a death-penalty lawyer in Kansas named Cheryl Pilate, and we wound up suing everybody. Federal civil-rights cases are very hard. There're all kinds of immunities—qualified immunity for the cops, absolute immunity for the prosecutors. You have to count on prosecutors when they testify to say, I didn't know about any of the exculpatory evidence, I never saw it. Because if they admit they did, it looks bad for them. If they admit it, though, they get an immunity back to the cops. It's very hard to bring these cases.

On the other hand, we've begun to do them. Our civil-rights firm—Neufeld, Scheck & Brustin—has brought a lot of them. Others have come up around the country. And now these cases are among the most successful kinds of things that you can do as a plaintiff's lawyer; that is to say, if you can get to the jury—and that's a pretty big *if*, because you have to show bad faith, misconduct, that caused the wrongful conviction, and it's got to be by a cop. And you've got to find somebody who can pay; you've got to do crazy things with insurance policies. Unfortunately, I know far more about insurance policies than I ever thought I would in my life.

But you look at a jury and you say, what's the value of the harm? What's the value of the harm of doing a year in a maximum security prison? I don't care who you are. We don't even bother asking for lost wages in most of these cases. What's the value of the harm? It's always a million dollars a year and sometimes more, and none, none, of these verdicts has ever been knocked down by any court, state or federal. So it's now become kind of an industry.

But Florida is a very tough place, as you know. The legislature has to approve all the payments and we'll look at that case. One of the two defendants had prior felonies, so he can't get paid in Florida, and that's a very tough place to sue. I've done it.

Q: Barry, talk about the O.J. Simpson case. I was just wondering, with a couple of decades of hindsight, how do you think that case has affected our judicial system and just us, culturally?

A: The O.J. Simpson case did nothing good for race relations in this country. It was a disaster. I did like some aspects of the documentary that was done, eight parts, on ESPN. But it was always a tabloid creation. A friend of mine from college, Steve Brill, created Court TV, and we used to have standards—ethical rules for commentators going on Court TV. You had to know what you were talking about in order to go on, et cetera. The O.J. Simpson case destroyed Court TV, and Steve sold it. The ABA even put out a book about high-profile cases.

Ironically, the only good thing that came out of the O.J. Simpson case is that, despite everything we did to attack the way the adversaries did the DNA evidence—the way they collected it, the DNA experts (a guy named Woody Clark, who became a judge in San Diego, and Rock Harmon)—we all knew each other, we were all friends, because we'd been working on DNA cases together by that point for maybe a decade. But they—everybody—agreed. Right after the trial, Janet Reno created a commission on the future of DNA evidence, and I was one of those on that commission and helped chart it. We put out a publication saying what every law-enforcement officer ought to know about DNA. And that was never to take a wet sample, never to put it in a plastic bag, because that creates bacterial degradation and you lose the DNA. Always change your gloves. Remember how we went after the people who were collecting the evidence? What about that Mr. Fung? He wasn't wearing a glove when he touched an envelope. You always have to change your gloves. They made fun of us when we said it was a big problem that the analyst at the Los Angeles Police Department lab had O.J.'s blood in a purple-top tube, opened it, had an aerosol of high molecular-weight DNA, and then touched every single sample—all the blood drops from Bundy and the black leather glove, without changing his gloves—and transferred all of the suspect's DNA onto all of those different things.

Now, I'm not going to argue about issues of guilt or innocence. I think the civil jury got it right based on what they had. I think the criminal jury got it right based on the evidence that *they* had. But there was never any question that we were using 19th century collection techniques for 21st century technology. And I can assure you that the

entire forensic community responded, and we changed the way that evidence is collected. We changed the way labs were organized to a large degree. We got regulation on them. At the Innocence Project, we're very proud of the fact that we've led the way in getting rid of junk science, getting a National Academy of Sciences report in 2009, now a decade old, on the weaknesses of forensic science, and establishing the National Commission on Forensic Science (which President Trump abolished as one of his first acts in office). But we still have the National Institute of Standards and Technology working on all these different standards, because everybody's recognized from the beginning that the only really validated forensic assay you can rely on is DNA. Now we're doing better with fingerprints. And we're doing better with ballistics and other forensic evidence. But we've got to make them really scientific. We have to have empirical studies on how you validate it. So much of what passed for forensic science was not validated science. It was not done by our academic institutions. It really came out of police departments.

