The Honorable Judge George Howard, Jr.—A Life of Courage and Civility in the Law

J. Thomas Sullivan
University of Arkansas at Little Rock William H. Bowen School of Law, jtsullivan@ualr.edu

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Cover Page Footnote
The Honorable George Howard, Jr., passed away on April 21, 2007, at the age of eighty-two. He was a man of many firsts, and the University of Arkansas at Little Rock Bowen School of Law is proud to have an endowed professorship in his name and honor. What follows is one of the essays from a collection of tributes to the late Judge Howard, written by some of his strongest friends, colleagues, and admirers. Given the impact of Judge Howard's civil rights work in the state of Arkansas, it is altogether fitting that this tribute to his legacy is included in this Law Review issue that also commemorates the 50th Anniversary of the integration of Central High School as well as other continuing legal efforts in civil rights.
THE HONORABLE JUDGE GEORGE HOWARD, JR.—A LIFE OF COURAGE AND CIVILITY IN THE LAW

J. Thomas Sullivan*

Judge Howard was an Arkansas legal pioneer. In 1954, he became one of the first black graduates from the University of Arkansas School of Law. For much of the next twenty-five years, Judge Howard practiced law in Pine Bluff, Arkansas and journeyed into courtrooms throughout Arkansas to valiantly represent persons who were striving to overcome economic, racial, and social injustice.¹

I. INTRODUCTION

On April 27, 2006, United States District Judge George Howard, Jr. was honored by the University of Arkansas at Little Rock William H. Bowen School of Law with the announcement of a distinguished professorship created in his honor. Judge Howard spoke briefly at the ceremony. His words were, as we would expect, thoughtfully chosen, and his remarks were delivered in the deliberate style of a jurist who was always mindful that his comments and observations carried with them the weight of his office and his personal integrity. His softly-voiced message that day reflected his enduring respect for others, for the duties we owe to the law, to our country and community, and for his personal faith.

Less than a year later, Judge Howard died, on April 21, 2007, at the age of eighty-two. He was laid to rest in his hometown of Pine Bluff, Arkansas, where he and his wife, Vivian, and their family spent their lives, as leaders in their church² and their community.

* Judge George Howard, Jr. Distinguished Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law. I want to thank UALR Bowen Law School Law Librarians, Kathryn Fitzhugh—who served as Judge Howard’s law clerk following her graduation from UALR Bowen School of Law—and Melissa Serfass for their assistance in obtaining records of The Chicago Defender. I also want to thank Judge Howard’s longtime law clerk, Judy Lansky, who read and commented on this article. I hope this short tribute, barely an introduction to the life and career of Judge Howard, will find his wife, Vivian Smith Howard, and his long-time secretary, Veloria Watley, in good health and even better spirits.


² Judge Howard and his wife of sixty years, Vivian, were lifelong members of New Town Missionary Baptist Church in Pine Bluff, Arkansas, where he was remembered at a memorial service on April 28, 2007, a year and a day after he spoke at the Bowen Law
II. JUDGE HOWARD THE ADVOCATE: CHAMPIONING THE CAUSE OF CIVIL RIGHTS

Judge Howard’s career in the law extended over half a century, and it is fittingly a career in which his service was divided between his representation of clients as a practitioner in Pine Bluff and his service to the people and the Constitution as a United States District Judge. Following graduation from the University of Arkansas School of Law, he entered a private practice in which he undertook the full range of difficult cases confronted by any lawyer in a smaller community. He championed the causes of equality before the law, civil rights, and racial justice in his representation of individual clients and in major litigation initiatives. Judge Howard earned the respect of his community and the legal profession with his courage and dedication to the highest standards for competent and ethical representation, being honored by the Arkansas Bar Association for distinguished service in the pursuit of justice in 2003.

Judge Howard’s career in private practice did not offer the luxury or security that lawyers may regularly expect as members of the Bar. In the United States and the State of Arkansas in the middle of the twentieth century, issues of equal justice and racial discrimination were not polite debating points focusing on political correctness. Instead, this country—particularly in the southern states—remained gripped by the pernicious effects of institutionalized discrimination and de facto racism. The nation was still coming to grips with the legacy of the Civil War, Reconstruction, and Jim Crow-forced segregation. Moreover, despite the unresolved issues of segregation and discrimination, many black Americans served in the Armed Forces during the Second World War, an experience shared by Judge How-

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4. Press Release, University of Arkansas School of Law, supra note 3.
ard, complete with its own racially-discriminatory experiences that led him to assume a leadership position in the fight for political equality and public civility.  

Judge Howard might have moved to one of the cities of the North upon graduating from law school and found a lucrative law practice without the persistent reminders of official and unofficial discrimination in his life and the life of his family. He might well have enjoyed a much more convenient and serene life as an attorney in Chicago, or even St. Louis. But he chose to return to his home, to Pine Bluff, where he would fight for the cause of justice and stand against the cause of hatred. He served as president of the local NAACP chapter, then succeeded Daisy Gatson Bates as president of the state organization in 1961.  

