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ELBERT PARR TUTTLE

Alfred C. Aman, Jr. †

Elbert Parr Tuttle was a great man. What makes a person great may not always be what makes for greatness in a judge, but Judge Tuttle's character was integral to his greatness as a judge. Throughout his long and illustrious life, certain qualities were always evident: his courage and independence of mind; his creativity; his commitment to law and to justice; his compassion, and his impeccable integrity. His demeanor—grace and attentiveness are the words that come to mind—added to his ability to communicate, learn, and persuade. As an advocate and as a judge, those qualities were perhaps most often reflected in his responses to the struggles of African Americans in the context of de jure segregation in the South.

In a very profound sense, these were also qualities that made Judge Tuttle a great teacher. Justice Holmes once wrote:

[N]early all the education which men can get from others is moral, not intellectual. . . .

Education, other than self-education, lies mainly in the shaping of men's interests and aims. If you convince a man that another way of looking at things is more profound, another form of pleasure more subtle than that to which he has been accustomed—if you make him really see it—the very nature of man is such that he will desire the profounder thought and the subtler joy.¹

Judge Tuttle had this kind of impact on those with whom he worked—his colleagues in the law firm, his fellow judges, and, especially, his law clerks. He made it possible for others to believe in justice, and he made it impossible for anyone who knew him to be cynical. He seemed always to be fully present as a person in his professional life. In a commencement address he delivered to the graduates of the professional schools at Emory University in 1957, he defined professionalism in a way that also described how many of us who watched him work every day saw him: "The professional man is in essence one who provides service. . . . In a very real sense his professional service cannot be separate from his personal being."²

Judge Tuttle was an appellate court judge for forty-one years. He presided as Chief Judge of the Fifth Circuit from 1961 to 1968, at the

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¹ Oliver Wendell Holmes, Jr., *The Use of Law Schools*, Oration Before the Harvard Law School Association, at Cambridge, November 5, 1886, on the 250th Anniversary of Harvard University, in *THE ESSENTIAL HOLMES* 224-25 (Richard A. Posner ed., 1992).

² Elbert P. Tuttle, *Heroism in War and Peace*, 13 *EMORY U.Q.* 129, 138 (1957).

peak of the civil rights movement, and wrote over 1400 signed opinions. His long career tapped many sources, including his childhood. The grandson of a civil war veteran who fought in the Union Army, Tuttle was born in California in 1897. From 1908 until he left for college, he lived with his parents and older brother, Malcolm, in the multiracial society of Hawaii. After excelling as a student at the Punahou Academy in Honolulu, he and his brother went to the mainland for their college educations. They chose Cornell University. Many years later, in a speech to the Cornell Club in Jacksonville, Florida, Judge Tuttle remembered his earliest days at Cornell in this way:

When I arrived at Cornell in the fall of 1914 from Honolulu, Hawaii, I am sure I was as green a freshman as ever trod those hills of Ithaca. Within a day or two of my arrival I, like many another lost freshman, ended up down at Percy Field where the football team was having afternoon practice. I was desperately anxious to find a niche for myself in a university that simply overwhelmed me by its size and complexity. While watching football practice, I saw this alert young upperclassman, with straight black hair and ruddy cheeks, talking to Dr. Sharp, the revered coach of Cornell's football team, almost as if he were an equal. I was so terribly impressed with this young man and his brashness at approaching the throne so nonchalantly that I made inquiries as to who he was. I was promptly told, "Why, that's Sam Howe, a member of the Board of the Cornell Daily Sun." I then made a few inquiries about the Sun and, having decided if that's the way you get to deal as equals with the great men of the campus then that was for me. I can't begin to say either privately to Sam or publicly to his friends here how much his tolerating me as a Sun Board competitor meant to me when I was trying to achieve a foothold. But in any event, I am glad to take this opportunity publicly to thank him for being much less abrupt and impatient with my efforts than he had the reputation of being with other put-terers and beginners.³

Judge Tuttle devoted much of his undergraduate career to working on the *Cornell Daily Sun*. He wrote extensively for the newspaper and even worked with E.B. White, who was a few years behind him. Tuttle became Editor-in-Chief of the *Sun* as well as his senior class president. After graduation, he tried his hand as a journalist in New York City and Washington, D.C., before returning to Cornell to pursue his law degree in 1920.

