

BLACK REPRESENTATION IN THE THIRD BRANCH

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THE BLACK POPULATION in the United States is underrepresented on the state and federal courts.¹ Integration of the courts is moving very slowly; in 1963 about 1% of the judges throughout the country were black and by 1970 the percentage had not increased.² As the Director of the Southern Region Office of the American Civil Liberties Union expressed it: ". . . the judicial network, federal, state, and municipal, is still one of the most segregated institutions in America."³ The degree of black representation, however, varies among the states, and this study seeks to discover and explain that variation.

The type of representation examined here is the kind demanded by all newly emerging groups in politics: participation on decision-making bodies by identifiable members of their own class, race, religion, or nationality. Such representation "where one person represents another by being sufficiently like him" has been called "descriptive representation."⁴ Descriptive representation is exemplified by construction of a party ticket in boss dominated municipalities, where the ethnic demands of a diverse constituency are satisfied by the proper distribution of nominations. These "balanced" tickets which include judicial as well as legislative and executive offices are created by party leaders to garner voting support for their coalition. On a political level

this tactic maintains the boss and his organization in power, but a distribution of offices among minority group members may also contribute to the solidarity or integration of the political system, by neutralizing antagonism and making supporters of former outsiders.

A clear-cut call for this type of black representation on the courts was made by the Cook County Bar Association, a black lawyers group in Chicago. In a statement published in 1959 the association demanded "a greater representation on the Federal and State Bench for

1. The first known black judge was Robert Morris, a Boston magistrate appointed by Governor George N. Briggs of Massachusetts in 1852. After the Civil War and prior to 1900 black judges served on lower courts in Massachusetts, South Carolina, Arkansas, and Florida. The first black state Supreme Court Justice was Johnathan J. Wright elected in South Carolina in 1870 who served until the restoration of white supremacy led to his resignation in 1877. The only black state Supreme Court Justice since reconstruction was Otis M. Smith, who served an unexpired term beginning in 1961 in Michigan but was defeated for reelection. The first black judge elected in the north after reconstruction was Albert B. George, municipal judge in Chicago in 1924. In 1939 Mayor LaGuardia appointed the first black woman judge, Jane M. Bolin, to the Court of Domestic Relations in New York City. See *The Negro Handbook*, ed., Ebony Magazine, 1966; and *Great Negroes, Past and Present*, Russell L. Adams, ed. (1963). For biographies of recent black judges, see *Profiles of Negro Womanhood*, Sylvania Dannett, ed., The Negro Heritage Library, Vol. 2, p. (1966) and *The Negro in America*, Peter M. Bergman, ed., (1969).
2. E. B. Toles, *The American Negro Lawyer, 1844-1963*, reprinted in *Congressional Record*, October 2, 1963, at 176205-6.
3. Charles Morgan, Jr., *Dual Justice in the South*, 53 *Judicature* 379 (April, 1970).
4. A. P. Griffiths, *Representing as a Human Activity in Representation*, at 135 (1969).

Negro lawyers."⁵ The complaint listed nine Chicago legal associations which work to secure judicial appointments for their members: the Catholic Lawyers Guild, Decalogue Society of Lawyers (Jewish), Bohemian Lawyers Association, Justinian Society of Lawyers (Italian), Nordic Law Club, Lithuanian American Lawyers Association, Polish Lawyers Association, and Hellenic Bar Association.⁶ The pamphlet then described the ethnic composition of all the courts in the Chicago area and concluded that "the Negro in Chicago represents the largest racial voting strength and has the smallest representation of judges and appointments to legal positions."⁷

Despite efforts to achieve representation on courts, the number of black judges on the bench is not in proportion to the black population. The black percentage of the population in the 1970 census was approximately 11% while only 1% of the judges on minor courts are black.

Research Techniques of the Study

DISCOVERING THE DEGREE of black representation on the courts presents certain research problems. The first problem is to identify and locate black judges and the second problem is to discover the size of courts in different jurisdictions. States do not publish information on the color of their judges nor even, in many cases, on the exact number of judges sitting on their courts. Recently published books on black achievements emphasize the more important judgeships. However, in February 1970 the Voter Education Project of the Southern Regional Council published a roster of black elected officials which included the names of judges in 25 states.⁸ Names of judges serving on both appointive and elective courts were listed by Edward B. Toles, of Chicago, Illinois, U.S. District Court Referee in Bankruptcy, in his report to the National Bar Association.⁹ Since neither of these listings were complete, one restricted by selection procedure and the other by court level, other

names were uncovered in newspaper accounts and journal articles.

Establishing a basis for the comparison of actual black representation on the courts to projected proportional representation is made difficult by the lack of available information on the size of specific courts. Judgeships on urban courts are increased every few years, those on rural courts decreased or abolished by legislative action. Some positions on the courts are vacant for long periods, both in urban and rural areas. Two major sources of information on the size of courts have been used to prepare a reasonable estimate of the number of judgeships per state and per court: the American Judicature Society and the Council of State Governments.¹⁰ Where the published statistics show more than 500 justices of the peace, a maximum number of 500 was used for the study on grounds that many of the legal positions are no longer filled. The state-wide analyses are based on the number of judgeships, but the urban court analyses are based on population where an accurate count of members of multi-judge benches was not available.

Since descriptive representation is measured in relation to the size of the black population, it was necessary to select for the study the states with large enough black populations to support at least one black judge. In some states the black population is still too small to foster expectations for "mirror" representation on the bench. In thirteen states blacks could not expect even one judge

5. COOK COUNTY B. ASS'N Committee on Public Affairs, *A Complaint versus Cook County Major Political Parties*, at 8 (1959).

6. *Id.* at 1.

7. *Id.* at 1.

8. National Roster of Black Elected Officials, Metropolitan Applied Research Center, Inc., Washington, D.C. (1970).

9. Congressional Record, 91 Cong. 2nd Sess. Vol. 116, No. 154, Report of Black Lawyers and Judges in the United States, at E7996-7, September 2, 1971.

