Charles L. Black, Jr.

Jack Greenberg†

I met Charlie Black not long after I came to work at the NAACP Legal Defense Fund in 1949. Around the same time, he began teaching at Columbia and was quickly recruited into LDF's informal group of academic advisers. In January 1950, he signed the *amicus curiae* brief of the Committee of Law Teachers Against Segregation in Legal Education in *Sweatt v. Painter*,[1] which we took as an indication that he was one of us. While the authors of that brief were such stalwarts as Erwin N. Griswold, Edward Levi, Thomas Emerson and John Frank, there was still a widely held mood in the country, in legal education, and indeed, among some faculty at Columbia at that time (Walter Gellhorn being the most notable exception), that LDF's enterprise and its effort to overturn racial segregation were at the very least questionable—politically, socially, jurisprudentially. In the eyes of many lawyers, those who were involved in the effort were misguided, if not disreputable. For a Texan like Charlie Black, the disapproval sometimes became opprobrium among fellow southerners. A Florida newspaper once called me a Bolshevik—imagine what some Texans must have said about Charlie!

In his work for the LDF on *Brown*,[2] Charlie, who then taught a course called Equity, focused particularly on the remedial aspect of the case, helping formulate the first and second rearguments in response to the Court's questions about how to write and administer desegregation decrees. It didn't take long to find out that he was not merely a great, indeed spectacular, advocate, but also a towering scholar of constitutional law and the greatest legal stylist of his generation. Soon I learned that he was (and is) also a poet (his three volumes of poetry have been published, as he puts it, under the pseudonym "Charles Black"), trumpeter, harmonica player, and cornetist (not all played at the same level of accomplishment), painter, long distance jogger, actor,[3] and more recently, student of Iceland and of modern Icelandic.

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1. Brief of Amicus Curiae Committee of Law Teachers Against Segregation in Legal Education in Support of Petitioner, Sweatt v. Painter, 339 U.S. 629 (1950).

2. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

3. The director of a Yale Repertory Company production of *Julius Caesar*, in which Charles played Cicero, urged him to shed his Texas drawl. Charles replied, "What makes you think Cicero talked like a Yankee?"

When I became Director-Counsel of LDF in 1961, I turned to Charlie repeatedly for help—out of both concern for the needs of our litigation program and personal affection. The big new issues of that period arose out of the sit-ins, freedom rides, and demonstrations of Martin Luther King, Jr., whom LDF represented. Foremost among those issues was determining what constituted state action under the equal protection clause of the Fourteenth Amendment. Civil rights demonstrators claimed that they had been arrested, prosecuted, and convicted by the state in violation of the equal protection clause as part of a systematic design to enforce the racial prejudices of the proprietors and the community. The prosecutors asserted the contrary: arrest, prosecution and conviction, according to them, merely enforced property rights in a neutral manner, and were thus constitutionally indistinguishable from assisting a homeowner's decision to exclude an ordinary unwelcome guest. The Supreme Court went to great lengths not to decide the constitutional issue—probably out of uncertainty over what the implications of such a decision might be. Instead, the Court decided the demonstration cases on a variety of nonconstitutional statutory and evidentiary grounds. Charlie was an advocate without equal in briefing the constitutional issue, making a forceful case for holding that state action existed, and then offering the Court a way out of deciding that issue by ruling for defendants on some nonconstitutional ground.

We took advantage of Charlie so mercilessly (although to our mutual pleasure) that he wrote a poem decrying the exploitation:

The Tide Turns At Menemsha Bight (1965)

Each summer while the sun has burned
To Greenberg's bondage I've returned,

And Nabrit, overseer-in-chief,
Has made me slave on writ and brief.

But now, to put the matter clinically,
My epidermis has actinically

So altered been upon this shore,
That I'm an ASP, a WASP no more,

And Chief Bull Connor, were he here,
Would seat me in the bus's rear.

So now the NAACP
Has got to start advancing me!

The best evidence of Charlie's lawyering, scholarship, and style is included in some of the briefs themselves, documents that are, unlike his

numerous poems, books and articles, not generally available to the average reader. While these briefs were collaborative efforts, there is no difficulty identifying those portions that Charlie wrote alone. The following excepts are from the petitioners' joint brief in *Barr v. City of Columbia*, *Bouie v. City of Columbia*, and *Bell v. Maryland*:[4]

> There are a number of elements of state involvement in these cases. These elements are complexly interrelated. The "state action" issue need not turn on any one of them in isolation, but may be resolved by consideration of their interrelation; this is not a matter of softening the focus but of widening the angle of vision. Nevertheless, analytic clarity requires separate consideration of the several modes of "state action" here found.
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> . . . These cases are stronger than *Shelley*. In *Shelley*, the state action immediately involved consisted (aside from the furnishing of recordation machinery) in keeping the courts open for the filing of complaints that asked injunctive relief, in granting such relief when asked by a private party, and in standing by with the contempt machinery for use in the event the private party might invoke that machinery. In these cases, the police were either present in advance to assist the proprietor in maintaining racial discrimination or acted as formal witnesses to the warning, or both. . . . The public prosecutor, supported by the public fisc, carried the cases to court. Most crucially, the cases were criminal prosecutions, in which the state appears as a party, *in its own interest*, in knowing support of the discriminatory scheme, which it thereby sanctions within the public order of its criminal law, and not merely within the framework of its dealing with private rights. The States of Maryland and South Carolina have taken on these cases as their own from the first policeman's warning to the last argument in this Court; it must be a paradoxical distinction indeed which could find "state action" in the private-law umpiring performed by the state in *Shelley v. Kraemer*, and not find it here.
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> The force of this argument is greatly augmented by recurrence to the basic symmetries of social obligation. The states of South Carolina and Maryland are not proposing that the petitioners be exempted from taxation, or from the duty to obey the general criminal law. Some of the petitioners are liable to military service, and may even have to risk their lives to keep safe the cities of Columbia and Baltimore. Emotion-fraught though they be, these facts are a part of the framework within which one must construe the Fourteenth Amendment obligation of South Carolina and Maryland to maintain

4. Brief for Petitioner, Barr v. City of Columbia, 378 U.S. 146 (1964), Bouie v. City of Columbia, 378 U.S. 347 (1964), Bell v. Maryland, 378 U.S. 226 (1964).

> legal regimes which do not "deny" to petitioners the equal "protection" of the laws. The scope of affirmative "protection" required ought not, as a matter of sound interpretation, be less than what is decent in face of the fact that the heaviest duties of citizenship, as well as the privileges of that status, were placed upon petitioners by the Fourteenth Amendment. Far from decent, it is scandalous that states imposing the burdens of state citizenship on Negroes, and benefiting from the imposition on them of the duties of federal citizenship, not only should fail to protect them in their right to be treated equally in fully public places, but should instead place the weight of law behind their humiliation.[5]

The Court decided the South Carolina cases by holding that the state trespass statute did not give adequate notice of what constituted a crime.[6] And because the Maryland prosecution might have abated as a consequence of newly enacted state law which apparently made noncriminal what previously had been a trespass, namely, a black person's refusal to leave the premises of a restaurant while seeking service denied on grounds of race, the Court held that the cases in that state should be remanded to the state courts to decide whether the judgments of conviction should abate.[7] Petitioners won; no new constitutional doctrine was declared.

Hamm v. City of Rock Hill,[8] decided the next Term, held that the 1964 Civil Rights Act invalidated all pending sit-in convictions, just as Charlie's brief had urged. In that brief, he argued:

> If these petitioners are now to be punished notwithstanding § 203(c) [the Public Accommodations Section], it will be for having insisted upon something which the national conscience has now most decidedly declared they are entitled to insist upon, against a refusal which the national conscience has now declared affirmatively unlawful. Their punishment can serve no purpose, for no valid state or private interest can now be admitted to exist in deterring them or others from doing what they have done; the only licit deterrence interest now runs the other way. Their punishment would afford the immoral spectacle of pointless revenge against those whose claim, substantially, has been validated by national authority. Such a result ought to be allowed only if the law unequivocally commands it. It is petitioners' submission that the law actually forbids it—that the Civil Rights Act of 1964 and especially its § 203(c), placed in the setting of the ancient law expounded in this Court's opinion in *Bell*

5. *Id.* at 22–24, 40–41 (emphasis in original).
6. *See* Bouie v. City of Columbia, 378 U.S. 347 (1964); Barr v. City of Columbia, 378 U.S. 146 (1964).
7. Bell v. Maryland, 378 U.S. 226 (1964).
8. 379 U.S. 306 (1964).

> *v. Maryland* abates these prosecutions and forces their remand for dismissal.
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> The nature of the statutes concerned here makes these cases fit the reason of the rule with a singular aptness. The petitioners, if freed by operation of this rule, would be the beneficiaries of no subtle gap in the seisin of the law, no merely technical "repeal" by dubious implication, no lapse or expiration through inadvertence. What they did would not have been criminal at all, in the states concerned, before 1959 or 1960, or could be made so only by a construction of prior state law so bizarre as to violate due process.[9]

The Court agreed with this argument, although the vote was 5–4, and the individual Justices' expressions of views on the statutory and constitutional issues were all over the landscape. Once more petitioners won; once more no new constitutional law was declared.

Charlie participated in many other cases for LDF, while pursuing an equally active scholarly career in constitutional law and admiralty law (where he is also a preeminent master). More recently, he has written a compelling volume on the death penalty, *Capital Punishment: The Inevitability of Caprice and Mistake*, which has played an important role in the struggle against the death penalty. Now Charlie, upon retiring from Yale, is returning to Columbia, just as I have come here as a teacher myself. Already, he has paid occasional visits to the faculty lounge at lunch time—most recently discoursing about Rebecca, his newly arrived granddaughter, who, as he has put it (ever aware of constitutional implications) became a "citizen of the great state of New Jersey and of the United States" at 11:31 p.m. on March the 11th, 1986.

I have wondered about how to account for Charlie's particular genius. Benno Schmidt tells a story which may shed some light. While a student, Benno approached Charlie for advice in selecting a topic for a *Law Journal* note. Benno was looking for something in constitutional law, something appropriately narrow and specific like the relationship between the First Amendment and various philosophical theories. Charlie admonished him: "The liability clause in bills of lading, young man. Bills of lading." The transcendent importance of the *particular* for comprehending the grand scheme of things has always been fundamental to Charlie's concept of how to understand, explain and persuade. He has, however, far more than others who also might recognize this truth, ranged over a great universe of concerns: New Jersey and Iceland, the arts (poetry, music, painting), community custom, statute, constitutional language and constitu-

9. Brief for Petitioners, at 23, 38 (citations omitted), Hamm v. Rock Hill, 379 U.S. 306 (1964).

tional aspirations. As Charlie might put it, he has worked in the fine grain, but always with his eye on the greater truth. And he has animated this perceptiveness with a rare courage to see an idea, indeed an ideal, through to its ultimate implications, and to press vigorously for its recognition. He has not feared to lose. He was with the winners on racial segregation. He lost on state action, but clearly he was right, and he actually triumphed in securing the freedom of those who protested against racial segregation. He will be with the winners some day when the United States joins the rest of the Western democratic world on capital punishment. And in a distinct and measurable way, America's conversion on that issue, as on so many others, will owe a debt of gratitude to him.