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DREAM MAKERS: BLACK JUDGES ON JUSTICE

*Julian Abele Cook, Jr.**

BLACK JUDGES ON JUSTICE. By *Linn Washington*. New York: The New Press. 1994. Pp. xxiv, 265. \$22.95.

Herein the longing of black men [and women] must have respect: the rich and bitter depth of their experience, the unknown treasures of their inner life, the strange rendings of nature they have seen, may give the world new points of view and make their loving, living, and doing precious to all human hearts. And to themselves in these the days that try their souls, the chance to soar in the dim blue air above the smoke is to their finer spirits boon and guerdon for what they lose on earth by being black.¹

Linn Washington² has written and compiled a provocative book that gives the reader a look into the minds, lives, and aspirations of many of our nation's outstanding Black jurists.³

His endeavor to "help fill the void in the literature on Black judges by presenting the experiences and insights of distinguished jurists" (p. xix) should be read by anyone who believes in the equality of justice under the law. This book should provide a special inspiration to the minority students, lawyers, and judges who often search — sometimes without success — for role models with backgrounds similar to their own. It also should leave all readers with

* Chief Judge, United States District Court for the Eastern District of Michigan. B.A. 1952, Pennsylvania State; J.D. 1957, Georgetown; L.L.M. 1988, University of Virginia; L.L.D. 1992, Georgetown (Honoris Causa) 1992. — Ed. I am deeply indebted to my law clerk, Tracey Weaver, a 1995 graduate of the University of Michigan Law School, for her invaluable and significant contribution to this article.

1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 76 (Bantam Books 1989) (1903).

2. Executive Editor, *Philadelphia Tribune*.

3. Washington reminds some of us and informs others of the rich and distinguished history of Black jurists in America. For example, we learn from Washington that (1) in 1852 Robert Morris became the nation's first Black judge when he was appointed to the magistrate's court in Boston, Massachusetts; (2) in 1870 Jonathan Jasper Wright became the first Black judge to be elected to the Supreme Court of South Carolina; (3) in 1993 Alan Page was elected to the Supreme Court of Minnesota, a state with a Black population of only three percent; (4) in 1991 Timothy K. Lewis became at the age of thirty-six the youngest member of the federal judiciary, only to be elevated to the Third Circuit Court of Appeals eighteen months later; (5) Federal judge Damon J. Keith was sued by a sitting United States president, Richard M. Nixon, over a wiretapping decision; (6) George W. Crockett was the first Black lawyer to be employed by the Wage and Hour division of the Department of Labor; (7) Charles Z. Smith was the first Black to serve on the Superior and Supreme Courts in the state of Washington; and (8) Judge Abigail Rogers was the first Black woman to be elected to the bench in South Carolina.

the knowledge that there is a continuing need for Black men and women to bring their experiences, hopes, and ambitions to the bench. Contemporary society often portrays Black people as violent, poor, and less intelligent than others. Written entirely in the first person by individual judges,⁴ Washington's book attacks these stereotypes with images of intelligent, thoughtful, committed Black jurists, all of whom have made, and are continuing to make, a meaningful impact upon their communities and our nation.⁵

Washington seeks to accomplish four goals. First of all, he hopes that the reader will learn something about the struggles, accomplishments, and philosophies of a few Black judges whose judicial pronouncements have affected the daily lives of the people in the communities in which these judges serve. Second, Washington explores the impact of the Black perspective on the law. He submits that these judges' experiences add to the academic fiber of the law and can provide an insight into their decisionmaking processes as they relate to social policy matters. Third, he attempts to correct any distorted views about racism in our society that the readers may bring to this book. Finally, Washington attempts to give young lawyers and judges of color a sense of their responsibility to the community as students of the law. He vividly demonstrates, through the words of several Black judges, that it is possible and desirable to assume the role of a judge with all of the fervor and ideals that are borne of the Black experience.⁶

I. SHE WAS ONCE ON THE BOARD OF UNITED CHURCH WOMEN

For centuries, the history of Black Americans has been recorded in twisted tales born out of bigotry. Sometimes, the lies are blatant. At other times, they take on the form of political rhetoric or scientific study — when an advocate asserts that Black people are genetically incapable of possessing the intellectual capabilities of their white counterparts. Often, however, these mistellings of history result from omissions — sometimes inadvertent and sometimes purposeful. Take, for example, the experience of Judge Constance

4. Washington's own words appear only in his introduction and in the biographical sketches at the beginning of each chapter.

