

## AGGRESSIVE ADVOCACY<sup>1</sup>

Florence Wagman Roisman

My dear friends and colleagues:

It's a joy to be here, and a great honor to have been asked to give this speech.

It's daunting, indeed, for this meeting includes a huge group of incredibly smart, dedicated, experienced, creative lawyers who've done and are doing wonderful work.

I've had a harder time writing this speech than any other I've ever given, because you're a crucially important and challenging audience and this is a rare opportunity. I care deeply about what I want to say to you, and I want to say it in the most effective way possible.

First, I want to talk about what our mission is, and how best to achieve it. Then, I'll address the reality that this is a particularly difficult time, with bad court rulings, a worse administration (which picks new judges), and a Congress that needs a great deal of bolstering.

First, our mission.

We are not ordinary lawyers. We are part of a program with a noble mission.

The Legal Services program was created to achieve a particular and precious goal -- to end poverty.

"Legal Services" was not about helping individuals fit into oppressive societal structures. It was about changing structures so that they would nurture and support, not oppress.

Legal Services was part of a war on poverty. And that war continues today.

To change the metaphor, you are all the trustees of that mandate.

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<sup>1</sup>Keynote Speech, National Legal Aid and Defender Association, Litigation and Advocacy Directors' Conference, Snowbird, Utah, June 23, 2002. Presented by Florence Wagman Roisman, Professor of Law and Paul Beam Fellow, Indiana University School of Law - Indianapolis, who is grateful for the help of IU-I's reference librarian Richard Humphrey, faculty assistant Mary R. Deer, research assistant Marissa Florio, and these colleagues: Michelle Adams, Beth Harris, Martha Wagman Healy, Art La France, Jane Perkins, Don Saunders, and Abigail Turner.

It is your responsibility to end poverty -- to attack and eliminate the structures that keep people in the United States poor.

The structures that bar them from what they need to be non-poor --

The structures that prevent them from living the kinds of fruitful, comfortable, productive, dignified lives most of us live --

The structures that prevent them from giving their children what most of us consider entitlements for our children --

Good educations

Good jobs -- that offer decent working conditions, a living wage, and respect

Good housing in neighborhoods that have good schools and jobs

Good health care

Good recreational facilities

Respectful treatment by government and private suppliers of services

Fair rules, and

A fair shot at the good things of life.

That's our job -- and it was defined in 1966, when Dr. King admonished that "America's greatest problem and contradiction is that it harbors 35 million poor at a time when its resources are so vast that the existence of poverty is an anachronism."<sup>2</sup>

Poverty has been substantially alleviated in other countries, but while "other countries have made significant progress in ameliorating poverty, reducing wage inequality and lifting the wage floor," poverty has been perpetuated in the United States by our laws and social policies.<sup>3</sup>

Does this sound foolish or romantic?

It shouldn't.

This isn't the first expression of a social justice movement in the United States.

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<sup>2</sup>David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 533 (1986).

<sup>3</sup>Robert M. Solow, *Welfare: The Cheapest Country*, N.Y. Rev. Books, Mar. 23, 2000, at 20 (reviewing Robert E. Goodin et al., *The Real Worlds of Capitalism* (1999) (stating that "low-wage employment has been perpetuated in the United States by our laws and social policies.")).

To end poverty in the United States almost certainly will be easier than it was to end human slavery here.

To end poverty in the United States almost certainly will be easier than it was to end *de jure* segregation here.

You have in your materials my article, “The Lawyer As Abolitionist,” making the point that the opponents of slavery in the 19th century, and the opponents of *de jure* segregation in the 20th century, were “fringe figures,” “very remote from the mainstream,” “a powerless and marginal handful” of reformers, promoting a campaign that seemed “economically unfeasible” and “absurd.”<sup>4</sup> So when we’re described as “fringe figures,” “very remote from the mainstream,” “a powerless and marginal handful” of reformers, and when we’re told that ending poverty is “economically unfeasible” and “absurd,” we’re in very good company.

I like the words of Columbia Law School Professor Charles L. Black, Jr., who wrote, in 1986: “winds change; they always have, and doubtless they always will . . . . [T]he way I want to see thought reformed is by our ceasing to view the elimination of poverty as a sentimental matter, as a matter of compassion, and our starting to look on it as a matter of justice, of constitutional right.”<sup>5</sup> And, I would add, as a matter of statutory right.

Now, how to achieve that goal? How to end poverty?

You and your colleagues and your programs are an immensely valuable resource -- a repository of highly developed, extremely effective advocacy skills.