Judge Tuttle was married during his law school years. He met his wife to be, Sara Sutherland, in Jacksonville, Florida on a trip he took there as an undergraduate with one of his fraternity brothers. As the Judge put it:

³ Elbert P. Tuttle, Talk for the Cornell Club of Jacksonville, Florida, 14 app.B (n.d.) (on file with author).

Within two hours of the time that I had walked down the gangplank of the Clyde Steamship Company's Steamer from New York, I met a Jacksonville girl, named Sara Sutherland. She too is here tonight. Her name is different since she now goes under the name of Mrs. Elbert Tuttle, but the girl is the same. . . .

The whole truth of the matter is that my entire life was shaped by the Cornell circumstances that originally brought me to Florida, since marrying a Florida girl and becoming acquainted with the south are the circumstances that caused me to decide to move to the south after graduating from law school in 1923.⁴

Judge Tuttle was no ordinary law student. He graduated first in his class, and he was Editor-in-Chief of the *Law Review*. Housing was a problem in Ithaca in those days, not only for students, but for faculty as well. Somehow Judge Tuttle was able to scrape together the financing needed to build an apartment house. He leased some of those apartments to his own law professors, and, as one of his classmates, Arthur Dean, noted many years later, Judge Tuttle's desire not "to offend a beloved teacher, while sticking up for his rights as a landlord, somewhat complicated his student and editorial life."⁵ The "Tuttle Apartments" still stand on Cayuga Heights Road, a tribute to the Judge's enterprise, diplomacy, and creative problem solving abilities.

Judge Tuttle chose Atlanta to begin his legal career. He and his brother-in-law, Bill Sutherland, eventually opened their own firm—Sutherland and Tuttle—and began the process of building yet again, this time one of the nation's great law firms. But the Judge always did more as a lawyer than just tend to business.

As a young lawyer, his passion for justice and his willingness to use his skills as an advocate for the broader good were well apparent. In a 1973 speech he gave to the student members of the *Emory Journal of Public Law*, the Judge reminisced about three cases in particular that he handled on a pro bono basis: *Downer v. Dunaway*,⁶ *Herndon v. Lowry*,⁷ and *Johnson v. Zerbst*.⁸ The Judge first became involved in the *Downer* case in his capacity as a member of the National Guard. In the Judge's words:

May 19, 1931, was just an ordinary day for most people. It was just an ordinary day for me until about three o'clock in the afternoon. At that moment my telephone rang, interrupting me from doing whatever a young lawyer, about eight years in practice, does in his office at three o'clock in the afternoon. It was an emergency

⁴ *Id.* at 14 app.A.

⁵ Arthur H. Dean, *An Appreciation of Judge Elbert Parr Tuttle*, 53 CORNELL L. REV. 1, 2 (1967).

⁶ 53 F. 2d 586 (5th Cir. 1931).

⁷ 301 U.S. 242 (1937).

⁸ 304 U.S. 458 (1938).

call from the Adjutant General of the State of Georgia. I was then a Major in the Georgia National Guard. General Parker told me that in a county jail situated upstairs in a sheriff's home next door to the courthouse in a rural county, approximately 60 miles from Atlanta, there were two black prisoners, one of whom had been identified by a young white woman as the perpetrator of an alleged rape the night before, and that a substantial mob of white men had surrounded the jail and were trying to storm it, intent on lynching the two prisoners. He said the local machine gun company of the National Guard had been called out and that they were on duty, but that they were powerless to protect the building short of firing their machine guns, which the mob knew quite well they would not do. He directed me to load several cases of gas grenades and proceed to this county courthouse in an effort to stem the tide.⁹

Judge Tuttle and his friend, Leckie Maddox, successfully diverted a mob of about 1,500 people, but the trial that followed this scene hardly accorded with the Judge's sense of justice:

Five days later a special grand jury was called into session, promptly indicted Downer, and the following day, on May 25th, two companies of National Guardsmen took Downer to the courthouse in sight of the scene of the riot of the preceding week, there to stand trial for his life. Conditions in bright daylight were almost as riotous as they had been on my last visit to that town. We had to line soldiers up with fixed bayonets to keep the mob out of the courtroom; each person permitted to enter was searched for weapons and some were found; and soldiers were stationed around the courtroom itself to be sure that no violence erupted.

