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PANEL: STATUS, PROGRESS, AND INTEGRATION OF LAWYERS OF COLOR IN THE LEGAL PROFESSION

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PANEL

STATUS, PROGRESS, AND INTEGRATION
OF LAWYERS OF COLOR IN THE
LEGAL PROFESSION

THE HONORABLE STERLING JOHNSON, JR.*

I would like to begin by thanking the committee for inviting me here. It has been an eye-opener. I never dreamed that I would see so many faces of color in academia, but just looking out over this audience. I can see that we have made some progress. The more you live, the more you learn. We have come a long way, yet we have a long way to go.

I have been around a long time. In fact, I have been in this profession since before many of you were born. I can remember starting out as a New York City police officer when black officers were not allowed to ride in radio cars. I can remember when I was an assistant United States Attorney; there were only three of us. I was the only one for a couple of years, then two others were hired. Eventually, I was appointed to the bench in the Eastern District of New York. I learned that, in over 200 years, out of the thousands of persons who had been appointed to the federal bench since 1789, less than 100 had been persons of color; African-Americans.

The first African-American district court judge in the United States was Dick Parsons.¹ There was a convention or seminar held in his honor in Chicago. They decided to have a dinner and luncheon for him, and he thought, "Why limit it to just me, why not all of the Article III judges in the country?" We flew in from all over the country. American Airlines provided the travel, Marriott provided the hotel, Ossie Davis and Ruby Dee were the master and mistress

* Federal District Judge for the Eastern District of New York. B.A., 1963, Brooklyn College; LL.B., 1966, Brooklyn Law School.

1. Judge Parsons was appointed to the federal bench in 1961 by President John F. Kennedy. Other sources consider William Hastie to be the first African-American federal judge. Judge Hastie was appointed federal judge for the Virgin Islands bench by President Franklin D. Roosevelt in 1937. See ABRAHAM L. DAVIS, *BLACKS IN THE FEDERAL JUDICIARY: NEUTRAL ARBITERS OR JUDICIAL ACTIVISTS?* 3 (1989).

of ceremony, and all of these African-American judges showed up and they were counted. They had a seminar on a Saturday and some of the "old timers" told stories of how it was to be a pioneer and what it was like to be an African-American judge.

I think one of the most poignant stories was told by Constance Baker Motley.² She was the first African-American female judge in the United States. She told a story of how the judges in her court used to have dinner meetings two or three times a year at a place called the Century Club. The Century Club was then a club where women, black or white, were not allowed above the first floor. She later on found out that she was allowed above the first floor only because some of her colleagues told the club management that she was the secretary for the judges.

I think Jimmy Carter, in four years, appointed thirty or thirty-three African-American judges to the bench. I think President Clinton has appointed thirty or thirty-three in two or three years. We still have a little less than a hundred. We have made some progress, but we still have a long way to go.

So far, I have only talked about the judiciary. I have to say something about my brother here, Zachary Carter. I came to the bench in 1991 and at that time there were only three prosecutors of color out of a total of 140 prosecutors in the Eastern District of New York. There were three African-American women and no African-American men. When I spoke to the powers that be, some of whom were my friends, I would ask them, "Why not hire diversity? That is the key." I was always told, "We could not find any." However, I used to see people being interviewed who had more experience than the people who were interviewing them.

In the Eastern District of New York, sixty-seven percent of the population is African-American. Many are from Haiti and other Caribbean nations. However, only three prosecutors were African-American, and that was a disgrace. When Zachary Carter was appointed, he was one of, at most, three African-American United States Attorneys. He is now one of twelve. When he came to the United States Attorney's Office, he hired one African-American for each of the first nine months that he was there, so it went from three to about twelve. He said he was hiring more, so we have come a long way, but we have got a long way to go.

I do think that this has always been a white-male profession.

2. Senior Judge, United States District Court for the Southern District of New York. Judge Motley was appointed by President Lyndon B. Johnson in 1966.

This group has not wanted people that do not look like them in the profession. I think academicians like yourselves have a great, great role to play. You have a lot of power, and you influence a lot of young lives. I congratulate you for what you are doing, and urge you to continue to do more. Thank you.