5. Washington interviewed the following judges: Fred L. Banks, Jr., Henry Bramwell, Joseph B. Brown, Jr., George W. Crockett, Jr., A. Leon Higginbotham, Jr., Damon J. Keith, Timothy K. Lewis, Veronica S. McBeth, Theodore A. McKee, Constance Baker Motley, Abigail R. Rogers, Charles Z. Smith, Reggie B. Walton, and Bruce M. Wright.

6. I do not suggest, and Washington does not imply, that all Black judges share similar views, attitudes, and philosophies. This is evident in the myriad of viewpoints expressed by Washington's interviewees. Nevertheless, as I will discuss in more detail, all of the judges in the book, from the most liberal to the most conservative, do share the common experience of racism in America.

Baker Motley at the week-long school for newly appointed federal judges that she attended shortly after her appointment to the United States District Court in Manhattan. On the opening day of the school, one of the lecturers introduced each of the new judges by making references to their many accomplishments in the field of law. In introducing Motley, however, he limited her tremendous accomplishments as a lawyer and community activist to her membership on the boards of the United Church Women and the YMCA (p. 129). In so doing, he failed to recognize that she was the first female to work with Thurgood Marshall at the NAACP Legal Defense Fund and that during her tenure there she won nine of her ten cases before the Supreme Court, including James Meredith's historic fight for entry into the University of Mississippi (p. 128). He also ignored her impressive credentials as the first Black woman in the New York State Senate, the first female president of the Borough of Manhattan, the first Black female federal judge, and the first woman to serve as Chief Judge for the Southern District of New York (pp. 128-29, 144).

One of the subjects of this book expresses his passionate disappointment over the failure of law schools to teach their students about the correlation between the law and the evils of racism. Retired Chief Judge A. Leon Higginbotham of the Third Circuit Court of Appeals notes with great despair that, although law schools do teach the importance of such significant Supreme Court cases as *Marbury v. Madison*,⁷ rarely, if ever, do they provide students with an opportunity to study the nation's first three major cases involving the plight of Black people⁸ or the most racist case in the history of the state of Missouri.⁹

Washington's book also presents a glimpse of Black American judges not often seen by the general public. For instance, Judge Veronica S. McBeth of the Los Angeles Municipal Court believes that whenever any Black participant in a judicial proceeding — whether it is a criminal defendant, a party to a civil lawsuit, a witness, a juror, or an attorney — enters a courtroom, the presence of a Black judge on the bench forces that participant to accept the judicial process and prevents her from summarily rejecting it as part of a racist conspiracy (p. 36).

7. 5 U.S. (1 Cranch) 137 (1803).

8. See p. 22. The cases are: *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Negress Sally Henry v. Ball*, 14 U.S. (1 Wheat.) 1 (1816); *Scott v. Negro London*, 7 U.S. (3 Cranch) 323 (1806).

9. In *State v. Celia*, Celia was a slave woman whose master had raped her repeatedly. One night, after she rejected his unwelcome advances, they fought. When the master subsequently was found dead, Celia was arrested and charged with murder. The Missouri court found that while a free woman had the right physically to resist rape, a slave woman did not have a similar right to protect herself. Celia was found guilty of murder and hanged, after giving birth to her master's child. See p. 22.

Indeed, this book demonstrates that the visibility of Black jurists is extremely important to the entire community. Judge McBeth says that “[j]udges have a tremendous power to educate because everybody looks up to them, even if they are Black. It is important for people to hear a judge up there telling them it is their obligation to be fair, telling them it’s the American way to do things” (p. 36). Fully recognizing that judges are often less visible than other public officials, Judge Reggie B. Walton of the District of Columbia Superior Court wryly notes that “[w]e now have a number of generations, maybe two or three, where people living in certain environments have never in their lives seen anybody leave the house and go to work” (p. 110). That fact makes it all the more important for authors such as Washington to highlight the accomplishments of people of color and thereby to give our young people something to hope for other than prison, poverty, or early death.