You are a resource for which there is far more demand, and far more need -- which, as we all know, is different from demand -- than there is supply.

You therefore should be very thoughtful, very careful about how you use that resource.

You want to be sure that you get the best return on your investment, the biggest “bang for the buck.”

How to do that? I want to suggest six principles to follow.

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<sup>4</sup>Florence Wagman Roisman, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time*, 19 St. Louis U. Pub. L. Rev. 237, 237-8 (2000) [hereinafter “Abolitionist”], quoting William Lee Miller, *Arguing About Slavery: The Great Battle in the United States Congress* 352, 53, 65, 10, 69 (1996).

<sup>5</sup>Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103, 1115 (1986).

First, be conscious of the goal -- to end poverty. If what we do helps only one person, we shouldn't be doing it -- that's not enough.

That's not to say that we shouldn't do individual service work, but it is to say that when we do individual service work, we should be asking: What's the underlying problem here? What can we do that will prevent this problem from recurring for other people as well as this individual?

Many cases that made major contributions to general welfare were cases that arose in the service context.<sup>6</sup> Whether you're doing service work or law reform, keep your eyes on the prize.

Second, be race-conscious.

We need to pay attention to the extent to which race is an explanation for poverty -- the extent to which people are poor because they are not white in a society that is based on white supremacy.

It certainly is the case that many poor people in the United States are white, but

- \*most of the people who are most severely deprived are non-white;  
and

- \*non-white people experience poverty as particularly powerful deprivation (of the 8 million people in high poverty neighborhoods, 75% are black or brown<sup>7</sup>); and, most importantly,

- \*the institutions that make and keep people poor are based on white supremacy.

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<sup>6</sup>See Roisman, Abolitionist, *supra* note 4, at 248 n. 55.

<sup>7</sup>John O. Calmore: A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty, 67 Fordham L. Rev. 1927, 1931 (1999).

The principal reason why we have the deprived public housing program we have is that public housing was perceived as a program for non-white people.<sup>8</sup> The principal reason why we have the deprived TANF program we have -- the principal reason why we have TANF instead of AFDC -- is because the program is perceived as a program for non-white people.

As Douglas Massey and Nancy Denton, in their important book, *American Apartheid*, wrote: "racial residential segregation is the principal structural feature of American society responsible for the perpetuation of urban poverty and represents a primary cause of racial inequality in the United States."<sup>9</sup> Let me repeat that: "racial residential segregation is the principal structural feature of American society responsible for the perpetuation of urban poverty and represents a primary cause of racial inequality in the United States." If "racial residential segregation is the principal structural feature of American society responsible for the perpetuation of urban poverty," and if we want to end poverty, then we need to be attacking "racial residential segregation."

We all should be attacking racial residential segregation in its many manifestations, starting, most obviously, with the government programs that impose racial residential segregation. The HOPE VI program is displacing people, segregating them, and often using potentially valuable tax credits to do these two evil things.<sup>10</sup> I'd like to see half the energy that's going into eviction defense diverted to challenging segregation in public housing, HOPE VI, and the Low Income Housing Tax Credit Program.<sup>11</sup>

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<sup>8</sup>See Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, and Gail Radford, *The Federal Government and Housing During the Great Depression*, both in *From Tenements to the Taylor Homes: In Search of an Urban Housing Policy in Twentieth Century America* 206, 208-9, 102, 118 (John F. Bauman, Roger Biles, & Kristin M. Szylvian, eds., 2000).

<sup>9</sup>Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* viii (1993). See also Calmore, *supra* note 7, at 1955 ("when race and space are synergistically involved with poverty, race-neutral or color-blind poverty practice is naively wrong-headed.").

<sup>10</sup>National Housing Law Project, *False HOPE: A Critical Assessment of the HOPE VI Public Housing Revitalization Program*, 32 *Housing Law Bulletin* 119 (2002); Florence Wagman Roisman, *Poverty, Discrimination, and the Low Income Housing Tax Credit Program*, available at <http://indylaw.indiana.edu/instructors/roisman/lihtcmemo.pdf>.

<sup>11</sup>See Florence Wagman Roisman, *Housing, Poverty, and Racial Justice: How Civil Rights Laws Can Redress the Housing Problems of Poor People*, 36 *Clearinghouse Rev.* 21 (2002) [hereinafter "Racial Justice"].

