

# W. Haywood Burns: To Be of Use

Michael Ratner<sup>†</sup> and Eleanor Stein<sup>††</sup>

## *To Be of Use*<sup>1</sup>

The people I love the best  
jump into work head first  
without dallying in the shallows  
and swim off with sure strokes almost out of sight.  
They seem to become natives of that element,  
the black sleek heads of seals  
bouncing like half-submerged balls.

I love people who harness themselves, an ox to a heavy cart,  
who pull like water buffalo, with massive patience,  
who strain in the mud and the muck to move things forward,  
who do what has to be done, again and again.

I want to be with people who submerge  
in the task, who go into the fields to harvest  
and work in a row and pass the bags along,  
who are not parlor generals and field deserters  
but move in a common rhythm  
when the food must come in or the fire be put out.

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We both knew and worked with Haywood for many years. Writing this Essay affected us deeply and made us realize the void he leaves in our lives and the lives of so many others. Of course, we miss his physical presence, his gentle smile lighting up a room, his bear hugs, the halo of grey hair he likened—characteristically—to both Karl Marx and Frederick Douglass. In this Essay, we have hardly begun to capture the richness of Haywood's life and work, and have barely tapped those whose lives he influenced. Haywood was a complex man with many dimensions—poet and motorcyclist, basketball player and dancer, angler and wit. Exploring his life and writings, and collecting his speeches and publications, will undoubtedly occupy academics and activists for a long time to come. In this effort we are grateful for conversations with Daniel Alterman, Penny Andrews, Mildred Aristide, Derrick Bell, Sue Bryant, Margaret Burnham, Naomi Burns, Guido Calabresi, Leroy D. Clark, Rhonda Copelon, Michael Deutsch, David Dinkins, Jennifer Dohrn, Barbara Dudley, Brian Glick, Victor M. Goode, Jeff Jones, Leora Mosston, John Payton, Herman Schwartz, Eric Sirotkin, Frank "Big Black" Smith, Robert Van Lierop, Patricia Williams, and Peter Zimroth.

1. MARGE PIERCY, *To Be of Use*, in MARGE PIERCY, *CIRCLES ON THE WATER* 106 (1982). For twenty years this poem, which Haywood often described as his favorite, hung on the wall of his office. He frequently recited it in speeches. Used by permission of the author and Alfred A. Knopf Inc.

The work of the world is common as mud.  
 Botched, it smears the hands, crumbles to dust.  
 But the thing worth doing well done  
 has a shape that satisfies, clean and evident.  
 Greek amphoras for wine or oil,  
 Hopi vases that held corn, are put in museums  
 but you know they were made to be used.  
 The pitcher cries for water to carry  
 and a person for work that is real.

—*Marge Piercy*

On Tuesday, April 2, 1996, Haywood Burns was travelling to a dinner party following a day at a convention of the International Association of Democratic Lawyers in Cape Town, South Africa. Haywood was accompanied by two colleagues; a young South African friend was driving. Remarking that the driver reminded him of his son, Haywood began to speak of his family when, suddenly, their automobile was broadsided by a speeding lorry.<sup>2</sup> Haywood died that night. He was fifty-five years old.

A week later, an extraordinary outpouring of thousands of people gathered in Abyssinian Baptist Church in Harlem to say their farewells. Haywood, knowing that his life entailed greater than ordinary risk, had penned detailed instructions. At his funeral, he wanted African drumming, Native American chanting, and Scottish bagpiping to represent the strands of race and ethnicity that made him up. The crowd reflected Haywood's rare gift for bringing disparate people together. The most distinguished members of New York State's bench and bar sat side by side with lifelong militants; academic luminaries shared pews with activist teenagers.

At a time when the legal profession is ridiculed as the refuge of the greedy, the self-absorbed, the ego-driven and the corporate-minded, the life of Haywood Burns instructs us with a very different ideal. As former New York City Mayor David N. Dinkins declared, Haywood "served as a role model, not just for African-Americans, but for all Americans."<sup>3</sup> What is more, Haywood Burns was a role model in a multiplicity of roles. As a scholar, his early essays on the history of racism and American law, along with those of Derrick Bell, secured the foundation for critical race theory. As a teacher, Haywood inspired generations of students.<sup>4</sup> As a civil rights advocate, he defended black militant activists, community organizers, prisoners, and death row inmates. As

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2. While the driver escaped with minor injuries, American law professor M. Shanara Gilbert and South African attorney Felicia Roberts were also fatally injured in the crash. Interview with Jennifer Dohrn, in New Rochelle, N.Y. (Sept. 6, 1996).

3. Letter from David N. Dinkins, Former Mayor of New York City, to Jennifer Dohrn (Apr. 6, 1996) (on file with authors).

4. Burns taught at New York Law School, New York University School of Law, State University of New York Law School at Buffalo, City College of New York, the City University of New York Law School and, most recently, the Yale Law School.

an architect of organizations, he led the National Conference of Black Lawyers and the National Lawyers Guild; he was a keystone of the Center for Constitutional Rights, and served as a director, advisor, counsel, or trustee to more than fifty organizations dedicated to social transformation of one kind or another.

Although Haywood earned some of the legal establishment's most coveted honors, he was never entirely at home in it, nor was it ever entirely comfortable with him. Recalling his early years at Harvard, Haywood whimsically described himself as a provincial at the cultural center. In fact, Haywood did remain something of an outsider, perhaps as a result of his implacable identification with the downtrodden. Yet all of these images of Haywood as outsider leave wanting something of the essential man so profoundly loved by such a wide spectrum of the community: They fail to capture his boundless enthusiasm, his delight in human variety, his unique capacity to listen and encourage, his extraordinary charm and sweetness.

Haywood's dedication to be of use was not without a certain toll. A willingness to travel and speak all over the world and to serve as unpaid legal counsel or director to so many would exact a price from anyone. And ultimately, as Reverend Calvin O. Butts, III, preached at Abyssinian Baptist Church, this commitment to be of use, to reject comfort and complacency, to work and celebrate in free South Africa rather than a corner office in a corporate law firm, cost him his life. This Essay is intended to be both a tribute to Haywood Burns, and a reminder to all of us in the legal profession that a life in the law can be a life of service, and that the highest goal of all may indeed be, as Haywood demonstrated, to be of use.

#### I. THE EDUCATOR: CITY COLLEGE AND CUNY LAW SCHOOL

Following Haywood's death, his students turned out by the hundreds to express their gratitude for his teaching and personal support and to express their determination to carry on his work. Educating students and shaping educational institutions were charges he took seriously. At his inauguration as dean of CUNY Law School—the first black dean of any law school in the history of New York State—he expressed his charge this way:

I thank all of you for me, but I also thank you for all those who went before me who have helped to make this day possible—for my grandfather, William Henry Burns, who was born into an America where it was a crime against the state, a violation of the penal law, to teach him to read; for my late father Junious; for my mother Josephine, who as a little orphan girl with one dress and no shoes, dreamed in the red Virginia dust of a better day; for all those of whatever hue and from whatever origins who sacrificed to make that better day possible, such that, even though I am sure that I am not the

first person of my background *qualified* to lead a law school in this state, I have now been given that opportunity by our great university and am privileged to serve you.<sup>5</sup>

Haywood wanted more Black, Hispanic, minority, and women students to become lawyers and for those lawyers to serve “the awesome legal needs of the nation’s poor and moderate income populations.”<sup>6</sup> In a broader sense, he also saw his work in public higher education as “part of the grand tradition” going back to the nineteenth-century goal of “educating the children of the whole people.”<sup>7</sup>

Before assuming command at CUNY, Haywood was first able to put his ideas into practice at the City College of New York, where he served as the Director of the Max E. and Filomen M. Greenberg Center for Legal Education and Urban Policy and Chair of the Urban Legal Studies Program, positions he held from 1977 until 1987. In conjunction with New York Law School, the Urban Legal Studies Program was a “six-year integrated B.A.-J.D. program focusing on the practice of law in an urban environment and designed to produce highly qualified, committed professionals who will use their skills in the service of the underserved—the urban poor and middle class.”<sup>8</sup> Up to fifty students a year pursued liberal arts studies with “specialized courses designed to broaden their understanding of the nature of the urban community and its problems.”<sup>9</sup> Haywood was proud of the students who came to this program and was pleased that it would “produce a number of lawyers who would not otherwise have been lawyers.”<sup>10</sup> The Program “takes lawyers out of inner city high schools . . . and it has the highest percentage of minority students of any law program in the country outside of the traditionally black law schools.”<sup>11</sup>

Haywood saw the Urban Legal Studies Program (ULS) as an alternative to affirmative action, which was already under attack in 1978. Characterizing the Supreme Court’s decision in *Regents of the University of California v.*

5. Haywood Burns, Inauguration Speech at the City University of New York School of Law at Queens College 1 (Sept. 19, 1988) (transcript, on file with authors).

