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## MAKING BRICKS WITHOUT STRAW: THE NAACP LEGAL DEFENSE FUND AND THE DEVELOPMENT OF CIVIL RIGHTS LAW IN ALABAMA 1940-1980

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That same day Pharaoh sent this order to the taskmasters and officers he had set over the people of Israel: "Don't give the people any more straw for making bricks! However, don't reduce their production quotas by a single brick . . . ."<sup>1</sup>

## I. INTRODUCTION

In the familiar Biblical passage, when Moses and Aaron requested of Pharaoh that the children of Israel be given a three-day holiday leave from the Egyptian brick-making sweatshops, Pharaoh responded by withdrawing an essential raw material for brick-making in ancient times: straw. Henceforth, the children of Israel would themselves be required to forage the countryside for straw, transport it to the brick ovens, and meet the same rigid production quotas set when the Egyptians were providing all of the raw materials, including straw.

The plight of black Alabamians in the 1930s was roughly comparable to that of the children of Israel when Moses embarked on that perilous task of delivering them from bondage. Although the Thirteenth Amendment to the U.S. Constitution purported to free blacks from chattel slavery, the Fourteenth Amendment extended citizenship to them and accorded them the rights of due process and equal protection, a series of developments effectively relegated blacks in Alabama and the rest of the South to slavery's first cousin—Jim Crow.

The First Black Reconstruction resulted in the extension of suffrage to black men and the election of black Republicans to local, state, and national offices. The Redemption Legislature of 1874 restored political power in this state to white Democrats. Two years later, Republican presidential candidate Rutherford B. Hayes, who had lost the popular vote, bargained to remove federal troops from the South in return for the support of the Florida delegation in the Joint Session of Congress. When he became president, he kept his promise. A few years later, in the infamous *Civil Rights Cases* in 1883, the Supreme Court provided a safe harbor for private racist acts by imposing a "state action" requirement in Thirteenth and Fourteenth Amendment cases. In 1901, a Constitutional Convention was called in Montgomery for the principal and avowed purpose of removing black Alabamians from the social and political life of the state. The Constitution, which was the handiwork of that Convention, largely achieved its purpose. By the end of the 1930s, the political and economic status of black Alabamians was little better than their counterparts in South Africa with one crucial difference: the co-existence of the Fourteenth Amendment and lawyers willing to challenge the Jim Crow/apartheid system.

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1. *Exodus* 5:6-8 (The Living Bible).

These civil rights lawyers often found missing or in short supply some of the essential raw materials needed for the creation of the brick foundation for civil rights principles. Victims of discrimination and oppression were often afraid to come forward to serve as plaintiffs—for it sometimes involved not simply a sacrifice of dignity, body integrity, loss of job—it sometimes called for the ultimate sacrifice of life. Aside from the lack of fee-shifting statutes when their impecunious clients prevailed, civil rights lawyers also risked their own lives and the ongoing threat of being disbarred, or charged with the crimes of barratry or champerty.

The remaining sections of this Article show how the NAACP's Legal Defense Fund and certain of its lawyers undertook the making of brick without the provision of straw.

### A. *First Principles of American Law*

The role of black American lawyers in the Herculean fight against American apartheid and its race rulers has only begun to be studied and reported as an integral component of American legal and social history.<sup>2</sup> This special story is worth examining and telling because it reveals a sordid past, a longstanding, fundamental contradiction between American principle and practice. Moreover, that invidious past has an inescapable debilitating legacy that affects every American living today. Indeed, there are numerous current legal questions that are inextricably linked to past exclusionary laws that relegated all colored Americans to inferior castes.<sup>3</sup> One can scarcely look at any aspect of American life without observing the consequences of conscious racial inequality. Not only has the inequality diminished the legal profession, but every American has been harmed by the illusion of white supremacy. These first principles of hereditary racial supremacy and racial inferiority have been cornerstones of American law.

Black lawyers "have taken the lead in confronting the American polity with the paradox of inequality within a society founded upon the doctrine of equality."<sup>4</sup> These lawyers have endured and engaged the

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2. See generally J.L. CHESTNUT, JR. & JULIA CASS, *BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR.* (1990); FRED D. GRAY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM* (1995); WALTER J. LEONARD, *BLACK LAWYERS: TRAINING AND RESULTS, THEN AND NOW* (1977); GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* (1983); *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS* (J. Clay Smith, Jr. ed., 1998); J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944* (1993); ROBERT W. SPEARMAN & HUGH STEVENS, *A STEP TOWARD EQUAL JUSTICE: PROGRAMS TO INCREASE BLACK LAWYERS IN THE SOUTH 1969-1973* (1974).

3. See generally BRYAN K. FAIR, *NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION* (1997); Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381 (1999).

4. LEONARD, *supra* note 2, at i.

many normative explanations for American inequality, whether based on religious, historical, or biological determinism. At bottom, American ideology presumed that coloredness caused debilitation, requiring that superior whites should act for colored persons since they were incapable of acting in their own best interests. Presumed racial supremacy explains why blacks were enslaved, why Native Americans were removed, why Mexicans lost the Southwest, and why Chinese and Japanese persons were declared ineligible for naturalization. Even some whites have not been white enough to receive the privileges of whiteness until they abandoned their ethnic customs and embraced white supremacy.<sup>5</sup> Black and other colored lawyers lived under this shadow of presumed incompetence, while seeking to dismantle America's discriminatory legacy. Thus, any racial progress at all is remarkable given the tremendous obstacles to it.

Over time, the cruel paradox sanctioned by the American Constitution caused the nation's bloodiest war, divided families and regions, and necessitated restorative federal laws. Black lawyers worked with others to remind the nation of its basic creed. By principle, all were to be equal under law. There were to be no castes here. In practice, castes were extant, most notably race (and gender) castes constructed under law and custom:

Historically, nothing [had] done more than the law in creating, maintaining and perpetuating the exploitation, degradation, and oppression of [colored] peoples. The slave trade was legal. Slavery was legal. The Black codes were legal. Jim Crow laws were legal. Then, as now, racists made the law, racists interpreted the law, and racists executed the law. Racism became a major component of the fabric of American life.<sup>6</sup>

This is the essence of institutional racism. Racism is not simply the work of a few random bad actors. It has been a foundation of American life and will remain so until the nation fully reconciles what admissions committees, bar associations, law firms, businesses, judges, juries, voter registrars, and law enforcement officials, among others, have done or permitted to be done to colored people. And it remains for black lawyers and others to link present caste with institutional racism and to persuade the American polity and its courts that no American has a legal right to maintain caste over another person. Black lawyers must explain with others why government has a duty to dismantle all forms of American

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5. James R. Barrett & David Roediger, *How White People Became White*, in RACE AND RACES 445-50 (Juan F. Perea et al. eds., 2000).

6. LEONARD, *supra* note 2, at 6-7.

caste.

*B. Origins of the Black American Lawyer in the United States*

In this post-modern period, when diversity and multiculturalism have gained currency in American letters, re-centering the significant contributions of black lawyers helps to reduce their apparent invisibility and marginality. Consider, for example, Macon Bolling Allen, the first black lawyer in the United States who was admitted to practice in Maine in 1844 at the height of sectional division over the legal status of blacks, whether slave or free.<sup>7</sup> Like most of the nation's earliest lawyers, Allen studied under a white lawyer who then recommended him for bar membership.<sup>8</sup> Within a year, Allen relocated to Massachusetts, again becoming the first black lawyer there.<sup>9</sup> He was appointed twice to justice of the peace positions, making him the nation's first black judge.<sup>10</sup> After the Civil War, Allen moved to South Carolina where he again was admitted to the bar.<sup>11</sup>

Undoubtedly, one reason that Allen moved so much was that it was difficult for black lawyers to find clients among whites or blacks who believed that they could prevail in American courts without a white lawyer.<sup>12</sup> Racial prejudice was extant in American public life, circumscribing the narrowest opportunities for colored people and their relation with whites. As one reads about the travails of Allen and others, one cannot escape the significance of color then, and one better understands America's current racial quagmire.

One consequence of race prejudice has been the marginalization of the contributions of black lawyers. Thus, while many Americans recognize the pivotal role that U.S. Senator Charles Sumner of Massachusetts played in arguing the landmark school desegregation case styled *Roberts v. City of Boston*<sup>13</sup> in 1850, far fewer know the lead role of Robert Morris, Sr., the second black lawyer admitted to practice in Massachusetts.<sup>14</sup> Morris worked alongside Sumner, arguing throughout the courts in Massachusetts that it was illegal for the local school officials to force little Sarah Roberts to pass by five whites-only elementary schools and attend

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7. SMITH, JR., *supra* note 2, at 93-95.

8. *Id.* at 93.

9. *See id.* at 93-94.

10. *See id.* at 94-95.

11. *See id.* at 95.

12. SMITH, JR., *supra* note 2, at 272, 274. This belief was due in part to the view that black lawyers were regarded as "threats to social peace." *Id.* at 272. Such beliefs caused black lawyers to take certain precautions in their practice of law. For example, in Alabama, some black lawyers enlisted the assistance of white attorneys in murder cases because their presence gave the defendant a better chance at a fair trial. *Id.*

13. 59 Mass. (1 Cush.) 198 (1850).

