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THE COLLECTIVE STRUGGLE FOR NEGRO RIGHTS: 1915-1940

RANDALL WALTON BLAND*

Following the Civil War, the newly-freed slave in the United States became disoriented and frustrated in a social structure not of his own making. The Negro, especially in the South, found himself in an environment during the Reconstruction period almost as hostile as slavery. The Ku Klux Klan employed terror and violence to keep him in the lowest level of society. Southern land owners manipulated Negro workers in a peonage system that was little better than slavery itself, while "mobs drove Negro voters from the polls, and the lynch rope kept the Negro men from being men."¹ Deep concern over human dignity, self-preservation, civil rights and true meaningful freedom led the American Negro to seek collective action.

Although several early attempts at organization had transpired outside the South, the only Negro structure that possessed a lasting quality in the South was the Church. The slaves had adopted the white man's religion, primarily the Baptist and Methodist denominations, and this tradition was maintained after the Civil War. Negro ministers provided inbred leadership and were respected uniformly by the entire Negro community. Stemming from the churches were developing social and fraternal organizations with the church building serving as the central meeting place.

Prior to the twentieth century the first effort at creating a national movement resulted in the National Negro Convention called in Philadelphia in 1830. Its principal concern was "the oppression of our brethren in a country whose republican constitution declares 'that all men are born free and equal.'"² These national conventions were reconvened for a number of years to deal with race relations and were predominantly Negro in attendance. A second major attempt was made in 1890 with the creation of the National Afro-American League in Chicago. None of these gatherings had a significant impact on the problem of race rela-

* B.A., 1964, Texas A & M University; M.A., 1966, University of Notre Dame. The present article is taken from a work in progress, THURGOOD MARSHALL: A CRITICAL ANALYSIS OF THE LEGAL CAREER OF AN ASSOCIATE JUSTICE.

¹ LANGSTON HUGHES, FIGHT FOR FREEDOM, 1 at 17 (1962).

² Quoted in HUGHES, FIGHT FOR FREEDOM 1 at 16 (1962).

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tions. Of more relative importance, perhaps, was the fact that state organizations were beginning to develop during this period, which helped train the Negro leaders of the future; the State Convention of Colored Citizens of Ohio (1849), the First California Negro Convention (1855), the Young Men's Progressive Association of New Orleans (1878), the Convention of Colored Men of Texas (1883), and the Macon, Georgia, Consultation Convention (1888) were the prominent among them. The fact remains that these initial and rudimentary rumblings of group activism had no lasting effect on the Negro drive for legal equality.

A "watershed" in the history of collective action on the part of Negroes occurred in 1905, when William E. B. Du Bois issued a call for a new organization. William Edward Burghardt Du Bois, a brilliant Negro author and essayist, graduated from Fisk and Harvard. He studied economics and sociology abroad at the University of Berlin. A proud and sensitive man and a child of the Negro elite of Great Barrington, Massachusetts, Du Bois returned to this country in 1894 to write on the race problem. He had believed "that truth, dispassionately presented, would set men free."³ Evidence of consistent discrimination and racial violence proved him wrong. Du Bois became convinced "that truth will only set men free if they have been actively seeking it . . . that truth, unsupported by organization and energy, is powerless among men running pell mell into darkness."⁴ His appeal was issued from Atlanta University where he served as a professor in social science:

The time seems more than ripe for organized, determined and aggressive action on the part of men who believe in Negro freedom and growth. . . . I write you to propose a conference during the coming summer for the following purposes: 1. To oppose firmly the present methods of strangling honest criticism, manipulating public opinion and centralizing political power by means of the improper and corrupt use of money and influence; 2. To organize thoroughly the intelligent and honest Negroes throughout the United States for the purpose of insisting on manhood rights, industrial opportunity and spiritual freedom. 3. To establish and support proper organs of news and public opinion.⁵

³ Lerone Bennett, Jr. points out that DU BOIS, *THE SOULS OF BLACK FOLK* published in 1903 as a book of essays had an impact on its age quite similar to the publication of Baldwin's *THE FIRE NEXT TIME* some sixty years later. LERONE BENNETT, JR., *CONFRONTATION: BLACK AND WHITE* 11, 99 (1965).

⁴ *Id.*

⁵ *Id.*

The call was answered and on July 29, 1905, twenty-nine prominent Negroes—lawyers, doctors, ministers and teachers—from all sections of the Country met with Du Bois. The meeting took place at Fort Erie, Canada, and the Niagara Movement was founded.⁶ The Movement was dedicated to "aggressive action" for the benefit of Negro freedom and growth.⁷

The following year the Niagara Movement held its second meeting at Harper's Ferry, where over 100 Negro leaders assembled to pay homage to the militant John Brown. In his keynote address, Du Bois sounded the demands of racial equality and freedom that are to this day still unfulfilled: "We want full manhood suffrage and we want it now. . . . We claim the right of freemen to walk, talk, and be with them that wish to be with us. . . . We want the constitution of the country enforced. . . . We want our children educated. . . . And here on the scene of John Brown's martyrdom we reconsecrate ourselves, our honor, our property to the final emancipation of the race which John Brown died to make free. . . . We are men! We will be treated as men. And we shall win."⁸

In 1907, the third and final conclave of the Niagara Movement took place in the famous Faneuil Hall in Boston. Sentiment for collective action had been growing since the founding of the Movement and new efforts were being made for an organization which would combine the Niagara group with white Americans embodied with like-objectives and aspirations.⁹ The reason for the sudden outburst of white sympathy for the plight of his fellow black citizens, appears to have been the shocking increase of mob violence and the lynching of Negroes.