The United States Supreme Court’s decisions dictated change, almost overnight, in beautifully worded and idealistic opinions that brought down the walls of legal discrimination, while at the same time conceding that change in individual and collective attitudes could not be forced upon the country by judicial decisions alone. The goal of social justice—the fulfill-

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5. For a very personal and touching article about Judge Howard’s service as a Seabee in the United States Navy during World War II, see Bill Wilson and Beth Deere, Seabees Service in the Second World War: A Judge in the Making, 42 ARK. LAW. 20 (2007).


8. The Brown I Court concluded, succinctly and powerfully: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” Id. at 495. In reviewing implementation of its decision in Brown I, the Court directed a year later that desegregation of the public schools should proceed with all deliberate speed. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 301 (1955) (“Brown II”).

9. As the Court stated:

   Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown I, 347 U.S. at 493.

10. For instance, in Brown II, the Court considered the need for some degree of flexibility in the implementation of its holding in Brown I, necessitated by practical problems impeding immediate application of remedies to achieve equality in public education, such as inadequacy of existing facilities and transportation systems requiring some reasonable delay in implementation. Brown II, 349 U.S. at 300–01.
ment of the promise of the right of all Americans to "due process and equal protection of the law"—however, could not be won by even the strongest wording in a unanimous opinion, 11 nor could the battle for civil rights and political equality be won by the 101st Airborne Division. 12

A. Fighting Segregation in Dollarway

The civil rights cause, ultimately, had to be fought in every city and every town. It was fought by citizens committed to extending the promises of the Declaration of Independence and the United States Constitution to all Americans and by lawyers like George Howard, Jr., who faithfully pursued justice on behalf of their clients in the lower courts of this country, representing their clients in the face of institutionalized racial prejudice.

In Pine Bluff, Judge Howard undertook through litigation the job, mandated by the Supreme Court in its decisions in Brown v. Board of Education, of pressing the constitutional commitment for equality in public education. 13 He won an initial, decisive victory in the United States District Court in Dove v. Parham, 14 in which the court—despite holding that the Arkansas Pupil Placement Act of 1959 15 was not facially unconstitutional— concluded:

11. See e.g., Cooper v. Aaron, 358 U.S. 1 (1958) (rejecting claims by Arkansas and Little Rock public officials that threats to public safety from forced desegregation of Little Rock public schools warranted delay in enforcement of desegregation orders). For a succinct and engaging account of the desegregation crisis, see generally Tony Freyer, Enforcing Brown in the Little Rock Crisis, 6 J. APP. PRAC. & PROCESS 67 (2004). Professor Freyer's account includes references to scholarly critiques of the Little Rock crisis and judicial response to the intransigence of Little Rock and Arkansas authorities to desegregation orders.

12. Freyer, supra note 11, at 69. President Dwight Eisenhower ordered the 101st Airborne Division was to Little Rock to support the United States Marshals charged with enforcing the District Court's order for desegregation of the Little Rock public schools.

13. See 3 Sue to Enroll in Ark. School, CHI. DAILY DEFENDER (Daily Edition), Feb. 9, 1959, at 5. The news account reported that George Howard, "an attorney from Pine Bluff," had sued the Dollarway Consolidated School District No. 2, which was not part of the Pine Bluff School District, and that Pine Bluff had "called off its integration plan, originally set to start in September, 1958, after rioting broke out at Central High School in Little Rock." Id. Arkansas statutes requiring segregation in public education were held unconstitutional in Hoxie Sch. Dist. v. Brewer, 137 F. Supp. 364 (E.D. Ark. 1956), aff'd, 238 F.2d 91 (8th Cir. 1956).


A TRIBUTE JUDGE GEORGE HOWARD, JR.

Under this record it is conclusively established, that the superintendents and the officers of the defendant school district and its Board of Directors, throughout the three school years when the plaintiffs, Earnestine Dove, James Edwards Warfield and Corliss Smith, sought admission to the white schools in the district, before that time and since, have had and continue to have and through its superintendents and other managing personnel, have carried into effect, enforced and maintained, a rigid, racial segregation policy in all of its schools, which, without exception, permitted no entry of any colored child into its white schools. It is established, too, that the Board intends a continuation of that policy, without any change or modifications and that its professing of the Pupil Enrollment Act of 1956 having been applied and in operation during the years 1957, 1958 and 1959, is but a cover-up to conceal its anti-racial and pro-racial segregation attitude.

These are the facts. The record permits no other conclusion.\(^{17}\)

The district court’s order was issued on July 31, 1959, and appealed by both sides. While the matter was pending in the Eighth Circuit, on an expedited docket, registration for the 1959–60 school year commenced.\(^{18}\) A key issue in the district court’s decision had been the school district’s argument that the plaintiffs had not exhausted available administrative remedies for registration. While the trial court concluded that further exhaustion of those remedies would have been futile, the Eighth Circuit held otherwise,\(^{19}\) based in part on testimony by the President of the School Board that he intended to

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admit any student applying for admission found to be qualified "without regard to race."\(^{20}\)

Following the remand that included the circuit court’s directive that an injunction against further maintenance of a system of segregated public schools,\(^{21}\) the Dollarway system administered physical and intelligence tests to the three student-plaintiffs who applied for admission to previously segregated, all-white schools, and had a psychiatrist and an educational psychologist interview them.\(^{22}\) The three students were found unqualified for transfer, and their applications were denied.\(^{23}\) They returned to court, filing a supplemental complaint contemplated by the circuit court’s order.\(^{24}\) Chief Judge Henley\(^{25}\) was now presiding over the case, rather than Judge Beck,\(^{26}\) who had delivered the forceful condemnation of segregationist sentiment reflected in the school district’s policy.\(^{27}\)

The district court found that the denial of the requested transfers did not amount to a racially-discriminatory action contrary to the Court’s requirements in Brown I and II\(^{28}\) noting that those decisions had not required local schools to adopt policies designed to affirmatively promote “race mixing.”\(^{29}\) The court noted that the school board had conceded that it had previously operated the schools in a segregated fashion and had not adopted any policy or plan to desegregate the public schools, despite expressing its intent to comply with the law and assign students in a racially non-

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20. *Parham*, 271 F.2d at 139.
21. *Id.* at 140.
23. *Id.*
27. For more on Judge Beck’s role in the Dollarway desegregation case, see *Jack Walter Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and Southern Desegregation* 87 (1961).
29. *Id.* at 513.
discriminatory manner. Moreover, it submitted that the Constitution did not require immediate cessation of all segregation, merely that the local school district develop a plan to implement integration of the schools.

And, with respect to the testing upon which the denial of the requested transfers had been based, the court posited, apparently without any sense of disingenuity:

And during this transition period it is not unlawful for a school board to require Negro students desiring to transfer to formerly all-white schools, or white students desiring to transfer to formerly all-Negro schools, to submit to reasonable tests and examinations to determine their fitness for such transfers, even though such tests and examinations are not required of students of either race who evidence no desire to change schools.

Judge Howard was undoubtedly dismayed in reading the district court’s order and in learning that the trial judge really could think that white students were lining up at the time to integrate Dollarway’s black schools and almost certainly pleased that if they were, they would face the same battery of tests and expert evaluations to which his clients had been subjected.

The court ordered no relief for the individual plaintiffs; instead it permitted the school board additional time to formulate a desegregation plan against which its performance could be assessed, while formally enjoining

30. Id. at 509.
31. Id. at 513.
32. Id. at 513–14 (emphasis added).
33. The court later explained that the mandatory testing process was not evidence of discriminatory intent:

It has been pointed out that in the preliminary stages of desegregation discrimination is not to be found in the fact that Negro students desiring to enter formerly segregated schools are required to take tests and submit to examinations not required of other students. These plaintiffs were the only ones in the District who desired to enter an all-white school. Had any white students applied for transfer to Townsend Park, there is no reason to believe that they would not have been subjected to the same tests and examinations. The tests, interviews, and examinations were not grueling or severe, and none of the plaintiffs manifested any objection to them at the trial.

Id. at 519. But, the fact that the plaintiffs did not object to the tests is hardly dispositive of the question of the school system’s intent in requiring the students to take them. Had they objected to the testing or refused, the school board would have cited that refusal as evidence of willful non-compliance with the administrative procedure that the court was intent on endorsing. More importantly, objection to testing or refusal to take the required tests would have afforded segregationists an argument that the objection or refusal was itself evidence that the students were intellectually inferior to white students and that segregation of public education was, consequently, both desirable and permissible.

34. Dove II, 181 F. Supp at 519.
the school board from continuing to maintain a system of segregated schools. At the same time, the court found that the school board had failed to take action affirmatively implementing desegregation of the schools. And as to Judge Howard's three clients, all students who were denied transfers to all-white schools, the court offered no remedy for past or continuing discrimination, reasoning:

In reaching its conclusion this Court does not overlook the fact that its decision means that the oldest of the three plaintiffs, a senior, must complete her high school education at Townsend Park. However, she has spent her entire school life in that school and its predecessor, and the evidence shows that she will not suffer educationwise by finishing out her final year in that institution. Her personal interest in and desire to attend an integrated school does not outweigh the larger interests which the Court is required to consider. Future assignment of the two younger plaintiffs, both of whom are in the ninth grade, will be subject to further consideration by the Board in the light of whatever acceptable plan it may be able to evolve.

Thus, the district court was willing to subordinate the interest of a student who had been subjected to admitted discrimination throughout her educational career, to the school district's claimed interest in establishing a policy designed to facilitate integration.

35. *Id.* at 521 ("In accordance with the mandate of the Court of Appeals an injunction will be issued commanding the Board to eliminate the compulsory racial segregation which has heretofore prevailed in the Dollarway District."). At best, this perfunctory endorsement of injunctive relief required by the Eighth Circuit's opinion, see Parham v. Dove, 271 F.2d 132, 140 (8th Cir. 1959), suggests a reversal from the policy of aggressive enforcement advanced by Judge Beck in his original opinion in the case. *See also supra,* note 17, and accompanying text.

