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# CONSTANCE BAKER MOTLEY: BLACK WOMAN, BLACK JUDGE

By MICHELLE WASHINGTON

MICHELE WASHINGTON has just completed her second year at the U.C.L.A. School of Law. Prior to entering Law School, Miss Washington received her B.A. from the University of Southern California and did some graduate work in public administration. She is presently working with the Center for Law and Social Policy in Washington, D.C., is a member of the U.C.L.A. Law Review and is Associate Editor of the BLACK LAW JOURNAL.

CONSTANCE BAKER MOTLEY stands high on the list of modern freedom fighters. For three decades this daughter of Africa has battled in the nation's courts to help empower her people. As a student, attorney, state senator, and now a federal district court judge, she has been a midwife to liberty and nurtured equality.

A brief sketch of her career reveals the amplitude of her deeds. After attending Fisk and graduating from New York University she studied law at Columbia University and was awarded her LLB in 1946. While studying law, Mrs. Motley had worked as a clerk for the NAACP Legal and Education Defense Fund (Inc. Fund); after graduation she was appointed to the position of assistant counsel. At that time there were only three other attorneys with the Inc. Fund: Thurgood Marshall, Edward Dudley, now a New York State Supreme Court Justice, and Robert Carter, who became General Counsel for the NAACP.<sup>1</sup> Slashing at the heart of white supremacy, these four lawyers, among others, were the razor's edge of legal change in the American South.

From 1949 Mrs. Motley was directly involved in the Inc. Funds major school desegregation cases. These suits challenged the *Plessy v. Ferguson* separate-but-equal doctrine, the keystone of American law's racist structure. In a series of cases, the Inc. Fund staff attacked school desegregation in Delaware, South Carolina, Virginia, Kansas, and the District of Columbia. Eventually these actions were appealed to the United States Supreme Court; in 1954 the court outlawed segregation in public schools. In this epochal opinion, *Brown v. Board of Education*, the Court held that "In the field of public education the doctrine of separate-but-equal has no place."<sup>2</sup> Thurgood Marshall, Robert Carter, and Constance Motley led the Inc. Fund team which achieved this victory.

The paper "law" was clear: segregation in state supported schools was illegal. But in issuing the desegregation order the court woefully underestimated the virulent tenacity of American fascism; it provided the white south the loopholes of "practical flexibility" and "all deliberate speed." The price paid for the courts' innocence was a ten year struggle by Constance Motley and other Inc. Fund lawyers to effectuate *Brown*. Almost immediately the battle began with the suit forcing the University of Alabama to admit Autherine Lucy. This victory was quickly followed by successful actions against the state universities in Florida, Oklahoma, Georgia, Mississippi, and South Carolina. Knowing with Joe Louis that racism could run but not hide, the small band of lawyers hammered away at the flabby defenses of

1. P. Lamsen, *Few Are Chosen* (1968) at 127.

2. *Brown v Board of Education*, 74 S.Ct. 686 (1954) at 692.

state attorneys throughout the South. Countering every conceivable trick, outwitting massive deception, and putting the boot to white lies, they pounded legal racism into submission.<sup>3</sup>

In 1961, Mrs. Motley was appointed associate counsel for the Inc. Fund, the organization's penultimate post. During that same year she commenced one of her most famous cases: *James Meredith v. Charles Fair and the University of Mississippi*.<sup>4</sup> After sixteen months of litigation she won the case; Mr. Meredith enrolled as the first "known" black student at "Ole Miss."

**H**AVING WON a symbolic victory in Mississippi, that stygian hole of Western civilization, she confronted satan, George Wallace, over the issue of integrating public schools in Mobile, Huntsville, and Birmingham, Alabama. The following was one of the most crucial battles in the desegregation struggle because it broke the South's racist back in the land of "never." Concurrently Martin Luther King and his legions were constantly subjected to police harassment and arrests during the Birmingham battle. Hence, in addition to fighting segregated schools, the Inc. Fund lawyers served as legal counsel for many jailed protest marchers. Mrs. Motley was chief counsel for the legal wing of the Alabama forces. These activities, however, were "adjunctive to her main design." When the federalized National Guard escorted black children into previously all white schools, her efforts in the school arena reached fruition.<sup>5</sup>

Between October, 1961 and December, 1964, Mrs. Motley argued ten times before the U.S. Supreme Court. She argued on such issues as the right to counsel in criminal trials, the defense of students arrested in sit-in demonstrations, school desegregation plans, discrimination in public recreational facilities, and desegregation of public transportation facilities and services. She was victorious in nine cases.<sup>6</sup>

Subsequently having shifted her base of operations from the south to New York, she pondered upon her people's rights of passage in the "cities of destruction." She saw Africa's historic struggle in a more complex phase. Hence, she changed her scene of battle from the judicial to the legislative arena. On February 4, 1964, in a special election for a State Senate vacancy, she won election to represent Manhattan's 21st District; nine months later, during the general election, she again won. In 1965 Manhattan's eight city councilmen appointed her to the office of Manhattan Borough President.<sup>7</sup> Continuing a campaign begun in the Senate, she labored to improve the city's housing and education and decrease unemployment. She transformed a quiescent symbolic office into a platform for political activism.