During the waning days of the "Gay Nineties" a Negro was being lynched on the average of one every other day in the South, so that by 1959, the total number reached 4,733 reported cases.¹⁰ A principal cause

⁶ Hughes takes note of the fact that the assemblage met on the Canadian side of Niagara Falls because no hotels or accommodations were open to Negroes on the American side. HUGHES, *FIGHT FOR FREEDOM* 18 (1962).

⁷ C. ERIC LINCOLN, *THE NEGRO PILGRIMAGE IN AMERICA*, at 142 (1967).

⁸ See note 2, *supra*.

⁹ The promotion of a mixed group of black and white Americans striving together for civil rights came basically from the white segment of society: Mary White Ovington, a wealthy independent thinker who worked with the underprivileged of New York City; William English Walling, a liberal southern journalist and author; Henry Moskowitz, a Jewish social worker; and, Oswald Garrison Villard, a grandson of William Lloyd Garrison and writer for the *New York Post*, were the prime motivators of the movement for unity. See LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA, 1919-1964*, 11, 281-285 (1964). [Hereafter cited BENNETT, *MAYFLOWER*].

¹⁰ WILLIAM BRINK AND LOUIS HARRIS, *THE NEGRO REVOLUTION IN AMERICA* 36 (1964).

for the arousal of human emotions over these atrocities was publication of a shocking study of the problem, entitled *Thirty Years of Lynching the United States, 1889-1918*. It disclosed that within this period, 3,224 men, women, and children had been lynched, and of these, only 19 percent of the victims had been accused of sexual offenses.¹¹ In addition, the nation's press began giving increased coverage of mob violence against Negroes during the turn of the century. Detailed accounts of these events such as the lynchings at Valdosta, Georgia in 1921 shocked the conscience of White America. This incident resulted from the fact that angry whites, not able to find the murderer of a plantation owner, lynched three innocent Negroes in bitter frustration. The pregnant wife of one of the victims screamed so loudly at her husband's death, that the mob seized and burned her alive. In the process, "her unborn child fell to the ground and was trampled underfoot; white parents held their children up to watch."¹² In most cases, justice and "due process of law" did not exist for an accused or suspected Negro, whether innocent or guilty. The immediate cause of the idea of a national conference of similarly-minded whites and Negroes was not a lynching, but rather a race riot.

In the summer of 1908, a two-day race riot took place in Springfield, Illinois. It was not a particularly large disturbance in comparison to others that had been experienced in a number of American towns and cities. What was horrifying was that it happened in the hometown of Abraham Lincoln on the eve of the centennial of Lincoln's birth.¹³ In a 48-hour period a white mob, frustrated over the escape of several Negro prisoners, engaged in an orgy of blood which included the lynching of a Negro barber and an 84-year-old man, looting and burning Negro homes and businesses, driving hundreds of Negroes from the city and seriously injuring some 70 persons.¹⁴ In a bitter article on the incident, William English Walling, a liberal southern journalist, described it as a "Race War in the North" and invoked "the spirit of the abolitionists, of Lincoln . . . to treat the Negro on a plane of absolute political and social equality . . ." or else riots and eventually racial wars will be the inevitable result.¹⁵ The article was a sensation in the liberal white community, and one of those most affected was Mary W. Ovington of New

¹¹ HUGHES, *FIGHT FOR FREEDOM* # 35 (1962). [Hereinafter cited HUGHES, *FIGHT*].

¹² *Id.* at 37.

¹³ BENNETT, *MAYFLOWER* at 281.

¹⁴ HUGHES, *FIGHT* at 20; and BENNETT, *CONFRONTATION*, 11 at 105.

¹⁵ The article appeared in a radical newspaper, *The Independent*. Cited in BENNETT, *MAYFLOWER* at 281.