There have been wonderful suits challenging public housing segregation, but many of the most segregated communities have not been the sites of those suits.<sup>12</sup>

States whose tax systems mirror the federal system are providing large tax benefits (including home mortgage interest and real estate tax deductions) to predominantly white, Anglo, male-headed households. I'd like to see people challenge that, in state court, arguing that the state has an obligation to spend an equivalent amount on housing benefits for poor people of color and women. And if you think this is a truly crazy idea, I want to tell you that David Bryson, whom many of you knew, David Bryson, the "lawyer's lawyer," thought that this was a good idea.

I've urged, in an article for Clearinghouse Review's double issue on race and poverty, that "housing advocates should look closely at every predominantly white community that has good schools, employment opportunities, security, and other public and private facilities and services and ask two questions: what is it that keeps poor people of color out of that community, and what would be the most effective way to get poor people of color into that community?"<sup>13</sup> Often, the answer to the second question will be some kind of litigation, which I'd like to see people bring.

And what I've said about white supremacy and racism applies to other forms of supremacist oppression. We need to be conscious of other forms of structural oppression, most obviously on the bases of ethnicity, national origin, color, language, disability, religion, sexual orientation, and gender.

Since I've been back in full-time teaching, I've had two regrets about the decades that I spent in legal services work. One is that I didn't focus on race. I don't want you all to make the same mistake.

Third, we need to understand history -- the history of racism, the history of the social welfare programs with which we're concerned, and the development of the welfare state in general. Also, there are many histories of particular locations -- usually urban areas -- Chicago, New York, L.A. -- and it's immensely enlightening to study how our particular communities came to be as they are.

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<sup>12</sup>See Florence Wagman Roisman, Long Overdue: Desegregation Litigation and Next Steps To End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs, 4 Cityscape 171, 173-174 (1999).

<sup>13</sup>Roisman, Racial Justice, supra note 11, at 26-27.

The second of my regrets about my years in legal services is that I didn't then spend enough time studying the history and social science that are relevant to our work. I know it's hard to find the time for ourselves and our families, but it's important to make time for that and to make some time for reading books and articles that help to explain why things are as they are.<sup>14</sup>

Fourth, pay attention to and be supportive of the client community, and, in particular, individuals or groups who are acting against perceived injustices and claiming entitlements. Support these people even if the issues about which they're concerned seem small: great movements often start with small challenges.

As you may know, there have been academic studies of how social change is made, and one of the best is Michael McCann's study of the pay equity movement -- a study in which he considers other social justice movements as well. He says about liberating movements, which he calls "counter hegemonic movements," that they "most often evolve incrementally through a series of more limited local struggles over quite concrete, often trivial ends . . . . [T]hey often provide rehearsals of opposition that prepare the way for bolder challenges in more propitious moments."<sup>15</sup>

An excellent example is provided by the Montgomery Bus Boycott. The original demands of Dr. King and the boycotters were modest -- initially, they did not demand an end to segregation, but respectful and fair treatment within the segregation laws. However, as Randall Kennedy has shown, the hard line response of the white establishment radicalized Dr. King and the boycotters.<sup>16</sup>

On-going relationships with activist, challenging, people and groups can put us in a position to make what in retrospect may be very significant advances.

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<sup>14</sup>For a list of readings I recommend for housing advocates, see Roisman, *Racial Justice*, supra note 11, at 30. Other material I recommend is cited in this speech.

<sup>15</sup>Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* 307 (1994). See also id. at 308 ("counterhegemony 'has to start from that which exists, which involves starting from "where people are at." All struggles commence on old ground.'").

<sup>16</sup>Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *Yale L. J.* 999, 1024-1028 (1989); but see III *The Papers of Martin Luther King, Jr., Birth of a New Age, December 1955-December 1956* at 7-8 (Clayborne Carson, ed., 1997)(noting that Dr. "King's personal opposition to segregation had been evident early in the year" and that "he later claimed that boycott participants knew from the start 'that the ultimate solution was total integration'....").

Think again about the Montgomery Bus Boycott. Two lawyers, Clifford Durr and Fred Gray, were involved in the beginning of the bus boycott. Both had been working with the Montgomery NAACP before that time. Thus, they were readily at hand when the NAACP's secretary, Ms. Rosa Parks, was arrested for refusing to obey a bus driver's order to give up her seat to a white man.<sup>17</sup>

And pay special attention to young people. They often are in the vanguard of social movements, and we should encourage and support such action. Young people play a vital role in social progress. Dr. King was only 26 years old when the Montgomery Bus Boycott began.<sup>18</sup> Fred Gray, the lawyer for the Montgomery Improvement Association, was only 25.<sup>19</sup> And, of course, students have been prime movers in the 20th century civil rights crusade,<sup>20</sup> the Free Speech Movement, and the contemporary living wage campaigns. Even when your programs are most pressed for money, spend some to bring young people in, so that they can learn what you do and how you do it.