A local lawyer of standing in the community was appointed by the court. He made no motion for continuance and no motion for change of venue. Of course, Downer was convicted and he was sentenced to be electrocuted 20 days later. We had to put him in the middle of a phalanx of soldiers to get him safely to the train and back to Atlanta to await his execution.

By the next morning my mind was in a turmoil about these proceedings. The forms of justice had been followed. Downer had been indicted by a grand jury; he had been given counsel to represent him; he had faced his accuser in open court; his fate had been submitted to a jury of twelve; and he had been given a sentence within the provisions of the Georgia statute. The lawyer had filed no motion for a new trial and the special term of court had adjourned, thus blocking any appeal on his behalf to the higher courts of the state of Georgia. Nevertheless, no lawyer of today would say that he had had a trial. Therefore, no lawyer would say that his execution would be after "due process."

⁹ Elbert P. Tuttle, *Reflections on the Law of Habeas Corpus*, 22 J. PUB. L. 325, 325-26 (1973).

Having been asked then by Atlanta's well known black lawyer, the late Austin T. Walden, later Judge Walden, to help him see if some relief could be obtained for Downer, I quickly found the language of the United States Supreme Court in the tragic case of *Frank v. Mangum*, where the Court, although denying relief, said "[w]e of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Thus began my practical education on the Constitution of the United States, and my first appreciation of the broad sweep of the "due process" clause of the Fourteenth Amendment, a new awareness of the interplay of State and Federal jurisdictions and the beginning of understanding of the majesty of a Constitution that contains the following clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."¹⁰

Downer received a new trial, but the outcome was the same. Nevertheless, the Judge continued to fight for Downer:

A number of the soldiers in the courtroom who heard the entire case tried had grave doubts as to the guilt of the accused. A number of us . . . went to the Governor's office seeking a stay of execution pending a further investigation or a commutation to a life sentence. This was denied, and Downer went to the electric chair still protesting his innocence. Thus John Downer, just as did Leo Frank, although not personally protected by it, made his contribution to the development of Constitutional Law for the protection of many others unknown to him.¹¹

The Judge's own constitutional education continued in the *Herndon* case, in which he participated with Whitney North Seymour in representing Angelo Herndon, an African American communist sentenced to twenty years on the chain gang for distributing leaflets on the courthouse steps. Ultimately, the U.S. Supreme Court reversed his conviction in 1937, thanks to the Judge's efforts. A year later, in the Judge's words:

I received a letter from a New York lawyer associated with the American Civil Liberties Union, who, like Whitney Seymour, was also working with a prominent New York law firm. In this letter, the lawyer, Victor Rothschild, asked me if I would interest myself in a case pending in the United States District Court in Atlanta. Thus

¹⁰ *Id.* at 327-28 (alteration in original) (footnotes omitted).

¹¹ *Id.* at 328-29.

commenced my interest in the landmark case of *Johnson v. Zerbst*. In his letter, Mr. Rothschild told about the plight of the young Marine, Johnson, who had been sentenced to three concurrent five year terms in the Federal penitentiary for the offense of passing counterfeit \$20 bills. He had been picked up with a fellow Marine in Charleston, South Carolina, when he sought to pay for his drinks with currency found to be counterfeit. He pleaded not guilty and was put on trial without being informed by the District Court that he was entitled to have counsel appointed to aid him in his defense. As might be expected, he made a shambles of his trial. The jury convicted him and on a three-count indictment he was sentenced to five years on each with the sentences to run concurrently. He commenced service of his term and then at the Atlanta Penitentiary he found all kinds of free legal advice from fellow inmates. Someone told him that he had been deprived of a constitutional right to counsel at his trial. He filed a petition for habeas corpus which Judge Underwood thought of sufficient gravity to appoint counsel to represent him. Upon a showing of the bare facts Judge Underwood denied the writ but made the comment: "I am of the opinion . . . that petitioners were deprived of their constitutional rights . . ." He thought it was too late.¹²