York. After corresponding with Walling, Miss Ovington convinced other liberal leaders of the need for a national conference on the Negro problem and the future of race relations in the United States.¹⁶ The appeal for the conference was made on February 12, 1909, the hundredth anniversary of Lincoln's birth and was jointly signed by sixty well-known Negroes and whites including Du Bois, Rabbi Stephen S. Wise, J. G. Phelps Stokes, Ida B. Wells Barnett and Jane Addams, the famous founder of Hull House.¹⁷ The call was written by Oswald Garrison Villard and appeared in the *New York Post*, and it read in part:

The celebration of the Centennial of the birth of Abraham Lincoln, widespread and grateful as it may be, will fail to justify itself if it takes no note of and makes no recognition of the colored men and women for whom the Great Emancipator labored to assure freedom . . . if Mr. Lincoln could revisit this country in the flesh, he would be disheartened and discouraged. He would learn that on January 1, 1909, Georgia had rounded out a new confederacy by disfranchising the Negro, after the manner of all the other Southern States. He would learn that the Supreme Court of the United States, supposedly a bulwark of American liberties, had refused every opportunity to pass squarely upon this disfranchisement of millions. . . . He would learn that the Supreme Court . . . had laid down the principle that if an individual State chooses, it may "make it a crime for white and colored persons to frequent the same market place at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested."

In many States Lincoln would see the black men and women, for whose freedom a hundred thousand soldiers gave their lives, set apart in trains, in which they pay first-class fares for third class service and in places segregated in railway stations and in places of entertainment; he would observe that State after State declines to do its elementary duty in preparing the Negro through education for the best exercise of citizenship. Added to this, the spread of lawless attacks upon the Negro, North, South, and West—even in the Springfield made famous by Lincoln . . . could but shock the author of the sentiment that "government of the people, by the people, for the people, should not perish from the earth."

Silence under these conditions means tacit approval. . . . Hence we call upon all the believers in democracy to join in a National Confer-

¹⁶ *Id.* at 284.

¹⁷ *Id.*

ence for the discussion of present evils, the voicing of protest, and the renewal of the struggle for civil and political liberty.¹⁸

The end-product of this appeal was a three-day conference that began on May 30, 1909, with an interracial gathering at the Henry Street Settlement in New York and concluded with a mass demonstration at Cooper Union. The organization resulting from the conference was entitled the National Negro Committee which numbered some forty persons.¹⁹ During the next year the Committee held four public meetings and had initiated a successful membership drive.

The second annual meeting of the Committee was held again in New York City during the month of May, 1910.²⁰ The first order of business was the choice of a new name and incorporation of the organization under the laws of the State of New York. The name selected was a lengthy one—the National Association for the Advancement of Colored People.²¹ As officially recorded, the purposes of the organization were as follows: "To promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored persons; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability and complete equality before the law."²² From the outset, the NAACP in both organization and membership was interracial. Proof of the beginning of a united front was evidenced by the fact that eight members of the group's Board of Directors had been former members of the Niagara Movement. A number of new Negro organizations were also formed in the first decade of the twentieth century, but none seemed to display the overall solidarity and harmony exhibited by the NAACP.²³

Adhering strongly to its official purposes the NAACP has employed

¹⁸ Quoted in HUGHES, *FIGHT* at 21-22.

¹⁹ *Id.* at 23.

²⁰ *Id.*

²¹ Although the NAACP did not receive its name until May, 1910, the date of its founding was officially recorded as the date when journalist Villard issued his appeal on February 12, 1909. It is interesting to note that the Urban League, also an interracial organization founded in New York, to deal with problems of urban Negroes, was organized in April, 1910. BENNETT, *MAYFLOWER* at 284.

²² Quoted in HUGHES, *FIGHT* at 23.

²³ Besides the NAACP and the Urban League, a more extremist group was founded by William Monroe Trotter entitled the National Equal Rights League. Trotter was a Negro separatist who distrusted whites and his all-Negro league reflected this attitude in its more bellicose preachings. BENNETT, *MAYFLOWER* at 285.

two basic methods in its protest movement—the legal approach and public education. As one noted historian has pointed out: "... the roles of the lawyer and the public relations man are paramount: The NAACP and other groups like it that are seeking social reform operate on the assumption that an informed public and the traditional channels of judicial appeal are all that are necessary to bring about the desired social change. It is in this sense that the NAACP protest is typically 'American.'"²⁴ Moreover, during its first thirty years, "the militant protest organization of a small number of intellectuals" was transformed into "a large nationwide association with an elaborate bureaucracy" and had "achieved a certain degree of acceptance and middle-class respectability."²⁵

During its first years, the NAACP was concerned principally with the urgent problems of mob violence and lynching and of appealing to the American conscience for law with justice. In 1914, Arthur B. Spingarn—a devoted white liberal—was appointed to supervise the legal program of the organization, and served in this capacity with only a minimum remuneration. As chairman of legal defense, Spingarn was able to persuade a number of prominent lawyers throughout the United States to freely volunteer their services to the Association—Moorfield Storey of Boston, Louis Marshall of New York and Clarence Darrow of Chicago, the more famous among them.²⁶

Between 1915-1936, the NAACP had participated in ten cases brought before the Supreme Court of the United States, other than those which involved a denial of certiorari. The main thrust of these cases was concerned with four major areas: Negro suffrage, residential segregation ordinances, restrictive covenants, and due process and equal protection for Negroes accused of crimes.²⁷ Ironically, the Association was not involved, either directly or indirectly, with a single education decision before the Supreme Court of the United States in this period.²⁸

The first case in which the NAACP participated was *Guinn v. United States* in 1915.²⁹ The facts of the case were predicated on an earlier decision by the Supreme Court, in which it had "indirectly approved"

²⁴ W. HAYWOOD BURNS, *THE VOICES OF NEGRO PROTEST IN AMERICA* 11 at 19 (1963).