So the Simpson case did change a lot of that. Obviously, the Innocence Project was started before the Simpson case, but it was very helpful when we called people on the telephone and said we're calling from Yeshiva University's Cardozo Law School in New York City. We'd like to look at some samples to see whether there's a wrongful conviction in your jurisdiction. We want to go back and look for the evidence. And, of course, we'll do a DNA test that could show an innocent person was convicted, and maybe a lot of people in the jurisdiction made mistakes and errors. Will you help us? That's literally what we were doing, and it actually helped that everybody knew that the one thing we could do was that we could bring cameras. And if they didn't do the right thing—and it really was the right thing—we could get a lot of publicity. So in that way the Simpson case helped, but in lots of other ways it was terrible.

Q: Talk about the movie.

A: Oh, the movie. Thank you.

One of the things the Innocence Project has done is work with forensic scientists in all kinds of different disciplines, and one group

of these is fire scientists. It turned out that arson evidence, a lot of it, was completely junk science. Cameron Todd Willingham was a man who was convicted of an arson murder on the day before Christmas. After his wife went to work, it was claimed that he set fire to his own home and killed his three children. The ostensible motive for it was crazy. A jailhouse snitch testified that Willingham's wife had beaten up the children, and Willingham was afraid, so to protect his wife he'd burned down the house and killed all the children. Crazy.

But the way they used to do arson investigations is they would go to a crime scene and look at the debris to see if there was any evidence of a chemical accelerant being spread around the house. If they found no chemicals, then they would assume, based on the so-called science, is that it must have burned off. And how do we know that it must have burned off? If we see scouring of floors, if we see wood where there's alligatoring; if we see any of a number of visual cues, then we know that this was a fire set with an accelerant, even if no chemicals were found in the debris. This is total nonsense. In the so-called Limehouse Experiment, they started burning down buildings and looking and seeing and realizing that everything that these so-called arson experts were testifying to was total nonsense. And at the trial of Cameron Todd Willingham, the arson experts got on the witness stand and they said, "The fire doesn't lie—it talks to me." This was their testimony. And they convicted this poor guy, a working-class guy in Corsicana, Texas. He didn't react right to the death of his children. And he was eventually executed.

After exposing a crime-lab scandal in Houston, we at the Innocence Project were able to get a forensic-science commission going in Houston. The first thing we did was bring in fire scientists to compare two cases—one where somebody was exonerated based on exposing the junk science, and the Willingham case. It turns out that just before the execution of Cameron Todd Willingham, his family had been able to come up with a real arson expert who said all this evidence that led to his conviction had been exposed as nonsense ten years earlier. Yet, despite that report from Dr. Hurst, Governor Rick Perry executed Willingham. He had the report literally in his hands. There are all kinds of problems with that case.

We brought a complaint to the Texas Forensic Science Commission. When Governor Perry saw that the Commission was going to come to a conclusion he didn't like, he removed a number of commissioners (talk about a Saturday-night massacre). But even after the purge, we eventually got a statement that the science in Willingham's case was totally unreliable. Then we got a fire commissioner in Texas to start looking at old arson cases and to overturn them. David Grann wrote a great article about this case in *The New Yorker* called "Trial by Fire,"⁴ which won every award you could win. And on May 17th, a movie, *Trial by Fire*, starring Laura Dern and a guy named Jack O'Connell will be coming out. It's very powerful and it's very good, so send all your friends and relatives.

Q: Barry, a lot of these cases we're hearing are from the '70s, '80s, '90s. Has the criminal-justice system gotten better within the last ten to fifteen years? And, if not, what reforms are still needed to make it better to avoid these wrongful convictions?