ZACHARY CARTER*

The issues addressed by Renée Landers and Judge Johnson are related to evaluating substantive issues of racial disparity in charging and in sentencing. The development of the Department of Justice's policies with respect to racial disparity in charging decisions, to the extent that such a policy is verified to exist, has been substantially and constructively impacted upon by President Clinton's appointment of twelve African-American United States Attorneys over the past three years. When we make progress and diversify, particularly in public sector jobs with significant levels of responsibility, whether in the judiciary or the executive branch, we must exploit those opportunities.

I believe that the history of minorities in this country has been a history of opportunities denied, opportunities lost, and opportunities that have not been properly exploited. In the 1960s, we had the opportunity to take advantage of fiscal resources that, to some extent, may have been indiscriminately thrown at problems. If our own community had taken those fiscal resources and not pocketed that money, but rather had found constructive ways of investing it in the future, in our kids, and in education, perhaps the progress that we witness today would be even greater than it has been.

Today, the same *fiscal* resources are not being devoted to social problems that are of particular concern to minorities. However, we do have *human* resources that have been steered in the direction of those problems. These human resources are us: you, as African-American members of the academy, African-American practitioners on the bench and in the Department of Justice, and in other positions of government. People of color in these positions have the opportunity to make decisions that affect other persons of color. I suggest that we should exploit the opportunities presented by having these human resources in place.

Sterling Johnson talked about the number of African-Americans that I have hired since I have been a United States Attorney. This is a reflection of my assumption that I will be the last United States Attorney of color appointed. I behave as if I am going to be the last and as if there is going to be no tomorrow. When I leave, I want to have stockpiled the office with enough qualified African-Americans to create an enduring legacy. This is because future

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judges are going to be drawn from the ranks of people I have hired. High Department of Justice officials are going to be drawn from those ranks. Members of the academy are going to be drawn from those ranks, and future United States Attorneys are going to be drawn from the ranks of people who have been former Assistant United States Attorneys. Therefore, I think it is very important that we take advantage of the opportunities that we have.

I return now to the question of racial disparity addressed by Renée Landers. This issue arises in a number of different contexts. The formal working group of African-American United States Attorneys has focused particularly on the controversy over crack cocaine and powder cocaine and the differing treatment these drugs receive under federal sentencing guidelines. There is a one hundred-to-one ratio of sentencing between crack cocaine and powder cocaine.¹ One of the things that is interesting about the development of this issue is that African-Americans are not monolithic in our views, nor should we be. No one else is. There is no reason for African-Americans and other persons of color to hold identical opinions on this issue. There were those in the working group who were strong advocates for equalization and there were those who felt that some disparity was justified. Despite these differences, there was consensus in the group that one hundred-to-one did not represent a warranted level of disparity. The current, arbitrarily high ratio has swept in young offenders, at the bottom of the drug trafficking organizations, and has subjected them to unnecessarily harsh terms of imprisonment. It was agreed by the working group that the Sentencing Commission should be directed, having failed to obtain equalization, to go back to the drawing board and suggest an alternative ratio that will more properly reflect the real difference in the impact on minority communities of crack drug trafficking.

This is an example of how you can have an impact, if you want to. The amendment to the legislation that just passed, with respect to the Sentencing Guideline Commission proposal for equalization, was attached to a bill that otherwise would have rejected equalization and left the one hundred-to-one ratio in place. It instead specifically directs the Sentencing Guidelines Commission to go back to the drawing board, to do some additional research, and suggest alternative ratios that might more fairly represent a rational crack

1. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1995).

cocaine enforcement and sentencing policy. This example shows that we can have an impact if we choose to.