36. The court found:

[I]t has not announced any affirmative policy with regard to the conditions under which a Negro student will be admitted to Dollarway School. And while it has adopted a policy against lateral transfers at the higher grade levels, except in unusual circumstances, there has been no definite affirmative recognition of the corollary of its policy, which corollary would require a liberal treatment of transfer requests at the lower grade levels. Nor has the Board given any indication of what it would consider to be "exceptional circumstances" which justify a departure from its general policy at the higher levels.

*Dove II,* 181 F. Supp. at 518.

37. *Id.* at 520 (emphasis added).

38. The district court did find, however, that the school district had improperly considered the plaintiffs' race as a factor in making the decision to deny the applications for transfer, but apparently concluded that this impermissible use of race as a factor in school assign-
The court simply reasoned that redressing the legal wrongs done to the child might actually result itself in injury:

Once a discernible and acceptable transition plan has been worked out, it may develop that the particular individuals who originally applied for admission to formerly segregated schools may not achieve their ends. And, when individual assignments are considered under such a plan, it seems to the Court that the race of a student who may desire to be assigned to a particular school may be considered to a limited extent as one of a number of factors going into the total equation. Otherwise stated, the Court is of the view that within limits a school board has the right, during the transition period, to recognize the fact that the assignment of a child of one race to a school attended exclusively or predominantly by members of another race may present serious problems for the child, and that, all factors considered, such an assignment may not be in the child's best interests, no matter how much it may be supposed that such an assignment might advance the total interests or aspirations of the race to which the child belongs.39

Thus, the court rationalized the school system's continuation of systemic discrimination as protective of the individual plaintiffs, suggesting a paternalistic concern in substituting the judgment of the court and white public officials, who had admittedly maintained the segregated school system, for that of the parents of the children for whose benefit the litigation had been brought. In so holding, the court more than suggested that the interests of the three children were being sacrificed in the pursuit of the political goals of the "race to which [they] belong," in the process, and, by implication, questioned the integrity of Judge Howard as their attorney.

39. Id. at 514 (emphasis added).
Subsequently, the district court accepted and approved the desegregation plan submitted by the school board.\textsuperscript{40} Again, both parties appealed the district court’s disposition to the Eighth Circuit.

The Eighth Circuit Court of Appeals recognized the deliberate delay in which the school board had engaged to forestall desegregation of the Dollarway public schools.\textsuperscript{41} The court rejected the district court’s acceptance of the belated desegregation plan adopted and filed by the school board and, similarly, rejected the district’s explanations for its hesitance to desegregate the public schools.\textsuperscript{42} And it roundly rejected the lower court’s paternalistic observation that denial of transfer might actually have been in the best interests of the plaintiff schoolchildren, concluding:

Standards of placement cannot be devised or given application to preserve an existing system of imposed segregation. Nor can educational principles and theories serve to justify such a result. These elements, like everything else, are subordinate to and may not prevent the vindication of constitutional rights. An individual cannot be deprived of the enjoyment of a constitutional right, because some governmental organ may believe that it is better for him and for others that he not have this particular enjoyment. The judgment as to that and the effects upon himself therefrom are matters for his own responsibility.\textsuperscript{43}

Similarly, the circuit court criticized the school board’s adoption of a testing policy for applicants for transfer, piercing the superficial uniformity of application that the trial court had accepted as non-racially discriminatory in intent.\textsuperscript{44} The circuit court discussed the district’s adoption of:

\textit{[T]he California Mental Maturity Test, the Iowa Silent Reading Test, the Otis Quick Scoring Test of Mental Ability, the California Language Tests, the Bell Adjustment Inventory, and other such things—which, at least in the elementary area of public education, are new adornments upon the entrance doors to school houses and class rooms...}

\textsuperscript{40} Dove v. Parham, 183 F. Supp. 389 (E.D. Ark. 1960) ("Dove III"), rev’d, 282 F.2d 256 (8th Cir. 1960). The district court found that the plan “provides a start toward the elimination of racial discrimination, and that it is sufficient to initiate a transition period.” Id. at 393. The plan provided that in general, school assignments for the 1960–1961 school year would remain the same as for the 1959–1960 school year. Id.
\textsuperscript{41} Dove v. Parham, 282 F.2d 256, 259–62 (8th Cir. 1960).
\textsuperscript{42} Id. at 258.
\textsuperscript{43} See id.
\textsuperscript{44} Id. at 260.
and concluded:

[W]hat the District has done and proposes to continue doing, application of these devices is not going to be made to the students generally of the system but only to such individuals as undertake to engage in application for a transfer—which in the realities of the District here simply means, to Negro students seeking to enter a white school.45

