

JUNE 2004

# PILCOP: Fulfilling the Mission of Brown v. Board of Education

The work of the Law Center has been the work of making Brown v. Board of Education in its largest sense a reality in American life. Brown was about renewing the dedication of this country to concepts of equality and of justice. It reinvigorated the meaning of the 14th Amendment's "equal protection of the laws" clause. It re-created the meaning of equal citizenship.

It was not an accident that John W. Davis, arguing for South Carolina, began his address to the court by warning that a triumph for the legal principles espoused by Thurgood Marshall would reach not just to opening schools to Negroes, but to opening schools to the "mentally incompetent" as well. Nor that when southern opposition wanted to undercut the Civil Rights Act of 1964's prohibition on discrimination based on race, they proposed including with it a prohibition on discrimination on the basis of gender. The principle of equality is far reaching, as the current debate on gay and lesbian access to civil rights shows.

It was Pilcop Co-Chief Counsel Thomas K. Gilhool, then in private practice, who proved John W. Davis correct, successfully arguing in the PARC case in 1971 that provisions of Pennsylvania state law allowing schools to exclude children with retardation and other disabilities from schooling with their peers, violated the principles of Brown. And it was that year that the Pennsylvania Human Relations Commission sought its first enforcement orders against the School District of Philadelphia to require it to end the segregation of its schools.

The Law Center is an outgrowth of Brown and the civil rights movement that it evoked. Philadelphia's Bernard Segal and New York's Harrison Tweed had responded to President Kennedy's call to provide attorneys to represent victims of racial segregation in the South by forming The Lawyers' Committee for Civil Rights Under Law, and in the late sixties it established urban chapters in the North, including one in Philadelphia initially led by Ned Wolf. In 1974, leaders of the Philadelphia Bar Association converted the committee to the Public Interest Law Center of Philadelphia and broadened its mission to deal with the exclusion of any persons – women, persons with disabilities, the poor, ethnic minorities, gays and lesbians, the elderly and children from equal access to the fruits of full citizenship.

## ***Attacking Race and Disabilities Discrimination***

The original agenda was to stop the epidemic of police abuse in Philadelphia that was used to intimidate the minority community in particular, to close segregated residential institutions for persons with developmental disabilities like Pennhurst, and to attack racial discrimination in employment by major employers like U.S. Steel, Lukens Steel, INA, and the City.

As a result of Law Center cases, Philadelphia went from 12 percent minority police officers to currently more than 35 percent; women went from none to 25 percent. Over \$30 million was awarded to the minority community by the steel industry cases. Twelve hundred persons living in Pennhurst went to live in closely monitored community facilities, nearer to their families and integrated into the daily life of the full community. Embreeville Center in Chester County housing 400 persons was similarly closed, and so was a substantial part of the Western Center in Allegheny County. With

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# Philadelphia School Desegregation Case Passes Milestone

The 33 year old Philadelphia School Desegregation case passed a milestone this spring when Judge Doris Smith-Ribner approved an agreement granting the District three years flexibility in complying with the outstanding goals of the court's orders and placing the monitoring of compliance with the Pennsylvania Human Relations Commission (PHRC) and the ASPIRA led intervenors represented by the Law Center.

The case, originally brought by the PHRC under state law, not federal, to increase the physical desegregation of students within the District, is nearly unique among school desegregation cases in its focus on closing the academic gap between minority and white students, as well as the resource gap. That effort began in 1982 when the District, under the leadership of Superintendent Constance Clayton and University of Pennsylvania Law School professor Ralph Smith, with the support of the Law Center and a coalition of educational advocacy groups it formed, made academic parity the center of its desegregation plan.

In 1995, Judge Smith-Ribner rejected the plea of the Philadelphia School



Judge Doris A. Smith-Ribner

District that it had done all that was feasible to desegregate its schools. Instead, based on evidence presented by the Law Center, she found that the District was highly segregated and that there were significant differences in the resources available to the racially isolated schools – schools with more than 90 percent of students of a single race

– which accounted for more than half of the students in the District, and between the academic achievements of students in the those racially isolated schools and in the desegregated schools. The District's schools, she held, were still separate and unequal, and not all feasible steps had been taken to correct that condition. Her decision was one of the first to focus attention so explicitly on the racial gap in academic achievement.