It was not too late, so far as the Judge was concerned. He filed an appeal. The Court of Appeals denied the writ, and the ACLU said there were no funds to go to the Supreme Court. That did not stop Elbert Tuttle:

I was so convinced that the trial without aid of counsel violated either the due process clause of the Fifth Amendment or the guarantee of the right to counsel of the Sixth Amendment that I couldn't turn it loose. So, after making certain from my client that he wanted to pursue the matter, I petitioned for certiorari. The Supreme Court granted certiorari and I had the pleasure of arguing the case before the Court. By a 6-2 opinion the Court held that the trial of an accused in the Federal Court without aid of counsel, unless assistance of counsel was intelligently waived, violated the Sixth Amendment. New law had been made. It is hard to believe today in light of the tremendous increase in the protections that have been thrown about Federal criminal trials and post trial procedures that as recently as 1938 such a case had to be decided in the Supreme Court.¹³

These cases are exemplary of the courage, legal imagination, and passion for justice Elbert Tuttle displayed as a young lawyer. His own career and convictions made his speech in 1956, to an ABA committee on the topic of Legal Aid and Equal Justice, even more compelling. He focused on a problem that remains with us today—the problem of

¹² *Id.* at 331 (alteration in original) (footnotes omitted).

¹³ *Id.* at 332 (footnote omitted).

assuring equal access to justice, not only as an issue of resources, but also as involving the public's understanding of advocacy and the rule of law. Judge Tuttle spoke from firsthand experience of the risks of representing unpopular clients. At the end of the McCarthy era, he reflected on the necessity of fair representation:

No one, unless he has been counsel in an unpopular cause or a cause which arouses the passions of the populace, can fully appreciate how trying it is to serve in such capacity, even though the offense is one which by its very nature excludes the possibility that the lawyer shares the guilt. How much more burdensome must it be, then, for a conscientious lawyer to fight to vindicate the rights of a client who is charged with an offense against laws whose violation brings down unanimous public contempt and where the secret intent or beliefs of sympathizers condemn them just as completely in the eyes of the public as the accused. In such a case it is so easy for the public to suspect that no one who does not secretly share such secret intent or belief would "stand in the way" of the quick and severe punishment of the accused. The representation of a client in such a case is such a burdensome matter that none but the hardest care to undertake it at best. None at all will dare assume this devastating risk if we permit the feeling to prevail that the lawyer is to be identified with his client.

. . . .

It devolves on all of us lawyers constantly to remain alert to such dangers to the administration of justice, because the right of the accused to his presumption of innocence, the right to legal representation, the right to trial by legal standards, or, as we know it, by due process, are all things that are of the very breath and being of the lawyer. Our duty as lawyers to retain this awareness is much greater because such rights are known dimly, if at all, by the layman who is aroused in a popular cause.

. . . .

Most of us who are not crusaders by nature, and especially if we do not ordinarily become involved in criminal proceedings, are too apt to become complacent about injustices that are not in some way brought home to us. This creates a serious danger to the administration of justice because too often the person who is directly affected, be he lawyer or accused, is too small a figure in our complex society for his voice ever to be heard. It is only by the constant vigilance of the leaders of the organized bar that such injustices can be effectively spotted and prevented. This is not the time for complacency. Chief Justice Warren draws upon a classical statement He related the fact that when Solon was asked how justice could be secured in Athens, he replied: "If those who are not injured feel as indignant as those who are."

We, as lawyers, cannot leave to the accused who fails to get decent representation, or to the lawyer who, having furnished it, is

punished by being identified with his unpopular client, the fight against such injustice. We must all feel outraged, because this is an injustice which, if permitted to continue, will threaten the temple itself.¹⁴

Leaving his firm, first to become General Counsel for the Department of Treasury in 1952 and then, in 1954, for a seat on the Fifth Circuit, was not easy. He loved practice and was sad to leave the firm he helped create and build. At the same time, a new challenge awaited. He looked forward to it, but he could hardly have anticipated just how challenging and important it would be.