²⁵ *Id.* at 18.

²⁶ TOWARD EQUAL JUSTICE (NAACP Legal Defense & Educational Fund), p. 2.

²⁷ A complete list of the cases is presented in Appendix I.

²⁸ The first case involving education to be brought before the Supreme Court was *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938), some twenty-nine years after the Association was founded.

²⁹ 238 U.S. 347.

Mississippi's constitution of 1890 which contained a multiplicity of devices to bar the Negro from the ballot box, an unfortunate decision which led to a flurry of activity on the part of southern legislatures to imitate these devices.³⁰ Although having no such clause in its constitution before being admitted to the Union in 1908, Oklahoma amended its organic law to provide that "no person shall be registered . . . or allowed to vote, unless he be able to read and write any section of the constitution," and further that, "no person who was, on January 1, 1866, or at any time prior thereto, under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to vote because of his inability to read and write sections of the state constitution."³¹ In effect this "Grandfather Clause" of the 1910 Oklahoma constitution prevented Negroes from voting on the ground that their ancestors did not have the franchise. By obeying the law, two election judges, Guinn and Beal, who refused to allow a Negro to vote, were indicted in a federal district court, and convicted for conspiracy under a section of the Enforcement Act of 1871.³² After being appealed to the Supreme Court of the United States, the constitutional question was focused on the validity of the "Grandfather Clause." Moorfield Storey, the lawyer who had begun his career as secretary to Charles Sumner, filed an *amicus curiae* brief in the case for the NAACP, on the grounds that the "Grandfather Clause" was a clear-cut violation of the Fifteenth Amendment.³³ In an 8-0 decision, in which Justice McReynolds took no part, the Supreme Court agreed with Storey's contention and invalidated the clause. Speaking for the majority, Chief Justice Edward White held that while the Fifteenth Amendment "gives no right of suffrage, it was long recognized that in operation its prohibition might measurably have that effect." To hold otherwise, he maintained, would make the Amendment "inapplicable by mere forms of expression embodying no

³⁰ *Williams v. Mississippi*, 170 U.S. 213 (1898).

³¹ LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 14, 218-219 (1966).

³² The section, which was later codified as Section 5508 of the revised federal statutes, prohibited state officials from denying or conspiring to deny the "free exercise of any right or privilege secured to him by the constitution or laws of the United States." Since the Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account, color, or previous conditions of servitude," the Enforcement Act was applicable in this case. See MILLER, *THE PETITIONERS* at 219, see note 30, *supra*.

³³ The famous Boston lawyer served as president of both the American Bar Association and the NAACP.

exercise of judgment and resting on no discernible reason other than the purpose to disregard" its restriction. Because the "Grandfather Clause" was so inherently a part of the provision, the Court held the entire article unconstitutional. The *Guinn* decision was a political victory for Negroes that was to be reflected in two other cases brought before the Supreme Court during this period; both were concerned with the laws of Texas which excluded Negroes from participating in the Democratic primary.

Statutory law in Texas stipulated that "In no event shall a Negro be eligible to participate in a Democratic Party election." After being denied the right to vote in the primary, a Negro resident of El Paso, Dr. L. A. Nixon, sued the election judges for damages. Nixon lost in a series of lower court decisions, but his attorneys Arthur Spingarn and Fred C. Knollenberg of the NAACP won appeal to the Supreme Court of the United States. On March 7, 1927, speaking for the majority, Justice Oliver Wendell Holmes held the "white primary" law to be invalid as a violation of the Equal Protection Clause of the Fourteenth Amendment: "States may do a good deal of classifying that is difficult to believe rational, but there are limits . . . Color cannot be made the basis of a statutory classification affecting the right set up in this case . . . We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."³⁴ Following quickly on the heels of the Court's decision, a special session of the Texas legislature was called to draw up a more ingenious plan. Admittedly, the Court had prohibited the State legislature from enacting laws denying Negroes participation in the party primary, but what about a law that authorized the Democratic State Committee to make its own rulings on voter eligibility? Consequently, the executive committee of the party resolved that only white Democrats could vote in the Democratic primary. Once again, Dr. Nixon with the support of the Association brought suit and lost in the lower courts and, once again, won appeal to the Supreme Court of the United States. Arthur Spingarn argued the case before the Court. In a squeaking 5-4 decision delivered on May 2, 1932, Associate Justice Benjamin Cardozo held that this was a delegation of state power to the party's executive committee, that the committee's discriminatory act was *de facto* state action, and as such was prohibited by the guaranty of "equal protection of the laws" of the Fourteenth Amendment.³⁵ "The 14th Amendment," wrote

³⁴ Nixon v. Herndon, 273 U.S. 536 (1927).

