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# CONCLUDING THOUGHTS: SPEAKING TO BE UNDERSTOOD: IDENTITY AND THE POLITICS OF RACE AND THE DEATH PENALTY

Emily Hughes\*

## INTRODUCTION

In the opening pages of *The Alchemy of Race and Rights*,<sup>1</sup> Patricia Williams discloses that as she writes the first chapter, she is sitting in an “old terry bathrobe with a little fringe of blue and white tassels dangling from the hem,” is having a “bad morning,” and “*hate[s]* being a lawyer.”<sup>2</sup> Whatever the reader may think of these frank admissions, Williams positions herself in the text in a way that is both bold and vulnerable. Unfolding the complexity of her identity—from her penchant for wearing terry bathrobes to her elite status as a law professor—Williams attempts to make the complexity of the politics of race and rights both sensible and intelligible, “[s]ince subject position is everything in [her] analysis of the law.”<sup>3</sup> Williams’ strategy calls to mind bell hooks in *talking back: thinking feminist, thinking black*,<sup>4</sup> when hooks writes that “if [we] do not speak in a language that can be understood, then there is little chance for dialogue.”<sup>5</sup> By speaking in a language that is imminently understandable—who hasn’t sat in his or her bathrobe on a given morning with some self-doubt or reservation about his or her chosen profession?—Williams makes connections “between lived experience and social perception.”<sup>6</sup> In so doing, she digs through the politics of race and rights to expose its layered complexity, thereby creating a dialogue with her readers by pulling

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1. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

2. *Id.* at 3-4.

3. *Id.* at 3.

4. BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1989).

5. *Id.* at 78.

6. WILLIAMS, *supra* note 1, at 8.

them into the text and challenging them to not only read what she has to say, but to truly hear and understand it.<sup>7</sup>

More than ten years later,<sup>8</sup> the politics of identity and race are not only being reshaped and redefined from within, they have come head-to-head with the politics of the death penalty. In the keynote luncheon address at the Race to Execution Symposium, Bryan Stevenson challenged his audience to

begin thinking about the identity we need to take. Because . . . it is an identity that not only has to say what must be said to make these issues sensible and intelligible, but it's also an identity that has to be willing to confront decisionmakers, policymakers, judges, [and] sometimes lawyers who believe and accept that racially biased administration of the death penalty is something that we're supposed to just get used to.<sup>9</sup>

In framing the critical issues underlying the Symposium mandate, Stevenson challenges law professors, practitioners, and law students to think critically about the identity they must take<sup>10</sup> to confront and challenge the politics of race and the death penalty, rather than accepting and rationalizing the status quo.

The status quo is not a pretty picture. As Samuel Gross explains, death row is filled with “a substantial over-representation” of African Americans—“whites are 46%, African Americans . . . are 42%, and Latinos are 10%”—even though African Americans are only “about 13% of the population.”<sup>11</sup> While the racially-biased administration of the death penalty is disturbing, the “disparity is not totally surprising,”<sup>12</sup> in part because of the “unmistakable, unanswerable discrimi-

7. *Id.* (“I will try to write, moreover, in a way that bridges the traditional gap between theory and praxis. It is not my goal merely to simplify; I hope that the result will be a text that is multilayered—that encompasses the straightforwardness of real life *and* reveals complexity of meaning.”); see also Bryan Stevenson, Keynote Address at the DePaul University College of Law Race to Execution Symposium (Oct. 24, 2003), in 53 DEPAUL L. REV. — (2004).

8. Williams published *The Alchemy of Race and Rights* in 1991; hooks published *talking back: thinking feminist, thinking black* in 1989.

9. Stevenson, *supra* note 7, at 1706-07.

10. *Id.* at 1700. Stevenson stated:

[W]hile I'm not someone who engages in identity politics as such, I do think the kind of identity we create for ourselves . . . is key to our ability to effectively say something that makes a difference. And you can sometimes say something sensible . . . but if you haven't supported what you say, what you do, with a kind of witness, with a kind of structure, with a kind of integrity that allows what you say and do to be meaningful, a lot of times it doesn't have significance.

*Id.*

11. Samuel Gross, Remarks at the DePaul University College of Law Race to Execution Symposium 6 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Gross Transcript].

12. *Id.*

nation by race of victim.”<sup>13</sup> What this means is that “[t]hose who were charged with killing white victims are far more likely to be sentenced to death than those who were charged with killing black victims.”<sup>14</sup> David Baldus, author of the famous “Baldus Study” discussed in *McCleskey v. Kemp*,<sup>15</sup> uses statistical analysis to document race-of-victim discrimination within the administration of the death penalty.<sup>16</sup> Baldus proffers that “race-of-victim discrimination is both unconstitutional and immoral” and contends that the execution of many offenders, who would be serving terms of life imprisonment but for the race of their victims, seriously impairs the legitimacy of the death penalty system in which it exists.<sup>17</sup>

Underscoring the statistically grounded observations of both Baldus and Gross are the personal observations of Eugene Pincham, an African-American attorney and former judge who was born in Chicago, then grew up in poverty in Limestone County, Alabama, eventually working his way through both college and law school.<sup>18</sup> Pincham states that he does not “know why it surprises us that racism is involved in the death penalty. . . . Racism is involved in every walk of life” and we must be “willing to recognize it and confront it, do something about it.”<sup>19</sup>

Recognizing and confronting the racism inherent in the administration of the death penalty is at the forefront of Bryan Stevenson’s message. In explaining the importance of confronting the discriminatory

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13. *Id.* at 9. “[N]early half of all homicide victims in the United States are African American,” while “only 12% of those who . . . have been executed in the past 30 some years, have been executed for killings of black victims as compared to about 80% for white victims. A disproportion . . . on the order of a factor of 6.5.” *Id.* at 8.

14. *Id.* at 9.

15. 481 U.S. 279 (1987).

16. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004).

17. *Id.* at 1414, Part III.

18. Albert Alschuler, Remarks at the DePaul University College of Law Race to Execution Symposium 98 (Oct. 24, 2003) (transcript on file with DePaul Law Review). See also R. Eugene Pincham, Remarks at the DePaul University College of Law Race to Execution Symposium 100 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Pincham Transcript]. Pincham explained to the audience:

You have just been misinformed about me. I did not grow up in poverty. We were not indigent. . . . My family was not impoverished. We were not economically deprived. We were not economically or socially maladjusted. We was “po.” I did not say poor because we couldn’t afford the four letters it took to spell the word. We was “po” . . . p.o. As a matter of fact, the shack in which I was reared in Limestone County, Alabama, it leaked so bad, the roof was so bad . . . we had to go outdoors to stand under a tree when it rained to keep from getting wet.