Judge Tuttle joined the Fifth Circuit in 1954. *Brown v. Board of Education*¹⁵ had just been decided, but no one could foresee its true significance. Indeed, as some of his early law clerks have noted,¹⁶ life in his office in those early days was focused on traditional law cases and the hard work of judging. Most of the early cases were not path-breaking, but some were memorable—in a variety of ways. One law clerk recounts a case involving some very complicated oil and gas issues and a rather long-winded appellate lawyer. At one point in the argument, the lawyer had the bad judgment of asking, “Are you with me, Judge?” Tuttle replied, “No. I’ve been where you are going for the last half hour!”¹⁷ In oral argument, the Judge was always extremely well prepared, and time after time, asked the key questions. That remained a constant characteristic of his judicial style for the forty-one years he served as a judge.

As the civil rights movement picked up steam, it was clear that the courts, and especially the Fifth Circuit Court of Appeals, would play a crucial role. Judge Tuttle became Chief Judge in 1961 and served in

¹⁴ Elbert P. Tuttle, *Legal Aid and Equal Justice*, Speech to Standing Committee on Legal Aid Work and the Standing Committee of Lawyer Referral Service of the American Bar Association (Aug. 27, 1956) at 11-17.

¹⁵ 347 U.S. 483 (1954).

¹⁶ See Letter from C.V. Stelzenmuller, Judge Tuttle’s first law clerk from 1954 to 1955, to Alfred C. Aman, Jr. (July 24, 1985) (on file with author). Stelzenmuller recounts:

We both worked pretty hard until the end of June, 1955, when I left him for my present law firm. If you don’t believe it, look at the printout of opinions written by Judge Tuttle that ten-month period. The printout shows 49 Fifth Circuit opinions and one District Court opinion written by him in that period, a total of 50. I think there were a few Per Curiam’s he wrote also which did not bear his name, and at least two which were work in progress when I left, not actually decided until July.

Id. at 3. See also Letter from Philip L. Evans, law clerk to Judge Tuttle from 1957-1958, to Alfred C. Aman, Jr. (Oct. 3, 1985) (on file with author). Evans recounts:

Although I have the fondest personal recollection of my tenure with Judge Tuttle for the six months I spent as his clerk in 1957 and 1958, the work of the court at that time had not become as intensely involved with the civil rights issues as it did later on

Id.
¹⁷ Letter from James C. Conner, law clerk to Judge Tuttle from 1958 to 1959, to Alfred C. Aman, Jr. 3 (Aug. 27, 1985) (on file with author).

that capacity until 1968. Some of the most important and controversial civil rights cases in this century came to his court. Judge Tuttle's profound understanding of these issues and the challenge they posed to society was reflected in his 1966 James Madison Lecture at New York University. In that lecture, he spoke primarily about the Fifteenth Amendment and the importance of assuring African Americans the right to vote:

Notwithstanding the truth of Mr. Justice Goldberg's statement in his lecture here two years ago, "that equality and liberty were the 'twin themes' of the American Revolution," it is clear that, under the various colonial and early state constitutions, not even all free men were "equal" when it came to the right to vote.

It is perhaps one of the interesting inconsistencies of the political philosophy of James Madison that he believed the very variety of the *interests* of the mass of the people in any popular government would constitute a curb preventing the ascendancy of any one particular interest, or group, and yet he could, with some degree of complacency, accept a government whose legislators were elected solely by the representatives of a *single* well-defined class having a definite special interest, the ownership of property.

It was not until the Emancipation Proclamation created a new, easily identifiable class of citizens, having in common with each other the distinguishing characteristics of race, color, poverty, illiteracy, and lack of attachment to the land, that it became apparent that neither a commonality of interests nor the multiplicity of interests among citizens would be adequate to protect the peculiar interests of the new class. It must be borne in mind that, *politically*, the Negro population of the Southern states did not *exist* prior to the adoption of the thirteenth amendment to the Constitution.¹⁸

The Judge's understanding of the history of the South, as well as the meaning of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution enabled him to see that the struggle that African Americans were engaged in was nothing less than the attainment of their full rights as national citizens. Judge Tuttle's view of *Brown* was, thus, a broad one.