10. American Judicature Society Rep. 9, Comparative Chart: Number and Tenure of Major Trial and Appellate Judges, (May 1968); H. James, *How the States Stack Up in Court Reform*, Christian Science Monitor, (1968); *Book of the States, 1970-71*; 18 Council of State Government 120.

as their proportionate share of the judiciary: Maine, New Hampshire, Vermont, Rhode Island, North Dakota, South Dakota, Montana, Idaho, Wyoming, New Mexico, Utah, Alaska and Hawaii.¹¹ The states included in this study are the 37 states with black populations of sufficient size to support at least one judge on the state courts. (Choice based on merit may produce a black judge regardless of population as occurred in New Hampshire with only a .2% black population.)

In order to make the analysis more meaningful and manageable, the 37 states were divided into two categories, 16 southern and 21 northern states. This classification is a modification of the four regional classifications produced by Luttbeg by his analysis of 118 social, economic, and governmental variables.¹² The southern category in this study includes sixteen of the seventeen states classified as southern by Luttbeg, omitting New Mexico. The northern category includes fifteen of the seventeen states classified as industrial by Luttbeg, as well as one of three he classified as frontier and five of thirteen he classified as northwestern.¹³ The six non-industrial states placed in the northern category fit better with the industrial than the southern states since their industrial indexes range from .24 to .43, higher in each case than the southern index. Although the census and other regional classifiers place Delaware and Maryland in the south, the Luttbeg analysis locates these states in the industrial section.

Since the black percentage of the population and the size of the courts varies in each state, it was necessary to develop two indexes to examine the degree of black representation. The Index of Judicial Malapportionment (IJM) shows the positive side, the percentage of black judges serving of those expected. Although California has a high IJR, its IJM shows more malapportionment than Iowa with a low IJR. In the South, Mississippi has the worst malapportionment measured by IJM, but Texas has

less representation by sitting black judges.

The Index of Judicial Malapportionment is based on courts of general jurisdiction and the southern index on all trial courts. The lack of black judges on major courts in the south makes the development of an index without including minor courts a futile endeavor. The percentage of black judges on major northern trial courts is 2.2% and the black population in those 21 states is 8.3%; so that the index for the region is negative 6.1%. Tables 2 and 4 show that the indexes in the northern category range from positive .004 to negative .14 and in the southern category from negative .025 to negative .35.*

A second index of Judicial Representation shows the positive side. This index is the ratio between the number of black judges expected if the black population were proportionately represented on all courts to the actual number of black judges. In the northern region this index ranges from zero where no black judge serves to .66. In the southern region this index ranges from .01 to .29. The closer the index comes to one, the more adequate the black representation. (See Tables 3 and 5.)

On the tables the extent of underrepresentation is categorized as minor, moderate, and high, depending upon the two indexes. In the northern region states with an Index of Malapportionment less than negative five and an Index of Judicial Representation over .20 were placed in the category of minor underrepresentation. If both indexes showed scores in the other direction, the states were categorized as extreme underrepresentation;

11. The black population percentage was calculated from the advance report, General Population Characteristics, United States, PC(V2)01, Department of Commerce, February 1971. When the black percent of the state population was less than .5% of the total number of state judgeships, the state was eliminated from the study. New Hampshire with a very small Negro population of .2% has one black judge on a minor court.

12. N. R. Luttbeg, Regionalism in American State Political Behavior: An Improved Classification, presented to the annual meeting of the Midwest Political Science Ass'n., Chicago (April 1970).

13. *Id.* at 20.

*All tables cited in text are on pp. 271-280.

and if the indexes showed opposite directions, then the states were categorized as moderately underrepresentative. In the southern states the cut-off point on the Index of Judicial Malapportionment was negative fifteen and on the Index of Judicial Representation .10. The northern and southern states are not comparable, since the extent of the white monopoly of the judiciary is more pervasive in the south.

Black Judges on Southern State Courts

THIS SECTION of the study attempts to explain the variations in black representation on the southern state courts. Table I shows that there are no black judges on southern appellate courts, three on trial courts of general jurisdiction, 37 on urban trial courts of limited jurisdiction, and 57 on rural courts, for a total of 97 black judges in sixteen states. Five states had minor, seven states extreme and four states moderate underrepresentation. The indexes for each southern state are listed on Tables 2 and 3.

The first prediction is that states with the most racist culture would have the fewest black judges and the most extreme underrepresentation. As Judge Crockett wrote, "To deny that racism exists throughout our judicial system is to be oblivious to the most fundamental truths about 20th century America."¹⁴ White supremacist attitudes in the South have been closely connected with the size of the black population.¹⁵ The more blacks, the more repressive has been the social and political tradition. The same relationship holds for representation of blacks on southern courts. Where the black population is over 18% in 1970, there are no states with minor underrepresentation but seven with extreme underrepresentation. Where the black population is under 18%, there is no extreme but eight states with moderate or minor underrepresentation. (See Table 6.) The rank order correlation between the percentage of black population of each state and the Index of Judicial Mal-

apportionment is extremely high (+.98, sig. .001).

The racist culture endures in the South even after large numbers of the oppressed populace have migrated.¹⁶ The eight states with a loss of ten to thirty percent of their black population between 1960-1970 were extremely or moderately underrepresentative (except for West Virginia), while those states with less than a ten percent loss or even a gain in black population were in the minor or moderate categories (except for Virginia). (See Table 7.) Perhaps not enough change in the population balance of whites and blacks has occurred to provide the whites with enough security to share political offices with the minority.

If Luttbeg's regional index is taken as a measure of the southern culture, i.e. the social, economic, and political environment of white supremacy, then the states with the highest index would be predicted to have the whitest courts. Eight of the sixteen states in this region had a southern index of —.75 or less and only Virginia had extreme underrepresentation. Eight had an index over .75 and only Tennessee had a low score. (See Table 2.) The rank order correlation between the Luttbeg southern index and the Index of Judicial Malapportionment was very high (+.82, sig. .01).