*Id.*

19. Pincham Transcript, *supra* note 18, at 102.

status quo, Stevenson recalled the United States Supreme Court's conclusion in *McCleskey v. Kemp* that "a certain amount of bias, a certain quantum of discrimination, if you will, is in the [C]ourt's opinion inevitable."<sup>20</sup> Turning pointedly to his audience, Stevenson challenged that "we are gathered in this room talking about race and the death penalty while the United States Supreme Court has already said it's pointless for [us] to be here. These problems are inevitable."<sup>21</sup> Rather than succumb to such defeatist attitudes, however, Stevenson highlights the foresighted thinking of Justice William J. Brennan's dissent in *McCleskey*, wherein Brennan "ridiculed the [C]ourt's analysis as a 'fear of too much justice.'"<sup>22</sup>

To speak in a language that can be understood, therefore, we must "say something much bolder, much louder, much clearer if we're going to make any progress with these issues."<sup>23</sup> We must "think about . . . the way we position ourselves"<sup>24</sup> and "be hopeful about what we can do."<sup>25</sup> Stevenson suggests that we must "[c]hange not only the thinking of the decisionmakers but change the decisionmakers [themselves]."<sup>26</sup> The decisionmakers whose thinking and identity must change include five key players: the jury, judge, policymakers (including the media), prosecutors, and defense attorneys.<sup>27</sup>

Using Stevenson's five-part framework provides a prism through which to view the comments of the other conference speakers, a juxtaposition that enables critical analysis about the identity of each of the

20. Stevenson, *supra* note 7, at 1706. See *McCleskey*, 481 U.S. at 312 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.").

21. Stevenson, *supra* note 7, at 1706.

22. *Id.* In his dissent in *McCleskey*, Justice Brennan stated:

The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of *McCleskey's* claim would open the door to widespread challenges to all aspects of criminal sentencing. . . . Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than *McCleskey* documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.

*McCleskey*, 481 U.S. at 339.

23. Stevenson, *supra* note 7, at 1707.

24. *Id.* at 1709.

25. *Id.*

26. *Id.* at 1710.

27. See *id.*

decisionmakers, as well as valuable insight into how each of the decisionmakers thinks—a first step to speaking to each of them in a language that can be understood in order to subvert any residual “fear of too much justice.”<sup>28</sup>

## II. THE IDENTITY OF THE JURY

In their seminal work through the Capital Jury Project,<sup>29</sup> William Bowers and Marla Sandys designed a project to discover “how real jurors in real cases think and decide things.”<sup>30</sup> The findings that Bowers and Sandys discussed at the Race to Execution Symposium included the observation that “the race of juror[s] is figuring in a pronounced way in the imposition [of the death penalty] in capital sentencing.”<sup>31</sup> Specifically, if the defendant is black and the victim white, the “race of the juror [has] the most pronounced affect on the sentencing outcome[s].”<sup>32</sup> For example, “[w]hen there are five or more white males on the jury, the percent of those cases that went on to [result in] death sentences is 71%. When there [are] fewer it’s 30%.”<sup>33</sup> In contrast, if “there [are] one or more black men on the jury, the likelihood of a death sentence is far reduced, from 70% to 36%.”<sup>34</sup> Bowers and Sandys explain that race “permeates these decisions and oftentimes it comes in, in the most obscure ways you would [not] necessarily expect.”<sup>35</sup> In sum, they could “go through every one of these cases that we have and show where race has come into play even when you have an all white jury.”<sup>36</sup>

Recognizing both the reality of how race affects juror outcomes and the difficulty of learning each juror’s position on this issue, Pincham explained that when he selected a jury, he “tried to make people real-

28. *Id.* at 1706.

29. See William J. Bowers, Marla Sandys & Tom Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497 (2004).

30. William J. Bowers, Remarks at the DePaul University College of Law Race to Execution Symposium 81 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Bowers Transcript].

31. *Id.* at 86.

32. *Id.*

33. *Id.*

34. *Id.* at 87.

35. Marla Sandys, Remarks at the DePaul University College of Law Race to Execution Symposium 93 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Sandys Transcript].

36. *Id.* at 96 (“There are cases where the jurors [on all-white juries] talk about how [they] have to talk about blacks from the attitudes of blacks because [the defendant] was black. And they’re talking to an all-white jury and saying that they can therefore understand what is going on.”).

ize that bigotry and bias are natural human emotions.” He went on to state: “And it’s hypocritical, it’s just an outright lie to sit up and say I don’t have any biases. It’s crazy. I tried to make people comfortable with their biases and acknowledge that they had them and commit not to allow their biases to influence them.”<sup>37</sup> The goal of giving jurors the space to be comfortable to acknowledge their biases, while at the same time enabling jurors to commit to not allowing their biases to negatively impact their ability to make the right decision, is easier said than done.

Part of the reason this goal is so difficult is because of the “empathic divide”<sup>38</sup> that Craig Haney has identified. In Haney’s work analyzing racially discriminatory death sentences, he discusses how structural racism underlies the “empathic divide” between blacks and whites, creating a tendency for white jurors to withhold compassion if the defendant is black in ways they would not withhold compassion if the defendant was white.<sup>39</sup> Haney goes on to say that black and white jurors “actually hear and weigh evidence differently, in cases in which the same evidence is offered on behalf of white defendants as opposed to African-American defendants.”<sup>40</sup> This not only means that white jurors “judge [exactly the same evidence of] mitigation as more mitigating . . . when it is offered on behalf of a white defendant, as opposed to a black defendant,”<sup>41</sup> but it also means that white jurors may actually switch whether they view evidence offered in mitigation as aggravating or mitigating evidence, depending on whether it is offered on behalf of a black or a white defendant.<sup>42</sup> In short, because “the barrier is much higher when the defendant is African American, that empathic divide is a much more difficult one [for white jurors] to get over, and so they hear the same evidence, but they don’t use it in the same way . . . [because] they don’t attach the mitigating weight or significance to it when it is offered on behalf of African-American defendants.”<sup>43</sup> While this empathic divide is not “impossible to traverse,” it is nonetheless “difficult to get past.”<sup>44</sup>

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37. Pincham Transcript, *supra* note 18, at 110.

38. Craig Haney, Remarks at the DePaul University College of Law Race to Execution Symposium 224 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Haney Transcript].

39. *Id.* at 224.

40. *Id.* at 223.

41. *Id.*

42. *Id.* at 224.