Whenever you see a movement or a charismatic leader going in the right direction, you should support it or her or him. When you're confronted with something that's risky, something that's scary, something that's outside your usual experience -- go with it. Always take the risk.

Fifth, and very much a corollary of the exhortation to pay attention to what and who is rising up in the community: we need to understand the role of litigation as part of a strategy that includes every other form of advocacy --

Legislative and agency work  
Media and other public relations work  
Public education, and  
Direct action.

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<sup>17</sup>See Virginia Durr, *Outside the Magic Circle: The Autobiography of Virginia Durr* 243, 280-81 (1985) and Fred Gray, *Bus Ride to Justice: Changing the System by the System* 37-39 (1995).

<sup>18</sup>See Kennedy, *supra* note 16, at 1021.

<sup>19</sup>*Id.* at 1030 n.198.

<sup>20</sup>See Clayborne Carson, *In Struggle: SNCC and the Black Awakening of the 1960s* (1981); Taylor Branch, *Parting the Waters: America in the King Years, 1954-1963* at 490, 711 (1988); John Lewis, *Walking With the Wind: A Memoir of the Movement* 114-115, 177-251 (1998); David Halberstam, *The Children* (1998).

You don't need to do it all. If you don't have the inclination, or the skills, or the ability, to do all these kinds of advocacy, that's fine. But you should work with others who do have the inclination, skills, and ability to engage in them.

These other forms of advocacy help with litigation -- they help to change judges' minds and court rulings. We have a very timely example in the Supreme Court's decision on June 20 in *Atkins v. Virginia*, in which the Supreme Court barred the execution of people who are mentally retarded. In that decision, the Court reinterpreted the Constitution because, as it said, of the changed views of "the American public, legislators, scholars, and judges."<sup>21</sup> What caused the Court to change its mind on this issue? Certainly, legislative advocacy in the state legislatures, which led states to ban such executions. And who can doubt that the Court also was influenced by the Innocence Project, and by the Columbia University study led by Jim Liebman, and by the moratorium on executions in Illinois? And many of us heard, at a recent NLADA conference, that defenders in Illinois attribute the Illinois moratorium to the work of journalists in Chicago.<sup>22</sup>

Judges read newspapers and watch television and are part of the common culture. The Zeitgeist -- the common view -- often is more important than what is in the record.<sup>23</sup> How could Potter Stewart have said, in *Milliken v. Bradley*, that it was "unknown and perhaps unknowable factors" that caused residential racial segregation?<sup>24</sup> There was a record in the case that showed that government action had caused the residential racial segregation. Every fairminded scholar in the field agreed that that was so. But the Court wasn't ready to know that.

What makes a court ready to know things? All those forms of advocacy are what make a court ready. And these other forms of advocacy are necessary to make litigation victories provide real world, substantive benefits. Mark Galanter said, in his famous article, *Why the "Haves" Come Out Ahead*,<sup>25</sup> that the system is very capable of changing rules without making real

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<sup>21</sup>122 S. Ct. 2242, sl. op. at 7 (2002).

<sup>22</sup>See 22 NLADA Cornerstone 4 (2000) (Ken Armstrong and Steve Mills, reporters at The Chicago Tribune, won the Emery A. Brownell Media Award, for which they were nominated by Marshall Hartman, Illinois State Deputy Appellate Defender.)

<sup>23</sup>See, e.g., Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 3 (1992) (writing about the constitutional revolution represented by the Supreme Court's endorsement of the New Deal, Horwitz says: "A constitutional revolution can take place only when the intellectual ground has first been prepared.")

<sup>24</sup>418 U.S. 717, 753, 756 n. 2 (1974) (concurring opinion of Mr. Justice Stewart).

<sup>25</sup>Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Society Rev.* 95 (1974).

change. Agency implementation and monitoring are essential to effect real change.<sup>26</sup> And they're most effective when they're done by clients who have real enforcement power.

Direct action makes social change. We have the Civil Rights Act of 1964 and the Voting Rights Act of 1965 largely because of courageous direct action in Birmingham and Selma.<sup>27</sup> The people who engaged in the direct action needed lawyers to support them, but lawyers alone would not have achieved the legislation – or the court decisions upholding the legislation. Group protest produces judicial change. One of my favorite examples is *Jones v. Mayer*, the 1968 decision in which the Supreme Court held that the 1866 Civil Rights Act -- which everyone had assumed applied only to state action -- in fact applied to acts of private discrimination.<sup>28</sup> There always are complex explanations for why a court does anything, but I cannot doubt that part of the explanation for that 1968 ruling was the marches, riots, and turmoil of the 1960's.