On a different level, Judge Abigail R. Rogers, who travels around the state of South Carolina as a family court judge, tells how her mere presence as a judicial officer — a Black judge — brings a justifiable sense of pride to many of the Black citizens and leaders in the small communities where she sits. Rogers recounts with pleasure the occasions when Black people visited her courthouse just to talk or bring food as their expressions of welcome. Once, a group of people who had heard that the new judge in town was a Black female waited in the courthouse parking lot to applaud her arrival (p. 218). It is obvious that they were immensely proud to have her — a Black female judge — as a role model.

I have had similar satisfying experiences during my tenure as a federal judge. One of the most important and fulfilling aspects of being a Black judge is seeing the pride in the eyes of the people of color as they come into my courtroom. At the completion of a trial last fall, I followed my regular policy of inviting the jurors to visit my chambers in order to glean their impressions about the lawyers and witnesses in the case and about the judicial process in general. After we discussed various aspects of the case and the trial, the Black foreperson summoned all of her nerve, looked at me, and inquired, “Are you Black?” Upon my reply of “Since birth,” she proudly turned to her fellow jurors and said, “I told you so.” People need to know that we are out here.

II. A REFLECTION OF THREE HUNDRED YEARS OF DISCRIMINATION

The difference between the experience of persons of color and persons not of color is that we persons of color have the advantage of having to turn negative experiences into positive experiences. We have a more mature outlook on life; we understand the importance of being fair to other persons because we don’t want other persons to

have the negative experience that we have had. [p. 188, quoting Judge Charles Z. Smith]

Washington points out that the quest for equality led several of my colleagues to their present positions. Little did R.A. Pearson, the president of the University of Maryland, know that when he rejected Thurgood Marshall's application to the law school because of his race, he set this future Supreme Court Associate Justice on a mission that would change the course of American history.¹⁰

In a like manner, the decision of Justice Fred L. Banks of the Mississippi Supreme Court to go to law school sprang from his desire to change the legal landscape in his home state of Mississippi. Mississippi had a grand total of nine practicing Black attorneys at the time of his law school graduation in 1968 (pp. 81, 84). Judge McBeth's motivation to study law arose from her view that Blacks and poor people had no meaningful access to the judicial system (p. 39). Senior Judge Damon J. Keith of the Sixth Circuit Court of Appeals decided to pursue law when he realized that German prisoners captured during World War II were treated with more respect than Black American citizens (p. 120). From the very beginning of their careers, these judges were consumed by a passion for equality and justice — an emotion that evolved from their firsthand experiences.

With Marshall's appointment, the nation's highest court spoke for the first time with the voice of someone other than a white man. His opinions evidenced his commitment to the rights of people of color and women. Carl Rowan accurately captures Marshall's passion for equality in the following imaginary colloquy in which Marshall gives advice to his trusted colleague, Justice Harry Blackmun, during the period immediately preceding the publication of the highly controversial *Roe v. Wade*¹¹ decision:

Harry, baby, do you know anything about the circumstances of life of pregnant women in our pockets of rural poverty, or in the worst of our urban ghettos? The doctor is so many miles away, with no wheels to use to get to him, and he is so expensive that these poor women don't see any doctor during the first trimester. Some don't even know they're pregnant. It may be twenty weeks before some show up in a doctor's office weeping, saying 'I just gotta have an abortion.'¹²

Blackmun sought Marshall's counsel over the years on issues involving the socially impoverished because he understood the

10. Marshall's rejection from the University of Maryland led him to Howard Law School and to his mentor, Charles H. Houston, whom he called "one of the greatest lawyers I've ever been privileged to know." CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS* 46 (1993). It was Houston who "set a fire burning in Marshall's belly" and channeled Marshall's anger into the Legal Defense Fund's movement to strike down segregation. *Id.* at 47.

11. 410 U.S. 113 (1973).

12. ROWAN, *supra* note 10, at 324.

precious quality that the black justice had brought to the Court. Marshall was the only justice who had ever defended a murder suspect. He was the only justice who had defended and worked with so many poor women that he actually knew how they suffered financially, were pained emotionally, often became psychological wrecks over knowledge that another baby was on the way.¹³

Of the rights secured in *Brown v. Board of Education*,¹⁴ Marshall wrote:

We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future.¹⁵

As we know from his stance on such issues as the Fourth Amendment, the death penalty, and abortion, he always injected the viewpoints of people of color and the poor into the debate.¹⁶ When asked whether he thought that his presence had sensitized the whites on the Court to such concerns, he replied in his usual tongue-in-cheek manner, " 'Oh, I should imagine so. I should imagine so. You don't hear certain words there at least.' " ¹⁷ His voice has been missed sorely and will not be heard again on the Supreme Court for a long time.

