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## Color at Century's End: Race in Law, Policy, and Politics

### Cover Page Footnote

Professor of Law, Harvard Law School; Senior Advisor to President Clinton for the Race Initiative; Consultant to President Clinton's Advisory Board on Racial Reconciliation; author of *Not All Black and White: Affirmative Action, Race and American Values* (1996) and *Administrative Law: Rethinking Judicial Control of Bureaucracy* (1992). This Article is a revised version of the Robert L. Levine Distinguished Lecture, delivered at Fordham University School of Law on March 11, 1998.

## LECTURE

# COLOR AT CENTURY'S END: RACE IN LAW, POLICY, AND POLITICS

*Christopher Edley, Jr.\**

At century's end, the question I want to ask with respect to racial and ethnic justice in America and our long-standing struggle with the challenges of color, is: What now? Where do we go from here?

From President Clinton's perspective, the question is: Serving as the last President of the twentieth century, how can I build a worthwhile legacy regarding this problem that is 150 years older than the nation itself?

So my conceit for this talk is to put yourselves in my shoes, as someone who serendipitously has the ear of the President on this issue and seems to have a platform to talk to people in the civil rights community about it. How would you answer these questions? What now? Where do we go from here?

My discussion has three parts, because I think to answer those questions you have to have three subsidiary inquiries: one is taking stock; second is some vision—what do we think we ought to mean by racial and ethnic justice in the twenty-first century; and the third is some sense of program—how to achieve that vision.

### TAKING STOCK

Let me start with taking stock. In summary, our situation is the cliché: We've come a long way; we have a long way to go. But let me just place a few observations on the table for consideration.

#### *Social Facts*

First, with respect to disparities along lines of color, the black unemployment rate continues to hover at twice that of whites, being the first to rise in recessions and the last to fall as recovery begins.<sup>1</sup> Furthermore, black employment is more volatile than white, so that the

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\* Professor of Law, Harvard Law School; Senior Advisor to President Clinton for the Race Initiative; Consultant to President Clinton's Advisory Board on Racial Reconciliation; author of *Not All Black and White: Affirmative Action, Race and American Values* (1996) and *Administrative Law: Rethinking Judicial Control of Bureaucracy* (1992). This Article is a revised version of the Robert L. Levine Distinguished Lecture, delivered at Fordham University School of Law on March 11, 1998.

1. Professor Edley compiled this information from statistics and empirical studies from expert sources within the executive branch. See Christopher Edley, Jr., *Not All Black and White: Affirmative Action, Race, and American Values* 42-52 (1996). These sources include the Council of Economic Advisers, the Department of Justice, the Equal Opportunity Commission, the Civil Rights Commission, and the Depart-

effect of recessions is more severe.<sup>2</sup> In the 1981–1982 recession, for example, the last one for which this kind of data is available, nearly one of every ten employed blacks lost his or her job—one of every ten—while fewer than two of every 100 employed whites lost their jobs.<sup>3</sup>

Consider poverty. Poverty for children—while one of every seven white children under the age of six lives below the poverty line, one of every two black children does, and almost that figure for Hispanics.<sup>4</sup> The overall poverty rate for whites is one-third that for blacks, about 11.5% of whites versus 33% for African Americans.<sup>5</sup>

The black-to-white ratio of median earnings has been stuck in the mid-50% to mid-60% range for two decades. There was improvement, but then it stalled, and we have been stuck.<sup>6</sup> The median annual income for black males working full time is 30% less than for white males.<sup>7</sup>

But if one considers wealth rather than income, the disparities are even more dramatic, and alarmingly so. So while you can think of the income gap in terms of earnings at 62% that of whites, the median wealth or net worth of blacks is only 8% that of the median wealth of whites;<sup>8</sup> Hispanics just slightly better than that 8%.<sup>9</sup>

Bear in mind the implications. Many observers have developed a habit of celebrating the expansion of the black middle class. I urge you to remember, however, that the measure of middle-class status used in those reports centers on income—that is, week-to-week, month-to-month, cash flow income. But the wealth data indicate that, overwhelmingly, the black middle class is two paychecks away from poverty because there is no wealth to fall back on in the event of any. In many respects, that measure of wealth, 8% that of whites,<sup>10</sup> is an indicator of the legacy of inherited disadvantage from generations—indeed, centuries—of prejudice, discrimination, and worse.

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ment of Labor. *See id.* The Editorial Board of the *Fordham Law Review* relies on Professor Edley for the accuracy of this information.

2. *See id.* at 42–43; *see also supra* note 1 (explaining the source of the statistics).

3. *See* Edley, *supra* note 1, at 43; *see also supra* note 1 (explaining the source of the statistics).

4. *See* Edley, *supra* note 1, at 43; *see also supra* note 1 (explaining the source of the statistics).

5. *See* Edley, *supra* note 1, at 43; *see also supra* note 1 (explaining the source of the statistics).

6. *See* Edley, *supra* note 1, at 43; *see also supra* note 1 (explaining the source of the statistics).

7. *See* Edley, *supra* note 1, at 43; *see also supra* note 1 (explaining the source of the statistics).

8. *See* Edley, *supra* note 1, at 44; *see also supra* note 1 (explaining the source of the statistics).

