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## Representing the Powerless: Lawyers Can Make A Difference

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# REPRESENTING THE POWERLESS: LAWYERS CAN MAKE A DIFFERENCE

*Alvin J. Bronstein\**

Judge Coffin, Mrs. Coffin, Chief Justice Wathen, Dean Zillman,  
Honored Guests:

I am honored to be the fifth person in the lecture series that honors Judge Coffin. Another great judge, William O. Douglas, in the second volume of his autobiography, included as a prelude the following words written a century earlier by Henry David Thoreau in *Walden*: "If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away."<sup>1</sup> I thought I would share with you some of the music I heard during my career as I tried, using Judge Coffin's words in his remarks on the occasion of the first Coffin Lecture four years ago, "[t]o keep alive the old ideals of [public] service."<sup>2</sup> And frankly, to the younger people here, I hope to influence some of you in how you spend the rest of your professional lives.

In the third Coffin Lecture, my former colleague and good friend, Pat Wald, a judge on the District of Columbia Circuit Court of Appeals, talked about measuring success for public interest lawyers in what I call fairly traditional terms: winning or losing, advancing a group's special interest, or furthering society's interest.<sup>3</sup> All true, of course, but for me, there was something else. If you can listen to a few powerless people who have never been listened to before—local black folks in Sunflower County, Mississippi, who in the 1960s had never been allowed to vote, or a shoplifter with mental health problems who had been brutalized in Alabama's prisons for thirty years—if you can listen to them and have their voices heard, you have made a difference. By listening to men and women in terrible circumstances and by assisting them in their desperate search for self-respect in a place often devoid of any dignity of its own, a lawyer, I believe, can make a difference.

The Bill of Rights in our Constitution is a marvelous document. It is a promise of equality, fairness and justice, but it is only a promise; it is not self-executing. For the Bill of Rights to have real meaning,

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1. WILLIAM O. DOUGLAS, *THE COURT YEARS* vii (1980) (quoting HENRY DAVID THOREAU, *WALDEN* (1854)).

2. Frank M. Coffin, *Remarks on the Occasion of the First Coffin Lecture on Law and Social Policy*, 45 *ME. L. REV.* 3 (1993).

3. See Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altruistic Lawyers*, 47 *ME. L. REV.* 1 (1995).

to have vigor and life, there must be a deep commitment on the part of many segments of our society—the courts, the executive branch, the legislature, at the federal, state, and local levels—all must have commitment and show leadership. There must be a commitment by lawyers, and most important, I think, there must be people willing to speak, to stand up and be heard. As Judge Coffin mentioned in his opening remarks, one of the most important courts in the history of our nation was the old United States Court of Appeals for the Fifth Circuit in the 1950s, 1960s, and 1970s, before it was divided into the Fifth and the Eleventh Circuits. The court was led by four great judges: two Republicans and two Democrats, Elbert Tuttle, John Minor Wisdom, Richard Rives, and John Brown. The book *Unlikely Heroes*<sup>4</sup> tells the dramatic story of that court and has one chapter on the role of the lawyers in those years. It ends in an interview with Judge Tuttle:

Critical as their role was, lawyers could act in civil rights cases *only* because there were those who insisted on exercising their rights as American citizens. “We became what I consider a great constitutional court,” Tuttle reflected, “and I think we largely have to thank the black plaintiffs for that.”<sup>5</sup>

As Judge Wald did in her lecture two years ago, I’m going to elaborate on my opening comments in a few minutes by talking briefly about two cases I worked on—one involving the struggle for racial equality, the other involving rights of prisoners. But before moving to those cases, I want to share two things with all of you. And, again, I’m talking primarily to the future lawyers here tonight.

First, contrary to what you may have heard or believe, there are today exciting opportunities and new frontiers in human rights litigation. And the courts, including the federal courts, are not hopelessly resistant to public interest law. Second, as you embark on your legal careers or whatever else you do with your law school education, I urge you to proceed with a commitment to moral reasoning, based on ethical values and standards—not as narrowly defined by the Canons of Ethics but in the broader sense, with a feeling of social responsibility in the tradition of Judge Coffin, a commitment to public service. I meet large numbers of law students and young lawyers in my work, in my travels, as clerks in my own office, and often hear the same lament—they were born too late, all those frontiers of exciting legal challenges of the late fifties and the sixties are done and gone. Even if there were issues left, they say, the hostility of the courts, the Reagan legacy, make it impossible to accomplish anything. None of that is really true, and you can still make a difference.

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4. JACK BASS, *UNLIKELY HEROES* (1985).

5. *Id.* at 296 (emphasis added).

Compare for a moment the situation today with when I left law school forty-five years ago. Today, there are thousands of public interest lawyers working in many different fields. The ACLU alone employs more than 150 full-time lawyers today. When I finished law school, the national ACLU had one lawyer on staff. There were three or four staff lawyers at that time at the NAACP Legal Defense Fund, and there were a handful of lawyers in private practice who did a fair amount of civil liberties and civil rights work. It is clear to me that there is much to be done in environmental law, consumer law, civil rights, women's rights, the rights of lesbians and gay men, the rights of the physically disabled, the mentally ill, the elderly, and the homeless. There are a few lawyers engaged in heroic legal efforts to challenge the increased application of the death penalty in the United States who desperately need help now that the federal government has stopped funding the death penalty resource centers. There are new legal battles to be fought on behalf of immigrants and of a woman's right of choice. You can still, believe me, make a difference.

