

2017

From Warren to Burger: Race Relations Inside the Court

Robert Fabrikant

Follow this and additional works at: <http://open.mitchellhamline.edu/mhlr>

 Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), and the [Judges Commons](#)

Recommended Citation

Fabrikant, Robert (2017) "From Warren to Burger: Race Relations Inside the Court," *Mitchell Hamline Law Review*: Vol. 43 : Iss. 6 , Article 1.

Available at: <http://open.mitchellhamline.edu/mhlr/vol43/iss6/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

FROM WARREN TO BURGER: RACE RELATIONS INSIDE THE COURT

Robert Fabrikant[†]

Chief Justice Warren E. Burger is an unsung hero in our nation's struggle to remove vestiges of racial segregation and race-based slavery and to create an environment of racial equality and equal treatment. What is noteworthy about Burger's contribution to racial justice is that he accomplished as much, if not more, in his off-the-bench activities as Chief Justice of the United States Supreme Court than in his very respectable jurisprudence on racial issues.¹ Burger did not simply talk the talk of racial equality. He practiced it, effortlessly and without fanfare, in his daily life and in discharging his administrative duties as Chief Justice. In order to fully appreciate Burger's transformative impact on racial equality, it is necessary to revisit the interior life of the Court as it existed when Burger took the helm in June 1969.

In 1974, five years after Burger became Chief Justice, and more than forty years ago, an article was published which rocked Washington, D.C.² A cub columnist, Nina Totenberg, accused the Court of being the "Last Plantation," because it was thoroughly

[†] Mr. Fabrikant is a partner at Manatt, Phelps & Phillips, in Washington, D.C. and a Professor in the Practice at Howard University School of Law. He clerked for Warren E. Burger on the D.C. Circuit Court, and then at the Supreme Court, when, from 1969 to 1970, he served as the Senior Law Clerk to the Chief Justice. I wish to express my deepest appreciation to Jan Horbaly for his characteristically sage reviews of this article. I would also like to thank Hernse Eugene, the extraordinary librarian at Manatt's Washington, D.C. office, for his superb librarian skills, which helped unearth hard-to-find sources.

1. See Robert Fabrikant, *Remembering Warren E. Burger*, 40 J. SUP. CT. HIST. 203 (2015); see also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that literacy and aptitude tests used by employer as prerequisites for jobs to which tests bore no direct application, and which had a disproportionately negative effect on African Americans, were impermissible violations of Title VII).

2. See Nina Totenberg, *The Supreme Court: The Last Plantation*, NEW TIMES, July 26, 1974, at 26–31. Ms. Totenberg was kind enough to send me a copy of the article, as I was not otherwise able to locate it.

segregated, with whites overseeing a phalanx of black subordinates.³ This was a shocking portrait because the Court had been the moving force in attempting to desegregate the rest of the country;⁴ yet, Totenberg portrayed the Court as practicing internally precisely the opposite of what it preached to the rest of the country.⁵ Many culprits were identified, but blame was ultimately placed on the racial norms that had long prevailed at the Court and in the country itself.⁶ Some of the Justices seemed to treat blacks as racial inferiors without even realizing it.⁷

Totenberg's provocative article painted a bleak picture of the Court as it stood in 1974, but she was apparently unaware, and made no mention, of the much worse racial atmosphere which had prevailed inside the Court during the tenure of Burger's predecessor, Chief Justice Earl Warren. Nor did she mention the truly transformative role that Burger played in improving the racial climate at the Court.⁸

During Chief Justice Earl Warren's era, blacks at the Court viewed Warren's staff as openly hostile towards them. Burger's arrival at the Court was a welcome and surprising change in the manner in which blacks were treated.

To the best of my knowledge, the only document that captures the racially unfriendly climate under Warren, and the transformative role played by Burger, is a transcript of remarks made by Alvin Wright Jr. to the Charles Hamilton Houston National Moot Court Team at Howard University School of Law in 2013.⁹ Mr. Wright Jr. is the son of now-deceased Alvin Wright Sr., an African American who had long served as the in-chambers

3. *See id.*

4. *See, e.g., Griggs*, 401 U.S. 424; *see also infra* note 27.

5. Totenberg, *supra* note 2, at 29, 31.

6. *Id.* at 26–31.

