

## Civil Rights: The People Behind the Victories

*Last April we invited Juanita Jackson Mitchell, Ed '31, M.A. '35, to come back to the University as our third Dean's Visiting Fellow. Once or twice a year we ask a graduate of the arts and sciences to visit the campus to meet with undergraduates. During their two-day stay, the fellows meet both formally and informally with students and faculty. Our students have a chance to talk to our fellows about their careers, their values, and the importance of their education in the arts and sciences.*

*When we learned that Juanita's husband Clarence, the former legislative director of the NAACP, would be accompanying her, we took the occasion to bring these two remarkable figures together with several other Pennsylvanians who have been active in the struggle for civil rights. The result was a symposium, "The Struggle for Equal Rights and the Law," moderated by Trustee Judge A. Leon Higginbotham and including Professor Ralph Spritzer, Judge and former Dean Louis H. Pollak, and Professor Ralph Smith. For all who were there, it was an unforgettable experience, and I know you will see why in the pages that follow.—Robert H. Dyson, Jr., Dean of the Faculty of Arts and Sciences.*



### The Roots of Great Moments

by Judge A. Leon Higginbotham

It is easy to lose sight of the fact that the great victories for civil rights announced by the U.S. Supreme Court and headlined

in the newspapers have most often started as routine and frustrating cases in some obscure trial court. In the trial courts throughout our land hundreds of skirmishes start and are won or lost generally without receiving any significant public attention. Yet if there had not been the first skirmish, if there had not been the lawyer willing to advocate the case, and if the first parties had not been willing to subject themselves to inconvenience, discomfort and denigration, there would have been no opportunity for the appellate star advocates to win victories before the highest courts in the land.

The woman we honor today was the quintessential initiator in the trial court, rather than the final advocate before the Supreme Court. She was always a profile in courage, litigating civil rights cases at a time when there was no funding, serving as an advocate for people who were weak, poor and dispossessed, giving them hope and making it possible for the court process to be more sensitive to the denigration which it had previously sanctioned.

Let me cite you one personal example of a case in which I was privileged to work with Juanita. When the sit-in movement was in vogue in 1960-61, some black and white students from Haverford and Temple went to Anne Arundel County, Maryland, to express their conviction that American citizens should be able to get a hot dog and a bottle of soda in a restaurant without segregation or denigration. They were all arrested and jailed for peacefully sitting as a racially integrated group in a restaurant which refused to serve blacks at the counter. Of course at the time you could always get unlimited advice, even from distinguished law school professors, when your brief was being prepared for the United States Supreme Court. However, the critical problem was that there were very few lawyers willing to go down to the jails in remote counties in the middle of the night as Juanita did.

When we went into the jail in Anne Arundel County about four or five in the morning, the first thing we did was to ask all of the students to sign a power of attorney, because black lawyers then were particularly fearful that they might be subject to disbarment proceedings on the technical ground of champerty—that we were soliciting cases. We told the students that we would try to post bail. To their credit, the students said to us, "We don't want you to post bail." This was a startling response, because the entire legal process is predicated on the proposition that anyone in jail wants to get out. The students stayed in jail as a matter of principle and protest. They wouldn't let us post bail, and we ultimately had to litigate the case on its merits. Of course, we raised every possible objection to the prosecution.

During this hectic period, there was never enough time. We would work until four or five in the morning, and be up a couple of hours later. Juanita always seemed to be able to react faster than any of us—even though we may have been a few years younger. She was gracious enough to let me be the chief trial counsel; I summed up to the jury by making reference to the Declaration of Independence and what America is or should be about. Perhaps my impact can be measured by the fact that the jury was out less than three minutes, returning a verdict of guilty. As I left the courthouse that evening, feeling somewhat depressed, I can still hear Juanita saying, "We'll rush back and prepare the appeals paper. We'll win it, we'll win it."

Though we did not win the case on the trial court level, there are memories from it which I shall long remember. The students in that jail, refusing bail, asked for only one thing—ten gallons of paint. And they painted that crummy Anne Arundel County jail in pastel green. Ultimately the jail was spanking clean, and as esthetically attractive as a jail could be. Finally, the case won on appeal. The success of the Anne Arundel case was possible because of a few great lawyers like Juanita, who faced the storms of prejudice, hatred, and discouragement yet kept their resolve and fought the battles when victory was so uncertain.

Juanita and Clarence are two of the heroes in America who have given their lives to build a better temple of justice. Of course, the temple of justice is still unfinished, and occasionally some portions of it wear out or are destroyed. But because of Juanita and Clarence, today there is a far broader and more secure foundation on which justice, liberty and equality for all can be built in America.