Her activities in politics were short-lived, however, because on January 25, 1966, President Johnson nominated her for a federal judgeship. The nomination was vigorously opposed by Mississippi's James Eastland, Chairman of the Senate Judiciary Committee. Finally, on August 24, after seven months of procrastination and debate, Fascism retreated another step: her appointment was confirmed.<sup>8</sup> On September 9, 1966 she was sworn in as a federal

3. *Supra*, note 1.

4. *Meredith v. Fair*, 305 F.2d 341.

5. *Supra* note 2; *supra* note 1.

6. Constance Baker Motley Biographical Sketch, April 1967, supplied by Judge Motley's New York office.

7. This, too, was a special appointment to fill a vacancy. In November of that same year she was re-elected in a city-wide election to a full four year term as Borough President.

8. An article which appeared in the New York Times shortly after the appointment had been announced stated:

"There was a great and general sigh of relief in many city agencies yesterday. Constance Baker Motley, a single-minded woman, has been selected as a federal judge and the hope was that the government boat she has been rocking since she became Manhattan Borough President would sail calmer waters."

judge for the Southern District of New York. The Judgeship was a reward well earned by one who had picked up Africa's battered banner and crowned herself with honor. Armed with steely faith, impelled by the will to liberty, and flinging contempt at the ruthless foe, she fought the odds and brought "ought" from the clouds to destool "is."

**I**F HER PAST is a tribute to Mrs. Motley's singular courage, the present reveals her sustained determination to wed justice to American law. Her judgeship has not blinded her to her people's plight. Although required to mutually adjudicate issues brought before her court, she has not hesitated to extirpate institutional racism and philistine bias from the law. She believes courts must continually act "in the interests of humanity and fundamental human decency."<sup>9</sup>

After less than six months on the bench, Judge Motley issued her first major decision in *Madera v. Board of Education of the City of New York*. The case concerned itself with the constitutionality of school discipline procedures. In her opinion, Judge Motley first fully outlined the procedure followed in conducting "guidance" conferences, a euphemism for star chamber procedures serving to exclude children from the educational process. The inquisition proceeded as follows: The school officials would meet to review the students' anecdotal record and discuss his "problems" while the parent and child waited outside; after the officials had decided, the parents and child would be brought in and asked if they had anything to say; the school officials would then advise the parents of their decision: the child could be reinstated at his old school, transferred to a new one, or sent to a special school for the "socially maladjusted." His case could be referred to other social agencies for further action. Also, the possibility of future court action through the Family Court and Bureau of Attendance hung over the student's head like the sword of Damocles. Judge Motley then demonstrated other possible consequences eventuating from such a "conference." The student could be totally banished from the school systems, sent to a court-designated institution, and prosecuted for juvenile misbehavior. If the parents refused to cooperate fully in any of these actions, they could face prosecution for child neglect.<sup>10</sup>

9. *O'Reilly v. Wyman*, 305 F.Supp. 228 (1969) at 241.

10. Victor Madera was a fourteen year old student in the seventh grade at P.S. 22. On February 22, 1967, after a year of what the court termed "behavioral difficulties," Victor was suspended from school. His principal notified the district superintendent of the suspension and she, in turn, sent a letter to Victor's parents requesting their presence at a "guidance conference" in her office on February 17. (a) Victor's parents secured legal aid from the legal services unit of Mobilization for Youth. (b) When their attorney contacted the superintendent's office and asked for permission to appear on behalf of the Maderas, his request was denied because of a school board rule stating:

"Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors et. al., to plan educationally for the benefit of the child, attorneys seeking to represent the parent or child may not participate." (c)

On February 16, after notice to the defendants and oral argument, Judge Motley issued a temporary restraining order barring the school officials: "from holding any proceeding at which the rights of any of the plaintiffs may be affected . . . without permitting plaintiff's legal counsel to be present and to perform his tasks as an attorney." (d) The school officials did not proceed with the hearing and the case returned to court for a full decision on the merits.

10a. The letter was both in Spanish and English and it advised the parents that (1) there would be a Spanish speaking person at this conference to translate "for all of us," (2) a "friend" could be brought to assist the parents in the translation. It was the attitude of the school officials that this "friend" could be anyone but a lawyer.

10b. Mobilization for Youth was a New York membership corporation which had been granted permission by the Appellate Division of the Supreme Court to practice law. It was partly financed by federal anti-poverty funds.

10c. General Circular No. 16 (1965-1966) promulgated by the Board of Education of the City of New York.

10d. *Madera v. Board of Education*, 267 F.Cupp. 356 (1967) at 358.