So, one principle is that winning a lawsuit is not enough. But it's also the case that litigation is useful even when it is not successful. Understanding litigation as part of a strategy means that litigation does not have to be successful to be useful.

Of course, we should try to win. We should engage in judicious forum selection.<sup>29</sup> We should use state courts -- and I commend to you two articles by Helen Hershkoff discussing effective ways to use state courts.<sup>30</sup> But we must continue to litigate in the federal courts, too. If we want to make effective changes in federal law, we have to be litigating in the federal courts.

There are many reasons to litigate even if one knows one will lose.

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<sup>26</sup>Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 *Law & Society Rev.* 911, 916 (1999).

<sup>27</sup>See Garrow, *Bearing the Cross*, *supra* note 2, at 231-337 and David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* at 78-132 (1978).

<sup>28</sup>392 U.S. 409 (1968).

<sup>29</sup>See *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1261 (5th Cir. 1983) ("Forum-shopping is sanctioned by our judicial system. It is as American as the Constitution, peremptory challenges to jurors, and our dual system of state and federal courts.").

<sup>30</sup>Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 *Harv. L. Rev.* 1833 (2001), and Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *Harv. L. Rev.* 1131 (1999).

People who have studied social justice movements say that the “indirect, radiating effects” of litigation often are the most important over time.<sup>31</sup>

What are these indirect effects?

\* Repeated litigation changes judges’ minds, by providing more facts, and by producing persuasive dissents. My favorite example of this is the racially restrictive covenant cases, *Shelley v. Kraemer*<sup>32</sup> and *Hurd v. Hodge*.<sup>33</sup> Charles Hamilton Houston, Thurgood Marshall, and others had been litigating these cases for years, always losing them. In *Corrigan v. Buckley*, the Supreme Court had said that the question whether judicial enforcement of such covenants was constitutional wasn’t even a substantial question.<sup>34</sup> But the NAACP and others continued to litigate the issue, and some judges dissented -- Justice Roger Traynor in California and Judge Henry W. Edgerton on the District of Columbia Circuit. And we are told that Judge Edgerton’s dissents, in particular, influenced the Supreme Court.<sup>35</sup>

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<sup>31</sup>McCann, *supra* note 15, at 285.

<sup>32</sup>334 U.S. 1 (1948).

<sup>33</sup>334 U.S. 24 (1948).

<sup>34</sup>See *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) ("While it was . . . urged . . . that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law . . . , [this contention] is lacking in substance.").

<sup>35</sup>See Francis A. Allen, *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 Wash. U. L. Q. 709, 719-20 (1989) (Professor Allen, who served as clerk to Chief Justice Vinson in the 1948 Term, wrote that the Chief Justice’s vote to grant certiorari in the restrictive covenant cases was based on his belief that the results below should probably be reversed, a belief that “appeared to rest mainly on his scanning of the impressive dissenting opinion” of Judge Edgerton, “a man whom Vinson had known as a colleague on the court of appeals and greatly admired.”). Judge Edgerton also had dissented in *Mays v. Burgess*, 147 F.2d 869 (D.C. Cir. 1945), cert. denied, 325 U.S. 868 (1945). Justice Traynor had dissented in *Fairchild v. Raines*, 24 Cal. 2d 818, 151 P.2d 260 (1944).

Shelley also showed that social science and legal scholarship change judges' minds. The lawyers working on the case said: let's ask Robert Weaver to write an article about the evils of the covenants; the article was written and was very influential.<sup>36</sup>

\*Repeated litigation gives oppressed people hope -- and a sense of entitlement and expectation, and stature, status, and dignity, all of which encourages political action. The sense of legal entitlement is crucial. Think of Dr. King, in his first speech of the Montgomery Bus Boycott, saying: "If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong."<sup>37</sup>

\*Litigation provides power, leverage, the ability to compel others to consider, address, and respond to concerns. When I was with the D.C. Neighborhood Legal Services Program, representing tenants in a rent strike, we noticed the deposition of the president of a savings and loan association. The S&L president could not believe that he had to come down to my grungy legal services office, sit at a table with a group of tenants, and answer our questions under oath. As it happens, we did win that lawsuit, but I honestly don't think the tenants enjoyed the victory as much as they enjoyed the deposition!<sup>38</sup>

\*Litigation provides the basis for collaboration with others, the formation of broader alliances.<sup>39</sup>

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<sup>36</sup>See Wendy Plotkin, "Hemmed In": The Struggle Against Racial Restrictive Covenants and Deed Restrictions in Post-World War II Chicago, 94 J. of the Illinois State Historical Society 39 (2001), citing Robert C. Weaver, Race Restrictive Housing Covenants, XX J. Land & Public Utility Economics 184 (1944). See also Plotkin at 50 ( Dr. Weaver also prepared a popular pamphlet which "was widely distributed and provided an ideological argument that covenant opponents could use on the lectern, in the legislature, and in the courts."). And see Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 70 (1959) (discussing the significance of Professor D.O. McGovney's article, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional, 33 Calif. L. Rev. 5 (1945)).

