

# LAWDRAGON

## The Long River of Justice: Cravath's Pro Bono Work in Alabama



*Photo by Bettmann / Getty Images.*

*By Katrina Dewey*

Justice is rarely fast and never easy. Real change and accountability take perseverance, dedication.

Damaris Hernández knows that all too well, not just as a child of Brooklyn and Puerto Rican migrants, but as a lawyer who ran the last lap of Cravath's four-decade battle to meaningfully integrate the police, firefighter and other workplaces in Birmingham, Ala.

“I became a lawyer to help people. So much of the pro bono work my firm does isn't the type that's easy and quick. It's pro bono that's highly effective, but it takes time,” says Hernández of the effort which saw the firm expend 100,000 hours including work from 150 lawyers and paralegals on a lawsuit that commenced in 1974 and which she concluded on Dec. 21, 2020.

What the firm achieved is as remarkable as the journey. The new framework for fair hiring in Birmingham and the surrounding Jefferson County created opportunities for tens of thousands, including Annetta Nunn, who would go on to become the first female African American police chief of Birmingham in 2003, leading the force run 40 years earlier by the infamous Bull Connor.

Nunn was four-years old on Sept. 15, 1963, when racists bombed the 16th Street Baptist Church and killed four girls readying for Sunday School: 14-year-old Addie Mae Collins, Cynthia Wesley and Carole Robertson, and 11-year-old Carol Denise McNair. The bombers targeted the church not just because their hearts brimmed with hatred, but also because civil rights activists had used it as an organizing site for a campaign that included students.

A walk of just seven blocks or so from Birmingham's City Hall to the 16th Street Baptist Church was to enter a different world, a home to African American residents and congregants who were relegated to "colored" lunch counters, drinking fountains, bus sections. In April of that year, Martin Luther King Jr. wrote his "Letter from a Birmingham Jail" decrying segregation in the city, and the counsel offered by some fellow clergymen to give the city's new leadership time. That new leadership was led by Albert Boutwell, who earlier that month had won a runoff for Mayor against Connor, a fellow segregationist and violent authoritarian who served as Commissioner of Public Safety and oversaw the firefighter and police departments.

"We are sadly mistaken if we feel that the election of Albert Boutwell as mayor will bring the millennium to Birmingham. While Mr. Boutwell is a much more gentle person than Mr. Connor, they are both segregationists, dedicated to maintenance of the status quo. I have hope that Mr. Boutwell will be reasonable enough to see the futility of massive resistance to desegregation. But he will not see this without pressure from devotees of civil rights.

"My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily."

King's letter is an enduring legacy of the cataclysmic year that saw Alabama Governor George Wallace resist integration of the University of Alabama in Tuscaloosa, just 55 miles away; the assassination of voting rights activist Medgar Evers on June 11 in Jackson, Miss.; the March on Washington in August; and the assassination of President John F. Kennedy in November.

In the midst of the maelstrom, on June 24, the president, Attorney General Robert Kennedy and Vice President Lyndon Johnson brought 244 leading lawyers to the White House to enlist the private bar to advocate for civil rights. They became the Lawyers' Committee for Civil Rights Under the Law.

Rowan D. Wilson was just 2 ½-years old out in Pomona, Calif., when King wrote his letter. His childhood was spent in Berkeley, Calif., and he would graduate from Harvard and

Harvard Law School in 1984 on his way to becoming the first African American partner at Cravath.

“It was referred to as Bombingham,” says Wilson, who started working on the case in 1989 and led the firm’s effort until he was appointed Associate Judge of the New York Court of Appeals in 2017. “When the lawsuits were filed in 1974, there was not a single African American or woman firefighter or police officer among a force of more than a thousand. And when you looked at who occupied the other jobs throughout the city and the county, and the various municipalities within the county, every job that paid anything, every supervisory job, was somebody who was white, almost always, a white man.”

