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# BY THE NECK UNTIL DEAD

## A Look Back At A 70 Year Search For Justice

by Clark J. Freshman

**"A**n Innocent Man Was Lynched," blared the headline in a special supplement to The Nashville Tennessean on March 7, 1982. "Leo Frank, convicted in 1913 and lynched in 1915 in one of the most notorious cases in American history," the article reported, "was innocent, according to sworn testimony given by a witness in the case."

Some 70 years after he was first accused of the murder of Mary Phagan, a 13-year-old employee in the National Pencil Factory where he was superintendent, Leo Frank had once again surfaced from the murky depths of the national conscience. More than an unsavory air haunted this case, had haunted it from the day in July 1913 when Frank went to trial; justice itself seemed to have been tainted with a noxious mixture of anti-Semitism, agrarian and Southern prejudice and mob rule that had asphyxiated one man, ruined the political career of another and seemed impervious to the fresh breeze of historical progress.

That mixture would resist justice again. But over the course of the next four years, an unlikely group of heroes would emerge from the Frank case: the four men and one woman of the Georgia Board of Pardons. Still one of Georgia's hottest murder cases—a case that spawned both the Ku Klux Klan and the Jewish Anti-Defamation League—the Frank case would at last be laid to rest by these five bureaucrats, who, before it was over, would be damned more than once for repeating the sins of their forebears.

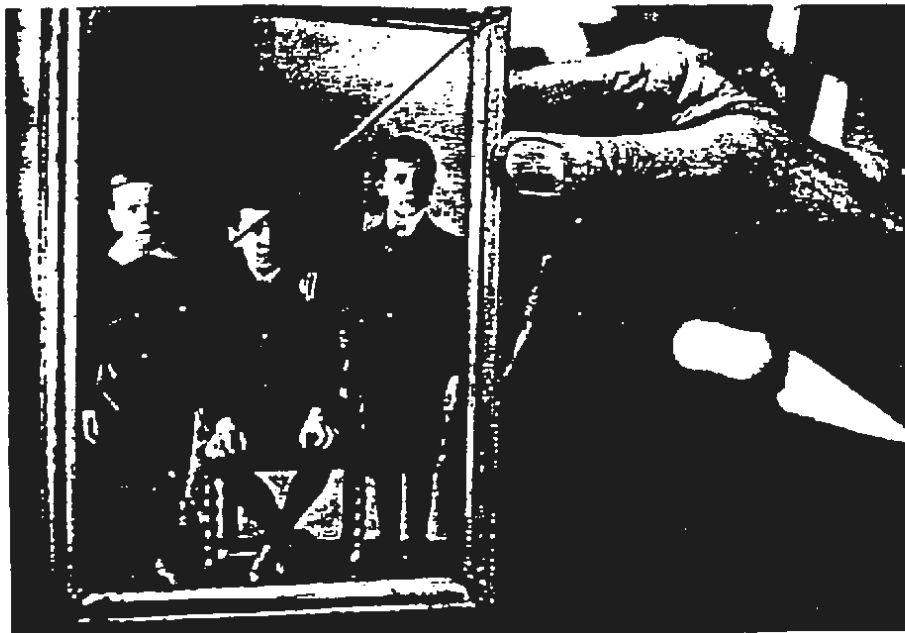
**I**n the mid-1910s, falling cotton prices were shutting down family farms, and rural Southerners were finding themselves forced to take jobs in Northern-owned and -operated factories. In this setting, Frank—Brooklyn-born graduate of Cornell, manager of the National Pencil factory, Jewish president of the B'nai B'rith and accused murderer of a Christian girl—played on every Southern prejudice. "People begin to roll it together," Georgia Pardon Board member Tom Morris said in 1985 about what must have gone through people's minds seven decades earlier: "They equate one with the other: educated, Northern, Jewish. You can't single one thing out and say that was the problem. If there was one central theme, it was carpetbagger, but everything became an adjunct. You mention one of the three [educated, Northern, Jewish] and you think of the other two. In the end it really became a class issue." Morris's view was supported by the testimony of a speaker at Frank's commutation hearing: "I feel obliged to say that there is a class prejudice in this case of employee against employer that was perfectly obvious before the trial, during the trial and ever since the trial."