6. Haywood Burns, *Urban Legal Studies: Training Tomorrow’s Lawyers*, 53 N.Y.U. L. REV. 667, 670 (1978).

7. Haywood Burns, *What Are You Doing Out There?*, Commencement Address at Kingsborough Community College 1 (June 14, 1993) (transcript, on file with authors). Burns explained: “For over 145 years the Colleges of this University have been responsible for educating each new wave of poor, immigrant, and working class who correctly saw education as a way up and a way out. Today the hues and the accents may have changed, but the tradition continues.” *Id.*

8. Burns, *supra* note 6, at 667.

9. *Id.* In addition to law-related courses, topics included Social Stratification and Racism; Socio-Dynamics in the Puerto Rican Urban Community; Contemporary Women’s Movement; Capitalism & Colonization in Contemporary America; Anti-Semitism: A History; The World of the Camps & the Ghettos; and Asian Institutions & Their Function in New York City. *See id.* at 668–69.

10. Haywood Burns, *Pre-Professional and Pre-Graduate Education: An Innovative Legal Education Program at the City College of New York*, 22 HOW. L.J. 483, 486 (1979).

11. *Id.*

*Bakke*<sup>12</sup> as a “major setback,”<sup>13</sup> Burns nonetheless saw in it opportunity rather than defeat: “One positive outcome of the decision is that we are now forced to reach into our resources and create new models, implement new curricula and think about alternative mechanisms.”<sup>14</sup> ULS was exactly that—an alternative curriculum, focusing on criteria other than the LSAT and preparing students to practice law in the “inner cities of our nation.”<sup>15</sup> Haywood answered the question, “Are there not too many lawyers?” with a firm “no”: “The problem is not one of overproduction of lawyers, but of poor distribution of lawyers, where they are and whose interest they serve.”<sup>16</sup>

Haywood wanted to train lawyers who understood the racism inherent in the legal system and who were prepared to represent the “underserved.” By that he meant “not only . . . the economic stratum of the clientele, but also . . . the insubstantial substantive development of specific areas of the law that have a significant impact on persons of those populations—for example, the legal problems of the aged, the mentally retarded, the abused wife or child, the medically indigent.”<sup>17</sup>

Many perceived the urgent need for such a program,<sup>18</sup> but it was Haywood who actually made it happen. Colleagues at CUNY Law School also mention Haywood’s focus on the importance of the individual student, describing his remarkable capacity to make time for students regardless of the administrative and diplomatic demands placed upon him.<sup>19</sup> He knew the students’ names, where he had met them, the names of their children. Most students at ULS and at CUNY could say, “I know the Dean.” Haywood was a “gifted teacher” who believed in “the tradition of classroom rigor,” recalls CUNY Law School professor Victor Goode: “He had the unique ability to engage students and although he used a Socratic style, it was never done in such a way to embarrass students. It really was like a conversation with scholars as he led students through some understanding of a set of cases.”<sup>20</sup>

12. 438 U.S. 265 (1978).

13. Burns, *supra* note 10, at 483.

14. *Id.*

15. *Id.* at 485.

16. *Id.* at 486.

17. Burns, *supra* note 6, at 667 n.2.

18. Telephone Interview with Derrick Bell, Visiting Professor, New York University Law School (Sept. 16, 1996).

19. Mildred Aristide, who applied to the Urban Legal Studies program after graduating from an all-girls Catholic high school, recalls that at her City College admission interview she saw Haywood rush by, and remembers him as:

a bushy haired figure dashing into his office, but on the way out having enough time to address by name the many students hanging out in the student lounge. All kinds of students—Vietnam vets, working moms, single moms, taxi drivers, lesbians, union activists and a handful of 18 year olds like me.

Letter from Mildred Aristide, attorney and wife of former Haitian President Jean-Bertrand Aristide, to Michael Ratner 1 (Sept. 13, 1996) (on file with authors).

20. Letter from Victor Goode, Professor, CUNY Law School, to Eleanor Stein 4 (Sept. 27, 1996) (on file with authors).

In the first week of classes, Haywood's students studied the United States Constitution from the perspective of the slave codes. Mildred Aristide recalls, "[s]tudying the law through the eyes of people victimized by *the law* challenged our young minds, leading us to ask why were *certain* people always the victims, why did there have to be *victims*, and how could the law change."<sup>21</sup>

From City College he applied for the deanship of CUNY Law School which, from its inception, dedicated itself to law in the service of human needs. His tenure as Dean ranked among his most cherished accomplishments. Opening its doors to its first class in 1983, CUNY Law School was conceived by a visionary group of academics that included Derrick Bell, Charles Halpern, Howard Lesnick, Victor Goode, and Sylvia Law. The school has now trained eleven graduating classes in civil rights, rights of the elderly, housing law, and family law. At the core of CUNY Law School's philosophy was the desire to open the legal profession to those for whom traditionally exclusive and expensive legal education was not possible.

Nothing could be nearer to Haywood's heart, nor flow more organically from his ten years at City College training prelaw students from the inner city, than this mission of making the profession more inclusive. He often spoke of himself as assisting at the "birth" of a school, borrowing a metaphor from his wife Jennifer Dohrn's midwifery profession after having shared her experiences building a childbearing center in the South Bronx. Colleagues remember him as

very much the spiritual center for the school. There were always many pressures to give up on our mission and he always stood fast . . . [b]ecause he believed so fervently in what the school was about. That enthusiasm permeated all of his work and was often uplifting for a faculty that often felt under siege by outside forces.<sup>22</sup>

On the occasion of his inauguration as Dean, Haywood described his vision of the school:

Just as medical schools engage in preventive medicine, our role should be to engage in a type of "preventive law"—to educate the wider public to their legal rights and help immunize them against foreseeable legal difficulties. We will do this through outreach programs in the schools, civic organizations, senior citizens centers and other community locations.<sup>23</sup>

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21. Letter from Mildred Aristide, *supra* note 19, at 1.

22. Letter from Victor Goode, *supra* note 20, at 5. Goode also recalled: "On Haywood's bookshelf among the many law texts were always a few books of poetry. I caught him a few times studying verse rather than ABA reports." *Id.* Haywood greatly appreciated, and wrote, verse.

23. Burns, *supra* note 5, at 4.

When Haywood assumed the deanship in 1988, the school faced a crisis: It had failed to obtain the permanent accreditation from the American Bar Association necessary to live up to its promise of readying its students for legal careers. The law school was dogged with a low first-time bar exam passage rate; the site visitors from the ABA were confounded by both its unconventional curriculum and its student body, admitted as much for their social conscience and drive to serve the community as for their LSAT scores. The ABA postponed for two years its critical permanent accreditation determination.