## The Law in the Lives of People

by Juanita Jackson Mitchell,  
Ed '31, M.A. '35

I would like to give flesh and blood to the law, both the legal precedents and the legislative enactments. I would like to tell you how I came to the University of Pennsylvania, and why I am celebrating the 50th anniversary of my graduation.

I had finished my second year at Morgan College (now Morgan State College) in Baltimore, Maryland—my home. As in most borderline and southern states during that period of American history, the church was attempting to do what the state wouldn't do; that is, to give black Americans an educational opportunity. Morgan was a struggling Methodist college for blacks. My mother found that Morgan was unaccredited. She and my dad came from a line of people who believed that a good education was key. She was determined that her children would get a first-class education. At that time the University of Maryland would not admit blacks.

We had an aunt living in Philadelphia. She and her husband had taken my sister, Virginia, into their home two years before. Virginia wanted to study art. My mother had sought to get Virginia admitted to the Maryland Institute of Art in Baltimore. They would not admit colored students. She had brought her here to Philadelphia and my aunt, a Philadelphia citizen, had taken her to the Pennsylvania Museum and School of Art at Broad and Pine Streets. Virginia was accepted. By the time I arrived in Philadelphia, Virginia had already completed two years of art at that institution. This opportunity had been denied her in Baltimore solely because of her race.

My mother brought me to Philadelphia. We went first to Temple University which was nearer my aunt's home. The admissions officials said they would be glad to have me enter the school, but they couldn't give me any credit for the courses I'd had at Morgan College. I'd have to start all over again. That my mother rejected.

She said, "There's a college that Ben Franklin founded. Where is it?" We found our way to the University of Pennsylvania. There we found a wonderful human being, Dean John H. Minnick of the Bennett School of Education. Good human beings can change the course of history. We sat in the dean's office until he could see us. The secretaries hurried about. They seemed to be a little disturbed that we would continue to sit until the dean found time. "Just a minute," my mother pleaded. "We will only take a minute."

So John H. Minnick, an educator in the highest and best sense of the word, gave us "just a minute." He had us come into his office. My mother explained what we were all about. When she had finished, he admitted me to the University of Pennsylvania as a junior and gave me credit for all of my courses at Morgan except Bible.

"Now, Mrs. Jackson," he had said, "do you know what you're getting into? The tuition alone is \$1,000." In 1929 this country was in a deep economic depression. My mother had replied, "What is \$1,000 for a first-class education?" But when she went home, my parents got

out their insurance policies to make loans. I remember my mother used to put on pants and go up on the roof with my dad to patch it so that her children could get a first-class education.

She had also said to him, "You know in my home, boys and books don't go together." We had a home that was disciplined. Education was very important in those days. We had to burn midnight oil. Our parents stayed close to us. They were going to make sure that we got this first-class education. But they said, "Now when you get it, you're not to come back home and segregate yourselves with an intelligent. We're giving you what we didn't get as a trust. You're to use it to help your people."

In September of 1929 I enrolled in the University of Pennsylvania. Surely enough, I kept up. I learned that a "D" at the University of Pennsylvania meant Distinguished. I came off with my string of Ds at the end of the first semester and earned a place on the dean's list. So I was graduated fifty years ago with honors.

My husband's family also believed in a first-class education. His family had sent him to Lincoln University, a Presbyterian college in Oxford, Pennsylvania. Upon graduation we both went back to Baltimore.

Baltimore was mean. The whole state was mean. In 1931, they lynched a black man in Salisbury, a small town on the eastern shore of Maryland. Eighteen months later in 1933, not only did they lynch a black by the name of Matthew Armwood, but they burned his body in the middle of town at Princess Anne, Maryland.

In Baltimore we were totally segregated. We lived in court-enforced racial ghettos. We couldn't be firemen. We couldn't be policemen. We could be teachers, but the school system was totally segregated. There was a colored school administrative building in the heart of the ghetto manned by a director of colored schools. The colored and white teachers had separate, segregated meetings.

In our town we couldn't even buy articles in the department stores. When we were in high school and learned French, we would put turbans on our heads and go down to Stewart's Department Store and speak French. We were welcomed as black foreigners. Black natives were unwelcome. This was how we got our kicks in high school, those of us who had the courage to do it.

We couldn't be social workers. We couldn't drive city streetcars or the taxicabs. We couldn't be telephone operators. We couldn't read meters for the gas and electric company. We couldn't do a large number of things you normally expect to do in a community.

A lot of people don't know that if you keep children segregated, they learn to fear, and they hate. Here at Penn I was able to lose my fear of white people. I made friends across the board. Gradually, I shed the shell I had brought with me to Pennsylvania, which had made me reticent, afraid to venture, afraid to speak up because of anticipated insults (which were not forthcoming), expected rejection (that did not happen). I have feared no man since.