43. *Id.*

44. Haney Transcript, *supra* note 38, at 224.

As difficult as it may be to bridge the empathic divide, Raymond Brown suggests that one way to do so is by speaking to the public directly about these issues.<sup>45</sup> According to Brown, "It is somewhat of an elitist notion to think that fundamental notions of justice, whatever they are, whether they have psychological or statistical or legal nuances, cannot be understood as well by those who do not have our formal training. It is a conceit, it is arrogant, and it is a failure to come to grips with our duties and our responsibilities."<sup>46</sup> Andrea Lyon agrees, explaining that one way to traverse the empathic divide is to acknowledge the importance of race when it is both a salient and nonsalient part of the case.<sup>47</sup> When race is salient, "direct comment through cross-examination, direct examination, or in opening or closing statements is warranted."<sup>48</sup> Lyon explains the techniques of "self-disclosure, not judging the feelings the jurors might have, and helping jurors to get to a place at which they can understand and adjust for what they feel" as methods by which an attorney might engage in an "honest unveiling of the obvious."<sup>49</sup> Even when race is not salient, however, race may still remain a factor that must be addressed.<sup>50</sup> In such circumstances, one way to bridge the empathic divide caused by race is to provide jurors a way to see and feel the concept the attorney hopes they will understand. Lyon provides the example of a capital defendant and victim who are both members of the same minority group. The attorney would like the jury to understand that the defendant was armed because of the dangerousness of the neighborhood in which he lived, but the attorney worries that communicating this idea will only distance the jury further from the defendant.<sup>51</sup> Rather than telling the jury the neighborhood is dangerous, the attorney shows the jury through a video camera on a street corner that records the events of a typical day.<sup>52</sup> In this way, the attorney bridges the empathic divide otherwise caused by race—no matter how nonsalient it may be—in order to help "jurors to get to the place at which they can understand and adjust for what they feel."<sup>53</sup>

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45. See generally Raymond Brown, Remarks at the DePaul University College of Law Race to Execution Symposium 301 (Oct. 25, 2003) (transcript on file with DePaul Law Review) [hereinafter Brown Transcript].

46. *Id.* at 315.

47. Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1659-61 (2004).

48. *Id.* at 1660.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Lyon, *supra* note 47, at 1660.



George Kendall takes Brown's demand to "come to grips with our duties and responsibilities,"<sup>54</sup> as well as Stevenson's charge to rethink the identity of juries,<sup>55</sup> by proposing radical changes in the very method by which juries are chosen.<sup>56</sup> Rather than using peremptory strikes to eliminate jurors, Kendall suggests that attorneys consider the idea of first qualifying a pool of jurors, then allowing each side to pick half of the jurors for the petit jury from the qualified pool.<sup>57</sup> Given that the current method of jury selection has failed to work despite the numerous post-*Batson*<sup>58</sup> contortions the Supreme Court has tried,<sup>59</sup> Kendall questions the harm of at least trying something different.<sup>60</sup>

Stevenson's charge to first understand, then change, the identity of the decisionmakers who form capital juries is both complicated and hotly debated. While the speakers may not have reached a consensus on how best to traverse the empathic divide that race creates in capital juries, they all agree that it is not only possible to do so, but that it absolutely must be done.

### III. THE IDENTITY OF THE JUDGE

At the most basic level, the racial identity of judges must change because "[t]here are too few people of color in the judge role."<sup>61</sup> The racial bias that some white judges bring to the bench can be absolutely blatant, such as a Florida judge who used racial slurs in open court when he referred to the parents of a black capital defendant,<sup>62</sup> but the more subtle effects of race also threaten our ability to strive for equal justice under the law, in part because of their hidden and hard-to-identify aspects.<sup>63</sup> Indeed, George Kendall notes the reality of elected

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54. Brown Transcript, *supra* note 45, at 315.

55. Stevenson, *supra* note 7, at 1711-12.

56. George Kendall, Remarks at the DePaul University College of Law Race to Execution Symposium 32 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Kendall Transcript].

57. *Id.*

58. *Batson v. Kentucky*, 476 U.S. 79 (1986).

59. See Kendall Transcript, *supra* note 56, at 31 (stating that *Batson* has been a "massive disappointment because again . . . the interest in protecting the prosecutor's discretion to use a peremptory challenge is way overvalued against the interest in ferreting out and remedying and ending discrimination").

60. *Id.* at 32.

61. Stevenson, *supra* note 7, at 1710.

62. *Id.* at 130.

63. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

judges needing the support of the white community instead of the black, and how this dependency leads to bias.<sup>64</sup>

Sheri Lynn Johnson discusses not only the covert bias that exists in all decisionmakers within the capital jury system, but also the way such bias can be utterly unconscious.<sup>65</sup> In a simple experiment conducted within a few minutes at the Symposium, Johnson timed audience participants as they attempted to pair white faces with “good” connotation words and black faces with “bad” connotation words, then she timed participants again as they paired white faces with “bad” connotation words and black faces with “good” connotation words.<sup>66</sup> After tallying their own results, the audience—a group composed of capital defense attorneys, academics, and students—seemed truly surprised at how race filtered into their own thinking.<sup>67</sup> Johnson has administered the test to approximately one million people, and the results indicate that “about three quarters of white Americans find it substantially easier to classify white with good than they do to classify black with good.”<sup>68</sup> While African Americans are “a more complicated group . . . , [o]n average they find it equally easy to lump [whites and blacks] all together, but in fact if you look at individual scores, there’s a wide variation.”<sup>69</sup> Johnson’s observation that “most people are surprised to see these results for themselves”<sup>70</sup> underscores the possibility that unconscious racism is possibly the most dangerous bias of all because people are probably not trying to overcome something they do not even realize is within themselves.<sup>71</sup>

#### IV. THE IDENTITY OF THE POLICYMAKER

Rory Little served as an Associate Deputy Attorney General at the United States Department of Justice from 1996 until 1997, where he was responsible for selecting the federal cases in which prosecutors

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64. Kendall Transcript, *supra* note 56, at 26.

65. Sheri Lynn Johnson, Remarks at the DePaul University College of Law Race to Execution Symposium 41-42 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Johnson Transcript]; see also Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1534 (2004).

66. See Eisenberg & Johnson, *supra* note 65, at 1543 (describing the Implicit Association Test).

67. See Sandys Transcript, *supra* note 35, at 89 (discussing Johnson’s work).

68. Johnson Transcript, *supra* note 65, at 37.

69. *Id.*

70. *Id.* at 41.