Over those two years, Haywood, along with Board of Visitors Chairman Seymour Boyers, was in perpetual motion, organizing support for the school within the bar, from the bench, and among the politically powerful in the borough of Queens. In addition, he shepherded a series of internal adjustments to align the school more closely with the traditional ABA requirements, including admission requirements and academic standards. But Haywood did not limit himself to implementing "traditional" reforms. He also opened a dialogue with the legal establishment and urged that the bar reexamine itself and reevaluate its criteria—and its prejudices. This he did with both his characteristic diplomacy and his passionate conviction that the legal profession should not resemble a plantation. Addressing the final site investigation committee, Haywood explained the school's accommodations of the bar's criteria. But he also insisted, more fundamentally, that the profession needed CUNY Law School. An institution dedicated to law in the service of human needs must have a place in the twenty-first century bar, he urged.

In August 1992, CUNY received its permanent accreditation. As New York's Chief Judge, Judith S. Kaye, described this process: "Without giving an inch on its bedrock principles, the law school did indeed receive approval and join the 'establishment.' But the 'establishment'—the profession's traditional model of legal education—will never be the same. The mountain moved."<sup>24</sup>

## II. THE SCHOLAR: RACISM AND AMERICAN LAW

Haywood's childhood years in the small Hudson River city of Peekskill, New York, where he was born on June 15, 1940, gave him both a powerful race consciousness and an abiding belief in the potential for justice in the American legal system.<sup>25</sup> There, Haywood grew up in a transplanted African-American community, consisting of former Virginia tobacco country sharecroppers and agricultural workers, which included both of his parents. Always close to his family and the Peekskill community, Haywood considered

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24. Judith S. Kaye, *Haywood Burns Remembered*, N.Y.L.J., Apr. 8, 1996, at 2.

25. See NEW WORLD FOUND., *THE EARLY YEARS—HAYWOOD BURNS* 6 (1996)

formative his family's roots in the Peekskill Mt. Olivet Baptist Church, the old-fashioned local public school lessons he received in American democracy, and his parents' strong sense of fairness.<sup>26</sup>

Haywood's youth provided him early experience with racism: the riots in Peekskill at Paul Robeson's open-air concert in 1949; being denied membership in the local fish and game association; exclusion from the lake outside town. Delivering and reading the black press and traveling to New York City expanded his world view. Haywood joined the NAACP and became president of its junior branch the year before the United States Supreme Court's landmark school desegregation decision in *Brown v. Board of Education*.<sup>27</sup> Having attracted the attention of the official local town historian, by the end of high school Haywood already had a passion for historical narrative and his first academic honors: three Daughters of the American Revolution awards for academic excellence. A four-year scholarship to Harvard provided the first step for Haywood toward realizing his dream of becoming a lawyer dedicated to the cause of justice.<sup>28</sup>

Haywood loved Cambridge and found Harvard "just like being in heaven."<sup>29</sup> But at Harvard in 1958, along with the scholarship came a job as janitor of the dorm. In typical fashion, he derived a benefit from a job that could have been viewed as a degradation: "I went up 10 days earlier than the rest of my class so that we could get the place spic and span. By the time the others arrived I was settled in and had a sense of place that I don't think I ever relinquished."<sup>30</sup> Haywood was one of only ten African-American students out of a thousand.

In February of Haywood's second year at Harvard, the Greensboro Four sat at a North Carolina lunch counter, and "like a prairie fire across the South, the sit-in movement began."<sup>31</sup> Recalling sharp confrontations trying to collect signatures of support, he described the effect of the civil rights program on him: "[D]irect action tempered my determination like steel in a very hot furnace."<sup>32</sup> With other students and friends, Haywood organized a group aligned with the Southern Christian Leadership Conference and with the Student Nonviolent Coordinating Committee (SNCC). He discovered the

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26. *See id.* As Burns himself reflected,

So between school, church and home, I got heavy doses of What Democracy is About. And I took it very literally. I believed all the stuff in the Declaration of Independence and the Constitution. I believed those good biblical tenets. I took them to heart; it's what I had to go on.

That was the ground on which I constructed myself.

*Id.* at 6.

27. 347 U.S. 483 (1954).

28. *See* NEW WORLD FOUND., *supra* note 25, at 10.

29. *Id.* at 11.

30. *Id.* at 10.

31. *Id.* at 12.

32. *Id.*



Muslim community in Roxbury, and met, heard, and debated Malcolm X and Louis Farrakhan.<sup>33</sup> Although he was absorbed in studies with Oscar Handlin, author of the important book *Race and Nationality in American Life*,<sup>34</sup> Haywood remarked that, at the time, Harvard offered no courses in African history.<sup>35</sup>

After graduating from college, with the Lionel de Jersey Harvard scholarship in hand, Haywood travelled to England to spend the 1962–63 academic year at Emmanuel College, Cambridge.<sup>36</sup> Visiting the London Institute of Race Relations, he looked over the publications and noticed a glaring gap: Its list included nothing about race in the United States. He decided to turn his Harvard senior thesis into a book. *The Voices of Negro Protest in America*<sup>37</sup> was published in 1963. Haywood returned to the United States in time to join the March on Washington in August 1963, where he was joined by Naomi Burns, who had been his book editor in London. They were married in 1964, during Haywood's first year at the Yale Law School.

Although not yet an attorney, Haywood was beginning to analyze the role of the law in both enforcing and transforming race relations in America. With regard to the *Brown* decision, he wrote optimistically: "The implications of this decision for the future of the American social system are great. It seems to portend the end of all forms of segregation in public life."<sup>38</sup> Having traced the development of twentieth-century black protest from the Niagara Movement until 1963, he was clearly aware of the divergences and the limitations of the early leadership, presaging, perhaps, his move from the NAACP Legal Defense Fund to the National Conference of Black Lawyers (NCBL) later in that decade. Writing lyrically about the accomplishments of nonviolent direct action, he noted that "[t]he student non-violent movement is not and will not be considered an N.A.A.C.P. triumph."<sup>39</sup> He also foresaw the impact of nationalism on the civil rights movement.<sup>40</sup>

At the core of Haywood's thinking and activism was an implacable opposition to racism. This was not only a theoretical or historical matter. He recalled his early involvement in the sit-in movement: "People would tell me

33. See *id.* at 12–13.

34. OSCAR HANDLIN, *RACE AND NATIONALITY IN AMERICAN LIFE* (1957).

35. See NEW WORLD FOUND., *supra* note 25, at 12.

36. See *id.* at 18.

37. HAYWOOD BURNS, *THE VOICES OF NEGRO PROTEST IN AMERICA* (1963).

38. *Id.* at 26.

39. *Id.* at 35.

40. See generally *id.* at 60–81 (discussing impact of black nationalist organizations). Regarding the Black Muslims, he wrote:

And probably at least something of the Muslim indictment of the larger white society for its crimes against the black man hits a responsive note in the heart of every Negro—wherever he might be. The Muslims represent a particular institutionalized version of the more general mood and serve as a vehicle to communicate this mood to the larger society which all too often knows little of the hidden hurt and hidden hate of the black man.

*Id.* at 81.

not to take it personally. Of course if they were talking about racial issues I did take it personally. On the other hand, nothing was going to stop me from resisting what I saw as wrong."<sup>41</sup> Out of his own history and experience came a profound body of work analyzing the institutionalization of racism in the United States.