Again at Pennsylvania, in this first-class educational environment, I developed the security that comes from competition with the best and being able to meet it. It gave me confidence in my own ability. It did something for me that has lasted all my life. I might be denied equality of opportunity but I knew I was not inferior.

I believed that what happened in Philadelphia ought to happen in Baltimore—my home. Exposure to democratic practices in Pennsylvania strengthened my faith that democracy could work in Baltimore. My husband and I decided we could help effect change. The Baltimore branch of the NAACP, which had been chartered in 1913, was inac-

tive. We organized the City Wide Young People's Forum, 500 of us. We began to crusade against racial injustice. Our activities led to the revival of the Baltimore branch of the NAACP.

In 1934 I came back to Pennsylvania to secure a master's degree because the University of Maryland was not yet open to blacks.

It wasn't until 1935 that the University of Maryland opened to blacks. Three NAACP lawyers—Charles Houston, Harvard-trained dean of Howard University Law School, Thurgood Marshall, and W. C. A. Hughes—took a fellow Baltimorean, Donald Gaines Murray, as plaintiff and sued the Regents of the University of Maryland for refusing to admit Murray to the Law School.

I know now that nothing is ever impossible. As NAACP's Charles Houston taught us, "If this is the law and it's wrong, change it. Get your facts together, get your plaintiffs, start your cases, and make the new law." Charles Houston and his team did such an outstanding job of presenting Murray's case and challenging his denial under the equal protection clause of the fourteenth amendment of the U.S. Constitution, that the judge, Eugene O'Dunne, didn't leave the bench. He admitted Donald Gaines Murray without recessing to consider his decision. Herbert O'Connor, then state attorney general, said to the judge, "Give us a stay of mandate until we can appeal to the Court of Appeals of Maryland."

Judge O'Dunne said what the U.S. Supreme Court doesn't always say, but it was the way he had learned the law: "A constitutional right is personal, present, and immediate. It cannot be postponed." He denied the state's plea for a stay. He ordered the Regents of the University of Maryland to admit this qualified black citizen to the University of Maryland Law School at once.

And this was in June 1935, in a "lynch state." Herbert O'Connor filed an appeal and quickly prepared his case. But he couldn't get it to the Court of Appeals of Maryland before September 1935, when the fall semester opened and Donald Gaines Murray had almost completed his first semester. And this is the marvelous thing. The Court of Appeals in a mean state, the "lynch state" of Maryland, affirmed a courageous lower court judge, Eugene O'Dunne, who saw the law as he had been taught it and ruled on the law with courage.

With that precedent, Charles Houston and his team of constitutional lawyers went on to the University of Missouri Law School challenging the denial of Gaines, a Missouri black citizen, to admission to the University of Missouri Law School. In 1938 the NAACP lawyers won in the U.S. Supreme Court the opening of graduate departments of state universities to black citizens where the state provided no separate facilities for black students. This was the opening gun in a series of cases brought by the NAACP to challenge the exclusion of black citizens from state educational institutions.

This is the flesh and blood of the law as it affects the lives of people.

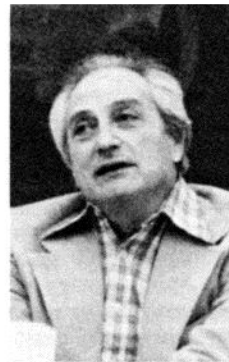
In September 1935, Walter White, the executive secretary of the NAACP, asked me if I would come to the national office in New York City to develop the youth program of the Association. I did. For three years I traveled all over this country, but mainly in the south, organizing young people, challenging young people that this is America, this is a democracy. In states that were as bad as mine and even worse, I tried to tell them that we can effect change. That under the Constitution, as Charles Houston taught us, and as my mother put it, "We've got to take the white man's law into the white man's court and tell him to obey it." That is what we did.

You are precious, you students. Whatever the issue, whatever the rejection, whatever the denial, whether it is race, whether it is

economics, whether it is religion, whatever it is, human beings do not have to take injustice. God helps those who help themselves. If you sit around and complain, you'll just sit.

You have to train, get all they will give you. Go the second mile, learn what you don't have to learn. Exceed the minimum as far as getting what you need.

With that arsenal challenge the inequities wherever they are. And in this country, if we are alert, if we have the courage, and if we are not "me-minded" but have a sense of mission, we can make this country into the kind of nation it ought to be.



