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## Jack Greenberg: Living Greatly in the Law

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## IN MEMORIAM

### JACK GREENBERG: LIVING GREATLY IN THE LAW

*John C. Coffee, Jr.\**

In 1886, Oliver Wendell Holmes, Jr., then a Professor at Harvard Law School, gave a talk to the students of Harvard College, which included a much-quoted line: “I say—and I say no longer with any doubt—that a man may live greatly in the law . . . [H]e may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.”<sup>1</sup>

Holmes set a high standard for greatness. It was not enough for him that a lawyer succeed in “the greedy watch for clients and practice of shopkeepers’ arts,” but rather he had to “wreak himself upon life.”<sup>2</sup>

Few can meet this standard, but Jack Greenberg is one of the clearest examples in our time of someone who surpassed it with ease, “living greatly” in the law in his own distinctive way—more understated and less rhetorical than Holmes but still attaining “the unattainable.” I recognize, of course, that Jack would have strenuously resisted the term “hero” being applied to him. Down to earth, modest, and never flamboyant, he nonetheless never ceased to “wreak himself upon life.”

This was evident even at an early age. During World War II, at the age of only twenty, he was the deck officer on a tank landing ship and piloted it onto the shores of Iwo Jima under intense enemy artillery fire to withdraw the wounded. Later, he participated in the battle of Okinawa and commanded a landing craft in the invasion of Ineya Shima. (I suspect this experience under enemy fire prepared him well for his later career as a litigator in sometimes very hostile environments.) But Jack was not simply a brave junior officer. Angered by the open racial prejudice that he witnessed in the Navy, he spoke

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1. This speech, entitled *The Profession of the Law*, was given on February 17, 1886, and was later included by Holmes in a volume of his essays, suggesting that he took it as a serious effort. Oliver Wendell Holmes, Jr., Assoc. Justice, Mass. Supreme Judicial Court, *The Profession of Law*, in *Speeches* 22, 22–23 (Boston, Little, Brown & Co. 1891). This was not long after the publication of his major academic work, *The Common Law*, in 1881, and Holmes’s biographers have assumed that Holmes already saw himself as working to meet this standard. See G. Edward White, Holmes’s ‘Life Plan’: Confronting Ambition, Passion and Powerlessness, 65 N.Y.U. L. Rev. 1409, 1430–31 (1990). Other historians agree that Holmes consciously embodied this ideal of “living greatly in the law.” See Ruth Gavison, Holmes’s Heritage: Living Greatly in the Law, 78 B.U. L. Rev. 843, 845 (1998).

2. Holmes, *supra* note 1, at 22–23.

out, sometimes confronting superiors about racial mistreatment. Once, he was threatened with a court martial by a superior officer for his alleged insubordination when he tried to obtain the release of a black sailor from the brig (eventually, in the first of many legal victories, Jack succeeded in obtaining that sailor's release).

After World War II, Jack returned to Columbia and entered Columbia Law School. There, he encountered another man whom I would describe as having lived "greatly in the law": Professor Walter Gellhorn. Although remembered today largely as a leading architect of the Administrative Procedure Act, Walter Gellhorn spent the post-War era as the embattled defender of civil liberties against the attacks of Senator Joseph McCarthy and others.<sup>3</sup> In his second semester, Jack took a vaguely titled course called "Legal Survey" taught by Professor Gellhorn. The title was deliberately vague so as not to raise the hackles of conservatives in an era often characterized by anticommunist hysteria, but the course's goal was to enable students to work for civil rights organizations, preparing complaints, briefs, and memoranda. Jack quickly found his calling and continued to work for civil rights organizations throughout his law school career. On Jack's graduation in 1948, Professor Gellhorn recommended him to Thurgood Marshall for a position with the NAACP's Legal Defense Fund and Education Fund (LDF).

At LDF, Jack again achieved extraordinary success almost immediately. In 1950, Thurgood Marshall assigned him to sue to desegregate the undergraduate college at the University of Delaware.<sup>4</sup> This was the first case to attack segregated colleges.<sup>5</sup> Litigating in state court, Jack Greenberg and Louis Redding (then the only black lawyer admitted to the Delaware Bar) convinced the Delaware Vice Chancellor (Collins J. Seitz, who later became a famous name in corporate law) that the black and white state colleges in Delaware were fundamentally unequal and thus that black students had to be admitted to the University of Delaware. Jack won this first victory at the ripe old age of twenty-five.<sup>6</sup>

But cases challenging segregated universities were only a prelude to attacking segregation frontally at the public school level. In July 1951, Jack and Louis Redding again teamed up to file *Belton v. Gebhart*<sup>7</sup> in the Delaware

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3. Based on over thirty-six years at this law school, I will offer the view (which I cannot prove) that Walter Gellhorn in the period of the 1950s and early 1960s would have been the overwhelming choice of the Columbia Law Faculty for Dean but never was chosen because the university feared his association with radicals. Of the people I have known in academia, Walter Gellhorn is one of the clearest examples of a person who lived "greatly in the law," and he was Jack Greenberg's mentor.