With respect to racial disparity in general, there are a number of studies that have been presented to the Sentencing Guidelines Commission that suggest there is disparity in charging decisions.² The studies have addressed charging decisions related to firearms offenses and decisions relating to whether or not the prosecutor moves the court for sentencing relief for a defendant who has testified against his or her accomplices. The raw data suggests that there may be disparities based on race.³ The Department of Justice is now doing its own study to determine whether this is a warranted or unwarranted disparity.⁴

It is very important for serious academicians to look at the raw data and to determine whether or not there is unwarranted, as distinguished from warranted, disparity. Let me give you a gross example. I am not going to apologize in the least for the fact that between 99% and 100% of all defendants that I prosecute in the Eastern District of New York for mafia-related organized crime are Italian. This is a demographic fact of life. No one would pretend that it constitutes an unwarranted disparity or constitutes some form of discrimination that 100% of the persons who are prosecuted for mafia-related organized crime offenses happen to be Italian, because the mafia is, last time I checked, not an equal opportunity organization. It is self-selecting.

This is true to a lesser degree with respect to crack cocaine and its distribution and impact on minority communities. Crack has visited itself on minority communities more than on other communities.⁵ Because of cultural phenomena, that you and the academy are in a better position to analyze and explain to the rest of us, traffickers in crack have been predominantly minorities.⁶ It presents a money-making enterprise for a lot of young African-

2. See, e.g., U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 70 (1995).

3. See U.S. SENTENCING COMM'N, ANNUAL REPORT 107 (1994) (90% of federal crack cocaine defendants are African-American); see also *United States v. Clary*, 846 F. Supp. 768, 786 n.52 (E.D. Mo.) (92.6% of all defendants in crack cocaine cases are African-American), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995).

4. See Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179 (1996).

5. See *Clary*, 34 F.3d at 714 (citing 132 CONG. REC. S7123-01 (daily ed. June 9, 1986)) ("crack has captured the ghetto").

6. See *id.*

American men and women who have been denied the opportunity for economic development in other legitimate spheres. Crack has historically attracted more African-Americans than others to the distribution trade. So when we, particularly African-American United States Attorneys, are called upon, are literally begged by minority communities, to use federal resources for change and place them at the disposal of disintegrating African-American communities to save them from the onslaught of the crack trade, we use the crude tool that we have. That tool has a disparate impact on African-American males by way of sentencing.⁷ As people of color who hold positions of authority in the judiciary, in the executive branch, and in the academy, we must take advantage of the opportunities available to us to help resolve these problems. Thank you.

7. *See id.*

TERESITA ALICEA*

I am not an academician. I guess I am kind of a street-brawler lawyer. I want to return to the issue of diversity in the judiciary. I have served on the Western Regional Judicial Nominating Council for about three years now. This is an eleven member committee, consisting of either single practitioners or lawyers from small firms. This committee is unusual in a couple of ways. First, before William Weld became Governor of Massachusetts, there was just one committee which sat in the Boston area, and all of its members were from huge firms. Today I think we have a slightly different situation. I do not know the exact numbers, but Governor Weld has, I am sure, appointed close to fifty percent or more women and minorities to judgeships. If there is an equally qualified white male candidate and white female candidate for a judgeship, he will almost always choose the white female. If there is an equally qualified white male candidate and a black female candidate, he will almost assuredly choose the black female. If there is a white male candidate and a Hispanic candidate, he will almost always choose the Hispanic candidate.

I am one of two Puerto Rican members on the Western Regional Judicial Nominating Council. This is another aspect of the committee which represents a departure from past practices. In keeping with this trend, I do not know how many of you have noticed that our police commission here in Springfield has two Puerto Rican members. The present Mayor was very much criticized for these appointments. Even a lot of members of the Puerto Rican community did not realize what a strange thing it was to have two Puerto Ricans on the police commission.

The same mystery surrounds the Judicial Nominating Commission. Nobody knows who we are except people who want judgeships, and nobody really seems to care who is or is not on it. Now, the judicial nomination process is political because it is a political appointment. A judgeship is a governor's appointment, and any time a governor appoints someone, it is a political decision. A lot of this depends on what kind of governor you have. I happen to think Governor Weld is a little bit progressive. If there is not a political issue involved and there is a minority candidate, he will

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probably appoint the minority candidate. However, if there is a minority candidate for a judgeship and the governor needs to appoint another candidate for political reasons, I can say with confidence that he will appoint that other candidate. Those are just the realities of life. Obviously, if somebody who ran your successful gubernatorial campaign then applies for a judgeship, I think you are going to treat them very well. Another governor who chose not to do that lost his bid for re-election and did not understand why. You turn into the man you used to hate, but those are realities of life.