Judge Tuttle's reading of *Brown* and the Civil War Amendments to the Constitution enabled him and the court he led to marshal the forces of change in the South to dismantle the de jure system of apartheid that then existed. In so doing, he was unfailingly courageous and fair. His decisions and those of the court he led have had a

¹⁸ Elbert P. Tuttle, *Equality and the Vote*, 41 N.Y.U. L. REV. 245, 247-48 (1966) (footnote omitted).

lasting impact on the fabric of the law¹⁹ and on the lives of the individuals they affected. The Judge did not, however, always prevail, and, in many instances, his dissents clearly showed his courage and commitment to justice. Indeed, some of Judge Tuttle's dissents ultimately became law. In *Wesberry v. Vandiver*,²⁰ for example, Judge Tuttle dissented from a three-judge court decision holding that Georgia's county-unit system could not be challenged because the issues involved constituted a political question. In Judge Tuttle's view, however, the issues clearly were justiciable, and the county-unit system was unconstitutional.²¹ Writing for the majority of the United States Supreme Court, Justice Black reversed the lower court's decision on appeal, stating: "We agree with Judge Tuttle that in debasing the weight of appellants' votes the State has abridged the right to vote for members of Congress guaranteed them by the United States Constitution"²² The Supreme Court also adopted Judge Tuttle's dissenting views in the *Bond* case, where another three-judge court of which he was a part ruled that it was constitutional for the Georgia legislature to refuse to seat duly elected state representative Julian Bond because of his outspoken views on the Vietnam War.²³

Even in cases in which Judge Tuttle ultimately did not prevail, his words and his philosophy were compelling. In *United States v. Barnett*,²⁴ for example, Judge Tuttle, in dissent, would have required that Ross Barnett, Governor of Mississippi and Paul Johnson, the Lieutenant Governor, be tried for criminal contempt of court because of their attempts to prevent James Meredith from enrolling as a student at the University of Mississippi. They had been charged with willfully violating the explicit terms of a temporary restraining order issued by the Fifth Circuit. Judge Tuttle stated his views in his characteristically clear and succinct prose:

The gravity of the charges was enhanced, not lessened, by the fact that they were against a governor and lieutenant governor of a state.

I agree that the Court now has full power to continue the prosecution or to dismiss it without more. I fully respect the judgment of those who believe the public interest, including the integrity of the judicial system, calls now for a dismissal. I do not share that judgment. As I believed then, I believe now, that the public interest

¹⁹ See, e.g., Jerome I. Chapman, *Expediting Equitable Relief in the Courts of Appeals*, 53 CORNELL L. REV. 12 (1967) (discussing "the development of techniques for expediting effective appellate relief in exigent circumstances").

²⁰ 206 F. Supp. 276 (N.D. Ga. 1962), *rev'd sub nom.* *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²¹ *Id.* at 286-87 (Tuttle, J., concurring in part and dissenting in part).

²² *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964).

²³ *Bond v. Floyd*, 385 U.S. 116 (1966), *rev'g*, 251 F. Supp. 333 (N.D. Ga.).

²⁴ 346 F.2d 99 (5th Cir. 1965).

requires that a trial be held and that the guilt or innocence of these two respondents be determined.²⁵

In *Novak v. Beto*,²⁶ the Fifth Circuit dealt with a prisoner petition claiming a violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment. The prisoner alleged, and the record showed, that in the Texas prison system, prisoners were regularly subjected to conditions in solitary confinement that included a bread-and-water diet (two slices of bread and some water and one "full meal" every seventy-two hours), complete sensory deprivation, scanty clothing, and no bedding. Upon release the inmate's head was shaved bald. Prisoners were often kept in these conditions for substantial lengths of time. The record showed that one inmate was kept in these conditions for seven consecutive weeks. The majority of the court held the Cruel and Unusual Punishment Clause was not violated. The Judge wrote:

I am quite reluctant to disagree with my brothers of the majority on an issue which, I think, necessarily, involves the application of a moral code to one of society's most difficult problems. However, there is no indication that the majority and I differ as to our concept of what the moral code should be. The difference lies in our concept of the extent to which judges can "risk" permitting their "own personal moral codes" in such an area as this to be "impose[d] . . . on a perhaps unready society." For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court in *Trop v. Dulles*, the application of "evolving standards of decency."