<sup>37</sup>Address by Martin Luther King, Jr., at Holt Street Baptist Church, Montgomery, Alabama (December 5, 1955), III The Papers of Martin Luther King, Jr., supra note 16, at 71, 73, also available at <http://www.africanamericans.com/MLKjr/HoltStreet.htm> and in A Call to Conscience Landmark Speeches of Dr. Martin Luther King, Jr. (Clayborne Carson & Kris Shepard, eds.) Audiobooks.

<sup>38</sup> The lawsuit was *Dorfmann v. Boozer*, 414 F.2d 1168 (D.C. Cir. 1969).

<sup>39</sup>See Michael Paris, Legal Mobilization and the Politics of Reform: Lessons From School Finance Litigation in Kentucky, 1984-1995, 26 Law & Soc. Inquiry 631 (2001) and McCann, supra note 15, at 48.

Litigation talk is “rights talk,” and “rights provide at least some grounds for winning what [Martha] Minow calls an ‘equality of attention’ in public debate . . . . ‘By invoking rights, an individual or group claims the attention of the larger community and its authorities,’ Minow observes.”<sup>40</sup>

\*Litigation dramatizes an issue.<sup>41</sup>

Sixth, be collaborative. I mentioned understanding litigation as part of a broad strategy. Doing so means what you should “network”: work well with your colleagues in advocacy.

Hands-on meetings, in person, like this conference – are wonderful and should occur more often,<sup>42</sup> but the internet offers opportunities for networking even when personal meetings aren’t possible.

The Housing Law Project operates the Housing Justice Network, a listserv for housing advocates. There should be similar listserves for other issues -- health law, welfare, employment -- and there should be a litigation list (which would help get the federal litigation manual updated).<sup>43</sup>

This networking should encompass not only legal services but also our colleagues in civil rights, civil liberties , and other kindred areas.

And we should include the academy -- both the legal academy and the social scientists. Two organizations that can be particularly helpful are the Society of American Law Teachers (“SALT”) and the Poverty and Race Research Action Council (“PRRAC”).<sup>44</sup>

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<sup>40</sup>McCann, *supra* note 15, at 298, quoting Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *Yale L.J.* 1860 (1987).

<sup>41</sup>McCann, *supra* note 15, at 279 (litigation can dramatize an issue, build an actively supportive constituency, generate hope, and focus attention).

<sup>42</sup>See Roisman, *Abolitionist*, *supra* note 4, at 249-50 n. 60.

<sup>43</sup>At the Snowbird conference, a group met to advance the updating of the manual and establish such a listserv. To join the listserv, or secure further information, contact Professor Jeffrey Gutman at George Washington University National Law Center, [jgutman@clinic.ncc.gwu.edu](mailto:jgutman@clinic.ncc.gwu.edu)

<sup>44</sup>For SALT, contact Michael Rooke-Ley, co-president, at [union2757@aol.com](mailto:union2757@aol.com) or Paula Johnson, co-president, at [pcjohnso@law.syracuse.edu](mailto:pcjohnso@law.syracuse.edu). For PRRAC, contact Chester Hartman, President-Executive Director, at [chartman@prrac.org](mailto:chartman@prrac.org).

Now, I want to say something about the terrible Supreme Court decisions that erect barriers to social justice.

I know that things look bad, but it's important to remember that things looked even worse to our predecessors in the social justice movement. When you get depressed, I want you to think about Charles Hamilton Houston.

Houston was the architect of the legal campaigns that led to the invalidation of racially restrictive covenants, racially segregated schools, and other evils. As special counsel to the NAACP in 1935, Houston directed the Association's campaign for civil rights.