After reviewing the school procedure and its possible effects, Judge Motley held that the potential consequences flowing from the administrative hearing warranted the application of due process requirements of the Fourteenth Amendment. Therefore, the enforcement of the "no attorneys" provision deprived the parents and child of their right to a fair hearing. She saw that when people must submit to state-initiated proceedings having such potential for substantially effecting their liberty, they must also have the right to seek the aid and advise of professional counsel. Allowing the school system, a state agency, to exercise unchecked inquisitorial power over private citizens would deny the individual protection from oppressive state action.

Having granted relief to the Maderas, Judge Motley focused on the case's class action aspects. She noted that most students subjected to this type of administrative suspension procedure were usually members of what some sociologists call "multi-problem families." Refusing to accept such a vapid description, Judge Motley said:

The expression 'multi-problem families' appears to be a euphemism for the new aliens in our midst — the urban poor. . . . These children emerge, in the main, from the quagmire of urban poverty and the vast social distortions which now infect the inner city. . . . For most of these children, perhaps, the one state-conferred benefit which they have of greatest monetary value is the right which has been given them by state law to attend the public schools without charge.<sup>11</sup>

She added that this right was, of course, subject to the reasonable rules of school discipline. She held, however, that when those rules operated to effectively deny that educational right or to deprive a child of his liberty, then due process required a fair hearing with the procedural protection of right of counsel. She then permanently enjoined the school officials from all future enforcement of this particular "no attorneys" provision and any other provision barring the attendance of a lawyer selected by the child's parents.

The school officials appealed the case and the state's Court of Appeals reversed Judge Motley's decision: it held that the guidance conference hearing was an initial and preliminary administrative proceeding. As such, it did not require the protection of due process. The Court of Appeals viewed Judge Motley's detailed analysis of the range of adverse consequences possibly resulting from such a hearing as a "series of hypothetical assumptions" and said that "law and order" in the classroom should be the responsibility of our respective educational systems," it believed the courts should not burden these proceedings with "unnecessary" due process requirements.<sup>12</sup> However, soon after this reversal, the New York State Legislature instituted those very procedural requirements Judge Motley had outlined in her opinion.<sup>13</sup>

**B**ECAUSE JUDGE MOTLEY sits in a court whose predominant concerns are corporate actions, maritime and admiralty law, opportunities for fighting social repression have been few. Despite her altered focus, she has been assertive on controversial issues. In June, 1968, she enjoined the New York draft board from inducting a divinity student into the army in retaliation

11. *Madera v. Board of Education*, 267 F.Supp. 356 (1967) at 374.

12. *Madera v. Board of Education, of the City of New York*, 386 F.2d 778 (1967).

13. N.Y. Education Law, § 3214 (b)(c).

for his participating in an anti-Viet Nam protest demonstration.<sup>14</sup> Eight months later she dissented from a decision upholding "good moral character" as a criterion for admission to the New York state bar. In dissenting in *Law Student Civil Rights Research Council v. Wadmond*, she classified the regulations and procedures as being vague, overly broad, and resulting in unjustifiably broad and sweeping inquiries into the background of bar applicants. She held that the statutes created an "improper focus upon the applicant's political beliefs and associations and the improper use of a political test in determining admission to the bar."<sup>15</sup>

Later in the same year, Judge Motley challenged the constitutionality of certain proposed changes in the administration of the New York Medicare health care program. The New York legislature had passed an amendment to the general health care law<sup>16</sup> providing for revisions in the methods of computing a person's eligibility for out-patient Medicare: subsequent applicants for total coverage would be judged on the basis of their *monthly* income, while those who had qualified for partial Medicare and subsequently sought to transfer to total coverage would be judged on the basis of their *annual income*. The difference in criteria created a higher financial standard for this latter class of applicants.<sup>17</sup>

The plaintiffs in the case, *O'Reilly v. Wyman*,<sup>18</sup> being members of the latter class, claimed that the difference in income computation denied them "equal protection" of the law. The majority opinion held that there was no specific federal regulation requiring that available income be determined on a monthly or an annual basis; it added that plaintiffs had failed to show any actual hardships had resulted from this particular form of administering the Medicare program. It admonished that "injunctions must be based upon existing or actually threatened real situations and not on far-fetched hypothesis."<sup>19</sup>

Judge Motley's dissent addressed the issues in the light of reality. She reviewed the specific financial situation of the three people listed as plaintiffs in the case, and said it would "strain the bounds of credulity" to believe that these people would never have medical situations that, under the proposed

14. *Kimball v. Selective Service Local Board No. 15, New York*, 293 F.Supp. 266 (1968). This was a preliminary injunction. Judge Motley felt that Kimball's case closely resembled the issues which were at that time, before the Supreme Court in *Oesterich v. Local Board No. 11*. She therefore stayed his induction until the Supreme Court had rendered a decision in that case.

15. *Law Students Civil Rights Council, Inc. v. Wadmond*, 299 F.Supp. 117 (1969).