14. SMITH, JR., *supra* note 2, at 96-97.

one for colored children.<sup>15</sup> Despite his aggressive, steadfast opposition to the Fugitive Slave Law of 1850 and a treason charge, Morris' popularity soared.<sup>16</sup> He was a candidate for Mayor of Chelsea and appointed a magistrate, only the second black to hold a judicial office in the United States.<sup>17</sup> It took the nation another century to catch up with Morris and Sumner,<sup>18</sup> but their work had immediate impact when Massachusetts adopted new laws banning school segregation by race.<sup>19</sup>

Similarly, most Americans know Thurgood Marshall was the first black American to serve on the United States Supreme Court, appointed by President Johnson in 1967, serving for twenty-four terms, until he was worn out. But his mentor, the great Charles (Charlie) Hamilton Houston, Amherst and Harvard Law graduate, Professor and Vice Dean at Howard Law School, Chief Counsel for the NAACP, and veteran labor lawyer, the man who killed Jim Crow, might well have reached the Court had he been white enough.<sup>20</sup> Instead, many talented Americans with darker skin could not be leaders in a nation founded on the principle of white hegemony. Houston, who once said he *would rather die on his feet than live on his knees*,<sup>21</sup> worked himself to death to rid America of racial caste.<sup>22</sup> He is an American hero, unknown and unsung largely because he was colored.

Recalling the role of black lawyers also reminds us that American educational opportunities have not been assigned meritocratically. Most law schools for most of their history had no place for colored students. Thus, some fifty years after beginning its law school, Harvard Law School became the first to graduate a black student, George Lewis Ruffin, in 1869.<sup>23</sup> Nearly another century elapsed before Harvard redoubled its efforts to recruit a diverse student body through summer law institutes targeting minority college students and encouraging them to consider law school. By far, Howard Law School, organized in 1869 by

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15. See *id.* at 97-99.

16. See *id.* at 99.

17. *Id.* at 98-99.

18. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding in 1954 that segregation of children in public schools on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment).

19. An Act in amendment of *An Act Concerning Public Schools*, 1854 MASS. ACTS ch. 256, §§ 1-5 (codified as amended at MASS. GEN. LAWS ANN. ch. 76, §§ 5, 16 (West 1996)). See also SMITH, JR., *supra* note 2, at 116 n.30.

20. SEGAL, *supra* note 2, at 210.

21. *Id.* (emphasis added). Houston graduated valedictorian from Amherst College as a member of Phi Beta Kappa. *Id.* He was also the first black American elected to the Harvard Law Review and graduated from Harvard Law School in the top five percent of his class. *Id.* See generally GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

22. See SEGAL, *supra* note 2, at 211. Houston died of a heart attack in 1950 at the age of 54. *Id.*

23. SMITH, JR., *supra* note 2, at 36.

John Mercer Langston,<sup>24</sup> graduated more black lawyers than any other American law school.<sup>25</sup> Thus, graduates of Harvard and Howard led the way in organizing the black bar and in answering the call to produce social engineer lawyers who would challenge racial caste in American life.<sup>26</sup>

The life stories of Allen, Morris, Houston, and Ruffin are part of thousands lost through a monochromatic abridgement that whitens American history, distorting significant contributions by brilliant, skilled colored folks. Yet, in a nation where coloredness created a presumption of inferiority, reconstruction and redemption would require the best efforts of many social engineers of whatever ethnicity or hue, courageous persons willing to risk security or life itself to fight entrenched laws, institutions, and ensconced privilege that taught all Americans, at least unconsciously, that Americans with darker skin were somehow less deserving of equal rights. Now, centuries late, supremacy myths have been debunked and the question remains, can the United States be made whole? Can colored folks belong to a nation so long pledged to white domination? Answers to these questions remain elusive. However, it is difficult to imagine that any group has been more committed than black lawyers to trying to restore a nation's lost dignity.

Throughout the country, black lawyers have overcome numerous personal and professional obstacles, joining a profession once closed to them and working alongside others to eliminate the scourge of color caste. Specifically in Alabama, between 1940 and 1980, the NAACP Legal Defense Fund ("LDF") and a few legal giants took the brutal beast of state-sanctioned, racial segregation by its awesome horns, wrestled it to the ground, and over time have been slowly destroying its capacity to generate misery and oppression of colored citizens.<sup>27</sup>

Although the war continues, in this Article, we build on the land-

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24. *Id.* at 42.

25. *See id.* at 64.

26. *See id.* at 43, 148. Howard School of Law held as its aim the production of attorneys who would seek to apply the law to the economic, political and social problems of the Negro. *See id.* at 43. Perhaps the most famous graduate of this ideology was Thurgood Marshall.

27. GRAY, *supra* note 2, at 115, 130, 175, 186, 192, 196, 203. Cases representing the LDF's struggle against state-sanctioned racial segregation include the following: *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (gerrymandering case involving the redrawing of Tuskegee, Alabama, into a "28-sided sea dragon"); *Henderson v. ASCS*, 317 F. Supp. 430 (M.D. Ala. 1970) (invalidating laws with the effect of preventing Negro farmers in Alabama from participating in agricultural committees); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (guaranteeing due process for Negro students expelled from state schools because of their participation in sit-in demonstrations); *Zellner v. Lingo*, 334 F.2d 620 (5th Cir. 1964) (regarding the right to peaceably demonstrate and march on the public roads and rights of way); *Lucy v. Board of Trustees*, 213 F.2d 846 (5th Cir. 1954) (highlighting the LDF's first attempt to desegregate The University of Alabama resulting in Governor George Wallace's famous "stand in the schoolhouse door"; the University was eventually desegregated in 1963); *Parker v. Franklin*, 331 F.2d 841 (5th Cir. 1964) (resulting in the desegregation of Auburn University in Alabama); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (representing perhaps the most famous case won by the LDF).



mark work of J. Clay Smith, Jr., among others, by relating how in Alabama, principally through the brave efforts of a few black lawyers working with the LDF, Alabama's rigid color barriers were defeated, one by one. This esteemed group includes among many others, the venerable dean of the Alabama black bar, the late Arthur Davis Shores, and one man who is still very much on the scene, Fred Gray. The story is one worth remembering not just by the black community, but by all Alabamians seeking to understand how a few lawyers changed the state forever. These lawyers lived greatly in the law, dedicating their lives to the principle of equal justice under law.

## II. BLACK LEGAL PIONEERS IN ALABAMA

### A. *Pioneers Before the LDF*

The first black lawyers in Alabama gained admission to the profession after the Civil War, despite widespread race prejudice and doubts about the general competency of all blacks.<sup>28</sup> Moses W. Moore, an 1871 graduate of Howard University Law School, became Alabama's first black lawyer, admitted to the Mobile bar in 1871 and to the Alabama Supreme Court in 1872.<sup>29</sup> Moore's admission was reported prominently in the *Mobile Daily Register*:

Moses Wenslydale Moore, a Negro as black as the ace of spades . . . presented himself for examination. . . . A great deal of interest was manifested on the part of the bar . . . from the fact of the applicant's color. He passed a very satisfactory examination, and an order was made by the court admitting him to the bar. This is the first negro ever admitted to the bar in Mobile.<sup>30</sup>

Similarly, after Moore's admission to practice in the Alabama Supreme Court, the *Montgomery Daily State Journal* hailed "an age of progress, [for] ten years ago who would have believed that a Negro was capable of learning the laws sufficiently to practice in the Supreme Court."<sup>31</sup>

James T. Rapier, who read law, was admitted to the Alabama bar between 1872 and 1873.<sup>32</sup> Within months, he was elected to the Forty-

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28. SMITH, JR., *supra* note 2, at 13. Many blacks assumed black lawyers to be incompetent because of their lack of wealth. *Id.* White lawyers often used this assumption to discourage the use of black lawyers. *Id.*

29. *Id.* at 271.

30. *Id.*

31. SMITH, JR., *supra* note 2, at 271.

32. *Id.*

third Congress, serving until 1875.<sup>33</sup> William Hooper Councilll was the first lawyer to challenge the racial segregation policy of railroad carriers with the Interstate Commerce Commission.<sup>34</sup>

In his path-breaking tome on black lawyers, J. Clay Smith, Jr. devotes some attention to Wilford H. Smith.<sup>35</sup> Smith single-handedly challenged the property, employment, residency, and literacy requirements, grandfather clause, and poll tax provision of the 1901 Constitution of Alabama.<sup>36</sup> Predictably, he lost in the Middle District of Alabama, but in a rather curious opinion by Justice Holmes, that decision was affirmed for want of federal jurisdiction.<sup>37</sup>

Attorney Smith may have taken some solace from the fact that three justices dissented: Harlan, Brewer, and Brown.<sup>38</sup> He should have felt somewhat vindicated by Justice Holmes' opinion in another of his civil rights cases decided by the Supreme Court in the following year, *Rogers v. Alabama*.<sup>39</sup>

33. *Id.*

34. *Id.* Councilll was the founder and first president of Alabama A&M University. He was admitted to the Alabama Supreme Court in 1882, after reading law. *Id.* at 272. As Judge Clemon wrote in *United States v. Alabama*, 628 F. Supp. 1137, 1148 (N.D. Ala. 1985):

While riding on a first-class railroad car from Tennessee to Atlanta in the summer of 1887, Councilll was roughly evicted from the first class section. He filed a complaint with the newly created Interstate Commerce Commission, which ruled that Councilll had not been treated equally and directed the railroad to provide equal service for blacks in the future.