9. Economic Report of the President: Transmitted to Congress February 1998, Together with the Annual Report of the Council of Economic Advisers 129 (1998).

10. *See* Edley, *supra* note 1, at 44; *see also supra* note 1 (explaining the source of the statistics).

Now, disparities, of course, are not identical to discrimination. They are important social facts, and we have to consider disparities when we are trying to decide where America is and where we need to go. The disparities help us decide the agenda for our future.

But on discrimination the evidence is also quite troubling. The traditional social science methodology, of course, is to do detailed statistical and econometric studies, trying to explain differences in wages, differences in income, and the like, by taking account of as many individual characteristics as imagination and data permit—education, age, geography, and so forth—and then consider the residual unexplained variances, the unexplained disparities, to be attributable to discrimination. There have always been, and will no doubt continue to be, vigorous argument about such statistical efforts to define and demonstrate discrimination, particularly when we move from employment to such areas as housing, mortgage lending, and credit.

But in many ways, I think, the more compelling kind of evidence is what has recently been developed through the use of so-called testers, or auditors, where matched pairs of individuals are sent to apply for a job that has been advertised in the newspaper or to try to rent an apartment.<sup>11</sup> In the last several years, in hundreds upon hundreds of testing incidents in dozens of studies across sectors and in several metropolitan areas, the evidence is overwhelming that discrimination remains very much alive in our social and economic lives.<sup>12</sup>

For example, in employment, African Americans and Latinos in five major metropolitan areas experienced discrimination 20% of the time in going to apply for a job.<sup>13</sup> Let me just make sure you understand that. Two people, one white, one minority, matched in every conceivable characteristic, given virtually identical résumés, dressed the same, with similar speech patterns, sent to apply for an entry level job that has been listed in the newspaper.<sup>14</sup> The minority tester is told, "I'm sorry, nothing's available," or "I'm sorry, the only job available is as a dishwasher." Twenty minutes later, the white tester goes

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11. See generally Clear and Convincing Evidence: Measurement of Discrimination in America (Michael Fix & Raymond J. Struyk eds., 1993) [hereinafter Clear and Convincing Evidence] (collecting articles discussing the methodology, results, and policy implications of testing for discrimination using the technique of auditing); United States Dep't of Housing and Urban Dev., Progress or Retreat? Testing and the Need for a National Report Card on Discrimination (Michael Fix & Margery Austin Turner, eds., forthcoming) (collecting articles discussing the state of results and methodological issues concerning testing in a number of sectors, prepared under contract to HUD's Office of Policy Development and Research).

12. See generally Clear and Convincing Evidence, *supra* note 11 (collecting the articles discussing the methodology, results, and policy implications of testing for discrimination using the technique of auditing).

13. See Richard B. Mincy, *The Urban Institute Audit Studies: Their Research and Policy Context*, in Clear and Convincing Evidence, *supra* note 11, at 169, 173.

14. See Michael Fix et al., *An Overview of Auditing for Discrimination*, in Clear and Convincing Evidence, *supra* note 11, at 1, 1-2.

and is told, "Why yes, we have three openings. Here's the benefits package. When can you start?"

In housing, black and Hispanic testers face discrimination approximately 28% of the time in housing searches for rental and purchase.<sup>15</sup> Again, keep in mind the picture: minority tester goes to see the landlord; the landlord says, "I'm sorry, we just rented that apartment." Twenty minutes later, the white tester goes and the landlord says, "We have three available. Do you want a two-bedroom or a three-bedroom? Don't worry, you don't need a security deposit."<sup>16</sup>

Now, the minority tester walks away from this situation with no clue that he or she may have been the victim of discrimination, right? The landlord says "There's nothing available," you shrug your shoulders and say, "Bad luck." It is only in the aggregate picture that the true social disease seems evident. This have-a-nice-day form of discrimination reflects some of the subtleties that we observe. While many people believe in an "America on the mend," the best available evidence suggests the persistence of behaviors that are discriminatory in character.

### *Legal and Policy Context*

Turning now to take stock of the legal, policy, and political environment, the summary formulation is that almost everything depends on two people: Justice Sandra Day O'Connor and Vice President Al Gore. Will Justice O'Connor freeze her position and stop a slide towards the conservative view that discrimination is a thing of the past, that race must never matter in legal and policy choices?<sup>17</sup> If she does freeze her steady slide in that direction and hold out until the next election, then all will depend upon whether Al Gore or someone else of relatively progressive views on civil rights is elected President and appoints justices to the Supreme Court who will stay the course rather than join the rollback in equal protection doctrine and other areas of civil rights law.

Affirmative action is in many ways the bellwether test case for what is going to happen with respect to several areas of legal doctrine, and we see quite a bit of rumbling. Suffice it to say that in some circuit

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15. See John Yinger, *Access Denied, Access Constrained: Results and Implications of the 1989 Housing Discrimination Study*, in *Clear and Convincing Evidence*, *supra* note 11, at 69, 103.