## The U.S. Government Takes a Stand

by Ralph S. Spritzer, Professor of Law

*Professor Ralph Spritzer is undoubtedly one of the most effective oral advocates to appear before the United States Supreme Court. He has that extraordinary ability to keep 50,000 significant facts in his head and to persuade judges, when arguing complex and difficult issues, that there is simply no other rational option than his position. He is an outstanding lawyer and professor.—Judge A. Leon Higginbotham, Jr.*

It is easy, though mistaken, to think of the legal struggle for civil rights as one simply involving lawyers—lawyers of the NAACP and lawyers of the state and federal governments—arguing in the hushed chamber of the Supreme Court. Behind each case that ended in the high court, there stood people at the grass roots, the men and women who had filed the cases and the lawyers who had brought them to trial, who had done so under conditions of great stress and anxiety and oftentimes at serious personal risk. I speak of the parents who asserted the right of their children to enter public schools from which they had been excluded; those who challenged "Jim Crow" practices of buses and railroads; and those who "sat in" at lunch counters in order to get service and were jailed for trespass. These people, and the trial lawyers representing them, were taking a stand, let us remember, in communities where acts of reprisal and violence, such as the firebombing of their churches, were not unknown.

My involvement in civil rights litigation was in the years that I was in the Department of Justice. The federal government began to participate in these cases as early as the late 1940s and became part of a continuing effort to establish civil rights through judicial proceedings.

The participation of the government—most often as a friend of the court rather than as a party to the case—was important, I believe, not only because of the influence it had upon some of the critical decisions of the Supreme Court; it was symbolically important that after long years, the United States was taking an active role in challenging



practices that inflicted grave indignities upon the black people of this country.

The first significant participation of the Solicitor General's office came in the case of *Shelly v. Kraemer* in 1948. The question in *Shelley* was whether it was consistent with the equal protection clause of the fourteenth amendment for state courts to enforce private agreements that restricted the use or occupancy of real property to white persons. A group of young lawyers in the Solicitor General's office persuaded Solicitor General Philip Perlman and Attorney General Tom Clark to enter that case. A brief was filed, and Mr. Perlman argued the case, together with Thurgood Marshall who represented black petitioners asserting the right to buy property covered by racial covenants. As you know, they won their case.

A couple of years later, the government entered the *Sweatt* and *McLaurin* cases, where young black plaintiffs sought to enter state universities to do graduate work. *Sweatt* had been denied admission to the University of Texas Law School, but was told he could enter a state school for blacks. *McLaurin* had been admitted to the University of Oklahoma, but was required by state law to sit apart from his fellows in the classroom, the library, and the cafeteria. The Supreme Court did not, in these cases, overrule the doctrine that "separate but equal" is constitutionally permissible. Rather, it found that the options given the plaintiffs did not in fact accord them equality.

Another case that came up at about the same time involved a black government employee named Elmer Henderson. In the course of his duties, Henderson made a trip from Washington to Atlanta on the Southern Railway. Entering the dining car to have a meal, he was informed that he could only be served in a specially curtained-off area. Henderson challenged Southern's rule. The Interstate Commerce Commission upheld the railroad's practice on the ground that the facilities provided to blacks, although separate, were equal to those provided others. In the litigation that followed, the Justice Department took the opposite position. Significantly, in doing so, it committed itself to the proposition that the "separate but equal" doctrine enunciated in *Plessy v. Ferguson* in 1896 should be reexamined. The Supreme Court did not reach that claim, but it did decide in Henderson's favor on the narrower ground that the Southern had violated anti-discrimination provisions of the Interstate Commerce Act.

By this time the public school cases were already on the tracks. In the waning days of the Truman administration, the Solicitor General filed the government's first *amicus* brief in *Brown v. Board of Education*. Following up on what had been said in *Henderson*, it supported the NAACP's position that *Plessy* should be overruled. This was a matter of some moment, because I doubt that the Eisenhower White House would have taken that initiative had the die not been cast. *Brown*, as you well know, was argued and reargued, and resulted ultimately in the total rejection of the idea that state-imposed racial segregation could be reconciled with the concept of equal protection of the laws.

The first *Brown* decision in 1954 was followed, of course, by sustained resistance, and the government was drawn into a new series of cases toward implementing and complying with this ruling. You will recall some of the more dramatic instances—Little Rock and Central High School, James Meredith and the University of Mississippi.

An awakening black consciousness had stirred the movement to open the public schools. The school decisions added new fuel. Segregation was being challenged in other areas. Protests against "Jim Crow" practices were taking place at bus terminals and train

stations. Blacks were "sitting in" at places of public accommodation and demanding their right to be placed on voting rolls. My most vivid recollection of the period is of the five young people whose case reached the Supreme Court in 1964 after they had been convicted of criminal trespass under state laws. It became my task to argue in those cases on the side of their counsel. The Court reversed the convictions, finding on narrow grounds that they were flawed, but did not deal with the broad constitutional question of whether the states, through trespass laws, might enforce decisions by private persons to discriminate at places like stores, lunchrooms, and amusement parks. That issue was soon addressed by national legislation, the public accommodation provisions of the Civil Rights Act of 1964.