16. New York Social Services Law, Section 367-a(4), amendment to be effective July 1, 1969.

17. The Social Security principle which governs all Medicare assistance programs is that "no recipient of medical assistance may be required in any circumstances to pay proportions of the medical expenses when his available income is at or below the public assistance level." The new amendment operated to create three classes of patients, distinguished, in part, by the manner in which their eligibility for Medicare benefits would be determined: (1) those applying for 100% medical coverage because their incomes were already below the public assistance level, (2) the "medically indigent" who are applying for 100% as opposed to 80% coverage because they have, by reason of having to pay co-insurance, "spent-down" to their particular public assistance level, and (3) those who are applying for 80% coverage initially because they have become "medically indigent" by virtue of a decrease in available income or because they have "spent down" to medical indigency levels from higher income levels. For people in classes (1) and (3), income determinations (which will establish whether the person is qualified to receive the Medicare assistance) is made on a monthly basis: only the excess income for the month or months in which care or services are given shall be considered. However, for class (2) persons, the income determination is made on an annual basis: the person's excess income for the entire year shall be considered. This means that before a person in class (2) could qualify for a transfer to 100% coverage, he would have to spend his total *annual* excess income, regardless of the fact that that would work to effectively drive his *monthly* income below the public assistance level, in direct contradiction to the general Social Security principles.

18. *O'Reilly v. Wyman*, 305 F.Supp. 228 (1969).

19. *Ibid.*

method of administration, would create the hardships at issue.<sup>20</sup> She stated that, in turning its back on the problem, the majority "simply fail[ed] to correctly understand the bitter truth as it exists for Mrs. Morris, Mrs. Silverman, and Mrs. O'Reilly." In response to the majority's statement of disbelief about the possible consequences of an adverse holding, she replied:

The poor *are* expected to do things that the rest of us are not, not least of which is to continue to live and be healthy on insufficient incomes. The poor *are* required to pay in advance for medical services; they do not receive 'credit' because their bodies are not worth 'repossessing' on default.<sup>21</sup>

Judge Motley favored enforcement of an injunction against the state regulation for she believed that until the state argued convincingly on the necessity of its classification, the plaintiff's claim was valid.

One of Judge Motley's most significant decisions was made just last year in the case of *Sostre v. Rockefeller*.<sup>22</sup> Martin Sostre, an angry radical Afro-American, is serving thirty to forty years in prison for the sale of narcotics. (There is increasing evidence that his arrest and conviction were based on trumped-up charges and were animated by political authority to stifle his radical activism in the Buffalo, New York ghetto.<sup>23</sup>) He petitioned to Federal District Court and alleged that he was a victim of the prison authorities' systematic and continuous harassment in violation of his civil rights. He requested relief. The petition, in the main, is a catalogue of a series of acts designed by the authorities to break his will, hammer him into docility, and prevent him from expressing his radical political beliefs.

On July 2, 1969, after considering the petition, Judge Motley issued a preliminary injunction releasing Sostre from solitary confinement. The Full case was decided in May, 1970. Speaking for the majority, Judge Motley held that Mr. Sostre's indefinite segregation in solitary confinement was cruel and unusual punishment because the evidence clearly demonstrated that his punishment was in retaliation for his political beliefs. As such, the punishment was excessive. Judge Motley found the procedural machinery used to confine Sostre to solitary was defective. She spelled out a set of standards validating such a procedure: that the prisoner receive written notice of the charges against him; that he have an opportunity to retain counsel; that he is entitled to a hearing before an impartial official; that he may cross-examine his accuser and call witnesses in rebuttal; and that he receive a written record of the hearing, decision, and evidence relied upon. She also held that a prisoner does not lose his right to freedom of political thought and expression while in prison, so long as his acts are within reasonable rules and regulations required for prison discipline.

She awarded Sostre compensatory damages of \$9,300 and punitive damages of \$3,720 for the "bad faith and malice which motivated [the warden] to put him in punitive segregation and, in effect, 'throw away the key'."

**M**ORESO THAN ANY OTHER, the Sostre decision reveals Judge Motley's ferric faith in the future. She perceives the living law as an unfolding process

20. Mrs. Morris had four children and made \$10 more per year than the public assistance income for a family of five. Mrs. Silverman was 67 years old, lived alone, and received the grand sum of \$54 per year in excess of the public assistance level. Mr. O'Reilly lived on Social Security payments with his welfare-recipient niece and had been receiving treatment for diabetes, Parkinson's Disease, and a hemorrhaging duodenal ulcer.

21. *O'Reilly v. Wyman*, 305 F.Supp. 228 (1969) at 239.

22. *Sostre v. Rockefeller*, 312 F.Supp. 863 (1970).

23. William Worthy, "The Anguish of Martin Sostre" in *Ebony*, October, 1970.

shaped by those whose humanism is limited only by their capacity to dream. Understanding that legal formalism expresses a fatigued judicial order, she readily unshackles feeble right from custom's might. She knows logic does not capture experience, but is only a tool serving imagination. And she discerns how tyranny, speaking softly in the language of prudence, often wears a bland official smile.