Following the only independent evaluation of the instructional system in the District's history by a team of seven national education experts, the Court ordered a series of remedial steps be undertaken with the goal of equalizing resources and improving the quality of schooling available in the predominately racially isolated schools.

The steps included ending the six week reorganization period at the beginning of the school year, full day kindergarten, smaller class size in elementary grades, a strengthened curriculum, improved instructional practices, an adequate supply of books, increased parent involvement, increased safety and more equal teacher assignment, as well as other measures.

The attempts of the intervenors, the PHRC and of the School District to require the state to provide the funding to carry out these activities led to a finding by Judge Smith that the state was responsible for the operation

***"This is a needed accountability tool to continue to keep us focused, and the entire administration and the entire school reform community focused, on what we're about, and that is finding a way to close this gap [in racial academic achievement]."***

*Philadelphia School District CEO Paul Vallas,  
to Commonwealth Court, March 18th.*

of the District in compliance with the Human Relations Act and that the state should provide an additional \$40 million. That finding was set aside on procedural grounds by the State Supreme Court in 1998 when it reversed an earlier decision and held that new parties, like the State, could not be added during an enforcement proceeding under the Human Relations Act.

Because the District has made substantial progress towards implementing the remedial orders and is making good faith efforts to use its current funding in compliance with them, the parties negotiated to provide the District with a three year period without court supervision.

## **Public Disclosure Required**

The memorandum requires that the District provide the PHRC and intervenors with data that will enable them to assess whether the two critical goals of the remedial orders are being met: equality of resources and progress in closing the racial achievement gap. That information, to be provided annually, will be publicly available so that the entire community can remain informed of the District's achievements and failures in these two critical areas. The Law Center is seeking foundation funding to enable it to conduct that analysis and to conduct public conferences on the District's compliance.

The Law Center has been representing ASPIRA, now headed by Alfredo Calderon, and the Philadelphia Home and School Council, in the case since 1991 and working closely with Shelly Yanoff and Aldustus Jordan at PCCY and Jerome Mondesire at the NAACP, as well as other educational advocacy groups. Board Member Richard Z. Freemann, Jr. gave substantial amounts of pro bono time throughout the trial of the case in 1994 and then Board Chair Edmund Spaeth provided considerable encouragement and advice. The William Penn Foundation provided partial support for the work on the desegregation case and related school funding litigation in 1995, 1997, 1999 and 2000. Support was also received from the Samuel S. Fels Fund in 2001 and 2002. ■

# Law Center Health Case Goes To Trial

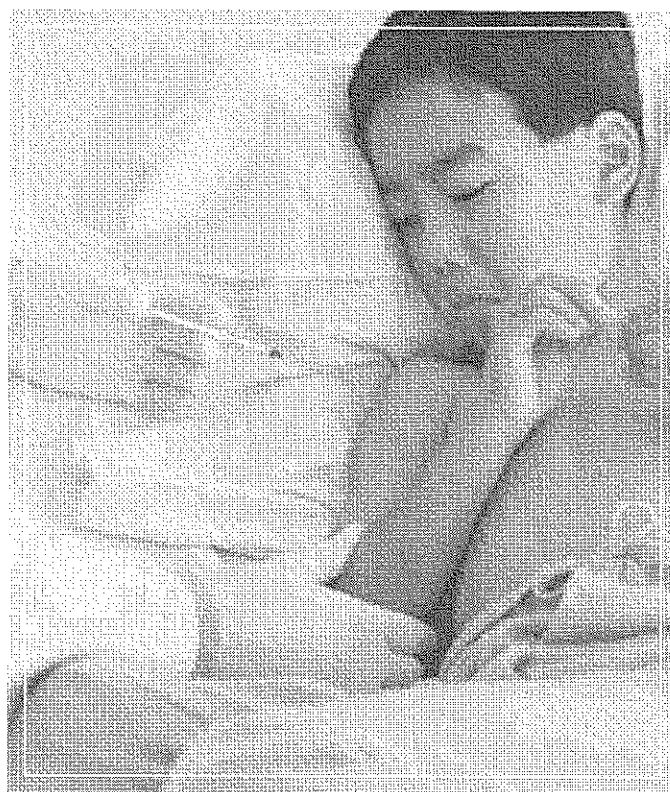
Poor children in Oklahoma – like many around the nation – are facing a crisis in securing even the most basic medical services. Fewer and fewer primary care physicians and specialists are willing to accept Medicaid as a result of exceedingly low state reimbursement rates which, until just recently, were only 72 percent Medicare rates. Physicians also refuse to accept Medicaid patients because of billing hassles and the state's bizarre auto-assignment system that randomly reassigns patients to primary care physicians, interrupting their continuity of care and creating administrative nightmares for providers. Parents are being forced to travel hundreds of miles for some specialty treatment, or otherwise be placed on waiting lists of up to four and five months for an appointment as a result of the shortages of participating specialists. *These delays probably caused the death of one child last year and are jeopardizing the health of thousands of children, despite federal laws that require states to provide prompt and effective medical services for poor children.*

## Feds Fail to Act

Working with the Oklahoma chapter of the American Academy of Pediatrics, and with distinguished Oklahoma civil rights counsel Louis and Patricia Bullock in Tulsa, the Law Center in 2001 filed OKAAP v. Fogarty to stop the state's abandonment of its federal commitments. The Medicaid Early Periodic Screening Diagnosis and Treatment (EPSDT) program provides federal funding to states to finance medical services for poor children on the condition that states comply with the requirements of the Act, including the prompt provision of all required children's health care services. Because enforcement is rarely undertaken by the federal government, the Law Center is seeking to compel states to improve their systems in order to protect the development and well being of thousands of low-income children.

This April, the Oklahoma case finally went to trial with prominent national figures including current and past presidents of the American Academy of Pediatrics, Dr. Carden Johnston and Dr. Louis Cooper, testifying. This is the first time that the full range of a state's delivery of its EPSDT has been tried on its merits. Although the Bullocks are doing the bulk of the trial work, PILCOP's Jim Eiseman spent two weeks in Oklahoma helping put on both national experts and other witnesses.

The federal government's Center for Medicare and Medicaid Services (CMS) collects statistics designed to show the percentage of the children enrolled in Medicaid who are on an annual basis receiving at least one of the Medicaid screens mandated by law. Oklahoma's performance in that area has been among the worst of the states with its statistics showing only 36-40 percent participation over the last few years those statistics have been collected.



At trial, parents testified to the obstacles they regularly encounter in attempting to get treatment for their children. One parent of a child with severe headaches told of being unable to get an appointment with a pediatric neurologist in her immediate area and having to trek hundreds of miles away at her own expense, spending the night in a hotel as the appointment was at 9 a.m. Another parent testified to how she had been auto-assigned away from her primary care physician twice in a four-month period. She had requested to be switched back to her chosen doctor only to be switched two months later to a different physician – a change which took several months to straighten out. And the testimony around care delivered to special needs children – where timely access to specialists' services oftentimes proves even more critical – revealed countless examples of children being assigned to doctors less qualified to address their unique needs.

This lawsuit seeks significant increases in the rates paid to primary care physicians and specialists so as to close the current gap between market and Medicaid rates so that Medicaid children have the same access to care as other children. The suit also seeks changes to the auto-assignment system and other administrative procedures that impose barriers to children enrolled in Medicaid getting care. ■

# Fighting Environmental Injustice

## *Minority Community Targeted for Harrisburg Waste Incinerator*

For the past thirty years, a predominantly minority community in Harrisburg, Pennsylvania has housed the municipal incinerator that serves Dauphin County around Harrisburg. The incinerator, which ceased operations last June, emitted dioxins at a rate 150 times higher than other incinerators in the state. That same community has now been targeted again to bear the pollution from new municipal waste incinerators. This time, it is the Rendell Administration's Pennsylvania Department of Environmental Protection (PaDEP) that granted the permits.