The legal revolution stimulated by the civil rights movement culminated in the civil rights statutes of the sixties, including the 1964 Act and the Voting Rights Act of 1965. That, of course, is far from saying that the objectives of the movement have been fully achieved. The struggle for equality of opportunity, as you are well aware, is a continuing one, and the obstacles, though their shape has been altered, remain formidable.



## The Human Element in Civil Rights Struggles

by Clarence M. Mitchell

*For more than thirty years, Clarence Mitchell has been in the trenches struggling valiantly, and often against great odds, for those human rights causes which bring greater justice to many Americans. He was a brilliant and effective legislative director of the NAACP, often single-handedly designing, and with others implementing, the important federal legislative programs which have made many of today's better options possible. We have had to pursue the summit of equal justice for all through many interrelated routes. Martin Luther King, Jr., Roy Wilkins, Whitney Young, and their respective organizations were often at the forefront of the civil rights struggle in terms of visible protests and moral appeal. As significant civil rights victories were won before the United States Supreme Court, most often because of the NAACP, Thurgood Marshall led the assault as an eloquent advocate in the federal courts.*

*But the journey from protests in the street and sporadic verdicts in the court to the ultimate legislative enactments which make victory a reality for all of our citizens is an arduous path. As much as any American leader, Clarence Mitchell is responsible for getting the 1964-65 and 1968 Civil Rights Acts moved from legislative proposals to the law of the land. And these statutes are at least as significant in creating solutions for the eradication of centuries of racism as have*

*been all of the other more dramatic victories. Clarence Mitchell is a hero not merely for blacks, or women, or minorities. He is a hero for all Americans, helping to make our nation a land which will ultimately be free and fair and just for all of our citizens.—Judge A. Leon Higginbotham, Jr.*

If any of you are wondering how I managed to get into the Jackson household when they didn't mix books and boys, I passed as a book.

Actually anything that I would say to Mr. Spritzer and Mrs. Mitchell will not really add much, but I do have a couple of footnotes to their remarks. With respect to Mr. Spritzer's comments, it has been my good fortune to deal with attorneys general from Francis Biddle through Griffin Bell. I haven't had any dealings with the present attorney general because I have retired from the NAACP's Washington bureau.

But the fact is there was a human element that was important to consider as we were laying the groundwork for civil rights legislation which was passed by Congress. Under Attorney General Biddle, there was very little effort to try to integrate the Department of Justice. As a matter of fact, we were unable to get a black into what was then known as the civil rights section, a small part of the criminal division. Finally, after much effort, under the Truman administration, we were able to get a very distinguished Philadelphian and Harvard graduate, Maceo Hubbard, a position in the civil rights section.

Another victory came with the 1957 Civil Rights Act. With the help of then Representative Kenneth Keating, the late Congressman Emanuel Celler, the present chairman of the House Judiciary Committee, Peter Rodino, and many others, we were able to have the government of the United States authorized to file civil action in voting cases. Prior to that time the department could only institute criminal cases. Department lawyers were almost never willing to do this because it meant criminal proceedings against key politicians and pillars of the community. And even if they did begin criminal proceedings, grand juries were unwilling to indict these people, and juries would not convict them. Unfortunately, the department rarely invoked the remedy of civil action.

The 1957 law also set up the U.S. Civil Rights Commission. Here again the human element entered into a great decision. There was a wonderful senator from the state of Missouri named Tom Hennings, who was the chairman of the Judiciary Subcommittee on Constitutional Rights in the Senate. The attorney general was Herbert Brownell, who was an Eisenhower appointee. These two just wouldn't get together. I decided to try to break the stalemate. It was necessary for somebody to get in there and get these two wonderful people together so that we could get something done.

The human element has played an important role in all of the civil rights legislation that we've worked on. Everyone was determined to include in the 1964 Civil Rights Act a section on public accommodations so that no one could be excluded or segregated in hotels, restaurants, or other public facilities. There were people who wanted to run me out of town because I said we ought to also include in the Act what is now Title VI, which prohibits the government from expending money for discriminatory purposes, and Title VII, which pertains to fair employment. As I said, there were many people who thought these latter two sections would jeopardize the whole bill. Some said we wanted to use those two sections for trading purposes.

I felt a considerable amount of heat from very high sources in this country, but again I want to pay tribute to those who stood with us. There was Speaker John McCormack who stood firmly with us. There

were the people in organized labor, like George Meany. Then there was Congressman William McCulloch, a Republican from the state of Ohio, and of course old stalwart Congressman Emanuel Celler. In the Senate we had similar backing.