4. See Jack Greenberg, *Brown v. Board of Education: Witness to a Landmark Decision* 49–53 (2004). Because of the Supreme Court's earlier decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), dealing with law school admissions, it was clear that university segregation was an easier, more vulnerable target than public school segregation. Earlier, Jack had also worked on *Sweatt*.

5. Greenberg, *supra* note 4, at 49; see also *Parker v. Univ. of Del.*, 75 A.2d 225 (Del. Ch. 1950).

6. Greenberg, *supra* note 4, at 52.

7. 87 A.2d 862 (Del. Ch. 1952); see also Greenberg, *supra* note 4, at 83–85.

Chancery Court; it was one of several parallel state cases that LDF had brought to attack school desegregation across the nation.<sup>8</sup> Passionate as he was about racial discrimination, Jack understood that in litigation, preparation is more important than passion. He thus quickly recruited a team of renowned social scientists, including Kenneth Clark and Jerome Bruner, to testify as to the inherently inferior nature of a segregated education.<sup>9</sup> Again, Vice Chancellor Seitz heard the case and was clearly impressed with the expert testimony that Jack had orchestrated and on which Seitz expressly relied. The decision, while narrower than the LDF had hoped, was still “the first case to order black children admitted to white schools.”<sup>10</sup> Later, at the now mature age of twenty-seven, Jack argued the Delaware portion of the consolidated cases in *Brown* before the Supreme Court.

While the Delaware college case was pending appeal, Jack faced a critical career decision. Another Columbia Law professor—Milton Handler, then the reigning deity in antitrust law—offered Jack a job with his law firm. Jack had worked as a student research assistant for Professor Handler, liked him, and saw needed economic security in the offer. But he declined, reasoning to himself that, as Holmes had insisted, a man “should share the passion and action of his time at the peril of being judged not to have lived.”<sup>11</sup> Thereafter, Jack was never far from the “passion and action of his time.”

When Thurgood Marshall was appointed by President John F. Kennedy to the Second Circuit in 1961, Marshall insisted that Jack Greenberg succeed him as Director-Counsel of the LDF, and Jack served in that role from 1961 to 1984, overseeing the LDF’s continuing battle to dismantle school desegregation. Overall, he argued some forty cases before the Supreme Court, winning not only school desegregation decisions but critical decisions on the death penalty<sup>12</sup> and discrimination in employment.<sup>13</sup>

Space limitations preclude any list of Jack’s awards, honors, and citations,<sup>14</sup> but a word must be said about his versatility. Not simply a litigator, he served ably as Vice Dean of Columbia Law School and later Dean of

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8. Ultimately, the Supreme Court consolidated five state cases under the *Brown* case caption. See *Belton*, 87 A.2d 862, aff’d, 91 A.2d 137 (Del.), aff’d sub nom. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). For an overview of these cases, see Steven J. Crossland, Note, *Brown’s Companions: Briggs, Belton, and Davis*, 43 Washburn L.J. 381, 395 (2004). Jack also was a critical member of the trial team in the Topeka, Kansas, school case that gave *Brown* its name. In this era, he was everywhere.

9. See Greenberg, *supra* note 4, at 83–85.

10. *Id.* at 87.

11. *Id.* at 56–57.

12. See *Furman v. Georgia*, 408 U.S. 238 (1972).

13. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

14. Mention must, however, be made of the Presidential Citizens Medal awarded to him in 2001, when President Bill Clinton observed that “[i]n the courtroom and the classroom, Jack Greenberg has been a crusader for freedom and equality for more than half a century. [and] he has helped shape a more just society.” LDF Remembers Civil Rights Icon Jack Greenberg, NAACP Legal Def. & Educ. Fund (Oct. 12, 2016), <http://www.naacpldf.org/press-release/ldf-remembers-civil-rights-icon-jack-greenberg-1> [<http://perma.cc/W8U4-CTYZ>].

Columbia College. Also, in an era when few men entered the kitchen, he delighted in cooking and even co-authored a cookbook. A prolific author, he wrote on topics far removed from civil rights law (such as Franz Kafka). To many of us, there seemingly was nothing that he could not do—and well.

Still, the most important point to make about Jack Greenberg is that he never stopped fighting. Approaching the age of ninety and afflicted with a serious illness, he still traveled to Europe and walked dangerous back alleys in remote cities in the Balkans to investigate and fight discrimination against the Roma. In Holmes's phrase, he simply "wreaked himself upon life." That explains the essence of Jack Greenberg. Although he was a devoted parent and husband and had a variety of other interests, the purpose of life for him was to fight evil and right wrongs. To live was to continue that fight, and Jack lived robustly to the end.