Another indicator of the racist culture is resistance to the integration of public schools. In those seven states where 5% or less of black children were in school with white in 1966, none showed minor resistance to integration of the bench, and of those nine states with over nine percent black children in school with white, only Virginia had extreme underrepresentation.¹⁷ The rank

14. George W. Crockett Jr., *A Black Judge Speaks*, 53 *Judicature* 361 (April 1970).

15. D. R. Matthews, J. W. Prothro, *Negroes and the New Southern Politics*, at 115 (1966).

16. U.S. Dept. of Comm. News, March 3, 1971 at CB 71-34, Table 5, *Estimated M. Net Migration of the Negro Population by States 1940 to 1970*.

17. Emerson, *et al.*, *Political and Civil Rights in the United States*, Vol. II at 1315 — quoting from So. Ed. Rep. Jan.-Feb. 1966, Table II *Status of Desegregation* (1967).

order correlation between percentage of children in integrated schools and the Index of Judicial Malapportionment was extremely high (+.95, sig. .001). The same white supremacist culture which delayed school desegregation was equally capable of delaying judicial representation.

The second prediction is that a popular, one-party selection structure would inhibit representation of blacks by judgeships. Of the sixteen southern states in this study, fourteen have systems of popular election for judicial office. Access to the polls then becomes necessary for the choice of a judicial representative. However, the tradition which separated black children from white in school also kept the black adults from the ballot box. Under pressure of the courts and the Department of Justice, county registrars have been forced to register black voters. Where the difference between percentage of black and white registered voters is small, only Arkansas has extreme underrepresentation, and in the states where the difference is large, there is no state with minor underrepresentation. The eleven states in the deep South for which information on black registration is available show a high correlation between the post-1965 percentage difference of black and white registration and the Index of Judicial Malapportionment (+.76, sig. .02).¹⁸

The one-party tradition of the South also serves to limit opportunities for black judicial candidates. Of the eight states with clear one-party scores in the Ranney analysis, none had minor underrepresentation, three had moderate, and five extreme.¹⁹ Of the eight states with a modified or two-party system, North Carolina and Virginia had extreme underrepresentation, Oklahoma moderate, and the other five minor. There was a very significant correlation between the rigidity of the one-party system and the lack of black judges (+.90, sig. .001). (See Table 2.)

The Legal Profession and Southern Black Judges

THE LACK OF BLACK lawyers correlates with the absence of black judges on major southern courts, and both phenomena are probably casually related to the racist culture. The rank order correlation between the black lawyer index and the index of judicial malapportionment is high (+.63, sig. .02). The black lawyer index is the percentage of black lawyers in the state which would be required to fill the judgeships expected on the basis of proportional representation. All three of the deep South states which would have to utilize over 50% of the available black lawyers to give proportional representation on the bench have pure white general jurisdiction courts. Despite the need for 50% of its black lawyers for the bench, Arizona has only minor representation. Of those states in which less than 20% of the black lawyers would be needed as judges, only Virginia and North Carolina have extreme underrepresentation. In no southern states would less than 10% be required to seat black judges on the bench proportionally to black population. (See Table 2.)

The scarcity of black lawyers does not account for the total absence of black appellate judges in the south, particularly in Texas where on a large appellate bench, seven black judges could be expected, and in Florida and North Carolina where four could be expected, in each case from a larger pool of black lawyers than in Louisiana and Georgia where nine and four could be expected. Nor does the small number of black lawyers account entirely for the total of three black judges on major southern courts. However, a larger selection pool of black lawyers would encourage the appointment or election of black judges without

18. U.S. Comm. on Civil Rights, *Political Participation*, at 12 (May 1968).

19. A. Ranney, *Parties in State Politics*, in *Politics in American States* at 65. An index of .5 indicates perfect composition between the two major parties, while 1.0 would mean that the Democratic party always wins and .0001 that the Republican party dominates all elections.

reducing the meager supply of ethnic legal counsel.

The racist culture permeated the southern law schools and prevented any black graduates between 1887 and 1935.²⁰ After 1935 the racist culture discouraged the legal practice of blacks and in effect deported them to the north. Although law schools are now legally open to blacks, the school situation from kindergarten through college, which has discouraged black attainment, has provided few black candidates for the law schools. Crash programs of recruitment at the law school level could not produce enough black lawyers to fill the needs of bench and bar in this generation despite the best intentions.

The opportunities on the bench which are open to blacks are related to the selection structure variable. Over half of the black judges in the South serve on rural courts of limited jurisdiction where a law degree is not a necessary qualification for the office. Arkansas, Alabama, and Mississippi have only justices of the peace representing blacks. At least forty of the 57 rural judges were elected in small communities with black majorities. Segregation and the electoral system made black representation on the courts possible in these cases.

Professor Davis said in 1949 that ". . . segregation assures employment of Negro professionals . . . [but] limits their professional development and financial returns and fosters discrimination."²¹ The converse is also true today, that desegregation prevents employment of black lawyers on the judiciary in mixed communities with white majorities. Current representation of blacks on the judiciary in the South is restricted to rural areas with black majorities and to courts of limited jurisdiction where a law degree is not required. The professional black lawyer has not had an equal opportunity in competition with the white lawyer for positions on the major southern courts.

The southern state which appears most ripe for judicial integration is Virginia.

Like states with less malapportionment, Virginia has moderate school desegregation, a low southern index, an appointive system, and a modified one-party system. With a low black lawyer index, the state also has some black lawyers available for the bench.

Black Judges on Northern State Courts

TWENTY-ONE STATES outside of the South have black populations large enough to sustain at least one black judge, if the judgeships were apportioned along ethnic lines. In these states black judges now serving include twelve appellate court judges, 44 on trial courts of general jurisdiction, and 104 on city or county courts of limited jurisdiction. There are no rural black judges in the north, undoubtedly due to population concentration in the urban areas. The black populations of these states are not represented to the same degree on their judicial branches. Although a single trial judge in Minnesota provides a slight overrepresentation, four in Maryland still leaves over 12% of the Negroes without peers on the trial benches of general jurisdiction. Seven of these 21 states provide only minor underrepresentation for blacks on their courts, eight moderate and six extreme underrepresentation.