I want also to stress the continuity of the problem of discrimination. Leon Higginbotham has written a book which is called *In the Matter of Color*. You ought to read that because it documents how we got into a terrible predicament in this country by using color as a criterion for evaluating people.

I hope you'll also go back and read the history of how we got rid of the poll tax in this country. It was my good fortune to work with Mrs. Hackney's mother in my early days in Washington. (Lucy Hackney, the wife of University President Sheldon Hackney.) She took the position that the poll tax was a means of denying constitutional rights to people and had a profound negative effect on the political life of this country. There were many people who didn't believe that. I remember talking to some blacks from Texas, who would say, "Anybody who doesn't pay a dollar for the poll tax should not be able to vote."

Finally, the poll tax was outlawed by the Supreme Court, but before that decision, we had a provision in the 1965 voting rights act authorizing the attorney general to institute action against the poll tax. I was in the state of Texas when that litigation was underway by the Department of Justice. Ralph Yarborough, who was then a senator from the state of Texas, was running in the primary. He was a liberal senator, and he won because 160,000 people who had not been able to vote before because of the poll tax voted in that primary. So you can see the importance of that provision.

The final thing I'd like to say is in the nature of a tribute to two of my fellow panelists. I have never met anyone who has greater commitment to human dignity than these two people have. Mrs. Mitchell is available for clients with or without money. Often, after we've been up to one or two in the morning, we must make an early visit to the police station to get somebody out of jail or to represent somebody whose mother has come in and told a story that deserves attention. I think that is the kind of spirit that will make the law live in this nation. So far as Judge Pollack is concerned, he is a man without any personal pretense. He has been one of our associates and friends through the years of civil rights cases.

The law is a "jealous mistress." But that mistress also has a human quality which requires that we look beyond what is in a statute, that we look beyond what is in the precedents, and get to the problem—denying a basic right to a human being. By thinking about it, by reasoning, and by acting, we can make the law do what it ought to do and give the victims of wrong a remedy.





## Marshall: The Man Who Made the Case

by Judge Louis H. Pollak

*As dean of the Yale Law School, Lou Pollak was superb both as dean and as a scholar in constitutional law. His two-volume work on the Supreme Court is still a classic. When I was on the equivalent of the Overseers Board at Yale, when Lou was dean, we recognized that a great law school should have more than a miniscule representation of minority students. It was always a joy to work with Lou because he approached us not as an adversary but as a committed advocate for pluralism. He received the "high calling" to teach at Penn and later became dean of this great law school. He is now a judge on the United States District Court. His opinions are crafted with the eloquence and the precision which one would expect of a superb scholar and gifted writer. For me there is no doubt that perhaps the most important contribution I have made to the federal court system was that my vacancy made Lou's appointment possible.—Judge A. Leon Higginbotham, Jr.*

In what Juanita and Clarence Mitchell have had to say, one gets a sense of what lawyering in the public interest can be, of what lawyering is at its best. It is an inspiration for all of us. Mrs. Mitchell is the embodiment of the lawyer in the community doing that thankless, demanding job that needs to be done as the infrastructure of the great advances. When it comes to changing national policy in the last forty years, I think that Clarence Mitchell and Thurgood Marshall simply stand alone. To be sure, Clarence Mitchell had substantial help from people like Walter White and Roy Wilkins who directed the NAACP, but on the legislative side of the agenda or the shaping of the executive policy, it has been Clarence all these years as it was Thurgood rallying the forces of litigation.

I'd like now to focus on the lawyer's role in civil litigation as it centers on Thurgood Marshall.

Before Marshall there was Charles Houston and William Hastie. When Marshall was a law student at Howard in the early 1930s, Houston was dean and Hastie was a young faculty member of brilliant promise.

Half-a-century ago, Houston—a prophet before his time, whom we now recognize as one of the great figures of American law—drew the blueprints for the great litigation campaign to undermine racial segregation. And then Houston went to court to begin the back-breaking job of turning the blueprints into reality.

Aiding Houston—then carrying his work forward—was Hastie, who also served as dean of Howard, as a leading litigator in the civil rights struggle, and as judge of the United States Court of Appeals for the Third Circuit, the first black federal judge in our history and one of the most distinguished judges of our time. Hastie linked Houston and Marshall. He was junior partner to one and senior partner to another.

