

PROMOTING RACIAL EQUALITY

Professor Machoney

I want to welcome you to this panel. This panel is on *Promoting Racial Equality* in light of the emerging economic and demographic trends in the twenty-first century. There is the question of defining what “racial equality” means, and against this background, there is also a question of methodology.

We have a distinguished panel here with us today. Now, I want to go ahead and introduce our moderator, Todd Rakoff. Starting in July, he will be the Dean of the J.D. Program at the law school. Professor Rakoff has done, among other things, academic work investigating how contract law can inform our understanding of what constitutes racial discrimination.¹ I will now turn the program over to Professor Rakoff.

Professor Rakoff

Good afternoon. About a hundred years ago, one of the most famous of all graduates of Harvard University, W.E.B. DuBois, in what is probably his most famous book, *The Souls of Black Folk*, wrote what is probably his single most famous line: “The problem of the twentieth century is the problem of the color-line.”²

What metaphor would DuBois use if he were writing today? The color line is a nice one-dimensional metaphor and, perhaps, reflects the stark one dimensionality – or the stark physicality – of the regime of Jim Crow about which he was writing. What would he say today? Would he change his one-dimensional color line into a two-dimensional color patchwork? Would he turn it into three-

¹ Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63 (1994).

² W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 10 (1979).

dimensional color boxes? Would he try to escape from dimensions altogether and talk of a non-physicality, a color miasma?

One thing we can be sure of is that he would not choose a rose as his metaphor. A lot has happened in the twentieth century since he wrote and there has definitely been some progress. Things are more equal now than they were at the beginning of the twentieth century. It is very clear, however, that we still have to deal with the social psychological inequality of racism and prejudice, and the social structural inequality of caste and class.

Today, as we start the twenty-first century, we have to say that the problem of the twenty-first century is the problem of the color – and you can take your pick – patchwork, boxes or miasma. Albeit in a new form, we can restate the same matter as DuBois stated almost a hundred years ago. The reason we are here today, I think, is so that we do not have to restate that evil again a hundred years from now — so that a hundred years from now we do not have to worry about what is the appropriate metaphor for this problem, because the problem will have disappeared and we will not need a metaphor for it.

To help us discuss today how we might make progress, we have three other outstanding graduates of this University, in fact all graduates of this Law School. I will introduce them in the order in which they are going to speak.

Our first speaker, on my far right, will be Paul Butler, presently a professor at George Washington Law School, and a 1986 graduate of Harvard Law School. Before going to George Washington, he worked both in the private sector for Williams & Connelly and in the public sector for the Justice Department. Perhaps the breadth of his ability to attract people is shown by the fact that he lectures for both the NAACP and the ABA.

Next is Professor Deborah Ramirez, a professor at Northeastern University Law School. She is a 1981 graduate of Harvard Law School. Prior to going into the professorate, she was an Assistant U.S. Attorney; presently, she is a consultant to the Justice Department concerning issues of racial profiling. I think she will tell us what she is presently doing in that regard when she gets a chance to speak.

Finally, on my immediate right, is Professor Christopher Edley, who is presently a professor at Harvard Law School. He is a 1978

graduate of Harvard Law School, and is also co-director of its Civil Rights Project. Before his present stint as a professor, he was the Associate Director of the Federal Office of Management and Budget, so he should have a very wide perspective on what can be done in terms of policy to address our concerns.

We plan to have the speakers speak for, all told, an hour or less. There certainly will be some time for questions from the audience after the panelists speak.

Professor Butler

Good afternoon. I am very happy to be here to meet Professor Ramirez and especially to be on the same panel as my former contracts professor, Professor Rakoff, and my former administrative law professor, Professor Edley. I also would like to thank the Law Review for inviting me and for the intriguing name of this panel. I adore the title, "Promoting Racial Equality," because I agree that racial equality is something that one has to promote or sell.

Accordingly, the first part of this presentation will be a sales pitch for racial equality. Then, because I do not know whether people who make the law are interested in buying equality, I will get pessimistic and tell you whose interests I think the law might be more prone to support.

Because I am going to first try to sell you an idea and then be pessimistic about its chances, the title of this talk is "Death of a Salesman."

The area of the law that I am going to focus on is criminal law. I am a former prosecutor and now I teach criminal law. This is a fascinating area for exploring race relations because of what it is all about – punishment is the object of criminal law. Punishment is the intentional infliction of pain. Whom is the government intentionally inflicting pain upon and why? In the end, it turns out to be mostly black people. African-Americans represent twelve percent of the population, but represent about fifty percent of the prison population.³ One in three young black men is under

³ David Cohen, *Democracy and the Intersection of Prisons, Racism and Capital*, 15 NAT'L BLACK L.J. 87, 88 (1997-1998) (decrying the disproportionate

criminal justice supervision as compared to about one out of fourteen young white men.⁴

In my city, Washington, D.C., that number is fifty percent.⁵ What this means is that, in a year, over half of the young black men in the District of Columbia are either in prison, on probation or parole, or awaiting trial. Nationally, more young black men are in prison than in college.⁶

Prison, in theory, is for people in society who are the most dangerous or the most immoral.⁷ What our country's criminal justice system tells us is that if we look at the most immoral and most dangerous men in the United States, over half of them are black, and black women, as a group, are much more immoral, and much more dangerous than white women as well, because they too are vastly over-represented in the system.⁸

The way we are told that our society should deal with the problems of these individuals, most of the time, is to intentionally inflict pain upon them by locking them in a cage for months, years, or decades, and sometimes by killing them. This is one of the stories about race that our criminal justice system tells us.

percentage of African Americans who are incarcerated compared with their actual representative numbers in the overall population).

⁴ Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 149 (1996) (citing Pierre Thomas, *1 in 3 Young Black Men in Justice System; Criminal Sentencing Policies Cited in Study*, WASH. POST, Oct. 5, 1995, at A1, A4).

⁵ See Eric Lotke, Nat'l Center on Institutions & Alternatives, *Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five Years Later* 1 (1997), available at <http://www.ncianet.org/ncia/hobb.html> (finding that one in two African-American men residing in Washington, D.C. is in jail or prison, or on probation or parole).

⁶ Jody David Armour, *Bring the Noise*, 40 B.C. L. REV. 733, 734 (1999).

⁷ See Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 912 (1997).

⁸ See *id.* at 912 (noting that "over half of the women in state prisons are African-Americans"); Paula C. Johnson, *At The Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 5 (1995) (stating that "African American women have been disproportionately incarcerated relative to their numbers in the overall population").

What can we do? The title of this panel suggests that maybe we should promote racial equality in the criminal justice system. So now I am going to make a sales pitch. Many of my ideas are informed by critical race theory⁹ and two tenets of this theory are important to my proposition.

One tenet is that people of color only make progress when their progress is in the interest of white people - that is called interest convergence.¹⁰ The second is that the law is indeterminate. That means that there is no single correct legal answer in a case.

A judge could write an opinion saying race-based stops violate the Fourteenth Amendment or he could say that they do not violate the Fourteenth Amendment, and both propositions would be perfectly logical under the law. Both would be right. Judges do not find law in a scientific way. Rather, they choose the law.¹¹ It is because the law is indeterminate that judges can decide cases based on the outcome they want to obtain.

These tenets are important to my promotion of racial equality because the first one suggests that if I can make my audience understand, especially the white majority understand, that racial equality in criminal justice is in the interest of white people, then I win.

The second tenet suggests that I should not be troubled by all the bad law that is out there now. For example, the majority of jurisdictions hold that race-based stops are constitutional, and that they do not violate the Fourth Amendment, but may possibly

⁹ See Francisco Valdes, *Outside Scholars, Legal Theory & Outcrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831, 831 n.1 (2000) (stating that "[t]hough it is not susceptible of any one definition, Critical Race Theory has been described as the genre of critical legal scholarship that 'focuses on the relationship between law and racial subordination in American society'"). See generally HANKS ET AL., ELEMENTS OF LAW 647-86 (1994).

¹⁰ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest - Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (stating that "this principle of 'interest convergence' provides [that]: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

¹¹ See Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 DEPAUL L. REV. 305, 305 (1999).

violate the Equal Protection Clause of the Fourteenth Amendment.¹² Critical race theory has good news for me. Since the law is indeterminate, if I can come up with a good pitch, I can get a judge to look at the Equal Protection clause and suddenly decide that race-based stops do violate the Constitution.

I do not want to sound too cute or too patronizing when I talk about promoting racial equality because I do believe in the concept. This is one of the reasons why I do legal commentary on television and write op-ed pieces. We have good arguments and we need to get these arguments out there because people are capable of being persuaded. Sometimes it takes a long time. It took about three hundred years for the white majority to be convinced that slavery was wrong. It took almost a hundred years for the white majority to be convinced that segregation was wrong. People are capable of being persuaded. I do believe in this idea of appealing to the majority and using that to try and change the law.

Here is a quick promotion for racial equality in criminal law. Many people are not that concerned about racial disparities in criminal justice, because, after all, we are talking about people who have broken the law. Whether they are black, white, Asian, or Hispanic, if they committed the crime, they should do the time. Here, then, is a sales pitch to get them to reconsider that analysis. It is kind of a racial role reversal. Sometimes those are helpful. Talking to the media about the Amadou Diallo case, I found it helpful to say: "Imagine if four black police officers shot a white man who was standing in the doorway of Trump Towers waving his wallet." Would that be a crime? I think it helps when you do those racial role reversals. It helps people see things differently.

This promotion is another racial role reversal and appropriate since the Federalist Society is meeting here at Harvard Law School at the same time as we are. My role reversal comes courtesy of one of its members, Kenneth Starr, the former independent counsel. My

¹² *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the Constitution "prohibits selective enforcement of the law based on considerations such as race" but that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment").

selling point is that Starr is to Clinton as ordinary prosecutors are to African-Americans.

I am going to make an argument against selective prosecution of blacks, and against punishment of many blacks who are actually guilty of crimes. This is an argument that I have made time and time again in the context of race. I have made the argument that black jurors should acquit many black defendants when they are charged with victimless crimes as a means of protesting discrimination in the criminal justice system.¹³

Mike Wallace did a report on 60 Minutes about my scholarship on that issue and he introduced the report with the words: "What you're about to see is going to infuriate a lot of you."¹⁴ That is the reception you get when you make these arguments solely in the context of race. Let us do this role reversal, and see if President Clinton's legal saga can help me promote racial equality.

Here I am only going to describe these ideas. I delivered another speech in which I tried to explain this theory more fully. The *Boston College Law Review* was kind enough to publish that speech.¹⁵ Please allow me to just throw out the ideas or to outline them to you, rather than explain them in detail.

I am thinking about this analogy in the context of three characteristics of criminal justice for African Americans: selective prosecution; abuse of prosecutorial discretion; and zealous punishment.

First, thinking about selective prosecution, what is the problem? Why are race-based stops a big deal? If people are stopped in part because they are black, but they turn out to have drugs on them, is that an issue that should be of concern to the racial critics?

¹³ See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) (stating that "[w]hen a jury disregards evidence presented at trial and acquits an otherwise guilty defendant, because the jury objects to the law that the defendant violated or to the application of the law to that defendant, it has practiced jury nullification").

¹⁴ 60 Minutes: *Tipping the Scales; Jury Nullification Should Run Rampant, According to Harvard University Professor Paul Butler* (CBS television broadcast, Mar. 10, 1996).

¹⁵ Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705 (1999).

It turns out there is an important correlation between looking for things and finding things. If the police decided that studying law was suspicious behavior and, on that basis stopped and searched law students, the number of law students who would get busted for drugs would rise appreciably.¹⁶ When we have law that essentially authorizes the police to systematically focus on African-Americans, we have an important explanation for the disproportionate incarceration of African-Americans for drug crimes.¹⁷ According to the Justice Department, blacks do not use drugs any more than whites.¹⁸ The Justice Department says that many African-Americans, about thirteen percent, are drug users, roughly proportionate to our percentage of their population.¹⁹ Yet, almost seventy-five percent of the people locked up for drug use are black.²⁰ It is selective punishment, and I submit that it is not fair, even if the selectively punished are guilty.

As support for this proposition, I offer Justice Antonin Scalia. He wrote an opinion about the Independent Counsel Act.²¹ Scalia, writing in dissent in a case called *Morrison v. Olson*,²² thought

¹⁶ *Id.* at 709.

¹⁷ *Id.* at 707-08 (citing MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 1 (1995)).

¹⁸ See U.S. DEP'T OF JUSTICE, *SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS* 1993, 592, 606 (Bureau of Justice Statistics 1994).

¹⁹ See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION: PREVALENCE OF SUBSTANCE ABUSE AMONG RACIAL AND ETHNIC SUBGROUPS IN THE UNITED STATES, 1991-1993*, at http://www.health.org/oas/ETHN_ALLb-18.htm (last visited Sept. 1, 2000); ERNEST DRUCKER, *DRUG PROHIBITION AND PUBLIC HEALTH: 25 YEARS OF EVIDENCE*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *PUBLIC HEALTH REPORTS*, 1999, No. 1, Vol. 114, at 14 (1999) (citing U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS (US): *POPULATION ESTIMATES FROM STATISTICAL ABSTRACT OF THE US: 1994* (Washington: The Bureau 1995)).

²⁰ See DRUCKER, *supra* note 19.

²¹ 28 U.S.C. § 594 (Supp. V 1982) (expired June 30, 1999, see 28 U.S.C. § 599 (2000)).

²² 487 U.S. 654 (1988) (holding that the Independent Counsel Act did not violate either the Appointments Clause, Article III or the separation of powers doctrine).

the Act violated the separation of powers doctrine.²³ He also had fairness concerns about the concept of a special prosecutor. I am going to read you a short excerpt from his opinion where Justice Scalia quotes with approval a former Attorney General. Remember, if you can, that Scalia is thinking about allegedly corrupt public officials and not talking about black people. He wrote:

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group.²⁴

That is why selective prosecution is wrong. Continuing my sales pitch, let's focus on abuse of prosecutorial discretion. Many of the things that Ken Starr did, such as putting people's relatives in before the Grand Jury, bullying minor witnesses into cooperating with government, subpoenaing everything that a witness ever touched, using the Grand Jury for discovery – those are things that

²³ *Id.* at 723 (Scalia, J., dissenting) (stating that because the Independent Counsel is subordinate to the president “her appointment other than by the advice and counsel of the Senate is unconstitutional”).

²⁴ *Id.* at 728 (Scalia, J., dissenting) (citing R. Jackson, *The Federal Prosecutor, Address Delivered at Second Annual Conference of United States Attorneys*, Apr. 1, 1940).

prosecutors do every day, in every criminal court, all over the country.²⁵ Yet many Americans did not like it when Starr used that power to investigate the President.

Now, as a result of the Starr investigation, some interesting limitations have been proposed on prosecutorial discretion.²⁶ For example, Jeffrey Rosen wrote an article in the *New Yorker* about "low" crimes and misdemeanors.²⁷ Professor Rosen suggested that, for investigating and proving high crimes and misdemeanors, anything goes. Prosecutors should use all of their considerable legal powers. For low crimes and misdemeanors, however, including the President's conduct, certain kinds of tactics are unacceptable even if they are legal.²⁸ Rosen argued for some kind of limiting principle. Racial critics have also sought restraints on prosecutorial power, and their arguments seem to have fallen on deaf ears. Perhaps the public's distaste for Starr's investigation gives us some reason for optimism.

The last point of my promotion of racial equality in criminal justice has to do with punishment. Now, the interesting thing about the public concern about Starr's investigation of Clinton is that

²⁵ See Peter Baker, *Starr Accused of Employing Intimidation*, WASH. POST, Feb. 8, 1998, at A20; William Glaberson, *Testing of a President: The Prosecutor; Tactics Called Abusive by Critics and the Ensnared*, N.Y. TIMES, Feb. 8, 1998, at A31.

²⁶ See, e.g., AMERICAN ENTERPRISE INSTITUTE AND THE BROOKINGS INSTITUTION, PROJECT ON THE INDEPENDENT COUNSEL STATUTE: REPORT AND RECOMMENDATIONS (May 1999), at <http://www.brookings.edu/gs/ic/report/-icreport.pdf> (recommending that the Attorney General's responsibility for appointing special counsel to resolve conflicts of interest should be fully restored; that Congress should enact a statute that requires the Attorney General to promulgate regulations for the conduct of special counsel investigations; that parameters should be established for a special counsel's investigation; that a balance should be struck between the special counsel's independence from political influences and its compliance with the Department of Justice's policies and procedures; and that termination and reporting requirements for the special counsel should be adopted).

²⁷ Jeffrey Rosen, *Low Crimes and Misdemeanors*, NEW YORKER, Nov. 16, 1998, at 41.

²⁸ *Id.* at 47.

many people conceded that President Clinton was guilty.²⁹ Yet the considered judgment of the American people seemed to be that sometimes allowing guilty people to go unpunished is just fine. Most Americans believed that Clinton should not be convicted in the impeachment trial and that he should not be prosecuted after he left office.

It is interesting that in response to Clinton's criminal conduct, a large portion of Americans embraced the radical possibility of doing nothing at all in terms of punishment. The costs of punishment outweighed its benefits. It is a very utilitarian way of thinking about punishment though. It is also, I think, a very grownup way of thinking about punishment and it is one that, I hope, can be applied to the black criminals as well Presidential criminals.

That is the promotion. Now let's watch the salesman die. I can start with one significant divergence between the target of Starr's investigation, and the black targets of the investigation of ordinary prosecutors. President Clinton is a white man. In fact, he is the biggest, most powerful white man in the world. I am comparing him to people who the criminal law usually constructs as "niggers." It may be that the public objects to the President of the United States being treated like a criminal, but the public does not object to ordinary black people being treated that way.

Critical race theory teaches us that racism is permanent.³⁰ No matter what the law does, racism will always exist, so rights do not matter much. An interesting parallel to this tenet of critical race theory again comes from Justice Scalia. In the *McCleskey*³¹ case, the issue was whether the death penalty was being administered in violation of the Equal Protection Clause of the Fourteenth Amendment. An empirical study suggested that black people were being killed by the State of Georgia when some of the similarly situated

²⁹ See Richard Benedetto, *Most in Poll Stand by Their President*, USA TODAY, Jan. 12, 1999, at 5A; *The President and the People*, CHIC. TRIBUNE, Jan. 30, 1998, at 16.

³⁰ See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 87 (1994).

³¹ *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (holding that Georgia's death sentencing process was constitutional and that McCleskey had not been discriminated against on the basis of the victim's race).

whites were not.³² Justice Scalia wrote a bench memo recognizing that racism exists, including in the administration of criminal justice. But, he said, this does not mean that we should eliminate the death penalty because racism is ineradicable. I thought of Scalia's analysis when I listened to this morning's panel on criminal law. Professor Stuntz was on that panel and he said that the prison system is "pathological." He does not put a lot of faith in litigation to expand the rights of accused persons to make it better.

He uses the *Miranda* case as an example.³³ That is a landmark decision. It expanded the rights of the suspect but Professor Stuntz said that it did not make them any better off.³⁴ The police get around it and they also get around the Constitution. Professor Stuntz was not ultimately pessimistic, but he said the system is very, very slow to change. Again, if you think about this in the context of race, there is an interesting comparison with the *Brown v. Board of Education* case.³⁵ That is the crowning achievement of civil rights litigation and it is the crowning achievement of public interest law. But did this decision really made black children better off. Who gets a better education, little Miss Brown in her segregated school in Kansas or some African American girl now in

³² *Id.* at 287 (explaining that prosecutors "sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims"); see DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 403 (1990); Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

³³ *Miranda v. Arizona*, 384 U.S. 436 (1966). Professor Stuntz lauds the benchmark *Miranda* decision, which rendered inadmissible statements obtained from defendants during interrogation without full warning of their constitutional rights, but maintains that *Miranda* is not as effective in practice because courts have construed "interrogation" narrowly to allow defendants' statements to come in even where defendants have been isolated in police presence and could be said to have been interrogated. Moreover, many criminal defendants are plagued by ineffective assistance of counsel and fail to raise *Miranda* violation claims for example. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997).

³⁴ Stuntz, *supra* note 33, at 36.

³⁵ 347 U.S. 483 (1954).

an urban school district in the year 2000? If *Brown* is the crowning achievement of civil rights litigation, then there is room for pessimism.

Robert Wilkins, who is in the room, also spoke this morning. He is actually the subject of one of the most famous cases involving race-based suspicion.³⁶ His case settled. He sued the Maryland State Police for stopping him simply because he was black. He worked in the criminal justice system for a number of years. Do you know what he told us at the end of his presentation? He has lost faith in the law. Now, in terms of achieving progress for black people, what he spends his time on now is building a museum on the National Mall, an African American Museum to remind people of the humanity of black people.

What is the meaning of these stories? Ultimately, African Americans can win all the rights we want but they are still going to be black. Or maybe not. One intriguing possibility lies in the fact that in a few decades, people of color will make up the majority of Americans. One interesting possibility is the idea of deconstructing race or at least deconstructing whiteness. If we all intermarry, we might be able to get rid of it. African-Americans, Hispanics, Asian-Americans and white people will not exist anymore in the United States. It is the tactic that says if you cannot beat them, join them.

We have already seen some subordinated groups, Jews, Asian-Americans, and to a lesser extent, Hispanic-Americans seeming to practice this theory. Inequality certainly would continue to exist in a world without whiteness, but at least allocated on the basis of race. It is not a theory that I am particularly fond of. It is a pessimistic view of what it will take to eliminate the problem of race, but it is an idea.

³⁶ See David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY, 544, 563-66 (1997) (describing how Robert Wilkins, a prominent African-American attorney in Washington, D.C., was driving home with his family from a funeral in Chicago when his car was pulled over by the Maryland State Police, and how Wilkins and his family were forced to get out of the car and wait outside for over an hour while the police searched the vehicle for drugs based on racial profiling of drug traffickers).

Professor Ramirez

Good afternoon. I want to continue to discuss Professor Butler's ideas, particularly the idea about the law as an instrumentality. I want to begin by talking a little about racial profiling, which Professor Butler touched upon, but I want to talk about it a little differently though. Many of you have heard the very eloquent story that Robert Wilkins, who is here in the room, told us this morning about his experience of being stopped in Maryland and how that felt and how unfair it was. When I do police training, I begin by telling the police officers about how pervasive the practice of racial profiling is perceived to be in the community of color, and how corrosive it is to the fabric of community policing. I also talk about how, in the long run, the goal is to get the community to work with the police, as opposed to against them.

I usually begin by telling police trainees that almost every parent of every color, when their child reaches the age when they are beginning to drive, gives them a lecture. The lecture goes something like this: "You are going to be driving and you are probably going to be stopped by the police at some point and the likelihood of your being stopped by the police is higher for you than your white friends. I want to tell you how to behave when the police approach you. Keep your hands on the wheel so that they will not think that you have a gun on you. Do not slouch to the left or to the right. Be sure to address the police officer respectfully. Turn the radio down. Keep the lights on in the car. Try to get a badge number and try to make a phone call as soon as you can after the incident."

At this point, most of the teenagers begin to ask us, the adults in the community, questions. They begin by asking us: "Why are you telling me this? I do not carry drugs or guns. Why are you telling me to protect myself from the police? This is not going to happen to me because I am not one of those kinds of kids." The parents have to reply: "Yes it is true that you are not one of those kids and it is not fair, but, you will be stopped and you will be stopped disproportionately. The reason you will be stopped is because you are Asian, because you are Latino, or because you are black." At that point, the children reply: "But I thought you said that did not matter, that I could do anything or be anything."

That is when the discussion gets tough because you have to tell the children: "In this case, your conduct is irrelevant. You are more likely to get stopped because of the color of your skin. I need to protect you and you need to be prepared when this encounter occurs, because your primary thought has to be that you want to stay alive after this encounter. You want to survive." Many parents even feel that it would be parental negligence not to give this lecture to their children.

I begin this way because I want to begin by talking about my own journey on this issue, which is a very different journey from the path of litigating these issues through the pattern and practice litigation that Robert Wilkins described, or through the changing theory the way Paul Butler described it. I began this journey as a non-litigator, as a person who watched the Diallo trial, and has watched other trials, and I said to myself: "I do not think the court system is the system that will redress this. I do not think that a judicial regulatory model is going to help. I do not think litigation is going to help." The suit that Robert Wilkins described was brought by the American Civil Liberties Union.³⁷ John Lamberth, a statistician, had to analyze the data collected by the Maryland State Police. There was long-term discovery; it was a long, drawn out and expensive process. John Lamberth told me: "Debbie, there are not enough statisticians, there is not enough time. We cannot possibly win this battle by suing every police department in the country. We have to think of a different way."

The different way that we began to think about was to actually solve the problem, investigate, collect data about the problem, and then work with the police to resolve it. In terms of the investigation, the first question we asked of the police was: "Why are you doing this?" "Why are you using race as a factor for stopping people?" One answer we frequently got was: "The Supreme Court said that we can do it." They are talking about *United States v.*

³⁷ See Deborah Ramirez et al., A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED, 6 n.9 (Nov. 2000), at <http://www.ncjrs.org/pdffiles1/bja/184768.pdf> [hereinafter RESOURCE GUIDE ON RACIAL PROFILING]; see also *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560 (D. Md. 1999).

Whren.³⁸ That is one of the responses you get. The other responses were more about policing. They described the ambit of discretion that the police could employ. Police officers told me that any police officer following a person on the road could figure within a minute out a legitimate reason for stopping that person, either because of under-inflated tires, a cracked window shield, an equipment violation, a soiled license tag, or because that person is following another vehicle too closely, or failed to signal, etc. There is an enormous amount of police discretion in determining whom to stop and whom to search. How are they going to figure out whom to stop?

Part of what they tell me is they are using these traffic stops as pretext stops, which is what you read about in *Whren*.³⁹ These are traffic stops made as part of an interdiction strategy to determine who is carrying drugs and weapons. There we get to the racial illusion that Paul Butler talked about. Although we in the community of color do not believe, given our numbers, that the drug problem in America can be owned by us and us alone, the police think differently about this. Even the youth statistics that Professor Butler used do not help them because the police respond by saying: "Well, that is who the users and sellers are - people of color." The officers indicate that they are trying to find drugs and guns and that is why they are disproportionately stopping people of color.

As a way of measuring this assertion, we began to collect data on that very issue - some of which I have with me. Next, a team of researchers at Northeastern and I began to make presentations to the police during training to indicate to them that their rationale for stopping people of color was an illusion, because, in fact, when you look at the racial demographics of who gets stopped and you look at the rate at which the police find contraband, drugs, or guns, those hit rates are the same across all races.⁴⁰

³⁸ 517 U.S. 806, 813 (1996) (deeming the subjective and actual motivations of police officers irrelevant in the probable cause context).

³⁹ *Id.* at 809.

⁴⁰ See DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS, AN AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT (June 1999), at <http://www.aclu.org/profiling/report/index.html>.

What does this mean? The customs services did their own investigation. They monitored and measured interactions with fifty-one thousand people traveling through airports. Their stops and searching were *not* based upon probable cause or reasonable suspicion because these were stops of people in transit. According to this study, the rate at which they found contraband for whites was 6.7 percent, for blacks 6.3 percent, and for Latinos 2.8 percent.⁴¹ What do those statistics tell you? They tell you first that we are not looking at a difference in behavior and that race does not matter here. It is, as Paul Butler alluded to, a game of “search and you will find.” That is, you find that there is almost the same probability of finding contraband for blacks as for whites. In fact, based upon all statistical and empirical studies to date, blacks and Latinos are no more likely than whites to be in possession of contraband.

You also find similar data from the Maryland study, which is the Wilkins case, where you have about the same hit rate of 28.8 percent among a thousand one hundred forty-eight cases.⁴² It is also true in a most recent New Jersey Attorney General study with about the same hit rate.⁴³ In the most recent study, which is the New York Attorney General Stop and Search Study, again you see hit rates that are very similar.⁴⁴

⁴¹ RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 10; *see* PERSONAL SEARCH REVIEW COMMISSION, REPORT ON PERSONAL SEARCHES BY THE UNITED STATES CUSTOMS SERVICE, at http://www.customs.gov/personal_search/pdfs/full.pdf (last visited Feb. 11, 2001).

⁴² RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 10 (stating that “[i]n Lamberth’s study on I-95 in Maryland, he found that 28.4 percent of Black drivers and passengers who were searched were found with contraband and 28.8 percent of White drivers and passengers who were searched were found with contraband”) (footnote omitted); *see* Report of John Lamberth, Ph.D. from ACLU Freedom Network, at <http://www.aclu.org/court/lamberth.html> (last visited Mar. 8, 2001).

⁴³ *See* INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING, at http://www.state.nj.us/lps/intm_419.pdf (last visited Feb. 2, 2001).

⁴⁴ *See* THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL, 95 (1995), at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html (providing that “blacks were over six times

What this 2.8 percent means for Latinos is that out of every hundred people the police are stopping, they get maybe three people, but ninety-seven percent are completely innocent and are being stopped for no reason at all. This indicates that profiling amounts to ineffective law enforcement. All of this clamor, and community unrest, for what? What is on the other side in terms of what the police get for engaging in this tactic? How effective is it? It is just not very effective. Indeed, if you just look at the white hit rates here, it is surprising to me that they engage in a practice that takes a lot of time, energy and money and that leads to such small results. One question that all of these studies raise is: How effective are these interdiction efforts? Would law enforcement be better off deploying scarce resources in more productive ways?

The other study, which is not here, is the London study in England.⁴⁵ They have been collecting data on the race ethnicity of all their pedestrians and traffic stops and searches, and, again, it shows over three years, that the hit rate is either the same or, for Asians, lower. I think that what we are seeing here is the beginning of a discussion with police about cost and benefits of engaging in this kind of behavior.

When I say it is a “search and you will find” attitude,⁴⁶ this is what I mean. Because police officers engage in aggressive and disproportionate searches of people of color, they are going to arrest more people of color. That is, if they search one hundred

more likely to be ‘stopped’ than whites in New York City, while Hispanics were over four times more likely to be ‘stopped’ than whites in New York City”); *see also* RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 10 (stating that “in the New York study of stop and frisk practices . . . the attorney general found that 12.6 percent of Whites stopped were arrested, compared to only 10.5 percent of Blacks and 11.3 percent of Latinos”).

⁴⁵ RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 8 (discussing the study by the British government’s Home Office “examin[ing] the racial and ethnic demographics of the stop-and-search patterns of 43 police forces in England and Wales”); *see also* MARIAN FITZGERALD & RAE SIBBITT, ETHNIC MONITORING IN POLICE FORCES: A BEGINNING, at <http://www.homeoffice.gov.uk/rds/pdfs/hors/hors173.pdf> (last visited Feb. 24, 2001).

⁴⁶ *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a police officer may stop and frisk a person to search for weapons in the absence of probable cause to make an arrest).

whites, they will find usually about ten percent of the time contraband and the same with blacks. The difference is that they are stopping the blacks, Latinos and Asians approximately eight to ten times as often as they are stopping whites.⁴⁷ This, in turn, leads to a disproportionate incarceration rate for non-violent narcotics crime. (Violent crimes must be distinguished because there is a whole different dynamic going on there.)

Now, I think this disproportionate rate is the problem. As lawyers, I think we usually think: "Problem? We have got to go to court." If the problem is with the doctrine, then we have to change the doctrine. I really do not have much faith in the courts as an institution monitoring police discretion. This is an old issue. How do you police the police? We have the judicial regulation model. Even when the court was most liberal, in the *Miranda*⁴⁸ and *Terry*⁴⁹ years, it could not come up with a workable set of rules to change behavior.

Miranda is a good example of a rule, but a rule that is easily circumvented. Police still obtain involuntary confessions. They just

⁴⁷ See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 562 n.59 (1997) (stating that an ACLU independent rolling survey found that minority motorists made up 21.8% of violators but 80.3% of those stopped and searched on Maryland portions of I-95); Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 261 (2000) (referring to a Volusia County, Florida study showing that seventy percent of eleven hundred drivers stopped for traffic violations were either African American or Hispanic); David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine New Jersey Study Finds*, N.Y. TIMES, Nov. 28, 2000, at A1 (reporting that eight out of ten searches by New Jersey troopers were conducted on black and hispanic drivers). See generally *United States v. Leviner*, 31 F. Supp. 2d 23, 33-34 (D. Mass 1998) (indicating that numerous studies report that African-American motorists are stopped and prosecuted more than any other citizens); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336 (1998) (stating that police officers target and stop black and Hispanic motorists in the hopes of finding illegal narcotics or other criminal evidence).

⁴⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that individuals in police custody must be advised of their constitutional rights to remain silent and to consult with an attorney prior to being interrogated).

⁴⁹ *Terry*, 392 U.S. at 1.

read those rights very fast and then engage in various types of pressures and technique. Here are the reasons why I have abandoned the judicial regulation model and why I think we ought to abandon it in terms of monitoring police discretion. It takes a lot of time. That was Lamberth's point. These studies take a lot of time. They are very expensive and the tools of the court are limited. They use the exclusionary rule⁵⁰ and so they throw out the case, they say the evidence was collected unlawfully. The public does not like that. It does not lead to the efficient disposition of cases and it can wreak havoc with the system.

The rules can be circumvented by the police, and, right now, at least, courts lack the will to do anything about these issues. However, as I said before, even during a very liberal era, courts did not have the will or the tools to engage in the kind of transformation that needs to take place. Thus, I do not think courts are the appropriate institution to police the police. That is because I do not think that, even in the situation of *Whren*, you can come up with a workable set of rules. Why not? Because, if the police come up to you and say to the court: "I was scared," the judicial system is going to allow them the discretion to stop and search a suspect for weapons. As long as the test rests on police discretion, then we cannot create a judicial rule because when the police officers express their fear, what evidence do we have on the other side? For that reason, I think that trying to go down the judicial regulation route is not the way to go.

I think that, in response to the problem, some communities have begun to do voluntary data collection. When I talk about voluntary data collection, what I mean is that they have begun to voluntarily collect data on the race and the ethnicity of all of the people the police are stopping and searching. I wanted to show you a sample of states and local jurisdictions that are collecting data.

Some of these data collections are pursuant to a consent decree or settlement. Even Jeb Bush in Florida has ordered the Florida

⁵⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961) (providing that evidence secured through police activity that is in violation of the Constitution is inadmissible at trial).

Highway Patrol to begin collecting data.⁵¹ Similarly, data are collected by the California Highway Patrol, the North Carolina Highway Patrol, and the Connecticut Highway Patrol.⁵² Seventy-five different law enforcement agencies in California are also collecting data on this.⁵³ In addition, many cities and towns and hundreds of other jurisdictions, are collecting data too. Every day more jurisdictions call and ask me for guidance about data collection.

This data collection is being done in a myriad of settings. I think it represents a different paradigm for regulating police discretion. It is similar to the role that the federal government has with respect to the Securities and Exchange Commission. As you know, if you are a company and want your stock to be traded publicly, you have to disclose certain data to the government. I think that is the model we need to use.

I think the role of the federal government here ought to be to tell the police departments that, if they want federal funding, federal training, federal forfeiture money, and all the guns and toys that the federal government can provide, including money for more police cars, computers, and other technical assistance grants, then the federal government, in turn, will be requesting a report from each law enforcement office. The federal government should require law enforcement to collect certain kinds of data and disseminate the data publicly. The required data collection should include: statistics about excessive use of force; what kinds of force are being used against citizens; the racial demographics of the victims of police force; how often it is done and whether people

⁵¹ See Vanessa Bauza, *FHP to Track Drivers' Race in Road Stops*, SUN-SENTINEL (Ft. Lauderdale), Sept. 2, 1999, at 1B (noting that Jeb Bush ordered every Florida Highway Patrol deputy to begin collecting data on the race of each driver they stop or arrest); see also RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 2 (noting that "hundreds of jurisdictions have begun to initiate data collection efforts. . . . [including] Florida[s] Governor Jeb Bush [who] directed the Florida Highway Patrol to begin collecting traffic-stop data in 2000"); *Florida Highway Patrol: Traffic Stop Data Collection*, at <http://www.fhp.state.fl.us/html/census> (last visited Feb. 2, 2001) (providing collected data arranged by race and ethnicity to the public via the Internet).

⁵² See RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 2.

⁵³ See RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 2.

are being sanctioned for it; specifics on pedestrian and traffic stops and searches and the demographics of these stops and searches; what the hit rates are; and how effective police are in using their resources. Moreover, the federal government should want to know what the community thinks about what states and local police are doing. The government should require a community justice survey every year in which police ask the community to report how they are doing; whether members of the community have had an encounter with the police during the last year; whether that encounter was good or bad; what its nature and outcome were; whether they were treated respectfully; and whether force was used. The federal government should request that such information be publicly disseminated so that the discussions can move from accusation and counter-accusation to a rational discussion about police deployment of resources.

This is a democratic experimentalism model. Just as in other countries when you talk about money, you would not say to your government: "We want you to spend your money this way on education." Then they would reply: "Well, we do not know if we are doing that because we actually do not measure that and we cannot actually determine how much we spent on education. We know that is what you want, but we just do not measure it. We do not keep those statistics, and if we do, we only keep them for ourselves." We would not accept that.

If police are the face of democracy on the street – and they are – then we as citizens can demand from them, just as we do from other government officials, that they be accountable to us, and that there be some transparency. We can ask the federal government to begin mandating that kind of accountability and conditioning federal grants on it.

What would be the reason for doing this? First, in the context of racial profiling, when jurisdictions begin the data collection process, they first send a clear message from top-down and bottom-up. The message is that racial profiling is ineffective and unfair law enforcement, and that officers ought not to do it notwithstanding what the Supreme Court says. It is simply ineffective policing. It is creating problems with people of color - with the community that police want to work with. Police are more effective by working collaboratively with people in that community, problem-

solving with them, getting information from them about who is committing crime, than by being viewed as an occupying force. The community of color will not work with police, will not serve on juries, and will not give information to the police if it perceives the system to be biased and unfair. Thus, the system has to change.

Second, we have seen that when you begin to monitor police practices, you change behavior. Sometimes you see fewer stops. In London what they saw was that the number of stops went down but their quality and their hit rate went way up.⁵⁴ Why? Because the police stopped profiling and trolling, and they started using intelligence based policing. They started looking to the community in a more strategic manner, as opposed to engaging in ad hoc stop and search policies.

Third, another advantage of this kind of monitoring is that it begins the conversation between the community and the police. It does so at a local level, and instead of a rigid rule, like *Miranda*, where every time you are arrested, these words are given to you, it allows localities to say: "Well, in this part of town, maybe for this thirty days where there's a gang war, we are going to tolerate very aggressive stop and search. But over here, thirty days later, we may not." The community and the police can then discuss how and when the stop and search policies are going to be used.

Fourth, it gives police the beginning of a management technique. This is my biggest selling point to the police chiefs when I go to their departments. I say to them: "Look at how effective you have been at managing crime. How? By stopping to just respond to 911 calls and emergency calls, and starting to measure where the crimes were and who was committing them. You started to make sense out of it. You started to map it. You started to hot spot it. Then you could intervene before a crime even occurred to stop the crime." That is what you have to do here if you want to be effective. You cannot manage what you do not measure. If you do not know what your hit rate is or what the racial demographics of your searches are, how can you begin to manage the way in which the police are conducting themselves in the community. I think of

⁵⁴ See RESOURCE GUIDE ON RACIAL PROFILING, *supra* note 37, at 37-42.

this as just the natural growth of what police officers are doing in the area of crime control.

Finally, there are two points that I think are good about this model. It transforms the culture of policing. Every time the police stop someone, they have to fill out a form or they do it on their little personal computer inside, or however they do it, and they have to write down the reason for the stop. If they do *not* really have a good reason for the stop, then it makes them think: "Maybe I ought not to do this stop." You cannot go about it by just creating rules and thinking that the police will change that way. I think you have to change the way they police.

My final point is that monitoring does not involve the court or politicians. Professor Rakoff says: "Well, what if the party changes?" I say: "It does not matter because we have abandoned the legislators too." Do not think that the political system on crime is rational. Politicians talk about getting tough and lock them up. That is not helpful. The police know they cannot just get tough and locking people up because they are there every day and they know they cannot win that war without the community by their side. We cannot incarcerate our way out of the drug problem in this country.

We work at convincing the police that this is in their own interests. While I know that some people say: "Well, the Justice Department litigation in Maryland did not work very well and Maryland police still have not been transformed." But that was, in part, because that was *not* voluntary data collection; it was imposed on them. I think that is a whole different model. Still, you do not know how much it has worked. You can say the same thing about New Jersey State Troopers. Have they really changed because of a court decree?

When I go to police departments, I get a better reception because of that litigation. Why? Because I tell the whole story of New Jersey. I say: "It could have all been resolved. It could have been prevented if they had listened to the community, to the black ministers who told them this was going on." If they had listened to Dr. John Lamberth in the *Soto* suit instead of appealing it.⁵⁵ If

⁵⁵ *New Jersey v. Soto*, 734 A.2d 350, 352 (N.J. Super. Ct. 1996) (holding that the defendants have established a *prima facie* case of selective enforcement

they had looked at the data and done something rational with them. I say: "This is a train and it is moving. You can be on it or under it."

You can be proactive or you can be in the category of New Jersey and be the poster child for racial profiling. If you choose to do this voluntarily, we will help you, we will do it with the community and we will try to ensure that there are successful outcomes. We know we do not have all the answers, but in the end you have only two choices with data collection. Either you are going to uncover a problem that you did not know about and it is better that you find out and you deal with it than that the feds come in and deal with it for you. Alternatively, you find out you do not have a problem and you communicate that to the public. It does not always work but it is a model, and a different model from a traditional litigation model. Thank you.

Professor Edley

I am going to try to cover three topics quickly: The first is a couple of things about context; the second is about new agendas and new tools; and the third is some implications.

First, context, where I want to make three points. Right before I started teaching, I worked for the Carter Administration in the White House and I was in charge of welfare reform, social security and a bunch of topics like that. I was about twelve years old at the time. What was striking about that experience is that those of us who were within the Administration trying to push welfare reform at that point were essentially trying to persuade people to spend another twelve to fifteen billion dollars a year on poor people. That is what welfare reform meant to us back then. We were talking about benefits for families; the benefit reduction rate; the Medicaid notch; the food stamp asset limit; and other similar issues. In other words, we were talking about the policy-plumbing details.

The opponents of welfare reform had begun a concerted effort to talk about the deserving and undeserving poor, about out-of-

of the traffic laws of New Jersey by using statistics that the State has failed to rebut, thus requiring suppression of all contraband and evidence seized).

wedlock births, and about the work ethic. In other words, they were talking about values. This went on for a couple of years and, as it turned out, the American people were not that interested in policy plumbing. They were paying attention to the value discourse. One morning, a couple of years ago, liberals woke up and the welfare entitlement was gone because the conservatives had won the value debate and, immediately on the heels of that, had won the political debate.

A couple of years ago, when I was working with President Clinton on affirmative action issues, I was struck that he ended up with the slogan: "mend it, don't end it." It was surprising because he had run in 1992 talking about ending welfare "as we know it." The question is why "end welfare as we know it," but for affirmative action, only, "mend it, don't end it," when it could easily have been exactly the opposite?

I think part of the answer, at least, is that on issues of racial and ethnic justice, we have not yet lost the value battle. I am quite worried because for the past thirty-five years a great deal of the attention of civil rights advocates has been on what might be termed the policy-plumbing details. It is not too late, but it does require a concerted effort, particularly by lawyers, to find ways to engage Americans on the terrain of values.

The second point I want to make is that, apart from that general strategic point about where we must go in the years ahead, there is a demographic reality that is much talked about. I just want to make sure that everybody has that in context. You have probably heard that by the year 2050, there will be no majority race in the United States.⁵⁶ You may or may not have heard that white students are a majority in only seven of the fifty-six largest school districts.

In communities across the country, the growing numbers of Hispanics and Asian Pacific Americans have transformed the issues

⁵⁶ Jill Lawrence, *Political Battlegrounds of the Future*, USA TODAY, Aug. 8, 1997, at A6 (noting that "[t]he United States won't have any racial or ethnic majority at some point between 2050 and 2100"); Marcus Stern, *Commencement Speakers; Clinton Says Ethnic Change Tests U.S.*, SAN DIEGO UNION-TRIB., June 14, 1998 at A-1 (noting that "[t]he trend, almost entirely immigration driven . . . will forge an America with no majority race, according to the Census Bureau").

of racial and ethnic difference so that it certainly is no longer black/white. If you go to Los Angeles and talk about the race issue as though it is black and white, they will look at you as if you were an idiot from another planet because that is just not what the race issue is about there. African-Americans are the third minority after Latinos and Asians in Los Angeles.

We are only beginning to understand the implications of these demographic shifts. In part, it means in a narrow way that the agenda items for pursuing racial and ethnic justice are going to have to shift somewhat to reflect the new challenges presented by new forms of difference. It also means that elements of intergroup competition and conflict are taking on a new cast. When we see voting redistricting following the 2000 census, there will be communities around the country in which, for example, emerging strong majorities or strong sub-populations of Latinos will be saying to black elected officials: "Thank you for your service, but it is our turn now."

One of the problems we have faced in the last thirty-five years is that we have not been teaching very well. As an aging law professor, I am repeatedly faced with how young my students are getting year after year. The things that I experienced are simply perhaps learned, more likely forgotten, pages of some civics textbook. When I am wearing my political and policy hats, and I am on the phone talking to reporters or something like that, I am struck by how many twenty-something and even thirty-something-year-old reporters and producers, who came of age during the Reagan era, believe that the most important challenge with respect to racial justice facing America is the oppression of white males. You can hardly blame them if they have not been taught well and if everything they have heard about civil rights for the past fifteen years has focused on the issues of reverse discrimination.

This question of relentless teaching, I think, is the relentless teaching that must be undertaken by anyone who would lead on this issue of racial and ethnic justice. I think it is quite central. I have to teach Administrative Law year after year after year because it turns out that at the beginning of the semester, the students are ignorant again. I think the same is true with respect to issues far more important than Administrative Law, issues about the history of our country, and about our country's hopes.

What I have attempted to do in a pathetic way is put sort of a little matrix on the board, which is what I use in my mind to map out a little bit of what we are doing now and a little bit of where we need to go. I should tell you that I have been developing this in two contexts. First, in trying to do some work with President Clinton on a book that he is writing on race. And then, more recently, as a relatively new member of the U.S. Commission on Civil Rights, trying to think strategically about what we ought to be doing now that there is a progressive majority on that Commission for the first time in twenty years. The way to read this is that up here across the top I have listed three tools or strategies for advocacy that are in common use and then three slightly new approaches. From left to right there are some classical equal protection arguments that we make by which, I mean, not just the constitutional doctrine, but also anti-discrimination law generally. Equal protection, that intellectual center of gravity, if you will, obviously generates a great deal of our advocacy and rhetoric.

Somewhat separable is a disparate impact analysis where, in some senses it is an argument about what factual circumstances we will use to infer discrimination. I think, perhaps better understood, disparate impact analysis says: "What social and economic circumstances do we identify as simply being unacceptable so that we will presume some kind of remedial activity is appropriate?"

A third focus of intellectual effort is around the theme of inclusion. Affirmative action is obviously the best example of that – affirmative action in its diversity-enhancing mode, as opposed to its remedial mode.

Those are, I think, three of our biggest weapons, if you will. In looking to the future, it seems to me there are several others and I have just mentioned three that we need to be thinking about. The first is the administrative state, and I say this not simply because I teach Administrative Law – well, maybe it is because I teach Administrative Law. What I am suggesting here is that in our tools of advocacy, and in our strategies for changing the behavior of public and private actors, more of a focus on the tools of regulation and understanding of the administrative state are useful. Indeed, this is what Deborah was just talking about with respect to racial profiling by the police.

When the advocates think about the problem of controlling the discretion of law enforcement officials, not in terms of equal protection or disparate treatment, or inclusion strategies, all of which continue to be vitally important, but in terms of ways in which we might intervene, then I think we have a possibility of making a different kind of progress.

Next, we need to do far more than we have done at working closely with social scientists. I have to confess that, in part, I think the need to work with such scientists to help arm ourselves is perhaps a reflection of the fact that we have lost a lot of moral authority for the arguments we were making heretofore.

Perhaps the best example I am working on at the moment is the question of how you persuade, particularly a court, a skeptical audience that an educational institution has a compelling interest in diversity for purposes of justifying race-conscious affirmative action under the Fourteenth Amendment or Title VI.⁵⁷ If we simply wave our hands about the importance of the inclusion theme, well, that has not been working especially well in recent years. The three-judge panel in the infamous *Hopwood*⁵⁸ case in the Fifth Circuit in the spring of 1996 held that, even though inclusion and diversity are important and all very nice, for the University of Texas to want to insist on diversity with respect to race is as irrational as insisting on diversity with respect to blood type.⁵⁹

I am not sure what planet they are on to equate those two. Obviously the social significance of race continues to be quite substantial. My point is that inclusion alone does not have as much punch and power as we need it to have. But social science evidence, if it can be marshaled as to why inclusion is an ingredient of excellence, properly understood, may be helpful – not hand

⁵⁷ 42 U.S.C. § 2000(d) (2000).

⁵⁸ *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996) (holding that the University of Texas School of Law may not use race as a factor in accepting students in order “to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the school’s poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school”).

⁵⁹ *Id.* at 945.

waving, but perhaps some evidence about the effective inclusion on the central mission of institutions.

Third, with respect to this new realm of strategies and tools – communications and community organizing – the general problem is that if relentless teaching is indeed an essential component of civil rights advocacy in the years ahead, that means that effective leadership on it will require not only simply mastering the equal protection doctrine, but also mastering the challenges of communications. By that I mean talking with those knuckleheaded reporters and producers and teaching them, and working with community organizers so that they have strategies about how to deal with the police, in order to forge connections between legal advocates and experts on the one hand and community organizers on the other.

I think it is important for us to truly think about this part of the agenda. One thing that we have done recently in The Civil Rights Project at Harvard, the think-tank that Gary Orfield and I started a couple of years ago here, is we have puzzled about religion.⁶⁰ Why are we thinking about religion? Gary is religious; maybe that is his excuse. I am not religious so my excuse for thinking about religion is as follows.

If many of our fundamental disagreements involving race and ethnicity are about differences in values, and if we want to communicate effectively with the broader public about values, then we need strategies to meet the public in that arena in which most of the public discusses values. For most Americans, that is their religion, their spirituality. The notion that spirituality and theology should be harnessed for racial and ethnic justice is far from new, but it does seem to have been largely abandoned. It was the moral energy for much of the civil rights movement, and the lawyers were working for the preachers until thirty-five years ago. Something has to be reclaimed in terms of our ability to tap the power of theology and spirituality to help engage the public in value discourse. Lawyers cannot be strangers to that effort.

⁶⁰ Harvard University, The Civil Rights Project, at <http://www.law.harvard.edu/groups/civilrights/mission.html> (last visited Mar. 7, 2001). The Civil Rights Project provides an ongoing assessment of the prospects of justice and equal opportunity under law for racial and ethnic minorities. *Id.*

If those are the columns on the matrix, then the rows represent the different substantive contexts and you might think of this in two parts. I want to draw a line and emphasize that in thinking about what is ahead, the question is what elements must be added the traditional familiar agenda. Let me give you a couple of quick examples before I wrap up.

With respect to democracy, for example, for some decades we have thought about voting rights and about districting. In addition, I think that we are beginning to see the rumblings of increased attention to a different kind of agenda with respect to democracy and democratic values, including work by various people on new voting schemes, and interest in getting out the vote and voter participation. It is not enough to be registered, and not even enough to have a district that is drawn to make it possible for you to elect a representative of your choice. The other question is how to make people feel connected enough to the political process so that they will actually participate.

In the years ahead you can imagine civil rights advocates taking on getting out the vote – GOTV – voter participation with passion, as a cause of considerable importance. Are the polls going to be open for twenty-four hours or forty-eight hours as a way of helping people and encouraging people to participate more? I can foresee that becoming a civil rights issue as a tool of enfranchising those who are now outside the political system.

I wrote down “money.” Increasingly, I believe, forward thinking civil rights advocates are even viewing campaign finance reform as an element of a civil rights agenda.

Going back up to the top, the opportunity agenda, of course, has had dimensions related to education, employment, credit, and the like. In the future, I think that some added wrinkles have to be given to that. We have thought about the education agenda often. Desegregation. The new question is integration. How much do we care about integration? When school districts have been declared to have unitary status so that they are no longer under court supervision, and the process of re-segregation takes place, how much scope will there be for school boards to voluntarily undertake race-conscious measures to try to see to it that children have experiences learning with peers who are different so that as adults they will be able to live with people who are different. There is

genuine ambivalence, not just within the white community but within minority communities, about the importance of the integration ideal, and that has to be worked through in the new context of more complicated diversity. In the education arena, however, I think we will have to press the doctrinal frontiers with respect to resource equity and with respect to the excellence agenda. Let me just talk about the excellence agenda for a moment.

It is true that, under current doctrine with the current conservative judiciary, we may have trouble winning many Title VI cases in which we are arguing for more resource equity in terms of opportunity to learn. We may have trouble taking the results of standardized tests in various states and using the evidence of disparities in educational achievement as, in fact, a weapon to demonstrate that there has not been an equal opportunity to learn.

Having said that, there is a challenge in the excellence agenda that I think we have not taken on fully enough. Right now, Congress is trying to re-authorize the Elementary and Secondary Education Act, which includes Title I, the major program for compensatory education around the country.⁶¹ It represents about eight billion dollars a year. Both democratic candidates for president have essentially suggested doubling that number. Relatively few civil rights advocates are engaged in that legislative battle thus far. Very few are thinking creatively about the tools of the administrative state that might be harnessed for the educational equity agenda put to the service of parents and children who lack the political power.

On the education agenda ahead, I think this is a particular area in which the new diversity is going to reshape our thinking dramatically about what it means to be an advocate for racial justice. Issues like bilingualism, for example, have to move center stage for the nation as a whole, not just for particular communities.

Lastly, allow me to talk briefly about, not the democracy agenda, not the opportunity agenda, but the justice agenda. Traditionally the emphasis was on things like basic protection of the laws, as in "I don't want to be lynched." Then, more sophisti-

⁶¹ H.R. 4564, 106th Cong. (1999) (seeking to amend, re-authorize and make improvements to the Elementary and Secondary Education Act of 1965).

cated problems of police misconduct, abuse, and general issues of bias in juries and sentencing have arisen. All, I think, fit pretty fairly, pretty squarely within a traditional mold of thinking about equal protection disparate impact and perhaps inclusion, as in "Let's get more minority police officers."

In addition, Deborah has already talked about the administrative state issue and to some extent about the social sciences issues. I think that similarly with respect to community organizing and communication, the strategies ahead are going to require that we develop evidence and do relentless teaching so that people will understand some of the things that Paul and Deborah were talking about earlier.

More specifically, I think, there are different elements that civil rights advocates should and I think will be paying attention to in the future. It is not just about prevention; it is also about excessive imprisonment. Civil rights advocates are going to start insisting not only that crime rates go down, but also that incarceration rates go down so people are not locked up indefinitely over and over again. I guess, actually I should have started with an even more basic issue: safety. I am not sure if I have a disagreement with Paul on this, but I am in favor of the following proposition: if someone told you that if you live in a poor or minority community, you have less entitlement to safe drinking water than a person who lives in a middle class or white community, you would find that a laughable proposition, a horrific proposition. I think by the same token, people in poor communities and communities of color have just as much right to community security as people who live in middle class areas.

I think that crime reduction will and should itself become a civil rights issue. The test will be to insist that communities not be presented with a false choice as in: "Be a victim or accept oppressive police conduct." That is a false choice. Appropriate strategies must be available, in terms of community policing, prevention, alternatives, sentencing, making the schools work - alternative strategies available in communicating with community organizers and advocates to help them see and advocate the issue.

To conclude, I have three quick points. Lawyers, yes we sort of took over the movement. There is a celebration tomorrow in Selma, Alabama commemorating the "Bloody Sunday" march over

the Edmond Pettis Bridge. President Clinton will be there with John Lewis and several people who marched over the bridge thirty-five years ago tomorrow. That march provided the impetus for passage of the Voting Rights Act.⁶² Something happened when the lawyers took over to start implementing these statutes and litigating under them. In the years ahead we will need lawyers to take on a different role, a new role, working closely with other partners, the social scientists, the community organizers, the religious leaders.

Second, another implication of this is that the kind of education that lawyers receive and the very conception of our professionalism has to be broadened. Being a civil rights lawyer who practices only Title VI doctrine, Title VII doctrine, or Equal Protection law, is similar to being a business manager, going to an MBA Program and learning nothing but accounting. We will need to develop a much richer set of strategies and a much broader set of tools.

Third, and the final implication is whether *Brown v. Board of Education* works?⁶³ That is kind of the question that Paul asked. Certainly in some ways it did work. Yet, it is true that today our schools have now become increasingly segregated. After school integration peaked about ten years ago, our schools are now again becoming increasingly segregated.⁶⁴

On the other hand, we cannot make the mistake of thinking that these particular doctrines, these particular cases, or these particular tools are going to solve all the problems. They have to be part of a package. Affirmative action gets attacked all the time in an agreement that it has not ended poverty or discrimination. I agree. It also has not cured the common cold. You cannot expect it to achieve more than its limited purpose. Our problem has been that we focused too much on the doctrine and the litigation exclusively and, in the years ahead, we will have to do so very much more. Thank you.

⁶² Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb-1 (2000).

⁶³ 347 U.S. 483 (1954).

⁶⁴ See Davison M. Douglas, *The End of Busing?*, 95 MICH. L. REV. 1715, 1715 (1997) (noting that "[f]orty years after the Supreme Court's decision in *Brown v. Board of Education*, America's schools are becoming increasingly racially segregated").

Professor Rakoff

I think the panel should prepare to stay for a little while and answer some questions. For those of you in the audience who have to leave, this would be a good time. Let's have some questions for the panel.

Audience Member

I want to direct this question to Professor Edley. Chris, you mentioned that if we said: if you lived in this neighborhood, you would be subject to contaminated drinking water — people would be outraged. That, unfortunately, is the reality in different parts of the country today. I think that it might be useful to look at what the Environmental Justice Movement has done in terms of using the administrative state, which has totally failed us in the movement; using social science, where we have thirty-five years of documented disproportionate impact; and using community organizing and religion, which are kind of the bases of the movement. Using all three of those tools, we are not much further today than we were in 1995 or 1990. I am just wondering how you might learn from the lessons of this particular movement and apply them to where you want to go.

Professor Edley

You make a terrific point. But I guess I disagree with you in terms of assessing what the Environmental Justice Movement is. I think you have gotten a lot further than you give yourself credit for. A decade ago it basically did not exist and now it is very much a mainstream component of the Justice agenda. You have executive orders about it; presidential candidates talking about it; mainline old stream civil rights organizations recognizing that they need to be part of it. I think it is more like: "You've come a long way, baby." Actually, when you think about it, in a sense the fact that the Environmental Justice Movement started with such a paper-thin doctrinal basis, is almost as though, since the doctrine was not there, you could not rely upon that, which forced you to be more

creative in thinking about other tools and other strategies, which I think is all to the good.

To some extent, I look at Environmental Justice as very much a part of the new agenda and in important respects, I think to be emulated. I would cite that as support for my propositions rather than counter evidence. It is really pretty dramatic. There are not that many social movements that have gotten so far so fast, if you look at American history. I just do not think there are.

Audience Member

I think this is the challenge we are facing because between 1987 and 1997 it has gotten worse, dramatically worse. At the same time the movement is coming to power, the actual concrete conditions on the ground are getting worse. I agree that we have come a long way, baby, but in terms of where we need to be, it is daunting. This stuff is ineradicable and we still need to fight.

Professor Edley

Yes, and I agree that it is ineradicable, but the fact that it is ineradicable should be understood as a caution that you cannot expect that some simple process of rational enlightenment is going to cure our psychosis about color. Instead, because it is ineradicable, it is something we have to struggle against every day, every year and every generation. Al Gore would say: "It is like our propensity to sin." You have to be prepared to struggle against it all the time. You will always have it. That does not mean it is going to consume you, but you have to be prepared to struggle against it.

The other point I would make with respect to the pessimism is that this is old, deep stuff. We hold these truths to be self-evident, that all men are created equal – and that is fine. However, America's color problems started about two hundred years before the Declaration of Independence and the Constitution were written, when the first permanent Spanish colony started oppressing native peoples. This is very old, deep stuff and one or two generations is certainly not going to take care of it.

Professor Rakoff

If I could follow up that question with a question to Deborah: I think that you pitched the police on what Paul would call a convergence of interests basis, and you told us what your pitch was. I am curious what the response is when you make that pitch.

Professor Ramirez

The response has been extremely positive when we have actually gone to police departments and given them a full presentation, which we usually give first to the police chief. If you can convince the police chief, then we find that you can convince the departments.

We only began in June of this year. I was at a conference and President Clinton announced that all federal agencies were going to begin to collect data and I was the person in charge of the racial profiling group. We could identify three places in the United States that were collecting data or had made an agreement to do so. They were San Diego, San Jose, and North Carolina. That was what my job was. I was to catalog that and write this guide book. Now, less than a year later, we have literally converted hundreds from Gov. Jeb Bush in Florida to the California Highway Patrol to others.

There is legislation pending in almost every state. I think that in this arena, though we did not succeed politically with Congress and though we did not succeed in the courtroom with *Whren*, we have succeeded in the community policing round. In the community policing round, the other place where we have made a lot of inroads is with the Boston Model of Community Policing.⁶⁵ That

⁶⁵ Editorial, *Zeroing in on Policing Styles*, BALT. SUN, Apr. 20, 2000, at 25A. This editorial explains that:

[T]he Boston model of community policing is twofold. First, it requires police to work with communities and identify the relatively small percentages of people who engage in violent crime. Once identified, law enforcement offers a clear choice: Desist now or face the full brunt of prosecution. Second, instead of casting a broad law enforcement net,

is, in terms of presenting this false choice between: "Are you going to protect the community or respect their rights?" We in Boston have been saying: "You can do both." We are working with the Ten Point Coalition to get that message across.⁶⁶

This is another area where we have seen enormous progress. The Ten Point Coalition is a group of African-American ministers, and the idea of their working with the police was so novel that even a few years ago, it just was not happening. Now, when I go to conferences, there are black ministers all over the country talking to numerous of other black ministers who are teaching values and entering that arena. I think that is effective.

Even my beginning speech about what we tell children is a female way of talking about it as opposed to "you guys are bad and ought to stop." It is also a value speech. It is also my plea to them to say: "We do not want to have to teach our kids this." "Help us to change this so we do not have to teach them." My son, Michael, is in first grade. I hope that when he gets his driver's license, and he tells me about police stuff, I can say to him: "That used to happen, Michael. It does not happen any more." Will I be able to say that? I do not know. I do not mean to be Pollyannaish, because I am not, but I have seen movement when you move from some of the traditional arenas.

police demonstrate their stake in young people's futures by working to assist many to obtain the social services they need.

Id.

⁶⁶ The "Ten Point Coalition" was a program established in Boston as a partnership between African-American clergy and the Boston police to combat youth violence and to "emphasize[] the benefits of faith organizations in revitalizing crime-ridden neighborhoods." Stephen D. Price, *Neighbors, Frayser Patience Urged on Crime*, COM. APPEAL (Memphis, TN), Jan. 19, 2001, at NT1; see also Randall Jelks, *Racial Profiling Results Show City Needs to Address Social Inequities*, GRAND RAPIDS PRESS, Jan. 20, 2001, at A11; Michael Paulson, *Mass. Strict on Faith-Based Funding Religious Factor Gets Toning-Down*, BOSTON GLOBE, Jan. 31, 2001, at A12.

Audience Member

Professor Edley, to accomplish your new model, I think first of all, we would have to change the political system infrastructure. What is your design for doing that?

Professor Edley

I think that there are three fundamentally important ingredients. The first has to do with democratic participation and engagement so that there is more community level grassroots involvement in civic life of various sorts, whether it is people working together to go after a toxic waste site or to try to foment revolution in the public schools. I think the strategy for leadership and community organizing has to really be focused on this question of just getting more people mobilized and more people engaged. I think we are getting there. I think that sentiment is something that you see moving in many parts of our life. You see it in the labor movement, in the evangelical religions, in Mothers Against Drunk Driving, in lots of different contexts. I think this shared sense of radicalizing grassroots engagement and civic participation is a way to reclaim control of our institutions, including our political institution. That is number one.

Number two is, I think that ultimately in most of our communities, that kind of engagement and mobilization for good purposes is not going to happen unless it is combined with self-conscious strategies for building bridges that connect people across lines of class and color so that an important part of the tool set of community leaders will be having strategies to make people who perceive themselves as being different, able and willing to work together towards shared goals. I do not believe that, for the most part, school reform and environmental justice will be sustainable as movements unless they can build those bridges. My second point is the need for a self-conscious, intellectually driven, experientially informed set of strategies for connecting people across lines of class and color. It does not happen by accident.

The third one is, I think we need education strategies. If I were going to pick one thing, it would be to try to get people impassioned about the need for transforming the quality of K-12

education. I think that, in part, it is because I believe that is an ideal venue for creating more political energy in communities around the country. I did not directly answer your question about changing the political structure because I do not do that. I am a militant incrementalist, not a utopian, or a revolutionary. When I talk about building bridges to connect people across class and color, I mean working out very concrete strategies to get people working together and emulating promising practice of that around the country. I am not talking about a transformation of the human spirit or anything like that. I am an incrementalist and I would change political culture and the political structure, not directly, but through indirection of a sort that I just described.

Professor Rakoff

I would like to thank all three panelists for an incredibly informative and motivating set of presentations. Thank you very much.