It is true that the federal appellate courts have, in the past fifteen years, become a bit more hostile to the rights of individuals. That does not mean we quit. It means we work harder and devise new strategies, new mechanisms. The struggle for civil liberties consists of many important small battles that lead to and support celebrated cases. Litigating under the broad and vague language of the Constitution allows judges a great deal of discretion to interpret issues and be influenced by ideology. We need to explore extra-constitutional sources of relief for public interest litigants—federal benefits and antidiscrimination statutes such as the Rehabilitation Act of 1973,<sup>6</sup> the Americans With Disabilities Act,<sup>7</sup> the amendments created by the Civil Rights Restoration Act of 1987.<sup>8</sup> We need to explore state constitutions and statutes and the state court systems. We need to look at contract theories and international law and the application of international human rights standards. We need to try to negotiate imaginative settlement agreements and consent decrees in some cases without litigation. For me, the most exciting new frontiers are in the international human rights field. The world is getting smaller every day. The newly emerging democracies in Eastern Europe, sub-Saharan Africa, and Latin America are exploring the development and implementation of human rights standards for their prisoners and other institutions for the first time.

I was involved with a task force that updated the 1955 United Nations Minimum Standards for the Treatment of Prisoners, cross-referenced them to more recent international treaties and cove-

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6. 29 U.S.C. §§ 794, 504 (1994).

7. 42 U.S.C. §§ 12101-213 (1994).

8. 42 U.S.C. § 2000d-4a (1994).

nants, and then developed a manual for their implementation.<sup>9</sup> The manual was presented jointly by the Task Force and the U.N. Crime Section in Vienna to the Ninth U.N. Congress on Crime Prevention and the Treatment of Offenders in Cairo last year and adopted overwhelmingly. It is now being used as a guide to the prison systems in Albania, in Moldavia, in Belarus, and in many of the sub-Saharan African countries. On a few occasions, American courts have referenced international human rights standards and, reluctantly, they are beginning to look at them to support a line of reasoning. Unlike the broad, general language of our Constitution, marvelous document that it is, many international standards are *very* specific on human rights issues. In the future, we shall be urging the U.N. standards, the Council of Europe standards, and others on our courts. We shall be arguing American human rights issues in international courts. A whole range of exciting new opportunities are out there waiting for you.

After more than four decades of lawyering, I can tell you this: The law is not an ideal vehicle for social change. As lawyers, however, it is what we have to work with, and in some times and places it actually does have a role to play in building a just social order, and you can make a difference.

Now the two cases I wanted to tell you about. First, a little bit of background on the Lawyers' Constitutional Defense Committee that Judge Coffin mentioned. In 1964, you may remember that various national civil rights organizations<sup>10</sup> announced a "Freedom Summer." They were inviting a few thousand college students from around the country to come to Mississippi, Alabama, and Louisiana to help register black citizens, teach in Freedom Schools, and, just by their presence, show some solidarity with the local folks who try to make a difference in their lives. And there was a great absence of lawyers down there. At the time I went to Mississippi in 1964, it was a state with a black population of one million, and there were four black lawyers, one of whom was really not a practitioner at all. The other three were very courageous men, not a great deal of legal education, but a lot of courage, and that was it. There was a great deal of in-fighting and back-fighting between the various established legal groups at that time for all kinds of silly political reasons. And so, the chief legal officers of the major civil rights and human rights organizations—the National Catholic Conference for Interracial Justice, the National Council of Churches, the ACLU, CORE, the

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9. See UNITED NATIONS & PENAL REFORM INTERNATIONAL, MAKING STANDARDS WORK (1995).

10. These were primarily the Student Non-violent Coordinating Committee (SNCC), the Congress of Racial Equality (CORE) and, to a lesser extent, the Southern Christian Leadership Conference (SCLC) and the National Association for the Advancement of Colored People (NAACP).

NAACP, SNCC, the Southern Christian Leadership Conference (Dr. King's group), the American Jewish Committee, and the American Jewish Congress—came together and created the Lawyers' Constitutional Defense Committee which, later on, became a project of the ACLU.

In that first spring and summer of 1964, it was expected that this committee would recruit volunteers through the summer and perhaps into the early fall, and then end at that time. I volunteered for two weeks in the late spring of 1964 and stayed almost five years. Mel Zarr<sup>11</sup> was one of the staff lawyers down there for the NAACP Legal Defense Fund and we worked very closely together. All the legal groups worked together after the lawyers in Mississippi forgot the political stuff that occurred in New York and Washington. We used volunteer lawyers extensively, and my group worked primarily in three states—Mississippi, Alabama, and Louisiana. We had offices in all three states. I ran the project from the Jackson office, and I had full-time staffs in the three states. We had a New Orleans office, and the chief staff person there was a young lawyer by the name of Richard Sobol who had clerked for a Second Circuit judge, and then was a young associate at Arnold, Fortas and Porter, one of the prominent Washington law firms. He too had come down for two weeks and decided to stay and has not been back to the law firm since. In any event, he became my staff lawyer in New Orleans—a very brilliant lawyer—and ran that office very successfully.

This case arose in October of 1966. I don't know whether any of you have ever heard of Judge Leander Perez in Plaquemines Parish, Louisiana. Plaquemines Parish is that strip of land along the Mississippi Delta, below New Orleans, which empties into the Gulf. Plaquemines Parish had been run since the twenties by Judge Leander Perez, who had been a state district judge from 1920 to '24. He still used the title and was really the king or the emperor of Plaquemines Parish, which was an extraordinarily mineral-wealthy piece of land. They had enormous mineral deposits, including sulphur and oil. Judge Perez had put through a constitutional amendment in Louisiana to create a separate special form of government in that Parish so that everything was controlled by the Parish Council. The president of the Council was Judge Perez, the district attorney was Leander Perez Jr., and the vice president of the Council was Chalen Perez, the judge's older son. They had tremendous wealth. If you wanted to get a license to look for sulphur or other minerals or oil in Plaquemines Parish, you needed to get a license from the Parish Council, and you could not get a license from the Parish Council unless you hired the Perez law firm to prepare this little form and submit it. The standing fee was literally a million dollars for a five-minute piece of work. Leander Perez was a close associate of Senator Bilbo

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11. Now a member of the faculty of the University of Maine School of Law.

and Senator Jim Eastland from Mississippi. He was a racist par excellence. He was one of the people who first began to distribute the phony Protocols of the Elders of Zion<sup>12</sup> and a number of other racist, anti-Semitic publications. He's the man who bragged that if Martin Luther King ever came to Plaquemines Parish, they had bought a little island in the Mississippi that was snake-infested and that had an old Spanish prison fort on it, and that's where Dr. King would be imprisoned if he tried to do anything in Plaquemines Parish. Perez was also excommunicated by the Archbishop of New Orleans because he physically tried to prevent the integration of the Catholic schools there in 1962 and '63.

In September of 1966, the Plaquemines Parish schools were finally integrated by a few young black students, and in October of that year a man by the name of Gary Duncan, a twenty-year-old black fisherman, married with an infant, who lived in Plaquemines Parish all his life, was driving home from work and passed the school and saw a bunch of kids on the sidewalk outside of the school. Two of the boys were his nephews, eleven- and twelve-year-old black kids who had been among the few to attend the previously all-white school. He saw that they were surrounded by about five or six white boys about the same age, and it looked like there was an incident or that something was going on so he pulled over, got out, and asked what was happening. There had been a little pushing and shoving between the kids, and his nephews said the other boys were taunting and teasing and threatening them. He said, "Okay, well, get in the car and I'll take you home." He then said to one of the young white boys, touching him on the elbow, "Go run along and go on home." Just like that. Across the street was one of the members of the Parish School Board, a man by the name of Herman Landry who had resisted the school integration, and who was a pal of the Perezes. He went to the phone and called Leander, Jr., the D.A., and said, "I just saw this (using a racist term), this black man touch that boy, and I think it was an assault." Sure enough, two days later, although the police investigated and found there was no assault, Gary Duncan was arrested and charged with battery, common law battery; that is, touching without permission and without the intent necessary to commit a real assault. He was charged with this battery, a misdemeanor which carried a possible penalty of two years in prison.

Louisiana is a civil code state, the only one in the country, and there is a peculiar distinction in its criminal code. Misdemeanors and felonies are not divided by definition in the context of the code itself or by the crimes, but only by the punishment. You can be convicted of a misdemeanor and get up to nine years, eleven

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12. A fictitious and anti-Semitic tract produced by an extreme right wing organization in the 1920s.

months, and twenty-nine days in a county prison and not be entitled to a jury trial. A felony is any crime punishable by a term of years in the state prison at hard labor.

So he was charged with this misdemeanor of battery, and his family called our office in New Orleans and asked for help. Dick Sobol and one of the black lawyers in the office, our local counsel, went down there, put up the bail money, got him out, and then looked at the statute, and saw this peculiar, bizarre thing: This man could face two years in prison and there was no right to a jury trial. They knew that trying a case like that in Plaquemines Parish before Judge Leon, who was also a crony of Judge Perez, was a futile exercise, so they demanded a jury trial. It was rejected, of course, the local court saying you're not entitled to a jury trial, this is only a misdemeanor. They decided that would be at least one issue that they would try to preserve for ultimate review in federal court.

Duncan, after he was released from prison, was tried without a jury. He was convicted and rearrested; indeed, they arrested him about eight times in the course of this case—at every possible opportunity. He had to put up another bond to appeal to the Louisiana Supreme Court. The appeal was rejected there. He was rearrested, and then we decided to go directly to the Supreme Court of the United States rather than go through the lower federal courts with a habeas corpus petition. We filed a petition for *certiorari* in the Supreme Court and Dick Sobol went down to Plaquemines Parish to Pointe A La Hache, the Parish seat, to get Duncan out of jail again. After he got him out of jail (this is now February of 1967) he stopped at a telephone. He was to call the office and report that he was heading back to New Orleans, which is an hour away. You've got to cross the river in a ferry boat. There were no roads going directly into the Parish. Guess who owned the ferryboat line? Right, Judge Perez! At that point, Dick Sobol was arrested and charged with practicing law without a license, a crime in Louisiana. It can be a civil law violation, but there was also part of the criminal code that made the unauthorized practice of law a crime, and that's what he was charged with, and he was put into the Parish prison.

