

From The Black Bar—Voices For Equal Justice by *Gilbert Ware*. New York: G.P. Putnam's Sons, 1976.

From the Black Bar is a collection of articles, essays and speeches from Black lawyers, judges and law professors, which details the inequities within the American justice system. The book grew out of Gilbert Ware's service as Executive Director of the National Bar Association's Judicial Council.¹ In the preface, Ware states the purpose for the compilation:

What are black lawyers and judges thinking, saying, and doing about law, order, and justice? That is the central question in this book, which seeks to answer it through essays, interviews, and decisions that explain the administration of justice as it is and as it should be—according to black jurists.²

The book is divided into sections dealing with problems in the civil and criminal areas of the law and the political process. The authors discuss the harsh treatment which the legal system imposes on poor and minority persons. A majority of the contributors are Black judges, representing several levels of the judiciary.³ Ware asserts that they are in a unique position to recognize and to remedy the negative impact of the law on Blacks: "[The book's] rationale is that their dual experience as Blacks and jurists makes these people particularly qualified to point the way toward fulfillment of America's promise of equal justice for all, even those whose race or class has made them politically powerless and therefore judicially abused."⁴

Included are excerpts from opinions written by Supreme Court Justice Thurgood Marshall, and Judges Motley, Keith and Higginbotham. Ware's selection of Mr. Justice Marshall's⁵ dissent in *Milliken v Bradley*⁶ illustrates the unique leadership role that Black judges can take in recognizing the law's impact on Black litigants and their ability to suggest appropriate relief. Justice Marshall's dissenting opinion opposed reversal of a district court order granting inter-district relief for illegal segregation in Detroit's inner city schools. The majority denied metropolitan relief because there had been no finding of a constitutional violation by the suburban school districts. Justice Marshall recognized that there could be no effective desegregation plan without crossing district boundaries because of the high percentage of Blacks in the inner city.⁷

1. The National Bar Association's Judicial Council was organized in August, 1971, at Atlanta, Georgia. Pp. xv.

2. Pp. xv.

3. One United States Supreme Court Justice, one United States Court of Appeals judge, three United States District Court judges and seven state court judges are represented in the collection.

4. Pp. xv.

5. Appointed Justice of the United States Supreme Court in 1967 by President Lyndon B. Johnson; A.B., Lincoln Univ. LL.B., Howard Univ. Law School; U.S. Solicitor General, 1965-1967; U.S. Circuit Judge, 2d Cir., 1961-1965; Former Director and Special Counsel, NAACP Legal Defense and Educational fund, 1940-1961.

6. 418 U.S. 717 (1974). *Noted in* Connolly, *Milliken v. Bradley: The Dilemma of DeJure Segregation in Black-Majority School Districts*, 6 COLUM. HUMAN RIGHTS L. REV. 567 (1974-75); 51 NOTRE DAME LAW 91 (1975); 69 NW. L. REV. 799 (1974); 48 TEMP. L.Q. 966 (1975); 14 WASHBURN 640 (1975), 21 WAYNE L. REV. 751 (1975). *See also* *Milliken v. Bradley II*, 433 U.S. 267 (1977).

7. 418 U.S. at 781. *But see* *Hills v. Gautreaux* 425 U.S. 284, there the Court followed Marshall's point of view and granted metropolitan relief to remedy segregated public housing patterns in the Chicago area. *Noted in*, 1975 U. ILL. L.F. 135 (1975).

In *Sostre v. Rockefeller*,⁸ district court Judge Constance Baker Motley⁹ fashioned a remedy to limit the number of days a prisoner could be kept in isolation. Plaintiff Sostre was punished for being a Black Muslim and engaging in jailhouse lawyering. Although Judge Motley's opinion is both thorough and legally creative, the *Sostre* case was reversed.

Judge Damon J. Keith¹⁰ addressed racially-motivated official actions in two abstracted opinions. In *Sarah Sims Garrett et al. v. City of Hamtrick*,¹¹ the judge ordered city officials to cease displacing families by urban renewal projects. Further, he ordered them to find housing for displaced persons retroactively and prospectively. In another case, *Stamps v. Detroit Edison Company*,¹² Judge Keith also provided mandatory relief by ruling that the defendant company's work force had to become thirty percent Black. Showing sensitivity to Black oppression, Judge Keith ordered the payment of four million dollars to compensate for discriminatory hiring practices. However, his decision on damages was modified on appeal.¹³