As Vice Dean of Howard Law School, Houston had been the teacher of Thurgood Marshall, whom Houston brought into NAACP work. Marshall, who described Houston as his "mentor," said: "I don't know anything I did in the practice of law that wasn't the result of what Charlie Houston banged into my head."<sup>45</sup>

Speaking of the great legal advances with which he is associated, Justice Marshall said:

Charlie Houston . . . started all of this . . . . There is not a movement that I have come across in civil rights or civil liberties that Charlie Houston didn't have a hand in back in those days when it was rough.<sup>46</sup>

As Judge A. Leon Higginbotham, Jr., wrote: without Houston, there would have been no *Brown v. Board of Education*.<sup>47</sup>

If we feel like groaning when we look at today's jurisprudence, think about what Houston -- and Marshall, and William Hastie, and Spottswood Robinson, and Robert Carter, and Constance Baker Motley -- think about what they all faced.

What was "the law" that Charlie Houston faced?

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<sup>45</sup>The Reminiscences of Thurgood Marshall (Columbia Oral History Research Office 1977), in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences* 480 (Mark V. Tushnet ed., 2001) [hereinafter "Marshall, Speeches"].

<sup>46</sup>Thurgood Marshall, Remarks at the Second Circuit Judicial Conference [Pretrial Detention] (October 17, 1987), in *Marshall, Speeches*, supra note 45, at 206.

<sup>47</sup>A. Leon Higginbotham, Jr., Reflections on the Impact of Charles Hamilton Houston - From a Unique Perspective, 27 *New Eng. L. Rev.* 605, 608 (1993).

When Houston practiced, the law was *Plessy v. Ferguson*: that states could segregate people on the basis of race so long as they provided facilities that were “equal” as well as separate.<sup>48</sup>

When Houston practiced, the law was the rule of the *Berea College* case, which upheld a Kentucky statute that prohibited the education of blacks and whites in the same place.<sup>49</sup>

When Houston practiced, the law was “that there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration” -- the statement of the U.S. Supreme Court in *Buchanan v. Warley* in 1917 -- *Buchanan* being a case that invalidated explicit racial zoning.<sup>50</sup>

When Houston practiced, racially restrictive covenants were judicially enforceable. Courts said that whites “who own a home . . . have a right to protect it against . . . elements distasteful to them,” and “should have confidence in the power and willingness of the courts to protect their investment in happiness and security.”<sup>51</sup> The Restatement of Property, in 1944, said that restraints on alienation were permissible when “social conditions render desirable the exclusion of the racial or social group in question.”<sup>52</sup>

When Houston practiced, criminal defendants had no right to counsel, even in capital cases. (*Powell v. Alabama* was not decided until 1932.<sup>53</sup>)

When Houston practiced, white primaries were legal.

When Houston practiced, many states excluded blacks from juries. (And many states excluded women from juries, for that matter.)

When Houston practiced, labor unions discriminated and segregated on the basis of race.

When Houston practiced, Congress would not even pass a law to make lynchings illegal!

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<sup>48</sup>163 U.S. 537 (1896).

<sup>49</sup>211 U.S. 45 (1908).

<sup>50</sup>245 U.S. 60 (1917).

<sup>51</sup>*Vose*, supra note 36, at 4.

<sup>52</sup>*Id.*

<sup>53</sup>287 U.S. 45 (1932).

Houston knew that all these rules were wrong; he knew that they had to be changed; and he set about designing and executing a strategy to make that happen. By patient, careful, thorough, thoughtful action, he and Thurgood Marshall and their colleagues made the terrible legal rules change.

What we have today is much less bad than what our predecessors faced.

We have problems with zoning laws, but restrictive covenants and explicit racial zoning were worse;

We have problems with the Fair Housing Act , but we have the Act -- and we have the holding that the 1866 Civil Rights Act applies to private discrimination;

We have the Supreme Court handing down bad interpretations of the ADA, but we have the ADA;

We have bad Supreme Court decisions involving voting rights, but we don't have white primaries, and we do have the Voting Rights Act.

We have programs that Houston and his colleagues only dreamed of -- food stamps, medicare, and medicaid, among others.

We may be at the midpoint of becoming a civilized nation -- but we'll get there.

We're attacking deep, structural evils that took decades or hundreds of years to produce. It's not surprising that it would take as long to uproot them. As Dr. King said at the end of the march from Selma to Montgomery: the arc of the moral universe is long, but it bends toward justice.<sup>54</sup>

Consider the situation from the other side. I'm going to induce you to sympathize with the poor right!

The generally accepted principles all are our principles -- because they're right, and because they honor the dignity and worth of every individual human being.

The Constitution says its purpose is to "establish justice [and] . . . promote the general welfare"-- not to mention "insure domestic tranquility."