35. SMITH, JR., *supra* note 2, at 273. Smith is described as "not only a skilled constitutional lawyer, but also an exceptional criminal lawyer." *Id.*

36. *Id.* at 293-94.

37. *Giles v. Harris*, 189 U.S. 475, 487-88 (1903). In *Giles*, Justice Holmes wrote:

In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order it may make. This is alleged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. . . . Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.

*Giles*, 189 U.S. at 487-88.

38. *Id.* at 488, 493.

39. 192 U.S. 226, 229 (1904) (reversing the conviction of a black defendant who had been indicted by a Montgomery County grand jury from which all blacks were excluded).

## B. Bringing the LDF to Alabama

### 1. Thurgood Marshall

Thurgood Marshall is, of course, a case study all unto himself.<sup>40</sup> After finishing Lincoln College, he enrolled at Howard Law School in 1929,<sup>41</sup> where he fell under the influence and tutelage of that most amazing black lawyer-professor, Charles Hamilton Houston.<sup>42</sup> Houston was in the process of transforming Howard into a first-rate school<sup>43</sup> for social engineers.<sup>44</sup> With young and extremely gifted black faculty, such as William Hastie<sup>45</sup> and James Nabrit,<sup>46</sup> Howard Law School was fast becoming a clinical laboratory where civil rights theories and strategies were being developed. In this environment, Thurgood Marshall excelled. He was one of the top students in his class<sup>47</sup> and enjoyed daily exposure and interaction with Charles Houston. They developed a lifelong admiration and working relationship.

When he graduated from Howard Law School, Thurgood Marshall established a practice in his hometown of Baltimore and became very active in the renewed NAACP Baltimore chapter as its legal counsel.<sup>48</sup> Marshall, joined by Charles Houston, brought suit in municipal court to desegregate The University of Maryland Law School.<sup>49</sup> The lawsuit was successful, and in 1935, a municipal judge ordered The University of

40. See generally RANDALL W. BLAND, *PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL 1934-1991* (2d ed. 1993); MICHAEL D. DAVIS & HUNTER CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* (1992); ROGER GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* (1992); CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961* (1994).

41. SMITH, JR., *supra* note 2, at 368 n.275.

42. LEONARD, *supra* note 2, at 120. While a student at Howard, Marshall assisted Houston and other attorneys who were acting as defense counsel in a capital murder trial known as the *Crawford* case. *Id.*

43. SMITH, JR., *supra* note 2, at 48-49. When Houston became Vice-Dean in 1929, one of his first acts was to increase the admissions standards in order to prepare Howard for accreditation by the American Bar Association. *Id.* Howard Law School gained its membership to the ABA in 1930. *Id.*

44. *Id.* at xi. According to Marshall, Houston's goal was to transform his students into "skilled professionals and social engineers." *Id.*

45. SMITH, JR., *supra* note 2, at 51. Hastie joined Howard Law School's faculty in 1930 and was promoted to lecturer in 1931. *Id.*

46. *Id.* Nabrit joined the law school faculty in 1936 after becoming an experienced civil rights lawyer in Texas. *Id.* His course in Civil Rights in American Law was the first such course to be taught in U.S. law schools. *Id.*

47. SMITH, JR., *supra* note 2, at 235. Marshall graduated from Howard in 1933 with honors. *Id.*

48. *Id.* at 164.

49. *Id.* The University of Maryland had accepted blacks in the late 1880s, but ceased to do so in 1890 after giving in to white student protests. *Id.*

Maryland Law School to accept black applicant Donald Murray.<sup>50</sup>

By 1936, Charlie Houston had left Howard Law School to become the general counsel of the NAACP in New York.<sup>51</sup> He invited Marshall to be his assistant,<sup>52</sup> and for the next two years Marshall commuted between Baltimore and New York. In 1938, Houston resigned his NAACP position and returned to private practice.<sup>53</sup> Thurgood Marshall then became the general counsel of the NAACP.<sup>54</sup>

Because the NAACP was bringing so many cases throughout the nation and challenging segregation by all means necessary, its detractors took steps to challenge its tax-exempt status. To head off this challenge, Thurgood Marshall and the other two lawyers in the NAACP's national office came up with the idea of spinning off from the NAACP and setting up a separate, tax-exempt legal organization to handle cases largely referred to it by the NAACP.<sup>55</sup> The new organization was incorporated in 1940 as a New York corporation under the name "NAACP Legal Defense and Educational Fund, Inc."<sup>56</sup>

After becoming general counsel to the NAACP following Charles Houston's term, Marshall established the LDF to assist with litigation against segregation in voting, housing, and education. Marshall's strategy was to build relationships with black lawyers throughout the country who could serve as local counsel. Marshall and other LDF lawyers traversed the country, especially the South, seeking to dismantle segregation from public life. About the time that Marshall became general counsel of the NAACP in New York, Arthur Shores was establishing himself as a full-service lawyer in Birmingham. The paths of Mr. Marshall and Mr. Shores probably had crossed even before Mr. Shores passed the bar, but the firmness of that relationship was set in stone once Mr. Shores became the Alabama lawyer handling NAACP cases<sup>57</sup> and Mr. Marshall became the lead lawyer for the NAACP. Eventually, Mr. Shores became the regional counsel for the LDF, participating in LDF cases throughout the South, including *Biggs v. Elliott*,<sup>58</sup> one of the cases decided with

50. SMITH, JR., *supra* note 2, at 148.

51. *Id.* at 17. Hamilton's appointment was significant because prior to 1933 this position had only been filled by white attorneys. Also, his appointment "assured the black community that one of its own lawyers would play a decisive role in the NAACP." *Id.*

52. *Id.* at 148. Marshall joined the NAACP staff in 1936 partly because the job offered a monthly salary of \$150 and because the position allowed him to devote all of his practice to civil rights law. *Id.*

53. Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER J. 17, 23 (1998).

54. *Id.*

55. Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1252 (1992). The NAACP Legal Defense Fund and the NAACP were separate entities, but the LDF's tax-exempt status helped it obtain funds from tax savvy donors. *Id.* at 1253.

56. *Id.* at 1252.

57. See CHESTNUT, JR. & CASS, *supra* note 2, at 307.

58. 342 U.S. 350 (1952) (vacating judgment of federal district court that South Carolina's

*Brown v. Board of Education.*<sup>59</sup>

## 2. Arthur Shores

Arthur Shores was admitted to the Alabama bar in 1937.<sup>60</sup> No black had been admitted to the bar in the preceding twenty years, and so in the black community, there was much ado about his passing the bar.

Mr. Shores was a native of Birmingham, having graduated from its Industrial High School (now Parker High School). He did not travel very far away for college, graduating from Talladega College in 1924. He was first a teacher then the principal of Dunbar High School in Bessemer, Alabama. He was always interested in education and civil rights. He was one of the founders of the Alabama State Teachers Association and served as that group's secretary. In the early 1930s, he was elected vice-president of the National Association of Teachers in Colored Schools. Unlike the other two black lawyers in Birmingham, he was very active in the NAACP, serving as treasurer of the Birmingham chapter. Throughout the period of his teaching career, Mr. Shores was reading the law, taking extension courses in law from LaSalle Extension University of Chicago, and graduate courses at the University of Kansas.<sup>61</sup> With a sigh of relief, Mr. Shores passed the bar exam in 1937.<sup>62</sup> It was entirely predictable that Arthur Shores would become a civil rights lawyer. He opened a law office in the prestigious Masonic Temple Building (the largest building owned by blacks in the country) on Birmingham's famed Fourth Avenue in the heart of Birmingham's black business district.

## 3. Fred Gray

The second Alabama lawyer who was a primary cooperating attorney with the LDF during the operative period was Fred Gray. A native

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constitutional and statutory provisions that required separate schools for children of white and black American races did not violate the Fourteenth Amendment).

59. 347 U.S. 483 (1954) (holding that segregating children on the basis of race in public schools violates the Equal Protection Clause of the Fourteenth Amendment).

60. SMITH, JR., *supra* note 2, at 274-75, 306 n.35. For more biographical information about Shores, see generally Annie Groer, *The Hatred, the Dynamite, the Bullets . . . Nothing Could Stop Arthur D. Shores*, BIOGRAPHY, Sept. 1997, at 86-91; *A Pioneer Passes*, N.Y. TIMES, Dec. 21, 1996, § 1, at 24; Diane E. Galanis, *Climbing the Mountain: Pioneer Black Lawyers Look Back*, 77 A.B.A. J. 60 (Apr. 1991). Helen Shores Lee and Barbara Shores Martin are nearing completion of the first biography on their father.

61. SMITH, JR., *supra* note 2, at 274. Judge Walter B. Jones, at the behest of Arthur Shores' father (who was a janitor in the building where the bar review course was taught to white bar applicants), made arrangements to "review the basis of law with Shores in his chambers" apart from his white students. *Id.* at 275.