No credible evidence supports the report (incorporated into NBC's upcoming miniseries, "The Ballad of Mary Phagan") that crowds chanted, "Hang the Jew or we'll hang you." Still, even if antipathy toward Frank was rooted in more than just anti-Semitism, that sentiment was undeniably present. After Frank was convicted, Southern populist Tom Watson would write, "Here we have the typical

libertine Jew who has an utter contempt for the law and a ravenous appetite for the forbidden fruit—a lustful eagerness enhanced by the racial novelty of the girls of the uncircumcised." One of Frank's attorneys later said, "If Frank hadn't been a Jew, there never would have been any prosecution against him." Dale Schwartz, chief lawyer in the 1982 effort to pardon Frank, agrees: "Suddenly he became the great sodomizer of young women, the destroyer of young Christian virtue ... lots of buzzwords that really add up to anti-Semitism."

But the racial politics of the case were far more complex. The prosecutor, Tom Dorsey, based much of his case against Frank on the testimony of Frank's black janitor, Jim Conley, who claimed that Frank had promised him money for bringing Phagan's body down the elevator into the factory basement. Frank's lawyers, while calling their client a victim of anti-Semitism, pandered to anti-black sentiment by strongly implying that no black could be trusted. And it's unlikely that Dorsey himself was an anti-Semite. Dorsey shared his practice with a Jewish lawyer (who, ironically, wrote Slaton to request a pardon for the man his partner helped convict) and vigorously and publicly denounced a planned boycott of Jewish merchants in nearby Marietta.

Nevertheless, it was anti-Semitism that, in the wake of the French persecution of Dreyfus, made the Frank case an international cause celebre—attracting national press attention, money for Frank's defense and a star-studded pha-



Alanzo Mann (right) with his brothers, circa 1910.



Leo Frank upon his installation as president of the Atlanta B'nai B'rith, circa 1912.

lanx of defense lawyers. And that notoriety, in turn, increasingly made Frank a mere prop in a great historical drama. At his trial, Frank's attorneys waived his right to be present at sentencing without even consulting him. "I impressed upon him," famed constitutional lawyer Louis Marshall wrote a supporter, "that I was not in the case as paid counsel, but that I had embarked upon it, because I felt that I owed a duty to the profession, to the cause of justice, and especially to the permanency of our institutions which are based on the supremacy of the law." Frank, in short, was left with no bills and as little control over his own fate.

Ironically, the elevation of his case was to be Frank's downfall. The legal question of his guilt or innocence was overshadowed by heavy rhetoric and inescapable symbolism; his defenders responded to attempts to cast him as the anti-Christ by casting him as a sort of latter-day Christ. "I know of no act," one of his attorneys said, "I know of no word of this defendant, inconsistent with innocence." Such hyperbole was more than a mere man could bear, and it was simply impossible for Frank to live up to it. "I invented for him by his defender. He [Frank] was in the middle," Morris says of these extreme characterizations. "He was just a working man in Atlanta, Ga., probably with some fantasies like most of us, just a John Doe."

In their crusade to sanctify Frank, his attorneys downplayed potentially important evidence relating to the crime scene in favor of medical evidence that their client did not exhibit any of the physical signs of of perversion; in short, their client didn't walk, talk or look like a devil, so he must be a saint. Later, the decision to commute Frank's sentence from death to life imprisonment would hinge on far more pedestrian evidence: Had Conley used the elevator to move Phagan's body, as he claimed, crushed feces would have been found in the shaft. They were not, so Conley must have lied. In the end, final sentencing in a case that the populist Watson thought could "test a dynasty" and that the constitutionalist Marshall equated with the survival of just institutions turned on the so-called "shit-in-the-shaft" argument.

**T**he man who commuted Frank's sentence, Georgia Gov. John Slaton, has long been seen as one of the few heroes of the Frank affair. By the time Slaton agreed to review the case, Frank's execution date had been set and the Governor had received some 100,000 letters on the subject, including

at least two appeals on the prisoner's behalf from fellow governors in North Carolina and Arkansas.