. . . .

As to the limiting effect of the "extant law," . . . we must remember that in each of the cases referred to in the opinion in which cruel and unusual punishment was found to exist, *some* court had to take at least a short step beyond what had previously been decided. This, in fact, is the gemus of the common law. I think it is the duty of the court whose members are "deeply troubled" by these conditions to seek a means of removing them that may offer more promise than merely saying that "prison reform is primarily a task for legislators and administrators."²⁷

Judge Tuttle's greatness as a person touched nearly everyone who knew him. Those of us who were his law clerks imagined this was especially true of us; certainly, he touched us in ways that shaped our own lives and careers in profound ways. It was my privilege to work

²⁵ 346 F.2d at 102 (Tuttle, C.J., dissenting).

²⁶ 453 F.2d 661 (5th Cir. 1971).

²⁷ *Id.* at 672 (Tuttle, J., concurring in part and dissenting in part) (alteration in original) (citation omitted) (footnote omitted).

for the Judge from 1970 to 1972. Not only did I learn daily from witnessing the way he lived the law, but all of his clerks and I felt a part of a very special family. The Judge and Mrs. Tuttle welcomed us to their home and made us feel like family. When one was in their home, one saw the same great man as on the bench and in his office. No one who worked with the Judge could fail to witness and appreciate the love that existed between the Judge and Mrs. Tuttle. Their relationship was an inspiration to all who knew them, and they generously shared their love with all of the clerks.

In 1985, in preparation for an oral history project undertaken by the Eleventh Circuit Court of Appeals Historical Society²⁸ (the Fifth Circuit was split into the Fifth and the Eleventh Circuits in 1981), I was asked by the Historical Society to write each of the Judge's clerks a letter asking them to recount their impressions of the Court, Judge Tuttle, and some of the cases they worked on while they were clerks. These letters provided background for the person who interviewed the Judge as part of this project, but they also provide a variety of perspectives on Judge and Mrs. Tuttle. In what follows, I draw on just a few of these portraits. Paul Szasz, who clerked for Judge Tuttle from 1956 to 1957, noted his great appreciation:

[O]f Judge Tuttle's wide legal knowledge, his common sense, his kindness and his consequent constant search for fairness and justice and the means to achieve these within the four corners of the applicable law, his clear style and his prodigious working habits, outstanding even on a hard-working court. Then as in later years he really traveled the Circuit, driving every few weeks with Mrs. Tuttle to sit in another city. However, perhaps my experience with him was special in that I didn't own a car or particularly care to travel on my own, and so I was a constant back-seat passenger and beneficiary of the Judge's conversations—ranging from matters of law to local history and geography, to personal anecdotes and sometimes pure but never malicious gossip—and of his wife's readings. There is no doubt that he is the most distinguished human being who ever touched my life.²⁹

Other "small" incidents over the years also speak volumes when it comes to the Judge's character and the way he dealt with people. Kit Bond, now a U.S. Senator from Missouri, who clerked for the Judge from 1963 to 1964, wrote:

In another instance his gentle temper and kindness came to the forefront. At that time his drafts were being transcribed by a stenographer in New Orleans. He mailed several tapes or tapes with

²⁸ Letter from Thomas H. Reese, Executive Director of the Eleventh Circuit Historical Society, Inc., to Professor Alfred Aman (June 12, 1985) (on file with author).

²⁹ Letter from Paul C. Szasz, Director, General Legal Division, Office of Legal Affairs, United Nations, to Professor Alfred C. Aman, Jr. 2 (July 25, 1985) (on file with author).

lengthy opinions on them to the New Orleans clerk's office. By some terrible mistake, the stenographer erased the tapes on which he had dictated the opinions. When Judge Tuttle was informed of the error, he laughed . . . and began again to redictate the opinions. The stenographer and the rest of us in the office were terribly distressed for him because of the added workload, but he assured all the people involved in the error that it caused him no major problem. His kind words made all of us feel much more at ease.³⁰

Anne Emanuel who clerked for the Judge from 1975 to 1976 relates:

As always, he was careful not to use the federal long distance lines for personal use, and I remember one occasion when he was upset because another judge called him at the office to arrange a weekend social visit—and Judge Tuttle was sure the call was at federal expense. Also, he himself pasted all the Turn Off the Light When Not in Use stickers up—on each switch—during the energy crisis.