71. See *id.* at 41-42 (“So I don’t know that people are trying to overcome something that they don’t know is there, which is of course the evangelistic reason that I’m giving you this test as well as demonstrating it so you get to see it in yourselves.”).

could continue pursuing the death penalty.<sup>72</sup> His writings about the federal death penalty not only reveal the geographic and racial disparity in its administration,<sup>73</sup> but go one step further by challenging the very conceptualization of the roots of the injustice. Little states that the supposedly “race-blind system” of choosing the federal cases for which prosecutors may pursue the death penalty does not work because “whatever is happening is happening earlier, when there’s no race blindness”<sup>74</sup> (i.e., the roots of the injustice manifest themselves long before the case is subject to the “race-blind” review).

One of the roots of this injustice is the role of the media in shaping policy-making decisions. Rob Warden, cofounder and Executive Director of the Center for Wrongful Convictions at Northwestern University School of Law and an award-winning legal affairs journalist, believes that, although the media has undergone a “revolution in [its] approach to criminal justice” and the public will see even more advances in the years to come,<sup>75</sup> injustices continue to exist. Raymond Brown underscored the fact that media reporting is a competitive economic enterprise operating under the mantra: “If it bleeds, it leads.”<sup>76</sup> In the last decade alone, while violence declined by 30%, the network coverage of violence increased by 500%.<sup>77</sup>

John Conroy is a staff writer for the *Chicago Reader*, an alternative news weekly with a circulation of about 150,000.<sup>78</sup> Conroy describes how the federal courthouse in Chicago has more than twenty courtrooms, but only one reporter from each major daily newspaper working those courtrooms, thereby ensuring that even the most diligent reporter inevitably “misses things.”<sup>79</sup> Similarly, the Cook County

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72. See Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591 (2004). See also Judge Nan Nolan, Remarks at the DePaul University College of Law Race to Execution Symposium 192-93 (Oct. 24, 2003) (transcript on file with DePaul Law Review).

73. See, e.g., Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999) [hereinafter Little, *Federal Death Penalty*]; Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791 (2001).

74. Rory K. Little, Remarks at the DePaul University College of Law Race to Execution Symposium 198 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Little Transcript].

75. Rob Warden, Remarks at the DePaul University College of Law Race to Execution Symposium 296 (Oct. 25, 2003) (transcript on file with DePaul Law Review) [hereinafter Warden Transcript].

76. Brown Transcript, *supra* note 45, at 303.

77. *Id.* at 303-04.

78. John Conroy, Remarks at the DePaul University College of Law Race to Execution Symposium 277 (Oct. 25, 2003) (transcript on file with DePaul Law Review) [hereinafter Conroy Transcript].

79. *Id.*

courthouse in downtown Chicago has a felony caseload of approximately 30,000 cases per year, and yet only one reporter from each paper is assigned to cover it.<sup>80</sup> It is within this context, Conroy explains, that he wrote the now famous series of articles exposing severe police brutality within Chicago's police force.<sup>81</sup> This brutality included one of the primary culprits—Commander Jon Burge—being thrown off Chicago's police force in 1993, as well as the City of Chicago admitting, in 1994, that torture had occurred.<sup>82</sup> As Conroy observed the trial in the county courtroom, he was sure he had only one crack at the story, certain that once he wrote his first article exposing the systemic brutality within Chicago's police force, the major dailies would pick up the story and run with it.<sup>83</sup> But to Conroy's surprise, "that didn't happen."<sup>84</sup> After Conroy published his first story putting the picture together, the "dailies didn't report it."<sup>85</sup> Conroy then acknowledged that the *Chicago Tribune's* coverage of such events is now vastly different than it was in 1993 and 1994, but he pointed out that "[e]ven today, the *New York Times* has only mentioned these torture cases twice: once in 1993 when the . . . police union was going to put Burge on a float in the St. Patrick's Day Parade, and then earlier this year when the four pardons [for torture victims] came down."<sup>86</sup>

Why is there such lack of coverage about such a riveting subject as police torture? Conroy proffers several reasons for this, including the observation that "to stand up for somebody who is on death row is difficult for a lot of people,"<sup>87</sup> but to stand up and say that person was tortured means that other people, who were not so honorable, were also tortured.<sup>88</sup> Put another way, while it is difficult to stand up for defendants facing capital crimes, it is almost unbearably difficult to stand up for defendants who are factually guilty of the crime for which they are accused, when standing up for those defendants means accusing a respected police officer of participating in system-wide discrimi-

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80. *Id.* at 278.

81. John Conroy, *House of Screams*, CHI. READER, Jan. 26, 1990, § 1, at 1; John Conroy, *This Is a Magic Can*, CHI. READER, May 27, 2000, § 1, at 1; John Conroy, *Deaf to the Screams*, CHI. READER, Aug. 1, 2003, § 1, at 1; see also JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE (2000).

82. Conroy Transcript, *supra* note 78, at 278.

83. *Id.* at 277.

84. *Id.*

85. *Id.* at 278 .

86. *Id.* On January 10, 2003, Illinois Governor George Ryan pardoned four men who had been sentenced to death in Illinois: Madison Hobley, Stanley Howard, Aaron Patterson, and Leroy Orange. See Steve Mills et al., *The System Has Failed*, CHI. TRIB., Jan. 11, 2003, at N19.

87. Conroy Transcript, *supra* note 78, at 279.

88. *Id.* at 279-80.

nation in our racial justice system. In Conroy's words, just as it is "unpalatable" for the citizenry, so is it unpalatable for newspapers and reporters "to be willing to say that this highly decorated, seemingly upstanding police officer, [a] very personable guy, pulled down a man's pants and put a cattle prod to his testicles and up his rectum."<sup>89</sup>

Another reason stems from the fact that the press is largely reactive. This means that, as a general rule, if the public is not outraged about an incident "or if the protest comes from what [the press] consider[s] [to be] the usual agitators, then the press feels no urgency" to report about that incident.<sup>90</sup> While such reasoning may help to explain why the major dailies did not pursue the police torture story in the way that Conroy anticipated they would, the analysis introduces a bit of the chicken-and-the-egg phenomenon: the stories that the major dailies choose to cover—and how they choose to cover them—may ultimately influence the stories about which the public is outraged (i.e., how can the public be outraged about an incident if they do not know it has happened?). Indeed, Marc Mauer proposed another way to view this dilemma by asking, "How do we advance the issue of race and what often [are] hostile political climate issues that we care about very deeply, [when] the public is not necessarily with us all the way on that?"<sup>91</sup>

Raymond Brown provides a partial answer by questioning any underlying assumption that the public is not passionate about race and justice.<sup>92</sup> A well-known former anchor for Court TV, Brown explains that as he travels around the country, people stop him because he looks familiar, although they do not always know why he is familiar. Once they determine that they have seen him on television,<sup>93</sup> Brown explains that people usually launch into a heated discussion of racial justice issues. While he may not always agree with their perspective, and while he is absolutely tired of discussing "whether O.J. did it,"<sup>94</sup> he finds that "inevitably people want to get involved in details, discussions about justice, and they care passionately about justice."<sup>95</sup> Brown underscores the importance of this passion by stating:

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89. *Id.* at 280.

