

Through the Gale - Rights Lawyering in the Age of Abolition

[00:00:00] **Olatunde** Welcome to Through the Gale, a podcast in which we investigate how law and lawyers are addressing racial injustice and working to create a multiracial democracy. I'm Olatunde Johnson, a professor at Columbia Law School. One of your hosts.

[00:00:31] **Olatunde** This is our first episode and we tackle how protests and the movement for Black Lives are reshaping the practice of civil rights lawyering. In this episode, your hosts will be me, Olatunde Johnson and Andres Estevez, a second year law student at Columbia. Let me turn it over to Andres.

[00:00:49] **Andres** 2020 was cataclysmic. The police killings of George Floyd and Breonna Taylor electrified the nation. Protests erupted around the world. There were protests in every American city lasting through the summer. This took place during a pandemic that affected all Americans, but was catastrophic for people of color. In the United States, the movement for Black Lives gained momentum by this confluence. The movement went far beyond policing. It called for an end to systemic racism in America. Lawyers have long been at the center of battles to address racism in courts. But these protests were taking the fight to the streets. Protesters and advocates on the ground were asking for something more than court ordered rights or social reform. They were asking for transformation and reimagination of institutions built on subjugation of black people and white supremacy. And they don't see courts as a locus for change. So the battle takes this new form. It leads us to ask how will civil rights lawyering change? I knew I wanted to speak with Ashok Chandran to understand the role of civil rights lawyers in social movements. He is assistant counsel at the NAACP Legal Defense Fund and works on police misconduct and fair lending cases. To begin, I asked what gave him the impetus to pursue civil rights?

[00:02:09] **Ashok** My pathway to civil rights law was sort of based on personal experience. I grew up in New York and in my middle school years, experienced sort of racialization in real time. I was in middle school when the September 11th terrorist attacks happened, and as a South Asian sort of very visibly brown person in an area where people were all of a sudden uniquely aware of and suspicious of brown people and middle schools, already a time when kids are first starting to grapple with what race means and how it impacts their lives. I really started to think more seriously about what race meant in America and what impacts it continued to have on people.

[00:02:47] **Andres** A childhood and teaching experiences with racial injustice inspired his curiosity for civil rights. I needed to know next when he first came to understand that terminology.

[00:03:02] **Ashok** When I was in school and teaching, you know, we read or we'd teach about people like Thurgood Marshall in the civil rights movement era, great civil rights litigators, people who argued against formal legal structures that oppressed people. And you'd read about these great victories that they achieved in courts. And we get the half of the story in public education that Brown versus Board was great and changed everything, or that litigation at the Supreme Court or by places like LDF transformed American Society. Which and I don't want to undermine the fact that those things really did matter for a lot of people and did help. But I don't think we talked as much about the the work that remains to be done. The fact that after Brown, most schools in the South, most districts in the South resisted it and refused to follow the ruling that it took another decade plus of litigation in order to even get places to start desegregating. And that even today, 2021, the vast majority of those desegregation cases that were filed in the fifties and sixties are still active and still, you know, being litigated by LDF and the Department of Justice, because I think I had sort of a conception of civil rights lawyering that was, you know, you file the case, you win the case, and then everything's fixed. And that the benefit of some experience in some age is is very much not the case.

[00:04:28] **Andres** Ashok's early curiosity for civil rights led him to Columbia Law School. After he graduated, he clerked and then worked as a litigator at a private civil rights law firm. That was until he realized he wanted to be part of something else.

[00:04:41] **Ashok** Most of my work was in the space of police misconduct and some fair housing and fair lending work, and that was great. And I really have so much respect for the firm and the work that it does, and I learned a lot of skills there. But as I got further into my career, I felt like I want I wanted less to spend my career helping individual people without as much of an eye towards how their individual cases were emblematic of broader problems, which I think is sort of no knocks against the firm, but is sort of endemic to the practice of being a for profit civil rights firm.

[00:05:19] **Andres** So Ashok left the private plaintiff side to become an associate at a nonprofit, the NAACP Legal Defense Fund. He told me he was still a litigator. I asked him how his work changed. He pointed out areas of overlap, but more importantly, the key differences.

[00:05:31] **Ashok** I think the main differences that I would identify are at LDF. Every case that we litigate is with an eye towards a broader vision for what it means in terms

of racial justice. We are mostly concerned with how they fit into what LDF vision of a racially equitable injustice society is, which wasn't as much of a consideration at the firm. Of course, you know, a civil rights law firm is going to have certain political views and is not going to take cases that, you know, compromise or are at odds with those views. But the for profit model is less concerned, I think, with changing the law in a good way, as opposed to helping people who are wronged under the existing legal framework.