I was in Jackson, Mississippi at the time, and I was called by one of the other staff lawyers in New Orleans to tell me that Dick Sobol had been arrested. This was about two o'clock in the afternoon. I immediately called Tony Amsterdam, who is now a professor at N.Y.U. Law School and was then still at Penn and one of our gurus, one of the most brilliant lawyers in the world. We had been prepared for this. We had had a previous arrest the year before of one of my Alabama staff lawyers. That case was mooted out when the state agreed to drop the charges of unauthorized practice, because this fellow wanted to leave Alabama anyway and go back to California. We knew at some point that we were going to face this business



of practicing law without being admitted to the local bar. I was admitted to the Mississippi Bar under the reciprocity statute thanks to Judge Cox's intervention, but Dick Sobol was not a member of the Louisiana Bar. We had the framework of a complaint with theories worked out already, and I discussed it with Amsterdam and alerted him that we needed to take action. I flew to New Orleans, arrived there about seven o'clock in the evening, and began what we used to call then, and Mel Zarr will remember these, an "all-nighter." That is where you work all night and get to court at nine o'clock in the morning. It was important, we felt, strategically and for the benefit of our clients to take the offensive because Sobol's arrest was front-page news in *New Orleans Times-Picayune*, the state's major newspaper, that Friday morning. We needed to send a message not just to the state officials but to our clients that, "Hey, the ball game is not over," because the feeling of desperation that I heard expressed by local black civil rights activists when they felt that they would no longer have access to our lawyers was really rather dramatic and rather poignant. Therefore, we needed to get that complaint filed. At nine o'clock on Friday morning, I filed a twenty-four page complaint in federal court seeking to enjoin Sobol's prosecution and seeking to declare the unauthorized practice of law statute, as applied to his conduct, unconstitutional—not on its face but as applied to Sobol's conduct in the Duncan case.

At that time (this was before the change in the federal jurisdiction statute) if you were challenging the constitutionality of a state statute, it was required that the case be heard by a three-judge federal court, with one judge from the court of appeals and two from the district court. I happened to stop in and visit with Judge Wisdom after I filed the complaint. He had been reading about it in the morning paper. Judge Wisdom knew Sobol, and the judge and I had been friends for some years, and he asked me about it. He immediately took me next door. Chief Judge Tuttle was visiting from Atlanta, and they started talking about Sobol's arrest. I said, "Wait a moment. No, no, no, no, no. You know, Judge Tuttle is going to have to appoint this court. You [Judge Wisdom] are one of the Louisiana appellate judges. There are only two of you; you may be one of the judges. Let's not discuss it." So the discussion stopped immediately. Judge Ainsworth was the other Fifth Circuit judge from Louisiana who was thereafter appointed to the court in the case, together with two district judges, Chief Judge Heebe, and Judge Fred Cassibry. The latter were competent, thoughtful, decent judges who knew of our work and who, I think, respected our work and who I thought would give us a fair shake.

I want to describe some of the strategy that went into dealing with this case; you couldn't just deal with these cases on their facts. One of the things we were very concerned about was that there were a

series of cases working their way up to the Supreme Court dealing with the ability and the authority of federal courts to enjoin state prosecutions, to interfere in state court proceedings. We were worried about a Supreme Court decision at some point in the process of this case. So, we worked very hard to get the United States Department of Justice to intervene, because the United States is not precluded by any of the jurisdictional statutes from seeking to enjoin state court proceedings. If they feel that it's in the interest of the United States to attempt to enjoin any state court prosecution, the anti-injunction statute doesn't apply to them. We were successful in getting John Doar, the Assistant Attorney General in charge of civil rights, to agree to intervene on our side on behalf of the United States. That solved our main jurisdictional problem.

Then we had some other strategic issues. We wanted to prove four things in our case. First, that there were very few black lawyers in the states who could handle these kinds of cases and clearly they could not handle the huge load of cases. Second, we wanted to prove that white Louisiana lawyers, generally, would not handle civil rights cases. There was one white lawyer at that time who would handle a civil rights case. He was excommunicated by his church for doing that. Third, that if one would come forward, with the exception of Jack Nelson, this one man I mentioned, he or she wouldn't be trusted by the local black community for historical reasons. Fourth, we had some special expertise in handling civil rights cases, and that the combination of all of these factors would lead to the conclusion that this prosecution was made in bad faith—that this statute creating a criminal law violation could not be applied to Sobol's conduct because it was constitutionally protected under the circumstances of this case.

Lined up on the other side, we saw that there would be seventeen lawyers in the courtroom. The District Attorney was prosecuting the case. Because it was a state statute that was being challenged, the Attorney General's office came in with three lawyers on the side of Plaquemines Parish. The Louisiana Bar Association, whose feelings were terribly hurt by the allegations in the complaint, intervened against us, retaining two of the biggest law firms in New Orleans. Named partners appeared in court. The New Orleans Bar Association similarly intervened against us, and the Louisiana Criminal Lawyers Bar Association as well. We knew from the way they spoke that each one of these lawyers was going to want to get on his feet and provide considerable rhetoric, as there would be a lot of press coverage of the trial.