62. *Id.* at 274.

of Montgomery, Gray graduated from Alabama State University<sup>63</sup> and accepted State of Alabama tuition grants<sup>64</sup> to attend law school at Case Western Reserve in Cleveland.<sup>65</sup> In 1954, Mr. Gray graduated from law school and passed the Ohio and Alabama bars in the same year.<sup>66</sup> He returned to Montgomery with a passion to “destroy everything segregated [he] could find.”<sup>67</sup> As it turned out, Mr. Gray returned to Montgomery shortly before the Montgomery Improvement Association, E.D. Nixon, and a young upstart by the name of Martin Luther King, Jr., were getting a bus boycott underway.<sup>68</sup> The LDF figured prominently in that boycott and in the illustrious civil rights career of Fred Gray.<sup>69</sup>

### III. THE LDF’S INITIAL BATTLEGROUNDS

In Alabama and elsewhere, the LDF and cooperative attorneys sought to reverse every vestige of segregation. This meant litigation of great constitutional questions, from separate but equal, one person one vote, to freedom of speech and association. They sought to dismantle every component of American apartheid that had been sanctioned by the United States Supreme Court for centuries.

#### A. Voting Rights

Between the period 1941-1970, voting rights were an ongoing and paramount concern in the black community. The LDF was involved in most, if not all, of the litigation during that period.<sup>70</sup>

One of the earliest LDF cases in Alabama was *Mitchell v. Wright*.<sup>71</sup>

63. GRAY, *supra* note 2, at 309. Fred Gray has been the recipient of many awards from his alma mater, including an honorary doctor of law degree given to him in 1990. *Id.*

64. *Id.* at 17-19. See generally ALA. CONST. art. XIV, § 256 (1975). Like many other Southern states, Alabama had “out-of-state arrangements” for black American students who, except for their race, were qualified to attend Alabama state schools. GRAY, *supra* note 2, at 17-19. Under these arrangements, the state of Alabama would reimburse these students for certain school-related expenses arising from their studies in another state, if the students could provide the monies initially. *Id.* Obviously, this hurdle was a disqualifier for many poor black Americans.

65. GRAY, *supra* note 2, at 30.

66. *Id.* at 32.

67. *Id.* at 19 (internal quotation omitted).

68. *Id.* at 38. Gray describes his opportunity to work with the Montgomery boycott as the launch pad for his legal career. *Id.*

69. GRAY, *supra* note 2, at 36-38, 56.

70. See SMITH, JR., *supra* note 2, at 18. The LDF was involved in *Smith v. Allright*, 321 U.S. 649 (1944), the “white primaries case,” in which the United States Supreme Court stated that blacks could vote in Southern primary elections. See also GRAY, *supra* note 2, at 116, 232. The LDF was also involved in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the United States Supreme Court case arising from the redrawing of the Tuskegee, Alabama, voting district, and *Smith v. Paris*, 386 F.2d 979 (5th Cir. 1967), a class action for declaration of invalidity of an Alabama democratic party county executive committee’s resolution changing the method of selection of committeemen. *Smith*, 386 F.2d at 979.

71. 62 F. Supp. 580 (M.D. Ala. 1945), *rev’d*, 154 F.2d 924 (5th Cir.), *cert. denied*, 329 U.S. 733 (1946).

Until the Second Reconstruction, Macon County, with its eighty percent black population, and Tuskegee Institute were always problematic for the defenders of segregation.<sup>72</sup> On July 5, 1945, William P. Mitchell, a black man, applied to vote at the Macon County Courthouse.<sup>73</sup> He brought with him two registered voters who would vouch for him, as required of black applicants by the white Macon County registrars.<sup>74</sup> After being forced to wait in a long line, the registrars refused to register Mitchell to vote.<sup>75</sup> On Mitchell's behalf, Arthur Shores and Thurgood Marshall filed a class action in the Middle District of Alabama against registrars Mrs. George C. Wright and Virgil Guthrie.<sup>76</sup>

Judge Kennamer dismissed the complaint, finding that the plaintiff had failed to exhaust his administrative remedies—circuit court, Alabama Supreme Court—and that a class action would not be appropriate since “[t]he question of unconstitutional discrimination in registration cannot be determined by groups or classes but must be determined as to each individual.”<sup>77</sup> The Shores-Marshall team appealed to the Fifth Circuit, which easily reversed and remanded the case back for trial.<sup>78</sup>

The LDF also challenged Alabama's “Boswell” Amendment (adopted in 1945), which permitted registration only of persons who could understand and explain any article of the Federal Constitution.<sup>79</sup> This standard was so vague that registrars could accept or reject whom-ever they pleased. In one county, although thirty-six percent of the population was black American, only 104 blacks were registered, as compared to 2,800 whites.<sup>80</sup> In striking down the statute, the district court said: “We cannot ignore the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color; ‘To do this would be to shut our eyes to what all others than we can see and understand.’”<sup>81</sup>

In *Sellers v. Wilson*,<sup>82</sup> Arthur Shores, Thurgood Marshall, and Robert L. Carter brought suit on behalf of four blacks who sought to register to vote in Bullock County.<sup>83</sup> On three separate occasions, their clients had appeared at the courthouse and tried to register.<sup>84</sup> They sat apprehensively while all of the white applicants were being processed

72. GRAY, *supra* note 2, at 110-11.

73. *Mitchell*, 62 F. Supp. at 581.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 582.

78. *Mitchell v. Wright*, 154 F.2d 924, 927 (1946).

79. GRAY, *supra* note 2, at 111.

80. *Davis v. Schnell*, 81 F. Supp. 872, 876 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949).

81. *Davis*, 81 F. Supp. at 881 (citing *United States v. Butler*, 297 U.S. 1 (1936)).

82. 123 F. Supp. 917 (M.D. Ala. 1954).

83. *Sellers*, 123 F. Supp. at 918.

84. *Id.*

and registered.<sup>85</sup> Each day, they would be told to come back the next day.<sup>86</sup> They faithfully did so, and on each next day the board refused them.<sup>87</sup> On the third day, after the whites had been registered and their turn came at 11:30 a.m., the board chairman told them that he was going to lunch and to come back at 1:00 p.m.<sup>88</sup> They did so, but they did not see him until 2:30 p.m.<sup>89</sup> They confronted him as he went to the basement, and he told them that the board was not in session that afternoon, that he was there alone and could do nothing for them.<sup>90</sup> On these facts, the court found that “[t]he acts of these defendants amounted to a denial of their request, a denial occasioned solely because the plaintiffs were members of the Negro race.”<sup>91</sup> The court granted the injunctive relief (prospectively, since the members of the board of registrars had resigned).<sup>92</sup>

The Macon County problem was highlighted most vividly in the landmark LDF case, *Gomillion v. Lightfoot*,<sup>93</sup> the infamous sea dragon case.<sup>94</sup> As of 1956, the City of Tuskegee had been square in shape.<sup>95</sup> The following year, the Alabama Legislature enacted a bill sponsored by State Senator Sam Englehardt, Jr., who was also the executive secretary of the White Citizens Council of Alabama.<sup>96</sup> This legislation, Local Act 140,<sup>97</sup> transformed, in the words of Justice Frankfurter, “the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure,”<sup>98</sup> thus the sea dragon. As a practical matter, this sea dragon reduced the number of black voters in the City of Tuskegee from four hundred to about four or five, leaving all of the white voters within the new city limits.<sup>99</sup>

On behalf of Tuskegee Civic Association President and Tuskegee Institute Dean of Students Dr. C.G. Gomillion and eleven others, Fred Gray, Arthur Shores, and LDF’s Robert Carter filed a federal class action to have the Act declared unconstitutional under the Fourteenth and Fifteenth Amendments.<sup>100</sup> Based on the “political question” doctrine, Judge Frank Johnson summarily dismissed the case.<sup>101</sup> On appeal, by a

85. *Id.* at 919.

86. *Id.*

87. *Id.*

88. *Sellers*, 123 F. Supp. at 919.

89. *Id.*

90. *Id.*

91. *Id.* at 920.

92. *Id.*

93. 364 U.S. 339 (1960).

94. GRAY, *supra* note 2, at 115.

95. *Id.* at 115-16.

96. *Id.* at 75, 115.

97. *Gomillion*, 364 U.S. at 340.

98. *Id.*

99. *Id.* at 341.

100. GRAY, *supra* note 2, at 3-4.

101. *Gomillion v. Lightfoot*, 167 F. Supp. 405, 410 (M.D. Ala. 1958).



split decision (Judge John R. Brown, dissenting), Judge Johnson's decision was affirmed.<sup>102</sup> The Supreme Court granted certiorari and unanimously reversed the lower courts, observing:

[The plaintiffs'] allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens. "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."

The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve.

....

In sum, as Mr. Justice Holmes remarked, when dealing with a related situation[:] . . . "Of course the petition concerns political action," but "The objection that the subject-matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioner's rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. . . .

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as

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102. *Gomillion v. Lightfoot*, 270 F.2d 594, 598-99 (5th Cir. 1959).

an instrument for circumventing a federally protected right.<sup>103</sup>

Fred Gray describes his experience in arguing *Gomillion*:

I argued first.

As I began, the Chief Justice wanted to know the meaning of the map. I explained that behind me was a map of the City of Tuskegee showing the old city limits with the new city limits superimposed thereon. Justice Frankfurter immediately asked, "Where is Tuskegee Institute? I know it is still in the City of Tuskegee." I pointed out to Mr. Justice Frankfurter where Tuskegee Institute was on the map. I told him that Tuskegee Institute was gerrymandered outside the city limits.