A: We have a whole reform agenda. We've done a lot about eyewitness identification. We now videotape interrogations in many states. We go state by state. We're trying to do something about jailhouse snitches. We have a massive campaign to get the mainstream scientific community in this country to start validating and reforming forensic science. But people never understood, to this day, how bad it was—how many innocent people are convicted because of it. We have to start thinking right now about a criminal-justice-reform act in 2021. That's how you have to think. And that can be done. One part of it should be a Marshall Plan for indigent defense because, as Don Beskind and I can tell you, having daughters who are working in the trenches of criminal defense, we really need resources for the defense. As great as it is to have progressive prosecutors in office, as great as it is to have them do something about bail, so many innocent people plead guilty to misdemeanors with terrible collateral consequences

4. David Grann, *Trial by Fire*, NEW YORKER (Aug. 31, 2009). David Grann spoke to the ISOB in 2011. See David Grann, *The Lost City of Z: A Tale of Deadly Obsession in the Amazon*, 45 INT'L SOC'Y OF BARRISTERS Q., no. 1, 2011, at 23.

because in so many places across the country they don't have the money to defend themselves, and their lawyers aren't otherwise funded. We have to do something about that. As great as it is to have a progressive prosecutor, you need a real defense lawyer.

When we started this work, we got a DNA exoneration in West Virginia. An analyst there named Fred Zane used to do only dry lab—computer models. He wouldn't even do the experiments, the serology or whatever he was doing, a lot of which, even when he did, he did wrong. But he didn't even do the experiments. And all these people were convicted, and he was cheered as a great savior. A woman named Joyce Gilchrist did the same thing in Oklahoma City. And on it goes. But where was the defense? If a guy didn't even do a test, why didn't the defense lawyer find it?

The truth is, you need defense lawyers.

You had a talk about artificial intelligence just before I walked in.⁵ I wish I had heard the whole thing. It sounded very interesting. It's a topic of tremendous interest to all of us. But I'm telling you right now, we have systems of data-gathering about citizens. You walk down the street, there's a surveillance camera. You heard about facial-recognition software and how you train people, how you train the machines on data—they can make mistakes. But when that person walks down the street, automatic facial recognition. They'll look at an artificial license-plate reader to see if you can attach that person whom you think you have in the facial recognition to the last place their car was, then you begin to track their cell phones. There are secret ways the government has been going about it, something called stingrays, where they'll start looking at it.

Now there's all kinds of powerful technology, much of it soon to be done with a deep learning and artificial intelligence that's looking at everything. One of the big challenges is that, on the one hand, that kind of technology can do amazing things in investigative terms; on the other hand, there's all kinds of evidence of innocence that's lying unstructured in the law-enforcement files that they don't even know is there. There's so much that has to be done. So I think, yes, we have

5. Bill Brown, *Surfing the Technological Tsunami* (forthcoming).

many powerful tools. The system is getting better in some ways. In others, it's getting more dangerous.

The most important thing is that we as lawyers have a responsibility to make sure certain fundamentals of our adversary system can work. Trial by jury. That one's disappearing. You all know that. I don't even have to tell that to this audience. We need to revive it in very powerful ways.

And we really need to do something about mass incarceration in this country. I started as a public defender with Don's partner for many years, David Rudolf, in the South Bronx. And I've watched. As the crime rate has dropped, the number of people going into prison has risen. Every one of the people I know and like—like Amy Klobuchar or Joe Biden or a lot of the people who were public defenders or prosecutors during this period, all liberals—they were all for mandatory minimum sentencing. Sentencing guidelines. We put so many people in jail for the longest periods of time you can imagine.

And now we've got to go get them out because they're doing life, like Archie Williams. We've got to get these people out. They're long past the age that they're going to be committing any crimes. These sentences are excessive. And the whole theory that doing this was going to cut crime rates—there's no proof of that, and it's done terrible, terrible things to our country. So we have to focus on the fundamentals. We have to improve indigent defense. We have to get some judges who know how to try cases on the bench in state and federal courts. Can you imagine all these people being appointed who have never even tried a case, and they're trying big, complicated federal cases? That's what's going on. I don't have to tell you guys. You know better than I do.