In 1969 Haywood began teaching a course at New York University Law School that may have been the first of its kind in any American law school. The goal of the course, "Racism and American Law," was to "deal openly and honestly with the way in which the law, as an institution, has been an instrument of the subjection of non-white peoples in this country."<sup>42</sup> The course took a historical and contemporary approach to the topic and included the experiences of African Americans, American Indians, and Asian Americans. The course dealt with a theme Haywood was to revisit repeatedly throughout his life: "the nature and impact of institutional racism as it is presently reflected in the legal system."<sup>43</sup> Even if a "great deal of the overt and explicit racism in the legal system has been removed in recent years through judicial and legislative action,"<sup>44</sup> racism had not been eradicated from the legal system. As Haywood explained:

The concept of institutional subordination or institutional racism is founded upon the recognition that not all racism is blatant, open and conscious, but that perhaps racism's most pervasive and pernicious form is the unconscious and indirect racial subjection that takes place as a result of the institutional arrangements which have been shaped and defined by the American past.<sup>45</sup>

Although this concept hardly sounds novel today, it was practically revolutionary at the time Haywood built a law school course around it, at a time when law schools were heavily under the sway of Professor Herbert Wechsler's "neutral principles."<sup>46</sup> Haywood's attempt to place law in a social context, and to view it, even when ostensibly "neutral," as an instrument of oppression would have been anathema at almost any law school in the country. As strong as his beliefs in constitutional principles and American democracy were, he was never enamored of the neutrality of law. Haywood often quoted with wry approval Anatole France's dictum that the "law, in its majestic

41. NEW WORLD FOUND., *supra* note 25, at 12.

42. Haywood Burns, *Racism and American Law: A New Course in Legal History*, 1970 U. TOL. L. REV. 902, 904. As was typical of him, Haywood takes no credit in the article for developing or even teaching the course.

43. *Id.* at 910.

44. *Id.*

45. *Id.*

46. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."<sup>47</sup>

In the course, Haywood pointed to numerous examples of institutional subordination or racism: the use of certain supposedly neutral tests or measures that deny minorities union membership, higher education, and home ownership. He argued that the "structural inequality of the law is visible in the operation of the money bail system, the system of jail in lieu of fines for indigents, and the application of capital punishment."<sup>48</sup> He also cited civil law examples including the effects of the "holder in due course" doctrine, owner-biased landlord-tenant law, large acre zoning, and laws that govern the political units in which nonwhites vote.<sup>49</sup>

Out of this course came a brief but incalculably influential essay, "Racism and American Law," which was published in 1971 in a collection entitled *Law Against the People*.<sup>50</sup> There, Haywood sketched "the nexus between law and racism,"<sup>51</sup> utilizing an innovative method—a historical review of American law from the vantage point of the African, Asian, Latin, and Native American peoples—that provided "examples of the law and the legal process as the means by which the generalized racism in the society was made particular and converted into standards and policies of social control."<sup>52</sup> Comparing, for example, the 1855 Kansas legislature's penalties for the crime of rape of a white woman—castration for a black man, but five years' imprisonment for a white man—Burns catalogued the racial and, as he termed it, the "sexual psychopathology of white America."<sup>53</sup> Striking in this essay is his portrayal of racism not as a remediable flaw in an otherwise fair system, but as endemic to our legal system, from the settlement of Native lands to the time when "through the operation of law, in this case legislated societal racism, the institution of American chattel slavery was created and perpetuated."<sup>54</sup>

He was always a strong advocate of affirmative action. He helped create the Joint Affirmative Action Coordinating Center, a coalition of the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights, and the National Lawyers Guild. The Coordinating Center fought to preserve and strengthen affirmative action, and appeared as amicus in several Supreme Court cases.<sup>55</sup> Haywood wrote and lectured extensively on the subject: To

47. ANATOLE FRANCE, *LE LYS ROUGE* (1894), quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 802 (14th ed. 1968).

48. Burns, *supra* note 42, at 911.

49. *See id.*

50. Haywood Burns, *Racism and American Law*, in *LAW AGAINST THE PEOPLE* 38 (Robert Lefcourt ed., 1971). The piece was reprised in a later essay. *See* Haywood Burns, *Law and Race in America*, in *THE POLITICS OF LAW* 89 (David Kairys ed., 1982).

51. Burns, *Law and Race in America*, *supra* note 50, at 89.

52. *Id.* at 89–90.

53. *Id.* at 89.

54. *Id.* at 90.

55. Prominent cases with which the Center has been involved include *Wygant v. Jackson Board of*

him, affirmative action was made necessary from "understanding our nation's past and knowing that there has been a wholesale group injury, so," he asked, "why shouldn't there be a group remedy?"<sup>56</sup> As Haywood explained:

[W]hen you look at the unique history of America, and the barbarity that is suffered by African-American, Native American, Latin American, Asian American people, then affirmative action 1987-style should be a matter of simple justice. But of course it's not. We have to fight one myth after another. . . . [W]e made it—we Europeans—why can't you. We have to fight the myth of the innocent party: you are going to hurt somebody innocent. We have to fight the myth of reverse discrimination. The myths of "goals" and "timetables."<sup>57</sup>

Haywood observed that "a central issue in American life continues to be how white people will respond to the historic wrongs visited on Americans of African descent."<sup>58</sup> In a controversial 1990 book review,<sup>59</sup> Haywood took author Jim Sleeper severely to task for his call for a "race-transcendent politics," appealing to what Sleeper described as a New York tradition of fair play and decency, a closing of ranks around issues of common concern involving economic deprivation and community-based power.<sup>60</sup> Rejecting this vision as naive, Haywood vigorously argued:

Sleeper's failure to grasp the unique nature of slavery in this country explains in part his failure of vision with respect to the racism that it engendered. Sleeper does not comprehend the social pathology of racism, its enduring pervasiveness or what it will take to excise it from the body politic.<sup>61</sup>

But Haywood's perspective was multidimensional. In a scathing editorial, he opposed the nomination of Clarence Thomas to the Supreme Court because of Thomas's rejection of affirmative action and other remedies for racial discrimination, his refusal to enforce the employment rights of the elderly, and his opposition to women's privacy and reproductive rights. Haywood, noting that his own "background closely resembles that of Judge Clarence Thomas, a sharecropper's grandson from Pinpoint, Ga.," quoted with approval Justice

*Education*, 476 U.S. 267 (1986), *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), and *Fullilove v. Klutznick*, 448 U.S. 448 (1979).

56. Haywood Burns, *The Future of Civil Rights* 17 (Jan. 27, 1987) (unpublished manuscript, on file with authors).

57. *Id.*

58. Haywood Burns, *The Activism is Not Affirmative*, *NATION*, Sept. 29, 1984, at 264, 266.

59. See Haywood Burns, *Apology for Archie*, *NATION*, Dec. 3, 1990, at 701 (reviewing JIM SLEEPER, *THE CLOSEST OF STRANGERS* (1990)).

60. See *id.* at 701.

61. *Id.* at 701.

Thurgood Marshall's warning that "in selecting his successor we must beware of 'a black snake as well as a white snake—they both bite.'"<sup>62</sup>

Despite Haywood's views on how the legal system was employed as a vehicle to perpetuate racism, he concluded his course with a discussion of "the potential of law for eradicating racism in the society."<sup>63</sup> Haywood asked "to what extent is it realistic, in a society permeated by racism, to expect that the law or any institution in that society can transcend that racism?"<sup>64</sup> Haywood's answer to that question, as reflected in many of his speeches and writings, was that while law was "not a panacea . . . it is too useful a tool to be abandoned."<sup>65</sup>

### III. THE ACTIVIST AND THE DEFENSE COUNSEL

Haywood's commitment to equality was by no means limited to the classroom or to theory. Change, he argued, did not occur spontaneously. Simply waiting for things to get better was unacceptable: "In the end, time will *not* make a difference. It is action in time that will."<sup>66</sup> Visions and dreams, Haywood urged, were not sufficient. In a sermon given in 1989 at the AME Zion Church in Peekskill, New York, he discussed the relationship of dreams and action:

Dreams are the basis for moving on out, and making a better day . . . . If you have a dream, you cannot just lay back on that dream. Comes the time [when] you got to wake up. Jacob didn't stay on that stone pillow saying how hard it is. [He] woke up, started to move and do something about his dream . . . . People may not always like it. They may not want to hear your dream. May throw you in the pit . . . . But you gotta move. Dreaming the dream is important, but there is action that follows from the dream.<sup>67</sup>

Although Haywood had involved himself with civil rights activities at Harvard, it was at the Yale Law School that he threw himself into the growing movement. At the end of his first year of law school in 1964, Haywood had been hired for a summer job in the Civil Rights Division of the Justice Department. Meanwhile, voting rights workers were flooding into Mississippi for "Mississippi Summer," registering rural blacks to vote, many for the first time, in the face of the poll tax and other exclusionary practices. When the

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62. Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19 (quoting Justice Thurgood Marshall).