While the court noted the trial court’s “careful consideration” of the elements of the Dollarway school board’s plan for desegregation in holding that the plan provided “a reasonable start” to desegregation, the Eighth Circuit’s characterization of the plan was far less kind: “[A]fter a lapse of six years, we think a board should be required to come forth with something more objectively indicative as a program of aim and action than a speculative possibility wrapped in dissuasive qualifications.”46 After a surprisingly short but intensive period of litigation, the Eighth Circuit finally afforded a measure of relief to Judge Howard’s clients, but not without the delay compromising their rights to the vindication promised in Brown I and II. In Dollarway, “all deliberate speed” was not at all deliberate.47

The Dollarway litigation demonstrates the frustration that counsel often face in representing clients in unpopular cases, or when the intransigence of public officials is reflected in the reluctance of courts to intervene aggressively to protect individual rights.48 This frustration is often accompanied by...
a profound sense of failure when the litigation ultimately proves unsuccessful and the case is lost. But even in victories, such as Judge Howard achieved in Dollarway, there is often personal pain. While denying relief to his clients in the second round of litigation, the federal district court addressed the violence against African Americans attending the desegregation effort. In its opinion, the court noted that this violence occurred during the school board hearing on the plaintiffs’ applications to transfer to previously all-white schools.\textsuperscript{49} It reported on the extent of violence:

The evidence reflected that the hearing before the Board was marred by a disturbance created outside the school by a crowd of white people whose presence there may well have been in part coincidental as a football game was being played nearby on the same night the hearing was held. This disturbance was marked by abusive language hurled at the Negroes present at the hearing, by the throwing of bottles in the halls of the Dollarway School, by the breaking of windows, and by some physical violence, fortunately not serious, directed at the persons of some of the Negroes as they left the school.\textsuperscript{50}

Judge Howard was subjected to personal indignities and threats upon returning to Pine Bluff in assuming the burden as counsel for many clients who had suffered the direct effects of racial discrimination, as reflected in the Dollarway desegregation litigation. He also suffered the experience of his family being subjected to abuse. His family was intimately involved in the integration of Pine Bluff public schools. In 1963, for instance, in one particularly frightening episode, his daughter, Sarah, a Dollarway High School student,\textsuperscript{51} and a second-grader were attacked by white students who pelted the car within which they rode with stones.\textsuperscript{52} Certainly, for a lawyer trained to seek recourse for wrongs in the courts, the inability of the law to fully control violence must have proved difficult for him, precisely because

Advisory Committee concluded, in part: “There has been no significant progress in the past decade toward the elimination of established substantial inequality between educational opportunity for white and Negro children; both tangible inequality of physical resources and intangible inequality through segregation persist.” \textit{Id.} at 26.

49. \textit{Dove II}, 181 F. Supp. at 520. The hearing date was October 8, 1959. \textit{Id.} at 510.

50. \textit{Id.} at 521.

51. \textit{Dollarway Re-opens; Negroes Are Absent}, \textit{PINE BLUFF COM.}, Jan. 24, 1963, at 1. Sarah Howard Jenkins returned to Arkansas after practicing with the firm of Lewis and Roca in Phoenix and teaching at the University of Memphis. Sarah, a nationally-known expert in the fields of contracts and the Uniform Commercial Code, now serves as the Charles C. Baum Distinguished Professor of Law at the UALR William H. Bowen School of Law.

his faith in the law prevented him from resorting to violence in response, even for the protection of his own children.53

B. Continuing the Push for Equality

Judge Howard's responsibilities as a leader of the civil rights movement in Pine Bluff and lawyer for the politically oppressed were not limited to efforts in desegregating the public schools. In 1963, for instance, Judge Howard was hired by the families of ten young African Americans arrested for demonstrating against segregation at a Pine Bluff movie theater and would thereafter be retained by the NAACP to represent all forty-four defendants, who were then being held in a jail designed to hold only thirty individuals.54 The following year he represented comedian Dick Gregory and a fellow demonstrator who were arrested in Pine Bluff and fined for refusing to leave a segregated truck stop.55

In practice, George Howard, Jr. demonstrated his ability as a creative and persistent attorney, especially in defending individuals in the criminal courts. In the 1960s he litigated issues that foreshadowed later holdings of the Supreme Court. He challenged the imposition of the death penalty for rape in Maxwell v. Stephens56 and Harris v. Stephens,57 demonstrating that its use had been systematically directed against black defendants charged with the rape of white women. Judge Howard also argued that the imposition of the death penalty for rape violated the prohibition against infliction of cruel and unusual punishment.58 Although the Eighth Circuit rejected the

53. Judge Howard's brother, William Howard, drove to school to pick up the two children. According to the local newspaper story, he reportedly heard the car being hit by something and proceeded to investigate. Apparently, a white youth assaulted him and he responded by defending himself with a pocket knife that he used as a tool in his work as a mechanic, leading to his arrest by four sheriff's deputies after he walked to a nearby business and asked to use the phone to call his insurance company and the FBI. Howard was charged with assault with intent to kill. Dollarway Re-opens, supra note 51. This incident was misreported by Holly Y. McGee in It Was the Wrong Time, and They Just Weren't Ready: Direct Action Protest in Pine Bluff, 1963, LXVI ARK. HIST. Q. 18, 22 (Spring 2007), which stated that "George Howard" had been arrested in an incident after a white student had thrown a brick through the windshield of his car in which his "niece, Sarah," was riding. Considering Judge Howard's personal reputation for deference to the rule of law and civility, this misidentification is particularly unfortunate.