Slaton approached his task with a meticulous zeal that befitted his background as a lawyer, scrutinizing details of the investigation, trial and subsequent appeals. The result of his research was a Solomonian decision that attempted to split the difference between Frank's guilt and death. In a lengthy written explanation of his decision to commute the sentence, Slaton tried to explain that "there is a territory beyond a reasonable doubt and absolute certainty for which the law provides in allowing life imprisonment instead of execution." It was a novel legal concept: Frank's guilt was clear enough to uphold his conviction, but not his execution.

It could not have been an easy conclusion to reach. Reaction to the decision was so severe that he had to call out the state militia to defend his home, but Slaton stood fast. "Two thousand years ago, another governor washed his hands of a case and turned a Jew over to a mob," Slaton said at the time. "If today another were lying dead in his grave because I had failed to do my duty, I would all through life find his blood on my hands and would consider myself an assassin through cowardice." The Governor left the state at the end of his term, never to hold elected office again.

But for all the appearance of courage and great sacrifice, Slaton did not go as far as he might have. "I think that Mr. Slaton mainly took such action [the commutation]," Mobley Howell, Pardons Board chairman in 1982-83, told me in 1985, "because he felt that, while the defense was unable to prove Mr. Frank's innocence, there was enough question as to his absolute guilt that he did not deserve the death penalty." Howell summarized the public Slaton well enough, but it is now clear that, privately, Slaton believed Frank to be innocent. In a March 1945 letter to his cousin, Slaton confided, "In my judgment, Frank was as innocent as I, and it was a question whether through political ambition I should shirk my duty as governor and allow the state to commit a murder." (That letter remained unknown to historians and Georgia Pardon Board members until 1985, when this writer found a copy in the archives at Emory University.)

Slaton believed in Frank's innocence, even likened him to Jesus of Nazareth and yet failed to pardon him. If Slaton was a hero, he was not a wholly honest one. He took pains in his official commutation order to dismiss allegations that

**"If a corpse 70 years molding can cry, Leo Frank is weeping today. Not for himself—death is immutable—but for justice, freshly lynched—and not by Klansmen, but by bureaucratic insensitivity."**

mob rule and anti-Semitism were influential in the outcome of the Frank case, but if we can trust his private correspondence, these forces obviously figured in the Governor's reasoning. And in the end, commutation or death were the same sentence for Frank, who was whisked from prison by an organized mob and lynched.

Nearly 70 years would pass before Frank would have his next shot at redemption. In 1982, Frank's former office boy, 83-year-old Alanzo Mann, claimed that he had seen Conley, Frank's janitor, carrying Mary Phagan's body down the stairs into the basement.

**"I** grew up in Georgia. My grandmother would point out where Leo Frank was lynched. As a child, I grew up thinking an innocent man was lynched. I don't even know if I knew there was a trial."

These words, spoken in 1985 by Michael Wing, a member of the Georgia Board of Pardons that denied Frank a pardon only two years earlier, sounded oddly reminiscent of Slaton's innocent-but-guilty conclusion decades earlier. But Wing and the other members of the Board of Pardons—Howell, Morris, Wayne Snow and Mamie Reese, the only

black and only female member—would soon reveal themselves as the true heroes of the Frank affair.

The pardon they denied in 1983 was a product of Mann's startling change in testimony. When Mann came forward, interest in the Frank case—never forgotten—was instantly rekindled. Joe Frank Harris, a gubernatorial candidate, promised to pardon Frank if elected—only to discover, after voters had delivered on their end of the bargain, that, since the 1940's, authority to grant pardons was no longer vested in the Governor but in the Pardons Board. District Attorney Louis Slaton, a descendant of John Slaton, discouraged the filing of an Extraordinary Motion for Retrial on Frank's behalf and directed lawyers interested in seeing Frank's name cleared to the Pardons Board. Georgia legislators pointed in the same direction, and the State Senate officially adopted a resolution asking the Board to look at the case. In December 1982, attorneys submitted a passionate petition to the Board, seeking a full pardon for Frank.

The Board, accustomed to working in obscurity (the reason authority for granting pardons was given to the Board in the first place was to remove the process from the often abusive, highly-publicized political arena), moved to center ring. "Things sort of took on a carnival atmosphere," recalled Howell. "Barbara Walters even called."