63. Burns, *supra* note 42, at 911.

64. *Id.*

65. Haywood Burns, *Political Uses of the Law*, 17 HOW. L.J. 760, 773 (1973).

66. Burns, *supra* note 56, at 27.

67. Haywood Burns, *A Man's Dream, A Man's Visions* (Jan. 15, 1989) (unpublished manuscript, on file with authors).

Department of Justice refused to send him to Mississippi, Haywood quit and went down briefly to join the civil rights activists and to teach. Haywood arrived in Mississippi on the day the bodies of the three murdered civil rights activists, Michael Schwerner, Andrew Goodman, and James Chaney, were discovered. Haywood kept on his office wall the Ben Shahn etchings of the three men until the end of his life.<sup>68</sup>

Judge Guido Calabresi was one of Haywood's professors during those years, and recalls him as very intellectual, yet "determined to try and change the world."<sup>69</sup> Particularly important to Haywood was his work on a major police brutality suit. New Haven was so polarized by the issue, and so notorious had Haywood become, that at the end of Haywood's final year of law school, the mayor of New Haven, Richard Lee, asked him if he was graduating and, after Haywood confirmed that he was, Lee responded, "Oh, good."<sup>70</sup>

After graduation from law school in 1966, Haywood began working with the prestigious New York law firm of Paul, Weiss, Rifkind, Wharton and Garrison. Almost immediately, however, he was offered a clerkship by former NAACP counsel Constance Baker Motley, newly appointed to the Southern District of New York and the first black female judge in the United States. Haywood was her first law clerk. From her office he joined the NAACP Legal Defense and Educational Fund, Inc. in 1967. By January 1969 he had become the first and founding director of NCBL, and by the end of that year he had resigned from the NAACP to work for NCBL full time.<sup>71</sup> Haywood possessed

68. Haywood often referred to the example of the three—two Jews and one African American—in analyzing black/Jewish relations.

69. Telephone Interview with Judge Guido Calabresi, former Professor and Dean of the Yale Law School (Sept. 19, 1996).

70. Telephone Interview with Naomi Burns (Sept. 20, 1996).

71. CUNY Law School professor and NCBL veteran Victor Goode recalls that Haywood was given only a small office, a desk, and a telephone in the back of co-chairman Floyd McKissick's office on 125th Street in Harlem. Telephone Interview with Professor Victor Goode, CUNY Law School (Sept. 15, 1996). Haywood recalled those tumultuous early years:

In December of 1968, a small group of black lawyers met in retreat in Capahosic, Virginia. . . .

Over the next several months, they organized and raised funds to bring together a national conference in the spring of 1969 attended by several hundred black lawyers. From that meeting, the National Conference of Black Lawyers launched its national program under the directorship of co-chairs Robert L. Carter and Floyd B. McKissick. . . . In December of 1969 NCBL was involved in the investigation and public outcry at the police assassination of the Black Panther leaders, Fred Hampton and Mark Clark in Chicago. Committed to representing unpopular and controversial clients who were involved in the Black Liberation struggle, NCBL was actively involved in the Panther 21 case in New York City and in support of Bobby Seale during the Chicago conspiracy trial when he was gagged and bound in the courtroom.

During the early 1970s the organization was at the center of the Angela Davis defense. NCBL played a key role in organizing Angela Davis's defense team and numerous NCBL members participated both in the extradition fight in New York state and in her successful defense in the state of California.

NCBL was actively involved in the investigation of the death of Black Panther George Jackson in California prison. Soon after his death NCBL lawyers were among the first to enter Attica prison after the Attica prison rebellion in September of 1971. NCBL lawyers played a crucial role in the united defense of over 60 prisoners who faced some 1400 felony counts

a dedication to building organizations—especially NCBL—that was rare in a litigator. He had immediately recognized the historic significance of “the creation of a strong, black organization that would be the legal arm of the black liberation struggle in this country.”<sup>72</sup> As Haywood noted, “anything from a page to a book could be written” on NCBL, the organization he was committed to until the end of his life.<sup>73</sup> Haywood managed to participate in some capacity in so many of the prominent civil rights defense cases in the decades of the nineteen sixties, seventies, eighties, and nineties that there is no way to discuss all of this work here. However, three efforts stand out, at least in their historic impact and in the impact they had on Haywood: the Poor People’s Campaign; the Attica prison rebellion; and the campaign against apartheid in South Africa.

#### A. *The Poor People’s Campaign*

At the convention of the Southern Christian Leadership Conference (SCLC) in 1967, the Rev. Dr. Martin Luther King, Jr., began formulating plans for the Poor People’s Campaign. Reacting to disillusionment with peaceful protest and the growing militancy of the African-American movement, Dr. King was searching for an alternative to urban rioting along the lines of organized mass civil disobedience, while fusing demands for economic justice and an end to the Vietnam War with his civil rights agenda.<sup>74</sup> At a press conference, Dr. King announced SCLC’s plans to bring thousands to an encampment in Washington, D.C.: “Waves of the nation’s poor and disinherited will stay until America responds [with] specific reforms, . . . until some definite and positive action is taken to provide jobs and income for the poor.”<sup>75</sup> Confrontation appeared to be in the making. While King was planning this campaign, and envisioned bringing it to the Democratic Convention that summer if its demands were not met, Justice Department officials and the Washington, D.C. police were also making preparations.<sup>76</sup> The demands of the Campaign included a \$30 billion annual appropriation for a comprehensive antipoverty effort, a full-employment act, a guaranteed annual income, and construction funds for at least 500,000 units of low-cost housing per year.<sup>77</sup>

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following the rebellion. The Attica defense was successful in winning dismissals or acquittals in the vast majority of the indictments brought.

Haywood Burns, National Conference of Black Lawyers: The First Decade 1968–1978, at 1–2 (undated) (unpublished manuscript, on file with authors).

72. *Id.* at 1.

73. *Id.* at 4.