90. *Id.*

91. Marc Mauer, Remarks at the DePaul University College of Law Race to Execution Symposium 332 (Oct. 25, 2003) (transcript on file with DePaul Law Review) [hereinafter Mauer Transcript].

92. Brown Transcript, *supra* note 45, at 306-07.

93. In addition to being a former anchor for Court TV, Brown hosts the nationally syndicated public television program *Inside the Law* and serves as a legal analyst for MSNBC.

94. Brown Transcript, *supra* note 45, at 307.

95. *Id.* at 306.

[T]he reason that a defense lawyer ever has a chance is if the defense lawyer has a limited belief in the possibility of human redemption . . . . [I]f you know that almost every[one] wants at some level to perceive themselves as fair and if you work past their biases about gender, about sexuality, about race, about these other characteristics, if you can get to that point where the person's sense of fairness lies, you've got a chance; you've got a chance and that's part of the good news . . . .<sup>96</sup>

Brown then turns his analysis into a question, asking if Lee Malvo was white, whether there “would be a more spirited discussion about the appropriateness of the death penalty for him in the national media, in the national discourse, the national conversation.”<sup>97</sup> In response to Brown's question, Scott Turow, who, in addition to being a renowned writer and attorney, also served on Governor George Ryan's Illinois Commission on Capital Punishment, volunteered the following observation:

What flashed into my mind [when I heard Brown's question] . . . was [when] John Walker Lynn was arrested, now he was an American citizen who, . . . to give credence to the prosecution theory, was responsible for the death of American soldiers and literally, George W. Bush remarked, when first confronted about this, “Sounds like a mixed up kid,” which is very much what I think [Raymond Brown] is talking about . . . . [Y]ou know, child of privilege . . . how does he end up as a[n] . . . Islamic extremist in Afghanistan, must be a mixed up kid . . . [w]hereas Malvo is named bloodthirsty murderer . . . .<sup>98</sup>

Two months after Turow made this observation at the conference, a Virginia jury sentenced Malvo to life in prison without the possibility of parole, rather than death.<sup>99</sup> The media commentary following this decision included descriptions of the brilliant defense strategy that resulted in the life verdict, as well as the fact that juries are reluctant to sentence a juvenile to death.<sup>100</sup> That a critical assessment of the inter-

96. *Id.* at 307.

97. *Id.* at 299; see also Raymond M. Brown, *The “American Taliban” vs. The “Junior Beltway Sniper”*: Toward Understanding Death, “Brainwashing,” “Terror,” and Race in the Court of Public Opinion, 53 DEPAUL L. REV. 1663 (2004) (discussing the media's failure to consider race as a distinguishing factor in Lee Boyd Malvo and John Walker Lindh's cases).

98. Scott Turow, Remarks at the DePaul University College of Law Race to Execution Symposium 347-48 (Oct. 25, 2003) (transcript on file with DePaul Law Review).

99. See, e.g., Adam Liptak, *Penalty for Young Sniper Could Spur Change in Law*, N.Y. TIMES, Dec. 25, 2003, at A12 (discussing the potential impact of the Virginia jury's December 23, 2003 decision to sentence Malvo to life in prison without the possibility of parole).

100. See, e.g., *Judy Woodruff's Inside Politics* (CNN television broadcast, Dec. 23, 2003) (Jeffrey Toobin, CNN legal analyst, stated, in response to breaking news of the Malvo sentence, that he “think[s] the defense strategy, which was to try this insanity defense, in the guilt phase, which really wasn't much of an insanity defense, was really just setting the stage for a penalty phase defense. It worked very well. I think it was extremely artfully designed. And obviously, very successful.” Then Jeanne Meserve, CNN correspondent, added that she had spoken with a juror

play between race and the jury's decision not to sentence Malvo to death was not part of the media reports begs a slight rephrasing of Raymond Brown's original question. If Lee Malvo had been white rather than black, would the media have been quicker to conclude that "justice was served" or the "right result [was] reached" by the jury's decision, rather than crediting the result to the skill of Malvo's lawyers or the jury's reluctance to sentence a juvenile to death?

While people may believe that the media's lack of critical race commentary in the reporting of Lee Malvo's verdict is a step in the direction of "race neutrality," a final observation by Brown complicates such a possibility. Brown maintains that the "idea of race" being behind us "wrongly influences the media," whether it be television, print, or radio. Even though the various media forms are "all . . . quite different and function by different rules," the media focuses the public on the question of whether the person "did it"—rather than focusing on the due process concerns involved in the question of whether the person got "a fair trial."<sup>101</sup> Taking this observation one step further, Brown offers the example of New Jersey, where both the media and law enforcement are "anxious" to execute a white person first, which "is perverse because the use of race is always perverse in these matters."<sup>102</sup> Brown maintains that the media and law enforcement's desire "to say we've got a white guy who's going to fry first" is "almost an attempt to engage in this denial to say race isn't a factor."<sup>103</sup> Such an analysis is not limited to New Jersey for, as Rory Little explains, "Timothy McVeigh looms as the poster child for the federal death penalty."<sup>104</sup> Just as both media and law enforcement

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who had sentenced John Allen Muhammad to death, but who said if she had been the juror for Malvo's case, she "could not [have] give[n] the death penalty to Lee Malvo . . . because he is 17 years old." Meserve summarized that the "juvenile issue weighed very, very heavily with her."); *Newsnight with Aaron Brown* (CNN television broadcast, Dec. 23, 2003) (After Aaron Brown provided background to the sentence by stating that to "many, everything about the case seemed tailor-made for the death sentence," Jeanne Meserve's voice-over stated, "Seventeen, that number appears to have saved Lee Malvo's life. Seventeen was his age when he went on a spree with John Muhammad, a spree that left 10 people dead."); *The O'Reilly Factor* (Fox News television broadcast, Dec. 23, 2003) (Fox News Senior Judicial Analyst, Judge Andrew Napolitano, responded to the question of how he would explain the verdict by stating, "The only rational explanation here . . . is the reluctance on the part of the good people of Virginia to impose death on a young man. That is really the only redeeming factor . . . that [he was] 17 at the time." Then, after Napolitano was questioned about whether the jury might not have also thought it was possible that Malvo was brainwashed, Napolitano responded that although it "probably went through their minds," he thought the jury ultimately rejected that rationale, because "it would be inconsistent for them to have rejected it in the trial and accepted it in the penalty phase.").