The Jefferson County laundry, for instance, employed approximately 55 African American women. The laundry had one white male employee, and he was the boss. That was typical of the segregated workforce, divided between a “classified service” – better-paying jobs with civil service protections and benefits – and an “unclassified service” that paid minimum wage and provided no job protections. A road crew was comprised of engineers, truck drivers and pavers, who held the classified jobs, and those who carried material and debris, who were unclassified. “They were almost all Black men,” says Wilson. “If sharecroppers were one step removed from slavery, the state of public employment in Jefferson County in the 1960s was two steps removed.”

1963 laid bare a change gonna come, no matter where you sat alongside the waters flowing by.

And come it did, fusing decades of indignities in a resolve to take on the government in court. Birmingham was, of course, one of many municipalities where legal action was pursued seeking equality in employment, education and the basic dignities of life. But the sweep of an effort initiated in 1974 by the first Black member of the Birmingham Bar Association and concluded by a Latina lawyer from New York City in 2020 deserves a moment.

For what it took. For what we can do together.

Oh yes it will.

On January 4, 1974, U.W. Clemon of Birmingham’s Adams, Baker & Clemon signed his name to a mighty spring from which that river would flow:

*Ensley Branch of the National Association for the Advancement of Colored People; Donald Nixon; William Moss; Alvin Mahaffey Jr.; Walter R. Ball*

v.

*George Seibels, individually and as Mayor of the City of Birmingham, Alabama; City of Birmingham, Alabama, a municipal corporation; Hiram Y. McKinney, Henry P. Johnson and James Y. Johnson individually and as members of the Jefferson County Personnel Board;*

*Joseph Curtin individually and as Personnel Director of the Jefferson County Personnel Board; [and] Jefferson County Personnel Board.*

Clemon and his law partners were all sons of Alabama, yet none had been permitted to attend law school in the state because they were African American. In 1950, the U.S. Supreme Court had ruled in *Swett v. Painter* that states could not reject a law school applicant based on race. States with segregated law schools were given three options: create a law school for Black students that was fully equivalent to the white one; admit Black students to the existing law school; or pay to send Black law students to an out-of-state law school that would take them. Unsurprisingly, Alabama chose the latter option.

The son of sharecroppers, Clemon attended Columbia Law School (paid by Alabama), from which he graduated in 1968 and went to work for the NAACP in New York before returning to Alabama. Oscar Adams had been a member of the Central Committee that planned demonstrations during the Birmingham Campaign of 1963, before becoming the first Black member admitted to the Birmingham bar in 1966. He had graduated from Howard Law School in 1947 and would go on to become the first African American Alabama Supreme Court Justice, while Clemon in 1974 became one of the first two African Americans elected to the Alabama Senate since Reconstruction before becoming a federal judge.

In 1975, the U.S. Department of Justice joined the lawsuit, bringing its might under Attorney General Edward H. Levi and President Gerald Ford. It filed suit under Title VII of the Civil Rights Act of 1964 on behalf of African Americans and women denied fair employment opportunities by Jefferson County, Birmingham, numerous other municipalities and their leaders as public employers.

“The defendant public employers have followed a policy of hiring and assigning their employees on the basis of race, color and sex, with Black and female employees being hired for and assigned to the less desirable and generally lower-paying jobs with the least opportunity for advancement and with white male employees being hired for and assigned to the more desirable and generally higher-paying jobs with the greatest opportunity for advancement,” the Justice Department alleged in the first of numerous claims making a federal case on behalf of those too long knocked down on their knees.

Judge Sam C. Pointer Jr., appointed by President Nixon, was assigned the cases. A Birmingham native and military veteran, he endured death threats in the ‘70s for ordering busing to integrate Birmingham schools. Pointer held a series of trials assessing the hiring and promotion practices of the Birmingham Personnel Board and ruled it had discriminated against African Americans and women in a range of jobs.

And the river flows on.

In 1979, Birmingham elected its first African American Mayor, Richard Arrington, who would lead the city until 1999. Arrington immediately settled the litigation against the City of Birmingham through a consent decree. The reconstituted Personnel Board followed suit

agreeing to specific goals and procedures for hiring, as did other jurisdictions including the County. By the end of 1982, Judge Pointer had approved a series of proposed consent decrees ordering the hiring and advancement of African Americans and women to compensate for widespread past discrimination.