7. This same point comes through in a recent biography of Justice William J. Brennan. *See* SETH STERN & STEPHEN WERMEIL, JUSTICE BRENNAN: LIBERAL CHAMPION 146, 211 (2010).

8. Ms. Totenberg did mention, however, that soon after he arrived, Burger sought to raise the salaries of the in-chambers messengers of the Justices; all of the messengers were black. Totenberg, *supra* note 2, at 31.

9. Professor Fabrikant is the longtime faculty advisor to the Team. I had invited Mr. Wright Jr. to address the Team to counter the racist and sexist image of Chief Justice Burger in the recent 2013 HBO movie, *Muhammad Ali's Greatest Fight*. The transcript of Mr. Wright Jr.'s remarks is attached to this article. *See infra* note 11.

messenger for Chief Justice Warren and then for Chief Justice Burger.¹⁰

The son, Alvin Wright Jr., remembered well that there was “a vast difference in terms of the kind of relationship and the kind of behaviors that my dad experienced for Warren versus Burger.”¹¹ Although Warren “was not a bad person to my dad,” Warren’s longtime lead secretary, Mrs. Margaret McHugh, “was the bane of my dad’s life.”¹² Alvin Wright Sr. had reported on a daily basis to Mrs. McHugh, and he confided to me on many occasions during my year at the Court that he and the other blacks at the Court viewed her as a racist and openly hostile to blacks.

Mrs. McHugh was not the only secretary at the Court during the Warren era to “display[] . . . racial prejudices” in dealing with black messengers at the Court;¹³ so too did Justice William Brennan’s secretary, Ms. Mary Fowler, whom Brennan eventually married.¹⁴ Fowler, who had grown up in southern Maryland, had no qualms in expressing to Brennan’s typically liberal law clerks her opposition to *Brown v. Board of Education*, and the manner in which she treated Brennan’s black messenger “troubled” Brennan’s clerks.¹⁵ At least one of them believed, “‘There was always a plantation feeling between the [black messenger and Fowler]’ . . . ‘She was very short with him.’”¹⁶ Ms. Fowler and Mrs. McHugh served together at the Court for many years.

Chief Justice Warren had inherited Mrs. McHugh from his predecessor, Chief Justice Vinson, a Kentuckian. Mrs. McHugh’s total control of the functioning of the Office of the Chief Justice during the Warren era is well captured by her reported claim that

10. As part of his duties as the messenger to Chief Justice Warren, Alvin Wright Sr. had the unfortunate responsibility of guarding the door to the Court’s conference room when the Justices were meeting in conference on the day President Kennedy was assassinated and knocking on the door to give a note to Justice Arthur Goldberg, who, as junior Justice, opened the door. ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 412 (1997).

11. Alvin Wright Jr., Remarks to the Charles Hamilton Houston National Moot Court Team at Howard University School of Law (Nov. 20, 2013), <http://mitchellhamline.edu/law-review/wp-content/uploads/sites/37/2017/03/Transcript-Wright-Jr-Remarks-to-HUSL.pdf>.

12. *Id.* Chief Justice Warren “invariably referred to her” as “Mrs. McHugh.” CRAY, *supra* note 10, at 273.

13. STERN & WERMIEL, *supra* note 7, at 211.

14. *Id.* at 485.

15. *Id.* at 211.

16. *Id.*

she “ran [Warren’s] office . . . [and] did most of his work, all of his work as far as chief justice [sic] was concerned.”¹⁷ It also appears that Mrs. McHugh believed she was authorized to speak, on behalf of Chief Justice Warren, on highly sensitive matters without it necessarily appearing that Chief Justice Warren had reviewed the communication in advance.¹⁸

But, when Burger arrived, according to Alvin Wright Jr., “things changed very dramatically for my dad.”¹⁹ Burger did not inherit Mrs. McHugh from Warren. Instead, when Chief Justice Warren retired, he kept Mrs. McHugh as his secretary, and Burger brought in a new secretary to administer his office. Consequently, Wright Sr. no longer reported to her. He now reported to Burger’s new lead secretary, Ms. Mary Burns, with whom Wright Sr. developed a very warm relationship.