In January of this year Judge Motley rocked a big boat, the U.S. Congress. The matter before the court concerned a grand jury inquisition of Joanne Kinoy and the new immunity statute of the Organized Crime Control Act of 1970. Miss Kinoy had been subpoenaed before the Federal Grand Jury to "give testimony and other information" aiding in apprehending two federal fugitives. Asserting that such an order violated her privilege against self-incrimination because the new immunity offered under the Crime Control Act was not co-extensive with her Fifth Amendment protections, she refused. Under the old federal law, a person ordered to testify in grand jury proceedings was granted total immunity from any future prosecutions for the offense(s) to which the questions related. The new immunity statute, however, provides only, "use immunity" which prevents only the use of the specific testimony actually compelled and leaves the individual still vulnerable to future prosecution based on whatever "independent" evidence the government can uncover through subsequent investigation.<sup>24</sup>

Applying the U.S. Supreme Court's decision in *Counselman v. Hitchcock*<sup>25</sup> she ruled that the constitution required a statute to provide full and absolute immunity from future prosecution. Hence, the congressional statute granting only "use" immunity was void.<sup>26</sup> Judge Motley believed the weakening of the immunity protections would be a step down the road toward oppressive state action and so acted to prevent it.

**W**HEN SHE WAS APPOINTED to the bench many feared she would be unable to continue struggling against America's racism and oppression. The conventional wisdom held that her role would require her to stand above the cause to which she had been so dedicated. But, Judge Motley has shown how a passionate commitment to justice and equality before the law are principles guiding judges as well as advocates. Earlier she challenged the openly racist laws oppressive of her people, now she goads the judiciary to make real the promise of democracy.

24. "It is designed to reflect the use-restriction immunity concept of *Murphy v Waterfront Commission*, 378 U.S. 51 (1964) rather than the transaction immunity concept of *Counselman v Hitchcock*, 142 U.S. 547 (1892)." House Report No. 91-1549, 91st Congress, 2nd Session, p. 42.

25. *Counselman v Hitchcock*, 142 U.S. 547 (1892).

26. *In the Matter of the Grand Jury Testimony of Joanne Kinoy*, No. M-11-188 (United States District Court, Southern District of New York, January 29, 1971).

\* The author gratefully acknowledges the invaluable assistance of Black Law Journal Assistant Editor, Warner Smith.



BARBARA J. WILLIAMS earned a B.A. from San Francisco State College in 1966, and MSW from the U.C.L.A. School of Social Work in 1968 and a Juris Doctor Degree from the U.C.L.A. School of Law in 1971. She has without a doubt made her mark in the black struggle. To her credit she has the following accomplishments: co-founder of the Association of Black Social Workers of Los Angeles County; co-founder and first Editor-in-Chief of the BLACK LAW JOURNAL; former chairman, Community Participation Center—U.C.L.A. School of Law; member of the Board of Trustees, National Assembly for Social Policy and Development (New York City); and a member of the Welfare Rights Organization of Los Angeles, California.



JEAN CAMPER CAHN is Director of URBAN LAW INSTITUTE in Washington, D. C. ULI is a (legal) and demonstration project which seeks to broaden representation of the poor. Staffed by twenty full-time lawyers, the Institute deals with a wide range of problems which confront the underrepresented of the inner-city.

Graduating cum laude, Ms. Cahn received her Bachelor of Arts degree from Swarthmore College in 1957. She attended Newnham College for graduate studies in law from 1958-59 and in 1961 graduated from Yale Law School, LL.B.

Long involved in the struggle for legal rights of the poor, Ms. Cahn has had an unbelievably interesting employment experience. Shortly after graduation from Law School, she founded the

OEO National Legal Services Program. Today, the Program has a budget of nearly \$70 million and represents over a million poor people. Other critical work efforts have included: International Attorney and Advisor on African Affairs (US Department of State); Associate Counsel, New Haven Redevelopment Agency in charge of Law Acquisition Division; Director of Community Organization Staff, Harlem Park Renewal Area; Dixwell Neighborhood Attorney, Neighborhood Services Program Community Progress, Inc.

Only an individual with great energy and desire to educate others would find time from work, family, and various national and local boards to write. With her very sensitive and committed husband, Edgar Cahn, also an attorney, she has co-authored many publications too numerous to mention completely. Some of her contributions to legal journalism include: *What Price Justice: The Civilian Perspective Revisited*, University of Notre Dame Lawyer, Fall 1966; *Justice and the Poor: Chapter 6 in Power, Deprivation and Urban Policy*, vol. II URBAN AFFAIRS ANNUAL REVIEWS; *Power to the People or the Profession? The Public Interest in Public Interest Law*, Yale Law Journal, vol. 79, no. 6, May 1970.

Ms. Cahn believes that there are two major problems in using law to organize the poor. First, the legal process is often so slow and tedious that the problem may often be alleviated but the people are gone. A second problem is that in an area like welfare, a few administrative victories will not change the basic causes of poverty or the inadequate laws dealing with the lives of the poor.