56. 348 F.2d 325 (8th Cir. 1965).
57. 361 F.2d 888 (8th Cir. 1966).
58. Maxwell, 348 F.2d at 330; Harris, 361 F.2d at 894–95. The panel decision rejecting Judge Howard's Eighth Amendment arguments in Maxwell was written by then-Judge Harry Blackmun, who was later appointed to the United States Supreme Court by President Richard
argument and supporting statistical evidence, the Supreme Court voided the use of the death penalty as a punishment for the rape of an adult woman in Coker v. Georgia.59

He consistently raised issues concerning the fairness of criminal jury trials in which most minority venirepersons were excluded through discriminatory juror selection procedures.60 For instance, he challenged racial discrimination in jury selection as well as the application of the death penalty for rape in Maxwell v. Stephens,61 a case ultimately leading to the Supreme Court's decision in Maxwell v. Bishop,62 holding that improper exclusion of a prospective juror in a capital case based on their opposition to the death penalty requires reversal of the death sentence.63 There, the Court applied its decision in Witherspoon v. Illinois64 to Maxwell's death sentence, which had been imposed before Witherspoon was announced to vacate the denial of habeas relief.65 Judge Howard continued to represent Maxwell as co-counsel in a second federal habeas petition.66

M. Nixon. Justice Blackmun dissented from the plurality holding invalidating existing death penalty statutes in Furman v. Georgia, 408 U.S. 238, 405 (1972), but in Callins v. Collins, 510 U.S. 1141 (1994), he dissented from the denial of certiorari, explaining that he found the death penalty constitutionally flawed in its implementation. In Callins, Justice Blackmun recalled that he had enforced the death penalty as a circuit judge, citing the decision in Maxwell, among others, while expressing public reservations about "its moral, social, and constitutional legitimacy." Callins. 510 U.S. at 1145, n.1. He wrote: "From this day forward, I no longer shall tinker with the machinery of death." Id. at 1145.

59. 433 U.S. 584 (1977). Coker was foreshadowed by the dissent from the denial of certiorari in Rudolph v. Alabama, 375 U.S. 889 (1963), in which Justice Goldberg, joined by Justices Douglas and Brennan, argued that certiorari should be granted to consider whether the infliction of death for a "rapist who had neither taken nor endangered human life" violates the prohibition on infliction of a cruel and unusual punishment. Rudolph, 375 U.S. at 889–90.

60. See, e.g, Trotter v. State, 237 Ark. 820, 831, 835–38, 377 S.W.2d 14, 21, 23–25 (1964) (rejecting challenge to failure to empanel venire representative of community demographics, suggesting claim defaulted by counsel's failure to exhaust peremptory challenges, a wholly inapplicable ground for default since a challenge based on exclusion of minority jurors from jury venire cannot be addressed through use of peremptory challenges in any event); see also Trotter v. Stephens, 241 F. Supp. 33, 42–44 (E.D. Ark. 1965). The state and federal courts in Trotter also rejected arguments that imposition of the death penalty against black defendants for rape of white women violated due process and the prohibition against infliction of cruel and unusual punishments. See also Harris v. Stephens, 361 F.2d at 891–92 (rejecting claim that jury formation process resulted in under-representation of minority jurors).

61. 348 F.2d at 332–34.
63. Id. at 266.
64. 391 U.S. 510 (1968).
65. 398 F.2d 138 (8th Cir. 1968). Once again, then-Judge Blackmun wrote the circuit's panel opinion denying relief. Id. at 139.
66. Judge Howard worked as a cooperating attorney with the NAACP Legal Defense Fund on the Maxwell case. On May 2, 1970, the CHI. DAILY DEFENDER (Weekend Edition), included a short news item, Ready for Countdown, and a photograph of Judge Howard con-
In *Harris*, his complaint to the closing of the courtroom to spectators during the examination of the complaining witness was dismissed as "spurious" by the court of appeals. Some forty years later, in *United States v. Thunder*, the circuit court addressed a similar claim as substantial and reversed the conviction when the defendant complained that closure of the courtroom during the testimony of minor complainants in a child sex abuse prosecution violated his Sixth Amendment right to a public trial.

In *Sheppard v. State*, he argued that the defendant's commitment to the state hospital and Intelligence Quotient (IQ) of forty-five demonstrated that his confession was not freely and voluntarily given. The defendant had been sentenced to death for murder committed during the commission of a rape, and Judge Howard entered the case after the trial had concluded. The state court, however, rejected his argument that the defendant was so impaired that his decision to waive counsel and give a statement inculpating himself should not be held against him. Four decades later, Arkansas law and United States Supreme Court precedent would have barred imposition of the death penalty because of his established mental deficiency. The span of Judge Howard's career in practice and on the bench serves to demonstrate the often dramatic shifts in constitutional interpretation that have marked the development of constitutional criminal procedure. While the Court's decision in *Atkins* in 2002 would presumably have saved Sheppard from the death penalty, only thirteen years earlier, in 1989, the Court rejected the argument that execution of a mentally retarded individual would necessarily violate the Constitution.

ferring with his client William L. Maxwell, who was reportedly suffering from tuberculosis and then confined to a hospital.