The thing about a river is this: It bends and turns, and rarely flows straight. Placid carriage can turn ugly just around the bend. And so sailed the tugboat *U.S. v. Jefferson County*.

Naturally, the proposed decree brought with it a notice and comment period, allowing objectors to appear at a hearing. Clouds appeared on the horizon as several white City employees objected and a group of white male firefighters claiming the decrees unfairly benefitted lesser qualified Black firefighters moved to intervene. Pointer denied their intervention and entered the City consent decree, after which the County, Personnel Board and other municipalities also entered into decrees. Denied intervention, the white firefighters filed a separate reverse discrimination lawsuit challenging the City decree.

Thunder came with the election of President Ronald Reagan, which brought the Justice Department under the leadership of Attorney General Ed Meese and Civil Rights chief William Bradford Reynolds. As plaintiff, the Justice Department had previously signed the consent decrees against Alabama and the municipalities. And while the decree obligated the United States to defend any attack on its lawfulness, the Justice Department now claimed implementation of the new hiring protocols was unlawful.

Brother, help me please.

“Is Tom Barr available?” From the heart of Washington, D.C., the call went forth to the head of litigation at Cravath, then as now among the nation’s most powerful law firms. The Lawyers’ Committee was on the line. Barr’s mentor, Bruce Bromley, had been among the lawyers assembled at the White House in 1963, and Barr himself had risen from his Kansas City roots through the Marine Corps to become the go-to trial lawyer for the biggest-ticket trials. He rang the rising star Bob Joffe, who had become partner in 1975 and made a name for himself representing Time Inc. Within Cravath, he was also known for his dedication to civil rights, having spent two years in Malawi, for instance, working for the Ministry of Justice setting up local courts and heading Harvard’s Civil Rights/Civil Liberties Law Review as a student.

Joffe won approval to represent the Alabama plaintiffs and turned the firm’s focus to the storm ahead – one that would persist through the rest of his career, including his ascent to presiding partner in 1997 and early death at the age of 66 in 2010.

The lawsuit filed by the white male firefighters, represented by Birmingham lawyer Raymond Fitzpatrick, fashioned what was then the relatively new claim of “reverse discrimination” – that the consent decrees designed to address the sins of the past were unlawfully impeding the futures of the white male firefighters.

As any sailor – or passenger – knows, the story of how the boat gets where it’s going is rarely as interesting as the destination except to those charged with navigating the tides and shoals. The journey started by Joffe would build – and be joined by legions of other lawyers from his firm, the Justice Department, jurists and the people of Jefferson County themselves – and change countless lives.

That it would take four decades no one could know, through the turbulent reverse discrimination battles including a U.S. Supreme Court decision, from 1983-1989; steady implementation of the consent decrees and the case against the County from roughly 1990-2013; and the final enforcement of the decrees which concluded last year.

They were able to carry on.

Joffe helmed the first phase, working with a team of associates in Alabama contesting the reverse discrimination claims through the 11th Circuit and to his only U.S. Supreme Court argument. In June 1989, in a decision by Chief Justice William Rehnquist, the court held 5-4 in *Martin v. Wilks* that the white firefighters were not bound by Judge Pointer’s consent decrees because they had not been parties to the litigation. The legal theory is collateral estoppel and for those who only recently endured the legal jargon of the transition from Obama to Trump, the prior shift from Carter to Reagan was a similar moment of “what just happened?”

Joffe tapped Wilson, then an associate, to lead the effort to turn back the reverse discrimination claims. Cravath began working on legislation to undo *Martin*, which ended up forming part of the Civil Rights Act of 1991. They also moved to certify a parallel class of African American women, employees and prospective employees alongside the reverse discrimination firefighters. In 1994 – 20 years after it was filed - an 11th Circuit panel took note of the egregious amount of time that had passed in *Ensley Branch NAACP v. Seibels*. The existing consent decrees were an unlawful “badge of shame” that the personnel board and the city had used as a crutch, the court noted, ordering the decrees to be modified to develop lawful selection procedures.