Generally, Ms. Cahn felt courts in the District of Columbia were sympathetic to problems brought to them by poverty lawyers. For example, the court's response to many landlord/tenant problems brought before it was to consider reform through the setting up of an administrative agency which will handle landlord/tenant problems freeing the very encumbered court calendar for other problems.

The optimism expressed by Ms. Cahn despite many battles both inside and outside the court in behalf of the poor is encouraging. Her optimism should be an incentive to many lawyers, who resist getting involved in the struggle, to provide legal rights to the poor. But, from Jean Cahn's perspective, until laws can be used to bring power to the people, there is little else happening in law.



our system, if you, as a lawyer are not corrupt, it's almost like being a loser." Ms. Kennedy sees little in the role of a lawyer in this society that is honorable. Poverty law, according to Ms. Kennedy, can best be equated with "getting in bed with the malaria patient to cure the patient — that is, the salving of one's conscience by lowering oneself to the economic level of one's client."

Calling society a "whorehouse," Ms. Kennedy has candidly stated "we are all in the same whorehouse and the question is only whether you want to be a pimp, a whore, the madam, the piano player — or do you want to blow the whole place up?"

Making many people uncomfortable with her quick tongue and constantly pointing up society's contradictions, Ms. Kennedy has recently established herself as an author. About her role as co-author of *Abortion Rap* she writes: "I've decided to try for a hustle outside the law whorehouse . . . into the lecture and writing bag to augment the law hustle and the frustration whereby lawyers can't affect the institutionalized oppression of a corrupt, racist, genocidal, sexist society, but are reduced to getting asses out of the wringer, one at a time, but can't stop the wringer." *Abortion Rap* includes testimony by women who have suffered the consequences of restrictive abortion laws.

In addition to her private law practice, Ms. Kennedy is Director of Media Workshop of the Consumer Service and Producer-Moderator of "Opinions," an award-winning (Peabody Award) radio talk-show in New York. Her professional activities include membership in Columbia Law Alumni Association, Federal Bar Association of New York, New Jersey, and Connecticut, and New York County Lawyers Association.

As a long time battler against any and all forms of institutionalized oppression, Ms. Kennedy is involved in what she calls the "Alliance of the Alienated." To activist lawyers committed to challenging institutions that repress individual freedoms, she says: "The oppressed far outnumber the oppressors, and they need only be educated and mobilized to achieve basic human rights."

Sharply critical of a society she feels is capable of doing more, but which has committed itself to less, Ms. Kennedy is truly a "bridge over troubled waters" for those whose needs remain unmet by the present legal system.



FLORYNCE KENNEDY is a black lawyer in private practice, an author, and a lecturer.

This witty and incisive fighter for black liberation has established herself as a leader for the rights of blacks, women, and all other oppressed groups. Using every occasion to speak out about the reality of laws on black lives, Ms. Kennedy says about herself: "Born fifty-four years ago, to groovy parents . . . I went to Columbia University undergrad night school, bullied my way into Law School." She graduated from Columbia University Law School in 1951.

Speaking candidly about a profession which former United States Attorney General Ramsey Clark says, spend 95% of its resources serving 5% of the population, Ms. Kennedy says: "In

DAISY COLLINS is staff attorney for North Mississippi Rural Legal Services, Greenwood, Mississippi. Beginning August 1971, she will become a Reginald Heber Smith Community Lawyer assigned to the Legal Aid Society of Cleveland, Ohio.

After spending early years in Berea, Ohio, Ms. Collins graduated June 1958, *cum laude* with a Bachelor of Science in Business Administration, Columbus Ohio. She graduated from Howard University School of Law, January 1970. Her activities while attending Howard Law School include work on the school newspaper, *The Barrister*, the *Howard Law Journal*, and the Student Boycott Steering Committee.

One of the few black women lawyers in the

state of Mississippi, Ms. Collins has used every opportunity to either speak or write about black community development. She has published articles both in the *Howard Law Journal* — "American Companies in South Africa and Human Rights" (vol. 15, no. 4); "The United States Owes Reparations to Its Black Citizens" (vol. 16, no.); "The United States Owes Reparations to the African States for the Slave Trade" (vol. 16, no. 2) — and in *A Current Bibliography of African Affairs* (May 1970).

Commenting on the relation of law to black people, Ms. Collins says: "We certainly cannot rely on 'the law' as the sole means of getting freedom and justice for black people. However, we should skillfully use law in ways possible to further our goals. In fact, as long as we remain in the United States in our present status, we will be compelled to make some use of the legal procedure." Ms. Collins views the confinement of Angela Davis, as an example of use of legal procedure to the detriment of blacks, particularly those who, like Angela, show courage and commitment to black people despite harrassment from those in the Establishment. Speaking further about the effect of laws on blacks, she says: "We might as well realize that the courts are not isolated from the political climate. The court is a major problem to which concerned attorneys should address themselves." She says: "Court procedure is often so cumbersome that it sometimes seems designed to deny rather than dispense justice, especially where poor and uninformed people are concerned."

Of major concern to many black women is the question of their role in relation to black men in the struggle for social justice. Ms. Collins states: "In my opinion, except for biological roles, the role of men and women are about the same in the struggle by black people for justice and self-determination. Black women should really try to understand the peculiar problems that black men historically have faced, and still face in this racist society. Black women should work along with black men for the progress of black people . . . to help expose racism in all of its forms."

Clearly, one begins to see in Daisy Collins a deeply committed, perceptive, and capable young advocate for legal rights of blacks in America. To her, freedom and equality are absolute. One either enjoys them or he continues to struggle until he does. Fortunately for blacks, Daisy Collins will not be satisfied until freedom and justice become total reality in America.



SHERRI GAINES is a Visiting Associate Professor of Law and Director of Minority Curriculum Development Program at Golden Gate College and School of Law, San Francisco, California.

She attended Barnard College, Columbia University from 1952 to 1956. She received her law degree from the University of Pennsylvania Law School in 1960. She is presently a member of the State Bar of California, the American Bar Association, San Francisco Bar Association, Alameda County Bar Association and the National Lawyers Guild.

Ms. Gaines has brought to the struggle for legal rights of the poor total commitment to insuring excellence and competence by those who represent the poor. Since 1966, she has been involved in the Legal Aid Program in Oakland, California. After a brief time in private practice, she began using the court for individual and group legal problems. As Senior Attorney of the Legal Aid Society of Alameda County from 1965 to 1966, she represented individual and group applicants in negotiation and litigation of a range of legal issues from domestic relations and bankruptcy matters to federal court and community-wide questions. From 1967 to 1970, she was involved in the major state court litigation of local public housing, consumer fraud, organization of appropriate legal entities for economic development and community action groups and representation of poverty area residents in Model Cities negotiations.

At Golden Gate School of Law, Ms. Gaines is responsible for the development and implementation of a special curriculum and academic program designed to train minority undergraduate students for successful careers in Law School and the legal profession. She is involved in addition, in degree qualifications processes at four par-

ticipating colleges to permit joint implementation of the teaching program, and in conducting law school classes in selected areas.

Asked her views about the role of black women in the struggle for women's liberation, she responded: "It has a point but I'm rooting that black men will not need to subjugate their women as have white men and therefore white women will be the only ones in need of women's liberation for social reasons." On an economic-employment basis, she said: "I'm for the elimination of all arbitrary and unfair distinctions." In regard to male-female relations, Ms. Gaines stated: "I see strong black men and strong black women TOGETHER!"

Asked how she felt law is relevant to black community development, Ms. Gaines responded: "Law is relevant and useful to black people only in the hand of a *skilled* practitioner. It is a competitive field and requires quality competition and not pleas for overlooking weaknesses whatever the source."

Ms. Gaines' goal, as evidenced by her present role, is to train quality practitioners to carry the fight. "Even the Panthers," she stated, "get some 'justice' with good lawyers on their side . . . II just want those lawyers to be black!"

What is clear in discussion with Ms. Gaines is a determination that the legal warriors representing the rights of the poor will not be unarmed — she has dedicated herself to the critical role of making sure those who represent the poor are equal to the task.

Despite her full-time commitment to making the legal system more responsive to new needs, Ms. Gaines defines herself as a very dedicated wife and mother who thoroughly enjoys both roles. For many young, bright, aggressive women torn between contributing to the struggle for human rights and having a fulfilling personal life, Ms. Gaines should be an inspiration.



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## COMMENTS

### *THE PRISON SYSTEM: A Lawless Agency?*

The prison system in the United States appears to elicit dismay from almost all close observers not economically controlled by prison administrations. Indeed, as prison conditions become more intolerable, even some corrections personnel are speaking out against the most stupid practices. One former commissioner of a state corrections agency in a letter to the President's Commission on the Causes and Prevention of Violence wrote: ". . . in actuality the prison is still a place where custodial personnel view prisoners as unworthy beings and in countless little ways reinforce this view with meaningless rules and endless punishments."<sup>1</sup> In his recent law review article, William B. Turner, assistant counsel, NAACP Legal Defense and Educational Fund, Inc. (San Francisco), opens with Simon Sobeloff's reminder that Acton's classic proverb—"Power corrupts and absolute power corrupts absolutely"—is true of prison guards, and closes with the reference to the "lawless sphere of our system of criminal justice."<sup>2</sup>

James V. Bennett, in his capacity as President of the Joint Commission on Correctional Manpower and Training, stated in 1969:

It will come as a shock to many if not most probation officers, prison keepers, and parole officials that they are not endowed by the law and the accoutrements of their office with unfettered power to make decisions concerning their charges.<sup>3</sup>

To the observer of the California prison system, whether from the strictly legal or the common sense human viewpoint, the two most glaring characteristics of the Department of Corrections are:

1) The absolutely corrupting influence of the authorities' absolute power over the prisoners, and

2) The lawlessness of the system as an agency, both in its relation to the in-

mates, and its relations to the outside world.

Most agencies of government, no matter how abusive or oppressive, are ultimately accountable to and reviewable by some source of authority beyond the agency itself; they are responsive, although to a limited degree, in a definable way, to the processes of "law." The prison system is almost totally non-responsive to the processes called "due process of law" or "law" itself.

The system acts with total arbitrary, yet flexible authority to avoid restraints asserting an inmate's rights (or desires) against the will of the prison's systems. It denies access to almost all but itself, and shows carefully constructed tableaux to the few it takes on tours. The system punishes inmates' questions, dissent, originality, protest, assertion of racial pride, expressions of humanity, and, especially any attempt at inmate organization by denying parole, confining "troublemakers" in solitary cages, and sometimes with death.

How is a lawless agency "reformed?" All theories of civil action depend in part upon a belief in and some factual basis of accountability. Accountability depends upon public access and knowledge and is effectuated by legitimate authority improving social norms upon deviation from legal rules.

It seems to follow that the standard approaches to reform of an agency or institution: education, writing letters of

1. Letter from Paul W. Keve, former commissioner of corrections, State of Minnesota, to the President's Commission on the Causes and Preventions of Violence, October 9, 1968.

2. Turner, "Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation." 23 *Stanford Law Review* 473, 518 (1971). Ramsey Clark, *Crime in America*, Simon and Schuster, N.Y. 1971, Pocket Book edition, May, 1971, at pp. 192-192, and p. 218: "The history of penology is the saddest chapter in the history of civilization . . . Virtually absolute power over nearly helpless people . . . the divorcement of all those lessons and skills [taught] in our great universities about medical science, mental health, psychiatry, psychology, sociology, hereditary and environmental influences from the people who need them most is almost total."

3. Forward, to Fred Cohen, *The Legal Challenge to Corrections*, consultant's paper prepared for the Joint Commission on Correctional Manpower and Training, Washington, D.C., March, 1969.

protest, molding of public opinion, lobbying, or request, or complaint carefully constructed lawsuits will have little, if any, effect unless, augmented by legal sanctions against those having total power over the inmates.

To induce judicial and political authority to impose such sanctions, concerned citizens must be persistent. He should also develop a capacity to understand the incredible, make sense of the grotesque, and, short of understanding prison lawlessness, compassionately envision the inmates suffering from it. The citizen should consult with prisoners and, only after listening and learning from the ideas of prisoners and ex-cons, proceed with reform. For it is on the backs of courageous prisoners that the cost of progress rests, and if those outside, working for reform, can sometimes see further, it is because they stand on the shoulders of the damned.

FAY STENDER

## COMMENTS

### *RACISM IN CAPITAL PUNISHMENT: Impact of McGautha v. California.*

By a vote of 6-3, the Supreme Court of the United States has rejected two major constitutional challenges to the death penalty which had been argued and reargued before the Court since December, 1968. The Court rejected claims (1) that the untrammelled discretion given to capital trial juries to choose between sentences of death or imprisonment without legal standards or guidelines violated the rule of law basic to the Due Process Clause of the Fourteenth Amendment; and (2) that the ordinary state procedure of trying the issues of guilt and punishment simultaneously in a capital case was unconstitutional because it whipsawed the capital defendant between his privilege against self-incrimination and his right to present relevant evidence on the penalty question to the jury which held his life in its hands.

The most immediate effort of the deci-

sion is to threaten termination of the 4-year moratorium on executions which has resulted, in significant part, from the pendency of these two issues before the Supreme Court. The last execution in the United States occurred on June 2, 1967. Since that time, attorneys participating in a concerted effort to end capital punishment in this country have secured stays for all other condemned men. The total number of men on death row had risen to 648 by the time of the Supreme Court's May 3 decision. Of that number, considerably more than half were black or Chicano. Of the 79 men condemned to die for the crime of rape, an overwhelming majority is black. Although 38 states retain the death penalty for one or more major crimes, sentences of death are disproportionately frequent in Southern states, and evidence of racial discrimination in capital sentencing is strong.

The long term effect of the *McGautha* decision is to license a system of capital sentencing in which individual juries are permitted to decree life or death as they wish, free of any legal constraint. In a society which is deeply infected by racism, this discretion inevitably metes out death to black men, in many cases, simply because they are black. The Supreme Court has not yet decided whether a black condemned man is entitled to relief from his death sentence if he can demonstrate factually that juries in the state which condemned him exhibited general patterns of racial discrimination in the life-death sentencing choice. That issue — together with the more basic issue whether the death penalty is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments — is presently pending before the Court on petitions for certiorari.\*

ANTHONY AMSTERDAM

\*EDITOR'S NOTE: On June 29, 1971 the U.S. Supreme Court granted writs of certiorari on the question: Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. CT