[00:06:17] **Andres** So the LDF provided us with the kind of civil rights work that inspired him as a younger person to intervene, the kind of work that wrestles with society's systemic injustices. With this new experience in both the for profit and nonprofit sides, I asked Ashok whether his idea of civil rights lawyering had changed since he studied Thurgood Marshall in college. He told me I did.

[00:06:37] **Ashok** Because most of my career has been practicing as a civil rights lawyer in the wake of sort of great national reckonings about race in some ways. I graduated right shortly after Michael Brown was killed. And that was a moment when, much like last year, the summer of 2020, there was this intense national buzz about policing and racism in police departments and how black people are uniquely subject to police violence and police brutality. So civil rights lawyering had already started to change by the time that I became a formal civil rights lawyer. And I, I don't know how much of it is sort of my familiarity with the world versus the nature of it changing. But what my practice has ended up looking like is really different than what I think. I thought civil rights lawyering was when I was in college.

[00:07:31] **Andres** So civil rights lawyers are practicing in the wake of multiracial movements to end racial injustice, and it's changing their practice and perception of civil rights lawyering. Before we talk more about this evolution, let's shift our attention back to litigation. Ashok and I spoke about three discrimination cases. He told me a lot more goes on after winning a case.

[00:07:49] **Ashok** Floyd, Davis and the third companion case, Ligon versus the city of New York, were sort of the three big stop and frisk cases that were brought against the New York City Police Department between 2008 and 2011. And Floyd, like you like you know, it went to trial in 2013. It was a really big deal that the federal court made these findings, that the NYPD had been engaged for decades in explicit racial profiling and consciously and intentionally violating both the 4th and 14th Amendment rights of New Yorkers by one, stopping people without any real suspicion, and to stopping people because of their race and that they'd been ignoring reports and evidence of this being a widespread problem for decades. And I was in law school when the Floyd liability

decision came out, and I remember thinking, “Wow, this is a huge deal” because I grew up in New York during stop and frisk, and I remember sort of what that era was like. And after the liability opinion came down and there was all this celebration, the case really dropped out of public conversation in ways that I think are reflective of what we were talking about with, you know, people think about the big cases being litigated and won and then things are fixed. A lot of people don't know that the Floyd and Davis remedial portion of the case is still ongoing. Floyd, Davis and Ligon remain active cases that are being worked on. I work on Davis actually here at LDF, even though it's 2021 now, 13 years after Floyd was filed and eight years after the court found that the New York City Police Department was liable. And that's because a lot of the work we do is in this monitor shape of looking at how practices within the NYPD are going, how the numbers of stops have changed over time, what the racial breakdown of those stops tend to be, what's effective as an intervention? What can the NYPD do internally? What has to be done by the outside oversight mechanisms? So there is a lot more that goes into the cases than just filing and even winning the case. After you win the looming question that I think a lot of lawyers don't think as much about in advance is, you know, what do you do with the win? Where do you take it from there?

[00:10:03] **Andres** So civil rights litigation has its limitations. Ashok told me that it's not just arguing a case and emerging victorious. He told me what most people don't see with respect to those victories.

[00:10:12] **Ashok** One of the things that I think, and I feel like I've said a lot today, capping what litigation can do and almost poo poo what you can achieve through litigation. But I don't want to completely undersell it and say that litigation can't do anything because I think the entire reason that we have the ability to be in a monitor ship in the Floyd Davis and Ligon cases is because in the litigation done by Thurgood Marshall and Constance Baker Motley, they created this very broad remedial framework for cases that seek injunctive relief on behalf of civil rights plaintiffs. So to go back to Brown, for example, I think most people are familiar with the actual Brown decision that declared segregation unconstitutional in public education. But I think a lot fewer people know about the subsequent decade of litigation that led to Green, which is the second big school desegregation case in which the Supreme Court endorsed the very affirmative obligations that school districts have once they've been found to have engaged in explicit racial discrimination. And Green sets forward a number of factors that school districts have to obtain complete constitutional compliance and before they can be deemed to have cured the de facto segregation. So I think a lot of people think about a desegregation lawsuit or any lawsuit involving intentional race discrimination as simply striking down the policy and then moving on. But I think litigators like Thurgood Marshall and Constance Baker Motley were much more acutely attuned to the idea that

that's not enough. You can't just go in and strike down a policy of explicit racial discrimination and then move on as if everything was fixed because there's going to be affirmative work that has to be done to undo the legacies that we've been living with, the legacy of that explicit segregation or that explicit discrimination. So the same thing is what allowed us to get into this monitorship in the Floyd, Davis and Ligon cases.