Mann seemed to want to act as ringmaster. He gave interviews, printed business cards and negotiated television rights for his story. But his story only generated more questions, not answers. Why, for example, had he waited 70 years before coming forward? (It was a nagging but important question: Board member Wing recalled a case in which he found that a letter recanting a rape accusation, the sole basis for a pardon application, was written only after the victim's mother threatened to harm her if she didn't take back the charge against the mother's onetime boyfriend.) Mann's only explanation for the delay was that his parents were opposed to his testifying in 1913. But Wing noted that Mann had dropped out of school against his parents' wishes to work for Frank. "Why would a man who wouldn't obey his parents about school," Wing wondered, "obey them when it came to potentially letting an innocent man hang?"

Mann's testimony, furthermore, did not in itself clear Frank. Even if Mann was telling the truth about what he remembered, and even if what he remembered was correct, his testimony merely



Governor John Slaton

proved that Conley had lied about using the elevator—which Slaton had already concluded in 1915.

Unpersuaded by Mann, the new hero of the Frank case, and unaided by the legacy left by Slaton, the old hero, Board members began a massive research effort that turned them into a kind of composite appeals court, history seminar and philosophy group.

Every night, members took home history books, such as C. Vann Woodward's lengthy biography of Tom Watson. "All the information gathered was being parceled out," Morris recalled. "It was almost like a sequel, passed around: Here, read chapter 1, then chapter 2. Keep it moving."

The tendency toward a more academic approach bothered members, who were used to a more personal touch and routinely supplemented their staff briefings with personal encounters to size up applicants and witnesses for themselves. Before voting on the final appeal of any death row inmate, for instance, a Board member would visit the state prison give the man or woman a chance to make a personal appeal.

Morris figures that he and other Board members spent "tenfold the time on the Leo Frank case over any death case," and Reese puts the figure closer to 100-fold. From the petition in December 1982 to the decision in December 1983, members found themselves asking questions, pooling information and swapping scenarios at their regular Tuesday group meetings.

For all those months, Frank's specter hit home harder than many contemporary cases. Jewish friends of Board members expressed concern. Snow once found himself being lectured by his optometrist about Frank. "You don't have too many people who don't have an opinion," he said later. "The general public may not be aware of the facts, but they have an opinion." But it wasn't just the opinions of others that weighed heavily on Board members. Wing, for example, recalled the tree his grandmother had pointed to. And the job in itself is burdensome. "I wouldn't want to be alone in all this," Snow said. "The public can't pinpoint any individual, but you know what you did. I wake up at night think about decisions."

In December 1983, however, the Board rejected the pardon application. The application had provided impeccable legal arguments—"masterful, probably all any lawyer could have done," Wing emphasized—but Morris and oth-

ers felt the fact section, drafted by journalists at The Tennessean, did not stick close enough to the evidence. "We set about to do almost the impossible: reconstruct something that occurred 70 years ago," Morris said after the pardon was denied. "We were totally at the mercy of accounts by others—mostly journalism accounts, letters, etc. Mostly opinions."

Part of the problem may have been that the pardon application reawakened the craving for absolutes that characterized the original trial. Attorneys pushing the pardon wanted the Board to overturn judge and jury and declare Frank innocent, to "exonerate him of any guilt"; and less for Frank's sake than for what he represented.

For Dale Schwartz, the chief attorney working for the pardon, the case had special significance. Schwartz, an immigration lawyer with the prestigious Atlanta firm of Troutman, Sanders and treasurer of the Georgia Democratic Party, had handled high-profile pro bono cases before—helping Russian Jews emigrate and representing Haitian refugees interned

Atlanta. Tooling around Atlanta in his Porsche, he looked like the quintessential success—doing good while doing well.

But Schwartz still felt like an outsider sometimes. He once told the local Emory University Hillel, a Jewish youth group, that his experience growing up as a member of the only Jewish family in rural Athens, Ga., included occasional shotgun blasts that blew out his family's windows and left bullet holes in the walls of their home.

"I am not working for Leo Frank or his family," Schwartz said of the pardon effort. To him and many of his fellow Southern Jews, it was once again the case's symbolic importance that mattered. The pardon application reflected that feeling, listing Frank almost incidentally in its stated objectives. "The public good will be served," it read. "A historic injustice will be corrected; a 70-year libel against the Jewish community of Georgia will finally be set aside, and the soul of Leo Frank will, at last, rest in peace." Like many Southern documents, it invoked religious sanction. "We must seize this opportunity," the petition for pardon concluded, "for we believe, as we do, you do, in following the biblical injunction: 'Justice! Justice ye shall pursue!'"