74. See DAVID J. GARROW, BEARING THE CROSS 575 (1988); TOM HAYDEN, REUNION: A MEMOIR 260 (1988).

75. GARROW, *supra* note 74, at 582.

76. See *id.* at 595.

77. See *id.* at 595–96.

Dr. King was murdered on April 4 of that year. Response to the call for a Poor People's Campaign grew in the wake of the rebellions that rocked cities after his death, and thousands came to Washington to the encampment known as Resurrection City, a canvas and cardboard shantytown built in the shadow of the Lincoln Memorial. Echoing the Bonus Army—12,000 World War I veterans who in 1932 encamped in Washington and demanded immediate payment for wartime services<sup>78</sup>—the Campaign intended to besiege the capital, a “mule train in the lead.” With fellow Legal Defense Fund attorney Leroy D. Clark, Haywood acted as counsel during the whole campaign.<sup>79</sup> Describing Haywood then as “a black hippie,” Professor Clark recalls that after King was killed, people in the Campaign were in a state of semidepression, and a sense of chaos prevailed.<sup>80</sup>

Haywood was a central figure in the negotiation process to obtain a permit from the city of Washington to allow the construction of Resurrection City—one of the very few times such a thing was permitted. He was “professionally unbelievably aggressive but in his personal interactions had a kind of sweetness,” Clark recalls,<sup>81</sup> that made him invaluable for the negotiations. Haywood was also involved in defense work for the demonstrators who were continually being arrested, and his time was consumed by his role as counsel to what was, in effect, a small city within a city. Resurrection City had internal problems, including teen runaways and threats to the leadership. Clark recollects Haywood “zipping around town on a motorcycle,”<sup>82</sup> briefcase under one arm, pulling up to the courthouse.<sup>83</sup>

The Campaign had a profound effect on twenty-eight-year old Haywood. His dedication, energy, and absorption impressed those who worked with him at the time.<sup>84</sup> Haywood vividly recalled a particularly momentous demonstration at the Supreme Court, and, in a peroration Haywood used in speeches for years, he analogized this demonstration to the Burger Court's later shutting its doors to racial minorities and the poor:

One day in the summer of 1968 I stood on the steps of the United States Supreme Court building and watched as throngs of people advanced from the valley below. They were part of the encampment on the Washington Monument grounds known as Resurrection City—a conglomeration of tents, wooden shacks and lean-tos that

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78. See, e.g., FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 180 (1934).

79. Telephone Interview with Leroy D. Clark, Professor, Catholic University Law School (Oct. 9, 1996).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*



were temporary homes for representatives of the Poor People's Campaign . . . .

Looking out at the approaching mass of Native Americans in full headdress and regalia, at Southern blacks wearing bib overalls and full Afros, at muscled, mustachioed Chicanos from the Southwest, at gaunt, pinched-faced whites from Appalachia, at sprinklings of Asian and Pacific peoples, I knew there was nothing in my Yale Law School training that had prepared me to deal with this situation. The people were angered by a recent Court decision that had undermined the treaty rights of Native Americans, and they had come to register their grievance. As I watched them near the steps, my peripheral vision took in hundreds of D.C.'s finest, truncheons ready. When I rushed forward to advise King's successor, the Rev. Ralph Abernathy, and my other clients of their legal rights, I heard behind me a loud rumbling sound, and turned in amazement to witness the massive bronze doors of the Court tremble and groan as they slowly closed, and then banged shut.<sup>85</sup>

The scene came to be emblematic of the themes that dominated Haywood's life: his concerns with minorities and the poor and how in their lives "the dominant experience has been one in which the law has been the mechanism by which the generalized racism in the society has been made particular and converted into policies and standards of social control."<sup>86</sup>

#### B. *Attica Means—Fight Back*

In a speech commemorating the twentieth anniversary of the Attica prison takeover, Haywood recalled one of his children, Seth, filling out a college application. His son wrote of the time when, as a small child, he sat upon the shoulders of a former Attica prisoner and was carried through the streets of Buffalo, New York, in the midst of massive street demonstrations as the crowd chanted "Attica means—fight back."<sup>87</sup>

Like his son, Haywood never forgot Attica. The prison rebellion at New York's Attica prison, outside Buffalo, lasted from September 9 to September 13, 1971.<sup>88</sup> It ended, as Haywood wrote, "when State forces gassed, and then fired upon, unarmed inmates. Troopers and guards fired automatic weapons, deer rifles, and shotguns loaded with dum-dum bullets—weapons which are outlawed by the Geneva Convention even in time of war. They killed and wounded inmates and hostage guards alike."<sup>89</sup> Haywood, then Director of the

85. Burns, *supra* note 58, at 264.

86. Burns, *supra* note 50, at 89–90.

87. Haywood Burns, *Attica Means . . .*, Speech at the National Lawyers Guild, New York City Chapter Commemoration (Mar. 6, 1992).

88. For a comprehensive narrative history of the Attica riots, see TOM WICKER, *A TIME TO DIE* (1975).

89. Burns, *supra* note 58, at 264.

NCBL, joined by lawyers from the National Lawyers Guild, went to Attica immediately after the killings. Getting into the prison, they reasoned, might at least prevent further reprisals. The lawyers were not let in. They went to court and obtained a court order; still they could not get access. Finally, they were admitted. Haywood compared the actions of the prison officials to those of George Wallace:

Lawyers were kept out of Attica, medical personnel were kept out of Attica despite a federal court order. We went to federal court when we were barred and got a temporary restraining order from the Western District of New York and still prison officials refused to permit entry. Corrections officials stood in the prison house door the way George Wallace stood in the school house door. It was interposition and nullification all over again.<sup>90</sup>

Haywood believed that the events at Attica demonstrated "just how far [the state] was prepared to go against those who rebel . . . [W]hen the usual techniques of control and cooptation fail, massacre and torture will be relied on by leaders in our country. We learned to never say 'never' again."<sup>91</sup>

New York State, rather than accept any culpability for the deaths at Attica, responded with prosecutions of inmates: "Millions of dollars were provided for the prosecution of 62 prisoners for 1,400 crimes, carrying the collective possibility of thousands of years in prison."<sup>92</sup> Haywood saw it as his responsibility to get involved in defending those prosecutions. In 1973, he asked Herman Schwartz, then a law professor at the University of Buffalo Law School, for a teaching job so he could support himself while becoming coordinator of the legal defense of the "Attica Brothers," as the defendants came to be known. He was promptly hired, and moved with his family to Buffalo, a move to a "strange and unfriendly city"<sup>93</sup> involving sacrifices, as Derrick Bell observed, few were willing to make at the time.<sup>94</sup>

Professor Schwartz described Haywood's journey to Buffalo as "the most inspiring odyssey by anyone I have ever known."<sup>95</sup> The legal defense was in "deep trouble."<sup>96</sup> Each of the sixty-two inmates had his own lawyer, and yet

90. Burns, *supra* note 65, at 771.

91. Burns, *supra* note 87. Nelson Rockefeller, New York's Governor at the time, approved the final assault to retake the prison. Haywood was outspoken about Rockefeller's role. He spoke out against Rockefeller's nomination for Vice President and in a 1974 Senate hearing charged him with responsibility for a "human tragedy that ranks in the annals of national disgrace with My Lai." Karen W. Aronson, *W. Haywood Burns, 55, Dies*, N.Y. TIMES, Apr. 4, 1996, at D21 (quoting testimony of Burns before Senate Committee on Attica Prison Uprising).

92. Burns, *supra* note 87.

93. Telephone Interview with Herman Schwartz, Professor, American University, Washington School of Law (Sept. 9, 1996).

94. Telephone Interview with Derrick Bell, *supra* note 18.

95. Telephone Interview with Herman Schwartz, *supra* note 93.

96. *Id.*

they wanted to launch a joint defense. There were political and personal problems, a lack of resources, and, as it turned out, a prosecution spy on the defense team. Haywood, Professor Schwartz recalled, "had the hardest job in the world."<sup>97</sup> It was the first time he was teaching full time; he would spend every day in court and work late into the night on the defense and preparing for class. "He could not have had more than three or four hours of sleep a night."<sup>98</sup> But it was Haywood, more than anyone else, several colleagues of the period remarked, who "held the defense together" and insured that it was indeed a joint defense. Other Attica lawyers recall that Haywood had the respect of both the Attica Brothers and the lawyers, that he was a consensus builder, spending time with and listening to all involved. Attorney Margaret Burnham recollects that Haywood brought something rare to the Attica defenses: "[T]he notion that people not trained in law had something to say about how their trials were to be conducted."<sup>99</sup>