[00:12:11] **Andres** So the solutions to some intentional discrimination cases often require affirmative out of court work in addition to litigation. Let's turn our attention back to how social movements fit in all of this. Ashok offered a look inside how the Legal Defense Fund responded to the death of George Floyd and the Movement for Black Lives.

[00:12:29] **Ashok** Last year, the summer of 2020 was sort of a, I think, flash point and a way that I've never seen in my life, where the tragic killing of George Floyd sort of captured American attention in a way that very few other things that I've seen have. It was a moment where I think everyone was forced to confront some of the realities of policing that a lot of us who have lived through or worked in the field of police misconduct have been talking about for decades, generations, even. Because I think everyone who saw what happened to Mr. Floyd had to acknowledge that something egregiously wrong happened. So I think LDF was prepared and in some significant ways to respond, as I'm sure you were aware, after the video of Mr. Floyd's death kind of went viral. There were protests across the country. Nearly every major American city, cities internationally, every state saw mass movements to protest what happened to Mr. Floyd. But also draw attention to how Mr. Floyd is not unique in his experience with police. People in every state have been killed by police officers who have ranged from reckless to intentionally malicious. And what I think people often don't pay enough attention to or talk about enough is how intensely local a lot of the protests were. In New York, the protests were talking about a number of people who were killed by police, by New York City police in the Bronx, in Brooklyn. And I think that that level of conversation about both what a national issue this is and what a local issue is was really important.

[00:14:15] **Andres** So what does a civil rights lawyer do in response?

[00:14:18] **Ashok** Unfortunately, I think a lot of police departments across the country responded to that wave of protests by engaging in exactly the same type of misconduct and excessive use of force that had created this sentiment in communities everywhere. So LDF currently represents protesters in two separate cases, one in Philadelphia and one in Louisville, both of which we filed pretty quickly after protests began to seek injunctive relief and money damages on behalf of protesters who were subjected to some pretty egregious uses of force, things like tear gas, sound cannons, pepper balls,

flash bangs like military grade weaponry that was designed specifically for the Iraq war, that's now being used with abandon in our streets. So those cases remain ongoing, and through them, we're hoping to obtain real changes to the way that certain police departments are responding to protests and what they're empowered to do and what they're prevented from doing, when people are exercising their First Amendment rights, particularly on such important issues as police misconduct and black lives. On the other end of the spectrum, in response to this kind of wave of protests, there's been a concerted effort by certain legislatures to crack down on how much people can engage in First Amendment conduct and protest for what they want to see happen in policing. Like in Florida, which is probably the most restrictive bill that was passed. But Florida is not alone. You know, Oklahoma passed a bill. Bills are being considered in Tennessee. All of which place significant burdens on people's rights to assemble people's rights to march and demonstrate. So LDF filed suit against the Florida bill on behalf of a number of local partners and actually a couple of months ago was successful in obtaining a preliminary injunction, blocking the governor from enforcing the most egregious provisions of the bill that, by his own admission, would have counted any, essentially any celebration of black history as a protest that could be criminalized under the bill. So that's another case where we continue to litigate sort of what protesters should feel they have the power to do and what states can do in response to protests. Because we're in this moment now, I think, where the effort to suppress specifically racial justice protests is more powerful than I think I've ever seen it.

[00:16:33] **Andres** So this is how the social movements shape Ashok's practice at the Legal Defense Fund. His role was not only representation and litigation, it also included community organizing policy work. But how do we define civil rights lawyering today? Ashok said this.

[00:16:46] **Ashok** What I see my generation as doing more as a common practice than I think perhaps older generations of civil rights lawyers may have been as explicit about is recognizing the limits of what litigation and lawyering can do. Having practiced now and living through sort of the moment that we're living through, I think it's hard to hold on to that belief that filing cases is the only or maybe even the main way that we make a change. No amount of litigation in the world could have stopped, in the moment, what happened to Mr. Floyd. Litigation is limiting. Litigation can stop the worst of the worst. Litigation can help after the fact. People get some kind of compensation for what they experienced. But litigation isn't the thing that changes people's hearts and minds. It's not the thing that gets at the root of how racial bias and racial disadvantage still structure most aspects of our society. My generation doesn't seem to put the same emphasis on litigation only. I think people have a much more holistic conception of civil rights

lawyering as litigation plus something else, whether that's trying to get bills passed or trying to help with community organizing and do more than just filing cases.