We had a fairly good team as well. Tony Amsterdam, who I mentioned as one of the real geniuses of the civil rights movement, was going to be there. The Justice Department lawyer, assigned by John Doar, was a fairly young, inexperienced lawyer, but a very compe-

tent one: Owen Fiss, who now is a professor at some other law school in New England down in New Haven, I forget the name of it, and now an authority on federal court practice and jurisdiction. Two of our local black lawyers, both of whom later became judges, Bob Collins and Nils Douglas, and myself. We made a decision, at Tony Amsterdam's suggestion, that one of the ways we could prove our case and illustrate our special expertise was that just one of us should take on the seventeen on the other side. I was the lucky person. I was the only lawyer who spoke for the plaintiffs during the trial with the exception of Owen Fiss for the government. Putting a lot of pressure on him, I said, "You're to do two things, Owen. At the beginning of our case, you're to stand up and say you are here to represent the interests of the United States of America, and then you sit down. At the end of our case, you're to say that the United States of America joins in with the Plaintiff's case and then you sit down. And don't say anything else." He pretty much agreed to do that. We wanted the court to hear that there was a larger governmental interest involved in addition to the interest of Richard Sobol and the Lawyers' Constitutional Defense Committee. And so during the entire direct case, I put on all the witnesses and I did all the cross-examination of the Defendant's witnesses.

The direct case basically was Sobol testifying about his background and experience, his judicial clerkship, his writings, and some of the trials he had handled. We put on some of the black lawyers in the state to talk about the problems that they had in handling civil rights cases. One of them talked about being before a state court judge in Baton Rouge, who pointed out his window to a tree and said, "That's where we hang nigger lawyers." That judge later became a member of the United States Congress. We put on the plaintiffs, the civil rights people, people from the Bogalusa Voters League, and people from the Madison Parish Voters League who talked about the great shock they had when they read about Sobol's being arrested, how they felt the movement would evaporate if they did not have access to lawyers from the Lawyers' Constitutional Defense Committee, and how they had this special trust in us and a few local black colleagues. They talked about the years of experience that they had in trying to get local white lawyers to do things and the fact that they wouldn't handle any civil rights cases. And so, we pretty much proved the four points that I set out earlier.

An interesting sidelight here, for those of you who know Tony Amsterdam: We didn't have the money to order daily transcripts of the trial testimony, so each evening after court, Tony would write out proposed factual findings from that day's testimony. At six o'clock the next morning he would give me typed proposed factual findings, which were really the guts and the heart of what we had proved that day or what we had extracted in cross-examination that

day. It was better than a running transcript because this was the heart of everything rather than everything itself. The man really was a genius. He never slept in those days. By the way, on this strategic point, I later met Judge Ainsworth at an ABA meeting, and he said, "I've always wondered about that Sobol case. You know, all those lawyers sitting at your table, but you were the only one who spoke. Were you trying to tell us something with that?" I said, "Well, did I?"

We had also put on some statistical information. We did a search of all of the reported West Publishing cases for a twenty-year period under the various civil rights annotations coming out of Louisiana and could not find one where there wasn't an out-of-state lawyer, either from the NAACP Legal Defense Fund, the National Lawyers Guild, or some other group. There were no civil rights cases handled exclusively by local lawyers other than a few black lawyers during a twenty-year period, and we put that into evidence as well.

On their case, they put on about twenty-five lawyers, each of whom basically said the same thing: "Well, I'd be *glad* to handle these civil rights cases. Nobody's ever asked me." At one point, I even stopped cross-examining some of them because it just, obviously, was foolish and not making an impact on the court. Then they came up with a man by the name of Thomas McBride, a lawyer from Plaquemines Parish itself. He said on direct examination that he would defend a Negro in a civil rights case, and I thought I heard him say something about "if he was a local Negro." Then he was turned over to me, and I asked him two questions. I said, "I think I heard you say that you would not hesitate to handle a civil rights case in Plaquemines Parish if it were a local Negro." He said, "That's right." I said, and I've got it written down here, "So that if three Negroes from Chicago came down and picketed the courthouse at Pointe A La Hache because they had White and Colored drinking fountains (which they still had) and were arrested, you would not represent them?" He said, "I would not. I'm a white man first and foremost." That was the heart of the case. Judge Ainsworth had sort of been dozing at the repetition of these people and I saw him poke Judge Cassibry, "What did he say?" And that was the case, and you can imagine the temptation then. I was working from a trial book. I said, "My God, the cross-examination I can now do on this man." But then I thought, "What else can I prove?" It was hard to do but I closed that book and sat down. And, you know, the courtroom was still. There was nothing more you could do. I mean the two questions had done it all. I still remember that and get chills when I think of that. The entire courtroom was still. We got a decision a few weeks later.<sup>13</sup> The court enjoined the prosecution of Sobol. It found that the statute was unconstitutional as

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13. See *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968).

applied, that the prosecution was in bad faith, and that Sobol could not be prosecuted for practicing law without a license. There was a lot of other good language in this decision—really important language which gave us, we felt, protection for all of our work in the other states as well.

In the meantime, the *Duncan* case went up to the Supreme Court of the United States where Dick Sobol argued it, and it resulted in the landmark decision of *Duncan v. Louisiana*.<sup>14</sup> The Supreme Court, for the first time, said that in a misdemeanor case, if you're facing a substantial punishment you're entitled to a jury trial. It suggested that six months was substantial because it was decided in tandem with a criminal contempt case, the *Bloom* case,<sup>15</sup> and that involved a six-month punishment. From that point on, misdemeanants charged with serious offenses were entitled to jury trials. The Supreme Court remanded the case to Louisiana for implementation of its decision. And, of course, what the Louisiana legislature did immediately was to amend the statute and read the decision as saying, "Well, if you could only get six months you would not be entitled to a jury trial." So they amended the punishment part of the battery statute to max the punishment at six months rather than two years, and then they wanted to prosecute Duncan again without a jury trial. They arrested him again, and we went back in, got him out on bail, and then brought another action in federal court to enjoin this prosecution.