After Burger arrived, Alvin Wright Sr., according to his son, came to believe he was “working under conditions that were, to him, exemplary. . . . [T]his was a major change [from the atmosphere that predominated at the Court under Warren] for him, not just him, but also for the others in the Court who were at his level, this group of messengers.”²⁰ Burger elevated the messengers, and, “most importantly, for people in those positions at that time, their pay increased significantly.”²¹

Burger and Alvin Wright Sr. “had birthdays on the same day” (September 17), and the two of them would “share a birthday cake”

17. CRAY, *supra* note 10, at 273 (internal quotation marks omitted).

18. See JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 139 (2006). For example, in 1967, Edison Uno, a Japanese-American who had spent four-and-a-half-years in an internment camp during World War II, as a result of government-imposed restrictions in which Warren had played an important role as California’s governor, wrote a letter to Chief Justice Warren asking for an apology. *Id.* at 138. According to Newton, Uno received “a belated reply,” which came not from Warren, but from Mrs. McHugh, “who informed [Uno] that she had not had the chance to speak with Warren about [Uno’s] request but warned him that no response was likely to be forthcoming. ‘He has stated on many occasions that it is a historical fact of many years ago which under no circumstances could be undone, and that it would serve no good purpose to dredge it up at this time.’” *Id.* at 139. Although many other prominent Americans who had also supported the wartime internment of Japanese-Americans, including Supreme Court Justice Tom Clark, “made their amends after the war[,] Warren refused” to do so. *Id.* at 138.

19. Wright Jr., *supra* note 11, at 3.

20. *Id.* at 4. As noted earlier, each of the nine Justices had a black messenger. See *supra* note 8; see also Wright Jr., *supra* note 11, at 4.

21. Wright Jr., *supra* note 11, at 4.

at the Court.²² Indeed, Burger would often have Alvin and his wife Lottie come to Burger's Northern Virginia home to celebrate their common birthday.²³ Alvin Jr.'s perception was that his father and Burger did not have merely an employer-employee relationship but "were actually, in fact, friends."²⁴ Based on his many discussions with his father, Alvin Jr. "fel[t] very confident in saying that [Burger] found [Alvin Sr.] to be somebody that he could be totally . . . comfortable and relaxed with as another human being."²⁵ Indeed, they often lunched together. My own observation is that Chief Justice Burger spent more time with Alvin Wright Sr. than any other person during his first year at the Court.²⁶ Burger's relationship with Alvin Wright Sr. was unique, and it was very different from the relationship that any other Justice had with his messenger. Burger's exemplary personal relationship with Alvin Wright Sr. contrasted markedly with the condescending, hypocritical attitudes of other Justices, especially some of the famously liberal Justices on the Court.

If there was one thing that irritated Burger, it was the hypocrisy of so-called liberal members of the bench, particularly in the area of race relations. The liberal Justices issued high-minded opinions, tinged with self-righteous pronouncements, which called upon others to do things the judges would not do themselves. For example, liberals fervently insisted upon public school desegregation²⁷ but rarely, Burger thought, sent their own children to public schools, and certainly not to racially mixed public schools.

I do not know whether Burger was aware, but Justice William Brennan, a leader of the left wing of the Warren Court, was a case in point: though the population of Washington, D.C. became majority black not later than 1960,²⁸ four years after Brennan

22. *Id.* at 12.

23. *Id.*

24. *Id.*

25. *Id.* at 12–13.

26. See Fabrikant, *supra* note 1, at 209–10 (containing a fuller description of the unique, and uniquely sweet, relationship between Chief Justice Burger and his messenger, Alvin Wright Sr.).

27. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. Compare BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1956 31 (1956), <https://www2.census.gov/library/publications/1956/compendia/statab/77ed/1956-02.pdf>, with BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1961 31 (1961),

moved to Washington, D.C., Brennan lived in lily-white Georgetown and “sent his daughter, Nancy, to an exclusive private boarding school just across the border, in Maryland, rather than to Washington’s [racially integrated] public schools.”²⁹

Brennan also infamously withdrew a clerkship offer to Michael Tigar after receiving pressure from members of Congress, the Lyndon Johnson administration, and other Justices as a result of Tigar’s highly publicized left-wing activities while an undergraduate and law student at the University of California Law School in the early 1960s.³⁰ Burger took the opposite tack: while I was serving as Burger’s senior law clerk, one of my brothers was charged with pornography. When the Federal Bureau of Investigation so informed Burger, he relayed the message to me and refused to entertain any discussion about my resigning as his law clerk.