[00:18:11] **Andres** I want to return to what Ashok said earlier about the new holistic view of civil rights lawyering. He defined it as litigation, plus something else, and that's something else can be the exercise of collective power between lawyers and those most directly impacted. I wonder, though, who is leading that exercise?

[00:18:30] **Ashok** I think the ideal civil rights partnership is one where directly impacted communities have the idea, have the solutions for what they want to see happen. And as lawyers, we have started the pathway to get their voices into a forum where they can make a difference. Because oftentimes, unfortunately, the most directly impacted people are also the ones who are facing the, you know, most significant barriers to participating in policy making discussions. But a lot of people don't appreciate the very fact that someone's story gets put out there in the form of a complaint, in the form of a deposition. And this person who feels like they were subject to this egregious misconduct has a venue to tell that story, to put it out there, to make people listen to them, I think is powerful in and of itself. LDF wins a lot of cases, but LDF also loses some cases. And the way I think about losses is sometimes a court won't agree, or sometimes you won't be able to show by a preponderance of the evidence that something happened. But there will still be a record at the end of the day of what happens to our clients. Their stories aren't going to just fade into the night, unheard by anyone.

[00:20:00] **Andres** It may be that there really is no contradiction between the aspirations and tactics of lawyers and those of social movements. I spoke to Professor Alexis Hoag from Brooklyn Law School, who you will hear from again in our episode about a lawyer's role in the abolition movement. Particularly for this episode, I wanted to ask Professor Hoag if she saw the tactics of the Movement for Black Lives as a challenge to traditional forms of civil rights lawyering.

[00:20:23] **Alexis Hoag** I don't know that I would necessarily characterize the tactics of the Movement for Black Lives as a challenge to traditional civil rights lawyering. I think that the movement isn't as concerned with the tactics that civil rights lawyers are using. I think they're more concerned with liberating black people. And I don't know that they see themselves in opposition to civil rights lawyers. Depending on who you talk to, they may say we work hand in hand, shoulder to shoulder with. But I think really it's important to recognize some of the fundamental differences between the way that individuals organizing, the collective is organizing with movement for black lives and then the tactics that civil rights lawyers use. And I think that's a helpful sort of framework to think

about, to get at your question. And civil rights lawyers typically, traditionally work within an existing and existing power structures, so the law, courts, legislation. And what I see happening with Movement for Black Lives, which really coalesced in 2014-15, around the time of the trial for George Zimmerman, who killed Trayvon Martin, and then obviously in the wake of Michael Brown's murder in Ferguson. So it wasn't just, you know, in 2020, the groundwork had been laid for at least, you know, five years. But I see that the Movement for Black Lives is really looking to dismantle, takes issue with existing power structures and really wants to disrupt existing power structures. And instead of sort of working within the confines of filing a court case and waiting for the court to issue a remedy, they're more concerned with empowering individuals, and recognizing that expertise and knowledge doesn't exist just sort of at the top. With regard to the Movement for Black Lives, they rely on the collective power of many to seek change and a remedy. They seek to harness the knowledge and again the expertise of individual people and elevate those voices and their experiences. So it's really not so much that the movement is challenged, civil rights lawyers, but that they're operating with a different model for change. And my hope is that civil rights lawyers and I think they are, are taking notice.

[00:22:55] **Olatunde** This is Olatunde Johnson again. While Andres was speaking with Ashok, I was trying to put these questions about civil rights lawyers in historical perspective. These aren't new questions, after all. We knew we had to go back to have a foundational discussion of civil rights lawyering and its tactics. And that meant going back to the NAACP and the NAACP Legal Defense Fund's path to the Supreme Court and Brown versus Board of Education. Our law school, Columbia Law School, is a central part of that story. Jack Greenberg, who worked on Brown versus Board of Education, was a faculty member from 1970 until he passed away in 2016. Professor Greenberg was one of the lawyers on Thurgood Marshall's team in Brown, and so was Constance Baker Motley, who graduated from Columbia in 1946, and later became the first black woman to serve as a federal judge. Motley and Greenberg were following the path of Charles Hamilton Houston, who was one of the key architects of the legal strategy to overturn formal segregation. So much of how we understand civil rights lawyering comes from their method and that's a method of carefully built incremental litigation to secure a win in courts or movement for black lives implicitly, and sometimes explicitly, poses a challenge to this strategy. To understand this history and the role of courts, we turn to Ted Shaw, a former Legal Defense Fund attorney and another Columbia Law graduate, who now teaches at the University of North Carolina. I knew that Ted Shaw would be the best person to talk to about the history and philosophy of the NAACP Legal Defense Fund. He was the associate director of the Legal Defense Fund when I was a younger lawyer there. He worked with lawyers like Julius Chambers, who was head of LDF, and Jack Greenberg, who I mentioned earlier. He's also