He said, "You mean to tell me that Tuskegee Institute is outside the city limits of the City of Tuskegee? I said, "Yes, sir, Mr. Justice Frankfurter." I believe that was the determining factor in getting Frankfurter's vote.<sup>104</sup>

The *Gomillion* case is still a leading case in constitutional law, laying the foundation for both the "one-person, one-vote" principle in *Reynolds v. Sims*<sup>105</sup> and the justiciability of redistricting cases expounded in *Baker v. Carr*.<sup>106</sup>

The LDF's legal participation in the Selma voting efforts and demonstrations is well documented.<sup>107</sup> Its mission was to get the would-be registrants out of jail as fast as Sheriff Jim Clark could put them in, which meant filing removal petitions in federal courts in the afternoon after blacks had been arrested in the morning merely for standing in line to register to vote.<sup>108</sup> For example, in *Clark v. Boynton*,<sup>109</sup> Judge Daniel Thomas found Sheriff Clark, a white sheriff, in contempt of court for inhumane treatment of black demonstrators and imposed a fine of \$1,500.<sup>110</sup> The opinion reflects the determination and relative success of the LDF and its cooperating Alabama lawyers.<sup>111</sup>

103. *Gomillion*, 364 U.S. at 341-42, 347 (internal citations omitted).

104. GRAY, *supra* note 2, at 121.

105. 377 U.S. 533 (1964).

106. 369 U.S. 186 (1962).

107. GRAY, *supra* note 2, at 221. See also CHESTNUT, JR. & CASS, *supra* note 2, at 192-93.

108. GRAY, *supra* note 2, at 200.

109. 362 F.2d 992 (5th Cir. 1966).

110. *Clark*, 362 F.2d at 993.

111. *Id.* at 995. Judge Thomas found, inter alia:

The demonstrators were not disorderly. About 2:30 p.m., Sheriff Clark and his deputies ordered the group to disperse. The group refused, so they were taken on a "forced march." The group was forced to either run or walk at a brisk pace for over four miles. Sheriff Clark and his deputies rode in cars, taking turns walking and conducting the march with posse men. Sheriff Clark himself was in a car at all times while the march was occurring. Several members of the group marching were struck with a cattle prod on the march.

The LDF's participation in the Selma movement culminated in *Williams v. Wallace*,<sup>112</sup> filed the day after marchers were beaten on the Edmund Pettus Bridge on Sunday, March 7, 1965.<sup>113</sup> In *Williams*, Judge Johnson's order, based on a plan presented by LDF attorneys, permitted the Selma-to-Montgomery march to take place.<sup>114</sup> In addition to granting the demonstrators the right to march, Judge Johnson's order also restrained the Alabama police "and all those in active concert or participation with them, from intimidating, threatening, coercing or interfering with the proposed march. . . ."<sup>115</sup> This march served as one of the major catalysts to the passage of the Voting Rights Act of 1965.<sup>116</sup>

### B. School Desegregation

To further ensure black caste, political exclusion was coupled with educational disadvantage. Black schools were neglected institutionally to allocate more resources for white schools. The LDF made ending segregation in education one of its most important aims.

The jewel in the LDF's crown is *Brown v. Board of Education*.<sup>117</sup> This decision was shaped by nearly two decades of litigation and an evolving legal strategy to overturn the "separate but equal" doctrine of *Plessy v. Ferguson*.<sup>118</sup> That strategy began with the teacher salary equalization suits, continued with college and graduate school desegregation, and ended with lawsuits to desegregate the elementary and secondary schools. LDF litigation in Alabama mirrored that strategy.

In 1942, Arthur Shores and Thurgood Marshall filed a class action lawsuit on behalf of William J. Bolden to equalize black and white teacher salaries in the public schools of Jefferson County.<sup>119</sup> The case was settled by a consent decree, entered in 1945, under which the county school board agreed to pay equal salaries to its black and white teachers.<sup>120</sup> Newspaper articles that were found in the personal papers of Arthur Shores reflect that two years later, in 1947, Ruby Jackson Gainer, local activist and sister of Emory O. Jackson—the venerable editor of

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*Id.*

112. 240 F. Supp. 100 (M.D. Ala. 1965).

113. *Williams*, 240 F. Supp. at 102, 104.

114. GRAY, *supra* note 2, at 221-22.

115. *Williams*, 240 F. Supp. at 109.

116. GRAY, *supra* note 2, at 225. After "Bloody Sunday," President Lyndon B. Johnson publicly denounced the treatment of the marchers and pushed for passage of the Voting Rights Act of 1965. *See id.* at 350. Throughout the period 1965-1970, LDF lawyers, working with Alabama attorneys such as Oscar Adams, Peter Hall, Demetrius Newton, and Orzell Billingsley, were involved in defending demonstrators and bringing some of the earliest cases under the Voting Rights Act.

117. 347 U.S. 483 (1954).

118. 163 U.S. 537 (1896).

119. *Gainer v. School Bd.*, 135 F. Supp. 559, 560 (N.D. Ala. 1955).

120. *Gainer*, 135 F. Supp. at 560-61.

the *Birmingham World*,—was fired by the board after she filed a petition asking the court to hold the board in contempt for violating the decree. Messrs. Shores and Marshall persuaded the Jefferson County Circuit Court to reinstate her.

Meanwhile, in 1947, Judge Lynne appointed a special master, attorney Reid Barnes, to investigate and recommend findings of fact and conclusions of law as to whether the Jefferson County School Board had discriminated in the payment of salaries on the basis of race against its black American teachers and principals.<sup>121</sup> Little more than six years later, on September 16, 1953, Mr. Barnes made his report.<sup>122</sup> Judge Lynne issued his decision two years later, on November 4, 1955.<sup>123</sup> The special master found that in fact the school board had continued to pay differential salaries to its black and white teachers.<sup>124</sup> The court

[agreed] with the master, for the reasons so ably stated by him, that differentials in the salaries paid white and Negro teachers in the “bachelor approved” class represented results of arbitrary discrimination, though without bad or evil motive, and holding that, in the final analysis, they were predicated solely on race or color, the Court concludes that a case for civil contempt has been made out.<sup>125</sup>

The court then proceeded to ask what proved to be a rhetorical question: “May the Court assess a fine against the Board in the amount of \$2,970 to compensate the parties-plaintiff in the offended class for salaries lost as a result of its disobedience of the injunction?”<sup>126</sup> The court labored mightily over this issue, considering the law both *ex contractu* and *ex delicto*.<sup>127</sup> Not surprisingly, the court found that it could not compensate the plaintiffs by way of a fine against the contumacious defendant, despite United States Supreme Court precedent to the contrary.<sup>128</sup>

While *Gainer* was pending, Arthur Shores and Thurgood Marshall proceeded to the next level in the strategy for overturning *Plessy*: the desegregation of Alabama’s institutions of higher learning. Those efforts commenced in 1950, when Mr. Shores’ brother-in-law and some-time business partner, Wilbur H. Hollins, sought application papers from The

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121. *Id.* at 562.

122. *Id.*

123. *Id.* at 559.

124. *Id.* at 566.

125. *Gainer*, 135 F. Supp. at 566.

126. *Id.* at 566.

127. *Id.* at 567-70.

128. *Id.* at 567. *But see* *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1949), and *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). In these two cases, the United States Supreme Court reached precisely the opposite conclusion.

University of Alabama School of Law.<sup>129</sup> As Judge Grooms wrote five years later:

The defendants furnished him an application, but the accompanying letter stated that the State had provided machinery "through the State Department of Education to assist colored students who desired to engage in the study of law to obtain opportunities for entering high grade institutions located elsewhere *which accept colored students.*" Defendants concluded the letter by stating that "We hope you can persuade yourself not to file your application for admission here."<sup>130</sup>

Apparently, Hollins was sufficiently persuaded and thereafter contented himself with a career in real estate.

The opportunity to move to the next level of the strategy presented itself in the Autherine Lucy case, a defining case in the life of this state.<sup>131</sup> Autherine Lucy and Polly Myers received baccalaureate degrees from Miles College in Birmingham in June 1952.<sup>132</sup> They decided to attend graduate school at The University of Alabama in Tuscaloosa.<sup>133</sup>

At the time, the University was Alabama's undisputed premier flagship university—for whites only.<sup>134</sup> Black Alabamians wanting to attend state-supported institutions of higher learning were confined to Alabama State College in Montgomery and Alabama A&M University in Huntsville.<sup>135</sup> To comply with *Plessy*, if a black student wanted to take a college, graduate, or professional course not offered at Alabama State or Alabama A&M, the State of Alabama would pay the difference between tuition and boarding at the University or Auburn University and the tuition and boarding at the university of the black student's choosing, anywhere in the United States, plus travel.<sup>136</sup> But rather than going to Yale to study library science or to Columbia to study journalism, Autherine Lucy and Polly Myers, respectively, decided that they wanted to study those subjects at their own state's flagship—The University of Alabama.<sup>137</sup>

On September 4, 1952, they both applied to the University.<sup>138</sup> Within

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129. *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala.) (discussing Hollins' treatment when he applied to The University of Alabama School of Law), *aff'd*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

130. *Lucy*, 134 F. Supp. at 238.