The new incinerators will burn 800 tons of waste a day and will emit over 500 tons per year of pollutants, of which 32 tons per year are PM-10, and a significant portion of this will be PM-2.5, an invisible pollutant which can cause decreased lung function, increased respiratory symptoms and disease. Those "at greatest risk include the elderly, individuals with cardiopulmonary disease such as asthma and children" according to the EPA and PaDEP.

The decision of the PaDEP to issue the permits came despite its own declaration to the EPA that the Harrisburg area already is over the ambient limit for PM-2.5 particulate and is considered a non-attainment area.

Because the EPA's 2.5 ambient air limit has been held up by industry litigation, it may not become effective

until 2004. The PaDEP chose to ignore the PM-2.5 issue despite the fact that the harm to human health continues both before and after the regulations become effective.

While the incinerators serve the entire county of Dauphin, which is 77 percent white, the two census tracts around the incinerator are 83 percent minority. Public health indicators for black residents of Dauphin County are substantially worse than for whites, with infant mortality rates 59 percent higher and age adjusted mortality rates 38 percent higher. According to a recent EPA publication, people in poorest health "are less capable of detoxifying contaminants absorbed into their systems" than people in better health.

### **State Made No Civil Rights Investigation**

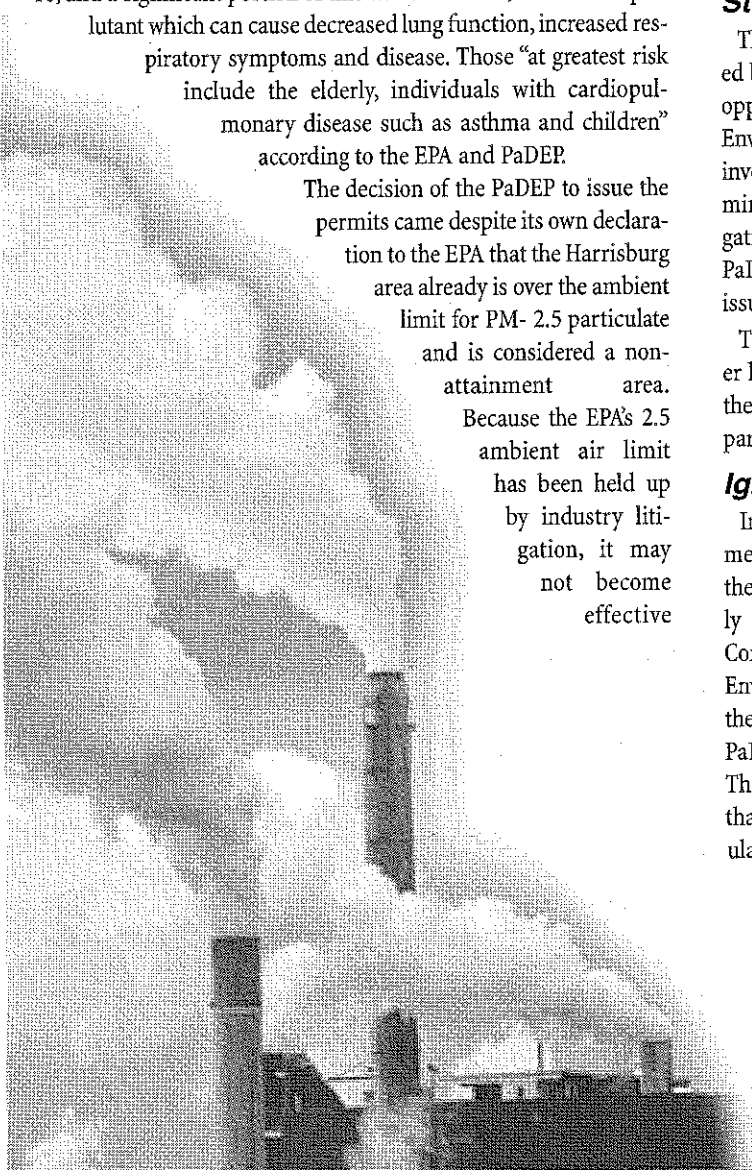
The Law Center became involved in this matter when it was contacted by representatives of Rev. W. Braxton Cooley, Sr., who organized the opposition to the Harrisburg incinerator. The appeal to the Environmental Hearing Board argues that the PaDEP chose to ignore investigating the discriminatory impact of the incinerator on the minority community thereby violating the PaDEP's Constitutional obligations to the EPA under Title VI of the Civil Rights Act of 1964. The PaDEP has designated the community a minority impacted area but issued the permits without any consideration of the impact.