Attica Brother Frank "Big Black" Smith, political director of the defense team while Haywood was legal director, remembers how closely they unified their efforts, resisting suggestions to separate the legal strategy from the political elements of the defense.<sup>100</sup> Smith, released from Attica in August 1973, had been in D block during the rebellion; he was charged in five indictments for the murder of two inmates and with thirty-four counts of kidnapping. All charges were eventually dismissed. He acknowledged that it was not always smooth, that he and Haywood came from different cultures with different lifestyles. Yet they became friends. Together they successfully resisted all efforts to splinter the defense camp. Observing Haywood's testimony at the Senate hearing concerning Nelson Rockefeller's role at Attica, Smith recalled him as "a magnificent man; and a black man at that. He was good and warm; it was rewarding to see a black person with that consciousness and guts, yet who was well liked and could fit in."<sup>101</sup>

Haywood also represented prisoner Shango Bahati Kakawana in one of the early criminal trials—a trial that ended in victory. Shango told the judge that it was a David and Goliath situation because the state was so powerful and had so many resources. However, as Haywood remembered,

the dedication and ability of the Brothers and their supporters, resulted in victories in court and in the public arena. The selective enforcement of the law by the Special Prosecutor was exposed, and

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97. *Id.*

98. *Id.*

99. Telephone Interview with Margaret Burnham, Attorney (Oct. 4, 1996). Burnham added: "This had begun in the Angela Davis and Panther 21 cases, but Attica really put it to the test. He was able to win remarkable respect for that point of view from all concerned, even the very traditional bar" *Id.*

100. Telephone Interview with Frank "Big Black" Smith (Oct. 4, 1996).

101. *Id.*

the prisoners ultimately prevailed in the criminal cases. It was David and Goliath, but, as in the original, David won.<sup>102</sup>

### C. *The Campaign Against Apartheid*

A third major campaign of Burns's life was his twenty-year fight against South African apartheid. He is credited with perceiving, "with characteristic prescience . . . that the Black struggle here required international alliances."<sup>103</sup> Haywood led NCBL delegations to Cuba and other Caribbean nations and participated in the work of the International Association of Democratic Lawyers in South Africa, Namibia, and Ireland. Visiting Namibia in 1989 for the celebration of that country's independence, Haywood made his first attempt to enter South Africa, but the government would not grant him a visa. After the end of apartheid, he greeted President Nelson Mandela on a visit to Harlem and served as an adviser on drafting the country's Interim Constitution. South African friends remarked that Haywood was very supportive of the anti-apartheid movement and possessed an internationalist spirit rare among Americans. He was among those moving NCBL and the National Lawyers Guild to work closely with African National Congress leaders Dullah Omar, now Minister of Justice, Kader Asmal, now Minister of Water Affairs, and Albie Sachs, now Constitutional Court Judge.<sup>104</sup> In 1994 Haywood worked as an election observer under the auspices of the Lawyers' Committee for Civil Rights Under Law, Southern Africa Project. Based in Mmbatho, the capital of the former tribal homeland of Bophuthatswana, Haywood's group covered an enormous territory, starting out before sunrise for two-hour drives into the countryside.<sup>105</sup>

It was there he met and became friends with South African attorney Felicia Roberts, who was killed with him and Shanara Gilbert in the April 2 accident. She was the coordinator of election monitors in that region for the Independent Electoral Commission, which was charged with overseeing the fairness of the voting. Monitoring involved resolving disputes when objections were made by the incumbent National Party to particular voters. Haywood and law professor Henry Richardson, a longtime friend, were teamed; they were "very effective in talking it through; everybody got to vote."<sup>106</sup> As one friend recalls, "For Haywood it was a spiritual experience—he was so in love with South Africa."<sup>107</sup> Indeed, in an interview later he suggested that the "potential is there for South Africa's multiracial democracy to become one of the great

102. Burns, *supra* note 87.

103. Marlene Archer & Margaret Burnham, *Haywood Burns & Shanara Gilbert: In Memoriam*, NCBL NOTES 3 (Spring 1996).

104. Telephone Interview with Penny Andrews, Professor, CUNY Law School (Oct. 3, 1996).

105. Telephone Interview with John Payton, Attorney (Oct. 3, 1996).

106. *Id.*

107. Telephone Interview with Penny Andrews, *supra* note 104.

nations in history. If they do, we're going to be going over there to find out how they did it."<sup>108</sup> Indeed, the election experience was a reprise for Haywood. He remarked to Margaret Burnham at the time that "it was like coming full circle back to Mississippi again."<sup>109</sup> In Cape Town, as Minister of Justice Dullah Omar recalled, "Haywood strode into parliament, I almost wanted to say like a colossus. . . . [F]or him that was a symbolic moment."<sup>110</sup> After listening to President Mandela and Justice Albie Sachs address the parliament, Haywood called home and described the event as the most joyful moment of his life.

For years, Haywood had hosted African National Congress organizers, many of them exiles like Sachs, who lost an arm in the struggle against apartheid. After Haywood's death, Sachs flew to Cape Town from Johannesburg to address the hastily organized memorial. In contrast to his time with the "legal smart set"—prominent lawyers of goodwill who played an important role in the international opposition to apartheid—Sachs described Haywood as a different sort of lawyer. Through Haywood, Sachs recalled,

I was introduced not simply to the ideas of constitutionalism and human rights but the lived experience of American people who themselves were fighting for their human rights on their own soil in their own context. So the bridge was not simply an intellectual bridge between what we were trying to overcome—apartheid in this country—and what American lawyers felt as part of international universal ideas, it was a human heart-to-heart . . . kind of bridge.<sup>111</sup>

Sachs remarked that in a fragmented and atomistic society, Haywood

somehow managed to pick up the warmest, the best, the most generous, the most insightful qualities of all the different communities and sectors and through him I was able to be in touch with a kind of united America that I found hardly anywhere else. It had a lot to do with his ideas but even more to do with his person. He lived it, he felt it inside his soul; he was a free liberated citizen of the United States of America . . . .<sup>112</sup>

Chiding himself for a touch of "South African arrogance," Sachs concluded that Haywood could have been a wonderful member of their movement,

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108. Jeff Jones, *Into Africa*, 20 EMPIRE ST. REP. 11 (May 1994) (quoting Burns)

109. Telephone Interview with Margaret Burnham, *supra* note 99.

110. South African Minister of Justice Dullah Omar, Remarks at the International Association of Democratic Lawyers Commemoration of the Lives of Haywood Burns, Shanara Gilbert, and Felicia Roberts, Cape Town, South Africa 2 (Apr. 4, 1996) (transcript, on file with authors) [hereinafter IADL Commemoration].

111. Albie Sachs, Justice of the Constitutional Court of South Africa, IADL Commemoration 1 (Apr. 7, 1996) (transcript, on file with authors) (provided courtesy of Leora Mosston).

112. *Id.* at 1–2.

because “he had that openness, that generosity, that breadth, that didn’t make him tame, didn’t make him weak, didn’t make him non-combative, but somehow made him a little bit ahead and always capable of bringing people together—a great unifier.”<sup>113</sup>

What these African experiences meant to Haywood is best said by him, in his last extemporaneous remarks from the floor, to the International Association of Democratic Lawyers’ Conference on April 1, 1996, in Cape Town, just hours before his fatal accident:

I think that one of the most moving experiences in my life on the subject of moving from liberation movement to state power occurred when I was fortunate enough to be an observer at the election in 1994 and saw in rural Bophuthatswana people coming across the hills and across the ages, dragging canes and ivy poles and walking on crutches to vote. That same day, I stood in a prison yard and watched prisoners cast their ballots in the yard and at midnight that night, I watched as the old South African flag was brought down and a new South African flag went up. . . . I thought that was perhaps the most moving day of my life. Today I think that experience has at least been rivaled.