I think, as practicing lawyers, you should really strive to find out what kind of mechanism there is in your particular community to choose judges and try to get on that committee. Besides your practice, that is probably the most important contribution you can make to your legal profession. You may not know the governor of your state, but I am sure that you know somebody who does. If you can get that person to speak on your behalf, you may be able to get an appointment to a Judicial Nominating Committee. You will then be in a position to screen the candidates, encourage minority folks to apply, and use your vote to give that person a way to a judicial appointment.

Serving on a Judicial Nominating Committee has another advantage. Although I am not speaking for myself, it can prepare you if, at some point, you would like to be a judge. Serving on the committee allows you to know a little about the process and start to learn some of the ways that can help you prepare yourself to be a better candidate.

Apart from my law practice, I really enjoy serving on this committee. I will not give it up. I will give up everything else before I give that up. It is a really exciting thing for me. One of the by-products of our committee was the appointment of a wonderful judge who is with us here today, Judge Jacques Leroy, who is one of two black judges in the Western Region of Massachusetts. The eleven member committee voted for him unanimously, which shows us that things *are* changing.

Five or six years ago I went into the court house, and besides the defendant, I counted eleven other people who were minorities who were there in their official capacity, including the defense lawyer, the judge, and a probation officer. There is some hope there, and we do see more and more diverse faces at the court house. There is still a lot to be done, but I have found that my job on this committee really gives me the opportunity to make a hands-on con-

tribution to the kinds of judges that we have in our community. I encourage you to do the same in your community. Thank you.

RENÉE LANDERS*

Right now I am on loan to the Department of Health and Human Services as a deputy general counsel, assigned to work on a number of health care related issues and regulatory issues for that department. I want to thank all of you for attending this final panel of the First Annual Northeastern People of Color Legal Scholarship Conference. I understand the conference has been a very interesting and profitable one.

The topic of this panel is Status, Progress, and Integration of Lawyers of Color in the Legal Profession. I think that all of the folks on the panel would like to try to build some connections between these issues and their relationship to the legal academy. There might be some relationship between what practicing lawyers do and how the legal academy can help with the process of integrating them more fully into the legal profession.

Over the last couple of days there has been much discussion about the challenges that the country is facing in terms of policies related to affirmative action. This discussion ties very closely into the subject of the panel for today. The legal basis for affirmative action is certainly eroding, given the United States Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*,¹ and the more recent decision of the Fifth Circuit in *Hopwood v. Texas*.² The legal and political context that has arisen as a result of *Adarand* and *Hopwood* may be cause for some realistic assessment about the future. I hope that the panel here today can try to turn that realism around into some positive thoughts about what legal scholars in the profession can do together to try to build a better public consensus for inclusiveness in the law and in the larger society.

A few years ago, when I was a law faculty member at Boston College Law School, I attended the annual meeting of the Association of American Law Schools in San Francisco, where former Judge A. Leon Higginbotham of the United States Court of Ap-

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1. 115 S. Ct. 2097 (1995) (holding that all racial classifications imposed by any governmental entity must be examined under strict scrutiny standard).

2. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996) (state university law school's admission process giving race-based preferences violates Fourteenth Amendment Equal Protection Clause).

peals for the Third Circuit was the keynote speaker for the luncheon at the conference. At that conference he observed that:

The great vision that we as lawyers have as to the potential role of the law, or in contrast the insensitivity and callousness that many lawyers now have, may be more attributable to the mentoring process and examples set by our law professors than many would want to concede. In many ways, [law professors] are . . . the "high priest[s]" of our profession. There are hundreds of subtle and occasionally even some blatant messages that law professors display in law schools. Students learn quickly whether Professor "X" dreams things that never were and says "why not?", [sic] or whether s/he believes that, now that one has tenure our nation is close to the best of all possible worlds. They perceive whether a professor believes there should be any demands for change in the present legal process and rules of law for anything more fundamental than a modest amendment to the Federal Rules of Evidence³

In sum, former Judge Higginbotham, now Professor Higginbotham,⁴ believes law schools and law professors have a profound effect on the type of lawyers that law graduates become. Given that significant influence, he believes that law schools and the people who are a part of the legal academy have to take some steps to try to educate students, judges, and the general public about the nature of bias and how that kind of bias can be avoided. I think that Judge Higginbotham's optimism about how the academy can contribute to this process is well founded.