At this point we knew that *Younger v. Harris*<sup>16</sup> and related cases were pending in the Supreme Court on the very issue of when and if federal courts should enjoin state court prosecutions, and we knew that we were not going to do well in those cases. We had to anticipate that with this particular action in *Duncan*. We just couldn't let this guy go to jail in the Parish. We brought a new injunction action, which was tried before Judge Cassibry. I tried this case, and we proved that it was a bad-faith prosecution, that there was no crime committed, that the touching was an everyday occurrence. People touched, people said, "Run along. Go home. Do this." We proved that the only reason that he was being prosecuted was because it was to be a lesson to teach the black citizens of Plaquemines Parish that if they fool around with the white power structure, they're going to get punished. We had a lot of evidence to that effect—that it was bad faith. The Perezes were sort of falling apart at that point. Judge Cassibry enjoined the prosecution of Duncan and held that the Louisiana officials were acting in bad faith.<sup>17</sup>

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14. 391 U.S. 145 (1968).

15. See *Bloom v. Illinois*, 391 U.S. 194 (1968).

16. 401 U.S. 37 (1971).

17. See *Duncan v. Perez*, 321 F. Supp. 181 (E.D. La. 1970).

They appealed to the Fifth Circuit and then *Younger v. Harris* came down. Interestingly enough, since we wrote the briefs in the Fifth Circuit, this case was really the exception to the *Younger* doctrine. In spite of *Younger v. Harris*, the Fifth Circuit affirmed Judge Cassibry.<sup>18</sup> And so, from this one touching, look at the law we made: the right to enjoin prosecution of a lawyer engaged in civil rights practice; the right to a jury trial for a misdemeanor; and then the *Younger* exception—bad-faith state prosecution *could* be enjoined by a federal court.

As I think back on this case, I remember leaving the Supreme Court after the argument, and Gary Duncan, his wife, and his parents were there, and Dick Sobol, of course. When we left and walked down the steps, Gary Duncan looked up at the inscription on top of the front of the courthouse—“Equal Justice Under the Law”—and he said something about how it was so great to be there. He really didn’t care anymore whether he won or lost. He could go to jail and do the sixty days, which is what he was sentenced to originally, because he thought he had really won. It was clear that he had been listened to and had been heard, and that was what was important to him.

The second case is a prison case. The National Prison Project, as Judge Coffin mentioned, started in 1972 after the Attica rebellion in the fall of ‘71. In our early years, we were doing a lot of narrow cases—you know, the lawyer’s hangup—procedural due process, which basically doesn’t change anything, at least in the prison context. It gets you the fair procedures and then the prison officials make the same old unfair decisions. Their decisions then were insulated from court review because you had all these due process procedures. We were hoping to get a court to take a systemic look at prisons. We kept thinking about Alabama as being one of the best fact situations from our point of view. Then, in 1974, fate intervened.

The chief judge in the Middle District of Alabama was Frank Johnson, who later went to the Eleventh Circuit. He had received a handwritten petition from a seventy-eight-year-old prisoner named Worley James, which said in a rambling sort of fashion that he had been in and out of the Alabama prison system for thirty years. He had just been a shoplifter when he started, and he didn’t feel well all the time, and they “keep abusing me,” and he sort of talked about some of the abuses, and being beaten. “They never made me any better, Judge. They keep making me worse, and when they turn me loose, I can’t make it, all the things they did to me, all I can do is go back to prison.” Frank Johnson had seen a lot of pro se prison cases, and a lot of other cases. He’d already done a statewide medical care case in the prison system for the Department of Justice. He

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18. See *Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971).

had done a statewide mental health case, *Wyatt v. Stickney*,<sup>19</sup> and he decided it was time to look at the prisons. So he certified this handwritten petition as a statewide class action, and then called in a law professor at the University of Alabama, George Peach Taylor, who had worked with us for a while in Mississippi.

By the way, last night at dinner, Chief Justice Wathen was commenting about the way in the South colorful nicknames are used. "Peach" reminded me, and I told him about one of my favorites. There was a fairly good state court judge in Mississippi in the sixties whose last name was spelled S-W-E-A-T-T, and on his official letterhead, it said "Circuit Court of Bolivar County, presiding N.S. "Soggy" Sweatt." That's true.

Anyway, after Judge Johnson had appointed George Peach he said, "And you need to get some help, Professor Taylor, and I suggest you call the National Prison Project in Washington." I had known Judge Johnson for some years. I tried a bunch of cases before him in the sixties, civil rights cases, and this was now 1974. There was an early pre-trial conference in November '74 in Judge Johnson's chambers. Judge Johnson was a very, very strict judge who ran his courtroom almost like a military establishment. He was also fair to everyone involved, a courageous and great judge. I think really a great conservative in the best sense of the word. He just believed that the Constitution applied to everyone. He was not particularly fond of criminals. He was an establishment white Republican, I think a fifth-generation Alabamian, but he believed in the Constitution, and so he laid down the ground rules and said, "I'm not going to let you in this case, Mr. Bronstein, as a plaintiff's lawyer because I don't want to build up legal fees against the State of Alabama." He said, "I'm going to have you come in as an *amicus* with the rights of a party." Now that's an invention of Judge Johnson. He's the only judge I know of who does that—who allows people to come into a case as *amicus curiae* with all the rights of a party. He said, "If you prevail, you'll be entitled to costs and expenses but no fees and I expect you to help present this case to the court in an orderly fashion." He then told the Assistant Attorney General, the only man there for the State defendants, "Get some help." He consolidated two other cases with this case, so the case ultimately was not known as the *James* case, it was known as *Pugh v. Locke*.<sup>20</sup> This is November '74, and he said, "I want to try this case next summer." I said, "Judge, this is a statewide case. We need to do a lot of discovery." He said, "We're going to try this next summer." And you never argued with Judge Johnson. If he had to say something twice, you were really in trouble. We knew that Judge Johnson did not like long trials. He does not like to hear a lot of evidence unless it's

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19. 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd*, 503 F.2d 1305 (5th Cir. 1974).