But speed remained a stranger. Valid tests needed to be created and the Personnel Board’s attention captured. Judge Pointer retired in 2000 and was replaced by Judge C. Lynwood Smith of Huntsville, who sensibly took offense at the lethargic pace of progress. In 2002, he set a trial date over one of the case’s many tributaries – a dispute over testing protocols for Sheriff Sergeants – and set a trial date two months away. Although both Cravath and the Justice Department objected to the selection procedure as discriminatory, without notice the Justice Department withdrew its challenge just 10 days before trial. And the night before opening statements, the Personnel Board’s lead lawyer, Charlie Waldrep of Waldrep Stewart & Kendrick, tapped on the door of Cravath’s makeshift Birmingham outpost.

“I can’t prove my case,” Waldrep said. “What do you want?”

Now that is a crazy question to ask to a trial lawyer, and Wilson was ready with an answer. First, he wanted the lawyer to acknowledge the concession to the judge. Second, the County needed to pick up the tab for expert fees. And third? The Personnel Board had to create a fair and workable system.

Done, done and done.

The next morning, lawyers congregated in a courtroom, as lawyers will do. And, true to his word, Waldrep stood up and said, “I can’t prove my case.” Wilson acknowledged the deal to an angry Judge Smith – who threatened to hold the Personnel Board in contempt. Wilson asked for and got five months to build a record on which he could rely to seek such an order.

Cravath built a record that was more like a Springsteen catalog, filled with tales of working people just getting by. Turns out many of the Personnel Board employees tasked with creating valid employment tests had no relevant background – in one case, a degree in English, in another, work at Taco Bell. Also, the leaders of the Board had not read the consent decree; one Personnel Board leader testified that he hadn’t been doing his job, and couldn’t, really. He quit shortly after. To the surprise of no one, Judge Smith held the Personnel Board in contempt and appointed a Receiver to bring it into compliance and a monitor to report on its progress. For the next five years, Cravath worked with the Receiver on very tight court-determined deadlines to develop and vet lawful selection procedures for the more than 600 different types of jobs under the Personnel Board’s purview.

“We spent thousands of hours each year that the Receiver was in place – many times objecting to portions of tests as they were developed, and working with our expert Industrial/Organizational Psychologists to both critique and help in that development,” says Wilson.

While the outcome of lawyering can produce bold headlines, it is more often in the fine print that true change comes. And Cravath’s work parsing the EEOC’s Uniform Guidelines on Employee Selection Procedures into a workable template for Birmingham, Ala., is a sterling illustration. The guidelines as well as federal law require that if a selection procedure produces adverse impact based on a protected classification such as race or gender reasonable efforts must be made to minimize that impact while not degrading the validity of the test. The tests in place had two basic types of flaws, according to Wilson. First, they tested for issues unrelated to the job, such as asking prospective truck drivers how to replace a water pump. Second, they tested by a method that would produce an adverse impact, when there were alternatives that would not, such as presenting questions orally and allowing work simulation or oral response instead of just written.

“In some cases, elimination of tests altogether and a reliance on minimum qualifications and prior experience was all that was needed,” says Wilson. “For example, holding a commercial driver’s license and 3 years’ experience driving a truck full time with a clean driving record proved better proof of job ability than passing a written test about how to drive a truck.”

The Personnel Board built a state-of-the-art assessment center, where candidates could be evaluated using video for both questions and answers. Videotaping the oral answers also allowed rescoring of results where evaluators differed sharply on a candidate's performance.

“It was only when the Board had in place lawful selection procedures that we were able to turn to the County,” says Wilson. “Where the Board had been sending largely all-white, all-male lists to the County and other employers, it would have been hard for us to prove that the County itself was not complying with its decree. It was only once the Board's lists of qualified candidates were nondiscriminatory, and we had a bit of a track record of how the County was hiring and promoting from those lists, that we had the data we needed to prove our case.”