16. See *id.*

17. In *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989), Justice O'Connor's plurality opinion found that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited [sic] by a particular classification." See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor . . . justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

court cases—particularly in the Fifth Circuit in *Hopwood v. Texas*,<sup>18</sup> in the Fourth Circuit in *Podberesky v. Kirwan*,<sup>19</sup> to some extent in the Third Circuit in *Taxman v. Board of Education*,<sup>20</sup>—we see that a federal judiciary made quite conservative through twelve years of careful Reagan and Bush nominations is interested in modifying civil rights doctrine to make it more difficult for minority claims to succeed.<sup>21</sup>

But affirmative action is not dead. Even within the civil rights advocacy community, there has been too-ready a tendency to say that we are in “the post-affirmative action era.” But it’s important to note that *Bakke*,<sup>22</sup> the Supreme Court’s 1978 case concerning race-conscious affirmative action justified by diversity in higher education, remains the law of the land, at least outside of the Fifth Circuit.<sup>23</sup> The question is: While affirmative action is certainly under assault in the courts, will it hold on until the political process, through the next presidential election season, renders a final verdict?

Finally, taking stock politically, one has to observe that the most important development afoot, in my view, is the burgeoning Latino population in California<sup>24</sup> and in several Eastern states.<sup>25</sup> With that shift, and with the problem of low political participation increasingly coming to the fore on the agenda of civil rights advocates, we seem to be on the verge of what could be a very important political realignment.

In the wake of California’s Proposition 187 concerning immigrants,<sup>26</sup> and California’s Proposition 209 concerning affirmative action,<sup>27</sup> the political dynamic in California seems to be that the Republican Party has alienated massive numbers of both new and experienced Latino voters.<sup>28</sup> If that alienation takes hold and solidifies

18. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

19. 38 F.3d 147 (4th Cir. 1994).

20. 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506, and *cert. dismissed*, 118 S. Ct. 595 (1997).

21. *See id.* at 1557-58 (finding that an affirmative action plan violated Title VII because it was not “remedial”); *Hopwood*, 78 F.3d at 961-62 (finding that the University of Texas School of Law’s affirmative action admission policy violated the Equal Protection Clause); *Podberesky*, 38 F.3d at 161-62 (finding that the district court erred in granting summary judgment upholding the affirmative action program of the University of Maryland at College).

22. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

23. *See Hopwood*, 78 F.3d at 961-62.

24. *See* Bureau of the Census, U.S. Dep’t of Commerce, Statistical Abstract of the United States 34 (117th ed. 1997) [hereinafter 1997 Abstract] (calculating that over 25% of California’s population is of Hispanic origin).

25. *See id.* (calculating that nearly 10% of the Northeast’s population is of Hispanic origin).

26. *See* Cal. Educ. Code §§ 48215, 66010.8 (West Supp. 1998) (excluding undocumented immigrants from public education).

27. *See* Cal. Const. art. 1, § 31 (requiring banning race and gender affirmative action at schools in the California university system).

28. *See* Gary Martin, *Bonilla Jumps GOP Ship over Affirmative Action*, San Antonio-Express News, May 9, 1998, at B7.

in California, in Texas, in Florida, and in New York, the consequences for national policy making, and for politics in general, could be quite profound. Indeed, Texas Governor George W. Bush, the early frontrunner for the GOP presidential nomination in 2000, has impressive support among his Latino constituents,<sup>29</sup> as does Florida GOP gubernatorial candidate Jeb Bush.<sup>30</sup> They have won such support in part by taking pains to distance themselves from national GOP policies that most Hispanics consider hostile to them and to immigrants.<sup>31</sup>

Let me move beyond just a recitation of some of the facts and talk about two particular policy areas, affirmative action and bilingual education.

On affirmative action, in 1995, I had been working at the White House as a senior budget official for a couple of years and was about to leave to go back to Harvard to do something about the footnote deficit that is afflicting Western civilization—but several people prevailed upon me to direct the President's review of affirmative action. It looked, in late-1994 and early-1995, as though the new Republican majority in Congress would make a concerted effort to dismantle affirmative action programs, certainly targeted federal programs created by statute or executive action, and perhaps even amending Title VII to curb voluntary private sector affirmative action in employment. Some of us on the White House Staff thought it would be important to try to develop an Administration policy in advance of the anticipated onslaught.

We met with the President, who had read a large pile of material we provided. He said, "Look, the first thing I want to do is understand all the facts. I want to understand what works and what doesn't work on these affirmative action programs. So let's do a review. I'd like a thorough review of all the affirmative action policies and issues." I think it's fair to say that all of us thought that this was a terrible idea, because of the inevitable delay, the difficulty of defining terms, and so forth. But it turned out that only one person had a vote. For better or worse, I decided to stick around and lead that review.

Our first substantive conversation in the Oval Office, in the winter of 1995, began with the Chief of Staff, Leon Panetta saying, "Mr. President, why don't we start by your telling us your basic position on affirmative action."

The President said, "Well, I believe in equal opportunity, I'm against quotas, and I'm for vigorous enforcement of the anti-discrimination laws."

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29. See Paul West, *Going All-Out to Win El Paso*, Baltimore Sun, Oct. 21, 1998, at 2A.

30. See *Nationally, Parties Work to Attract Latino Support: Group's Votes Needed in High-Stakes Votes*, Idaho Statesman, Oct. 4, 1998 at 12A.

31. See Rene Sanchez, *Both Parties Courting Latinos Vigorously: California GOP Tries Strategy of Inclusion*, Wash. Post, Oct. 26, 1998, at A12.



Everybody said, "Good, good, sounds great, fine."