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<sup>54</sup>Martin Luther King, Jr., *Our God is Marching On!*, Montgomery, Ala., March 25, 1965, available at <http://www.africanamericans.com/MLKjrOurGodIsMarchingOn.htm> and *A Call to Conscience*, supra note 37.

And we agreed, in 1948, in the Universal Declaration of Human Rights, that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”<sup>55</sup>

We’ve won the rhetorical battle in domestic statutes, too -- for example, the National Housing Act of 1949, which sets the goal of a decent home and a suitable living environment for every American family, and the Civil Rights Acts, including the ADA.

What the right has done is to nibble at these great central commitments, leaving us with a group of hobbled principles --

\*That one needs to prove intentional discrimination to establish liability under the Equal Protection Clause or Title VI;

\*That one can’t have an interdistrict remedy without showing intent across the line;

\*That there’s no distinction between malign or benign mention of race in a governmental pronouncement, either one requiring strict scrutiny;

\*That poverty is not a suspect classification;

\*That congressional power to declare and enforce rights is constrained;

\*That states are immune from enforcement of civil rights laws;

\*That private rights of action will be limited;

\*That the right to enforce regulations will be restricted;

\*That statutory terms will be defined narrowly, to restrict the sweep of statutes.

Notice four things about these bad principles:

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<sup>55</sup>Universal Declaration of Human Rights, Article XXV, G.A. Res. 71, U.N. GABOR, 3rd Sess., U.N. Doc. A/810 (1948).

First, they're not all new. I asked several of our colleagues to identify the worst of the Supreme Court decisions; Lucy Williams' list included *Hans v. Louisiana*.<sup>56</sup> And Professor Charles L. Black, Jr., urges reconsideration of the Slaughterhouse Cases,<sup>57</sup> which he describes as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court."<sup>58</sup>

Second, as I've said, they deal with enforcement, with remedy, not with the underlying principles.

Third, most of them are patently absurd -- both to knowledgeable experts and to lay people:

That there's no difference between malign and benign uses of race?

That the XIth amendment applies to suits against a state brought by a citizen of that state?

That the XI<sup>th</sup> amendment affects state court jurisdiction?

These are ridiculous propositions.

Fourth, and finally, most of these principles were laid down by the barest majority, by one vote,

If you were a right winger, a Federalist Society stalwart, would you sleep well at night, confident that absurd rulings, rulings that contradict formal assertions of our aspirations, rulings carried by a single vote --

Would you consider those rulings secure?

Now: I'm not saying that the next appointment to the Supreme Court will turn the tide. It may well make those 5-4 votes 6-3 majorities.

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<sup>56</sup>134 U.S. 1 (1890) (holding that XIth amendment bars suit against a state by a citizen of that state).

<sup>57</sup>83 U.S. 36 (1872).

<sup>58</sup>Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* 55 (1997).

I do believe, however, that in the lifetimes of people in this room, many of those rulings will fall, and that they'll fall all the sooner if they're pushed to the wall by thoughtful, effective, strategic, collaborative, well-implemented, aggressive, greedy, unreasonable litigation, coordinated with legislative, administrative, public, and public relations activity -- which is what you all will do.

Thank you very much.<sup>59</sup>

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<sup>59</sup> Because I already had used more time than I'd been allotted, I ended the speech at this point. I had intended, however, to close with three of my favorite quotations. I set these out in this footnote.

The first is from my Lawyer as Abolitionist article, *supra* n.4. It was written by William Lee Miller, author of *Arguing About Slavery*. He was writing about slavery, but might as well have been writing about poverty and homelessness.

“For it to be ended,” he said,

there had to be some individual human beings who did what they did . . . some people -- a very small number, on the margin of society, condemned and harassed - who nevertheless made it the first order of their life's business to oppose American slavery, and to insist that it was a grotesque evil that should be eliminated, and . . . in a little over thirty years, it was.

[Miller, *supra* note 4, at 513 (1996)].

The second quotation is from Albie Sachs, who was a member of the African National Congress and a leader in the struggle against apartheid and for human rights in South Africa. Under the apartheid regime, he was twice detained without trial by the security police, and he was the victim of a car bomb attack which severely injured him. He said: “All revolutions are impossible until they happen; then they become inevitable.” [Albie Sachs, *Running to Maputo* 173 (1990).]

The third and final quotation is from what you'll probably think an unlikely source: Sir Winston Churchill, who was speaking during the darkest days of the blitz. All of us here say to the right and to the world, as Churchill “declared to the demoralized French ministers in the bleakest hour of 1940, ‘we shall fight on for ever and ever and ever’ . . .” [Isaiah Berlin, *Personal Impressions* 6 (1980).]