Justice in this sense is, of course, separate from the particulars of the law that guide legal decisions. Ideally, the two



Populist Tom Watson

move in the same direction, but an eye to the former would not allow the Pardons Board to skip over the latter. Members were horrified by various aspects of the case—the anti-Semitism, the lynching, the subsequent failure by the state to prosecute any members of the lynch mob—all the more horrified because they spent a year absorbing every gruesome detail of the case. "One of the worst tragedies to occur in this case," Morris said, "was the state's inability to protect one of its citizens." Reese took only small comfort in the absence of definitive proof that any state officials took part in the lynching itself. "You're repulsed by the lynching," said Snow, who helped write Georgia's death penalty law as a legislator. "Even if we didn't participate in it ourselves, we are still shamed if

could happen in a society built on law. It has no place in the system." None of the members could make any sense of the state's failure to prosecute anyone for Frank's death. "There were always lynchings," Wing said, "but letting them get off scot-free seems to me the worst crime."

But, whatever their personal feelings, granting a pardon declaring innocence was outside the Board's ordinary jurisdiction. Implying innocence—effectively saying "you're wrong" to a jury and judge—requires extraordinarily solid proof of that innocence. Indeed, no member of the Board could recall more than one such "innocence" pardon—and that had been at the request of the trial judge. "Knowing what we were charged with granting," Howell said, "I feel we were constrained." A visibly troubled

Morris told the same story. "I don't know. I wish we could do something to right this wrong. I know we want to do something, but to say with 100 percent certainty that Leo Frank is an innocent man is a very difficult thing to do." "It was a bureaucratic decision," said Wing of the denial. "For us to issue a pardon because of different things would have been a mistake. It would have been tantamount to the jury considering that Mary Phagan was a little girl and Leo Frank was operating a sweatshop."

**T**wo years after the denial, Board members still smarted from the sharp criticism they had received. In a widely reported remark, Jewish Anti-Defamation League head Nathan Perlmutter had said, "If a corpse 70 years molding can cry, Leo Frank is weeping today. Not for himself—death is immutable—but for justice, freshly lynched—and not by Klansmen, but by bureaucratic insensitivity." An Atlanta Constitution cartoon depicted the five Board members as blind men stumbling around

## If the Frank case was less about one man's absolute purity than about the bigotry and mob rule it symbolized, then a different kind of pardon might provide a solution.

looking for evidence of Frank's inno-

cence. They felt entirely misunderstood, and Wing hoped that an Esquire piece by Steve Oney would help straighten things out. But the September 1985 article milked the case for all its sensationalism, making the gentle and deliberate Wing sound like a Georgia cracker who wandered around glibly referring to key evidence as the "shit in the shaft argument."

Board members continued to be haunted by their decision. And yet, despite a persisting sense of Frank's innocence, no one knew if decisive evidence would ever show up. "Within the next 20 years," Mamie Reese assured me hopefully in 1985, "something decisive will be found, like an archeologist ... will find the bone that identifies the dinosaur. They finally found the Titanic, didn't they?" Others doubted that Frank could ever live up to the demands placed on him by his martyrdom and symbolic importance. When it came to the facts of the case, he was still just a "John Doe"; in the eyes of the law, he was not a symbol, just a man who couldn't be proved innocent with a high degree of certainty.

## THE LAST BONE

**“W**ithin the next 20 years, pardons Board member Mamie Reese said hopefully in 1985, "something decisive will be found (in the Leo Frank case) like an archeologist ... will find the bone that identifies the dinosaur."

The search for that missing bone has been long and fruitless, and it seems unlikely that decisive evidence will ever be found. But the search itself has long distorted the real importance of the Frank case as a symbol of anti-Semitism, bigotry and mob rule.

May 29, 1915: Doctors submit a statement to the Poison Board that their examination did not reveal a trace of any thing common in degenerates or perverts ... and Mr. Frank is in no sense a pervert and had never been addicted to or oppressed by opium.