I said, "Wait a minute. What does that mean? I mean, I can't think of any mainstream politician who couldn't say exactly those words. *David Duke* could say exactly those words." Remember, I was on leave; and could talk like that because I had tenure back at Harvard.

The President said, "I don't understand. What are you talking about?"

I said, look, you say you're for equal opportunity, but there's a big argument about how to define equal opportunity. Are you thinking equal opportunity in the sense that Lyndon Johnson was when he talked about it not being equality to simply bring the white man and the black man to the starting line of the footrace, remove the latter's shackles, and say, "You're free; everything's equal, now run"; or does your notion of equal opportunity include some measure of remediation, or even reparation? What do you mean? And you say you're for vigorous enforcement of the anti-discrimination laws, but what do you mean by discrimination? Some people believe that discrimination exists whenever I can point to a social or economic statistical disparity. Other people believe that to demonstrate discrimination you need an identifiable victim and an identifiable perpetrator with racial animus dripping like venom from the lips. So where along the spectrum do you define discrimination?

He said, "Oh, I see, I see."

I said, "Look, that's just the beginning. That's how you define discrimination. Now how do you prove it? What kind of evidence? And, having established it, what kind of remedy are you prepared to support in order to solve the problem?"

Lesson number one: This can't be about platitudes; this can't be about the easy phrases calculated to paper over our disagreements rather than expose and close our differences.

Well, how much discrimination is there? A little later in the spring, during the course of this review, a group of us were preparing the President for a press conference. This is an exercise in which you sit around the table in the Cabinet Room and people throw out questions: "Mr. President, what's your position on the latest developments in Bosnia?" "Mr. President, what's your position on the cost overrun on the NASA space station program?" "Mr. President, what's your position on affirmative action?"

Asked that question, the President launched into a wonderful monologue, a soliloquy, talking about the social science evidence demonstrating the persistence of discrimination, especially the tester studies I just described. "And that's why," said the President, "we continue to need affirmative action, because we need an effective remedy to combat and prevent discrimination."

Everybody said, "Ah, great! Terrific, terrific!"

I said, "I'm not so sure. Look, you did your homework. You get an A. Everything you said was right. But the problem is that your audience sitting there watching you on television doesn't believe that they discriminate, doesn't believe their friends discriminate. They're going to listen to you talking about discrimination and think: 'There goes old liberal Bill Clinton. He thinks there's a racist behind every tree. What planet is he on?' I mean, don't get me wrong. I want you to educate the public about discrimination, but it requires relentless teaching, not a simple Q&A in a press conference."

He said, "All right, all right. So what do you want me to say?"

I said, "Well, I don't know. But look, how about this? Most of us, I think, would admit that we have a simple human tendency to prefer people, to gravitate towards people, who are like ourselves. When you're making a decision about with whom to have dinner, whom to date, maybe whom to worship with, maybe whom to hire, or promote, or do business with, you are probably looking for some kind of connection, some basis for affinity, something that signals that the other person is like you. And, all too often, still, in America, color—not only color, but color certainly—gets in the way of that connection.

"Now, if most of us prefer people we think are like us and act on that basis, and we aggregate all of those little preferences over our social and economic interactions, then in the aggregate it may amount to the denial of opportunity. Here's the key: In an important sense, it doesn't matter whether you call that discrimination or not. It's not the kind of America we want. One thing that affirmative action does is give us a tool to lean against that simple tendency to prefer people who are like ourselves, to open us to the possibilities of all of humanity."

He said, "Great, I like that, I like that." And he went out and gave his press conference; nobody asked him about affirmative action.

I have two points about this. Discrimination is a label that we apply to a circumstance or a behavior and it's sort of conclusory. It really represents a conclusion that "this is wrong, and we want to do something about it." Second, there is a value choice at stake in deciding what circumstances and behaviors are going to receive that label. When a Korean grocer in the middle of an African American community decides she would like to hire kinfolk to work in the store, people with whom she feels comfortable, is that discrimination or is that *family*? And even if you think it's not really right, do you then decide that you want the state, the government, to regulate it?<sup>32</sup>

So, there is a value at stake and we have conflicts over those values, reflecting deeper disagreements about our vision of what kind of com-

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32. Of course, Title VII answers this by saying that employers with fewer than fifteen workers are exempt from Title VII. *See* 42 U.S.C. § 2000e (1994). But the important question from the perspective of the President or any leader is not simply what is the law, but what *should* be in the law.

munity we want and how to achieve it. You cannot escape the values conflict by saying, "I'm for vigorous enforcement of the anti-discrimination laws, aren't you?"

Let me make one related point, if I can elevate the discussion just a moment and talk about the O.J. Simpson case. You may recall—you certainly recall if you were breathing—Mark Fuhrman, the allegedly racist L.A. cop. According to opinion polls taken around the time of the incident, roughly two-thirds of Latino and black residents in L.A. County felt that Mark Fuhrman was the tip of the iceberg, that there were lots more where he came from; while roughly two-thirds of the Anglo community felt that Mark Fuhrman was just an aberration, an isolated example.<sup>33</sup> This indicates radically different perceptions of the world, just like radically different perceptions of the extent to which discrimination continues to be a problem.