functionally a historian of the civil rights movement. And this is through his firsthand experience and an incredible amount of reading. In talking to Ted, it's important to understand that he didn't grow up in the South. He grew up in the 1960s in New York City, in the Bronx. This was after some of the formal legal rights had been won in cases like Brown, but when he could see from all around him that more needed to be done to make those rights real. When I talked to Ted, I asked him why he decided to be a civil rights lawyer. He said that it started in high school in the Bronx.

[00:25:23] **Ted Shaw** If I go back to that time, yes I was one of the African American students at Cardinal Spellman High School in the Bronx, and we were about 10% of the population. And Cardinal Spellman was a very good high school, if I may say so. Myself and Sonia Sotomayor and I were classmates and have remained lifelong friends. But in high school, I was very much an activist and one of the things that made a huge difference in my life was the assassination of Martin Luther King Jr in 1968. And one of the events that followed that was that the then archbishop of New York, Cardinal Cooke, wanted to do something about issues of race. And in his Catholic way, he settled on creating a program for young black men that would encourage them to become priests. Well, that became the archbishop's leadership project, but it quickly became apparent that the young black man from Harlem and the Bronx, we weren't interested in becoming priests. We were interested in the whole black consciousness movement and civil rights issues. And that, in turn, raised my consciousness, which was already, if I may say so, myself, significant. You know, I read voraciously not only black history, but also history in general. And at some point, I decided that I wanted to be part of the most significant events of my lifetime, my young life at that time, which was on which were the civil rights movement. And so the question was, how could I get engaged in that?

[00:27:43] **Olatunde** Well, Ted didn't become a priest. He made his way to Wesleyan University. And then from Wesleyan University, Ted found his way to Columbia Law School, and after graduation to The Department of Justice's Civil Rights Division.

[00:27:55] **Ted Shaw** While I was in law school, I took a seminar taught by Jack Greenberg. And Jack, as you well know, was the second director, counsel of the Legal Defense Fund. He was one of the lawyers who worked on and argued in the Brown cases. And I had the good fortune of meeting him while I was in law school. However, it was not easy to get a job at either the Justice Department or the Legal Defense Fund and the Legal Defense Fund, you didn't apply to it at the time. They called you and told you that they wanted you.

[00:28:43] **Olatunde** Ted relished working at the Department of Justice. He worked on significant housing and school integration cases. I loved when he told us what it meant for him as a young black lawyer to represent the United States in court.

[00:28:54] **Ted Shaw** Over a period of almost three years, I worked at Justice. And I have to tell you that to go to court, I've never forgotten this, and to get up in front of a judge and say, you know, "Your Honor, I'm Theodore M. Shaw and I represent the United States of America," that was always a thrill for me. I never took it for granted.

[00:29:21] **Olatunde** But working at the Department of Justice became a lot more fraught after Ronald Reagan was elected in 1980, and Ted found himself often in conflict with the political appointees. He decided to leave.

[00:29:33] **Ted Shaw** I got a call from Jack Greenberg one day out of the blue, and Jack offered me a job at the Legal Defense Fund, which was you know, I had two dream jobs. One was Justice, Civil Rights Division, and the other one was the Legal Defense Fund. And this just I mean, I couldn't have been more happy and excited, given that I was not going to stay at Justice to be able to go and work for the NAACP Legal Defense Fund.

[00:30:11] **Olatunde** Working at the Legal Defense Fund was Ted's second dream job. I asked him to tell me about the history of the Legal Defense Fund. And Ted began with something that was very familiar to me, which was distinguishing the NAACP from the NAACP Legal Defense Fund.

[00:30:26] **Ted Shaw** The NAACP Legal Defense Fund, created in 1940 was not, or is not the of NAACP. It was born out of the NAACP. But those of us who work for the Legal Defense Fund spent a lot of time explaining to people that it had become a completely separate organization, and institution. And you grow up, you become independent of your mother and your father. You may still have that last name, but you're not your mother and you're not your father, you know? And so that's the relationship between the Legal Defense Fund and the NAACP, the NAACP being a membership organization, the Legal Defense Fund being the first public interest law firm of its kind. But it is a law firm, a public interest law firm dedicated to fighting for racial equality and justice. So I found my way to the Legal Defense Fund.