One more anecdote. On one occasion I traveled to Jacksonville with the Judge. It happened that the other Judges who traveled there for the sitting had also brought clerks who happened to be white females, and one had brought his secretary, also a white female. Clarence (. . . a youngish black man in the clerk's office in New Orleans) was there for the clerk's office. One night the clerks, the secretary, and Clarence all went out to dinner. Several of us were on the same floor of the hotel as the Tuttlés and as it happened, when we arrived back at the hotel and got off the elevator, the Judge was out in the hall The next morning, we met in the office and prepared for his day on the bench. He asked me if we had gone out to dinner with Clarence. I said yes, and that we had gone out to a nice restaurant at Jacksonville Beach, and had a nice time, etc. The Judge looked at me with tears glistening in his eyes—quite moved—and he said: "You will have to forgive me. But when I first started coming down here it would have been impossible for you to go out to dinner together—certainly to the particular restaurant you went to. And it really does mean a great deal to me."³¹

Stephen Ellman, who clerked for Judge Tuttle from 1976 to 1977, reflects on how generous the Judge was when it came to the mentoring role he performed for his clerks, as well as how the Judge never stopped learning or growing himself:

I felt, in fact, that the Judge was really not at all dependent on his clerks. He took pleasure in talking with us, and he relied on us readily, but if we fell short he calmly took up the slack. I had the

³⁰ Letter from Christopher S. Bond to Professor Alfred C. Aman, Jr. 2 (July 31, 1985) (on file with author).

³¹ Letter from Anne Emanuel to Professor Alfred C. Aman, Jr. 3 (July 25, 1985) (on file with author).

feeling that if we'd done nothing at all he would just as calmly have taken up even more slack. One result was that working for the Judge was a great pleasure—while I wanted very, very much to please him, he was free to indulge my youth. It was also an inspiration and an education, for I felt that working with him (and getting to know him and Mrs. Tuttle) revealed to me more about the elements of judging than perhaps anything I'd read in law school. The Judge's combination of ironic amusement and courageous conviction seemed remarkable to me then, and still does; and Mrs. Tuttle's role in his life of course was and is profound.

Part of his strength was also his ability to learn. He came to the court with a deep commitment to racial equality, and so he hardly needed to be taught a commitment to the Constitution, but he once said that the judges of the Fifth Circuit had been given an education on the Constitution (perhaps he said they'd gone to school on the Constitution) through the race cases, and so had come to read not only the Equal Protection Clause but also other sections of the Constitution carefully and seriously. This was no small feat, and surely it is unusual that a man grows less conservative as he grows older—yet that seems to be what Judge Tuttle has done.

I can't close without mentioning the Judge's encouragement to his clerks as they set out in the world. His clerks have gone in many different directions, and I think he has rejoiced in each, but without ever pushing me he did help me to follow my heart into public interest law, a decision that proved to be absolutely the right one but which seemed far from a sure thing to me at the time. But from a judge growing younger all the time, this support is something one can count on.³²

These reflections are all remarkably consistent when it comes to the qualities that made the Judge a great man and a great judge. We all miss Judge Tuttle very much. Yet, all that he built, all that he created is still here. His integrity and his ability to make us believe in justice also are a part of his legacy.

Judge Tuttle's greatness was derived from his private, everyday approach to life and people and his enormous capacity to love. He was always himself, always the same person, at home, on the bench and with his friends, family, and colleagues. His character defined his views of what a professional was and this, in turn, gave him the courage, vision, and legal creativity to be a great judge. Judge Tuttle lived, every day, the principles and convictions that inspired his legal imagination and transformed a nation.

³² Letter from Stephen J. Ellman, Associate Professor of Law, Columbia Law School, to Professor Alfred C. Aman, Jr. 2-3 (Nov. 8, 1985) (on file with author).