101. Brown Transcript, *supra* note 45, at 301-02.

102. *Id.* at 317.

103. *Id.*

104. Little Transcript, *supra* note 74, at 206; *see also* Little, *supra* note 72, at 1604.

may be “anxious” to execute a white person first—and just as the nation as a whole was “anxious” to execute Timothy McVeigh—so do the intentions of one of the chief arms of law enforcement, the prosecutor, play a critical role in the ultimate decision of which cases to pursue in the capital arena.

#### V. THE IDENTITY OF THE PROSECUTOR

Although the roots of injustice manifest themselves long before a federal case is subject to any “race-blind system” of choosing federal death cases,<sup>105</sup> it is important to analyze the identity and thinking process of those prosecutors who have the initial responsibility of pursuing the death penalty. As a preliminary matter, George Kendall points out that charging decisions today are still made overwhelmingly by white prosecutors. Kendall explains that “98% of the decisionmakers in the prosecutor’s office who were deciding whether to seek the death penalty in a given case are white.”<sup>106</sup> In light of Johnson’s observation that racial bias permeates the unconscious thinking process of “all the actors who play a part in capital cases,”<sup>107</sup> one must question any true possibility of achieving “race-neutral” justice.

Add to that mix the observations of Rory Little, and a bleak picture emerges. A former federal prosecutor himself, Little has explored the issue of “what federal prosecutors really think” and has offered two primary strands of commonality: (1) federal prosecutors really think their “defendants are guilty”;<sup>108</sup> and (2) even though most federal prosecutors may be aware of alarming statistics suggesting that racial bias permeates the administration of the death penalty, “they are puzzled by the idea that they should drop a particular specific prosecution because of race bias statistics generally.”<sup>109</sup> This means that regardless of other systemic problems about which federal prosecutors are aware, federal prosecutors do not think racial bias plays a part in their particular cases. “[T]hey believe they’ve looked through their files and they are prosecuting people who are not just guilty, but who are free of bias and not innocent. . . . And so these prosecutors look at each other and say, ‘I’m supposed to drop my case against a heinous, guilty person because of a statistical disparity that doesn’t exist in my case?’”<sup>110</sup>

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105. See *supra* notes 73-74 and accompanying text.

106. Kendall Transcript, *supra* note 56, at 25.

107. Johnson Transcript, *supra* note 65, at 34.

108. Little Transcript, *supra* note 74, at 204; see also Little, *supra* note 72, at 1602.

109. Little Transcript, *supra* note 74, at 200.

110. *Id.*



In the same way that Haney's "empathic divide" can be linked to jurors withholding compassion for a defendant who is black in ways they would not if the defendant was white,<sup>111</sup> so does the same structural racism operate within prosecutors. Little believes the idea of "unconscious racial empathy"<sup>112</sup> may be where the roots of "prosecutorial and investigatorial bias" actually begin.<sup>113</sup>

Juxtaposed against such an observation is Robert Warden's historical analysis of the ability of prosecutors to concede error in capital cases. According to Warden, prosecutors were historically "much more willing to admit they had made errors" than they are currently willing to do.<sup>114</sup> He attributes one of the main differences between then and now to the fact that, historically, the only people who were given the benefit of a trial were white, while black people who were accused of crimes were lynched.<sup>115</sup> In Warden's words: "Trials were for white people and when the mistakes were discovered, the prosecution seemed pretty willing to acknowledge them."<sup>116</sup>

Just as it is unsettling that prosecutors were more willing to admit error in charging decisions before the advent of DNA or other advances in technology, so is it alarming that prosecutors may be well versed in the systemic pervasiveness of racial bias in everything from charging decisions to jury verdicts, but refuse to acknowledge that such systemic problems apply in their own cases. Such an observation implies that no matter how many statistical studies document the pervasiveness of racial bias,<sup>117</sup> such studies may be landing on deaf ears. In the same way, the Supreme Court accepted the statistical validity of David Baldus's seminal work in *McCleskey*, then refused to find it relevant in *McCleskey's* case.<sup>118</sup> And thus the analysis comes full circle, harkening back to the Supreme Court's chilling concession that

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111. See Haney discussion *supra* notes 38-44 and accompanying text.

112. Little Transcript, *supra* note 74, at 204; see also Little, *Federal Death Penalty*, *supra* note 73, at 484-90.

113. Little Transcript, *supra* note 74, at 204.

114. Warden Transcript, *supra* note 75, at 287.

115. *Id.*

116. *Id.*

117. See Gross Transcript, *supra* note 11, at 14-15 (Prosecutors generally "prefer white juries and white jurors to black juries and black jurors," not only because African Americans are "more likely to be skeptical of the truthfulness of the representatives of the criminal justice system," but also because the "concreteness of the experience that African Americans have with the criminal justice system has other and deeper implications . . . . [O]ver 10% of African-American males between the ages of 24 and 29 are in prison right now.").

118. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

some amount of disparity in the administration of the death penalty is “inevitable.”<sup>119</sup>

It is precisely at such moments when Bryan Stevenson demands that one consider “what it means to do the difficult”<sup>120</sup>—to shake things up and make noise in a way that makes the demand for change not only heard and understood, but realized. To this call steps the defense attorney.

## VI. THE IDENTITY OF THE CRIMINAL DEFENSE ATTORNEY

Although the Constitution guarantees a criminal defendant the right to be represented by a competent attorney,<sup>121</sup> George Kendall emphasizes that a key component of establishing such competency is first establishing trust through a diverse defense team.<sup>122</sup> In fact, Kendall believes that diversity of race and gender on a defense team is so important that he “will not do a case anymore as a white defense lawyer involving a minority defendant unless [he has] a minority co-counsel with [him].”<sup>123</sup> Although the examples Kendall gives to underscore the importance of defense team diversity include a defense lawyer who had been the former imperial wizard of the Klu Klux Klan,<sup>124</sup> as well as another case in which the attorney referred to the defendant as “boy,”<sup>125</sup> such egregious examples are not the only reason diversity is important. The more subtle structural racism that Johnson describes provides even more reason to ensure diversity on a defense team<sup>126</sup> because it highlights the fact that even well-intentioned, seemingly empathetic defense attorneys may not be cognizant of the structural racism clouding their thinking. As Johnson addressed an audience filled with a substantial number of criminal defense attorneys and a majority of white participants, Johnson candidly stated, “[t]he short story is [I have met] the enemy, and he is us.”<sup>127</sup> One reason such structural racism infects even the most well-intentioned defense attorney’s performance is because it is unconscious.<sup>128</sup>

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119. *Id.* at 312.