When Cravath commenced discovery of county hiring procedures, the county responded that it was working on creating a structured interview process. According to Wilson, in reality it was asking truck driver supervisors, for example, to construct the questions and answers for the people they were interviewing and scoring. Questions were being formulated that were unrelated to the jobs, scoring was inconsistent from candidate to candidate, and certain candidates were given the answers in advance. The Roads and Transportation department, for example, was hiring a truck driver. And the department head selected a 19-year old white man instead of an African American man who had been driving garbage trucks for 15 or 20 years. When he was asked, “Well, why did you do that?” he responded, “The kid's dad and I live on the same block and I've known the kid since he was born. If he ever gets out of line, all I have to do is call his dad.”

The case against the county was largely developed by Kristy Greenberg, then a very junior Cravath associate who is now the deputy chief in charge of the criminal division of the U.S. Attorney's Office of the Southern District of New York. She spent well over a year in Alabama, taking 70 or more depositions, faced off with two Jefferson County attorneys. She was belittled and ignored. “And she just focused on what she was doing and took deposition after deposition after deposition and assembled it into a massive order of proof,” Wilson says. Job by job, she threaded through all the evidence from depositions, exhibits and other documents to create a remarkable record of, essentially, bad faith.

That record formed the backbone of the case against the county when trial commenced in 2009. When it resumed after a hiatus in December 2012, Wilson and retired partner Tom Rafferty included Lauren Rosenberg, then a very junior associate, and former associate Rachel Fritzler at counsel table. Rosenberg had summered at Cravath in 2010 and joined in 2011 after graduating from Columbia Law School.

“Our firm prides itself on staffing cases leanly, which is to the benefit of clients as long as your lawyers are bringing the skill and commitment needed for the work,” says Rosenberg of the corps of Wilson, Fritzler, Tom Rafferty, and herself who split up roughly 15 witnesses. “I had worked at Cravath for just over a year, so the ability to examine and cross-examine witnesses in a trial of this importance was obviously exhilarating, incredibly rewarding and showed how much [Wilson] trusted us.”



The county relied on its intent to comply with the decree, drawing a line between what happened in the past and the current administration. “We demonstrated that the County’s conduct since the election of new commissioners still did not demonstrate reasonable steps to come into compliance with the decree – they made critical decisions without even considering the decree or the effects those decisions would have on the county’s workforce,” says Rosenberg.

For example, when the county filed for bankruptcy, it laid off employees. But it did not consider how the layoffs would affect class members. “They took a last in, first out approach. So the recent hires of women and African Americans were then the first to be laid off. The County conceded that it had an adverse impact,” says Rosenberg. Adds Wilson, the County itself had done an analysis that showed its planned workforce reduction would operate more severely against women and African Americans. “But it went ahead anyway, without consideration of its obligations under the decree,” he says.

Class members testified to being passed over for promotions that were given to family or friends of supervisors. “We developed close relationships with several of these witnesses,” says Rosenberg, impressed at how much time the class members were willing to spend in a case where damages were not on the table.

“Obviously they hoped that it would improve the conditions for themselves, but they were focused on improving the conditions generally so that others would not endure the discrimination that they had experienced.”

In August 2013, Judge Smith held Jefferson County in contempt and appointed a Receiver to oversee all hiring and employment activities, and to develop non-discriminatory hiring protocols.

It’s been a long, long time coming.

Hernández was a reluctant recruit to Cravath when she joined in 2007. Her parents ran a bodega together, when her father suddenly passed away during her senior year in high school. While a sophomore in Cambridge, her Mom lost the bodega and Hernández took leave for two years before moving the family to Cambridge two years later. When she interviewed with Cravath’s then-presiding partner Evan Chesler – who succeeded Joffe as presiding partner – she figured she was assessing who the opponent would be when she went off to save the world.

And the boat was able to carry on. When Wilson was appointed to the bench, he tapped Hernández to bring Cravath’s four-decade journey home.

“I remember the first day I went to court and met Judge Smith. He explained how he got this case from Judge Pointer, and that he was optimistically hopeful to see the case come to an end in 18 months. He said, ‘It’s been more than 18 years and I’m still here, Ms. Hernández. I hope you can resolve this case before I die.’ I was able to do that.”