Ware includes excerpts from two opinions by Judge A. Leon Higginbotham, Jr.¹⁴ in litigation against a local of the International Union of Operating Engineers. In one ruling, the judge issued an order protecting the Black plaintiffs from beatings by members of the defendant union.¹⁵ The other ruling denied defendant's motion for recusal in which it was contended that a Black judge could not fairly adjudicate a case in which Whites were charged with racial discrimination.¹⁶ Judge Higginbotham uses both opinions to demonstrate his understanding of racism in American life.¹⁷

All of the abstracted opinions highlight various problems of Blacks in

8. Pp. 145; 312 F. Supp. 863 (1970 S.D.N.Y.); *rev'd and modified sub nom* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971). Judge Motley held that the first amendment protected prisoners from being punished for exercising their right to speech, and assessed punitive damages against the state. *Noted in*, 5 SUFFOLK U.L. REV. 259 (1970); 1971 UTAH L. REV. 275 (1971).

9. Judge, U.S. District Court for the Southern District of New York (first black woman federal District Court Judge); A.B., New York Univ., LL.B., Columbia Univ.; Pres. Borough of Manhattan, 1965-66; N.Y. State Senate, 1964-65; Staff Atty., N.A.A.C.P. Legal Defense and Educational Fund, 1945-65. *See Constance Baker Motley: Black Woman, Black Judge*, 1 BLACK L.J. 173 (1971).

10. Chief Judge, U.S. District Court for the Eastern District of Michigan; A.B., West Virginia State College; LL.B., Howard Univ. Law School; LL.M., Wayne State Univ. In October 1977, Judge Keith was nominated to be U.S. circuit judge, 6th Circuit. 46 U.S.L.W. 2210 (1977).

11. 335 F. Supp. 16 (E.D. Mich. 1971), *rev'd* 503 F.2d 1236 (6th Cir. 1974) (punitive damages improperly awarded based on the trial court record; remanded to determine whether the representatives were the proper parties to represent all class members on all issues).

12. 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd and remanded*, 515 F.2d 301 (6th Cir. 1975), *cert. granted*, 431 U.S. 951 (1977). *Noted in*, 20 WAYNE L. REV. 1337 (1974).

13. 515 F.2d 301 (6th Cir. 1975).

14. Judge, U.S. District Court for the Eastern District of Pennsylvania; A.B., Antioch College; LL.B., Yale University; Adjunct Prof. Sociology, Univ. of Pennsylvania Graduate School; Lecturer in Law, Univ. of Pennsylvania Law School; formerly a Commissioner of the Federal Trade Commission; Vice-Chairman, The Nat'l Comm. on the Causes and Prevention of Violence; Comm'r, Commission on Reform of Federal Criminal Law. On October 18, 1977 the Senate confirmed the nomination of Judge Higginbotham to the 3rd Circuit Bench. 46 U.S.L.W. 2198 (1977).

15. *Commonwealth of Pa. v. Local 542, Internat'l Union of Operating Engineers*, 347 F. Supp. 268 (E.D. Pa. 1972).

16. *Commonwealth of Pa. v. Local 542, Internat'l Union of Operating Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974).

17. *See also*, Higginbotham, *Racism and the Early American Legal Process*, 1619-1896, 407 ANNALS 1 (1973).

the legal system. To the extent that these opinions illustrate Black jurists' ability to recognize and remedy problems peculiar to Blacks, Ware's selections serve his stated purpose. However, he provides no guidance to the reader to help him determine whether or not the decisions represent the best legal solutions to the problems experienced by Blacks. Also, the opinions are scattered through all sections of the book and no commentary is given to indicate the significance of the decisions. This failing is indicative of the overall organization of the volume. No editorial language connecting the articles within each section is provided. Rather, Ware limits his editorial role to giving an introduction to each section. Although it does help to place the succeeding articles in perspective, a more active editorial role would have been helpful.

Ware does state the premise of the first section of the book, *Race, Justice, and Politics*:

[P]eople who are responsible for designing and executing the law—legislators, police, prosecutors, and judges—function in “a politically organized society.” They discharge their responsibility in such a way as to protect the interests of the most powerful segments of society whom they represent.¹⁸

With the exception of the article by Haywood Burns, none of the articles in this section show how the law can be used in the political process. While the other articles support Ware's major premise, they reiterate grievances that are common knowledge without going further to give concrete suggestions which can be implemented to overcome the problems identified. In addition, there are no articles which specifically treat the legislative process, an integral and important aspect for complete coverage of the political arena.

