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"Modest Man—Momentous Achievements" (Review of Ware: William Hastie: Grace Under Pressure)

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"MODEST MAN—MOMENTOUS ACHIEVEMENTS"

WILLIAM HASTIE: GRACE UNDER PRESSURE. By Gilbert Ware.*
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*Reviewed by Jon M. Sands***

INTRODUCTION

William Hastie had a remarkable, even amazing, life. Born at the turn of the century, into a family of unassuming background, he went from success to success. Educated at Amherst and then Harvard Law School, he became a lawyer of exceptional skill and talent. He won notable civil rights cases, served in government, was an educator, and culminated his career with close to thirty years tenure as a judge on the United States Court of Appeals for the Third Circuit. When Hastie died in 1976, his life was a testament to achievement. His accomplishments are noteworthy in and of themselves, but they are even more startling given the racism that permeated America at the time. You see, William Hastie was black.

Gilbert Ware's *William Hastie*[1] chronicles a fascinating life. It also does more than that. Ware describes how Hastie, working together with an extraordinary group of fellow black lawyers—a virtual modern day "Gideon's band"—championed the cause for civil rights in a day and age when they still, in the South, had to ride to the courtroom in the back of a bus. At the end of the biography, upon Hastie's appointment to the Third Circuit, the reader is left with a profound respect for this advocate of civil rights.

As Ware makes clear in this, the first full-scale biography of Hastie, nothing about Hastie's life is without interest.[2] This review, in highlighting Hastie's accomplishments, will follow Ware's chronological narrative. The first section concentrates on Ware's treatment of Hastie's emergence as a leading figure in the civil rights struggle. Next, Ware's discussion of Hastie's role in the implementation of the NAACP's strategy of civil rights litigation is reviewed. This section focuses on Hastie's skills as a constitutional advocate; this section uses, among the many major cases that felt Hastie's sure touch (and Ware's sure explication), *Morgan v.*

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1. G. WARE, WILLIAM HASTIE (1984). References made to this work will appear in textual parenthesis.

2. For an earlier study of Hastie, which still serves as an excellent introduction, see Rusch, *William Hastie and the Vindication of Civil Rights*, 21 HOW. L.J. 749 (1978).

Virginia[3] as an illustration of Hastie's talents. Then, as Ware does, this review examines Hastie's administration of the Virgin Islands as its first black governor. Finally, while Ware ends his study upon Hastie's appointment to the Third Circuit, this review briefly looks at Hastie's tenure as appellate judge and ends by assessing Ware's contribution to historical scholarship.

I.

Ware begins with Hastie's birth in Knoxville, Tennessee in 1904. It is a date noteworthy because it fell a half-century after ratification of the thirteenth and fourteenth amendments[4] and a half-century before *Brown v. Board of Education*.[5] The year 1904, midpoint between these two events, also was in many ways a nadir for blacks in America.

In setting the social context of the time, Ware accurately describes how blacks, as victims of odious discrimination, were all but consigned to second-class status as Americans.[6] The American legal system tacitly approved this, for in *Plessy v. Ferguson*,[7] the United States Supreme Court had upheld the constitutionality of segregation. The Court, thereby, sanctified Jim Crow laws under the "separate-but-equal" doctrine.[8] Ware makes clear throughout his work that Hastie, while conscious of this discrimination, was determined to transcend it.

Ware stresses the point that Hastie, an only child, was born into a family that socially and economically belonged to the small black middle-class. Both his parents were college educated. His father studied pharmacy

3. 328 U.S. 373 (1946).

4. U.S. Const. amend. XIII, XIV. The thirteenth amendment, ending slavery, was ratified on December 18, 1865, and the fourteenth amendment, ensuring due process and the equal protection of laws, was ratified on July 28, 1868.

5. 347 U.S. 483 (1954). *Brown* ended state-sponsored segregation of school children. It also signalled the demise of the "separate-but-equal" doctrine which Plessy v. Ferguson, 163 U.S. 537 (1896), instituted. *See infra* pp. 11-12 & n.8. *Brown* became, therefore, not only the landmark case in the civil rights struggle but the preeminent constitutional case of our age. For an excellent study of *Brown*, see R. KLUGER, SIMPLE JUSTICE (1976). For recent studies of *Brown*'s legacy, see, e.g., *Educational Equality Thirty Years After Brown v. Board of Education*, 55 U. COLO. L. REV. 515 (1894); *In Honor of Brown v. Board of Education*, 93 YALE L.J. 983 (1984).

6. *E.g.*, J. WILLIAMSON, THE CRUCIBLE OF RACE 224-58 (1984); C. WOODWARD, THE STRANGE CAREER OF JIM CROW 67-110 (3d ed. 1974). For a sense of racism's impact on individuals, see, e.g., J. BALDWIN, THE PRICE OF THE TICKET (1985); J. BALDWIN, GO TELL IT ON THE MOUNTAIN (1953); R. ELLISON, INVISIBLE MAN (1952); R. WRIGHT, BLACK BOY (1945); R. WRIGHT, NATIVE SON (1940).

7. 163 U.S. 537 (1896).

8. "Jim Crow laws" came to be the popular term for the segregation statutes. These segregation statutes were first enacted in the 1890's and served as public symbols and constant reminders of the inferior position of blacks in society. As one scholar observed:

> They constituted the most elaborate and formal expression of sovereign white opinion upon the subject. In bulk and detail as well as in effectiveness of enforcement the

and mathematics, first at Ohio Wesleyan and then Howard; his mother graduated from Fiske. Moreover, both parents had fairly good jobs. His mother was a school teacher; and his father, after being unable to find work as a pharmacist, secured an appointment as a clerk in the United States Pension Office, the first such appointment ever given to a black (pp. 3-5).[9]

Hastie grew up in a family that refused to meekly accept the racist status quo. Ware recounts how Hastie's parents fought the racism that surrounded them. Ware writes, for example, that "[r]ather than riding the segregated street car, they bought a horse and buggy for transportation to town" (p. 4). This attitude is exemplified in the family creed, defiantly expressed by Hastie's mother as: "They can't Jim Crow us!" (p. 4).

Hastie grew up in Washington, D.C., where his father had been transferred. While his parents lavished attention upon him, Ware notes that they both continually stressed the need for him to excel. Hastie was fortunate to be raised in a city that had a small, but active, black middle-class which supported progressive black high schools of the highest calibre. Ware rightfully emphasizes the importance of this in Hastie's development (pp. 6-7).

Hastie attended Amherst, where he shone academically. He won numerous academic prizes, was elected to Phi Beta Kappa in his junior year, and was the valedictorian of his class (p. 19). However, as Ware explains, while scholastic acceptance was one thing, social acceptance

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segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.

C. WOODWARD, *supra* note 6, at 7.

Professor Woodward's definitive study, *The Strange Career of Jim Crow*, expertly traces the origin of the segregation statutes and their demise. His thesis that the laws resulted from economic and political conflicts within white southern society which were resolved only at the Negroes' expense is widely accepted. *See generally* L. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979); J.WILLIAMSON, *supra* note 6.

For an apt comparison of racial segregation laws between the American South and South Africa that is revealing in the origins and purposes of such statutes, see G. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981).

9. The Pension Building, where Hastie's father worked as the first black clerk, was built in the 1880's and is located only a few blocks from the capitol. It has been called "one of the great American buildings of the 19th century" where "the American spirit is truly captured . . . [in a] splendid and utterly American mix of romanticism and pragmatism." Goldberger, *Architecture View*, N.Y. Times, Oct. 27, 1985, § 2 (Arts and Leisure), at 32, col. 2. It is tempting to speculate that Hastie's father, working in this grand building with its eclectic style and celebration of spirit, became imbued in some small way with its sense of the possible and he imparted this sense to Hastie himself. Ideally, such a transference of spirit should be one purpose of public architecture. *See id.*

was something else. Blacks were not made to feel an integral part of campus life. They were ignored as being beyond the social pale. The classroom might be opened for Hastie, but the fraternities and drinking clubs were not (pp. 14-18).

In 1927, after two years spent teaching at a black high school to earn money, Hastie entered Harvard Law School. This decision took courage, for the legal profession was not an easy one for a black to enter. As Ware makes clear, obstacles included the all pervasive racism, financial difficulties in acquiring the education necessary, and simply not enough professional opportunities (p. 29). When Hastie enrolled at Harvard, of 160,000 practicing attorneys in the United States, only 1230 were black (p.29).[10]

At Harvard, Hastie excelled. He had, as a fellow student commented, "a mind that can see around corners" (p. 30). Upon graduation, Hastie ranked fourteenth out of a class of nearly seven hundred, served as a member of law review, and was by all accounts a brilliant student (pp. 29-34).[11]

Upon graduation, Hastie returned to Washington, D.C., where he became a lawyer in Roosevelt's New Deal Administration. Ware never fully explains what drew Hastie back. The reasons, however, are not hard to find. Washington was Hastie's home. Moreover, these were the heady days of the New Deal, where government work attracted young ambitious lawyers.[12] Another factor had to be the nascent civil rights movement. Unfortunately, too, job possibilities were not expansive for a black attorney, even a Harvard graduate.[13] Probably all these factors attracted Hastie to Washington and propelled him into a position at the Department of the Interior under Secretary Harold Ickes (p. 81).[14]

10. Even at Harvard itself, which had admitted black students since 1869, blacks were by no means made welcome at the law school. Hastie would be one of only nine blacks that graduated from Harvard between 1920 and 1930 (p. 30).

11. Hastie also attracted the attention of Felix Frankfurter, and entered into the charmed circle of Frankfurter's favorites (p. 31). Indeed, Frankfurter, who taught Hastie constitutional law, commented that he was "not only the best colored man we have ever had but he is as good as all but three or four outstanding white men that have been here during the last twenty years" (p. 28). This was high praise indeed from Frankfurter, but it was also praise tainted by the fact that he felt the need to distinguish Hastie as "colored."