The appeal further argues that the PaDEP failed to consider the poorer health of the residents in granting the permit, the effect of granting the permit in a minority area, and the non-attainment status for fine particulate emissions.

### **Ignored Recommendation**

In addition, the petition charges that the PaDEP ignored the recommendation of its own Environmental Justice Work Group (EJWG) that the Department "make improvements of conditions in environmentally burdened minority and low-income communities one of the Commonwealth's top priorities." The Law Center asked the state's Environmental Hearing Board to prevent construction until it can hear the full case and has the opportunity to send the permit back to the PaDEP for appropriate investigation and review. A decision is pending. The undertaking of such an investigation by the PaDEP is similar to that which Judge Stephen M. Orlofsky held was required by Title VI regulations in the Law Center's Camden litigation, *SCCA v. NJDEP*.

In 2003, the Law Center conducted the very first survey of Environmental Justice (EJ) activity among the fifty state Departments of Environmental Protection. Of the thirty-one states that responded, only three had EJ programs. Pennsylvania, which initially did not respond to the survey, does not even have an EJ program. Perhaps, as a reaction to the Harrisburg incinerator appeal, the PaDEP finally responded to this survey on April 27, 2004 - 9 months late - and revealed that it has never made a civil rights investigation. ■■



# Making Special Education Work

Congress placed special responsibility on the states to ensure meaningful education of children with disabilities. Unfortunately, in many states, the tradition of local autonomy has led those states to exercise the necessary leadership seldomly. This has had particularly difficult consequences for students with low-incidence disabilities where schools have to adapt the most to accommodate the student's needs and where resistance is consequently highest.

This year, the Law Center has made major advances in two of its cases against states to enforce the Congressional mandate that they ensure compliance with the central provision of the Individuals with Disabilities Education Act: an appropriate education in the least restricted environment.

## Pennsylvania

In Pennsylvania, the Gaskin case targets the overall failure of the state's districts to include children with disabilities in regular education classrooms. While eighty percent of students with disabilities are in regular education classes at least eighty percent of the time in Vermont, in Pennsylvania, that figure is below forty percent when students needing only modest speech therapy are excluded.

Although the state purports to require Districts to justify why students are not included at higher rates, the evidence assembled by the Law Center team led by Judith Gran shows that the Pa. Department of Education rarely, if ever, has rejected District explanations. Calling such monitoring lax would ascribe more substance to it than exists.

The Law Center analyzed and summarized vast quantities of data describing what was happening across the state. Given the gross failure of districts to comply with state guidelines and Pennsylvania's lack of enforcement, the Law Center asked Judge Eduardo Robreno to grant summary judgement against the State. After the argument in March, he asked the parties to make settlement proposals, and that process is now underway.