The disparity between what liberal Justices said in their judicial opinions and how they acted in their private lives in the area of race relations was quite evident in how they treated and thought of their office staff. Perhaps the three most liberal white Justices on the Supreme Court during the Warren-Burger era were Earl Warren, William O. Douglas Jr. and William J. Brennan Jr. They are rightly considered the lions of the left, along with Thurgood Marshall, during that period. Yet Warren, Douglas, and Brennan called upon their black staff to provide personal services that went well beyond their official duties and failed to compensate them for these extra-curricular activities. While it might be hyperbole to label this as treating their black staff as “slaves,” one of Justice Brennan’s law clerks used comparably provocative language to

<https://www2.census.gov/prod2/statcomp/documents/1961-02.pdf>.

29. STERN & WERMIEL, *supra* note 7, at 210, 243. Brennan’s hypocrisy was not limited to his treatment of blacks. It spilled over into his treatment of women and his disregard for the right of free expression. Brennan authored the landmark opinion in *Frontiero v. Richardson*, holding for the first time that gender was a “suspect classification” and thus requiring legislation to withstand the most exacting standard, “strict judicial scrutiny.” 411 U.S. 677, 682 (1973). But at the very moment he was publically denouncing gender discrimination and prohibiting others from practicing it, Brennan continued his long-standing practice of refusing to hire women as law clerks simply because of their gender. See STERN & WERMIEL, *supra* note 7, at 386, 399. Brennan changed this practice in 1974, only after he was scolded by one of his former clerks for engaging in such highly hypocritical conduct; the former clerk wrote Brennan a letter stating that Brennan’s gender discrimination against women was “literally unconstitutional, under the decisions’ that Brennan had joined or written himself.” *Id.* at 400.

30. STERN & WERMIEL, *supra* note 7, at 264–70.

describe a particularly troublesome practice common to all three of these Justices.³¹

Warren, Douglas, and Brennan each required their office messengers to serve as waiters at social events held at their residences and did not compensate them for this work.³² Warren even required his messenger to wear a white dinner jacket when he served dinner at Warren's residence. One of Justice Brennan's law clerks, in commenting on Brennan's unpaid use of his messenger to serve at a private function at Brennan's house, stated to Brennan that he considered the practice to be "one half a step out of slavery."³³ Requiring office staff to serve at the Justice's private functions required the staff to use time-consuming and, for them, expensive public transportation to reach their destination, as few, if any, of the staff had their own cars.

In contrast, Burger never asked Wright Sr. to serve at Burger's house, and, moreover, on those occasions when Wright Sr. and his wife joined the Burgers for their birthday celebrations, Wright Sr. and his wife never had to take public transportation to Burger's house.³⁴ Burger had the Court limousine pick them up and return them home.³⁵

Warren Burger's ascendancy to the Supreme Court may not have been welcomed by liberals, but it was Chief Justice Burger who made major changes that improved race relations in the Court. Burger was a man who practiced what he preached and preached what he practiced. Burger raised the salaries of the Court's black messengers. Further, he promoted black court security personnel to senior court security officer positions, hired black professionals to senior staff office positions in the Court, and hired black secretaries to work in his chambers. In short, Burger integrated all levels of the Court's staff, changed the racist culture which long existed in the chambers of liberals during the years of the Warren Court, and improved the overall work environment for all black workers employed at the Court. That took courage in the racially charged environment of prejudice and double standards that

31. *See id.* at 211.

32. Justice Douglas reportedly fired his messenger for "refus[ing] to serve at a private party in Justice Douglas' [s] home." Totenberg, *supra* note 2, at 28.

33. STERN & WERMIEL, *supra* note 7, at 211.

34. Conversation with Lottie Wright, in Washington, D.C. (Aug. 2012).

35. Fabrikant, *supra* note 1, at 209.

8 MITCHELL HAMLIN LAW REVIEW SUA SPONTE [Vol. 43:6

prevailed in the nation at the time and, sadly, at the Court in the beginning of Burger's tenure as Chief Justice.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School of Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu