BOOK REVIEWS

American Constitutional Law by *Laurence H. Tribe*. New York: The Foundation Press, 1978.

One of the many impressive features of Professor Tribe's distinctive new treatise on *American Constitutional Law* is the candor with which he alerts readers to his goals. At the outset he acknowledges the temptation to state a more modest purpose in the hope that readers would favor his self-effacement, "but that just wouldn't wash."[1] Rather he proclaims that the treatise would not serve the real needs of students, scholars or practitioners if it were merely "another extended outline, a largely non-critical summary of leading cases and black letter rules."[2] Professor Tribe's objective is to present "a unified analysis of constitutional law," by employing "a systematic treatment, rooted in but not confined to the cases, sensitive to, but not centered on social and political theory."[3]

As interpreter of and commentator on the Supreme Court's constructions of the Constitution, Tribe is more intrigued than awed by the Justices' perceptions and rationalizations. "I do not," he announces, "regard the rulings of the Supreme Court as synonymous with constitutional truth."[4] In his effort to present how the doctrines and theories of constitutional law have been shaped, what they mean, how they interconnect, and where they are moving, Tribe views the Constitution as "an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices."[5] If there is reverence in this volume, it is for the Constitution itself, not for the Supreme Court "that held slaves to be non-persons, separate to be equal and pregnancy to be non-sex-related."[6]

With this prefatory trumpeting of his credo, Professor Tribe proceeds to examine the tendencies, emphases and approaches to constitutional interpretation and adjudication through seven basic models: separated and divided powers; implied limitations on government; settled expectations; governmental regularity; preferred rights; equal protection and structural justice. The 1174 pages that follow manifest the depth of meticulous scholarship, the ingenuousness of profound commitment to democratic ideals, the finely honed technical skills of the legal profession and, occasionally, a "holier than thou" quality which few critics can completely eschew. Tribe points out the Court's errors and logical inversions with the conviction and zeal of a candidate for office. Although the "if I were king" dimension may not be wholly admirable, it nonetheless leaves the reader with compelling evidence that the author is not only frequently right, but that his opinions make more

1. Pp. iii.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

of what Llewelyn used to call "situation sense" than have some Supreme Court decisions.

I was especially impressed by Professor Tribe's analysis in Chapter 16 of his "Model of Equal Protection." He begins with an eloquent ode to equal justice under law, commenting that it is more than an inscription in marble on the Supreme Court building; it serves in practice as an indirect guardian of nearly all constitutional values. The standard of equal justice under law "wars with the idea that equality is liberty's great enemy and can be purchased only at an unacceptable price to freedom."[7] Tribe then proceeds to examine the judicial standards of rationality, conceivable basis, and strict scrutiny in tracing the Court's methodologies and substantive outputs.

He recognizes the device of strict scrutiny as "most powerfully employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, by consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle."[8] At the same time, he realizes that application of the strict scrutiny test cannot invariably prevent "the nefarious impact that war and racism can have on institutional integrity and cultural health,"[9] as evidenced by *Korematsu*'s[10] justifying the "relocation" of Americans of Japanese ancestry during World War II. I lament Professor Tribe's failure to allocate more detail to such examples of egregious judicial departure from constitutional norms. He deals as sparsely with the particulars of the *Dred Scott*[11] case as he does with *Korematsu* and *Hirabayashi*.[12] He flays the Court's decisions in these infamous cases but he doesn't explain how they came about. Merely to label the *Dred Scott* case an "infamous decision" may perpetuate the notion that it was a wild aberration rather than both prototype and end product of an era's heinous indifference to human persecution. Every dimension of the *Dred Scott* case should be delineated as fully as *Marbury v. Madison*[13] or *McCulloch v. Maryland*[14] so that our own and future generations can understand its place in past history and prevent resurgence of its underlying assumptions.

Tribe's analytical skills again fuse with his conscience toward the end of his discussion of the equal protection model as he focuses on the recent decline of judicial intervention on behalf of the poor. These pages constitute special gems of insight, analysis and critique.[15] Emerging from the decisions of the 1970s, Tribe finds, is "a wavering commitment to maintain for the poor access to criminal justice and the political process."[16] He finds a deter-

7. Pp. 991.
8. Pp. 1002.
9. Pp. 1000.
10. Korematsu v. U.S., 323 U.S. 214 (1944). This case provides the only episode in which the Supreme Court upheld racial discrimination while applying the strict scrutiny standard.
11. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (denying citizenship status to Blacks, free or slave, and holding the Missouri Compromise unconstitutional).
12. Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding a curfew on persons of Japanese ancestry).
13. 5 U.S. (1 Cranch) 137 (1803). Tribe discusses Marbury in Chapter 3 on Federal Judicial Power. Pp. 20-26.
14. 17 U.S. (4 Wheat.) 316 (1819), fully discussed at pp. 228-231.
15. Pp. 1118-1136.
16. Pp. 1135.

mined commitment by the Court to preserve ways by which the non-poor can purchase distance from the less fortunate. At the same time he finds "a possible" judicial belief in protecting the poor against horrendous deprivations of education, nutrition and welfare, and predicts that the Burger Court "will not refuse lifelines to those about to drown, even if it will throw them from a point perched safely above the disquieting signs of distress."[17]

Despite my unbounded admiration for the effort, achievement and principles that pervade Tribe's treatise, I am puzzled by two small facets and one larger one. While I applaud his recognition that nothing in the Supreme Court's opinion in one of the abortion cases, *Roe v. Wade*,[18] "provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability,"[19] it seems inconsistent with this salient point for him to wind up viewing the abortion decisions as "less problematic" than might otherwise appear by classifying them as leaving the decision as to whether to bear a child "to women rather than to legislative majorities."[20]

The second cavil stems from Tribe's choice of an "elusive thread" to "help us wind our way through the story" of his seven models of constitutionalism. That thread is the fourteenth amendment's Privileges and Immunities Clause. At other points Tribe contrasts the Due Process and Equal Protection Clauses' applications to "persons" with the Privileges and Immunities Clause's applications to "citizens." Thus, it is difficult to see how a clause limited to "citizens" can sew together an enduring constitutional doctrine.[21]

My greatest puzzlement, however, is over Tribe's allocation of the problem of state action to his concluding chapter and to his categorization of that problem as being "what the Constitution is *not* about."[22] The state action requirement is one of many thresholds that must be crossed before constitutional protection effectively can be invoked. Like standing, ripeness, justiciability and the demonstration of protectable liberty or property interests, it is a *sine qua non* to recovery under particular clauses of the Constitution. To treat it as uniquely non-constitutional is confusing at best and, at worst, misleading and dysfunctional.

I agree that a central conundrum of constitutional law is why the courts failed to follow up on every dimension of Justice Bradley's definition of state action in the *Civil Rights Cases*.[23] It is true that the Court declined the Attorney-General's invitation to stretch state action into a constitutional version of "original sin," and ignored claims that requiring a state license to engage in business converts a businessman's subsequent actions depriving persons of their rights into state action. It might also be noted that, at least by implication, Bradley rejected the "war of race" theory, proposed in his *Cruikshank*[24] decision, which would have made it possible to invoke the

17. *Id.*
18. 410 U.S. 113 (1973).
19. Pp. 927.
20. Pp. 933.
21. *See generally*, Comment, *Reviving the Privileges or Immunities Clause*, *supra* at pp. ——.
22. Pp. 1174.
23. 109 U.S. 3 (1883).
24. U.S. v. Cruikshank, 92 U.S. 542, 543 (1876).

prohibitions of the fourteenth and fifteenth amendments without alleging state action at all.

Nonetheless, it would be incomplete to cite the *Civil Rights Cases* for the proposition that civil rights guaranteed by the Constitution against state aggression cannot be impaired by the wrongful acts of individuals. No constitutional claim can be stated for the wrongful acts of individuals if those individuals are unsupported by state authority. If, however, laws or customs having the force of law, or judicial proceedings or executive proceedings give an individual's acts prior authorization or subsequent sanction, then they have been supported by state authority and hence violate the guaranty against state aggression. In addition, if the State should fail to protect against perpetration of individual acts, the injured party can ground state action on such failure. Under the view expressed by Bradley, state action had to be shown, but state action was made up of *custom* as well as overt acts of state officials and of failure to fulfill state duties as well as violations of state prohibitions.[25]

Certainly Tribe is correct in maintaining that the Supreme Court subsequently abandoned "any attempt to enforce as a matter of due process a general division of responsibility between governmental and private actors."[26] One may also agree with him that "in resolving state action questions, therefore, the Court has not been able to resort to a unified, affirmative theory of liberty in order to reconcile the tension between the premises of the

25. The detailed contents of state action emerged from Bradley's explanation of why Sections 1 and 2 of the Civil Rights Act of 1875 were unconstitutional:

> An inspection of the law shows, that is, makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States . . . . It applies equally to cases arising in States which have the justest [sic] laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the Amendment. In other words, it steps into the domain of local jurisprudence and lays down rules for the conduct of individuals in society towards each other and imposes sanctions for the enforcement of those rules without referring in any manner to any supposed action of the State or its authorities.