[00:31:28] **Olatunde** I was always interested in the fact that when we were at the Legal Defense Fund, we always made that distinction. And I thought in part it was to claim a point of pride, of this particular organization that had been built. But I wondered if there was anything else behind it, if there was some reason that we needed to distinguish a

membership organization, as you said, from a legal organization. How do you think about that question?

[00:32:00] **Ted Shaw** Membership organizations are important, vitally important. You know, we think about how that changed the country and it wasn't everything, but it played a crucial role in ending American apartheid. I want to be clear, I wish I could say it ended segregation in this country, but it didn't. You know, we still struggle, as you know, and as you know, and you do and have done against racial segregation and discrimination. But it ended legalized apartheid in this country and did it through law. The belief that we could go to court and use the Constitution, which wasn't always true because for most of the years following the end of slavery, through the era of reconstruction and right on through I mean, there was a moment of daylight, but then we had Plessy versus Ferguson and other cases. And until 1954, the 14th Amendment didn't mean what it was meant to me. It didn't do what it promised. And in 54, we began to see the 14th Amendment and the Constitution have some meaning. But the Legal Defense Fund played this key role in doing that. Most of the people who are, you know, with us today are listening. Probably you haven't heard of Charles Houston, one of the great lawyers in this country. I started to say public interest lawyer. I could have said African American lawyers, but that wouldn't do him enough justice. He was one of the great lawyers in this country, period.

[00:34:09] **Olatunde** Ted told us about the history of LDF and he began by talking about how the ideas behind the Legal Defense Fund started in the 1920s and 1930s, and that these lawyers who were working them were impeccably trained and credentialed. It was almost as if you needed this kind of training to build a successful battle against Plessy v Ferguson. And Plessy was the case that infamously held that legalized separation of races could be equal.

[00:34:40] **Ted Shaw** Charles Houston, born in the 1920s or something like that in Washington, D.C., son of a lawyer, went to Amherst College back in a time when there were almost no black students in Amherst. His cousin, William Hastie, was also an Amherst student and he became the first black federal judge and time great lawyer. Great judge. But you know, at that time, Charles Houston was a top student, graduated, may have been Phi Beta Kappa and went on to Harvard Law School. Think about that. You know, at that time in the 1920s, and graduated from Harvard Law School and went back to Washington, D.C., practiced with his father and began to do all kinds of work that small practitioners and solo practitioners did at that time, but also began to do some civil rights cases representing black folks who were discriminated against. The short of it was he also began to teach at a night law school at that time. And that night law school would become Howard University. He would become the dean of Howard University,

and he was relentless in his expectations of his law students. He would tell them, look to the left, look to the right. One of you wasn't going to be here, you know. And he had this saying, which has meant so much to so many of us over the years. He said that a lawyer is either a social engineer or a parasite on society. He was talking about lawyers as agents of social change and in particular changing America. When it came to the institution of and the institutions of racial discrimination, and Jim Crow, one of his top students, Class of 1933, was Thurgood Marshall, graduated number one in his class. And I think second in the class was Oliver Hill, as you know, from Virginia, who became one of the great lawyers. He litigated the Virginia desegregation case that was part of Brown, and he taught many others. And Charles Houston became the founder of the NAACP Legal Defense Fund, or at least he mentored Thurgood Marshall, who became the founder and the first head of the NAACP Legal Defense Fund. No Charles Houston. No Thurgood Marshall. No Brown versus Board of Education. He didn't live to see Brown. He died four years prior to the Supreme Court's decision. But Thurgood Marshall and the others who, including Jack Greenberg and Oliver Hill and the others, who litigated Brown the day that decision or those decisions came down, they thought about Charles Houston. And most Americans don't know who he is. We should all know who he was.

[00:38:31] **Olatunde** This was the history that preceded Ted Shaw. By the time Ted came to LDF, it was well after Brown, but LDF was still figuring out how to fight for substantive equality. I wondered if that next phase of the racial justice struggle could be achieved through courts without social movements.

[00:38:51] **Olatunde** You had on the books a lot of what you have described as the end of formal legal apartheid, right? Through the Brown versus Board of Education and its progeny. But you're also facing at this time the question about whether or not law as conceived as litigation is going to be enough. How did you think about that moment?