I thought I would talk about two issues today in introducing this panel. First, a success story about a contemporary effort to integrate people of color more fully into the legal profession and, most notably, into the federal judiciary; and second, an example of another scholarly movement that has contributed to the development of the law in ways that have tended toward more inclusiveness and has had a positive impact on the development of the law.

Why would I talk about the judicial selection process? One of the duties that I had while I was in the Office of Policy Development at the Department of Justice was to participate in the judicial selection process. For a time, we also organized the selection process for United States Attorneys around the country. I think Presi-

3. Judge A. Leon Higginbotham, Jr., Remarks at Association of American Law Schools Luncheon (Jan. 6, 1990), *in* 1990 ASS'N AM. L. SCH. PROC. 177, 180.

4. Professor, Kennedy School of Government, Harvard University, Cambridge, Massachusetts.

dent Clinton's record of judicial appointments has been a sterling example of how diversity can be achieved in accommodation with other kinds of goals and how much progress can be made.

When President Clinton came into office, he had three basic goals for the judicial appointments process: first, to choose judges who have the intelligence, integrity, and experience to serve in these vital positions; second, to depoliticize the judicial selection process by choosing judges who are committed to the rule of law and not to ideological litmus tests, and by so doing, to restore civilized consideration of judicial nominees and to renounce the rank or partisanship considerations of some previous judicial nominees; and third, to reflect the rich diversity of the bar and the country in choosing among the many excellent candidates who have been recommended to him.⁵

But what is the Clinton record on this issue? Let's put this into context. There are 847 Article III judicial positions. When President Clinton took office, there were 113 vacancies, representing 13% of the federal judiciary.⁶ The situation was alarming because in many districts there was a serious shortage of judicial personnel. To date, the President has nominated and the Senate has confirmed 187 federal judges, and there are 31 nominations pending in the Senate. The President's record of appointments reflects the revolution that has occurred in the legal profession in the last twenty-five or thirty years. Record numbers of women and minority professionals are graduating from the nation's graduate schools. President Clinton has an unsurpassed record of appointing a qualified and diverse pool of people. Sixty-four percent of the President's judicial appointments have been rated well-qualified by the American Bar Association, a higher percentage than his three predecessors in office.⁷ The President has achieved that outstanding record of excellence while, at the same time, appointing judges who really do reflect the rich diversity of the bar in our country, although, obviously, one can always improve on these numbers. About 26% of President Bush's judicial appointments were women and minorities,⁸ and overall, almost 51% of President Bush's appointees are in

5. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 287, 297 (1993).

6. See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 279 (1995).

7. See *id.* at 285.

8. See Henry J. Reske, *A Report Card on Clinton's Judges*, 80 A.B.A. J. 16, 16 (1994). According to statistics compiled by The Alliance for Justice Judicial Selection

the ABA's well-qualified rating.⁹ Seventeen percent of President Reagan's appointments were women and minorities,¹⁰ and overall, 55% of these appointments were in the well-qualified rating.¹¹ By comparison, 56% President Clinton's appointees are women and minorities,¹² and 64% have the ABA's highest rating, the well-qualified rating.¹³ These statistics demonstrate that diversity and quality are not mutually exclusive characteristics, although some who have cast the affirmative action debate in terms of racial preferences might suggest that they are. This is a success story. People at every level of the decision-making process, from those who hire students upon their departure from law school to those who choose candidates for the very pinnacle of the profession, selecting federal judgeships, can really think more creatively about ways to diversify the profession.