It's no surprise that with these radically different perceptions comes a likelihood that there will be racial divisions in assessing the credibility of a witness, or the plausibility of a conspiracy theory, or indeed the ultimate question of guilt or innocence. These differences in perceptions and differences in values obviously arise, at least in part, from the separation between our communities and the experiences related to those separate community existences.

If I can drive home the value point just one more way. In the second or third meeting with the President back in 1995, I put it this way: "Mr. President, we have to talk about color blindness. Now, here is one way to think about it: Do you believe that there is a moral cost to making decisions about people based upon immutable characteristics, like race, gender? Is there a moral cost?"

Now, this is a multiple-choice question. Answer number one: Yes, there is a moral cost, and the cost is so great that we should never be willing to pay it. That's the position of some folks who embrace color blindness.

Answer number three: Well, no, there is no particular moral cost. After all, society allocates benefits and burdens based on all manner of characteristics all the time. You decide where to build a highway or how to structure the tax code; there are winners and losers. We allocate benefits based on where you live, how athletic you are, how rich you are. So long as you are not doing it for some invidious purpose (whatever that means), there is no particular moral problem with allocating benefits and burdens based upon color.

I think both of those positions are wrong. The third answer is wrong because race is different. Defenders of affirmative action sometimes say, "Look, why shouldn't we have race-conscious affirmative action in higher education? After all, we have affirmative action

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33. See Cathleen Decker, *The Simpson Legacy: L.A. Times Poll*, L.A. Times, Oct. 10, 1995, at S1.

for athletes, and for people from Iowa. So why not for historically under-served minorities?" I think the answer to that is race is different because: (a) we fought a civil war, and (b) it *feels* different. Imagine yourself telling someone that they didn't get the job or they didn't get the spot in law school because—"We have enough people from Iowa, thank you very much" or "We have enough people with skin color like yours." It *feels* different to use race or ethnicity, and I believe there is a moral truth to the fact that it feels different.

The import of the fact that we have so-called preferences for athletes and Iowans is simply that we do not in fact have a rigid commitment to a particular view of merit that is driven exclusively by test scores. We think about the excellence of the institution along many dimensions, including geographical diversity and variety of student interests. Therefore, it is not necessarily inconsistent with the conception of excellence to think about racial or other forms of diversity as well. It's a question of how you do it.

So, if it is wrong (in my moral view) to argue that there is no particular cost to using race as a factor in decision making, does it follow that the first answer is correct? There is a moral cost so great we should never be willing to pay it. That position, I believe, boils down to a question of effectiveness. If I show you compelling social science evidence that there is continuing discrimination, and I further persuade you that piecemeal litigation is an inadequate tool to combat it and prevent it because of the inefficiencies of litigation and because "have a nice day discrimination" is not vulnerable to individualized suits, then will you agree that affirmative action—race-conscious measures, gender-conscious measures—may be necessary in order to combat, to remedy, that kind of discrimination?

To explore this, let me talk briefly about the death penalty. Some people have a view about the death penalty that depends upon a utilitarian or consequentialist calculation: Will it deter violent crime? I will examine the social science evidence. If I look at the evidence and the evidence indicates that it *is* an effective deterrent, then I support the death penalty. Or, I may look at the evidence, see that it *doesn't* effectively deter crime, so I *oppose* the death penalty. It doesn't matter. My point is this is a community of people who make a value choice that is rooted in consequentialist terms; they are looking for an effective strategy to combat violent crime. Effectiveness matters.

Now, there is another community of folks whose view about the death penalty has nothing to do with utilitarian or consequentialist calculations. It's more kind of a Kantian thing. They are saying, perhaps, "I believe in the sanctity of human life and, therefore, an eye for an eye; I *support* the death penalty." Or they may cite the sanctity of life but conclude, "Therefore, the state should never take another's life; and I *oppose* the death penalty."

My point is that folks in this second moral community do not care about the social science evidence, they do not care about calculating the effectiveness of a particular policy choice. Their calculation is of a different sort.

I understand these two moral positions. And between the two, there is a value choice at stake. For me, in late twentieth-century America, I care about effectiveness because we have gone too long without an effective strategy to purge America of the legacy of racial supremacist ideology in its myriad expressions and manifestations.

Answer number two is: Yes, there is a moral cost to making decisions about people based upon color, but it is a cost we ought to be willing to pay in at least some circumstances. That is where I came down; that is where the President comes down; that actually is, currently at least, where constitutional law comes down.<sup>34</sup> That is reflected in strict scrutiny doctrine under the Equal Protection Clause, suggesting that if there is a compelling interest, government can take account of race in making its decisions, provided the measure is narrowly tailored.<sup>35</sup> The hard question is to argue through the particulars in the circumstances.

But the value choice represented by the debate about color blindness, the value choice represented in the definition of discrimination, the differences in perceptions represented by empirical propositions about discrimination and the like—all of these are deeply controversial matters and we are not doing an effective job in civic discourse of engaging them.

I am fond of saying of this whole mess that it is not rocket science; this is harder than rocket science—and we are ill served by leaders or scholars who approach the subject with platitudes alone.

On bilingual education, as a second example in taking stock, let me simply say that this is a huge conundrum for a number of reasons. Let me tick off four.