20. 406 F. Supp. 318 (M.D. Ala. 1976).

absolutely necessary. We knew that he was not going to visit the prison. He didn't like prisons. We knew that he had never taken tours in his early cases, so it was hard to visualize how we were going to get the sight and smells of the prisons across to the trial judge, which is so important. You lose that in the appellate courts, but it's important to get that before the trial judge, and so we had to make decisions on how to do our discovery. Fortunately, the Alabama prison system was one of the first to be computerized. They had a lot of data. Judge Johnson told the State and us, "I want full disclosure on discovery; I don't want anyone coming back here on motions to compel. They upset me, and I want people to cooperate and get full disclosure." Then he looked at the Attorney General, and we got quite full disclosure. The State retained private counsel, which made things a little bit easier because the private counsel were a lot more competent than the Attorney General's office.

We decided that one of the things we were going to try to present the judge with was a host of factual stipulations, and so we did requests for admissions after our discovery. We, in fact, got eleven hundred stipulations that we presented to the judge a week before the trial, which really laid out the entire case by sections on overcrowding, mental health care, classification, fire safety, sanitation, and violence. We had this all laid out with stipulations based on the admissions that we had elicited from the defendants. We also had a couple of books of photographs. We had three hundred photographs which tracked the testimony of one of our experts, our environmental health expert, so that when the expert would describe entering this particular cell block and seeing the broken lavatories and the overflowing toilet filth on the floor, there was a picture of it. You could see Judge Johnson turning, flipping the pages of the three volumes of photographs as this public health expert was testifying. We had seven other experts: classification experts, criminologists, and prison officials from other states. It was also interesting that not a single expert asked for a fee in that case. They all saw it as a very important public service; they saw that this was going to be the first big statewide "totality of conditions" case. What we attempted to prove was that each of the conditions by themselves, individually, might not have constitutional significance, but put together they created an environment that was cruel and unusual punishment, so that the judge in his remedial orders could address each of these individual areas.

We tried the plaintiffs' case in five days. Today, in other cases of similar dimension, we spend three months in trial. In the Texas case, a much bigger case, involving a bigger system, the trial before Judge Justice went on for seven months. This plaintiffs' case took five days and we rested. We thought we had proved a solid case. Then the State went on. This, by the way, was August 1975. We asked for,



but did not get, a continuance. On the third day of the defendant's case, they asked for a conference, and they came into chambers and said that they were prepared to concede that the plaintiffs had proved an Eighth Amendment violation. I'll never forget that moment. Judge Johnson, who wore half-glasses, looked down his glasses and said, "Mr. Lamar, [Lamar being the private lawyer representing the defendant], you are telling the court then that the Attorney General and Governor Wallace have authorized you to go into open court and concede that the plaintiffs have proved a gross violation of the Eighth Amendment? Is that what you're telling me?" Well, they hadn't planned to go into open court and do this because, you see, there was national press out there, but they got the message from Judge Johnson. When he puts on his glasses and looks over them, you don't talk back to him. They went into open court and conceded the Eighth Amendment violation. There was a lot of national press attention; this case probably had more importance outside of the State of Alabama than inside it. We got calls from other state corrections officials asking, "What are these standards that the judge ordered?" In his remedial order, he set forth certain standards that they had to comply with to fix these constitutional problems. They didn't want to get hit with court orders like that, and so it had a great spillover effect throughout the country.

One of the horrors of the Alabama prison system was a building called the "Dog House." It was a segregation building, windowless, with six or seven men in a four by eight foot cell. That's slightly larger than the average door in your home. Seven men were in a windowless room, so crowded that they couldn't all lie down at the same time. Four men had to stand while three would lie down, with empty cells on either side of them. It was a real punitive kind of thing. He ordered that building destroyed. I had the great pleasure of seeing prisoners demolish the building with sledge hammers on the CBS Nightly News. He gave us immediate injunctive relief at the end of the trial, ordering that building closed and destroyed. Then together with Judge Hand, from the Southern District, Judge Johnson issued an order capping the state prison system at its design capacity and enjoining any intake until they got down to that design capacity, with some exceptions. If you've got a murderer coming along, you could take the murderer in, but you had to release a property offender or something like that. All of this got a lot of publicity, and the final decision in the case in January 1976<sup>21</sup> had a great deal of impact nationally.