Within this section, Derrick A. Bell, Jr.¹⁹ discusses the history of judicial decisions which have had a negative impact on Blacks in this country.²⁰ He points out the political motivation of many decisions from the Emancipation Proclamation to the present time. The article provides a good historical explanation of judicial decisions, but fails to suggest specific political uses of the law. Bell has written several other articles which might have been better suited for this book²¹ containing a more pointed discussion of politics.

Although focusing on criminal law issues, Howard Moore, Jr.²² and Jane Bond Moore²³ have done a better job of illustrating the impact of politics on the treatment of Blacks within the justice system. In an article entitled *Some Reflections: On the Criminal Justice System, Prisons, and Repressions*²⁴

18. Pp. 1.

19. Professor of Law, Harvard Law School; A.B., Duquesne Univ.; J.D., Univ. of Pittsburgh Law School.

20. *Black Faith in A Racist Land*, Pp. 11, reprinted in 20 J. PUBL. J. 371 (1971).

21. Among Bell's works which examine the inequities within the justice system and the political forces involved are *Racism In American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973); *Racial Remediation: An Historical Perspective On Current Conditions*, 52 NOTRE DAME L.J. 5 (1976); *Real Cost of Racial Equality*, 1 C.L. REV. 79 (1974).

22. Attorney in Atlanta, Georgia; A.B., Morehouse College; LL.B., Boston Univ. Moore was one of the attorneys in the celebrated Angela Davis trial. See *Howard Moore: The People's Lawyer*, 2 BLACK L.J. 55 (1972). See also, Moore, *Does Justice Have a Skin Color? Law: Is It a Skin Game?* 5 N.C. CENT. L.J. 2 (1973).

23. A.B., Spellman College; J.D., Univ. of California School of Law, Berkeley.

24. Pp. 32.

the Moores state:

The values, judgements, and fears of those in power are expressed in its constructs, however obtusely; Through firm control of the legislative, law enforcement, and the criminal labeling processes, the white racist ruling class defines what acts are criminal and fixes penalties. Thus criminal law, in both content and administration, is a political instrument, written and enforced by the powerful against the poor and powerless, who are for the most part Blacks or other ethnic minorities.²⁵

After asserting the need for prison reform and the need for a general overhaul of the criminal justice system, they conclude that there must be a reallocation of power in order to accomplish this goal. While such a strong indictment of the justice system is probably warranted,²⁶ some scheme for "power reallocation" should have been included, if Ware's purpose for compiling this book is to be accomplished, *i.e.*, how justice ought to be administered.

Haywood Burns²⁷ does a better job of meeting that goal. In his article, *Political Uses of the Law*,²⁸ he discusses not only examples of politically-motivated racial injustice, but also gives some specific direction as to how a more equitable system might be devised. He gives several examples of repressive legislation, and administration of the law.²⁹ Believing that the law is a very effective tool for producing change, Burns nonetheless recognized its limitations. His specific recommendations include, among others, long-range, in-depth policy analyses through inter-disciplinary problem solving.

The article by D'Army Bailey,³⁰ discusses the discretion granted to parole officials by the California Penal Code. Because of their subject matter, both Bailey's article and the Moores' contribution might have been better placed in the next section dealing with criminal justice. The articles in the section entitled *Criminal Justice and Blacks* focus on the relationship between race and class, and its effect upon the administration of criminal justice. This includes discussions regarding various stages of the system from arrest to sentencing. It is in this section that several judges speak about their judicial experience.

Bruce McM. Wright's³¹ narrative uses colorful words and phrases to

25. Pp. 34.

26. For other articles which support the proposition that there is racial injustice within the justice system, *see generally*, Nagel & Neef, *Racial Disparities That Supposedly Do Not Exist: Some Pitfalls in Analysis of Court Records*, 52 NOTRE DAME LAW. 87 (1976); Carroll & Mondrick, *Racial Bias In The Decision to Grant Parole*, 11 L. & SOC. REV. 93 (1976); R. QUINNEY, *CRIMINOLOGY: ANALYSIS AND CRITIQUE OF CRIME IN AMERICA*, (1975). *But see*, E. GREEN, *JUDICIAL ATTITUDES IN SENTENCING* (1961); J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971), both suggesting that there are no disparities in the trial stage of the system, but possibly in the sentencing phase.

27. Professor of Law, Univ. of Buffalo Law School; A.B., Harvard Univ.; LL.B., Yale Univ. Burns' other articles include *Black People and the Tyranny of American Law* 407 ANNALS 161 (1973); *Taking Liberties*, 1 C.L. REV. 179 (1973) (discussion of inequitable military discharges which bar employment).

28. Pp. 18.

29. *Repressive Legislation: Preventive Detention*, Pp. 19; "Legalized" Invasion of Privacy, Pp. 20; Grand Jury Immunity and the Interstate Riot Act, Pp. 21; *Repressive Administration of the Law: "Red Squads" and Surveillance*, Pp. 22; Informants, Pp. 23; Mass Arrests, Pp. 25; Grand Jury Manipulation, Pp. 25; Bail as Ransom, Pp. 26.

30. Attorney, Memphis, Tenn.; A.B., Clark Univ. LL.B., Yale Univ.

31. Judge, Civil Court of the City of New York; A.B., Lincoln University; LL.B., New York University. Other articles by Judge Wright include *Bangs and Whimpers XXXIX: The Legacy of*

depict ordinary events. For example, in describing the treatment of indigent arrestees he states: "But every morning and night black paddy wagons with barred windows arrive at the criminal courthouse in Manhattan, to discharge its herd of two-legged beasts, all chained and shackled together as they are hurried into the pens, to await the awful wrath of a harried judge" ³² Judge Wright gives several graphic examples which illustrate the inequities involved when justice is meted out along racial lines. ³³ He feels that most white judges are insensitive to the circumstances of Black defendants, which results in unequal treatment.

Wright suggests some unorthodox methods for remedying that treatment, such as requiring that judges receive training in ethnic sensitivity, basic psychology of the poor, and Black history in the United States. Wright makes the suggestions in a sarcastic manner, but they should be given serious consideration. Another contributor to this section, Joyce London, ³⁴ makes a suggestion similar to that made by Judge Wright. She advocates that the criteria for selecting juvenile court judges include an assessment of the judges' ability to be sensitive to Black juveniles.

Other contributors in this section are Joseph C. Howard, ³⁵ Basil A. Patterson, ³⁶ and the late William H. Hastie. ³⁷ Judge Howard analyzes court records of rape cases to determine the disparities in indictment, trial, sentencing, and parole of Black and white defendants. ³⁸ Categorizing both offenders and victims by race, he concludes the Black offenders/white victim

Dred Scott, 5 N.C. CENT. L.J. 148 (1974) (discussion of Judge Taney's opinion); *A Black Brood On Black Judges*, 57 Jud. 22 (1973) (advocates judicial activism by Black judges); *Caveats From The Elders: Warnings and Alarums to Students of The Law As They Learn To Tread Water In Its Inconsistent Depths*, 4 N.C. CENT. L.J. 219 (1973), (address to first year law students).

32. Pp. 93.

33. Judge Wright recounted:

[L]ate in 1973, a committee of judges . . . issued a report in which the justice system was called a failure. The report suggested that the police are more diligent in apprehending Blacks than Whites. One example of discrimination was underscored . . . It is said that the charge most often leveled against a White male in a stolen car case is "unauthorized use of a vehicle." But virtually all Black males [are] charged with grand larceny, auto.

Judge Wright notes that unauthorized use is merely a misdemeanor while grand larceny is a felony. In discussing racial injustice in the sentencing stage, Judge Wright highlights the disparities:

In a fraud case, involving illegal trading in stock, through numbered Swiss bank accounts, to the tune of \$20,000,000, the rich defendant was represented in court by a former federal judge. The defendant and his firm had received illegal profits of some \$225,000, and besides, the defendant had perjured himself during the grand jury investigation. He was fined \$30,000, received a suspended jail term, and was placed on probation. One week later, the same judge had before him an unemployed Negro shipping clerk. The Negro was married, with two children and a prior record of one robbery. He was charged with stealing a television set worth \$100.00 from an interstate shipment. He received one year in jail.

Pp. 92-93.

34. Attorney, Boston Legal Assistance Project; A.B., Howard Univ.; J.D., New England Law School.

35. Assoc. Judge, Supreme Bench of Baltimore City, Md.; B.S., Univ. of Iowa; J.D., Univ. of Washington and Drake Univ.; M.S., Drake Univ.

36. Attorney, New York City; B.S., St. John's College; J.D., St. John's Law School; former vice-chairman Democratic National Committee.

37. Deceased, 1976, Senior Judge, U.S. Court of Appeals for the Third District; A.B., Amherst Univ.; LL.B., Harvard Univ.; S.J.D., Harvard Univ. See also, *These Do We Honor*, *supra* at Pp.-.

38. The statistics were apparently gathered from police records and court files in the City of Baltimore and the State of Maryland, for rape cases during 1962-1966 and for capital sentencing from 1923-1966. The conclusions are those of Judge Howard.

group is more likely to receive the death penalty than the white offenders/Black victims group. In virtually every stage of the criminal process, a similar conclusion was reached.

Because of the period covered by the data, doubts arise as to the study's validity when the book was published. Both Ware and Howard have left the reader in a quandary because there is no indication of whether the article was written at the close of the statistical period, or specifically for the book. In any event, Judge Howard could have included an update on capital sentencing, in light of the virtual suspension of the use of death penalties in the late 1960's and throughout the 1970's.

Two other judges and a prosecutor are also represented in this section. Milton B. Allen, former state's attorney of Baltimore, Maryland, discusses an insider's view of prosecutorial power. Both Judge Crockett and Judge Smith indicate that they are willing to take the active role for which Ware asserted that Black judges are uniquely qualified. Crockett³⁹ suggests that Black judges "concisely plan the reexamination and the eventual overruling of old outmoded legal theories and precedents which no longer serve the legitimate interests of today's new political majority; and ultimately, to assist, judicially, in returning America to her true constitutional moorings."⁴⁰ This section of the book is effective in pinpointing the ills of the criminal justice system and contains more concrete suggestions for change than the preceding one. The recommendations of the contributing judges were persuasive because they were based on actual experience.

The final section, *Civil Justice and Blacks*, is the least appealing portion of the book. It contains a discussion of the problems of landlord-tenant relations by Howard Bell and Solomon Baylor. The article is of limited general use because it deals only with Maryland and New York law. Also of limited use, apart from its historical value, is a 1949 speech by Charles Hamilton Houston on the problems of Black railroad workers. In addition to the opinions of Judges Higginbotham, Keith and Marshall, discussed above, the most valuable articles in this section are by William H. Brown and Robert L. Millender.⁴¹ Both view governmental administrative agencies as valuable supplements to the judicial process. By alerting the reader to this alternative, these authors have provided a service.

Despite its lack of coherence, *From the Black Bar* accomplishes the editor's purpose of presenting the views of a broad cross section of the bar. Nonetheless, many of the articles included are dated, most having been written five to seven years before the book was published. The book's topic lends itself to a fresher approach and newer material, considering the nu-

39. Presiding Judge, Recorder's Court, Detroit, Mich.; A.B., Morehouse College; LL.B., Detroit College of Law.

40. Pp. 109. For related writings by Crockett see, *A Black Judge Speaks*, 45 J. URB. L. 841 (1968); *1967 Detroit Riots; Commentary: Black Judges and the Black Judicial Experience*, 19 WAYNE L. REV. 61, (historical account of Blacks from the Bench); *Racism in American Law*, 27 GUILD PRACTITIONER 176 (1968) (discussion of the effect of racism on the various phases of the legal profession).

41. Brown is an attorney in Philadelphia, Pennsylvania; B.S., Temple Univ.; J.D., Univ. of Pennsylvania; former chairman, Equal Employment Opportunity Commission. Millender is an attorney in Detroit, Michigan; A.B., Detroit Institute of Technology; LL.B., Detroit College of Law.

merous decisions rendered and laws enacted in the last several years. Alternatively, an editor's comment could have been included to reflect recent developments. Furthermore, very few of the authors gave more than a general statement as to recommendations for curing the injustices found in the legal system. These shortcomings made the book read like a list of unconnected general observations, rather than a comprehensive recommendation for achieving equality in the courts.

The book does, however, sensitize the general reader to the problems within the American justice system and the need for change. For example, non-lawyers would be unlikely to have access to official reports of the judicial decisions reprinted in the volume. Indeed, the fact that a majority of the observations in the book were written by members of the Black judiciary shows that unequal justice is pervasive. While this is not news, it is encouraging to learn that leading Black jurists are willing to assist in effectuating change. In the preface, editor Ware observed that "From the men and women who are in the judicial arena . . . [w]e need examples of judicial activism against racism and classism so that people who possess or obtain judicial power will have models to emulate."⁴² By providing examples of the way in which Black judges use the law creatively, Ware has helped the reader to understand that the law is capable of adjusting to new rights and new remedies.

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42. Pp. xxv-xxvi.