³⁵ Nixon v. Condon, 286 U.S. 73 (1932).

Cardozo, "adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."

Another legal area in which the Association met with some measure of success was that of racial zoning laws. At the outset an attempt was made to eliminate racial discrimination in housing by publicizing the evils of such practices. In its first year the NAACP familiarized its membership with "the practice of writing letters to the press and magazines, in regard to any and all matters where the rights of colored were at issue, notably in the Baltimore segregation agitation; however, as more and more city councils enacted segregation ordinances,³⁶ it became clear to Association leaders "that a city ordinance could not be stopped by a letter to the editor."³⁷ The first case brought by the NAACP before the Supreme Court of the United States dealing with state-enforced segregation ordinances had a very unusual background.³⁸ Robert Buchanan, a white resident of Louisville, Kentucky, owned a lot in a block in which two Negro and eight white families resided. He entered into a sales agreement with William Warley, a Negro, which provided therein the following clause: "I am purchasing the . . . property for the purpose of having erected there on a house which I propose to make my residence. . . . I shall not be required to accept a deed . . . or pay for said property unless I have the right under the laws of the State of Kentucky and the city of Louisville to occupy said property as a residence." Since the city had a racial zoning ordinance, both men, as well as their respective attorneys, knew well that Warley would not be able to reside in the predominantly white block. Accordingly when Buchanan demanded the purchase price in exchange for the deed, Warley refused. Buchanan expressed pain and surprise, and maintained that the ordinance was invalid and obnoxious to the Fourteenth Amendment of the Constitution. In so doing, he brought suit against Warley in state court and enlisted the aid of the legal arm of the NAACP. Thus, the case "presented the strange spectacle of the white plaintiff, Buchanan, contending that a segregation ordinance was

³⁶ By 1915, Baltimore, Richmond, Winston-Salem, Louisville, Birmingham, and a number of other communities had enacted racial ordinances. In the following year, Dallas adopted a segregation ordinance and in a popular referendum the people of St. Louis favored such a law by a vote of two to one. CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES, 111 at 51 (1959) [Hereafter cited as VOSE, CAUCASIANS ONLY].

³⁷ *Id.*

³⁸ For a complete description of the background of the case, see MILLER, THE PETITIONERS, 16 at 247-251.

unconstitutional and of the Negro defendant, Warley, apparently fighting tooth and nail to uphold racial segregation."³⁹ After losing a series of lower court decisions, the NAACP was able to take the case before the Supreme Court of the United States.⁴⁰ In November, 1917, the Court in a unanimous decision invalidated the Louisville ordinance because it interfered with property rights "in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution." Speaking for the Court, Justice Day maintained "it is the purpose of such enactments to require by law . . . the compulsory segregation of the races on account of color" in the sale of property. Such an ordinance can not stand, Day continued, because "colored persons are citizens of the United States and have the same right to purchase property and enjoy the use of the same without laws discriminating against them solely on account of color . . . The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him . . ." If Buchanan was not allowed to complete the sale, he said, it would be a denial of due process of law. The *Buchanan* case was a tremendous legal precedent for the NAACP. In addition, it was rather inexpensive for the Association at \$1,342, since President Moorfield Storey volunteered his services in the case free of charge.⁴¹

Despite the fact that new segregation ordinances were still appearing throughout the country, the *Buchanan* rule made it possible to overturn these devices by way of litigation. In 1927, when Louisiana courts upheld the zoning ordinance of New Orleans in spite of the objections of local NAACP members, the Association's legal staff was again able to take the matter to the Supreme Court of the United States.⁴² The Court by invalidating the ordinance on the grounds that it violated the Fourteenth Amendment, adhered to the *Buchanan* decision. Three years later, the NAACP brought another case before the Supreme Court which involved a Richmond zoning ordinance which based its segregation on the prohibition of intermarriage, rather than color or race.⁴³ The Supreme Court was not fooled by the disguise and agreed with the pronouncement of a lower federal court in concluding that "the legal prohibition of intermarriage is itself based on race" and, as such, violated the Fourteenth

³⁹ *Id.* at 248.

⁴⁰ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁴¹ VOSE, CAUCASIANS ONLY at 51-52.

⁴² *Harmon v. Tyler*, 273 U.S. 668 (1927).

⁴³ *City of Richmond v. Deans*, 281 U.S. 704 (1930).

Amendment. So successful was the NAACP's effort against racial zoning laws, that "since 1929, racial segregation by ordinance has been a rarity of no consequence."⁴⁴ This same measure of success was not accorded the legal committee of the Association, in combating private agreements which provided for residential segregation. These agreements are better known as restrictive covenants.