When the school desegregation cases came to a focus, Houston was dead, and Hastie was a judge, and Marshall alone was the leader of the enterprise. It was a collective enterprise, and many of those who worked with Marshall have distinguished themselves in all sorts of ways thereafter—James M. Nabrit, who later became president of Howard University; Robert Carter and Constance Baker Motley, now on the federal bench in New York; William Coleman, later to become President Ford's Secretary of Transportation; Spotswood W. Robinson, III, now on the Court of Appeals for the District of Columbia; Jack Greenberg, who was to succeed Marshall as director of the NAACP Legal Defense Fund; and many, many others. Yet, it was Marshall at the center who had not only the professional skills, but who was the catalyst for bringing this group together as a whole, as an effective legal fighting force. Those privileged to serve on that fighting force—from novices at the bar to senior litigators and established legal scholars—never faced a greater professional challenge.

Let me tell you an anecdote about one of those novices: In 1953 I was nominally working for something called the Department of State of the United States, but I didn't really have anything to do because the secretary, whom I'll call Mr. Dulles to preserve his anonymity, apparently didn't think I could help him very much. When I wasn't reading *The New York Times*, I would wait for the mail from New York in which draft briefs in the school desegregation cases would come.

I remember when the penultimate draft came with a covering memo from Mr. Marshall, asking us to get our comments back to him as quickly as possible. I read it through quickly and decided that the summary of argument, the most critical part of the brief, really didn't say what it ought to say as crisply as it should. And I sat down with my lawyer's yellow pad and spent an hour-and-a-half rewriting the summary of the argument and coming out with something crisp and clear and powerful, and it was magnificent. And I went down the hall to the office of the young woman who was assigned to assist me and asked her if she could type it up. I was very patient. I probably waited about ten minutes before I was back in her office asking for it. After she finished typing my draft, she said to me, "Oh Mr. Pollak, that's the most interesting thing. I was glad to type that up. It was so clear and so well-written, and I really liked it." I smiled a shy smile and said I was very glad she thought well of it. She said, "There was just one thing I didn't understand. I wonder if I may ask you a question. Is it that you want those little colored children to go to school with the little white children or that you want them not to go to school with the little white children?"

And that's how it was. Happily there were lawyers who could put the matter in a more compelling fashion. And I'm going to take the liberty of reading you part of the closing paragraphs of Mr. Marshall's closing argument of 1953. There were many lawyers of extraordinary distinction who participated in the arguments of the several consolidated school cases, but basically it was a debate between Thurgood Marshall on the one hand and John W. Davis on the other. Davis, a former Democratic presidential candidate, and the eminent appellate lawyer of his time, tried to make the case for segregation. You will see from what I will now read to you from Marshall's peroration why even John W. Davis couldn't make the case.

*"They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion,*



despite the fact that I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit, because nobody can dispute, say anything anybody wants to say one way or the other, the Fourteenth Amendment was intended to deprive the state of power to enforce Black Codes or anything else like it . . . we must submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings. Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why, of all the multitudinous groups of people in this country, you have to single out Negroes and give them this separate treatment.

"It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man. The only thing it can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as possible; and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for."



## A Moral Claim For The Future

by Ralph Smith,  
Assistant Professor of Law

*I don't know any professor in or out of the Law School who has been as vibrant an*

*individual in terms of the community as Ralph Smith. It's not uncommon for me to hear many, many students say, "Well, as Ralph Smith said the other day in his office . . ." I am amazed at how accessible Ralph has been to so many students—inspiring them, encouraging them, and getting them ready for the important leadership roles they will serve in this country. It is easy for professors to become so immersed in the minutiae of their specialty that they become oblivious to the quality of life for students at our university and to the needs of the less powerful citizens of our nation. To his great credit, probably more so than any professor at Penn, Ralph has focused on human and civil rights with steady persistence and thoughtfulness.*

*Many who utter occasional platitudes for pluralism and affirmative action abdicate any role in implementing change, but Ralph is one of the decreasing few who work at this demanding task with steadiness and effectiveness. His commitment, his voice, and his presence con-*

*stitute one of the important assets of our University.—Judge A. Leon Higgenbotham, Jr.*

What I can add to this morning's discussion might be done best by recalling the case of Allan Bakke, a white aerospace engineer who contended that his being denied admission to the University of California's Davis medical school was due to so-called "reverse discrimination." Mr. Bakke challenged the legality and constitutionality of a two-track admissions process which had the effect of setting aside a given number of seats for qualified minority students. His lawsuit was viewed as a challenge not only to this particular program but to the whole policy of special admission and the underlying concept of affirmative action. By the time that dispute wound its way to the United States Supreme Court, it had become one of the most highly publicized and widely-discussed cases in recent history.

Once the case reached the nation's highest tribunal, it became clear that the most important brief would be that filed by the Solicitor General on behalf of the United States. Those of us who monitored this case were concerned that for the first time in three decades, the United States would lend its moral weight to those opposing efforts to remedy the continuing consequences of this country's history of slavery and racial discrimination.

Shortly after Labor Day, the word got out that the United States' brief did support Bakke. Lou Pollak and I took the train to Washington to join the dozen or so people already assembled. It was an interesting group consisting of congressmen, civil rights lawyers, and activists from a broad cross-section of the progressive community. Hours later after often heated discussions and literally dozens of telephone calls, this session had developed a detailed strategy to turn the government around.

The suggestion was made that if anybody could get a copy of the government's brief, it would probably be Mr. Clarence Mitchell. Now I would hate to accuse Mr. Mitchell of having purloined the government's brief, but somehow, mysteriously, this top-secret document appeared, and we were able to verify the fact that the government of the United States would have supported the case of Allan Bakke, at least to the extent of urging his admission to the University of California.

Given the miracle of Xerox, that brief was circulated throughout the country within the next twenty-four hours. Copies went to Philadelphia, New York, California, and Boston. By Monday morning the strategy had unfolded, and the solicitor general was besieged.

That important Monday morning three congressmen, Congressmen Conyers, Mitchell and Stokes, asked Lou Pollak, Jim Nabrit and myself to act as their counsel as they went to meet with the solicitor general and senior officials of the Justice Department. To underscore the gravity of the issue, each congressman spoke less than five minutes. They addressed the political implications of submitting such a brief. Jim Nabrit then took the floor and set out in detail how the historical development of the fourteenth amendment would support affirmative action and race-conscious programs. I followed and recounted the development of this particular case to show that urging the admission of Bakke was not mandated by the facts of this case. If there were concerns about defects in the record, the most appropriate course for the government of the United States was to urge a remand of the case back to California.

As I turned the floor over to Lou Pollak, it occurred to me that

nobody knew what he would say because none of us had asked him. He paused for a moment. And then he began talking about the history of the Office of the Solicitor General in much the same way that Professor Spritzer has just outlined it. Judge Pollak said that for three decades, the government of the United States and the Office of Solicitor General had been on the side of those who were seeking justice. And he recalled that a few years earlier then-Solicitor General Bork had to respond to a question which his instincts as a conservative would have told him he had to answer "no." Mr. Pollak explained that Mr. Bork thought for a moment, realized the historic obligations of his office, and answered "yes." And Lou Pollak looked directly at Judge McCree and said, "You, the solicitor general, you are the lawyer for all of the people, and it is that historic obligation that we urge you to discharge."

There was no doubt in my mind in the silence that followed Judge Pollak's comments that we had won the day. We may have persuaded the solicitor general perhaps by the use of logic, perhaps by resort to history, perhaps by resort to the record. But Lou Pollak in the last five minutes had managed to bring forth the moral claim that the solicitor general could not deny.

That morning while we were in the Justice Department, Andrew Young, ambassador to the United Nations, and Patricia Harris, secretary of Housing and Urban Development, and Joseph Califano, secretary of Health, Education and Welfare, were over in the cabinet meeting making many of the same arguments. On our way into meeting with the solicitor general, we met William Coleman, President Ford's secretary of Transportation, and Jack Greenberg, director of the NAACP Legal Defense Fund, who were coming out. During that forty-eight-hour period, a civil rights community had galvanized. People from the labor movement, people from academia, the politicians, and the preachers came together to act in unison against a perceived threat. And I understood, perhaps emotionally for the first time, the tremendous affinity, the feeling of warmth, the sense of mission, the collective achievement, that these people had felt for so long. I understood it and I respect it. And I realize why the people who met that morning and the people you see here today are in fact real American heroes.

With that as a background let me suggest that we're about to undergo a transition, a transition that will not be easy or without its ripples. A new generation of civil rights leadership is emerging. And this new generation, like those who came before us, must respond to the issues of our time, must take part in the actions and the passions of our time. And the actions and passions of our time demand that we focus our attention not only on the problem of discrimination, but on the problems of poverty. I suspect that the 1980s and the 1990s and part of the twenty-first century will see the civil rights movement coming together with the quest for economic justice in this country. I believe that the disproportionate number of blacks who are poor, the over one million black families who live in substandard housing, the forty-six percent of black youth who do not finish high school, the forty percent of black teenagers who are unemployed, will come together to make new demands on the current generation of civil rights lawyers. The black poor will demand that we move on the business of

assuring that there is a guaranteed annual income to replace the patchwork of poverty and welfare programs that we now have, that there is a serious commitment to full employment, and that children get a first-class education regardless of whether a child in the next seat is black or white.

I suspect that we will find a new generation of black lawyers, a new generation of activists. We will find new Juanita Mitchells and new Clarence Mitchells, who will be willing to join hands with the Ralph Spritzers and the Lou Pollaks of this generation to assure that we respond as admirably to the challenges that face us as our heroes did to the challenges they faced in their generation.

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