One is that the situation in the education of Hispanics is truly desperate. The disparities in educational attainment and achievement are daunting, and the racial isolation of Latinos in public schools is worsening; Latinos are more segregated in California than blacks are in Mississippi and Alabama.<sup>36</sup> The general question is: How much patience will we have for the educational disaster within minority communities. And in particular, what about the crisis in Hispanic education? How much patience will we have in dealing with it and how will we allocate responsibility for achieving a remedy?

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34. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (finding that race-based action is constitutionally permissible if it is narrowly tailored to further a compelling interest).

35. See *id.*

36. See William J. Eaton, *Segregation in U.S. Schools on Rise, Study Finds*, L.A. Times, Dec. 14, 1993, at A1.

There is a second thing that is at issue in this debate right now, and that is the confused research on the effectiveness of bilingual education. There have been a lot of studies—I just read a meta-analysis of about seventy-five studies, and all but thirteen of the studies were thrown out right away because the methodology was so lousy that it's hard to really draw any reliable conclusions from them.<sup>37</sup> But of the studies that have been done, I think—certainly in the view of the National Academy of Sciences—a fair summary would be that there is mild evidence supporting a modest positive effect for native-language instruction, bilingual education, in contrast with English-immersion or English-only instruction.<sup>38</sup>

Nevertheless, the debate in the political arena makes relatively little reference to the research literature. Instead, there are anecdotes about grandmothers and how they learned English, and there is lurking just beneath the surface, in my view, a subtext about culture, color, and race. Is the motivation to dismantle bilingual education in California genuinely “we’ve got to do something more effective for the kids,” or is there an agenda fueled by resentment, fueled by nativism? I suspect that if the true motivation were effectiveness, the research base would play a larger role in the public debate.

In California in 1976, 78% of the population was Anglo.<sup>39</sup> Today, barely 50% of the population is Anglo.<sup>40</sup> Since 1990, there has been a large population growth in California, 89% of that growth Latino and Asian.<sup>41</sup> Within a few years, there will be no majority race in California.<sup>42</sup> In four or five decades, barely 50% of the population will be Anglo.<sup>43</sup>

In the schools in California, the number of English-language learners, students trying to learn English, has increased by 400%.<sup>44</sup> Fully a quarter of all of the public school students in California are trying to learn English.<sup>45</sup>

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37. See Jay P. Greene, *A Meta-Analysis of the Effectiveness of Bilingual Education 1-11* (1998) (published as a working paper by the Tomas Rivera Policy Institute in Claremont, California) (on file with the *Fordham Law Review*).

38. See *Improving Schooling for Language-Minority Children: A Research Agenda 139-62* (Diane August & Kenji Hakuta, eds., 1997).

39. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 36* (110th ed. 1980).

40. See 1997 Abstract, *supra* note 24, at 34.

41. Compare *id.*, with Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 24-25* (111th ed. 1991).

42. See 1997 Abstract, *supra* note 24, at 38.

43. See *id.* at 19.

44. See John Mockler, Editorial, *The Wrong Turn for State Education*, Sacramento Bee, Mar. 27, 1991, at B7.

45. See Susan White, *Opportunity May Knock, But Only for Those who Do Their Homework*, San Diego Union-Trib., Aug. 14, 1996, at D4.

These demographic and cultural shifts represent an enormous challenge. At the heart of the bilingual debate is the question of national identity, but we are not discussing it in those terms.

#### VISION

Now let me shift from taking stock to talking about vision. And I confess that in taking stock I tended to focus a little bit on the glass is half-empty rather than the glass is half-full, but that's the kind of day I'm having. So let me move on to the vision thing because, obviously, in saying "where do we go from here?" it would be nice to have some sense of what the destination is. I divide the vision into pieces: one relates to community; the other relates to substantive justice.

With respect to community, I am looking for a metaphor that describes the kind of community, the kind of nation, we want. How are we to grapple with our increasing diversity in a constructive way; how can we avoid, as President Clinton would put it, the "apocalyptic Bosnia" scenario—not next year, maybe not five years from now, but twenty-five years from now.

The best metaphor or analogy that I have been able to come up with is religion. The United States, it has been reported, is the most observant, the most religious, among all the industrialized nations.<sup>46</sup> And yet, we've not achieved that intensity of spirituality or religious practice by all of us worshipping God in the same way; quite the contrary. And I think, by and large, we are quite proud of the fact that we are a religiously diverse nation. We do not simply *tolerate* our religious differences (we increasingly do so, though certainly not in every respect). I think most of us actually *celebrate* the fact that we live in a society in which religious difference is part of the fabric of our lives. We point to this diversity with pride because it is a manifestation of the liberty we revere.

In this, it seems to me, is a picture of what we want with race and ethnicity. You do not surrender your religious identity in order to be an American, nor should you surrender your racial or ethnic identity (to whom?) in order to be an American. We should not simply tolerate our racial and ethnic differences; we should genuinely celebrate them as a source of richness in our lives and a source of strength in our social and economic endeavors.

But in addition to this sort of celebration aspect of a community vision, there also, it seems to me, has to be a connection aspect. I mean, we do not want everybody huddled in their own enclave celebrating the fact that there are lots of enclaves. We would also like to have some kind of communication, some kind of intercourse, among, between, these enclaves, a mutuality and a connection, a better strat-

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46. See Wiliam Pfaff, *To Each National Culture Its Own Force of Capitalism*, Int'l Herald Trib., Dec. 2, 1997, at 8.

egy for dealing with difference, for conceptualizing who is “us” and who is “them”—because let’s remember the basic problem. The basic problem is that if we are going to cohere as a society, we’ve got to care about each other and be willing to invest in each other; and if color gets in the way of caring, we are in trouble.