120. Stevenson, *supra* note 7, at 1714.

121. U.S. CONST. amend. VI.

122. Kendall Transcript, *supra* note 56, at 27-28.

123. *Id.* at 27.

124. *Id.* at 28.

125. *Id.*

126. Johnson Transcript, *supra* note 65, at 38-39; see also discussion *supra* notes 65-71 and accompanying text.

127. Johnson Transcript, *supra* note 65, at 38.

128. *Id.* at 41. See also Eisenberg & Johnson, *supra* note 65.

William Moffitt, past president of the National Association of Criminal Defense Lawyers and a prominent criminal defense attorney who has appeared on a variety of media programs,<sup>129</sup> addressed the structural racism issue that afflicts even the best-intentioned defense attorney by calling for more African-American lawyers to practice in certain areas of the country.<sup>130</sup> As Moffitt explains, "I've had literally hundreds of lawyers say that they would never practice law in Virginia, and we desperately [need] black lawyers. We desperately need African-American lawyers in Virginia, if nothing other than to teach the system that they can perform at high levels."<sup>131</sup> While the mere addition of more diverse attorneys will not automatically cure the racism inherent in the administration of the death penalty, Moffitt explains that improving such diversity "does add a factor, and it is another factor and it needs to be looked at. It needs to be analyzed and studied."<sup>132</sup>

While Kendall, Johnson, and Moffitt's suggestions focus largely on improving the diversity of representation within the capital courtroom, both Stevenson and Brown challenge attorneys to broaden their thinking about how best to instigate change by expanding their practice to include certain litigation that is outside a defense attorney's traditional role. Such thinking, Stevenson explains, is critical if we are going to create an identity that allows us to deal with this problem of under-representation and "change the decisionmakers who affect who these decisionmakers are."<sup>133</sup> Brown echoes Stevenson's charge by drawing on Charles Hamilton Houston's assessment that "a lawyer who is not a social engineer is a parasite."<sup>134</sup> According to Brown, such a conception of "social engineering" means a "continuing struggle for justice."<sup>135</sup> Stevenson provides an example of this kind of social engineering by explaining that, although he and his attorneys at the Equal Justice Initiative in Alabama spend most of their time representing clients accused of capital crimes during postconviction, di-

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129. Moffitt's television appearances include: *The Today Show*, CNN's *Crossfire*, ABC News, CBS News, CNBC's *Rivera Live*, *America's Talking*, ITN British Television, *Newstalk Television*, MSNBC's *Hardball*, FOX News, and Court TV's *Cochran & Co.*

130. William B. Moffitt, Remarks at the DePaul University College of Law Race to Execution Symposium 61 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Moffitt Transcript].

131. *Id.*

132. *Id.*

133. Stevenson, *supra* note 7, at 1712.

134. Brown Transcript, *supra* note 45, at 297-98.

135. *Id.* at 298.

rect appeals, and trials, he has begun to broaden this mandate to include litigating certain civil rights violations as well.<sup>136</sup>

In a related vein, Brown suggests that another vision of “social engineering” includes Justice Anthony M. Kennedy’s decision in *Gentile v. State Bar of Nevada*,<sup>137</sup> which Brown cites for the proposition that “a lawyer has an obligation to defend his client in a court of public opinion.”<sup>138</sup> Brown stresses that such a mandate “means a whole new form of representation is emerging for which we are not trained . . . [as] lawyers in individual cases.”<sup>139</sup> The fact that this “new form of representation” is emerging may be evidenced by tuning into television shows such as *Larry King Live*, in which a string of lawyers readily come forth to defend their clients the moment any accusations are aired.<sup>140</sup> In contrast to the onslaught of media appearances for certain highly publicized cases (or certain highly publicized lawyers), other lawyers with high-profile cases maintain a policy of not commenting on their cases before the jury has rendered its decision.<sup>141</sup> Many of these lawyers point to ethical concerns in defending their clients in the “court of public opinion,” citing rules that limit an attorney’s ability to speak to the media about their clients’ cases.<sup>142</sup> Whether these ethical

136. Stevenson, *supra* note 7, at 1711.

137. 501 U.S. 1030 (1991).

138. Brown Transcript, *supra* note 45, at 320 (interpreting *Gentile*, 501 U.S. at 1043). Brown stated:

An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client’s reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

*Id.*

139. *Id.*

140. See, e.g., *Larry King Live* (CNN television broadcast, Dec. 18, 2003) (attorney Mark Geragos defending child molestation allegations against Michael Jackson).

141. For example, in the U.S. Northern District of Iowa, Assistant Federal Defender Jane Kelly represents Luke Helder, the alleged pipe bomber accused of blowing up mailboxes in the shape of a “smiley face” across the midwest. Despite the media frenzy surrounding Helder’s case, Kelly has not granted any interviews or commented to the press. See, e.g., Colleen Krantz, *Helder Likely To Take Plea Deal, Law Expert Says*, DES MOINES REGISTER, May 14, 2002, at 1A (“A representative of the U.S. Public Defender’s Office in Cedar Rapids, where Helder’s attorney, Jane Kelly, works, said the office won’t comment on the case or possible defense strategies.”); Colleen Krantz, *Helder To Use Insanity Defense*, DES MOINES REGISTER, Aug. 20, 2002, at 1A (“Kelly . . . has said she will not comment while the case is ongoing . . .”).

142. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (1999) (“A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substan-

restrictions represent another hurdle that must be either respected or overcome in the zealous representation of capital clients remains a divisive question within the criminal defense community.