June 5, 1915: W.E. Henkin writes John Slaton to ask about rumors that teeth marks on Mary Phagan's body match

Frank's teeth. Slaton does not write back.

June 21, 1915: Slaton commutes Frank's sentence and adds, "Under the evidence, which is not so strong in detail, there is every probability that the victim of Mary Phagan was not [Slaton] the 26th day of April, 1915."

1943: University of North Carolina Press publishes claim by Judge William Powell, a friend of Slaton, that he and Slaton knew Frank was innocent based on confidential evidence. "I expect to write down what I know and why I know it," he claims, and puts it away with the instruction that if not to be opened until certain people are dead. If Powell did leave behind such a file, no one ever found it.

1949: Allen Henson, Henson's Commission of Special Lawyers, that Jim Conley, the chief witness against Frank, confessed to his attorney that he himself killed Mary Phagan.

1964: Pierre Van Paassen, a French journalist, claims to have uncovered dental records that show Frank's teeth did not

match teeth marks on Phagan's body. No one ever verified the dental records.

March 7, 1982: Alarizo Mann, onetime office boy to Leo Frank, tells The Nashville Tennessean that he saw Conley carrying Phagan's body down the stairs—not the elevator, as Conley swore, in 1915.

December 1982: A pardon application to the Georgia Board of Pardons claims that Conley confessed—at least three times—to Phagan's murder; to an insurance agent in letters to his girlfriend and to his attorney. The application "cites books by other people."

1985: Attorney Dale Schwartz tells an audience at Emory University Hill that Conley confessed thousands of times to Phagan's murder and that reports of these confessions should be binding by themselves warrant the granting of a pardon.

June 29, 1915: Leo Frank, in a letter to his wife, wrote, "The public will tire of thinking about the case."



Seventy years after the fact, this parole board pardoned Leo Frank.

New pardon efforts that began in July 1985 argued that an impossible standard—"innocence beyond any doubt"—had been applied to the original pardon application and asked that the standard be overturned. Yet only two Board Members had relied on that standard in rendering their decision. Howell, who wrote the official denial in 1983, suggested later that everyone's sense of justice could have been met in 1983 if a routine forgiveness pardon had been "granted and worded in such a way as to imply that neither the Board nor the State of Georgia condoned the cowardly action of the mob which abducted and lynched Mr. Frank."

But the forgiveness pardon was too weak to satisfy some of the backers of the original pardon, who believed and wanted it known that Frank had done nothing to be forgiven for. Perlmutter dismissed any new effort in a confidential July memorandum to Charles Wittenstein, Southern counsel for the Anti-Defamation League. No compromise was necessary, Perlmutter reasoned, because "our

constituency—the literate world—knows that Frank was railroaded." Wittenstein shot back, "Our constituency also knows that the Holocaust was real, but we continue to counteract Holocaust denial." The pragmatic Schwartz might have been able to prevail, but in October, Schwartz—president-elect of the Immigration Lawyers Association—was accused of illegal tactics in several immigration cases. The charges were dismissed months later, but the controversy kept him from the center of pardon negotiations.

Gradually, Board members and lawyers working on the Frank case realized that, if the Frank case was less about one man's absolute purity than about the bigotry and mob rule it symbolized, then a different kind of pardon might provide a solution. The new pardon had to transcend the gulf between a routine forgiveness pardon and the exceedingly rare innocence pardon. Over a period of months, a pardon emerged in 1986 around the consensus that had been building among Board members since

1983. The product of intense thought and negotiation, the 1986 pardon honestly forswore the ability to conclusively determine guilt or innocence after 70 years. On March 11, 1986, the Board unanimously granted a pardon that condemned Frank's lynching and the failure to prosecute his murderers and attempted to "heal old wounds." The announcement received international acclaim, and feared protests by the Klan never materialized.

Frank's gravesite in Mt. Carmel Cemetery in Queen's, N.Y., bears the Latin inscription *semper idem*—"always the same." Schwartz used to point to the description as a strangely appropriate epitaph for a case that lasted over 70 years. In 1986, though, five members of the Georgia Board of Pardons and Paroles proved that things could change. •

*Clark Freshman is a Marshall scholar in philosophy, politics and economics at University College, Oxford. His research into the Leo Frank affair helped facilitate Frank's 1986 pardon.*