The second point I wanted to make is how scholarship relates to public policy. I think that the academy can learn a great deal from the approach taken by the feminist legal scholarship movement. I understand that the analogy is not perfect because there are differences in the way gender issues are discussed and received in this society and the way in which issues of color are discussed and received. From the beginning, the feminist legal scholarship movement made an effort to encourage practical scholarship that directly addressed public policy issues. Scholars studied the impact of divorce on women and children and the effectiveness of the way in which courts handle domestic violence cases. These scholarly writings gave policy makers information that they could use directly in formulating public policy. The challenge for the academy in the race area is to try to emulate that example.

People like me, who made the transition from the academy to government work, can make a valuable contribution to the government because we can build bridges between the academy and the formulation of government policy. For example, when I went to the

Project, 26.6% of President Bush's judicial appointments were women and minorities. *See id.*

9. *See* Goldman, *supra* note 6, at 285 n.23.

10. *But see* Reske, *supra* note 8, at 16. According to statistics compiled by the Alliance for Justice Judicial Selection Project, 13.2% of President Reagan's appointments were women and minorities. *See id.*

11. *See* Goldman, *supra* note 6, at 285 n.23.

12. *See* Sheldon Goldman & Matthew D. Saronson, *Clinton's Non-traditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 70 (1994) (in 1994, 56 of 88 appointments were of "nontraditional" candidates).

13. *See* Goldman, *supra* note 6, at 285.

Justice Department in 1993, I was put in charge of implementing the Attorney General's directive to develop a more coherent and proactive alternative dispute resolution policy for the Department of Justice. There are a lot of people in the Justice Department who think that all cases should be litigated all the way to the Supreme Court, if that's what they require. They think alternative dispute resolution has absolutely no relevance to the realm of litigation whatsoever. I assembled a working group from various components of the department and consulted broadly among practitioners. I made sure the group of practitioners was diverse and included people of color and women. I also consulted with legal academics who had credentials in the field to make sure that the policy that was created was something that was going to be credible in the academic community as well as among practitioners. People in the academy can make a large contribution to the public policy debate by working on issues that have practical implications, and by making sure that the academic input is fed into the process of public policy formulation.

There have been a number of legal academics who have had a profound impact on the way policy has operated in the current administration. For example, Professor Chris Edley at Harvard Law School worked with me on the White House staff and the President's Affirmative Action Review. Drew Days, who served as the Solicitor General, as well as several of his deputies, all came from academic environments. Walter Dullenger, a Duke Law School professor, has been the head of the Office of Legal Counsel and has been responsible for giving advice to the President about legal issues that affect the operation of the government. Eventually, these people will presumably go back to the academic institutions, and I think that will provide good cross-fertilization. Thus, it is possible for the academy and the profession to work together on some of these issues. Thank you.

JACQUELINE BERRIEN*

In the past six months, both the *Washington Post* and the *New York Times* have published results from opinion polls. The *Washington Post* article about race in America discussed a poll in which whites were asked what percentage of the population they believed was African-American.¹ More recently, the *New York Times* reported on a poll of attitudes about immigration, which asked whites what percentage of people they believe were recent immigrants.² In both instances, the figures that were offered were wildly inflated. In fact, they were virtually doubled. In both the *Washington Post* and *New York Times*, whites said that they believed that African-Americans were about 25% of the population, which is more than double the actual representation of African-Americans in the population.³ There were similar wide discrepancies, wild discrepancies actually, between the estimated number of people who whites believed were immigrants.⁴

I start with these statistics because I think that, in this discussion, it is important to have some perspective on the real numbers. It is, perhaps, easy for those of us sitting in this room to overestimate the degree of influence or the degree of representation that people of color have in the legal profession. According to the 1990 census, 3.3% of all attorneys in the United States are African-American. African-American lawyers are the largest subset of attorneys of color. The numbers go down from there: 2.5% of attorneys are Hispanic, 1.4% of attorneys are Asian or Pacific-American, and 0.18% of attorneys are Native-American.⁵ A 1995 *New York University Law Review* article, which reviewed current enrollment in ABA accredited law schools around the country, reported that 7.2% of the students enrolled in J.D. programs in ABA approved law schools were African-American, 4.9% were Latino, 5.1% were Asian or Pacific-American, and 0.7% Native American.⁶

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1. See Malcolm Gladwell, *Reality Check: Attitudes and Anxieties About Race*, WASH. POST, Oct. 8, 1995, at A26.

