

*“Let the Supreme Court take the blame if it dares to say to the entire world, ‘Yes, democracy [in the United States] rests on a legalized caste system. Segregation of races is legal.’ Make the Court choose...”*

James M. Nabrit Jr.  
Howard University President,  
HU Law School Dean and Professor  
in *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* by Richard Kluger



# Overturning The COURT

Striking blows for African American freedoms is a Howard University School of Law tradition.

by Frank McCoy

Howard University School of Law has never had the luxury of being an average law school. Since it was founded in the 19<sup>th</sup> century, many of the school's deans, professors, alumni, and students have volunteered to serve on the front lines of ongoing civil rights struggles in America.

As a result, the law school has always had dual goals. The primary one was, and is, to train mostly black, but also Hispanic, Native American, Asian, and white students in research fundamentals; steep them in legal history; teach them how to understand and use ethics and professional standards; and finally, to ensure they are ready to pass the bar. Secondly, throughout much of its existence Howard has also served as an incubator for attorneys and legal scholars dedicated to attacking all aspects of *de facto* and later *de jure* racial discrimination and segregation and their legacies.

The law school's interim dean, Patricia M. Worthy (J.D. '69), says that "the law school teaches students to be leaders who are committed to helping African Americans and other disadvantaged people enjoy the full rights of citizenship, ensuring equal protection for all, and reminding our nation of its responsibility to fulfill the promises of our Constitution."

The Howard University School of Law was founded in 1869—four years after the Civil War's end, and two years



RON CEASAR

*The law school's interim dean, Patricia M. Worthy*



RON CEASAR

Professor Okianer Christian Dark

after Howard University was founded—welcoming a class of six. The now 133-year-old school was created during the Reconstruction era and trained black lawyers to face a gathering force of white legislative resistance to black political and economic advances. The white opposition's efforts culminated in the 1896 U.S. Supreme Court "separate, but equal" ruling of *Plessy v. Ferguson* that reinforced racial discrimination in this country.

Fifty-eight years later, the United States Supreme Court issued its landmark opinion in *Brown v. Board of Education*, which ended legal segregation. Since at least 1905, the law school's deans, professors, alumni, and students had established the foundation for this victory, through legal scholarship, personal sacrifice, and tireless persistence as they devised strategies that led the high court to finally make its pivotal decision.

This level of commitment is not surprising. Until the 1950s, the law school produced more than 90 percent of the African American lawyers in this country.

Beginning in the fall of 2003, Howard

University and the Howard University School of Law will kick off a series of events that will not only commemorate how the *Brown* ruling tossed out the rotten husk of segregation, but will also challenge Americans to rededicate themselves to the *Brown* decision's mandate.

In the words of one of the commemoration's planners, law professor Okianer Christian Dark, "*Brown* was successful in the case, but not in its implementation. We are still waiting for the promise of *Brown* to be fulfilled as we fight battles that haven't been won and engage foes that plague our community in the 21<sup>st</sup> century."

In May 2004, the university, the law school, the NAACP, and the NAACP Legal Defense and Education Fund will undertake a series of 50<sup>th</sup> anniversary events with the theme: "*Brown* at 50: Fulfilling the Promise."

But before looking forward, anyone concerned with the Howard University School of Law should walk through its corridors and gaze at the portraits of graduating classes dating back to the late 19<sup>th</sup> century. The assembled groups on those walls comprised the multi-generational team that ultimately defeated "Jim Crow." As Howard University President H. Patrick Swygert (J.D. '68) said in his 1996 inaugural address, "Modern civil rights litigation was shaped and formed at Howard's law school."

The most prominent among Howard law alumni, of course, is Thurgood Marshall—the first African American associate justice of the U.S. Supreme Court, about whom volumes have been written. The 1933 graduate studied under other greats, including professors William H. Hastie and Marshall's mentor Charles Hamilton Houston.

Marshall was the epitome of the law school's commitment to social justice. From 1940, when he won his first case before the Supreme Court, until 1961, he served as the NAACP legal director. He was the point man on the *Brown v. Board of Education* legal team (which also included Howard law professors James M. Nabrit, Jr., George E.C. Hayes, and Spottswood Robinson III), that successfully challenged segregation in public schools. Marshall won an overwhelming majority of the cases he argued before the U.S. Supreme Court.



Thurgood Marshall, the first African American associate justice of the U.S. Supreme Court

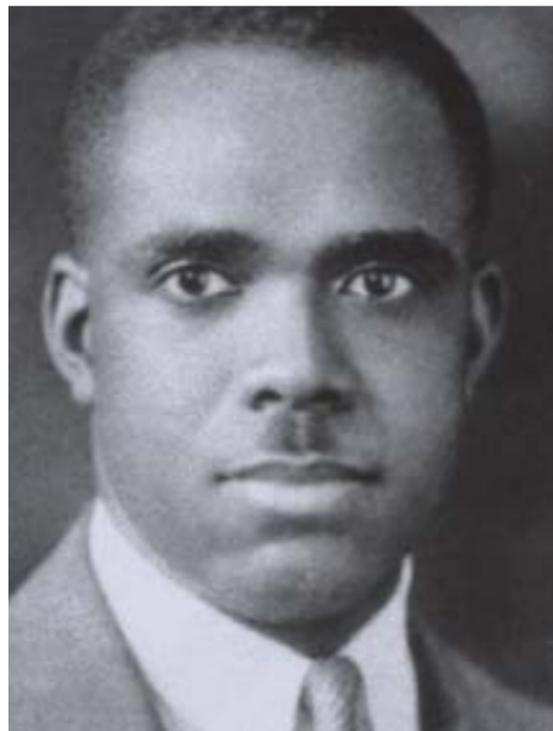
PHOTO COURTESY OF THE MOORLAND-SPINGARN RESEARCH CENTER

Despite these victories, Marshall knew the black struggle for civil and economic rights was ongoing. As associate justice, he once advised law students, "Don't stop fighting. Use Howard Law School as a stepping stone...a driving spirit in the battle for equality. Don't slow down. If you do, they'll run you over."

Professor Julian R. Dugas, who was of counsel in *Bolling v. Sharpe*, a companion case to *Brown* in 1954, recalls that Marshall "was smart,

articulate, and handsome, which met all the prerequisites of making a good impression on the court."

For many though, Charles Hamilton Houston, the first black editor of the *Harvard Law Review* and dean of Howard's law school (1930-1935) is "the man who killed Jim Crow." Although Houston died in 1950, four years before *Brown v. Board of Education*, he knew the Supreme Court well. He argued his



Clockwise from top left: Howard law professors William H. Hastie, Charles Hamilton Houston, George E.C. Hayes. Professor Spottswood Robinson III (far right) standing next to law school dean George Johnson.

first case before it in 1935 and won several victories, including overturning death sentences imposed by juries that had excluded blacks.

In 1935, he also became the NAACP's first full-time paid special counsel, a position Marshall, his protégé, later took over. It was there that he and others began to devise an incremental legal campaign to dismantle segregation. The idea was to create successful precedents based on proving the inequality of "separate but equal" education, first at the graduate and professional school level, then in elementary and high schools. The end of this process was *Brown v. Board of Education*.

Houston was equally calculating in giving advice to students, once telling prospective graduates that, "A lawyer is either a social engineer or he is a parasite on society."

William H. Hastie, like Houston, was a native Washingtonian, an Amherst College graduate and a former *Harvard Law Review* editor. He was also a great litigator, having appeared before the Supreme Court in teacher salary equalization, voting rights, and transportation cases. From 1937 through 1939, while dean of Howard's law school, Hastie—who would become the first black federal judge in the United States—mobilized the school's talent to serve at the appellate level.

Historian Michael R. Winston says: "Of all the brilliant activist professors at the Howard law school in the battle against segregation, Hastie was one of the most versatile and successful."

### Making the case

When individuals are engaged in a great quest, they may agree on the specific goal, but disagree on the tactics and tools needed to complete it. Looking back 50 years, the fact that *Brown v. Board of Education* comprised five related legal cases, not just one, is often overlooked. But each case had arguments that hammered at the wall of segregation in a different ways.

The first four cases, *Brown v. Board of Education* (Kansas), *Briggs v. Elliot* (South Carolina), *Davis v. County School Board of Prince Edward County* (Virginia), and *Gebhart v. Belton* (Delaware), hinged on the argument that segregation in those states deprived African Americans of equal protection of the laws under the

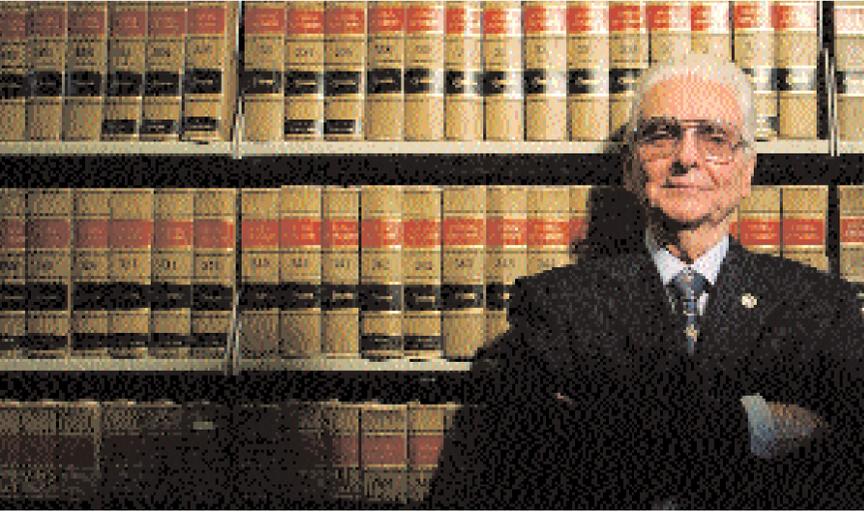
Fourteenth Amendment. When the Supreme Court overturned *Plessy v. Ferguson* and the "separate but equal" doctrine, finding that it had no place in public education, its ruling declared segregation in public education unconstitutional. Unfortunately, the battle to actually desegregate the nation's school systems continues today.

The companion case to *Brown*, *Bolling v. Sharpe*, was similar, but with a subtle difference. Since the District of Columbia is not a state, but a federal jurisdiction, the legal team could not say that public school segregation was a violation of the Fourteenth Amendment. Instead, it said that the District's segregated schools denied blacks the due process of law guaranteed by the Fifth Amendment to the Constitution.

To James M. Nabrit, Jr., the Howard law professor who argued the case before the Supreme Court, the distinction was paramount. On the incremental victory path that Thurgood Marshall and Charles Houston traveled, contesting *Brown v. Board of Education* was seen as merely a step toward eventually overcoming *Plessy v. Ferguson*. In fact, prior to the *Brown* decision, Dugas recalls that the team's mood was pessimistic. There was fear among some of the members that if the high court sustained *Plessy*, then segregation might be further entrenched. "They thought the foundation was being laid for a victory later," he says.

Nabrit didn't agree. He refused to argue that D.C.'s segregated schools were unconstitutional due to their inequality, but instead thundered that American apartheid itself was unconstitutional. It was the type of frontal assault on segregation that Nabrit, who witnessed a lynching as a boy, relished.

The Morehouse graduate, who was first in his Northwestern University Law School class in 1927, had been preparing to destroy segregation for a decade before he joined the Howard's law school faculty in 1936. Prior to moving to Washington, D.C., the former partner in a Houston, Texas firm had practiced all types of law, but specialized in electoral issues affecting blacks. In 1939, in *Lane v. Wilson*, which he won before the Supreme Court, Nabrit overturned Oklahoma's "grandfather clause" that prevented blacks from voting.



Professor Julian  
R. Dugas

Two years earlier, the man who would later become dean of the law school (1958-1960) and president of the university (1960-1969), created the nation's first formal civil rights course. During that time, he also began collecting more than 2,000 cases on the subject—an invaluable library the legal team used to find precedents for the arguments they employed against segregation.

Nabrit should also be remembered for his refusal to back down. Prior to the *Brown* decision, the white-controlled media and some black leaders felt assaulting segregation head-on might provoke southern white violence. Nabrit responded by asking, "Suppose it does? Shall the Negro child be required to wait for his constitutional rights until the white South is educated, industrialized, and ready to confer those rights on his children's children?...Wherever the Negro is laboring under constitutional disabilities in the South, there is the best place to attack. The attack should be waged with the most devastating forces at hand."

Dugas, who was a student of Nabrit's and worked for him and his legal team colleague professor George E.C. Hayes, still reveres this toughness. He says, "Nabrit was the most courageous of them all. He was steadfast and believed in no compromise. The others thought incrementally about ending segregation, but he said black freedom is a present right."

In 1949, Nabrit laid out his vision of a new America in a "Syllabus on Civil Rights-Cases and

Material." It envisioned a country where every citizen could vote, get an education, stay in an accommodation, or own property without suffering discrimination based upon race, color, religion, sex, or national origin.

### Turning the table

Two other Howard graduates played prominent roles in the quintet of 1954 cases. Oliver W. Hill and his law partner, Spottswood Robinson III, who later became a Howard law dean, were the scourge of school segregationists in Virginia. They filed more civil rights cases there than the total filed in all other southern states during the early civil rights period. They also won more than \$50 million in better schools, equipment, and higher salaries for black students and teachers.

Hill was a classmate of Thurgood Marshall. In 1933, Marshall was first in their graduating class and Hill was second. Hill retired from his law practice at the age of 91. In 1951, Hill filed *Davis v. County School Board of Prince Edward County* on behalf of black students at a dilapidated high school. It later became one of the five *Brown v. Board of Education* suits.

His partner, Robinson, was the number one Howard law student in 1939. Current law professor and historian J. Clay Smith says Robinson's "brilliant legal mind helped win numerous Supreme Court decisions that gave all Americans the right to buy property where they wanted; to travel equally on public transportation; to enjoy equal access to public education; and to use public recreational facilities."

At one time, Robinson and Hill had legal actions in 75 Virginia school districts.

In 1954, the youngest member of the NAACP legal team, Dugas, was 34. Now 84, he has been affiliated with Howard University in some capacity for 56 years. Since 1964, he has taught trial advocacy there.

Nearly a half century ago, Dugas was of counsel for the D. C. school desegregation case *Bolling v. Sharpe*. In a 1999 *Legal Times* article, he said of that period, "I always liked to think of it as walking in the valley of the giants because all of these people were extremely good lawyers and I was just beginning. When the case was tried, I had only been at the bar for three years."

Dugas, who doesn't consider himself scholarly, says the legal team expected him to be persistent, orderly, organized, and to do research for them. He adds, "I do think these cases changed the fabric of the nation and the world."

That doesn't mean there isn't more to be done. In a 1998 memorandum, Dugas crafted what he thinks is Howard University School of Law's continuing mission:

*Preparing students for entry into the workplace of today and tomorrow by passing a bar*

*Taking the lead in finding solutions to the myriad problems facing the black community in its efforts to enjoy the full rights of citizenship and eradicating vestiges of inequality or injustice*

*Ensuring that equal protection and opportunity are available for all by never shirking from reminding the nation to fulfill the promises of the Constitution in deeds not words*

Plus, he said in a recent interview, "In the 21<sup>st</sup> century, the war blacks must win by any legal means necessary is the fight for economic equality."

One amazing revelation gleaned from looking at the *Brown* legal team is how supportive the Howard University administration was of their efforts to wage an insurrection against American apartheid. During the 1940s and early 1950s, Howard University President Mordecai W. Johnson backed these rebels fully despite the fact that Howard depended upon congressional funding from unsympathetic congressmen from the south as well as the north.

The university's facilities were always at the team's disposal. Dugas says in the early 1950s, Marshall, Nabrit, Hill, and Robinson regularly used the law school to rehearse oral arguments before the Supreme Court. Howard law faculty, alumni, students, and members of the Washington Bar were invited to critique and to ask questions as if they were the high court justices.

Perhaps not so coincidentally, 50 years later, Howard' law school still has gifted legal debaters. Last March law students led by professor E. Christi Cunningham, who teaches legal methods and labor law, won the Sutherland Cup, the nation's oldest national moot court competition, besting teams from Georgetown



University, New York Law School, and Vanderbilt University. A month earlier, another law school team took home the "Best Overall Team" award at the Juvenile Law National Moot Court Competition at Whittier University School of Law in Costa Mesa, California. A two-person Howard team carried away the "Best Oral Advocate" and "First Runner-up Oral Advocate" awards.

Fifty years ago, the Howard School of Law provided the brains, bodies, and books needed to redress legalized discrimination. At the time, the connection had a transforming effect. Nabrit once said, "Our students, who had formerly been just reciting and listening to the professor's lecture, were now made to start drafting documents, drafting pleadings, and procedures."

Where else in America could a faculty and students know that their work would be used in such high-level appellate litigation?

Nowhere but the Howard University School of Law. **H**  
Frank McCoy is a Baltimore-based freelance writer and editor.

*Top: Law professor and historian J. Clay Smith, bottom: Assistant professor E. Christi Cunningham*