Washington believes that many of the Black jurists on the bench today continue Marshall's legacy by adding their own unique perspective to our system of justice. Judge Higginbotham notes that although we have been fortunate to have a large number of white judges who have shown sensitivity to acts of injustice, he believes that a greater percentage of Black judges have shown a willingness to confront it (p. 23).

In Judge Banks's view:

Black judges bring two important assets to the bench. The first thing Black judges bring, depending on how many you have, is new respect for the system itself in the community. When people see that the system is representative of all the segments of the community, they have more respect for the system. Much of this respect, or potential respect, depends on how the Black judges perform. Black judges also bring a perspective that is sorely lacking in their absence. They bring some perspective, some insight from a segment of the community that has simply gone unrepresented. This perspective is born out of an

13. *Id.* at 324-25.

14. 347 U.S. 483 (1954).

15. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974).

16. See, e.g., *Wyman v. James*, 400 U.S. 309, 342, 347 (1971) (Marshall, J., dissenting) (Fourth Amendment); *Godfrey v. Georgia*, 446 U.S. 420, 439 (1980) (Marshall, J., concurring) (death penalty); *Harris v. McRae*, 448 U.S. 297, 337-48 (1980) (Marshall, J., dissenting) (abortion).

17. ROWAN, *supra* note 10, at 389.

experience that one has had growing up in a Black community as opposed to a white community. [pp. 83-84]

Judge Bruce Wright of the New York Supreme Court spoke more bluntly of the need for a more diverse bench:

Most of the judges in America are white and male. The law is too pale and too male. Most of these judges have worn the badge of their privileged white skin with all kinds of arrogance. They have no idea of the insults that have been handed out to us and no idea how all the sensitive ones among us have suffered all kinds of emotional trauma. [p. 248]

Washington elicited two particularly vivid examples of the way that the perspective of a Black judge can affect the judicial system. The first example caught my attention because it involved Retired Judge George Crockett of the Detroit Recorder's Court. He tells the following story: The Republic of New Africa, a Black separatist organization that wanted to create and develop an independent Black nation in the southern region of the United States, held its national convention at the New Bethel Baptist Church in Detroit in 1969. Some of the New Africans openly carried long weapons, which was not a crime in Michigan, and the Detroit Police constantly circled the site. The atmosphere could be described best as nervous and tense. An altercation eventually ensued in which one police officer was killed and another was wounded seriously. Carloads of police arrived and "shot their way into the church, without seeing who they were shooting" (p. 166). They arrested 140 people, many of whom were not members of the Republic.

The pastor of the church made a personal appeal to Judge Crockett. The judge then went to the police headquarters where he immediately convened an impromptu court session. The prosecutor arrived shortly thereafter and vehemently protested Crockett's "courtroom" as well as his decision to grant personal bonds to many of those persons who had been arrested and held in custody since the melee at the church. The prosecutor directed the police not to bring any more prisoners to Crockett — and near chaos developed. Eventually, the prosecutor and the police relented, but not before the news media, public officials, and many citizens had publicly expressed their outrage over Crockett's actions. Notwithstanding this criticism, Judge Crockett stood his ground. He eventually received plaudits from judges and legal scholars, most of whom supported the legality and logic of his decisions (pp. 166-69).

I think it fair to say that few judges would have had the courage to respond to this crisis as Judge Crockett did on that potentially explosive Sunday morning. Even fewer would have retained their stance in the face of such staunch criticism.

The work of Washington State Supreme Court Justice Charles Z. Smith provides another vivid example of the effect that the pres-

ence of a Black judge can have on the judiciary. His local work in the Washington legal community reflects his desire for a more diverse and representative judiciary. Nationally, he was the first non-white person ever to serve on the American Bar Association's Standing Committee on the Federal Judiciary. This Committee interviews and rates all federal judicial nominees; however, when Smith initially joined it, the Committee did not consider a nominee's cultural awareness, treatment of women, or background regarding intergroup relations. Smith challenged the committee members to explore each nominee's attitude toward women and to inquire about her level of understanding about racial, ethnic, and linguistic minorities. These challenges eventually produced an inquiry process under which the Committee examines, among other things, a nominee's grasp of fundamental social issues (p. 202).