[00:39:14] **Ted Shaw** I've come to say and believe that that law, civil rights lawyers and the work that we do and have done without activism is like a ship, without water, you know, without an ocean. It's not going to go very far, if anywhere. There's a distinction between lawyers and activists that we weren't activists. And there are lawyers who think of themselves as activists, and there are different theories of lawyering. But I think that lawyers sometimes can turn, and I've said this many times, can turn activists into bystanders. And I think it's important for activists to continue their work.

[00:40:02] **Olatunde** Ted believes that you need activists, but lawyers are decidedly not activists.

[00:40:08] **Ted Shaw** When lawyers are activists, and this is somewhat conservative small C, but I acknowledge it. But it also is small C in the way that the legal defense fund has worked over the years. Thurgood Marshall in some ways, and Jack Greenberg and Jim Nabors and the others who ran the Legal Defense Fund believed that the judges in the federal courts had to be clear on what the agenda was of the lawyers who represented their clients and who came to the Supreme Court, to any lower federal courts to argue the cases that they were not so much political as they were dedicated to the interpretation and application of the law. They didn't have political agendas. Their clients may have, but they themselves were more apolitical. Now, nowadays, that might seem naive to a lot of people, but it was in a time in which the federal courts were listening to the lawyers of the Legal Defense Fund. And I remember hearing Jack say, you can't be outside of the courtroom and inside of the courtroom at the same time. You know, you had to decide where you wanted to be. Let me give another example of this, and it involves a lawyer who was very much progressive. I miss him dearly. He had been a Legal Defense Fund Lawyer. He was the first law clerk for Constance Baker Motley, former Legal Defense Fund lawyer, who was the first black woman federal judge. And this lawyer was well-known for being progressive. He was somebody I met when I was in law school, and I came to admire him tremendously. And I remember when I got out of law school, I worked with him, we were battling against a parte and there were demonstrations at the South African mission in New York City. And I wanted to march in these demonstrations. And he said, "Teddy, we don't need you to march. There are lots of people who can march. Anybody can march. We need you to get people to help get people out of jail. You can do that as a lawyer." And I remember that moment struck me. The difference between being an activist and being a lawyer in many ways was exemplified by that moment. And so I hope that's a good example about what I mean about the difference between activism and lawyers. That lawyer, by the way, was Haywood Burns, who would later become the dean of CUNY Law School, a heavily public interest law school. And he tragically died in a car accident in South Africa, where he was at a conference. And I miss him all these years later and always will.

[00:43:53] **Olatunde** I want to talk about how you think lawyers and people who are racial justice or civil rights lawyers, how they should relate to the social movements that are happening today. And what I see is not so much that the movements reject courts and lawyers. They just implicitly don't think of it as being the terrain in which change is going to happen. They talk about building political power and they do look at legal reforms, but their eye really is on having the politics drive change, and activism drive change. They also are thinking more ambitiously in some ways, or they would term it more ambitiously, not about integration into a society that is structured the way it does, but has a little bit less hierarchy. But many of the modern day movements around black

lives are really thinking about we can build a more radically inclusive society, right? One that's not so dependent on racial hierarchy. So it links questions of racial justice to economic justice and other forms of repair. What do you think, given this climate, what do you see as opportunities for racial justice lawyering? What do you see as its future?

[00:45:21] **Ted Shaw** You said you didn't live through the sixties, and I know. I did. And you know, I never forget those who were activists of the sixties and who were not lawyers. I sat in this chair a couple of weeks ago and I pulled the book off the shelf behind me. And I, I remind myself of Fannie Lou Hamer and her story. And I wish that people would know more about Fannie Lou Hamer, who she was and what she did, and the violence and torture that she suffered for her activism. There is no greater activist, there was no greater activist in the cause of civil rights and Fannie Lou Hamer. And I mention that because, you know, nowadays there are activists who are very much, I don't want to say the Fannie Lou Hamer is of the 21st century because I don't know that she has any peer, but I encourage people to read about her and make your own judgments. But I admire so much the young activist, the Black Lives Matter movement. You know, the women disproportionately, but that was true in the civil rights era, also, even though the men took most of the credit. But I admire these young people so much for what they are doing. Now. Today. That young woman who climbed the flagpole in South Carolina and took down bars and bars and took down the Confederate flag that flew over the state capitol. And I could think about so many of the other activists. I still think there's a need for civil rights lawyers. But as you've heard me say many times, when lawyers think that they are going to lead social movements in their role as lawyers, those movements are doomed to failure. Gandhi was a lawyer, but he didn't lead the movement for Indian independence in his role as a lawyer. Nelson Mandela was a lawyer, didn't lead the movement against apartheid and his role as a lawyer. We could go on to talk about other lawyers who were activists. They did not lead movements in their role as a lawyer. They led them in the roles...Law is inherently conservative. Courts are inherently conservative. When we look to courts as instruments of social change, we are limiting what kind of social change we can see and may see. And now we see the courts, the federal courts in particular, more conservative than at any time during our lives. I don't think, I mean it's important to have people who do that work. But I don't think we can look to the courts, certainly not this Supreme Court, as an instrument of social change. People have to be political. They have to put pressure, social, political pressure on institutions if they are going to change. I believe that in all my heart, with all my heart, in spite of the fact that I for one minute do not regret having spent my life as a civil rights lawyer and would do it all over again, but only with the understanding of the relationship of civil rights lawyers to activists. And I think that we have to be in some ways second, in our understanding of what really brings about social change. Even though at any given moment we've had tremendously