## Arkansas

In Arkansas, the Law Center's focus was solely on students with high functioning autism, called Asberger's Syndrome. We represent a single student, David Bradley, in a claim of inappropriate education by a tiny school district that received ineffectual assistance from the state and a class against the state for not making mandatory the use of best practices by school districts. A nine day bench trial was held at the end of February and a decision is awaited. ■

## Law Center Selected To Create Statewide Report Cards On Inclusive Education

The Law Center was awarded a multi-year grant from the Pennsylvania Developmental Disabilities Council in the amount of \$213,000 to research the state's 501 school districts, develop a rating system and issue report cards based on inclusive practices for children with disabilities. The Law Center's Barbara E. Ransom and Judith A. Gran will serve as Co-Directors of the project which is being carried out with the assistance of Beverly Evans, Ph.D., Associate Professor at Duquesne University and the Center for Outcome Analysis. The creation of such a rating system that evaluates a district's commitment and actual implementation of inclusion across disabilities will provide families of students with disabilities with critical resources needed for comparison.

## UpDates...

■ The Law Center was awarded a grant in the amount of \$36,100 from the Helen F. Graham Grants Program of the MBNA Foundation to train parents of special needs children throughout Delaware about their rights under the IDEA.

■ Thomas Gilhool was selected to receive Temple University's Institute on Disabilities' "From Generation to Generation Leadership Award" in the category of Inclusive Education Leadership: Established Leader.

■ Jerome Balter was invited by New Jersey Governor James E. McGreevey to attend the signing of an Executive Order creating a state Environmental Justice Task Force. The Task Force will serve as New Jersey's principal mechanism for both identifying and remedying potential health risks in the state's urban communities, including the disproportionate exposure of certain neighborhoods to environmental pollution.

■ Gloria Geissler, Comptroller, has resigned to join Haines & Associates. Mrs. Geissler worked at the Law Center for eight years where she was responsible for financial management of the organization. Her dedication and skills will be greatly missed.

■ The Law Center's Judith A. Gran representing People First of Tennessee and persons with disabilities, helped negotiate a settlement agreement with the state that compels Tennessee to deliver community based services to persons on waiting lists. The state's progress in finding appropriate services for all those in need will be monitored in monthly meetings by the state and the plaintiffs. A public information campaign, as well as an effort to find all those in the state who need services, is also part of the settlement.



# Brown v. Board of Education

Continued from page 1...

the adoption of the deadly force guidelines written by the Law Center, police shootings declined to one third of their previous level, with no increase in crime.

Closing segregated facilities and opening up access to the community for persons with developmental disabilities has taken bitterly fought contests in Connecticut, Oklahoma, New Mexico and Tennessee in which the Law Center took leading roles. Equality for persons "cared" for is a hard concept. In many other states Law Center attorneys played a significant role in either helping attain or inspiring greater self-empowerment for persons with disabilities.

**Abraham Lincoln once noted that the statement that "all men are created equal" was not put into the Declaration of Independence to aid the separation from England, but for future use. Its authors meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit.**

Since the 1980s, amidst reports documenting the disproportionate exposure of minorities to polluting facilities, the Law Center has been an innovative leader in the fight for environmental justice, successfully halting turning the City of Chester's minority population into a dumping ground for Delaware County's pollution. With environmental justice litigation stymied by recent Supreme Court decisions, the Law Center is actively working to protect communities made vulnerable to pollution by advocating for siting decisions that consider residents' poor health.

## Attacking Discrimination in Education

It is not surprising that it was in the field of education that the assault on segregation made its mark, rather than employment or public accommodations, for in a utilitarian world the need for education was apparent, and the belief that education could give everyone in each generation a fresh and equal chance for success was strong.

It was not only the South that experienced school segregation. In Delaware County there were Negro only schools into the mid-sixties, and in Philadelphia the assignment of students by race had stopped in the mid-thirties, but the actual segregation of students based on race was intense, and the assignment of teachers still was based on race at the time of Brown. By the time the Human Relations Commission took Philadelphia to court, the separation between the white suburban schools and the minority city schools was firmly in place.

It was Law Center research that disclosed that the gap between what was spent on educating kids in Philadelphia schools and on kids in the average suburban school was \$2,000 per child, the equivalent over 12 years of more than three years of schooling. That gap still exists. And it was an expert in the Law Center's suit against the state who discovered

that the state share of education funding is distributed in a way that the 16 predominately minority school districts in the state (including Philadelphia) receive less state funding per student than similarly situated predominately white school districts with the same level of poverty. The gross inequality of Pennsylvania's funding system and its harmful effects on minorities 50 years after Brown is a telling answer to those who say that the Civil Rights movement did its job and is no longer needed.