For all of us, these worldwide usual suspects sitting in the chamber there this morning, the chamber where the laws of apartheid have been passed, with the people being in control. It was just an amazing experience in view of the kinds of concerns we had today about transition from liberation movement to state power. To see Albie Sachs there as a justice of the Constitutional Court and Dullah Omar in there as the Minister of Justice and Kader Asmal as a Minister as well. So I think that at least for me, I have some understanding about what it is we are trying to address here today and I think we are all affected by this in our own personal way. I mean, I could die now . . . .<sup>114</sup>

#### IV. UNFINISHED

Among the many gatherings held around the country after Haywood’s death was the Buddhist memorial service and lay ordination held for Haywood at the Zen Community of New York, in accordance with tradition, following the forty-ninth day after his death. At the ceremony, Roshi Bernard Glassman gave him a Buddhist name: Ko-Kai An Gyo, meaning “the eternal handshake and peacemaker.” The name celebrated Haywood’s rare ability to link diverse peoples and groups. This ability is reflected in his writings; it is even reflected in the condolences received by his wife, Jennifer, which ranged from a personal letter from President Bill Clinton to a polite emissary from Nation of

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113. *Id.* at 2.

114. Haywood Burns, Remarks at International Association of Democratic Lawyers’ Conference, Cape Town, South Africa (Apr. 1, 1996) (transcript, on file with authors) (provided courtesy of Eric Sirotkin).

Islam Minister Louis Farrakhan. Yet not only was he a consummate diplomat in the broadest sense, he also believed in organization and contributed mightily to the building of countless funds, boards, committees, and groups.<sup>115</sup> Among his notable achievements, his organization-building work for the National Conference of Black Lawyers, the National Lawyers Guild, and the Center for Constitutional Rights stand out. His predecessor as Guild president, Barbara Dudley, recalls how often she sought out Haywood to participate in difficult negotiations for the “gravitas he would bring.”<sup>116</sup> “When Haywood entered a debate,” she observed, “it would always raise the tenor and lower the shrillness.”<sup>117</sup>

One of his last projects, a dream deferred since the NAACP days, was a law firm in Haywood’s beloved community, Harlem, in an elegant nineteenth-century townhouse on Convent Avenue. Along with partners Robert Van Lierop and William Schaap, Haywood practiced international law and literary representation, and counseled groups and businesses that were seeking to revitalize Harlem. Thanks to Van Lierop’s efforts, the block is now named for Haywood. From South Africa, Haywood was faxing a motion to dismiss disciplinary charges against an NCBL attorney who had told a reporter outside the courthouse that a judge’s ruling “clear as black and white . . . was a racist decision,”<sup>118</sup> and conferring on a motion for admission to the New York bar of an ex-offender CUNY Law School graduate.<sup>119</sup>

Another of his last projects was a new book, a collection of views on the future of race in the twenty-first century. He had written letters to prominent African-American leaders, ranging from Roger Wilkins to Louis Farrakhan, inviting contributions. The book was conceived during his year as Senior Scholar in Residence at the Yale Law School in 1994–95, following Haywood’s resignation of the CUNY deanship. Judge Calabresi described Haywood during that year: “He was still young, he was always reaching out and open to new ideas. . . . Haywood was ready to start out again; that is the tragedy. . . . He was not a burned-out volcano.”<sup>120</sup> One of his delights about

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115. His resume includes trusteeships or directorships ranging from the Asian American Legal Defense and Education Fund to the Fund for Modern Courts, from the New Press to the Franklin and Eleanor Roosevelt Institute. In addition, Haywood received numerous awards from community and civic groups, neighborhood organizations, and academia, including the National Emergency Civil Liberties Committee Tom Paine Award in 1992 (which particularly pleased him, as he had always admired Paine and Paine’s home was not far from Haywood’s). He was the Presenter of the Franklin D. Roosevelt Four Freedoms Award to Justice Thurgood Marshall, another of his heroes, in 1991; the American Bar Association Section on Litigation gave him its first Annual Pro Bono Professional Responsibility Award in 1989; he received the Black American Law Students Association Service Award in 1980; and he received the award for Best Teacher, New York University School of Law in 1976.

116. Telephone Interview with Barbara Dudley, Former President, National Lawyers Guild (Oct. 2, 1996).

117. *Id.*

118. Telephone Interview with Sarah Diane McShea, Attorney (Sept. 20, 1996).

119. Telephone Interview with Neal Wiesner, CUNY Law School graduate (Nov. 11, 1996).

120. Telephone Interview with Judge Guido Calabresi, *supra* note 69.

that year was his law school office, overlooking a small cemetery where lay the brilliant historian and founder of the Niagara Movement, W.E.B. Du Bois. Haywood was researching Du Bois's life, and conceived of the volume to carry into the next century Du Bois's prophetic words that open his 1903 masterpiece *Souls of Black Folk*: "The problem of the Twentieth Century is the problem of the color-line."<sup>121</sup>

Dearest to his heart of all his projects, however, was his family. Haywood was both an exuberant public man and an intensely private man. Of that which he has left behind, nothing was closer to his heart than participating in the flowering of five young people: Seth, Amilcar, Jeremiah, Haydee, and Ata. He indeed lived a life of service, a life profoundly "of use" to the larger community, but nothing gave him greater joy or pride than the intimacy of this extended family life. That this family life was cut so short can only be considered a tragedy. It is a tragedy shared by all of us who were touched by this man of extraordinary accomplishment and proportionate humility, for whom the greatest measure of human life was "to be of use" and who, by that measure, achieved greatness.

Haywood stood for something that is all too rare. He could have been devastated by this country's shameful treatment of black Americans. But he was not. He could have turned his back on those less successful than he at overcoming this treatment. But he did not. He could have made a fortune and sought fame. But he did not. In this divided society that exploits difference, his voice has been one of the strongest in saying we could live together. He did not underestimate the difficulty in doing so and understood that major injustices had to be remedied. His unique voice was strong, but not strident. He spoke with civility and great feelings of love.

Studying Haywood's life, we aspire to be less harsh, more willing to listen to those with whom we disagree. We realize one can adhere to principle without alienating those around us—and that one *must* adhere to principle, consistently. We always thought of ourselves as standing shoulder to shoulder with Haywood, but realize that he was far ahead of us. He had a profound understanding of our society and of what was necessary to reach the goal of a fair and just America, an understanding honed over a lifetime of thought, study, and practice. This necessity had thrilling moments, even glamorous moments. But it also entailed work common as mud, for forty years, often against appalling odds.

Haywood understood that change would not be brought about solely by bringing an important case to trial. He knew that schools, organizations, and community institutions were urgently needed, and he built them, brick by brick. He knew that professionals from the "underserved" were needed, to be trained to represent the "underserved." And these professionals had to

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121. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* at v (New York 1994) (1903).



remember from where they came and—as we heard him admonish the Judicial Friends, New York’s predominantly African-American judges’ organization—those people who made such sacrifices to make their own careers possible. For this work he will be remembered as a builder; out of this work have come several generations of black, Hispanic, Asian-American, and women lawyers. Among them, Haywood has left many, many “Haywoods.”

As Haywood mused, “[i]f there is the permanence of racism, there is also the permanence of struggle.”<sup>122</sup> But he remained a fighter and an optimist. Upon receiving the Tom Paine Award from the National Emergency Civil Liberties Committee, Haywood observed that “[t]he nation we seek has yet to be . . . . Our work remains, and,” he reminded us, “like Paine, while it remains, let us carry on that work from crisis to crisis, from liberation struggle to liberation struggle, from arena of injustice to arena of injustice, with a constancy of principle and a commitment to right that is unflinching.”<sup>123</sup>

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122. Haywood Burns, *The Content of Our Character*, NATION, Nov. 16, 1992, at 605, 606 (reviewing DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992)).

123. Haywood Burns, *Not Yet Spring*, Speech on Receipt of the Tom Paine Award from the National Emergency Civil Liberties Committee 6–7 (Dec. 3, 1992) (transcript, on file with authors).