Justice Smith has been involved in several other endeavors directed toward the creation of a more diverse court. Whether he is presiding over the National Consortium of Task Forces and Commissions on Race Bias in the Courts, chairing the Minority Justice Task Force in Washington, or making certain that at least one of his law clerks is a person of color, he makes no apologies for imprinting his character and background onto every aspect of his job. When considering how some may criticize him for showing favoritism to nonwhites, he replies:

I don't care whether I get the reputation of being an ethnic minority who hires only ethnic minorities. It worked the other way for so long. I am not embarrassed or ashamed about hiring minority law clerks. Call it being counted. I don't mind being counted as long as the system changes. [p. 205]

In Smith's view, minorities must be counted and must be heard if the system is to change for the better. Washington's book takes a great step in both directions by giving voice to several of those who have perhaps the greatest will and capacity to make a meaningful change. As Judge McBeth maintains:

There is one thing about Black judges: No matter how far we've moved up the ladder of success, and no matter where we may live now, we always go back at some point to the Black community. We go there for church or our mother lives there, so we never sever our roots. We always know what is going on in these communities, and that's a tremendous asset we bring to the system. [p. 44]

During the course of my career, I have found that the most valuable thing that a Black judge brings to the bench is his experience as a minority in America. It is this experience and a desire to make significant changes in our society that drove many of us into the field of law in the first place. My strong interest in civil rights is what initially led me into the field of law. I also realized how pivotal a judge could be to the judicial process and to the civil liberties

and rights of the litigants. I wanted to ensure that all citizens, regardless of their ethnicity, would receive basic civil rights protections.

During my law school days, I remember reading with revulsion about William Callahan, the racist trial judge in the so-called "Scottsboro" case.¹⁸ Judge Callahan displayed gross insensitivity to the fundamental rights of the young Black men accused of rape. I felt then that there was something inherently wrong with a system of justice that so easily could adopt a "mob" mentality that would then dictate the conduct as well as the limitations upon the trial participants.

My experiences, as well as those of my ancestors, influence the way that I handle the disputes in my courtroom. I respect and follow the letter of the law; however, I also know that the law does not exist in a vacuum, and this knowledge makes me very cognizant of the effects of my judicial pronouncements — such as in the Phillip Chance case.

Phillip Chance, a Black man, was indicted in 1973 by a grand jury in Choctaw County, Alabama, on charges of robbery, burglary in the second degree, and murder in the first degree. Upon the advice of his counsel, Chance pled guilty to murder. Although the remaining charges were dismissed, Chance still was sentenced to a term of life imprisonment. On June 23, 1981, after eight years of incarceration, Chance escaped and fled to Michigan. The State of Alabama sought Chance's extradition in 1982, 1984, and 1994. On each occasion, the governor of Michigan denied Alabama's request. Finally, in 1994, Alabama filed a lawsuit in Michigan, seeking a judicial declaration that, *inter alia*, Michigan's governor legally was obligated to surrender Chance pursuant to the Extradition Clause of the U.S. Constitution.

The Chance case came to me on a random assignment. It was a difficult case: There was no question that Chance had been convicted of a serious crime, that he had escaped from prison, and that he had become a fugitive from justice. I denied Alabama's request. It was my judgment that Alabama had to give full faith and credit to the governor's decision to grant asylum to Chance. Was the decision legally sound? Of course! However, my understanding of how the criminal justice system in counties like Choctaw, Alabama treated Black people in 1973, as well as my knowledge that the facts that had served as the foundation for Chance's conviction were questionable, made it easier for me to look beyond his status as a fugitive and to remember the extraordinary circumstances that faced a Black man in rural Alabama during that time in our history.

18. Powell v. Alabama, 287 U.S. 45 (1932).

III. AND WE CONTINUE TO BLEED

Some of the most intriguing portions in Washington's book involve the judges' various, and sometimes innovative, approaches to the crime and violence that plague our society, especially our inner cities. Many of the judges interviewed in this book preside in communities plagued by crime and drugs, or are on the "front line," as Washington says (p. 25).