The first possible explanation for variations in malapportionment in the north is the existence of supremacist attitudes similar to those in the south. One indicator of racial bias is the size of the black population in the state. The percentage of black to total population in these 21 states ranges from 1% in Iowa to 18% in Maryland, with nine states over 6% and twelve 6% or less. Only California, of the states with a high percentage of black to total population in by black judges; five had extreme under-

20. U.S. Comm. on Civil Rights, Executive Staff Draft, 1963 Justice Report, July 24, 1963, Chapter 10, The Negro Lawyer in Southern and Border States, and Appendix II, Table 9, Exclusion of Negroes from State Bar Associations (mimeo); See McGee *The Problems and Promise of Black Men of Law*, 1 Black Law Journal 28 (1971).

21. M. R. Davis, *Negroes in American Society*, at 116 (1949).

representation. In contrast, of the states with a small percentage of blacks, six had minor disproportion. Only Kansas had both a low percentage of blacks, no black judges, and extreme underrepresentation. The rank correlation between black population and the index of judicial malapportionment was extremely high (+.90, sig. .001).

Moreover, the states which had the large black populations twenty years ago are more resistant to black representation than states of the post World War II diaspora. The correlation between the size of the black immigration and the index of judicial malapportionment is in reverse. All of the states with minor underrepresentation had over 20% immigration during both periods, 1950-1960 and 1960-1970.²² Those with moderate underrepresentation had both high and low migration patterns and all those with extreme underrepresentation except New Jersey had less than 20% immigration in 1960-1970. There is evidently a response to the need for visible political representation in those states most recently affected by large black migration from the South. Kansas, the only state which had a net loss of black population in 1960-1970, badly underrepresents its black population. Tables 8 and 9 show the relation of population and migration to underrepresentation. White supremacist attitudes are evidently a hold-over from an earlier period.

The third test of the relationship between racist attitudes and judicial malapportionment was the southern index for the northern states. The Luttbeg southern index reflects the southern political process, economic development, and public policy.²³ This index clearly distinguishes the states with the most and the least black representation on the courts. Eight of the ten states with a southern index over .05 had minor or moderate underrepresentation and only Colorado and California had low scores. Nine of the eleven states with a southern index over .05 had minor or moderate underrepresentation, and only Michigan and New Jersey had high scores. North-

ern states with a supremacist culture similar to the South's raise high barriers against black judges. (See Table 4.)

A second possible explanation for the failure to accord black representation on northern courts lies in the selection structure. The first variable checked was the competitiveness of the party systems on the Ranney scale. There were only four one-party states in the northern group and none had minor underrepresentation. Kansas and Maryland had the highest one-party scores, Kansas in the Republican direction and Maryland in the Democratic direction, and both had extreme underrepresentation. The eight competitive states had less malapportionment; only Delaware in this group was in the extreme category. Of the non-competitive states, only two out of thirteen had a reasonable record.

The second structural variable examined was the selection system. The three major types of selection used in these states are partisan election, non-partisan election, and gubernatorial appointment, with or without a Missouri-type commission to recommend names to the governor. Table 10 shows that partisan election was least favorable to the ambitions of black lawyers and non-partisan election most favorable. Only in Michigan did extreme underrepresentation occur under a non-partisan structure. The appointment process produced erratic results. Governors in the middle Atlantic states were incapable of making black appointments; those in the farm belt were weak, and only the Governors in New England and the west succeeded in approaching equity. Schlesinger's index of gubernatorial power, which includes indicators of power over budget, veto, and appointments, and a tenure measure, was used in an attempt to distinguish the appointment states with different levels of black representation on the courts.²⁴ Although it might have been predicted that only a strong governor could afford to

22. U.S. Department of Commerce News, *Supra* note 16.

23. Luttbeg, *Supra* note 12, at 3.

24. J. A. Schlesinger, *The Politics of the Executive*, at 229.

make black appointments, there was no correlation between the indexes. Such appointments at present appear to be idiosyncratic.

The Legal Profession and Northern Black Judges

THE POOL OF available black lawyers is small even in the north. The northern courts in the urban areas populated by blacks generally require admission to the bar and practice as conditions for eligibility to the bench. Most state court judges are products of their own law schools; so without law schools inside the state producing black lawyers as candidates for the judiciary, the likelihood of black incumbents is slim. In nine of the 21 northern states more than 10% of the available black lawyers would be needed to fill the bench proportionately to the racial composition of the total population. Only two of these states had minor underrepresentation. The twelve states with a more adequate pool of black lawyers were equally divided among those with minor, moderate and extreme underrepresentation. Kansas, Pennsylvania, Michigan and Ohio had sufficient black lawyers to supply the bench and the bar, but their courts are still malapportioned.

Since the bar assumes some responsibility for producing candidates for the bench, whether in the elective or appointive systems, by informal suggestions and recommendations or by formal mechanisms, the bar must share some of the blame with the law schools for failing to move black lawyers onto the bench. Discriminating practices of major bar associations, which only ended after World War II, reflected deep-seated attitudes and prejudices.²⁵ The racist state cultures which correlated with malapportionment are probably also explanatory of the present failure of the bars to promote black candidates.

This examination of judicial malapportionment in the north suggests that the large states with established black

populations twenty years ago are more resistant to black representation on their courts than smaller states with new migrations of blacks. However, three small states have extreme underrepresentation: Maryland with four trial judges in courts of general jurisdiction, Delaware with one, and Kansas with none. Iowa without a single black judge is moderately under-representative. The most obvious explanation for finding Maryland and Delaware in this category is that they have the largest black populations in the industrial states. On Luttbeg's southern index, Maryland has the highest score of the northern states, then Iowa and Kansas. The similarity of Iowa and Kansas economically and socially to the southern culture may explain their poor apportionment.

Wisconsin and Nebraska with a zero southern index had no environmental or structural variables to account for the failure to have a single black judge until 1971. The only barrier to black representation was the small pool of black lawyers, as indicated by the index for Wisconsin of .28 and .20 for Nebraska. In cases where the variable associated with racial prejudice are missing but the consequences are the same, another explanation must be sought. Perhaps black pressure groups were poorly organized to seek political power or party organizations failed to put the matter on the agenda. In each state the Governor achieved two political ends in appointing a black woman lawyer to an urban court, the satisfaction of ethnic demands in the largest metropolitan area and the fulfillment of a political debt to a supporter.

Black Judges in Metropolitan Areas

THE BLACK MIGRATION from the South has flowed into the metropolitan areas of the north, where the increasing size of the black population requires more black judges for proportional representation on

25. U.S. Department of Commerce News, CB 71-34, Table I, Components of Population Change, by State: April 1, 1960 to 1970 (March 3, 1971).

the urban courts. In 24 cities outside the South with over 10% and 25,000 black population, the number of blacks represented by one black judge varies from 26,000 in Boston to 125,000 in Cincinnati.²⁶ Five of these cities have no black judges: East St. Louis, Hartford, Patterson, Youngstown and Rochester. Now that Milwaukee has one black judge, she represents 105,000 people, although the white judges each represent 25,000. (See Table 11.)

Black migration within the South has brought many blacks from the rural to the urban areas, providing the rationale for black judges in southern cities.²⁷ In 27 southern cities with over 10% and 25,000 black population, the number of black persons represented by one black judge varies from 21,000 in Louisville to 317,000 in Houston. Thirteen of these cities have no black judges: Atlanta, Birmingham, Richmond, Winston-Salem, Norfolk, Savannah, Mobile, Jackson, Shreveport, Jacksonville, Fort Worth, Tampa, and St. Petersburg. If Atlanta had one black judge, he would represent 255,000 people. (See Table 11.)

In ten major cities, north and south except California, for which there was precise information on court size, there was a correlation between the index of school segregation and the index of judicial malapportionment (+.76, sig. .02). Evidently in the cities as well as the states as a whole, the separatist culture indicated by the school situation carries over to the occupation of political office. However, there was no correlation between the index of residential segregation and the index of judicial malapportionment for these cities, despite the fact that the school and residential indexes were highly correlated.²⁸ It is possible that residential segregation would foster representation, if the electoral structure for the court were decentralized. (See Table 13).

In California it is possible to examine black representation on all urban courts since information on the exact number of judgeships per court is available.²⁹ In seven metropolitan areas thirteen black

trial judges out of 605 were serving on Superior and Municipal benches. The expected number of black judges to serve as descriptive representatives would be 48. The variation from expectancy is greatest in Los Angeles where the black population requires 22 more judges and in San Francisco-Oakland where nine more would be required for proportional representation. Looking at six cities where black judges were serving on the municipal district bench, there was a high correlation between school segregation and judicial malapportionment (+.80, sig. .05). Although the percentage of black judges on these courts increased with the size of the black population, the index of judicial malapportionment also increased. The elements of racist culture, indicated by school segregation and stemming perhaps from the large white southern immigrations, limit the number of black incumbents on the courts. (See Table 14.)

As in cities outside of California, there was no significant correlation between the index of residential segregation and the index of judicial malapportionment. The concentration of the black population neither helped nor hindered the placement of black judges on the courts. The non-partisan judicial elections in California are at-large on a county-wide basis for the Superior Courts and on a district-wide basis for the Municipal Courts. Although the structure for selection is elective, all of the thirteen black judges were appointed for their first judicial position by the Governor and only one had experience in another elective office before he accepted the judgeship. The action of a formal (Governor) or informal (boss) political leader with a sound political motive for making racial

26. V. Countryman and R. T. Finman, *The Lawyers in Modern Society*, at 327, 391 (1966).

27. U.S. Department of Commerce News, CB 71-22, *Population Change for White and Negro Population in Metropolitan Areas of 500,000 or more*, by Central City and Ring: 1960 to 1970 (Feb. 10, 1971).

28. T. Lynn Smith, *The Redistribution of the Negro Population*, 51 *J. of Negro History*, Table III at 169, and Table IV at 173, July 1966.

29. Alam and Karl Tauber, *Negroes in Cities*, Table I, *Indexes of Residential Segregation for 207 Cities*, 1960, at 32-34 (1965).

appointments is needed to produce descriptive representation on the urban benches.

*Black Judges on Federal Courts*³⁰

THE SMALL PROPORTION of black judges on state courts is reflected on federal courts located in the same states. Where states have black appellate judges, the federal court is likely to have a black judge. There are black U.S. District judges in Illinois, which has one state appellate judge; in Michigan, which formerly had one black Supreme Court justice; in Pennsylvania, which has two black appellate judges; in New York, which has four black appellate judges; in California, with one black appellate judge; and in the District of Columbia, where one black judge sits on the district court of appeals. The only other states with black appellate judges are Ohio and Washington, and it is reasonable to predict that these two states will have the next black federal judges. The black judges on the federal Court of Appeals are found in the Third Circuit, which encompasses Pennsylvania; in the Sixth Circuit, which includes Michigan and Ohio; and the D.C. Circuit. Perhaps the next federal appellate judge will appear in the Seventh Circuit, which includes Illinois, the Second Circuit which includes New York (to replace Justice Thurgood Marshall), and the Ninth Circuit, which includes California and Washington.

The Fourth and Fifth Circuits, which contain the states of the South and border, are totally without black judges at the trial or appellate level. The First Circuit has only one state, Massachusetts, with a black population sufficient to support a judge, but since that state has a fair record for representation in the state courts, there may soon be a black federal trial judge in Boston. The Eighth Circuit includes states in the southern group as well as in the northern group with various sizes of black populations; but even the metropolitan multi-judge federal courts are small for a black representative. The Tenth Circuit includes Oklahoma and

Kansas, both with poor records, and Colorado, with minor underrepresentation in state courts but a small federal bench. The worst malapportionment in the federal courts is in the districts which serve metropolitan areas with large black populations. The overall malapportionment, compared to 10% for state courts, is an eight percent deviation from the expected percent, as can be seen on Table 15.

The concern of some national leaders to provide descriptive representation was expressed by presidential candidate John F. Kennedy at the American Bar Association meetings in 1960: "I assure you that in a new Democratic Administration there will be far better representation, on the basis of merit, of persons of all our racial groups, including particularly those who in the past have been excluded on the basis of prejudice."³¹ Law and the administration of justice in the federal courts as well as the state courts have been explicitly racist in the past and many customs and attitudes hold over in the present.³² Despite the good intentions of presidents, the selection of federal

30. K. J. Arnold, *California Courts and Judges Handbook* (1968) and Supplement (1969).

31. The first black lawyer appointed to the federal bench was William Hastie chosen by President Roosevelt for the district court in the Virgin Islands in 1937; in 1949 President Truman elevated him to the Third Circuit. The Virgin Islands has had a succession of black judges since that time, including Herman Moore, Walter Gordon, and at present Almeric Christian. The first three were educated and practiced in the states prior to their appointment in the islands. On the continental United States the first black judge on a national bench, Irvin C. Mollison, was appointed to a term on the Customs Court in 1945, followed by Scovel Richardson and James Watson, still serving. The first trial court judge with life tenure in a district court is James B. Parsons, appointed by President Kennedy in 1961 to the Chicago bench. Wade McCree Jr. was placed on the bench in the E.D. Michigan in 1961 and later elevated to the Sixth Circuit. He was replaced by Damon Keith. A. Leon Higginbotham was appointed to the E.D. Pennsylvania in 1963 and Spottswood Robinson to the D.C. district bench that same year and later elevated to the D.C. Circuit. Four black judges sit on the D.C. district bench at present, Aubrey E. Robinson, Joseph C. Waddy, William B. Bryant, and Barrinton D. Parker. Constance Baker Motley was placed on the S.D. New York in 1966 by President Johnson and David W. Williams taken from the California Superior Court to the C.D. California by President Nixon in 1969, and Laurence W. Pierce from a state commission to the S.D. New York in 1971. Thurgood Marshall, who had served on the Second Circuit from 1961 to 1965, was appointed to the U.S. Supreme Court by President Johnson in 1967.

32. Address by John F. Kennedy, American Bar Association, Washington, D.C., August 31, 1960.

judges is so closely tied to local political interests, that the similarity of black representation on federal and state courts in the same area is not expected.

Conclusion

ON THE APPELLATE courts the substance of the decision may be more important to the black minority than the participation of a decision-maker of their own race. Since appellate courts are collegial bodies, whose important deliberations are private, the public philosophy rather than the race of the judge produces the consequences. The possibility of elevation to the appellate bench means more to black members of the bar than to the black man in the street.

In contrast, the trial judge makes many decisions in the open courtroom, where his race is a visible factor, with psychological if not legal meaning for counsel, parties, jurors, and observers. A black official has more power in a one-man position than on a collegial body such as a school board or legislative committee, since his decisions are not subject to negotiation or compromise with white peers.³³

Although this study has been concerned only with empirically available "descriptive" representation, the trial judge has opportunities for interest representation. A black Baltimore newspaper editorialized that ". . . a definite effort is being made to keep colored judges out of the South where they would be able to exercise their power over civil rights cases."³⁴ The white monopoly in the Fourth and Fifth Circuits is probably due to the linking of ethnic and policy consequences to black appointments.

Consciousness of this opportunity is at the roots of the formation of the first formal organization of black judges at the National Bar Association meetings in Atlanta in 1971. The new Judicial Council

established as its first project a drive for more federal judgeships in the South as well as the north. Their new president, Judge Crockett, claimed that one black judge could have a great impact in the judicial process.³⁵

In a study of black office-holders in Cook County, this hypothesis was proposed: "The more powerful the post, the fewer the black policymakers."³⁶ If we define "powerful" in this context in terms of opportunities to change policy, then the absence of black judges would suggest an apprehension that judges can upset the status quo and that black judges would do so. Simply the existence of the black judge in a southern court testifies to a change from the old culture. Even if the only policy arena under the control of a municipal judge were the treatment of defendants in his own courtroom, his actions would be significant to hundreds of persons every week. The presence of a black judge on an important trial bench might attract cases which lawyers would not invest resources to bring before another judge. It has been suggested that the most vital exercise of power is not in winning old conflicts but in raising new issues.³⁷ At a minimum, the black judge by his visibility on the trial bench opens the judicial door for the articulation of different complaints.

33. Racial Discrimination in the Southern Federal District Courts, Southern Regional Council, Inc. (April 1965).

34. Blacks are less underrepresented in the lower house of state legislatures where their votes are diluted by the majority voting system. Of the 21 northern states in this study, Colorado, Iowa, and California have a disproportionately large number of state legislators in relation to their black populations. In only two of these northern states are blacks better represented on the bench than the legislature. In half of the sixteen southern states in this study, there were black state legislators in the lower house. See Negro Membership in State Legislatures in 1967, *Revolution in Civil Rights*, Congressional Quarterly Services, June 1968, p. 113.

35. Colored Judgeships, editorial *Baltimore Afro-American*, October 22, 1963, at

36. N.Y. Times, August 8, 1971, at 30.

37. Baron, Black Powerlessness in Chicago, 6 *Transaction* 31 (Nov. 1968).

38. Bachrach and Barantz, Power and Poverty, at 3 (1970).

TABLE 1
BLACK JUDGES IN 37 STATE COURT SYSTEMS

	<u>Appellate</u>	<u>Trial Court Jurisdiction</u> <u>General</u>	<u>Limited</u>	<u>Rural</u>	<u>Total</u>
ORTH 21 States)	12	44	104	0	160
OUTH 16 States)	0	3	37	57	97
otal	12	47	141	57	257

TABLE 10
Selection Structures and Judicial Underrepresentation in
21 Northern States

<u>Selection Structure</u>	<u>Extent of Underrepresentation</u>		
	<u>Minor</u>	<u>Moderate</u>	<u>Extreme</u>
Non-Partisan Election	California Oregon Washington	Minnesota Nevada Wisconsin Ohio	Michigan
Appointment (including Missouri Plan)	Colorado Connecticut Massachusetts	Iowa Nebraska	New Jersey Delaware Maryland
Partisan Election	0	Illinois Pennsylvania	New York Indiana Kansas

Source: Selection Systems, Book of the States, 1970-1971, pp. 124-25.

TABLE 2 & 3

BLACK UNDERREPRESENTATION IN 16 SOUTHERN STATE COURT SYSTEMS

State	Luttbeg Southern Index	Black Lawyer Index	Ranney Party Index	Voter Registration Index	Index of Malapportionment	Black Percent of Pop.	Appellate		Number of Black Judges Trial		Rural		Index of Judicial Representation
							Expected	Actual	Expected	Actual	Expected	Actual	
Arizona	.42	.50	.7490	--	-.025	3	0	0	1	1	5	0	.17
W. Virginia	.63	.12	.7223	--	-.04	4	0	0	1	4	16	0	.24
Oklahoma	.61	.22	.8193	--	-.066	7	1	0	9	2	35	0	.04
Kentucky	.75	.15	.7650	--	-.074	8	1	0	5	6	40	0	.13
Missouri	.48	.12	.6603	--	-.06	10	2	0	10	10	40	0	.19
Texas	.62	.23	.9590	+8.3	-.127	13	7	0	22	2	65	0	.02
Florida	.69	.30	.9220	-17.8	-.145	15	4	0	18	2	53	0	.02
Tennessee	.83	.40	.8715	-8.9	-.11	16	3	0	14	7	32	7	.29
Arkansas	.87	.42	.9427	-9.6	-.18	19	1	0	8	0	57	4	.06
Virginia	.62	.16	.8795	-7.8	+.17	19	1	0	17	4	95	6	.09
N. Carolina	.79	.16	.8793	-31.7	-.19	22	4	0	11	2	7	0	.09
Georgia	.93	.47	.19915	-27.7	-.256	26	4	0	14	2	130	0	.01
Alabama	.96	.83	.9565	-38.0	-.23	26	3	0	20	0	130	19	.12
Louisiana	.78	.60	.9867	-34.2	-.29	30	9	0	24	1	150	7	.04
S. Carolina	.92	.45	1.000	-30.5	-.29	30	2	0	5	1	150	4	.03
Mississippi	.99	.70	.9805	-31.7	-.35	37	3	0	16	0	185	10	.05

Sources: Luttbeg Index, see footnote 12.
 Voter Registration Index, see footnote 18.
 Ranney Index, see footnote 19.

TABLES 4 & 5

BLACK UNDERREPRESENTATION IN 21 NORTHERN STATE COURT SYSTEMS

State	Luttbeg Southern Index	Black Lawyer Index	Ranney Party Index	Index of Malappor- tionment	Black Percent of Pop.	Appellate		Number of Black Judges		Minor Trial		Index of Judicial Represen- tation
						Expected	Actual	Major Trial Expected	Actual	Expected	Actual	
Iowa	.22	.07	.2495	-.01	1	0	0	1	0	15	2	.125
Minnesota	-.07	.07	.4610	+.004	1	0	0	1	1	6	0	.14
Oregon	-.02	.14	.3545	-.01	1	0	0	1	0	3	1	.25
Washington	.03	.10	.5647	-.007	2	0	1	2	1	10	1	.25
Colorado	.21	.20	.4827	-.016	3	0	0	2	1	7	1	.22
Massachusetts	.05	.02	.5227	-.03	3	0	0	1	0	5	4	.66
Nebraska	0.00	.20	.3875	-.002	3	0	0	1	0	12	1	.08
Wisconsin	0.00	.28	.2997	-.03	3	0	0	5	0	6	1	.09
Kansas	.20	.10	.2415	-.05	5	0	0	3	0	8	0	.00
Connecticut	-.02	.08	.4420	-.003	6	0	0	2	2	11	1	.23
Nevada	.10	.25	.5263	-.060	6	0	0	1	0	3	1	.25
Indiana	.13	.18	.3545	-.055	7	1	0	9	2	32	1	.07
California	.14	.03	.3930	-.042	7	4	1	12	5	20	9	.42
Ohio	.10	.04	.3523	-.085	9	4	3	17	1	54	12	.21
Pennsylvania	.17	.10	.4050	-.06	9	1	2	15	5	45	9	.26
Michigan	0.00	.05	.3770	-.067	11	2	0	14	3	33	9	.115
New Jersey	.05	.26	.3605	-.11	11	2	0	17	0	50	9	.13
New York	-.03	.03	.3173	-.074	12	4	4	21	8	372	25	.10
Illinois	-.02	.07	.3847	-.105	13	4	1	47	9	57	14	.22
Delaware	.08	.33	.5420	-.14	14	0	0	1	0	4	1	.20
Maryland	.40	.25	.7137	-.123	18	2	0	13	4	38	1	.09

TABLE 6

JUDICIAL UNDERREPRESENTATION BY BLACK POPULATION IN SIXTEEN SOUTHERN STATES

<u>Black Population</u>	Extent of Underrepresentation		
	<u>Minor</u>	<u>Moderate</u>	<u>Extreme</u>
Over 18%	0	Alabama	Arkansas Georgia Louisiana Mississippi North Carolina South Carolina Virginia
Under 18%	West Virginia Arizona Kentucky Missouri Tennessee	Florida Oklahoma Texas	0

TABLE 7

JUDICIAL UNDERREPRESENTATION BY BLACK EMIGRATION IN SIXTEEN SOUTHERN STATES

<u>Black Emigration</u>	Extent of Underrepresentation		
	<u>Minor</u>	<u>Moderate</u>	<u>Extreme</u>
Under 10%	Arizona Kentucky Missouri Tennessee	Florida Oklahoma Texas	Virginia
10% to 30%	West Virginia	Alabama	Arkansas Georgia Louisiana Mississippi North Carolina South Carolina

TABLE 8

JUDICIAL UNDERREPRESENTATION BY BLACK POPULATION IN 21 NORTHERN STATES

<u>Black Population</u>	Extent of Underrepresentation		
	<u>Minor</u>	<u>Moderate</u>	<u>Extreme</u>
Over 6%	California	Illinois Ohio Pennsylvania	Delaware Indiana Maryland New Jersey New York Michigan
6% or less	Colorado Connecticut Massachusetts Oregon Washington	Iowa Minnesota Nebraska Nevada Wisconsin	Kansas

TABLE 9

JUDICIAL UNDERREPRESENTATION BY BLACK IMMIGRATION IN 21 NORTHERN STATES

<u>Black Immigration</u>	Extent of Underrepresentation		
	<u>Minor</u>	<u>Moderate</u>	<u>Extreme</u>
Over 20%	California Colorado Connecticut Massachusetts Oregon Washington	Minnesota Nevada Wisconsin	New Jersey New York
Under 20%	0	Illinois Iowa Nebraska Ohio Pennsylvania	Delaware Indiana Kansas Maryland Michigan

TABLE 11

BLACK JUDGES IN 27 SOUTHERN CENTRAL CITIES

<u>City</u>	<u>Black Percent of Pop.</u>	<u>Number of Black Judges</u>	<u>Black Pop. Per Judge (in thousands)</u>
Washington D.C.	71.1	6	90
Atlanta	51.3	0	(255)
New Orleans	45.0	1	267
Savannah	44.9	0	(53)
Birmingham	42.0	0	(126)
Richmond	42.0	0	(105)
St. Louis	40.9	5	50
Portsmouth	39.9	1	44
Jackson	39.7	0	(61)
Memphis	38.9	2	121
Mobile	35.4	0	(67)
Winston-Salem	34.3	0	(46)
Shreveport	34.1	0	(62)
Charlotte	30.3	1	73
Norfolk	28.3	0	(87)
Greensboro	28.2	1	41
Houston	25.7	1	317
Dallas	24.9	1	210
Louisville	23.8	4	21
Miami	22.7	1	76
Jacksonville	22.3	0	(118)
Kansas City (Mo.)	22.1	3	37
Ft. Worth	19.9	0	(78)
Tampa	19.7	0	(55)
Nashville	19.6	1	88
St. Petersburg	14.8	0	(32)
Oklahoma City	13.7	1	50

TABLE 12

BLACK JUDGES IN 24 NORTHERN CENTRAL CITIES

<u>City</u>	<u>Black Percent of Pop.</u>	<u>Number of Black Judges</u>	<u>Pop. per Black Judge (in thousands)</u>
East St. Louis	69.1	0	(48)
Newark	54.2	6	34
Gary	52.8	1	93
Baltimore	46.4	5	84
Detroit	43.7	9	73
Wilmington	43.6	1	35
Cleveland	38.2	7	41
Philadelphia	33.6	10	65
Chicago	32.7	21	53
Dayton	30.5	1	74
Flint	28.1	1	54
Hartford	27.9	0	(44)
Cincinnati	27.6	1	125
Patterson	26.9	0	(39)
Youngstown	25.2	0	(35)
New York	21.2	30	56
Jersey City	21.0	1	55
Buffalo	20.4	1	94
Pittsburgh	20.2	3	35
Columbus	18.5	1	100
Indianapolis	18.0	2	67
Rochester	16.8	0	(50)
Boston	16.3	4	26
Milwaukee	14.7	1	105

TABLE 13
BLACK JUDGES IN MAJOR CITIES

<u>City</u>	<u>Index of Judicial Malapportionment</u>	<u>Index of Residential Segregation</u>	<u>Index of School Segregation</u>
Baltimore	16.8	89.6	84.2
Chicago	12.7	92.6	89.2
Detroit	7.7	84.5	72.3
Houston	22.7	91.5	93.0
Indianapolis	10.6	91.6	70.5
Miami	17.7	97.4	91.4
Milwaukee	14.7	88.1	72.4
New York	13.2	79.3	56.0
Philadelphia	.3	87.1	72.0
Pittsburg	4.2	84.6	49.5

Source: Index of School Segregation, U.S. Commission on Civil Rights, Racial Isolation in the Public Schools, 1967, Vol. 1, Table 1, Extent of Elementary School Segregation in 75 School Systems, pp. 4-5.

Index of Residential Segregation, footnote 29.

TABLE 14
BLACK JUDGES ON CALIFORNIA MUNICIPAL COURTS

<u>District</u>	<u>Black Percent of Population</u>	<u>Percent of Black Judges</u>	<u>Index of Judicial Malapportionment</u>	<u>Residential Segregation Index</u>	<u>School Segregation Index</u>
San Diego	7.6	4.5	3.1	81.3	13.9
San Francisco	13.4	12.0	1.4	69.3	21.1
Los Angeles	17.9	3.4	14.5	81.8	39.5
Oakland-Piedmont	34.5	9.0	25.5	73.1	48.7
Richmond	41.8	33.3	8.5	77.3	39.2
Compton	71.0	40.0	31.0	84.4	---*

* The percentage of black children in schools over 90% black was not reported for Compton by the Vicil Rights Commission. If available, it would be the largest index in this list.

TABLE 15

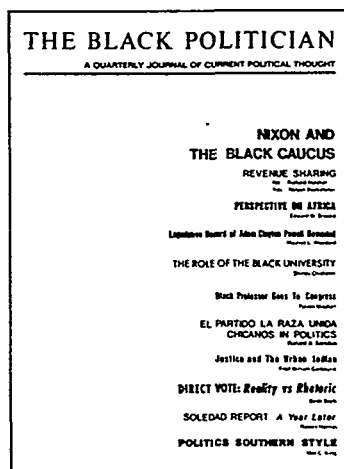
BLACK REPRESENTATION ON FEDERAL COURTS

<u>Court</u>	<u>Number of Judges Black</u>	<u>Total</u>	<u>Percent of Black Judges</u>	<u>Percent of Black Pop. in Area</u>	<u>Index of Judicial Malapportionment</u>
N. D. Illinois	1	13	.08	.18	.10
E. D. Michigan	1	10	.10	.18	.08
E. D. Pennsylvania	1	19	.05	.18	.13
S. D. New York	2	27	.07	.16	.09
C. D. California	1	16	.06	.11	.05
D. C. District of Columbia	4	15	.27	.71	.44
Courts of Appeals	3	97	.03	.11	.08
Supreme Court	1	9	.11	.11	.00
Total	14	503	.03	.11	.08

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