Within Philadelphia, the Law Center was instrumental in Judge Doris Smith-Ribner finding that the racially isolated schools attended by most black students still were separate and unequal from the schools attended by white students. Their schools had less experienced teachers, fewer advanced courses, fewer and older books, etc. As a remedy, the Law Center and its clients proposed improving the quality of the schooling in order to end the racial academic achievement gap which it documented for the first time. The accompanying article about the Philadelphia Desegregation case settlement tells more.

For students with disabilities, equality means not just being allowed into the public schools, it also means access to effective educational services. Consequently, the Law Center has gone back to court repeatedly beginning with PARC II to establish that students with disabilities have the right to programs designed to help them learn, not just to elaborate day care. In Oberti, the Law Center established integrated education to be the norm. Unfortunately, Pennsylvania is one of the laggard states, with a low percentage of its students with disabilities included in regular classes. Many students still are pioneers, the first to be in a regular classroom in their school.

Brown is not only a model for the substance the Law Center strives for, but for the way we actually do our work. Just as Brown used Kenneth Clark's empirical research on the effects of discrimination, the Law Center utilizes the knowledge of experts on what actually will work in case after case. Increasingly, we realize that informing the public as well as the courts of the myths and stereotypes that are barriers to treating our clients with equality is our most important task.

Abraham Lincoln once noted that the statement that "all men are created equal" was not put into the Declaration of Independence to aid the separation from England, but for future use. Its authors meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit. The 14th Amendment was a milestone in that path, as was Brown v. Board of Education. We are still traveling it, as fast as we make circumstances permit, and the Law Center is an important vehicle on that journey. ■





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## Spring Renewal

*Continued from page 8...*

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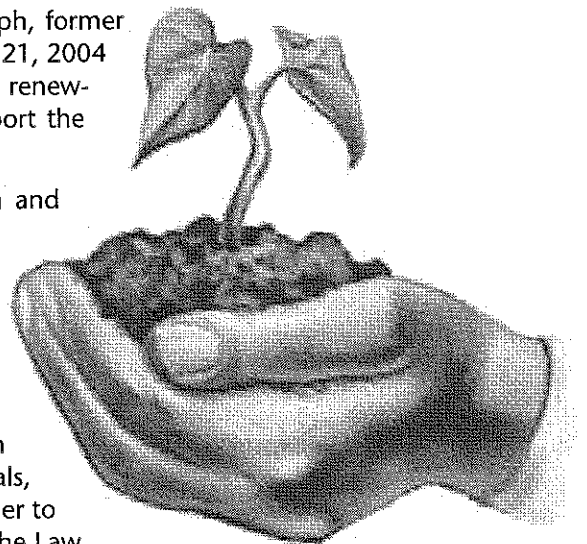
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# Spring Means Renewal

Approximately thirty-five persons – staff and current and past Board and Advisory Board members – gathered at the home of Donald K. Joseph, former Chairperson of the Law Center's Board of Directors, on Sunday, March 21, 2004 as part of PILCOP's informal spring event. The theme of the event was renewal and its objective was to reinvigorate attendees to vigorously support the work of the organization in 2004.

Current Chair Roosevelt Hairston, Jr. and past Chairs David Smith and Donald K. Joseph generously underwrote the cost of the event.

**In keeping with the theme of the event, the Law Center will throughout the year be asking our supporters to give serious consideration to increasing their gifts to the organization, as well as to aid in the identification of new donors.** Under IRS regulations, the Law Center is not permitted to receive more than fifty percent of its income from fees it collects when it prevails in cases – the rest comes from contributions from individuals, businesses and foundations. Unfortunately, cases take longer and longer to complete and some do not qualify for fees. To keep doing its work, the Law Center needs to identify new contributors, as well as secure increased contributions from its current base of support.



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