It is clear that Judges Veronica McBeth, Joseph Brown, Abigail Rogers and Bruce Wright all believe that their prior experiences help them to ensure that those persons who come into their courtroom will be treated fairly. As Judge Brown, Jr., of the Shelby County, Tennessee, Criminal Court notes, "We need judges who understand the defendants" (p. 49) and who "understand a lame line when [they hear] it" (p. 50). As Judge McBeth says:

There is one thing about Black judges. No matter how far we've moved up the ladder of success, and no matter where we may live now, we always go back at some point to the Black community. . . . You can go to Harvard, but you're still going to visit somebody in South Central. You know the crime that is there. You see the drugs and other stuff. You can bring that awareness into a system that doesn't fully understand the problems it is called upon to resolve. [pp. 44-45]

Judge Rogers laments that she is the only Black female judge on the family court bench in South Carolina who grew up in a Black neighborhood. In her judgment, her background makes a significant difference to the Black children who come through her court. Less talked about but equally important, as Judge Walton reflects, is the need for Black prosecutors, as most crime victims are minorities.

The book reveals a divergence of viewpoints among the interviewed judges pertaining to the subject of crime. What all of the judges have in common, however, is a sense of urgency and responsibility that comes from watching Black people destroy each other. There is not much dispute among the interviewees about the causes of crime. They point to poverty, unemployment, hopelessness (pp. 42, 51, 61, 68, 87, 107, 235), and the dramatic escalation of the inner-city drug trade (pp. 68, 87, 117). Finally, although racism may play a role in crime to the extent that it exacerbates these social problems, it is equally clear to all of the judges that minorities must not use these social ills as an excuse for their criminal conduct.¹⁹

19. Judge Brown tells a story about a young Black defendant who accused him of "putting a case on him." Judge Brown challenged the young man's logic by saying:

Man, when in the history of the world have you ever heard of any warriors poisoning the wells in the village where they live? When have you heard of warriors salting the rows of the crops they are supposed to eat or sticking a spear in the belly of a fellow warrior?

What is not so clear — as social scientists, community activists, and students of the law agree — is the solution to the crime problem. Most of the judges with whom Washington talked concurred that individuals guilty of criminal conduct should be forced to take responsibility for their actions; however, the way in which we force them to do so remains a point of contention in the Black community just as in society as a whole. Senior Judge Henry Bramwell of the Eastern District of New York represents one end of the philosophical spectrum when he presents his most myopic solution. In his view, criminals should be made to adhere to the criminal justice system and made to know that they will go to jail for criminal conduct. He believes that the crime problem must be solved preventively within the family structure and reactively in our prisons (p. 176). Judge Bramwell also favors mandatory sentencing because it enables everyone to inject her input into the issue.²⁰ He argues that the guidelines effectively control the judges who “would send[] everybody home no matter what the crime” and that they prevent the judiciary from undersentencing or oversentencing (p. 185).

At the opposite end of the spectrum from Judge Bramwell is Judge Wright, whom the community and the media affectionately and not-so-affectionately call “Turn ’em Loose Bruce.” He contends that incarceration does not rehabilitate and that prisons are often carbon copies of the mean neighborhoods from which most nonwhite defendants come. He has refused, for example, to fine prostitutes or to send them to jail because of his belief that the law does not have a right to determine how a woman should use her body (p. 262).

Personally, I wish we had a device other than the sentencing guidelines to deal with the problems that are wrecking the moral walls of our communities. Unlike Judge Bramwell, I do not like the sentencing guidelines. While I recognize that they can rein in a judge who tends to oversentence or undersentence, these statutory directives also tie the hands of those judges who would like to explore alternatives to incarceration. For now, however, all that I can do is look for the defendant’s numbers on a chart and pronounce a decision on the basis of my mathematical calculation.

P. 50. In effect, Judge Brown told the defendant that if anyone was a racist in the courtroom, it was him because he had harmed his own community.

20. The United States Sentencing Commission is an independent agency in the judicial branch that promulgates the sentencing guidelines for federal courts pursuant to 28 U.S.C. § 994(a) (1994). Its guidelines set forth sentencing ranges that vary according to the offense, the defendant’s criminal history, and any mitigating factors. While in theory judges may depart from the guideline range, downward departures are often overturned on appeal. See Stephen J. Schulhofer, *Excessive Uniformity — And How To Fix It*, 5 FED. SENTENCING REP. 169, 171 (1992) (describing district court departures and overly stringent appellate review of such departures).

In fact, many judges who recognize the seriousness of the crime problem and its devastating effects on society are seeking viable alternatives to incarceration. As Judge McBeth maintains, jail terms — which have become less of a punishment and more of a “rite of passage” for young criminals — cannot solve our social problems. Thus, many judges continually look for other ways to stem the tide of crime in our communities, such as legalizing drugs or sending young offenders to boot camp instead of prison.