131. *Id.* at 325.

132. *Id.* at 237.

133. *Id.*

134. GRAY, *supra* note 2, at 194.

135. *Id.* at 18.

136. *Id.* at 18-19.

137. *Lucy*, 134 F. Supp. at 237.

138. *Id.*

a week, they were advised that they had been accepted and to send in their five dollar room reservation fee.<sup>139</sup> They duly complied, and the University advised them on September 10, 1952, that they were assigned to the Adams-Parker dormitory.<sup>140</sup> Three days later, University President Gallalee wrote both of them and assured that they would be welcomed on the campus.<sup>141</sup>

But when they arrived on campus ten days later, Lucy and Myers were refunded their room reservation deposits and advised that the courses they sought were available at Alabama State College in Montgomery.<sup>142</sup> Their applications to attend the University were rejected and their appeal to President Gallalee was to no avail.<sup>143</sup> President Gallalee contacted a party in Birmingham and asked him to intervene with Arthur Shores and have him persuade Lucy and Myers to withdraw their applications and to enroll at Alabama State or Tuskegee.<sup>144</sup>

Undaunted, Shores then wrote to the Governor, the president-ex officio of the University's Board of Trustees, requesting assistance.<sup>145</sup> Governor Persons responded by placing the applications on the agenda of the next annual meeting of the board—in June of the following year!<sup>146</sup> On June 6, 1953, the Board of Trustees deferred action on the applications, pending the anticipated decision of the Supreme Court in *Brown*.<sup>147</sup> Its secretary informed Mr. Shores of the board's action, the board's note that Alabama State College and Tuskegee Institute offered courses in library science and journalism, and of the board's suggestion that his clients "make application to those institutions."<sup>148</sup>

Having handled the leading cases on point, Messrs. Marshall and Shores filed the lawsuit in federal court.<sup>149</sup> On October 9, 1953, Judge Grooms dismissed the case, without prejudice to the plaintiffs' right to file an amended complaint.<sup>150</sup> The appeal was dismissed as premature.<sup>151</sup>

In the wake of the *Brown* decision of May 17, 1954, the Board of

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Lucy*, 134 F. Supp. at 237-38.

143. *Id.*

144. *Id.* at 237.

145. *Id.*

146. *Id.*

147. *Lucy*, 134 F. Supp. at 237. Of course, what the Board of Trustees of the University did was to blissfully ignore the law. It was not open to question in 1952 whether Lucy and Myers could be denied or deferred admission to the University because of their race. From *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), to *Sipuel v. Board of Regents*, 332 U.S. 631 (1948), culminating in *Sweatt v. Painter*, 339 U.S. 629 (1950), the Supreme Court had made it perfectly clear that states could not segregate its graduate and professional schools based on race.

148. *Lucy*, 134 F. Supp. at 238 (internal quotation omitted).

149. GRAY, *supra* note 2, at 192.

150. *Lucy v. Board of Trustees*, 213 F.2d 846, 847 (5th Cir. 1954).

151. *Lucy*, 213 F. Supp. at 847.

Trustees did not resurrect the applications of Lucy and Myers. A full year and two weeks after *Brown*, again as found by Judge Grooms:

[O]ne Agnes Stoudemire wrote Dr. Carmichael, President, stating that she was desirous of taking some courses at the University Extension Center in Birmingham; that she was a Negro and would like to know whether or not the policy had changed for the admission of Negroes so that she might be accepted as a student. Dr. Carmichael replied to this letter, advising her that "the admission requirements of the University of Alabama have not changed in recent months."<sup>152</sup>

On further motion by Messrs. Shores and Marshall, Judge Grooms found that although there was no written policy or rule excluding blacks from the University, there was a tacit policy to that effect.<sup>153</sup> On July 1, 1955, he enjoined the University from denying Lucy, Myers, or other similarly situated blacks "the right to enroll in the University of Alabama and pursue courses of study, solely on account of their race or color."<sup>154</sup>

The University did not give up. It appealed to the Fifth Circuit, which affirmed Judge Grooms in a three-paragraph per curiam opinion.<sup>155</sup>

On December 30, 1955, the district court ordered the University to admit Lucy for the second semester, commencing on February 3, 1956.<sup>156</sup> She did enroll at The University of Alabama at that time, becoming the first known black ever to do so.<sup>157</sup> Her tenure there was short-lived, however. Despite the denial of dormitory space and dining hall privileges to her by the Board of Trustees, she attended three days of classes.<sup>158</sup> On the third day, February 6, 1956, she was attacked by a mob.<sup>159</sup> That night, the board met and voted to exclude her from attending classes "until further notice."<sup>160</sup> On February 29, Judge Grooms held a hearing on the contempt petition filed by Messrs. Shores and Marshall.<sup>161</sup> He thereafter ordered the University to terminate the order of

152. *Lucy*, 134 F. Supp. at 238. It is probably no coincidence that Agnes Stoudemire was Arthur Shores' secretary at the time of her letter of inquiry.

153. *Id.* at 239.

154. *Id.*

155. *Adams v. Lucy*, 228 F.2d 619, 620 (5th Cir. 1955).

156. For the fullest account of the Autherine Lucy saga, see generally E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA* (1993).

157. *See id.* at 57-59.

158. *Id.* at 58.

159. *See id.* at 71-77.

160. *Id.* at 79.

161. CLARK, *supra* note 156, at 99.

suspension or exclusion by March 5.<sup>162</sup> But by March 5, the University had permanently expelled Lucy for statements her lawyers had made in their contempt petition.<sup>163</sup> Judge Grooms upheld the suspension.

President Carmichael's lamentations in explaining why the University had to admit Autherine Lucy is a testament to the tenacity of the LDF and Arthur Shores:

The court case . . . had been in litigation for three and a half years. During that period the Board of Trustees sought through all legal means to maintain the historic tradition of segregation which they conscientiously believed to be in the best interests of all concerned. . . . Finally, when the last legal battle was decided adversely the trustees were faced with two alternatives, yielding to the court's decree or defying the law.<sup>164</sup>

Six years elapsed between the time of Autherine Lucy's expulsion and the admission of LDF-sponsored Vivian J. Malone and Jimmy A. Hood to The University of Alabama. Despite a defiant governor's "stand in the schoolhouse door," the injunction obtained by Arthur Shores and the LDF in *Lucy* proved to be more powerful than the governor.<sup>165</sup> Since 1963, blacks have attended the University in ever-increasing numbers.<sup>166</sup>

The desegregation of Alabama's other flagship institution, Auburn Polytechnic Institute, now known as Auburn University, was less dramatic. Fred Gray and LDF lawyers Constance Baker Motley and Leroy Clark represented Harold Franklin in this undertaking.<sup>167</sup>

In 1962, Franklin, a graduate of Alabama State College, applied for admission to the graduate school at Auburn.<sup>168</sup> He was denied admission on the ostensible ground that his undergraduate degree was awarded by an unaccredited institution.<sup>169</sup> The ensuing litigation was assigned to Judge Frank Johnson of the Middle District of Alabama.<sup>170</sup> Judge Johnson spoke directly and forcefully to the issue presented:

Franklin was rejected on one basis: He had not been graduated from a college that held an accredited status with the Southern Association of Colleges and Schools. Thus the State of Alabama

162. *Id.* at 102.

163. GRAY, *supra* note 2, at 192.

164. *United States v. Alabama*, 628 F. Supp. 1137, 1141 (N.D. Ala. 1985).

165. GRAY, *supra* note 2, at 193-94.

166. *Id.* at 194. The University of Alabama is reported to have "one of the highest percentages of African-American student enrollment of any predominantly white Southern university." *Id.*

167. *Id.* at 196.

168. *Id.* at 195.

169. GRAY, *supra* note 2, at 196.

170. *Franklin v. Parker*, 223 F. Supp. 724 (M.D. Ala. 1963).



has denied to Harold A. Franklin, a Negro—solely because he is a Negro—the opportunity to receive an undergraduate education at an accredited state college or university; at the same time, the State of Alabama afforded adequate opportunity to its white citizens to receive an undergraduate education at accredited State institutions. Now, after having done this, the State of Alabama, acting through its State operated and maintained institution Auburn University, insists that graduate education at that institution shall be open only to students who are graduates of accredited colleges or universities. On its face, and standing alone, the requirement of Auburn University concerning graduation from an accredited institution as a prerequisite to being admitted to Graduate School is unobjectionable and a reasonable rule for a college or university to adopt. However, the effect of this rule upon Harold Franklin—an Alabama Negro—and others in his class who may be similarly situated, is necessarily to preclude him from securing a postgraduate education at Auburn University solely because the State of Alabama discriminated against him in its undergraduate schools. Such racial discrimination on the part of the State of Alabama amounts to a clear denial of the equal protection of the laws. This is true regardless of the good motives or purposes that Auburn University may have concerning the rule in question.<sup>171</sup>

Auburn was ordered to admit Franklin, and it did so.<sup>172</sup>

Governor George Corley Wallace, as chairman of the Auburn Board of Trustees, then intervened. Largely because of his intervention, Auburn refused to assign dormitory space to Franklin, even though space was admittedly available.<sup>173</sup> On application by Fred Gray, Judge Johnson ordered that the dormitory space be provided forthwith.<sup>174</sup> Auburn complied, and Franklin was duly enrolled as a graduate student on January 2, 1964.<sup>175</sup>

It is fair to say that the LDF has been involved in all of the public school desegregation cases in Alabama. Starting with suits against individual school boards in Birmingham, Montgomery, Jefferson County, Mobile, and Huntsville, and culminating in Fred Gray's *Lee v. Macon County*<sup>176</sup> case, the LDF and cooperating Alabama lawyers had brought an end to all officially segregated schools in this state by 1974.

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171. *Franklin*, 223 F. Supp. at 726.

172. *Id.* at 727-28. See also GRAY, *supra* note 2, at 196-97.

173. *United States v. Alabama*, 628 F. Supp. 1137, 1144 (N.D. Ala. 1985).

174. *United States v. Alabama*, 628 F. Supp. at 1144.

175. *Id.*

176. 289 F. Supp. 975 (M.D. Ala. 1968) (consolidating 99 school systems under court order in which Judge Frank Johnson denied petition to modernize certain classrooms at predominately black American schools).

### C. *Employment Cases*

While tackling education and voting injustices, the LDF also addressed racial discrimination in Alabama's employment practices. Thurgood Marshall's professor and mentor, Charles Houston, worked with Arthur Shores in one of the most important and widely-cited cases in the field of labor law: *Steele v. Louisville and Nashville Railroad Co.*<sup>177</sup>

Bester William Steele, a black resident of Birmingham, had worked as a fireman for thirty years at L & N Railroad as of 1940. He and other black firemen were not permitted to join the all-white Brotherhood of Locomotive Firemen and Enginemen, which represented the bargaining unit under the Railway Labor Act.<sup>178</sup> In 1940, purporting to act as the representative of all firemen, the Brotherhood entered into an agreement that would ultimately exclude all "non-promotables" (i.e., blacks) from serving as firemen.<sup>179</sup> By supplemental agreement, not more than fifty percent of the firemen in each seniority unit could be blacks, and the seniority rights of the "non-promotables" were severely restricted.<sup>180</sup> The black firemen were not given notice of these changes before they became effective.<sup>181</sup> When Steele was laid off for sixteen days and then assigned to a less desirable job because of these changes in the collective bargaining agreement, he came to Arthur Shores.

Mr. Shores filed in the Circuit Court of Jefferson County, a suit that was summarily dismissed for failure to state a cause of action.<sup>182</sup> The Alabama Supreme Court affirmed.<sup>183</sup> The United States Supreme Court granted certiorari.<sup>184</sup> Charlie Houston argued the case.<sup>185</sup>

The Supreme Court held unanimously that the Railway Labor Act<sup>186</sup> imposed a duty on a labor union, acting under authority of the statute as the exclusive bargaining representative of workers, to represent all the employees in the craft or class of employees without discrimination because of race.<sup>187</sup> Chief Justice Stone wrote for the Court:

Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of

177. 323 U.S. 192 (1944).

178. *Steele*, 323 U.S. at 195.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 198.

183. *Steele*, 323 U.S. at 198.

184. *Steele v. Louisville & Nashville R.R. Co.*, 322 U.S. 722 (1944).

185. *Steele*, 323 U.S. at 193.

186. 45 U.S.C. §§ 151-63, 181-88 (1994).

187. *Steele*, 323 U.S. at 202-03.

the craft, without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. . . . We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, . . . , but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.<sup>188</sup>

*Steele* is notable as one of the first instances where the Supreme Court read a federal statute to impose on a private entity the duty not to discriminate on the basis of race. Justice Murphy would have gone further and held that the Constitution would be violated by a private association that had been given authority by Congress to engage in racial discrimination.<sup>189</sup> He concluded:

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.<sup>190</sup>

The LDF and its Alabama cooperating lawyers were also at the forefront in the development of Title VII law. Among their more important cases are *Pettway v. American Cast Iron Pipe Co.*,<sup>191</sup> *United States v. United States Steel Corp.*,<sup>192</sup> *Swint v. Pullman-Standard*,<sup>193</sup> *Huff v. N.D.*

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188. *Id.* at 199, 202-03 (internal citation omitted).

189. *See id.* at 208-09 (Murphy, J., concurring).

190. *Id.* at 209 (Murphy, J., concurring).

191. 332 F. Supp. 811 (N.D. Ala. 1970) (holding that limiting membership on board of operatives to whites violated Title VII of the Civil Rights Act of 1964).

192. 371 F. Supp. 1045 (N.D. Ala. 1973) (holding that seniority system and lines of promotion

*Cass Co.*,<sup>194</sup> and *Burns v. Thiokol Chemical Corp.*<sup>195</sup> LDF litigation in the steel industry lead to a decree that affected steelworkers throughout the nation and reformed the steel industry.<sup>196</sup>

#### D. Other Areas

This Article is too brief to explore all the original cases that the LDF and cooperating attorneys brought to end segregation. Yet, a few other illustrations are essential.

##### 1. Housing

*Monk v. City of Birmingham*<sup>197</sup> involved a challenge of a 1926 Birmingham ordinance making it a misdemeanor for a person to move into, for the purpose of establishing a "permanent residence" (i.e., for more than twenty-four hours), "an area of the City of Birmingham generally and historically recognized at the time as an area for occupancy by members of the [opposite] race."<sup>198</sup> Mary Means Monk was denied a permit to build a house on what is now "Dynamite Hill,"<sup>199</sup> a Birmingham community earning its name for the numerous bombings occurring there after its transition from majority white to majority black.

Arthur Shores and Birmingham attorneys Peter Hall and David Hood, along with Thurgood Marshall, filed a class action in the Northern District of Alabama.<sup>200</sup> They presented their proof to Chief Judge Mullins. After judicially noticing the ordinances and finding that Mary Monk had paid \$2000 for the property and another \$2000 for plans and specifications to a contractor, Judge Mullins found that the City of Birmingham denied her application for a building permit solely because she proposed to build in an area zoned for whites.<sup>201</sup> He concluded that he had no choice but to follow the law as interpreted by the Supreme

of company violated Title VII of the Civil Rights Act of 1964), *vacated in part, appeal dismissed in part*, 520 F.2d 1043 (5th Cir. 1975).

193. 539 F.2d 77 (5th Cir. 1976) (vacating judgment of district court that employer had made prima facie case that its seniority system was in compliance with Title VII of the Civil Rights Act of 1964), *rev'd*, 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982).

194. 468 F.2d 172 (5th Cir. 1972) (affirming opinion of district court that employer had not discharged minority employee for racial reasons, but had dismissed employee for poor quality of work), *reh'g en banc*, 485 F.2d 710 (5th Cir. 1973).

195. 483 F.2d 300 (5th Cir. 1973) (reversing decision of district court and remanding for new trial on the basis that discoverable employment records were not provided to plaintiff in employment action brought under Title VII of the Civil Rights Act of 1964).

196. *See, e.g.*, *United States v. Allegheny-Ludlum Indus.*, 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir. 1975).

197. 87 F. Supp. 538 (N.D. Ala. 1949).

198. *Monk*, 87 F. Supp. at 539.

199. *See id.* at 540.

200. *Id.* at 538.

201. *Id.* at 540.

Court.<sup>202</sup>

## 2. *Demonstrations*

Prior to 1960, the LDF, along with Fred Gray, instituted the lawsuit that brought an end to segregation in Montgomery buses and, thus, a successful end to the bus boycott.<sup>203</sup> The late Oscar W. Adams, and Demetrius C. Newton, filed a similar lawsuit in the Birmingham federal court.<sup>204</sup> The Court of Appeals had no such difficulty.<sup>205</sup> The Supreme Court's summary affirmance in *Browder* ended, once and for all, any argument that *Plessy v. Ferguson* and the "separate but equal" doctrine had any further life.

When the freedom rides hit Alabama, the LDF was there. In addition to defending the riders, the LDF, again with Fred Gray, filed *Lewis v. Greyhound Corp.*<sup>206</sup> and obtained an injunction against the bus company and local and state law enforcement officials ordering an end to enforcement of segregation on the buses and in bus terminals.<sup>207</sup> The LDF was also in Birmingham in 1963 defending the demonstrators at all levels. Virtually all of the convictions were eventually thrown out by the Supreme Court in *Shuttlesworth v. Birmingham*.<sup>208</sup>

202. *Id.* at 544. The district court judge stated:

But it is my duty to follow the three decisions of the Supreme Court of the United States conclusively holding municipal zoning ordinances based on race or color, such as those here involved, unconstitutional and void as being violative of the Fourteenth Amendment. . . .

Under the decisions it becomes my duty to declare each of the three ordinances here involved unconstitutional, as being violative of the Fourteenth Amendment, and to issue an injunction against the further enforcement of the same.

*Monk*, 87 F. Supp. at 544.

203. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

204. *Baldwin v. Morgan*, 149 F. Supp. 224, 224-25 (N.D. Ala. 1957), *rev'd*, 251 F.2d 780 (5th Cir. 1958). The district judge was at a loss to understand the complaint of racial segregation in Birmingham's Terminal Station:

This is but another in the growing list of cases wherein both the tutored and the untutored apparently entertain the mistaken notion that the proper function of the federal courts is propaganda rather than judicature. They who espouse the theory that such courts should essay the roles of super legislatures know not what they do.

. . . .

In vain, the court has searched the allegations of the complaint for a definitive statement of facts, showing "that there is a substantial controversy, between [plaintiffs and defendants] of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

*Baldwin*, 149 F. Supp. at 224-25 (citations omitted).

205. *Baldwin v. Morgan*, 251 F.2d 780, 784-85 (5th Cir. 1958).

206. 199 F. Supp. 210 (M.D. Ala. 1961).

207. *Lewis*, 199 F. Supp. at 216-17.

208. 394 U.S. 147 (1969) (reversing conviction of participant in Good Friday march). *But see Walker v. Birmingham*, 388 U.S. 307 (1967) (upholding conviction of marchers for violating court order prohibiting march).

### 3. *Freedom of Association*

Two vital constitutional law cases came about as a result of the LDF's noble fight to ensure the right of the NAACP to operate in Alabama. In an effort to appeal to and appease the white racists in this state, Attorney General John Patterson brought suit in 1956 to ban the NAACP, a membership organization incorporated in New York, from Alabama for its failure to register with the Alabama Secretary of State as a foreign corporation.<sup>209</sup> Patterson alleged that the NAACP's activities here were inimical to the well-being of Alabama citizens.<sup>210</sup> On the day the complaint was filed, Patterson's office obtained an *ex parte* injunction from the Montgomery Circuit Court barring the NAACP from conducting any business in Alabama and from attempting to qualify to do business there.<sup>211</sup> The injunction shut down the NAACP in Alabama. Makeshift organizations sprang up—for example, The Alabama Christian Movement for Human Rights.<sup>212</sup>

Meanwhile, the circuit court ordered the NAACP to produce, *inter alia*, its Alabama membership lists.<sup>213</sup> Realizing the catastrophic, perhaps fatal, implications of such production, the NAACP wisely refused.<sup>214</sup> It was promptly adjudged to be in contempt of court and fined \$100,000.<sup>215</sup> The Alabama Supreme Court affirmed the contempt order.<sup>216</sup>

Arthur Shores, Thurgood Marshall, and Bob Carter handled the contempt aspect of the case.<sup>217</sup> On certiorari to the United States Supreme Court, Justice Harlan wrote for a unanimous Court on the issue of constitutional standing:

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in

209. GRAY, *supra* note 2, at 106.

210. *Id.* at 105-06.

211. *Id.* at 106-07.

212. *Id.* at 107. See *Civil Rights in Birmingham 1956-1963* (visited Mar. 22, 2001) <<http://www.sage.edu/RSC/programs/globcomm/division/students/civil.html>>. See generally ANDREW M. MANIS, *A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH* (1999).

213. GRAY, *supra* note 2, at 106.

214. *Id.* at 107.

215. *Id.*

216. *Ex parte NAACP*, 91 So. 2d 220, 221 (Ala. 1956).

217. *Ex parte NAACP*, 91 So. 2d at 220.

every practical sense identical. The Association, which provides in its constitution that “[a]ny person who is in accordance with [its] principles and policies . . .” may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.<sup>218</sup>

The Court went on to hold that compelled production of the NAACP’s membership lists was an unconstitutional restraint on freedom of association.<sup>219</sup> It noted the uncontroverted showing that in the past, revelation of the identity of NAACP members had exposed them to economic reprisals, loss of employment, threat of physical coercion, and “other manifestations of public hostility.”<sup>220</sup> The Court found it apparent that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.<sup>221</sup>

The Supreme Court’s holding in *NAACP v. Alabama ex rel. Patterson* established the enduring constitutional sanctity from state scrutiny of the membership lists of an association such as the NAACP, absent a compelling state interest.<sup>222</sup>

The vacature of the contempt order by the Alabama courts was not as easy as the Supreme Court had imagined. It took two additional trips to the Supreme Court over a seven-year period before the merits of the NAACP’s ban could be addressed.<sup>223</sup> By the time of the second grant of certiorari, Fred Gray, Peter Hall, and Orzell Billingsley had joined the team.<sup>224</sup>

With the Supreme Court breathing down its neck, the Montgomery circuit court on December 29, 1961, entered a final decree and perma-

218. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958).

219. *Patterson*, 357 U.S. at 462.

220. *Id.*

221. *Id.* at 462-63.

222. *Id.* at 461.

223. *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 244 (1959) (foreclosing the state from shifting grounds as a basis for upholding the contempt order); *NAACP v. Gallion*, 368 U.S. 16 (1961) (requiring the federal district court to entertain the action unless the state courts had granted a hearing on the merits by January 2, 1962).

224. *Ex parte NAACP*, 122 So. 2d 396, 397 (Ala. 1960).

ment injunction banning the NAACP from doing business in Alabama.<sup>225</sup> The Alabama Supreme Court summarily affirmed fourteen months later.<sup>226</sup>

Suffice it to say that the United States Supreme Court gave short shrift to each of Alabama's arguments. It found no case, and the Alabama Attorney General referenced none, in which a corporation was ousted from Alabama for failing to comply with the registration statute.<sup>227</sup> It proceeded to find that "[t]he other asserted grounds for excluding [the NAACP] from Alabama furnish no better foundation for the action below."<sup>228</sup> Justice Harlan's opinion concludes:

There is no occasion in this case for us to consider how much survives of the principle that a State can impose such conditions as it chooses on the right of a foreign corporation to do business within the State, or can exclude it from the State altogether. This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas. Freedoms such as . . . [this] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference.<sup>229</sup>

Thanks to the LDF, Bob Carter, Arthur Shores, Fred Gray, Peter Hall, and Orzell Billingsley, the NAACP has operated in this state now for four decades.<sup>230</sup>

225. *NAACP v. State*, 150 So. 2d 677, 678 (Ala. 1966). The injunction was based, among other things, on the NAACP's activities in employing or paying money to Autherine Lucy and Polly Myers to enroll at The University of Alabama; organizing, supporting, and financing the Montgomery bus boycott; making false charges against officials of the State and The University of Alabama; attempting to pressure Pennsylvania football officials and the Penn State football team to boycott the Alabama football team when they played in the Liberty Bowl; and encouraging a course of conduct seeking to deny Alabamians the right to "voluntarily segregate." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 302-03 (1964). Of course, it was also based on the NAACP's alleged "carr[ying] on its activities in Alabama without complying with state laws requiring foreign corporations to register and perform other acts in order to do business within the State." *Id.* at 303.

226. *NAACP v. State*, 150 So. 2d at 683.

227. *Flowers*, 377 U.S. at 306.

228. See GRAY, *supra* note 2, at 105-09.

229. *Id.* at 309-10 (citations omitted).

230. *Id.* at 105-09. Considerations of time and paper will not permit us to do justice to the LDF's significant involvement in other aspects of civil rights law in Alabama.

For example, prior to the banning of the death penalty in the seminal LDF case *Furman v. Georgia*, 408 U.S. 238 (1972), the LDF monitored each death penalty case in Alabama, and as the key contact for Alabama between 1969 and 1972, it was Judge Clemon's responsibility to see to it that no one was executed in this state.

When the Fifth Circuit was proposed to be split in 1977 by placing the conservative judges in Mississippi, Alabama, Georgia, and Florida in one circuit, and the liberal judges in Louisiana and Texas in a separate circuit, it was the LDF that stepped in and organized the opposition that ultimately prevented it. See DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 196* (1988).



## IV. CONCLUSION

The brick foundation of civil and constitutional rights laid by the LDF in Alabama soil is yet strong and secure. Thurgood Marshall, Arthur Shores, Fred Gray, and the civil rights lawyers who followed in their footsteps between 1940-1980 always instinctively and intuitively sought out and found whatever straw was needed, and they utilized that straw to create the brick foundation on which today we all stand at various times. Thus, we all owe an unending gratitude to the LDF and its cooperating attorneys in Alabama.

Of course, racial, sexual, national origin, religious, disability, and religious discrimination have not somehow miraculously evaporated from the atmosphere in Alabama since 1980. Such cases still dominate the civil trial dockets in federal courts.

For those lawyers who are so inclined, there is much work to be done in the tradition of the LDF, Thurgood Marshall, Arthur Shores, and Fred Gray.

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When the rape trial of the retarded Tommy Lee Hines was transferred from Morgan County to Cullman County for trial, it was the LDF that intervened on his behalf. *Hines v. State*, 384 So. 2d 1171 (Ala. Crim. App.), *cert denied*, 384 So. 2d 1184 (Ala. 1980). The LDF sponsored the case that established the principle that black witnesses need not respond to a prosecutor unless the appropriate courtesy titles are used. *Ex parte Hamilton*, 156 So. 2d 926 (Ala. 1963), *rev'd*, 376 U.S. 650 (1964). And it vindicated the right of blacks to be buried in white cemeteries. *Terry v. Elmwood Cemetery*, 307 F. Supp. 369, 377 (N.D. Ala. 1969). In the move to appoint black judges to Alabama's federal bench in 1979-1980, Elaine Jones of the LDF was at the forefront. GRAY, *supra* note 2, at 291, 294. Elaine Jones was a supporter of Fred Gray's nomination for U.S. District Judge for the Middle District of Alabama in 1979. *Id.* at 294.