Hernández followed the footsteps of “two legal giants who had worked on it. And Wilson had already gotten the other three defendants into compliance. So it was daunting. I was humbled. I was excited but I didn’t want to mess it up,” she says.

In 2017 at his final hearing, Wilson addressed a packed courtroom, including Hernández on her first visit to Alabama. He went through the history of the case with a slide presentation. “And then the last slide I have in there is a giant picture of Damaris. And most of the audience were our clients – women and African Americans whom I’d known for a decade or two – who didn’t know that I was leaving. And I said, ‘I’m leaving, but you’re in good hands.’”

“I wasn’t even sitting at counsel table,” says Hernández. “And when he says big, it was like a full-blown slide. When I get up to introduce myself, the judge says, ‘Welcome Ms. Hernández. You know you have some big shoes to fill?’

“That’s the first thing he ever says to me. And I sit there thinking to myself, ‘Don’t I know it. And I’m only a size seven.’”

Getting the boat to shore entailed a new receiver for the Personnel Board who could inspire confidence there would be progress and change. “Tone from the top is what matters. And we found that in the past, it was the people at the top that were damaging our plaintiffs, our clients,” says Hernández.

In May 2018, the parties jointly submitted a plan to transition authority from the receiver back to Jefferson County. The court adopted the plan in June 2018 and terminated the receivership. A Monitor continued while the County proved it could operate without federal oversight. “We were still around, but they took control of HR,” says Hernández. And there were hiccups, including termination of an HR director for violating selection procedures. “She promoted someone who was less qualified because one of the directors had asked her to do it. So we had taken one step forward, two steps back.”

In 2019, having seen the County respond by firing the director, the Judge issued an order to show cause why the decree should not be terminated. Surprised, Hernández made a submission asking to at least wait until a new HR director was onboarded and fully aware of “the history of Jefferson County, the mandate of the decree, how the county works,” she says.

After one last legal kerfuffle over an anonymous email alleging a new act of nepotism the judge said, “Okay, Ms. Hernández, look, they practically [resolved] this themselves. It’s already been four years since you came on this case. Can we get it done?”

And get it done she did. With a cast of hundreds from one of America’s iconic law firms working on behalf of tens of thousands of workers in Alabama who just wanted a fair shot at a good job.

On December 21, 2020, amidst a pandemic, the decree was terminated.

“It feels like my colleagues before me ran the marathon and then I just stood right in front of the finish line and their unwavering stride and momentum pushed me over,” she says.

Today, the municipalities, county and City of Birmingham employ women and African Americans in far greater numbers. And, in perhaps a look forward, research data on demographics of Birmingham police departments in December 2021 focus far more on the racial breakdown of arrests and other acts of violence or detention than the composition of the force.

In June, Cravath donated \$6M to the Birmingham Civil Rights Institute, the Equal Justice Initiative, EJI’s Legacy Museum, Fisk University and the Lawyers’ Committee for Civil Rights Under Law. The fees were awarded to Cravath for its four-decade journey on the case. The firm had previously donated \$1.8M to the Lawyers’ Committee that it had recovered from the Personnel Board, City and Sheriff.

“As we reflect on the culmination of four decades of effort to make real the promise of civil rights reforms in Jefferson County, Ala., we feel privileged to carry forward that commitment by supporting the work of each of these remarkable organizations,” says Faiza J. Saeed, Cravath’s Presiding Partner.

“Things have changed,” says Wilson. “The bombings would be unthinkable now. And that’s within my lifetime. And I wouldn’t say it’s a result of this case. But did this case help move that along to some degree? I would say yes, because women and African Americans can get better paying jobs and afford somewhat better houses and all the other things that come with having a reliable and somewhat improved income and status.

“Those things end up helping to change a community. It doesn’t happen overnight.”

In 1996, Nunn wrote to Joffe, thanking him for coming to Alabama and handling the litigation because without the firm, she would never have been appointed the first African American woman Chief of Police in Birmingham, Ala.

“This has been the most rewarding work of my career,” says Hernández. “It just made me proud to be a Cravath partner.”

Oh yes it will.

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