In California, the Los Angeles County Department of Children’s Services (DCS) offers such an alternative. The DCS operates a program for children who are wards of the court and nearing their eighteenth birthday (p. 43). The program teaches the children how to open a checking account, complete an employment application, apply for a job, and find an apartment. Instead of incarcerating defendants for nonviolent theft crimes, Judge Brown devised another alternative: a form of restitution called “reverse theft.” Under this system, the victim of a theft may visit the offender’s home, accompanied by a bailiff and court order, and take anything that he likes up to a certain value. He also requires criminal defendants to donate their services to the community (p. 52). Brown encourages other judges to be innovative in their efforts to correct criminals — to require them to obtain voter registration cards as a condition of bond or to obtain GEDs or some other form of education, for example (p. 51). Using incarceration as a form of “shock treatment” rather than punishment, he concentrates on training people to live in the real world through the use of job training, psychological treatment, and anything else that may help to revitalize the community.

Judge Walton was instrumental in expanding the scope of pre-trial diversion for criminals charged with minor, nonviolent criminal offenses. While believing in the importance of punishment, he does not view incarceration as the only means of rehabilitation because, in his opinion, many defendants would prefer incarceration to a steady job. Therefore, he pushes defendants to meet their obligations to provide financial support for their families, to work, and to learn a skilled trade (p. 97).

Judge Smith established a program that *Time* magazine called an “oddball disposition.” He requires third-time offenders who have received proceeds from prostitution to contribute to a scholarship fund for prostitutes. The program works so well that a community-minded woman made arrangements to supplement the fund with monies from her estate. In another case, Judge Smith required a forger who could not read or write to enroll in a literacy program (p. 197).

While I do not work "on the front line" as do some of the judges interviewed by Washington, I do, as a jurist on the federal district court bench, see my share of criminal defendants. I agree that there must be a genuine effort to find innovative and effective ways to deal with the problems of crime and drugs in our communities. We must find ways to let young criminal defendants know that their actions are wrong without requiring them to spend so much of their lives in prison. The drug problem is of particular concern to me because I deal with it a lot in federal court. I do not, however, believe that the legalization of drugs is the answer. I have heard many of the arguments from those on the other side, and none of them has persuaded me that legalization is a viable alternative to our present system.

In any case, there is no one solution to the crime problem. The usefulness of any alternative depends upon the individual defendant and the circumstances of his case. Nonetheless, we must abandon the view that prison is the only alternative. Readers of Washington's book will hear from the mouths of those judges who preside in the inner cities that there are other ways effectively to punish defendants and rebuild communities. For example, they will hear from Judge Walton:

We have to quit playing politics with the crime issue and with social policy. We have to quit making the American public think that we can solve these problems overnight. We have to sit down, roll up our sleeves, and come up with a *long-term* strategy that will, maybe in fifteen years, start to have a positive impact. . . .

If we continue on our current course, things are never going to get better. We're just going to continue to bleed. [p. 112]

IV. "I HAVE ALWAYS BELIEVED THAT IT WAS A BLACK JUDGE'S ROLE TO CHALLENGE THE STATUS QUO"²¹

A common thread that runs throughout the pages of *Black Judges on Justice* is the sense of obligation felt by its subjects. All of them firmly believe that they have a unique perspective to add to the judicial process. The thoughts they shared with Washington reflect a collective commitment to equality.

Their views regarding the extent of their public responsibility, however, varied. Some of the interviewees opined that, while the presence of Black judges adds to the diversity and appearance of fairness in the court system, they play no special role beyond that. Judge Higginbotham, for instance, feels that no Black judge should work solely on racial matters.²² Judge Walton does not think that

21. P. 147 (quoting Judge George W. Crockett, Jr.).

22. See p. 4. Judge Higginbotham does note that Black judges bear burdens that their white counterparts do not. He also believes that Black judges should be concerned about the

there is, or should be, a special role for Black judges. In a like manner, Judge Motley points out that people of color do not have a particular view of contract law that can be distinguished from the "white" view. In many ways, an objective standard of excellence is just as crucial as community service to the role of a Black judge. After recognizing the many accomplishments of Third Circuit Court of Appeals Judges William A. Hastie and A. Leon Higginbotham, Judge Timothy Lewis describes his responsibility as a minority in the legal profession in the following manner:

A young lawyer is a lawyer, not a Black lawyer or a white lawyer. A young lawyer should be a lawyer first in terms of getting the job done. Then, when for reasons of pluralism and trying to improve the overall status it is necessary to work in certain areas, then the identity can change. But when it comes to appearing in court, when it comes to preparing pleadings, when it comes to writing a memorandum for a senior partner, when it comes to all of those things that are really tied in with the performance of a lawyer, a person should be a lawyer first and a Black lawyer second. [p. 241]

Beyond the academic realm, however, some Black judges feel a strong obligation to use the law to aid the development of their communities. They fulfill this obligation by going beyond their job description and using their position to make changes inside and outside the courtroom. Judge McBeth often goes to speak at schools, sometimes speaking to as many as three elementary school classrooms per week. She tries to be a role model and to provide young students with direction, support, and encouragement (p. 37).

The most interesting commentary on a Black judge's responsibility to his community comes from Judge Brown. He asserts that the judicial system desperately needs — more than mere diversity on the bench — a "superjudge," a criminal court judge who is also a knowledgeable, wise, and hardworking social worker (p. 48). Furthermore, in an effort to give some sense of direction to the many segments within the Black community, he has developed several innovative ways to combat recidivism. For example, at the time that this book was printed, Judge Brown was working with a community college in Memphis to set up a boot camp in some of the buildings on campus as an alternative to incarceration. In addition, he once required a forger to write one hundred thousand times that he would not issue any more bad checks. When the man gave him only six thousand lines, Judge Brown asked him, "How come the judge wants you free more than you want to be free?" (p. 55-56). He has people who have never read anything in their lives walking with some self-respect after making them read *The Autobiography*

aspects of the system that work unreasonably and adversely against Black people. He feels strongly that Associate Justice Clarence Thomas lacks this concern. See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas*, 140 U. PA. L. REV. 1005 (1992).

of *Malcolm X* (p. 56). For his efforts, Judge Brown fancies himself somewhat of an African “village chieftain,” in that he corrects those who are willing to be corrected and gets rid of those who refuse to be corrected. Ultimately, he prides himself on being able to “get down” and speak the same language as some of those with whom he interacts in the courtroom.

I bring all of my experiences as a Black man to the bench. I believe that it is my responsibility to be a standard-bearer, as well as a role model, for Black students and lawyers. I fulfill this obligation by attempting to maintain a standard of excellence on the bench and by remaining active in my community. Being in a position of power affords me a great opportunity to effect social change. Now more than ever, we need Black jurists who will take on this responsibility.²³ To quote Judge McBeth:

My feeling about Black judges is this: If we sit here and don't say anything and don't do anything, then we don't need to be here. Really, we don't need to be here because anybody could sit here and do nothing. We have to lead and be part of the leadership that is saying things people don't want to hear. [p. 45]

V. THANK YOU

I conclude this review of Washington's book by saying “thank you.” Thank you for providing me and others with an opportunity to view the world through the eyes of other Black jurists. This is an opportunity that is not afforded often. I sincerely hope that the words of these Black judges will reach those who need to hear them — our fellow judges, legislators, young lawyers, and law students. We have come a long way. However, we still have a long distance to travel. Washington's book provides a firsthand lesson about where we have been and where we must go.

I end with Judge Smith's response to the question of whether he was excited about being the first nonwhite person appointed to Washington State's Supreme Court:

I'll be excited when there are five women on this court. I'll be excited when my daughter — if my daughter who is a lawyer wants to be a judge — is appointed to the supreme court. I'll be excited when my granddaughter — if my granddaughter who is two years old becomes a lawyer and wants to be a judge — is appointed to the supreme court. [p. 208]

Encouraged by — but never content with — the strides that have been made by Black judges in this country, I, along with my colleagues who have been portrayed so graciously by Washington in

23. Judge Bramwell takes issue with Judge Higginbotham's *An Open Letter to Justice Clarence Thomas* in which he criticized Thomas's lack of commitment to the Black community. Bramwell feels that Higginbotham's disapproval of Thomas's strict conservatism amounts to blatant Black-on-Black racism. See p. 175.

his book, continue to press toward the prize of a higher calling — to bring life to the words “Equal Justice Under the Law.”