68. 438 F.3d 866 (8th Cir. 2006).
69. Id. at 868.
70. Id. at 866.
71. U.S. CONST. amend. VI.
72. 239 Ark. 785, 394 S.W.2d 624 (1965).
73. Id. at 790–91, 394 S.W.2d at 627–28. An expert, who evaluated the defendant while he was confined at the Arkansas State Hospital, put the defendant's mental age between nine and ten years old. Id. Evaluating experts concluded that he was not so impaired as to lack responsibility based upon mental defect. Id.
74. Id. at 789, 394 S.W.2d at 626.
75. Arkansas code section 5-4-618(a)(2) establishes a rebuttable presumption of mental retardation barring execution under subsection (b) based on an IQ test result of sixty-five (65) or below. Ark. Code Ann. § 5-4-618(a)(2).
77. In *Sheppard*, even the highest reported IQ performance for the defendant was fifty-nine, although the testifying expert explained that his deficient mental age, as an adult, demonstrated less impairment than would be expected of a child functioning at a ten year old age level. Sheppard, 239 Ark. at 791, 394 S.W.2d at 627.
Throughout his career in practice, Judge Howard worked as local counsel for the NAACP Legal Defense Fund in capital cases and civil litigation, including *Shelton v. Tucker*,79 challenging state law requiring teachers to disclose their memberships in political organizations.80

As a practitioner, Judge Howard litigated skillfully, while often suffering the experience of losing difficult cases while advancing novel claims or arguments. Yet the history of constitutional litigation demonstrates that the kinds of claims he was raising in the 1960s would ultimately be recognized as compelling by the Supreme Court a decade later. And, later, as a judge of long service, he lived to see some of his best work undone by later courts.

III. THE HARDWORKING AND COURTEOUS JURIST

Judge Howard's record of public service on the bench is unparalleled in Arkansas history.81 He was appointed to the Arkansas Supreme Court by Governor David Pryor in 1977 and to the newly-created Arkansas Court of Appeals by then-Governor Bill Clinton in 1979. He was the first African American to serve on these courts, just as he had been the first to serve on the Arkansas Claims Commission, from 1969 to 1977, including serving as its Chairman. And he was the first African American to serve on the federal bench in Arkansas as a result of his appointment by President Jimmy Carter as United States District Judge in 1980.82 As a federal judge for over a quarter of a century, his reputation as a hard-working and courteous jurist was well-known. He served his community and the nation with the same degree of dedication to principle as a defender of the Constitution and with his eyes firmly fixed on justice that he brought to bear as a lawyer in Pine Bluff and public servant before his appointment to the District bench.

In 1977, as a member of the Arkansas Supreme Court, he wrote the opinion in *Sanders v. State*,83 upholding the warrant requirement for personal luggage seized from an automobile where police had probable cause to believe that the suitcase contained contraband. His reasoning was affirmed by the United States Supreme Court two years later in *Arkansas v. Sand-
ers, a principle which stood for years until undermined by United States v. Ross, which expanded the automobile search exception, and finally by the Court’s decision in California v. Acevedo in 1991, abandoning the constitutional requirement for search warrants for personal property seized by police.

During his tenure on the federal bench for the Eastern District of Arkansas, Judge Howard presided over some of the most highly publicized trials in the state’s history, including the Whitewater prosecution conducted by Special Prosecutor Kenneth Starr. He ordered the deposition of then-President Bill Clinton as a critical witness in the Whitewater prosecution of the President’s former business partners. His refusal to order release of the videotape to news media was upheld by the Eighth Circuit. He presided over the trial in which then-Arkansas Governor Jim Guy Tucker and Jim and Susan McDougal were convicted. And, subsequently, he presided over the trial of Susan McDougal, charged with obstruction of justice for her refusal to testify before the Whitewater grand jury investigating the business affairs of President Clinton and now-Senator Hillary Clinton.

91. United States v. James B. McDougal, 133 F.3d 1110 (8th Cir. 1998).
92. United States v. Susan H. McDougal, 137 F.3d 547 (8th Cir. 1998).
93. Susan McDougal had already been held in contempt of court for her refusal to testify by then-Chief Judge Susan Webber Wright. Judge Wright’s order was upheld on appeal. In re: Grand Jury Subpoena, 97 F.3d 1090, 1095 (8th Cir. 1996). McDougal was then prosecuted by the Whitewater Special Prosecutor, Kenneth Starr, and the case was tried by Judge Howard. See, e.g., McDougal Jury Deliberations to Resume Monday, http://www.cnn.com/ALLPOLITICS/stories/1999/04/09/mcdougal/ accessed (last visited
Judge Howard also issued important decisions in election cases focusing on candidate access to the ballot. In *Citizens to Establish a Reform Party in Arkansas v. Priest*, he concluded that a state law that set an arbitrarily early date for qualification of a political party based on production of petitions containing signatures of registered voters equivalent to at least 3% of the lesser number of votes cast for the office of governor or presidential electors in the preceding election unreasonably burdened third parties seeking places on the general election ballot. The requirement constituted a violation of the First and Fourteenth Amendments, he wrote in assessing the early date for qualification, because:

> Early filing deadlines such as the one herein at issue unduly hinder, if not bar, minor political parties from influencing the electoral process by ballot access. Only in the election year itself do issues begin to coalesce such that minority parties with opposing or different views may emerge. At such an early point in the election year, it is often difficult to get volunteers from the voting public to become involved in the petition collection process.

As new political parties continued their struggle for recognition and growth, fighting the framework of a system once controlled by a single party and now clearly in the grip of two parties, Judge Howard continued to support ballot access to reflect these movements.

In *Green Party of Arkansas v. Priest*, he responded to a complaint filed by the Green Party that its candidate for a special election for the Third
Congressional District\textsuperscript{100} was being denied access to the ballot with his party designation.\textsuperscript{101} Relying on its earlier decision in the Reform Party case, the court again held that the state could require no greater number of registered voters petitioning for party recognition than the 10,000 signatures required for inclusion of an individual on the ballot.\textsuperscript{102} But for purposes of the special election, he also found that state law governing the collection of signatures imposed time limitations and deadlines for petitioning for party recognition that rendered qualification for the special election impossible.\textsuperscript{103} Finding First and Fourteenth Amendment violations in the operation of the overly-restrictive party recognition regime, he enjoined the Secretary of State from excluding the Green Party candidate from the special election ballot.\textsuperscript{104}

Most recently, in \textit{Green Party of Arkansas v. Daniels},\textsuperscript{105} the judge was once again presented with a question of ballot qualification relating to the 3\% signature requirement under state law.\textsuperscript{106} He found the 3\% requirement for recognition of a political party was not "narrowly drawn to serve a compelling state interest,"\textsuperscript{107} instead finding that the 10,000 signature requirement for independent candidates demonstrated "a sufficient modicum of support to serve the state’s interest in avoiding cluttered ballots."\textsuperscript{108} Once again, he enjoined the Secretary of State from refusing the recognition the Green Party and ordered inclusion of its candidates on the ballot for the 2006 election.\textsuperscript{109}

Judge Howard’s disposition in the ballot access cases may have reflected, in part, a belief in openness in the democratic process that had eluded him as a practitioner vigorously representing individual litigants against politically entrenched institutions. Or perhaps it reflected a faith in the fundamental efficacy of a democracy in promoting citizenship, just as his career had been built on a faith that the courts and the rule of law would protect the

\begin{itemize}
	\item \textsuperscript{100} \textit{Id.} at 1141. The vacancy arose when Representative Asa Hutchinson resigned the seat upon his appointment to serve as Administrator of the Drug Enforcement Administration.
	\item \textsuperscript{101} \textit{Id.} at 1142.
	\item \textsuperscript{102} \textit{Id.} (citing Citizens to Establish a Reform Party in Arkansas v. Priest, 970 F. Supp. at 699).
	\item \textsuperscript{103} \textit{Id.}
	\item \textsuperscript{104} \textit{Id.} at 1145.
	\item \textsuperscript{105} 445 F. Supp. 2d 1056 (E.D. Ark. 2006).
	\item \textsuperscript{106} \textit{Id.} at 1058. Under Arkansas code section 7-7-205(a), a political party must demonstrate support equivalent to 3\% of the lesser of the total number of votes cast for governor or presidential electors in the preceding election to obtain recognition for purposes of listing its candidates as representing the party on the election ballot. \textsc{Ark. Code Ann.} § 7-7-205(a) (LEXIS 2006).
	\item \textsuperscript{107} \textit{Green Party}, 455 F. Supp. 2d at 1062.
	\item \textsuperscript{108} \textit{Id.}
	\item \textsuperscript{109} \textit{Id.} at 1063.
\end{itemize}
IV. CONCLUSION

In reflecting on Judge Howard's career, it is his work as an advocate that is perhaps most inspiring. He knew the frustration of litigating zealously and losing. And yet, he persisted. What no lawyer of a younger generation can likely share with Judge Howard, of course, is the life experience of an African American lawyer returning to his hometown to raise his family and build a practice in the throes of the unrest of the civil rights movement. Only his family can likely understand the full extent of his personal courage and commitment, the incredible pressures to which they were subjected, and their resolve to stand with him, and he with them, in the pursuit of justice. And in their love and the faith which now sustains them, he undoubtedly found the source of his great strength.

With his death, the Arkansas delegation to the United States Congress initiated and supported legislation to rename the United States Courthouse in Pine Bluff in Judge Howard's honor, an altogether fitting designation for a lawyer who devoted his professional life to the Constitution.