So this vision of community, then, is one that involves the celebration of our differences, but also involves intercourse, which implies a model of national identity that is not melting pot, that is not assimilation, but nor is it enclave-nationalism.

Now, yes, there is community in this vision, but what else can be said? Yes, we deal better with difference, but what else must be said? The answer, of course, is opportunity, because we have to come to grips with the disparities I described earlier.

The vision, it seems to me, must be that a Martian will look at America and detect no evidence, discern no evidence, that here is a society with a history of racist supremacy ideology. We will have leached from the fabric of our social and economic life the taint, the legacies, of slavery, of conquest, of colonization.

To put it differently, in a Rawlsian perspective, you are standing behind the veil of ignorance, you don’t know what your color is going to be.<sup>47</sup> What kind of distribution of benefits and goods do you want as related to race? What kind of lottery in life’s chances do you want, the lottery of a black man or woman, the lottery of a Latino, the lottery of a white? The answer, of course, is that we would like the lotteries to be identical. If we prefer, behind this veil, to be members of one subgroup rather than others, it should be on the same basis that we might prefer to be one religions rather than another. It should not be because the choice of subgroups will determine the opportunities in life.

The disparities and the discrimination that we observe today are both evidence of the legacy of disadvantage and they are barometers of justice. So in the vision that we have to work for, it is one in which the signs, the signals, suggest a nation healed, a history reconciled.

Now, these two agendas, community and substantive justice, are obviously somewhat separable, but not entirely. In particular, it seems to me it is impossible to suggest that we have healed ourselves in terms of racial understanding and connection without simultaneously having done something pretty dramatic and effective about the disparities.

#### PROGRAM

Finally, let me turn to the issue of program. What are we going to do? If that is a plausible vision, if the way in which I have taken stock

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47. See John Rawls, *A Theory of Justice* 136-52 (1971).



of America's current situation makes some sense, where do we go from here? Let me talk a little bit about law, a little bit about policy and politics, and finally, a little bit about values.

With respect to law, in the short term the critical issues are to defend affirmative action and to defend disparate impact doctrine, although not because affirmative action is a cure for all ills. It certainly, absolutely, definitely is not. All that affirmative action does is crack open the door so that those who are already well prepared to take advantage of the opportunities have a chance to get in the door. But it doesn't do anything for all of the folks who are being denied opportunities or who have been unable or unwilling to take advantage of the opportunities before them. Affirmative action is a limited tool, but I think it is very important to hold on to it within the legal framework.

In the longer term, the legal agenda is to try to create enforceable statutory rights to a foothold on the lower rungs of the opportunity ladder—for example, in K-14 education. I am not talking about recirculating twenty-five-year-old arguments about substantive due process rights to education, although such claims may be available under some state constitutions. I am saying statutory claims—for example, statutory arguments about a minimum opportunity to learn in education, or different strategies with respect to housing assistance, and the like.

The point that I am trying to make here is that leveraging the legal system to create enforceable interests continues to be an important strategy because the political system too often fails minorities and the poor, and we must work to improve that.

With respect to policy and politics, surely the principal venue for advancing the opportunity agenda, I would simply say this: the challenge is to take the inexorable demographic change that we see and channel it into a progressive politics of opportunity, rather than into a Balkanization of our civic life.

The demographics are suggesting increasing diversity, and the question is: Will we have a strategy in our politics to deal constructively with that increasing diversity, or will we splinter? In the short term, the strategy in politics and policy has to be multi-racial coalitions and, I think, a radicalization of our insistence upon concrete measures in the opportunity agenda. But in the longer term, the vision has to be for a politics that is trans-racial in character and for a policy agenda that is trans-racial in character.

The difficulty is that too many of us want to leap over the short term and go directly to the long term, to leap over the current problems and challenges of color and directly say that all public policy, all private practice, must transcend race and be color blind. What we need, in this short-cut formula, are race-silent anti-poverty strate-

gies writ large, rather than strategies that will do something about the festering and intense nature of disadvantage in minority communities.

The danger with the strategy of leapfrogging to a trans-racial political and policy agenda is that we cannot get there. We cannot get there because color systematically disables efforts to form coalitions, and color systematically poisons civic discourse on aspects of the opportunity agenda because there is a corrosive, corrupting subtext of misunderstanding, stereotypes, fear and loathing.

Why won't affluent suburbs invest in the health of the inner city? It's clearly in their economic interest. So, why? There are several reasons, but *one* of them is color. And so, to build the moral and the political consensus for bold measures one needs to also have a strategy for confronting the problem of color.

Turning to the program on values, I consider this the most important aspect of all, because of what I discussed earlier. In the conversations with Clinton, perhaps the most important lesson to me was how much of what we argue about can be understood in terms of value choices—and, indeed, that is a lot of what is in my book.

If I am right that our disagreements are rooted in conflicts in values and perceptions that are rooted in differences in communities, then the real issue for the future as a strategy matter is to answer the question: “How do you change people's values?”

How do you change people's values? Here is what you should *not* do: just talk, expecting that rationality and evidence will do it.