In 1921, some thirty residents of Washington, D. C., signed an agreement covering twenty parcels of land which provided that "no part of these properties shall ever be used or occupied by, or sold, leased or given to, any person of the Negro race or blood."⁴⁵ Two of the residents who had signed the agreement were John J. Buckley and Mrs. Irene Corrigan; however, within a year the latter party entered into a contract of sale of her lot to Mrs. Helen Curtis, the wife of a well-known Negro physician. On the grounds that the contract of sale violated the restrictive covenant, Buckley sued Mrs. Corrigan and Mrs. Curtis. Thereupon, Mrs. Curtis filed a motion to dismiss the suit, since the covenant was void in attempting "to deprive her of property without due process of law, abridged her 'privileges and immunities,' and denied her equal protection of the law in violation of the 'Fifth, Thirteenth, and Fourteenth Amendments.'"⁴⁶ In addition, she claimed that the courts of the District were not able to enforce such contracts because they violated the public policy of the District. The attorney of record for the defendants was a young Howard Law School graduate, James A. Cobb, who after losing his case in two District courts enlisted the assistance of the National Association's legal staff. Two experienced lawyers were provided; the old warrior, Moorfield Storey, who was at this time over eighty years old, and Louis Marshall, president of the American Jewish committee, who was seventy. The lawyers appealed the case to the Supreme Court of the United States and it was argued on January 8, 1926.⁴⁷ Marshall and Storey contended in their brief that "the decrees of the courts below constitute a violation of the Fifth and Fourteenth Amendments to the Constitution, in that they deprive the appellants of their liberty and property without due process of law."⁴⁸ In oral argument before the Supreme Court, Louis Marshall presented a rationale that was to be employed successfully by his successors in defeating state enforcement of restrictive covenants:

⁴⁴ VOSE, CAUCASIANS ONLY at 52.

⁴⁵ MILLER, THE PETITIONERS at 252.

⁴⁶ *Id.*

⁴⁷ *Corrigan v. Buckley*, 271 U.S. 323 (1926).

⁴⁸ Quoted in VOSE, CAUCASIANS ONLY at 53.

The court has been asked to restrain Corrigan from selling and Mrs. Curtis from buying property as to which a restriction has been created forbidding its use or ownership by colored people. If a judgment to that effect were rendered, the court would prevent Mrs. Curtis from buying this land because of her color. If it rendered such a decree, the court would be carrying out a policy which discriminates against colored persons and would thereby bring about segregation. The legislature may not segregate; the governing body of a city or village may not do so. Can a court, acting as a branch of the Government, by its mandate bring about segregation without running afoul of the decision in *Buchanan v. Warley*, 245 U.S. 45? I think not.⁴⁹

In a unanimous decision, the Supreme Court dismissed the appeal of the plaintiffs. Speaking for the Court, including Holmes and Brandeis, Justice Sanford noted that the contention that the restrictive covenant violated the Constitution was "entirely lacking in substance or color of merit": the Thirteenth Amendment abolished slavery and involuntary servitude, while the Fifth restricted the national government and the Fourteenth merely prohibited racial discrimination on the part of the states. In no case, Justice Sanford continued, was the object of the law private individuals, nor do the Amendments prohibit them "from entering into contracts respecting the control and disposition of their own property." The court claimed it had no jurisdiction to decide any other issue. The NAACP would have to live with this decision until 1948, when Thurgood Marshall⁵⁰ and his associates succeeded in convincing the Supreme Court to invalidate court enforcement of restrictive covenants.⁵¹

The final area of legal activity in which the NAACP played an important part prior to Thurgood Marshall's arrival in 1936, was the protection of civil liberties of Negroes accused of crime. A notorious example of injustice arose out of the mob action which took place in Elaine, Phillips County, Arkansas, in October 1919, which led to the case of *Moore v. Dempsey*.⁵² Negro share-croppers and farmers in Elaine,

⁴⁹ *Id.*

⁵⁰ Marshall served as Special Counsel for the NAACP, and later as Director-Counsel of its Legal Defense and Educational Fund, Inc., from 1935-1961. He has served as an Associate Justice of the Supreme Court of the United States since 1967.

⁵¹ State enforcement of restrictive covenants was found violative of "equal protection of the laws" guaranteed by the Fourteenth Amendment in *Shelley v. Kraemer*, 334 U.S. 1 (1948); federal court enforcement, on the other hand, was held in violation of "due process of law" of the Fifth Amendment in *Hurd v. Hodge*, 334 U.S. 24 (1948).

⁵² 261 U.S. 86 (1923).

Arkansas, had been harassed by their white landlords for years. They were refused itemized bills for the supplies owed to their landlords, and were unable to obtain an accounting of weights and prices for their crops. In desperation, the Negroes hired a white lawyer to make their claims. Fearing a possible conviction for peonage, the landlords made an armed attack with firearms on a meeting of Negro farmers in a church. In the exchange of fire that ensued, several Negroes and one white man were killed. Hours later, enraged mobs of white residents killed over 200 Negroes. Over one thousand Negro men and women were placed in a large stockade and were tried by a kangaroo court of their overseers. The "trial" was a travesty of justice. Held in an extremely hostile atmosphere, the defense counsel did not ask for a change of venue; he did not challenge prejudiced jurymen; he failed to ask for separate trials. Moreover, the defense counsel had no preliminary consultation with the accused, brought forth no witnesses for the defense, and placed no defendants on the stand. Within five days, twelve Negroes received the death penalty and sixty-seven others were sentenced to long prison terms, after a trial that lasted only forty-five minutes.⁵³ The legal arm of the NAACP fought for four years in a long series of litigation through the lower courts, to obtain justice for the seventy-nine Negro defendants. Finally, the case reached the Supreme Court of the United States and in February, 1923, it was decided that a new trial must be held for all of the defendants. Speaking for the majority, Justice Holmes wrote: ". . . if the case is that the whole proceedings is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." Such a trial, he continued, held in a hostile atmosphere of fear and hate was inherently unfair and resulted in a denial of "due process of law" as protected by the Fourteenth Amendment. By 1925, all seventy-nine defendants were released without additional prosecution.⁵⁴

Besides a deep concern with overt injustice reflected in mob violence, the Association also challenged the arbitrary exclusion of Negroes from petit and grand juries. The first such case brought by the NAACP be-

⁵³ TOWARD EQUAL JUSTICE at 4, see footnote 25, *supra*.

⁵⁴ *Id.*

fore the Supreme Court of the United States was decided in 1935.⁵⁵ The litigation had originated four years earlier when Jess Hollins, a resident of Sapulpa, Oklahoma, was convicted of rape and sentenced to death. He could neither afford counsel nor was one provided for him by the court. Qualified Negroes had been systematically excluded from the jury that sentenced him. With only three days remaining before his execution, the NAACP intervened and obtained a stay of execution. In a memorandum opinion the Supreme Court of the United States established the principle, reiterated in a number of subsequent decisions, that "the trial and conviction of a Negro by a jury of white persons, upon an indictment found and returned by a grand jury of white persons, from both of which all qualified Negroes have been excluded solely on account of race or color is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution."⁵⁶ Although at this time, the states need not provide a trial by jury⁵⁷ for accused persons, if one *was* employed it must be essentially fair, the trial must be kept free from the intimidation of the mob, as well as from the subtleties of systematic racial exclusion.

Finally, the Association fought against convictions of Negroes which were based on confessions admittedly obtained under torture. It first confronted the Supreme Court of the United States with this matter in February, 1936, in the case of *Brown v. Mississippi*.⁵⁸ In 1934, Ed Brown, Henry Shields and Yank Ellington, Negro farm workers in De Kalb County, Mississippi, were convicted of murder. They were convicted solely on the basis of confessions obtained by force. Ellington was hanged to a tree by arresting officers in order to make him confess. Under fear of death, he eventually did so. The rope burns on his neck were evident at the trial, and the deputy sheriff freely admitted his part in obtaining the "confession." When asked on the witness stand how severely he beat the defendant, the deputy sheriff replied: "Not too much for a Negro; not as much as I would have done if it were left to me."⁵⁹ Moreover, none of the men who participated in the torture denied beating the defendants. As expected, the Supreme Court of Mississippi affirmed the con-

⁵⁵ Hollins v. Oklahoma, 295 U.S. 394 (1935).

⁵⁶ Thurgood Marshall, *Equal Justice Under Law*, THE CRISIS 200 (July 1939).

⁵⁷ In 1966, the Supreme Court of the United States made the trial by impartial jury provision of the Sixth Amendment mandatory upon the states in all felony cases, capital and non-capital, by way of "due process of law" of the Fourteenth Amendment. Parker v. Gladden, 385 U.S. 363 (1966).

⁵⁸ 297 U.S. 278 (1936).

⁵⁹ Quoted in Marshall, THE CRISIS 200 (July 1939). See footnote 53, *supra*.

viction whereupon the Association's legal staff petitioned for certiorari to the highest federal court. After taking the case, the Supreme Court of the United States reversed the convictions and granted a new trial. In the majority opinion, Chief Justice Hughes wrote:

Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand . . . The duty of maintaining the constitutional rights of a person on trial for his life rises above mere rules of procedure, and whenever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.

In holding that the use of confessions obtained in such a manner violated the Fourteenth Amendment's guaranty of "due process of law," the Chief Justice added that the "complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole preceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."

In its first twenty-five years, the NAACP had participated in ten cases before the Supreme Court of the United States and had suffered only one defeat—the decision in which the Court had upheld the validity of restrictive covenants.⁶⁰ Of the legal accomplishments of the Association during this period, Thurgood Marshall would later write:

These decisions have served as guideposts in a sustained fight for full citizenship for Negroes. They have broadened the scope of protection guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments . . . in the fields of the right to register and vote, equal justice before the law, Negroes on juries, segregation. . . .

In addition, they broaden the interpretation of constitutional rights for all citizens and extend civil liberties for whites as well as Negroes.

The activity of lawyers acting for the NAACP has added to the body of law on civil rights for all Americans. The Association, by pressing these cases, has brought nearer to realization the ideal embodied in the quotation engraved over the Supreme Court building in Washington, D. C.: "Equal Justice Under Law."⁶¹

In this—the first article Marshall had published—he reaffirmed his faith in the legal structure of the United States, despite the fact that

⁶⁰ *Corrigan v. Buckley*, 271 U.S. 323 (1926).

⁶¹ MARSHALL, *THE CRISIS*, July, 1939, at 199, 201, see footnote 53, *supra*.

progress for the American Negro under the law would often be stymied by procrastination :

While it may be true that laws and constitutions do not act to right wrong and overturn established folkways overnight, it is also true that the reaffirmation of these principles of democracy build a body of public opinion in which rights and privileges of citizenship may be enjoyed, and in which the more brazen as well as the more sophisticated attempts at deprivation may be halted.⁶²

Despite the admitted legal successes of the Association, not all Negro leaders, even within the NAACP, were satisfied. In 1934, W. E. B. Du Bois, editor of *THE CRISIS*, the official publication of the organization, maintained that efforts thus far had been futile. In fact, he added, there was more discrimination and actual segregation today than existed when the Association was formed. Representing an early form of black nationalism, Du Bois proposed "that since segregation was inevitable Negroes ought to use it by organizing consumer and producer cooperatives and cultivating their political strength."⁶³ Joel Spingarn, Executive Secretary Walter White⁶⁴ and other Association officials were shocked by this unexpected attack from their director of publicity and research. In defence of NAACP policies, the official leadership of the organization retaliated with a bitter attack against Du Bois. Finally, Du Bois was forced to resign and returned to his teaching career at Atlanta University. But the "can of worms" that Du Bois had opened could not be quieted so easily. His criticism had been only one of many against the Association. Indeed, the situation was worsening; segregation was on the increase and the economic condition of the NAACP was so poor that it could not afford to sustain the struggle. In response to its critics the organization appointed a Committee on Future Plans and Programs headed by Abram Harris. The Committee released its proposal at the annual convention of the NAACP in St. Louis in 1935. It called for "vigorous economic action and unification of black and white workers" and "... organization of classes in workers' education, the creation of

⁶² *Id.* at 201.

⁶³ BENNETT, *CONFRONTATION* at 140.

⁶⁴ The position of real power in the NAACP is that of Executive Secretary, not that of President. The Board of Directors chooses the Executive Secretary who carries out the policies of the annual convention of the NAACP—the true governing body of the Association at the national, regional and local levels. Walter White was succeeded as Executive Secretary by Roy Wilkins in 1955. For a description of the organization and operation of the NAACP, see BURNS, *VOICES OF NEGRO PROTEST* at 19-27.

industrial and agricultural councils, and the setting up of workers' councils.⁶⁵ For whatever the reasons the program was never carried out. Adding his voice to the growing criticism of the NAACP, Ralph Bunche accused Association officials of having "a narrow vision of leadership."⁶⁶ Bunche, who conducted a study of the Association for use in Gunner Myrdal's landmark work, *An American Dilemma* (1943), concluded: "In an era in which the Negro finds himself hanging ever more precariously from the bottom rung of a national economic ladder that is itself in a condition if not too animated suspension, the Association clings to its traditional faith, hope, and politics."⁶⁷ The future did not seem bright for the NAACP in the mid-thirties; however, in the years to come, it would make its greatest contributions in the struggle for obtaining the legal rights of Negroes.

APPENDIX I

NAACP Legal Activity: 1915-1936

Cases argued by lawyers of the NAACP before the Supreme Court of the United States, excluding those involving a denial of certiorari:

Primaries in State Elections

- (1) *Nixon v. Herndon*, 273 U.S. 536 (1927)
- (2) *Nixon v. Condon*, 286 U.S. 73 (1932)

Voting Procedures

- (3) *Guinn v. United States*, 238 U.S. 347 (1915)*

State Enforced Residential Segregation

- (4) *Buchanan v. Warley*, 245 U.S. 60 (1917)
- (5) *Harmon v. Tyler*, 273 U.S. 668 (1927)
- (6) *City of Richmond v. Deans*, 281 U.S. 704 (1930)

Private Restrictive Covenants

- (7) *Corrigan v. Buckley*, 271 U.S. 323 (1926)

Procedural Rights in Criminal Cases

- (8) *Moore v. Dempsey*, 261 U.S. 86 (1923)
- (9) *Hollins v. Oklahoma*, 295 U.S. 394 (1935)
- (10) *Brown v. Mississippi*, 297 U.S. (1936)

⁶⁵ BENNETT, CONFRONTATION at 140.

⁶⁶ *Id.*

⁶⁷ *Id.*

* *amicus curiae*