important civil rights victory. I don't know if that answered the question you're asking, but that's what I think about where we are in the 21st century now, in which also we we're really looking at the question about whether or not American democracy is going to survive.

[00:50:25] **Olatunde** Ted's dog started barking and we ended there, even though I could have spoken to him for many more hours.

[00:50:40] **Olatunde** So we figured it all out, right, Andres?

[00:50:44] **Andres** I think so. Thinking about my conversation with the show, there has been a shift in the paradigm for civil rights lawyering. You know, the old model lives on today. But we identified a shift in a way that supports social movements, and in a way that's led by the most directly impacted.

[00:51:00] **Olatunde** Yeah, I guess where these conversations leave me is seeing the wisdom of what Professor Ted Shaw offered about lawyers roles as being primarily confined to courts. But like you, I was also really interested in how civil rights lawyers, like Ashok Chandran, emphasized, working outside of courts in legislatures, for instance. And they also seem to be broadening their ambition in and thinking about how civil rights lawyers can support social movements. Ted Shaw mentioned Heywood Burns, who passed away in 1996, and he worked at LDF. He served as a general counsel to Martin Luther King Jr Poor People's Campaign. He helped found the National Conference of Black Lawyers in 1969 to serve as the legal arm of the Black Revolution. We see lawyers today helping preserve the civil society and legal rules that allow social movements to flourish, much like Heywood Burns did. Andres, as a young lawyer, do you feel hopeful given all that has happened since 2020?

[00:52:00] **Andres** I am hopeful. Our trajectory will not always be linear. There are ugly periods and ugly ideas that have traction, but we all move forward. We don't always have solutions, but rather compromises. In the summer of 2020, people did not compromise. The people were activated. As a young lawyer, that energy is something to be hopeful about. I am excited to employ the legal tools I've acquired at Columbia Law School to contribute to a broader understanding of justice.

[00:52:26] **Olatunde** I asked Ted Shaw about hope, too, and I think a nice way to conclude this episode is with what he said, which I found quite hopeful and maybe helps us think about this gap between lawyers and activists. He said Hope is a choice.

[00:53:40] **Ted Shaw** We have to choose hope. Not because there's every reason to be hopeful, but because the alternative is unacceptable. It's impossible. And so I believe in and hope. But I also believe very strongly, if you ask about this moment in younger people. I believe in passing the baton, but even more importantly, for younger people to take the baton, even if it's not passed to them. We have no choice. I mean, my generation has already begun to thin out, it pains me to say. But that's the way of the world. That's the reality of it. So I'm always excited and eally fortified when I see younger people beginning to take the baton and become activists and also younger lawyers, etc. That makes all the difference in the world. You know, one of my favorite singing groups is Sweet Honey in the Rock and Ella's song about Ella Baker. And there are these passages when you know, the refrain is "We who believe in freedom cannot rest and struggle. And I myself don't mean a whole lot. I've come to realize that teaching others to stand up and fight is the only way our struggle survives. We who believe in freedom cannot rest. And to me, young people come first. They have the courage when we fail."

[00:54:01] **ELLA'S SONG** To me young people come first, they have the courage where we fail. And if I can but shed some light as they carry us through the gale

[00:54:21] **Olatunde** We thank you for listening. This episode was produced by me all the time, de Johnson and by Andres Estévez. It was sound edited by Devin Korton and recorded by Jacob Rosati. We thank Katelin Walsch for her assistance with this podcast. Our funding is provided by the Center on Constitutional Governance and the Columbia Law School Anti-Racism Grant Program. Please check out our website for a list of books and articles and all the music we played. Some of the book recommendations come from Professor Ted Shaw. In our next episode, we turn to the private sector and ask, Can big law be anti-racist?