One thing I want to talk about here is that during the trial we had two plaintiffs there all the time. We were going to have a lot of plaintiff witnesses, because we followed each expert with live prisoners to put some flesh on the bones of the expert testimony, to tell

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21. *See id.*

horror stories about what they were talking about, to talk about the assaults, the sexual assaults, the violence, and the fact that prisoners were pulling teeth because they had no dentist there. We wanted Judge Johnson to hear about this. But all of those prisoners would be sequestered from the courtroom because they would be witnesses. So, we asked that we have two prisoners there all the time: Worley James, the seventy-eight-year-old black man who had filed the original lawsuit, and a white man who was about sixty by the name of Bill Campbell, a jewel thief and a long-time Alabama prisoner. Both of them could also be helpful because they would know if the wardens were telling outright lies about something. They would be able to tell us: "Oh, that's not true. That doesn't exist in that particular prison." They sat there in the courtroom for the entire eight days of trial. After the first day, we noticed something. Usually, when you have a prisoner in a courtroom and there is a recess, a lunch recess, or, in those days—Frank Johnson was a cigarette smoker as I was—a smoking recess, the prisoners would be shackled and taken into the marshal's lockup down the hall. But James and Campbell were escorted out into the hallway, no shackles, no restraints, a few marshals, not in uniform, standing discreetly maybe ten or twenty feet away, just leaning against the wall. These two men would stand there like any other spectator. Many years later I asked Judge Johnson about this. He said, "Well, it was their case. They were plaintiffs. They weren't prisoners at that point. They were parties. They didn't seem to be dangerous to me, and they had to be treated like parties in my court." And because of that fact, their presence there, and their treatment—they were listened to, and they were heard. That's what was important about that case, more than the great legal precedent, that these prisoners, the most powerless in our society, were heard.

Some final reflections that I want to share with you. I think this country is in pretty dreadful shape. We have lost the capacity for collective moral discourse, and we lack moral vision. We ignore the hunger, the disease, and the misery of a substantial portion of our population. We debase our politics. We suppress dissent. We indulge in panic-driven, costly but ineffective policies, and I'm talking about both political parties now. This is not a political thing, it's a general thing. We indulge in these panic-driven, costly but ineffective policies to deal with crime and drugs while reducing commitments to health care, housing subsidies, childcare, and decent schools. We label them liberal elitism. A review of Barbara Ehrenreich's book on the eighties<sup>22</sup> describes "yuppies" as young people who, driven by fear, equate a respectable career in the helping professions with a year's internship with Mother Theresa and

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22. See BARBARA EHRENREICH, *IRREVERENT NOTES FROM A DECADE OF GREED* (1990).

then head to something really profitable like corporate law, international finance, or cocaine dealing. And lawyers have a role in all this and should be making a difference.

In a study of lawyers practicing in a particular county in the State of Washington, it was discovered that when lawyers talked about their work, they likened it to a game. People in other professions—doctors, teachers, ministers, scientists—seldom use the term “game” to describe what they do. For lawyers, an attitude of emotional detachment reinforces the idea that law is a game to be played for its own sake with winners and losers, and the adversarial system makes it easy to maintain personal distance. News stories describe lawyers in Miami who are involved in the debate over the ethics of representing drug defendants on a regular basis. The least onerous reason given by members of what’s called the “White Powder Bar” for representing drug dealers was that everyone had a right to a lawyer of his choice. One lawyer, who claims to have an annual income of more than one million dollars from representing figures associated with the Medellin drug cartel, sees his clients as underdogs facing an overreaching government. Another claims to be fascinated by drug kingpins like Pablo Escobar, seeing them as historical figures to justify representing them for huge amounts of money. One lawyer was completely open about why he represented drug figures: It’s a question of money. There’s only one reason to represent someone charged with a drug crime, and that’s money, big money.

Another popular industry for lawyers is the lobbying law firm. There’s been explosive growth in this field, attracting lawyers who are willing to involve themselves less with courtrooms and the Constitution than with political fundraising and walking the halls of Congress. While some may be unable to find any cause for moral cheer in the newfound popularity of lawyer lobbying, one Washington lawyer, who reportedly has an annual income exceeding one and a half million dollars a year, argues that these are the kids, who in an earlier time, came to Washington to work for Jack Kennedy. Asked if the comparison might be flawed because the lawyer-lobbyist works for wealthy corporate interests rather than the President or the Congress, the lawyer replied, “They want to be involved in the system, and that’s good.” You, who are law students, are entering a profession that has enormous power and influence in our society. Much of it, I think, is being used unwisely, improperly, and often immorally. Lawyers must be prepared to take personal moral responsibility for the consequences of their professional acts. Our society can no longer afford lawyers who see themselves only as hired guns.

I’d like to conclude by quoting from sections of two speeches given by one of my heroes, the Nobel Laureate Elie Wiesel. They’re not exact quotes because I’ve added a few of my words to his. After

he received the 1986 Peace Prize in Oslo, he gave two addresses: the Nobel Address and then the next day the Nobel Lecture. This is a compilation of some things he said, with my tinkering.

There is so much to be done and there is so much that can be done. One person, a Raoul Wallenburg, an Albert Schweitzer, a Martin Luther King, Jr., one person of integrity can make a difference, a difference of life and death. We must all try to be one person who makes a difference. As long as one dissident is in prison, our freedom will not be true. As long as one child is hungry, our lives will be filled with anguish and shame. What all these victims need, above all, is to know that they are not alone, that *we* are not forgetting them; that when their voices are stifled, we shall lend them ours; that while their freedom depends on ours, the quality of our freedom depends on theirs. There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest. The *Talmud*, Wiesel says, tells us that by saving a single human being, woman and man can save the world.

I hope that each of you will try to be one person who makes a difference.