Regardless of this disagreement, however, Brown also suggests that criminal defense attorneys must be ever cognizant of how they discuss general public policy (unrelated to specific clients) within public forums. To illustrate the importance of this point, Brown described his own experience debating the Attorney General of Pennsylvania about the relationship between DNA and capital crimes. Brown described painstakingly preparing for the debate, which was a radio broadcast before a live studio audience. It was not until after the debate was over that Brown realized he had both prepared for and spoken to the wrong audience—for it was not the limited studio audience who should have been Brown's primary concern, but the thousands of radio listeners whom he could not see, but who nevertheless were listening. Although Brown grounded his analysis in superior statistical knowledge of the number of people who have been wrongly convicted of capital crimes and sentenced to death row before advances in DNA later enabled them to prove their innocence, Brown realized that he had not prepared an adequate response to the Attorney General's retort.<sup>143</sup> In essence, the Attorney General's response was to "totally ignore the percentages" and to say that the new advances in DNA meant "we don't have to worry about innocence" because the reversal rate "meant that the courts [are] catching due process violations . . . so all [is] well and no innocent people [are] being sent to their death."<sup>144</sup> Based on this experience, Brown realized that the "failure of those of us who think it really matters that these disparities exist, to explain why they exist, why it matters, why it strikes at the very heart of the perception that our republic is a just place and stands for what it stands for, that failure is egregious."<sup>145</sup>

With this suggestion, Brown clarifies why criminal defense attorneys must examine, if not ultimately redefine, their personal position of what it means to have "an obligation to defend [one's] client in a

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tial likelihood of materially prejudicing an adjudicative proceeding"); *id.* at R. 3.6(b) (giving examples of areas to which a "statement" may not refer, such as the possibility of a plea of guilty or any opinion as to the guilt or innocence of a defendant or suspect); *id.* at R. 3.6(c) (specifying matters that a lawyer may comment about without elaboration, such as information contained in the public record); *see also* MODEL CODE OF PROF'L RESPONSIBILITY D.R. 7-107 (1969) (amended 1981) (trial publicity).

143. Brown Transcript, *supra* note 45, at 308-10.

144. *Id.* at 309-10.

145. *Id.*

court of public opinion.”<sup>146</sup> To do so means not only to redefine one’s own identity as a criminal defense attorney, but to comprehend the importance of understanding and engaging the broader identity of communities.

## VII. THE IDENTITY OF THE COMMUNITY

One of Stevenson’s final mandates is the challenge to “engage communities in a very different way.”<sup>147</sup> Although the public sentiment can make one feel like one is swimming upstream, Stevenson stresses that we cannot lose hope and must continue to “deal with the context” because if “we don’t deal with the context, . . . there’s just all this unmitigated anger and then anger will justify virtually anything.”<sup>148</sup> He explains that we have “to understand that anger . . . that context, and we cannot understand it until we begin to think very broadly about these issues . . . .”<sup>149</sup> Craig Haney provides one such example of widening the context in which to understand racial discrimination in the administration of the death penalty. He describes how, in Chicago alone, 95% of the children who are in foster care are African American,<sup>150</sup> but that “once they are in the child welfare system, African-American children are less likely to receive in-home services, less likely to receive mental health services, and [are] more likely to be institutionalized for their emotional problems.”<sup>151</sup> By stressing that “[v]irtually all of the studies of discriminatory death sentencing that we do begin their analysis long after these factors have taken life-altering affects,”<sup>152</sup> Haney underscores the importance of widening the context in which we understand the roots of racial discrimination as a first step to changing it.

Similarly, Coy Pugh, a former Illinois State Legislator, observes that part of the wider social context that must be taken into account begins “[w]hen you look at the fact that school districts [in] Chicago, which are predominantly black, receive a third of the resources that school districts in surrounding suburbs receive.”<sup>153</sup> Such an analysis mirrors not only Bryan Stevenson’s call to broaden the context in which we

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146. *Id.* at 320.

147. Stevenson, *supra* note 7, at 1712.

148. *Id.* at 1713.

149. *Id.* at 1714.

150. Haney Transcript, *supra* note 38, at 216.

151. *Id.*

152. *Id.* at 219.

153. Coy Pugh, Remarks at the DePaul University College of Law Race to Execution Symposium 349 (Oct. 25, 2003) (transcript on file with DePaul Law Review).

understand the roots of discrimination,<sup>154</sup> but also Rory Little's observation that discrimination in the administration of the death penalty happens earlier than the actual charging decision.<sup>155</sup>

Indeed, the necessity to recognize the identity of not only a broader national community, but a broader global perspective, is highlighted by both Raymond Brown and David Cole. Brown proffers that part of the background to the Supreme Court's decision in *Brown v. Board of Education* was the influence of the Cold War, which figured prominently in the brief filed on behalf of the Justice Department in support of Brown: twenty-five of the thirty-seven pages of the brief were devoted to placing the issue within the context of the Cold War.<sup>156</sup> This contextual framework included the observation that the "[United States's] struggle in the Cold War was part of what caused the mass media to begin to go to Birmingham and cover bus boycotts and to go to the south and cover student sit-ins. The perception of who we are to ourselves and to others matters, and justice is at the core of our right to say we [are] different if indeed we really are."<sup>157</sup> Similarly, David Cole explains:

[T]here may be some interplay between . . . civil liberties and the war on terrorism and the death penalty. . . . Ultimately, the government is going to be trying to execute some of the people in Guantanamo, and it's going to do it in military tribunals, where people don't have the opportunity to see the evidence against them, where their chosen counsel don't have the opportunity to see the evidence against them, . . . where they have no recourse to any independent review, much less habeas corpus, of any meaningful sense, and they are all foreign nationals [in] Guantanamo, from [forty-two] different nations and that has already generated a tremendous amount of criticism around the world, that undermines our efforts in the war on terrorism. [C]ooperation is going to be less, if people are critical of the way we are treating their people. . . . I think [that in] seeking to execute them in a trial that has the appearance of justice, I think [that] will bring a tremendous amount of political pressure to the United States, and that will come from around the world. . . .<sup>158</sup>

In essence, just as the United States's struggle during the Cold War was intricately related to the Supreme Court's decision in *Brown v. Board of Education*, so might the United States's war on terror instigate significant improvements in combating racial discrimination inherent in the administration of the death penalty.

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154. See generally Stevenson, *supra* note 7.

155. Little Transcript, *supra* note 74, at 204.

156. Brown Transcript, *supra* note 45, at 311.

157. *Id.* at 311-12.

158. David Cole, Remarks at the DePaul University College of Law Race to Execution Symposium 356-57 (Oct. 25, 2003) (transcript on file with DePaul Law Review).

## VIII. CONCLUSION

There is no more fitting conclusion to summarize the Symposium mandate than to recall Stevenson's stirring description of listening to deaf children sing in his church in Alabama and how the "the whole church had to make a lot of noise" before the children would begin singing, then once "[t]hey started a rhythm . . . , with the rhythm the whole church began to rock."<sup>159</sup> We must not be afraid to start a rhythm throughout the country, to engage the public, the media, the judges, the juries, the prosecutors, and even the defense attorneys, in passionate discussions about racial justice concerns. We must not be afraid to "do the difficult." For it is only by speaking in a language that can be understood—whether it be rocking the church or rocking the courtroom—that we create a chance for dialogue, and with dialogue, we create not only the hope for change, but the real possibility of it.

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159. Stevenson, *supra* note 7, at 1714.