Think back. I am sure everybody here took a course in probability theory—well, maybe not. There is this thing in probability theory called Bayes' Theorem, which is a normative theorem that answers the following question: If you start with a guess about the likelihood that some asserted fact is true, and then you get more information, how should you revise your guess in light of the additional information?<sup>48</sup>

Consider this experiment: I give you a coin you have never seen before. It is a Croatian dinar. I ask you the question, “Do you think it's a fair coin? That is, what do you think the probability is of flipping it and getting a head rather than tail?”—now, I assume there is a head on a Croatian dinar—and, of course, you will say, “Well, 0.5, 50% chance, 50/50, fair coin.” That is your beginning, or a *priori* estimate. Now flip the coin five times—heads, heads, heads, heads, heads. Now I ask you, “Now what do you think the odds are that if you flip it you get heads?” Bayes' Theorem will tell you that when you do the arithmetic the numbers comes out to, say, 0.82. You really ought to revise your estimate and guess an 82% change of getting a head. But the experimental psychologists tell us that real human beings, like most of

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48. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1353 (1971) (discussing Bayes' Theorem).

us in this room, will not guess 82, will guess perhaps 55. Very slow to change, very slow to update our prejudice.

Flip the coin more times, ten times, ten heads in a row. Bayes' Theorem says there is no way the coin is fair. That instead of 50-50 you should estimate the odds at say, 95-5. But real people will say something like 70%. Flip the coin the eleventh time—and suppose it is tails. Real people will say, "There, see, 50/50! I told you it's a fair coin!" Just one little piece of evidence that tends to confirm your prejudice and you go right back to square one.

The point is that real people are very hard to educate with the facts, very hard to educate out of their prejudices; and, moreover, any new evidence that tends to confirm where they were in the first place and they regress—which was the point that I was making to Clinton when we were preparing him for the press conference. You can't just put it out there, "here's the evidence on discrimination." It really is hard to teach.

And values are even harder to change than perceptions. So we need a strategy for changing values. In particular, we need to resuscitate the integration ideal, and I believe we need to revive the role of spirituality in civil rights discourse. Now, this is a somewhat bizarre claim, perhaps.

It used to be in the 1960s that leaders made a great deal of explicit reference to theological values when they were talking about racial and ethnic justice. The secularization of the civil rights movement, which occurred simultaneously with the disintegration of the multi-racial coalition in the civil rights movement in the late-1960s, has impoverished the tools of advocacy. We are relying too much on the Fourteenth Amendment and not enough on the Torah, the Koran, and the New Testament.

#### PRESIDENT CLINTON'S RACE INITIATIVE

Let me close by suggesting briefly how Clinton's Race Initiative reflects some of what I just said—and again, I want to emphasize that I am only a consultant to the President on this thing, I'm designated schmoozer, rather than the person in charge, which means I have deniability if it gets badly off-track. But I know that the President agrees with this characterization, so let me offer it to you.

To make a difference, Clinton's effort has to proceed along two tracks:

- The first track is a policy track. Yes, there needs to be policy ideas, no question. I love policy ideas. I am a committed-in-my-bones policy wonk. I eat public policy for breakfast. You need changes in public policy and private practices in order to change the social and economic facts in people's lives. That's fine. Okay, track one is policy. Great.

But the problem is that if I give you my bold idea for saving inner cities, that bold policy idea will be dead the moment it falls from my lips because there is no moral or political consensus for the bold policy measures needed to make a meaningful difference. The simple proposition is that one reason we do not have that consensus is that to take bold measures we have to care about each other, and color gets in the way of caring.

• So the second track of the Initiative—the values track, if you will—has to be about community. It has to be about a strategy for changing people's perceptions and values so that they will draw the circle wider—change their perception of who is “us” and who is “them”—change values in order to create the moral and the political predicate for bold policy measures.

Now, the second track is often called the “national conversation on race”—a phrase stolen, ironically, from Lani Guinier<sup>49</sup>—but that is a bit of a misnomer, because it is not about just dialogue. It cannot be. This is not about closing the “chat gap”; it's about closing the opportunity gap. So there must be policy as well.

And the conversation is not an end in itself. The conversation has to be the first step in creating understanding and moving people to a different sense of community through actions, through *experiences*, that will shape people's values.

Now, how? What kinds of conversations, what kinds of experiences, will change people's values? The answer is I don't know. But my premise, and the President's premise, is that the question is both researchable and teachable, and vitally important. A major component of the Race Initiative, therefore, is a search for what we call promising practices, looking for the effective strategies for changing people's values and people's sense of community.

Despite all the faltering steps along the way, I am cautiously optimistic that by the end of the year the President will actually have something to say on the subject that might be useful. Nonetheless, meaningful changes in values and community will likely fail if we expect that leadership on this issue is going to come from Bill Clinton or any large group of political leaders talking to us on a television tube in four-and-a-half-second sound bites. It will not work, because this is too hard. It's not rocket science; it is harder than rocket science. The only way we are going to get it done is if there are leaders in institutions and communities around the country who will do the homework to figure out the strategies that could make a difference—leaders who will take it upon themselves to be soldiers for justice.

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49. Nadine Brozan, *Chronicle*, N.Y. Times, Dec. 1, 1994, at D34.