109 U.S. at 14. Bradley's choice of language warrants the conclusion that the requisite state action could have been shown by referring to the inadequacy of unjustness of existing state laws respecting the personal rights of citizens or to the failure of state officials to carry out duties assigned under otherwise adequate and just state laws or to the violation by state officials of the prohibitions contained in the fourteenth amendment regardless of state laws on the subject.

An equally important dimension of Bradley's view of state action was present in his affirmation of the Court's decision in Ex Parte Virginia, 100 U.S. 339 (1880), upholding Section 4 of the same statute. Section 4, he explained, was entirely corrective. It applied to state statutes and to the conduct of state officials under or contrary to the statutes. "Whether the statute book of the State actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule; and it is against such State action, through its officers and agents, that the last clause of the section is directed." *Id.* at 15. Bradley thus reaffirmed the doctrine that acts of state officials are state action even when not required or authorized by state law. Legislation and enforcement are recognized as separate but equally meaningful forms of State Action. Bradley's reasoning in approving the validity of the Civil Rights Bill of April 9, 1866, was another indicator of the breadth of the concept. This statute, too, was deemed clearly corrective. It was "intended to counteract and furnish redress against State laws and proceedings and customs having the force of law which sanction the wrongful acts specified." *Id.* at 16. The penalty of the statute applied "only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc. of any State or territory." *Id.* at 17. The Court here explicitly added "custom" having the force of law to state action.

26. Pp. 1115.

state action requirement or to decide when government tolerance of private conduct amounts to 'state action'."[27] But this doesn't warrant the conclusion that the state action concept stands independently of all other constitutional threshold issues or that it poses "a series of problems whose solutions must currently be sought in perceptions of what we do not want particular constitutional provisions to control."[28] The question of what activity constitutional provisions ought to control lies at the core of what constitutional law is about, and is manifested throughout the "balancing" and other policy evaluations the courts make every day in construing whether, in principle, constitutional protection applies and as a matter of practice, what protection is due under the circumstances of each case.

No doubt others will find different points about which to question or disagree with the author. What is more significant is that Professor Tribe has implemented a well conceived analytical framework and supportive hypotheses, so that on virtually every page one's intellects and values are confronted and challenged. Moreover, his prose is invariably readable, and many of his brilliantly crafted critiques are destined for future editions of Bartlett's *Familiar Quotations*, to say nothing of future court decisions. If he does not make a habit of complimenting the Supreme Court, he does pay consistent tribute to his readers by providing the most literate, systematic and creatively contentious treatise of its generation.

VICTOR G. ROSENBLUM*

27. *Id.*
28. Pp. 1174.

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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's[5] 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]

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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 Motley[9] 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. Keith[10] addressed racially-motivated official actions in two abstracted opinions. In *Sarah Sims Garrett et al. v. City of Hamtrack*,[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 book[21] containing a more pointed discussion of politics.

Although focusing on criminal law issues, Howard Moore, Jr.[22]and Jane Bond Moore[23] 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 penalities. 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 Burns[27] 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's[31] 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. Paterson,[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] Catagorizing 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 Assitance 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 penalities 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. Crockett[39] 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.

FRANCES C. BROADUS

42. Pp. xxv-xxvi.

Simple Justice by *Richard Kluger* New York: Alfred A. Knopf, 1976.

Simple Justice is a well documented account of the history of *Brown v. Board of Education*.[1] The book is divided into three major segments with an epilogue. Part I, entitled *Under Color of Law*, is a discussion of the history of American racism and the people, organizations and institutions who struggled to overcome it. The history of *Brown*, its companion cases,[2] and the litigation strategy used by the NAACP is outlined in Part II, entitled *The Courts Below*. The internal decision-making process of the Supreme Court is revealed in Part III, entitled *On Appeal*, which also assesses certain prejudices and political concerns of the Justices.

The book depicts the human drama involved in the struggle for equality by a group of both prominent and obscure Black Americans. Kluger's purpose in writing the book was "[T]o suggest how law and men interact, how social forces of the past collide with those of the present, and how the men selected as America's ultimate arbiters of justice have chosen to define that quality with widely varying regard for the emotional content of life itself."[3]

The opening chapter demonstrates that change through law begins with the collective efforts of people who have the most to gain or lose by challeng-

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1. 347 U.S. 483 (1954). This Kansas case involved a challenge to a statute that permitted, but did not require, segregation in certain cities. The Topeka School Board established segregated elementary schools although other schools were operated on a nonsegregated basis. The United States District Court held that segregation in public education did have a detrimental effect upon Black children, but that no relief could be granted since the Black and white schools were substantially equal. 98 F. Supp. 797 (D. Kan. 1951).

2. In addition to *Brown*, there were four other cases which challenged either segregation itself or the equality of segregated facilities. They involved the states of South Carolina, Briggs v. Elliot, 347 U.S. 483 (1954), Virginia, Davis v. County School Bd., 347 U.S. 483 (1954), Delaware, Gebhart v. Belton, 347 U.S. 483 (1954), and the District of Columbia, Bolling v. Sharpe, 347 U.S. 947 (1954). In *Briggs*, the challenge was against a mandatory school segregation statute. The federal district court found the Black schools to be physically inferior to the white ones and ordered equalization. However, Plaintiffs were denied admission to the elementary and high schools during the equalization phase. 98 F. Supp. 529 (E.D.S.C., 1951). Moreover, the court sustained the statute. The Supreme Court vacated the judgment and remanded for the district court's opinion on the progress of the equalization program. 342 U.S. 350 (1952). On remand, the district court found that the defendant school officials had proceeded in good faith in furnishing equal education facilities and refused to enjoin continued segregation. 103 F. Supp. 920 (E.D.S.C., 1952). In *Davis*, the Virginia case, the federal district court denied an injunction against enforcement of mandatory public school segregation. However, it did find the Black schools to be inferior in physical plant, curricula, and transportation facilities and ordered the county school board to proceed with all diligence and dispatch to remove the inequality in physical plant. Nonetheless, during the equalization process the plaintiffs were not allowed admission to the white schools. 103 F. Supp. 337 (E.D.Va., 1952). *Gebhart*, the Delaware case, was the only one brought to the Supreme Court on appeal from a state court. Here too, elementary and high school age plaintiffs sought to enjoin the enforcement of state laws which required segregation. In this case, however, the Delaware Court of Chancery gave judgment for the plaintiffs and ordered that they be admitted to the White school. The Chancellor held that while the Black schools were physically inferior, segregation itself resulted in an inferior education. 32 Del. Ch. 343, 87 A.2d 862 (1952). The Supreme Court of Delaware affirmed. 33 Del. Ch. 144, 91 A.2d 137 (1953). In the Supreme Court the defendants claimed that the Delaware courts had erred in allowing the immediate admission of the Black plaintiffs to the white schools. *Bolling*, the District of Columbia case, was the only one that did not challenge inferior physicial facilities. Rather, the challenge was to the constitutionality of segregation itself. After the District Court ruled that the plaintiff failed to state a claim upon which relief could be granted, an appeal was taken to the circuit court, but the Supreme Court granted certiorari before judgment by the appellate court.

3. Pp. X.

ing the status quo. Initially the reader is taken to Clarendon County, South Carolina during the late nineteen-forties. The author's discussion centers on the plight of grass roots organizer Reverend J. A. DeLaine and the courage of Harry Briggs. Kluger describes in a captivating manner, the risks, tensions and obstacles these men encountered when they attempted to defy southern tradition by protesting and ultimately suing to obtain equal educational treatment for Black children. Kluger notes, for instance, that Harry Briggs and his wife lost their jobs as a consequence of their efforts to fight for better schools. DeLaine, his wife, and others were fired from their jobs and threatened with bodily harm. He was sued and found liable for slander on a questionable claim. His house and church were burned down. Finally DeLaine was forced to flee South Carolina. The grass roots efforts of DeLaine and Briggs came to the attention of the NAACP lawyers, and led to a school desegregation case in which Briggs was one of the named plaintiffs.[4] This chapter can be read as a message to Black Americans that little positive social change can be accomplished without unity of purpose and courage.

In the remaining eleven chapters of Part I, Kluger outlines the history of American racism and traces the evolution of the NAACP Legal Defense Fund into a division of the parent organization. The author does excellent mini-biographies of many of the NAACP lawyers. The reader is enlightened by Kluger's portrayal of the roles played by Charles Hamilton Houston, Thurgood Marshall, James Nabrit, Jr., Spottswood Robinson III, William Hastie, William Coleman, Robert Carter, Nathan Margold, Oliver Hill, and Jack Greenberg. Surprisingly very little has been written concerning the careers of these NAACP attorneys, with the exception of Thurgood Marshall.[5]

Charles Hamilton Houston was the principle strategist in the early stages of the NAACP legal attack on segregation and also served as Dean of the Howard Law School. Kluger brings to light the important contribution of the school, which emphasized the training of legal engineers whose purpose would be to eliminate the difference between the law as written and as ultimately applied to Blacks. In addition, Kluger discusses the litigation strategy used by the NAACP in a number of cases which cut against the "separate but equal" concept.[6] In other chapters of Part I, Kluger goes on to note the hypocritical language of the Declaration of Independence, the im-

4. Briggs v. Elliot, 347 U.S. 483 (1954).

5. *See, e.g.*, R. BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL (1973); L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS, 3063-92 (1969) (Thurgood Marshall); G.R. McNeil, *Charles H. Houston*, 3 BLACK L.J. 123 (1974); Poling, *Thurgood Marshall and the Fourteenth Amendment*, Collier's, (Feb. 23, 1952). *See also*, *Profiles: The Brown Strategists*, 3 BLACK L.J. 115 (1974).

6. *See* Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936), (Black plaintiff was denied equal protection where the only reason for denying him admission to the University of Maryland Law School was his race and no comparable Black law school existed in the state); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (failure to admit Black person to University of Missouri Law School solely because of race violates equal protection; state obligated to furnish, within its borders, equal legal education); Sweatt v. Painter, 339 U.S. 629 (1950) (establishment of Texas Southern law school did not offer a substantially equal legal education as that offered to Whites at the University of Texas); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (held that even though physical facilities were equal, restrictions placed on a Black plaintiff impaired his ability to study and learn, to such a degree that his training was unequal to that of his classmates).

pact of the Civil War and the Post-Civil War amendments, the Reconstruction and Post Reconstruction periods, the legal birth of the "separate but equal" concept, and other court decisions which effectively deprived Blacks of their rights. Using landmark events as stepping stones, Kluger traces the history of American racism as it appeared during slavery, in the minds of the framers of the Constitution, and in the practices of the political system and individual White Americans.

Kluger covers an enormous amount of history in a style that is vivid, colorful, and impressively detailed. Much of what Kluger discusses in the first part of the book are events that have been written about before. For example, the history of American slavery has been treated continuously by writers from various disciplines,[7] the Civil War and the amendments adopted in its aftermath have also been treated elsewhere.[8] The reader benefits, however, from Kluger's compendium of the scholarship of others, which allows him to view *Brown* in its full historical light. By reconstructing the events leading to *Brown*, the writer gives his work synergism. Kluger was thus successful in demonstrating "how law and men interact" and in identifying the collision of past and present social forces. His discussion of the NAACP and Howard Law School makes one strikingly aware of the vital importance of the need for black lawyers today; without them positive social change for Blacks would be unlikely.

Kluger begins the second part of his book with a discussion of the underlying justification for segregation. Also in Part II is a detailed account of the *Brown* litigation in the lower courts. At the trial level the objective was not so much to win as it was to form a favorable record for appeal to the Supreme Court. Kluger notes the efforts of the NAACP to get Kenneth Clark's highly controversial social-science data on the record in the lower courts. He further examines the organization's position on the use of such data when he writes:

> By no means all the lawyers in the elite corps Thurgood Marshall was enlisting for the massive assault on segregation were enthusiastic about Kenneth Clark's participation. In fact, his dolls were the source of considerable derision, and the social-science approach itself was viewed as unlikely to sway the Justices.[9]

This passage, together with Part III indicates that neither the NAACP nor the Supreme Court was relying too heavily on the social-science data.[10] This contribution by Kluger tends to blunt the criticism that the *Brown* decision was largely based on that data.[11]

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7. *See, e.g.*, L. BENNETT, BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA, 1619-1964 (1966); D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966); J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (1969); E. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY (1965).

8. *See, e.g.*, J. RAWLEY, RACE AND POLITICS: "BLEEDING KANSAS" AND THE COMING OF THE CIVIL WAR (1969); K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (1965); J. TENBROEK, EQUAL UNDER LAW (1965).

9. PP. 321.

10. Of the five desegregation cases which came to the Supreme Court, only *Brown* and *Gebhart*, expressed findings of fact with regard to the social science data. Kluger notes that Justice Jackson viewed the social science evidence as worthless, PP. 604, 689; Warren thought it was of minimal importance, PP. 706; while others were more or less indifferent, PP. 600-13.

11. *See, e.g.*, CAHN, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955) (social science testimony is misleading and that the rights of Blacks ought not to rest upon such questionable evidence); Gre-

The last part of Kluger's book describes the colloquia between the NAACP attorneys and the Supreme Court justices concerning certain difficult issues. One question to which plaintiffs' counsel had to respond in *Brown* was whether the segregation question was one which should have been submitted to Congress for resolution. This concern was voiced most strenuously by Justice Jackson.[12] In oral argument in the Davis case, NAACP attorney Spottswood Robinson III, responded to Justice Jackson's inquiry by advancing the notion that the Constitution itself was law, and that Supreme Court judicial decisions were self-executing amendments to that law. Furthermore, there were many examples in history where the Court had, in effect, judicially legislated in areas where Congress had failed to enforce prohibitions or rights originating from the fundamental law of the land.[13]

Also in Part III, Kluger gives an illuminating account of the behind-the-scenes decision-making process of the Supreme Court.[14] The conclusions in this section of the book are based on Kluger's interviews and correspondence with attorneys for both sides, the justices, their clerks, and the justices' own conference notes. There appears to have been a sharp ideological split among the justices. From notes and records, it appeared that Chief Justice Vinson would have voted not to overturn segregation, because he thought the problem was more social and political than legal.[15] Mr. Justice Reed was also prepared to vote for sustaining the "separate but equal" concept. On the other hand, Justice Black believed that segregation was a *per se* violation of the fourteenth amendment and that it should be outlawed unless prior decisions compelled another conclusion. There were conflicting reports, however, as to whether or not he would have voted to overturn segregation if the majority had voted otherwise.[16] Like Justice Black, Justice Douglas believed segregation to be unlawful.[17] Mr. Justice Burton's view

gor, *The Law, Social Science, and School Segregation: An Assessment*, 14 WEST. RES. L. REV. 621 (1963) (social science evidence was irrelevant and imprecise and that the weight of authority supported a contrary conclusion); Reston, *A Sociological Decision*, N.Y. Times, May 18, 1954, at 14, cols. 4-5; VAN DEN HAAG, SOCIAL SCIENCE TESTIMONY IN DESEGREGATION CASES—A REPLY TO PROFESSOR KENNETH CLARK (1960) (attacks the validity of Clark's experiments). *But see*, Clark, *The Desegregation Cases: Criticism of the Social-Scientist Role*, 5 VILL. L. REV. 224 (1959-60) (defends the use of social science data if and when it is used properly); Greenberg, *Social Scientists Take The Stand: A Review and Appraisal of Their Testimony*, 54 MICH. L. REV. 953 (1956) (contends the testimony educated some of the justices and had some persuasive effect; however, the cases would have been decided the same way even without the testimony); Lewis, *Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation: An Assessment"* 14 WEST. RES. L. REV. 637 (1963). *See generally*, 39 LAW AND CONTEMP. PROBS. 1 *et seq.* (1975) (substantial treatment of social science and school desegregation in *Brown* and its progeny).

12. PP. 576-77.

13. Santa Clara Co. v. So. Pac. R.R., 118 U.S. 394, 396 (1886) (corporation is a person within the meaning of fourteenth amendment).

14. To reach his conclusions about the Supreme Court, Kluger obtained information through interviews and correspondence with former law clerks and Supreme Court Justices. He made extensive use of Justice Burton's conference notes and diary which can be found in the Manuscript Division, Library of Congress. Justice Jackson's conference notes, which are in the Jackson Papers, were also consulted. Kluger gleaned information from letters of the Justices to other members of the Court. And finally, he used traditional sources e.g., books and articles for much of the biographical materials on the Justices.

15. PP. 591.

16. PP. 591-93.

17. PP. 602.

can be summarized by an excerpt from a letter he sent to Justice Frankfurter on September 25, 1952: "I doubt that it can be said in any state . . . that compulsory 'separation' of the races, even with equal facilities, *can* amount to an 'equal' protection of the laws in a society that is lived and shared so *'jointly'* by all races as ours is now."[18]

It was somewhat difficult for Kluger to assess the views of Justice Frankfurter, because his civil libertarian background was seemingly in conflict with his concept of strict constitutional construction and judicial restraint. However, Frankfurter's main concern was to unite the Court and achieve a unanimous decision. For this reason, he wanted to delay making a decision. Mr. Justice Clark usually voted the same way as the Chief Justice, but like Frankfurter, Clark wanted to delay.[19] The author notes that Jackson "was keeping his options open," for he did not see any judicial basis for outlawing segregation.[20] The reports about Justice Minton's position were inconsistent.

Kluger's discussion in Part III centers around the increased likelihood of a unanimous decision in favor of the NAACP after the death of Chief Justice Vinson and the appointment of Earl Warren as Chief Justice. Warren used his gift of persuasion to achieve this result. In order to get a unanimous decision, compromises were made with some of the Justices, and Kluger outlines the role played by the new Chief Justice in this process.

This reviewer feels that Kluger deserves to be complimented for his extraordinary research effort and major contribution to our understanding of the Supreme Court. Kluger takes immense materials and reconstructs them into a plausible and readable narrative. His descriptions of the courtroom encounters gives the reader a sense of presence. One cannot help but feel the tensions and pressures on the attorney having to respond to a difficult question posed by a Justice of the Supreme Court.

From Kluger's portrayal of the Supreme Court, civil rights lawyers may gain a more realistic view of the possibilities for social change through the judiciary. Indeed, as one reviewer noted, "Kluger illustrates the necessity of developing a much more complex and sophisticated framework within which to conceptualize the actual operation of the Supreme Court."[21] However, Kluger's conclusions from the random thoughts of the judges on segregation are subject to criticism. For example, some of the notes Kluger examined were nearly indecipherable and/or were considered out of the context in which originally written. However, if one reads Kluger's work with this chance for error in mind, he or she can fully appreciate the reconstruction of events that Kluger provides.

The final thirty pages of *Simple Justice* are an epilogue of the twenty years of social change since *Brown*. The author has been justifiably criticized by several reviewers for not giving these concluding passages the same kind of detailed description and complete analysis as employed in the prior

18. Pp. 611.
19. Pp. 611-12.
20. Pp. 610.
21. Beiser, 89 Harv. L. Rev. 1945, at 1951 (1976).

sections of the book.[22] Kluger leaves the impression that the struggle for equality under law was totally vindicated with the *Brown* decision, but the euphoric tone with which Kluger concludes is unwarranted.[23] Unless Kluger was prepared to give the epilogue the same kind of detailed treatment accorded other parts of the book, it should have been left unwritten.

Notwithstanding Kluger's conclusion and occasional preoccupation with superfluous detail,[24] the book is a well written narrative providing valuable information to lay persons as well as lawyers and legal scholars. Reading Kluger's description of the courageous efforts of the plaintiffs in the *Brown* cases should inspire other Black Americans. The book is a testament to the proposition that a *New Bill of Rights* can be achieved through unity, sacrifice and perseverance.

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22. *See*, MURPHY, 29 VAND. L. REV. 1471, 1472 (1976); Jefferson, NEWSWEEK (January 26, 1976).

23. *See generally*, D. Bell, *The Burden of Brown on Blacks: History Based Observations on a Landmark Decision*, 7 N.C. CENTRAL L.J. 25 (1975); *Symposium: Brown to Defunis: Twenty Years Later*, 3 BLACK L.J. 105 (1974); *Symposium on Completing the Job of School Desegregation*, 19 Howard L.J. 1 (1975).

24. There are instances where Kluger lapses into gossip. For instance, in discussing the quiet nature of Charles H. Houston, Kluger writes of a newspaper account of the Houston's divorce and how his first marriage "had not been a love story for the ages" Pp. 200. Such information detracts from the book's major theme and adds nothing of value.