12. *See, e.g.*, P. IRONS, THE NEW DEAL LAWYERS (1982); Rauh, *Lawyers and the Legislation of the Early New Deal* (Book Review), 96 HARV. L. REV. 947 (1983). On the legal legacy of the New Deal, see generally *The New Deal and Its Legacy*, 68 MINN. L. REV. 265 (1983); *New Deal Symposium*, 59 WASH. L. REV. 693 (1984); *The Legacy of the New Deal: Problems and Possibilities in the Administrative State*, 92 YALE L.J. 1083 (1983).

13. For example, it was not until 1949 that a major New York law firm hired a black attorney. Firm Resume of Paul, Weiss, Rifkind, Wharton & Garrison 1 (Sept. 1, 1985).

14. At Interior, he was the principal drafter of the Organic Act of 1936, ch. 699, §§ 1-41, 49 Stat. 1807, 1807-17 (codified at 48 U.S.C. §§ 1405-06m [1982]). This legislation ended the colonial sleep of the Virgin Islands by ensuring it the rights, benefits, and responsibilities of a full-fledged territory (pp. 83-84). Hastie, for his work, was appointed a federal judge for the District of the Virgin Islands (p. 85). He resigned, however, from the federal bench in 1939 to return to Howard Law School as its dean (p. 93).

Hastie, once in Washington, quickly became involved in securing civil rights for blacks. Ware charts Hastie's involvement at length. Ware describes, for example, Hastie's relationship with the radical New Negro Alliance (pp. 66–80),[15] and his joining of Howard Law School's faculty, where he assisted Charles Hamilton Houston in developing a cadre of black lawyers to wage the civil rights struggle in the courts.[16]

At this point, Ware relates the beginning of Hastie's participation in the NAACP. According to Ware, Hastie was instrumental in forming and implementing the NAACP's desegregation strategy,[17] and he took active roles in litigation that resulted in the termination of racially discriminatory salaries to public school teachers[18] and in the first of a series of cases which eventually resulted in *Brown* (pp. 35-54).[19]

Ware then recounts how, because of Hastie's work at the Interior,[20] Hastie was appointed in 1937 to the federal district court of the Virgin Islands. After only two years, though, he resigned to assume the deanship

15. Hastie played a key role in New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938). There, the Court held that the Norris-LaGuardia Act protected from enjoinment picketeers who were protesting an employer's discriminatory practices. The Act, the Court stated, was not confined to controversies between employers and employees or labor unions. Rather, it covered all those who were protesting unfairness and inequality in the terms or conditions of employment (pp. 66-80).

16. For a recent biography of Houston emphasizing his contributions to the civil rights movement as special counsel to the NAACP, see G. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983). *See also* Steiz, *Surveying the Groundwork* (Book Review), 83 MICH. L. REV. 1046 (1985). For an assessment of Houston's contribution to black legal education as vice dean of Howard Law School, see Spottswood, *No Tea for the Feeble: Two Perspectives On Charles Hamilton Houston*, 20 HOW. L.J. 1 (1977).

Houston and Hastie were life-long friends. Their parents knew one another, the families were close and they grew up together. Indeed, Hastie seemingly followed in Houston's footsteps: Amherst and then Harvard, Howard, and the NAACP. Hastie described him as "my friend, my distant kinsman, my mentor and senior colleague in both the practice and the teaching of law" (p. 142).

17. *See infra* pp.11-14 and accompanying notes.

18. Mills v. Board of Education, 30 F. Supp. 245 (D. Md. 1939). In *Mills*, Hastie argued that the differential in pay between white and black teachers in Maryland had no reasonable basis but for discrimination. The court agreed in a path-breaking decision. *Mills* became a cornerstone of the NAACP's attack on segregated education. *See, e.g.*, Morris v. Williams, 149 F.2d 703 (8th Cir. 1945); Alston v. School Board of Norfolk, 112 F.2d 992 (4th Cir. 1940); Freeman v. School Board of Chesterfield County, 82 F. Supp. 167 (E.D. Va. 1948).

19. Hastie was lead counsel in the first case in this strategy, Hocutt v. Wilson, Superior Court, Durham County, N.C. (Mar. 28, 1933) (unpublished), which concerned a black applicant to the graduate pharmacy program at the University of North Carolina, the only such program in the state (pp. 46-53). At trial Hastie was impressive. He argued forcefully that, in the absence of a comparable black program, Hocutt must be admitted. Yet Ware, in his attempt to showcase Hastie, ails to recognize that even this exemplary lawyer made mistakes.

In *Hocutt*, for example, Hastie asked for a writ of mandamus; this would force the court to compel the school officials to admit the black applicant. The court, however, was wary of overstepping its authority and ruled that Hastie asked for the wrong relief. This was a tactical error, for Hastie should have sought declaratory judgment, whereby rights would be specified and an important legal point possibly won. Hastie realized his error. As he stated, "I am kicking myself all over the place for not having thought of that possibility long ago" (p. 51). Granted, the southern court might still have denied the applicant's claim. And the court's decision did rest on other grounds, but Ware glosses over this key point. If Ware's study suffers any flaw, it is his tendency to hero worship.

20. *See supra* note 14.

at Howard Law School. Hastie just arrived at Howard, however, when government service again beckoned him. This time, it was the War Department.

Ware's account of Hastie's tenure as an aide to Secretary of War Henry Stimson is valuable both to understanding Hastie and for an awareness of the pervasive racism in the military. Under Stimson, Hastie's responsibility was to ease racial tension in the armed forces, which were still segregated (pp. 95-109).[21]

Ware makes clear that while Hastie strove to have blacks afforded an equal responsibility in defending the nation, it was an uphill battle (pp. 117-32).[22] Indeed, as Ware quotes Hastie, the fact that blacks had to fight for the right to militarily defend their nation was "one of the greatest ironies of the Second World War" (p. 95). Finally, faced with the Army Air Force's refusal to train blacks as pilots, Hastie resigned his War Department position in 1943 as a public challenge (pp. 130-31).

Upon his resignation, Hastie returned to the deanship at Howard. From there, Ware follows his involvement with the NAACP and his use of Howard as an institutional post from which to recruit and train a faculty composed of brilliant motivated black lawyers dedicated to the civil rights struggle (pp. 148-59).[23]

Because Hastie's life was intertwined with the NAACP and its goals, Ware correctly spends a good deal of time on the organization and its formulation of a litigation strategy against segregation. Excelling in appellate argument, Hastie helped to argue and win two crucial cases for the NAACP before the Supreme Court: *Smith v. Allwright*,[24] which opened up previously all-white political primaries to black participation, and *Morgan v. Virginia*,[25] which invalidated a Virginia law that required segregation on interstate transportation. These cases were key precendential stepping stones in the NAACP litigation strategy and compromise a noteworthy legacy honoring Hastie's efforts in the civil rights struggle.[26]

II.

Ware recognizes that a reader can best appreciate Hastie's achievements by understanding the special demands that civil rights litigation made on

21. Segregation in the military did not end until 1948 as a result of Truman's presidential order.

22. The virulent racism in the military, and the desire of blacks to fight for their nation in the Second World War, is accurately portrayed in C. FULLER, *A Soldier's Play* (1982).

23. During this period, Howard served as a center for black intellectual life. Howard, as one of the few "homes" open to black intellectuals, deserves greater recognition as an institution.

24. 321 U.S. 649 (1944).

25. 328 U.S. 373 (1946).

26. These cases are still studied in constitutional law courses and are discussed in constitutional law treatises. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 388, 788 & 1164 (1978).

a lawyer. This pressure was especially intense on the appellate level, where Hastie won his most notable victories. For this reason, Ware rightfully devotes a good part of his study to Hastie's appellate achievements. A review, unfortunately, cannot be so expansive. An appreciation of Hastie's accomplishments can be gained, however, by focusing on one case as illustrative. The case is *Morgan v. Virginia*.[27]

NAACP litigation, such that occurred in *Morgan*, took place against a legal backdrop dominated by *Plessy*.[28] *Plessy*, handed down in 1896, held that, while the fourteenth amendment had tentatively put blacks on the same legal footing as whites, "in the nature of things, [the amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[29] This decision, by which the court labeled as fallacious the argument that enforced separation branded "the colored race" with a "badge of inferiority," did not constitute one of the finer moments in American jurisprudence.[30]

The NAACP chose to attack *Plessy* indirectly. This strategy involved legal erosion rather than frontal assault (pp. 44-47).[31] Such a strategy made sense given the context of the times: pervasive racism, an entrenched, unsympathetic judiciary, and the possibility of outright judicial affirmance of the "separate but equal" doctrine.

Ware describes how the NAACP, without challenging the constitutionality of segregation itself, began to move against "the state's practice of failing to make the facilities for blacks actually equal to those provided for whites" (p. 44). Ware explains that the NAACP reasoned (rightfully) that Southern states would not, and indeed financially could not, erect wholly separate institutions for blacks. This was especially true in education. The upshot of the NAACP bringing suits to enforce the "separate

27. 328 U.S. 373 (1946).

28. 163 U.S. 537 (1896).

29. *Id.* at 544.

30. *Id.* at 551.

31. The strategy of erosion was designed to undercut the foundations of a legal doctrine by chiseling out so many exceptions that it weakens the precedent and will cause it to be overturned in the end. *See generally* R. KLUGER, *supra* note 5, at 132-33. In the context of school desegregation, an erosional tactic, for example, was integrating state law schools even while grade schools remain segregated. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (overturning state ban on admission of blacks to state law school where state's alternative law school inferior); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (per curiam) (requiring admission of qualified blacks to state's only law school where admission denied because of race).

Frontal attacks, in contrast, directly challenge a prevailing legal doctrine. A good example of this tactic is the Reagan Administration's recent challenge to Roe v. Wade, 410 U.S. 113 (1973), in its amicus brief in Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986), and Diamond v. Chambers, 84-1379 (U.S. Feb. 28, 1985).

but equal" doctrine was "to make segregation a luxury that . . . states could not afford" (p. 44). If the states lost and appealed the cases, the results would likely be decisions granting greater benefits to blacks (p. 44). Such a strategy would not immediately topple Jim Crow, but would undercut it (p. 45).

Ware stresses that this strategy required skilled lawyers for it to be successful. And Ware is correct that the NAACP could have found no better lawyer than Hastie. To Ware, "[Hastie's] courtly reserve was emblematic of an ability to approach problems from a perspective divorced from the emotion of a lifetime—emotion deeply felt, but kept completely under control . . . calm and dispassionate presentation of ideas was undeviatingly his manner, and clarity of expression his trademark" (p. 190). It appears that Hastie, as an advocate, had the ability to make the law reflect black aspirations in a way that was both legally and morally persuasive to judges (p. 190).[32]

Moreover, as Ware notes, Hastie was a perfectionist. Ware recounts how those who worked with him found it both grueling and exhilarating. For example, Ware quotes Justice Thurgood Marshall on what it was like working on a section of a brief with Hastie:

> "I worked on it and worked on it, and got it into good shape, I thought. Then I cut it down to twenty pages, and eventually I thought I did a beautiful job: I cut it down to six or eight pages." Hastie said it had to be cut down even more. "And we argued, and I in very polite fashion said, 'Well, goddamn it, if it's going to be shortened, you shorten it!' And he said 'Will do.' And over the weekend he cut those six or eight pages to a paragraph. And then he said, 'Now find something I haven't covered'" (pp. 180-81).

Of course, everything was.

The sense one gets from Ware is that Hastie brought to the courtroom a pilot's sixth sense of navigation. Indeed, Hastie's ability cooly to steer his arguments in the midst of treacherous constitutional currents and among dangerous precedents, thereby getting to the desired point of landing, is exemplified in *Morgan*.

The case had its origins in Irene Morgan's decision to take a bus ride on July 28, 1944. Morgan, who was black, bought a Greyhound bus ticket at a rural grocery store in Virginia and boarded the bus already

32. Hastie understood "[t]hat although the judge, as a sensitive human being engaged in resolving human controversy, will not be enslaved by concept, the exigencies of the maintenance of an ordered society and the special discipline of the judge's mind preclude a disposition of the particular case which cannot be fitted into a general scheme." Hastie, Book Review, 32 NW.U.L.R. (Ill. L.R.) 1009 (1938). But when presented with a case that falls within a scheme, "a judge usually can and will achieve a decent solution of the case before him." *Id.* Hastie therefore saw his duty as making the particular issue fit into a legal framework a court felt comfortable with applying.

crowded with both black and white passengers. The bus, as all buses were in Virginia, was segregated; this bus, however, ran interstate. When she boarded the crowded bus, she could not find a seat in the black section. After standing awhile, Morgan took a seat left vacant by a departing white. The driver insisted that she move and, upon her refusal, got a sheriff, who arrested her. She was found guilty and fined for resisting arrest and violating a state law requiring segregation on interstate bus lines. She paid the fine for the first charge, but appealed the second, contending that the state law did not apply to her as an interstate passenger.

Morgan therefore concerned the segregation of passengers on buses traveling interstate. While the issue of segregation on interstate bus lines had never been before the Court, it appeared ripe for review. The requirements of segregated travel presented a patchwork of different state regulations. Ten states required segregation on all inter and intra-state commercial transportation; one required it only on intra-state commercial transportation; and nineteen forbade segregation on any commercial transportation.[33] These various laws, Hastie argued, constituted a burden on interstate travel.

Precedent, however, was against Hastie. The Supreme Court had never invalidated a state law that required segregation in transportation and had never validated one that prohibited segregation. Moreover, Congress had repeatedly failed to act; bills designed to forbid segregation always died in committee (p. 187). There was no reason to think that the Court would strike the statute down.

Moreover, even though Hastie built his argument on the commerce clause, there loomed the question of the fourteenth amendment and the *Plessy* holding. During the argument, Justice Rutledge attempted to apply the amendment, and *Plessy*'s interpretation of it, to *Morgan*. Hastie knew that the time was not ripe for a reversal of *Plessy*. Not wanting to take a chance on losing *Morgan* by digressing into the fourteenth amendment, Hastie parried the question even though he "was bursting with arguments against *Plessy's* separate but equal doctrine which he thought irrefutable" (p. 189).

33. Ware vividly describes the obstacles such a law placed on a black's journey from Pennsylvania to Mississippi.

> In Pennsylvania passengers were not segregated, and when they reached the Maryland line the law permitted interstate, but not intra-state, travelers to remain unsegregated. In the District of Columbia all passengers were free to sit where they pleased, but all were required to return to segregated seating in Virginia. Once in Kentucky, interstate passengers were unsegregated, intra-state passengers segregated. In Tennessee interstate travelers were segregated. No one knew what the seating would be in Arkansas. Unaffected by local law in Louisiana, interstate passengers were affected by local law in Mississippi. The logistics of travel were onerous to passengers, the details of compliance were burdensome to carriers, and all this adversely affected interstate commerce (pp. 187-88).

Hastie's self-control must have been great to resist attacking a situation that he considered a moral outrage. He managed, however, to suppress his desire to urge *Plessy*'s overturning then and there. Instead, Hastie kept the Court's attention focused on the commerce clause, and how segregation unconstitutionally burdened it. Hastie clung to the ground he thought would provide him with a victory and from which the next attack on segregation could be launched.

His tactic was justified when the Court ruled on June 3, 1946 that segregation of interstate passengers was an undue burden on interstate commerce.[34] With this decision the NAACP achieved a noteworthy victory, capable of supporting arguments made for analogous networks of transportation. Of such gains, fought and won in the courtroom by Hastie, and lawyers like him, the civil rights movement gained the momentum that culminated in the eventual overruling of *Plessy* by *Brown* and its progeny.[35]

III.

In 1946, President Truman asked Hastie, who had been an ardent Democrat since the New Deal, to assume the Governorship of the Virgin Islands. Hastie's ties to the territory, stemming from his work at Interior and his tenure as a district judge, made him a natural pick for the post. Hastie quickly accepted (pp. 192-93).

Ware's work is strongest through Hastie's involvement in the NAACP. It falters and lags once Hastie left the organization. Perhaps Ware loses the tight focus legal analysis provided. Perhaps, too, Ware's sympathies toward Hastie prevent a totally objective assessment.

This can be seen in Ware's treatment of Hastie when Truman picked him to be Governor of the Virgin Islands. Given Hastie's ties to the territory, stemming from his work at Interior and his tenure as district judge, the choice appeared to augur well (pp. 192-93). It was, however, not to be.

For example, Ware's hero-worship sees him avoid criticizing Hastie's record as Governor of the Virgin Islands. By all accounts, Hastie's governorship was troubled (pp. 192-212). Hastie's progressive social agenda (which Ware glosses over) clashed with the vested interests of the Islands' elites who dominated the legislature. Futhermore, Hastie's difficulty with

34. *Morgan*, 328 U.S. at 386. *See generally* C. BARNES, A JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT (1983) (history of the struggle to end segregated transport in the South).

35. *E.g.*, Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (prisons); Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (courtrooms); New Orleans City Park Improvement Ass'n. v. Detiege, 358 U.S. 54 (1958) (per curiam) (parks); Gayle v. Browder 352 U.S. 903 (1956) (per curiam) (buses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches). *See generally* L.TRIBE, *supra* note 26, at § 16-15.

the legislature was exacerbated by his lack of political rough-and-tumble experience, and his aloof, patrician attitude. Not surprisingly, a political stalemate soon developed. While Hastie as governor, by avoiding either political "strong-arm tactics" or overt "horse-trading," might have displayed "the proper use of political power," the question can be asked whether it was *effective* political power (p. 224). One is tempted to answer "no."

One also wonders why Hastie in 1946, immediately after *Morgan*, chose to take himself away from the thick of the civil rights fight. The Virgin Islands might have appeared idyllic, and Hastie had ties there dating from his work on the Organic Act of 1936 and his tenure on the federal bench. Still, after such notable victories as *Allwright* and *Morgan*, why leave when other battles awaited. Ware points out this incongruity, but fails to explain it.

IV.

In 1948, Truman nominated Hastie to United States Court of Appeals for the Third Circuit. Confirmed in 1950, Hastie became the first black to sit on the Federal Court of Appeals (p. 225). At this point, Ware chose to end his study. Such a choice is odd, and disappointing, for Ware thereby leaves unexamined how the donning of judicial robes would affect so active a participant in the civil rights movement as Hastie.

Ware's study would have profited from a comparison of Hastie as advocate with Hastie as judge. For example, Hastie, once on the bench, advocated judicial restraint; he both preached[36] and practiced it.[37] This approach might be considered surprising given his avowed civil rights activism, but Hastie, with his respect for federalism and political processes, eschewed judicial overreaching.[38] Perhaps, too, Hastie was mindful of how judicial activism could become a double-edged sword.

Hastie's strong belief in judicial restraint can be seen best in *Lynch v. Torquato*.[39] The case, which was one of the few opinions that Hastie

36. W. HASTIE, *Judicial Method in Due Process Inquiry* in GOVERNMENT UNDER LAW (A. Sutherland, ed. 1956) at 330-42 (noting the "observable trend away from the idea that justice consists of providing a workable maximum of individual freedom, and toward a more inclusive concept of reconciling and satisfying a great diversity of deserving but often conflicting human claims."); Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947 (1973).

37. *See, e.g.*, Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); *See also*, Remarks of Chief Justice Warren E. Burger, Memorial Service, 535 F.2d 8 (1976) ("[Hastie] did not believe that he or any other judge should be or could be so sure of his own perception of the popular will that judges should rely on their own perception of that area rather than performing their duties with fidelity to accepted legal principles.").

38. Perhaps this was because, at heart, Hastie was a Madisonian constitutionalist, convinced that government should control itself. *See* Rusch, *supra* note 2, at 807-08.

39. 343 F.2d 370 (3d Cir. 1965). The analysis of *Lynch* which follows is drawn from Rusch, *supra* note 2, at 809-10. I am indebted to his article for making this point.

wrote which dealt with equal protection, was a singularly apt one.[40] In *Lynch,* disaffected Democrats in Cambria County, Pennsylvania, challenged the method of selecting county chairmen. Chairmen were elected by precincts, and the plaintiffs alleged that the wide contrast in number of registered voters between the precincts deprived them of equal protection.[41]

In arguing their case, plaintiffs strove to have the Democratic Party workings fall under state action, thereby rendering its internal management subject to the fourteenth amendment. This was the same tactic Hastie had pursued successfully in *Allwright*[42] (pp. 177-85), where the Supreme Court held that a state election primary constituted state action and was subject to the fourteenth amendment. Any racial discrimination involved in it, therefore, violated the equal protection clause.

Interestingly Hastie made no reference to *Allwright* in his opinion when he wrote that a political party's internal management lay outside of state concern. As Hastie wrote in *Lynch:*

> [A] citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of a political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. The people, when engaged in primary and general elections for the selection of their representatives in their government, may rationally be viewed as the "state" in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws. In contrast, the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action which must satisfy the requirements of *Gray v. Sanders.*[43]

Such an absence is telling.

Perhaps *Lynch* is indicative of Hastie's reluctance to involve the judiciary in what he perceived as purely the political sphere. After all, for

40. Hastie wrote surprisingly few civil rights cases. This may be attributed to the Circuit caseload and to the randomness of assignments. Still, it is startling that of close to 500 signed opinions, only two dozen deal with the fourteenth amendment.

41. One county, for example, had 750 registered Democrats and another only 18. 343 F.2d at 371.

42. 321 U.S. 649.

43. Lynch, 343 F.2d at 372 (footnote omitted).

Hastie, government in the end must be responsible for governing itself. Still, *Lynch* does stand in contrast with *Allwright* and it is surprising that Hastie could make such short shrift of the state action argument. After all, the county chairmen controlled extensive patronage.[44] Moreover, where one party held political sway in a district or state, then internal party management became, for all intents and purposes, government. This was especially true in the South. Certainly Hastie was aware of this. Perhaps he considered both the factual context and the times in deciding the case. Whatever, *Lynch* offers insight into Hastie's views of what the judiciary should or could do. This is an area that Ware could have profitably explored.[45]

Ware's decision to stop his work on Hastie's life at 1950 is regrettable also from the human interest angle. If it is true, as Hastie once remarked, that "[j]udges stand somewhat apart from the battles that inevitably rage in society,"[46] then how did he, one of the key participants in the civil rights movement, cope with his removal from the struggle? How did he also cope with the disappointment and frustration of being passed over for the Supreme Court because it was too politically dangerous?[47] And how does one reconcile, for example, the ardent civil rights fighter who fought the status quo with the respected judge who, when accused by a black militant of kowtowing to the establishment, responded: "Young man, stop, stop right there. I want you to understand something. I am not a spokesman for the establishment. I am not an apologist for the establishment. I am the establishment."[48]

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44. *Id.* 343 F.2d at 372.

45. For example, Ware could have examined Hastie's philosophy toward affirmative action. *See, e.g.*, Hastie, *Affirmative Action in Vindicating Civil Rights* 4 U. ILL. L.F. 502 (1975). Regarding affirmative action, Hastie apparently accepted the use of race as a prime consideration in correcting past discrimination in employment opportunities and housing. *See* Contractors Ass'n. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (member of panel that upheld affirmative action quotas for minorities for building contractors receiving federal funding); Hastie, *supra*, at 505-10.

Hastie felt differently, however, when it came to education. In that context Hastie viewed race as just one factor to be weighted and balanced in making education policy. *Id.* at 515-16. As for quotas in higher education, Hastie thought that "the use of race as a determinant of the eligibility or qualification of an applicant for college or graduate admission offends the equal protection clause." *Id.* at 516. Race could be considered as one factor in granting admission, just as geographic diversity, athletic ability, musical talent, or alumni affiliation were considered, but it could only be considered after all applicants had all satisfied the "formal prerequisites for admissions" and had been considered qualified in the "professional judgment of admission officers." *Id.* at 515. A lowering of standards for one race meant a rising of standards for others and hence, a denial of equal opportunity. *Id.* Such a position was to be expected from someone like Hastie who excelled at Amherst and Harvard, taught high school, and was a rigorous dean at Howard Law School. For an overview of Hastie's judicial philosophy, see generally Rusch, *supra* note 2, at 807-13.

46. Remarks of Bernard G. Segal, Memorial Service, 535 F.2d 12 (1976).

47. *See infra* note 50.

48. Remarks of Dr. Kenneth B. Clark, Memorial Service, 535 F.2d 17 (1976).

This last question might be the easiest to answer for while it might seem odd that Hastie would want to consider himself a member of the power structure that had put so many obstacles in his path, in some respects, it is perfectly understandable given Hastie's background and training. Hastie was always taught to work within the system, to excel by playing by the rules, and to right wrongs using the legal means and tools available. Hastie was not a revolutionary. He thought the system could be changed from within, and his achievements were evidence of it.

Though Ware's work ends upon Hastie's appointment, Hastie served on the bench until his death in 1976. He was considered an exemplary jurist, earning high praise from his colleagues and the bar.[49] From 1968 to 1971, when he assumed senior status, he served as the Circuit's Chief Judge. In his time on the court, he was frequently mentioned as a candidate for the United States Supreme Court.[50] His death, on the eve of the nation's bicentennial, was also a little over two decades after the Supreme Court decided *Brown*, a decision for which he helped lay the groundwork.[51]

CONCLUSION

It is unfortunate that Hastie and other leading black civil rights lawyers have been neglected by historians.[52] Their lives, by and large, remain unchronicled and their achievements not widely recognized.[53] Gradually, however, their contributions to our nation are being given their due accord.[54] Gilbert Ware's biography of William Hastie is one such overdue effort at recognition.[55]

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49. *See, e.g.*, Memorial Service, 535 F.2d 5-21 (1976).

50. Hastie was first considered for the United States Supreme Court by President Dwight D. Eisenhower. President John F. Kennedy gave him serious consideration in 1962 when Justice Charles Whittaker retired. At that time, however, Kennedy considered it too politically dangerous to appoint a black to the Court. President Lyndon Johnson considered Hastie, but decided instead to appoint Thurgood Marshall. Ware neglects this aspect of Hastie's life, which surely must have led to frustration and disappointment. A good account of it can be found, however, in Rusch, *supra* note 2, at 813-16.

51. It is a shame that, because of the present Administration's policies, the present efforts of civil rights activists must be directed at the maintenance of this groundwork, instead of being able to build further upon it. *See* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (Administration filed amicus brief in support of position that would allow a segregated college to retain tax-exempt status); Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984); *see also, e.g.*, Editorial, *Going Back to the Back of the Bus*, N.Y. Times, Nov. 10, 1985, § 4 (The Week in Review), at 26 (Reagan Administration has deliberately neglected civil rights enforcement); N.Y. Times, Sept. 1, 1985, § 1, col. 2 (nat. ed.) (Reagan Administration's policies perceived as anti-black and anti-minority).

52. These would include, to name a few, Justice Thurgood Marshall, Judge Spottswood Robinson, and Judge Robert Carter.

53. *See* Smith, *Forgotten Hero* (Book Review), 98 HARV. L. REV. 482, 482 & n.5 (1984).

54. *E.g.*, G. McNeil, *supra* note 16. For recent works in this area that also serve as an introduction to the contributions of black lawyers to American history, see FROM THE BLACK BAR: VOICES FOR

Ware's well-researched book establishes Hastie as a leading figure in the black fight for civil rights. It is a work, however, that is not without some flaws. There are places where more legal analysis is needed and there are times Ware is too uncritical of his subject. These are minor criticisms, however, in light of what Ware has accomplished. *William Hastie* is a notable contribution to black, and hence, American, history.

EQUAL JUSTICE (G. Ware & H. Hill eds. 1976); R. KLUGER, *supra* note 5; W. LEONARD, BLACK LAWYERS (1977); G. SEGAL, BLACKS IN THE LAW (1983); G. SEGAL, IN ANY FIGHT, SOME FALL (1975); Hastie, *Toward an Equalitarian Legal Order* 1930-50, 407 ANNALS 18 (1973).

55. As a result, Ware's *William Hastie* joins other recent biographies in acknowledging the extraordinary accomplishments of notable blacks in the arts, sciences, and sports. *E.g.*, W. BAKER, JESSE OWENS (1986) (track and field); G. BUCKLEY, THE HORNES (1986) (entertainment); J. COLLIER, LOUIS ARMSTRONG: AN AMERICAN GENIUS (1984) (jazz); J. FRANKLIN, GEORGE WASHINGTON WILLIAMS (1958) (history); K. MANNING, BLACK APOLLO OF SCIENCE: THE LIFE OF ERNEST EVERETT JUST (1983) (biology); C. MEAD, CHAMPION: JOE LOUIS, BLACK HERO IN WHITE AMERICA (1985) (boxing); J. TYGIEL, BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY (1983) (baseball).