2. See Priscilla Labovitz, *Immigration—Just the Facts*, N.Y. TIMES, Mar. 25, 1996, at A15.

3. See Gladwell, *supra* note 1, at A26; Labovitz, *supra* note 2, at A15.

4. See Gladwell, *supra* note 1, at A26; Labovitz, *supra* note 2, at A15.

5. See Gladwell, *supra* note 1, at A26; Labovitz, *supra* note 2, at A15.

6. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry*

I think it is important to start with those statistics. They reveal that we are still substantially underrepresented in the legal profession.

That underrepresentation is not unique to one segment of the profession. I have had an opportunity this weekend to interact with a number of people who are teaching law in various institutions who feel they are underrepresented. I am a practitioner and I practice law in New York with the NAACP Legal Defense Fund. Fortunately, in my office, I do not feel like a minority. However, in the practice world at large, I am constantly reminded of my status as one of very few people, who look like me, who practice law, and certainly who practice law in the kinds of places that I practice. I think we have to start with these statistics, because we need to understand where we are numerically right now within the profession. We must also understand the implications of our status and of the current developments in our profession on what we have to look forward to, absent some very, very strong action and responses right now.

I represent a group of African-American voters in Louisiana who have intervened in a lawsuit for the purpose of defending the existence of a majority black congressional district in Louisiana. The case is *Hays v. State*,⁷ and my co-counsel in the case includes Judge Higginbotham, the Lawyers Committee for Civil Rights, attorneys from the Department of Justice, and attorneys from the Louisiana Attorney General's Office. We tried this case in October of last year, and at one point during the proceedings, one of my colleagues turned to me and said, "Have you noticed what's wrong with this picture?" On the other side of the room were a group of plaintiffs, eleven white and one African-American, who said that their rights were violated by the existence of a majority African-American congressional district in Louisiana. They said that the reason they filed this suit was that they believed it was important under the Equal Protection Clause, for race not to be taken into account in the districting process. They believed that the existence of this majority black district stereotyped them, somehow diminished their rights, classified them on the basis of race, and classified African-Americans on the basis of race. That group of plaintiffs was represented by eight white male attorneys.

On our side of the room, defending against a Fourteenth

into the Legal Profession: The Role of Race, Gender and Educational Debt, 70 N.Y.U. L. REV. 829, 860 (1995).

7. 936 F. Supp. 360 (W.D. La. 1996) (per curiam).

Amendment Equal Protection Clause claim, we represented an African-American member of Congress and four African-American voters in the state of Louisiana. We presented testimony from African-American voters and white voters who resided in the Fourth Congressional District, ranging from long-time civil rights activists to a seventy year old nun who lived in Shreveport. She was a native of the South, stood up on the stand during this case, and said, "I think that this majority black congressional district is one of the most important things that has happened in this state because it's finally breaking down the longstanding exclusion that has occurred, not only for blacks, but for poor people generally in this state." Our witnesses were racially diverse; our witnesses were diverse in terms of age; our witnesses were diverse in terms of background; our witnesses were diverse in every way, economically and otherwise. The counsel table was similarly diverse: there were four African-American men, one Native American woman, two white males, two white women, and myself representing that group of defendants, the people who were defending the Fourth Congressional District.

I think that example really does summarize to me what it means for me to be an African-American woman attorney engaged in the kind of law practice that I have, and why I think it is important and will continue to be important for me to practice this kind of law. But I do not pigeon-hole. I do not believe it is the only important practice. I believe that we can make those kinds of contributions and make a difference in many ways. In some ways we make a statement simply when we stand up at the podium in the courtroom. Those of us who teach make a statement when we stand up at the podium in the classroom. We are often very conscious of what that statement is: that people are expecting certain things, some rightly, some wrongly, because they see a particular kind of person.

While it is important for us to always challenge or be critical of efforts to pigeon-hole or label us, I think it is also important for us to be very aware of the ways that the current political atmosphere can take that resistance and direct it against us. For example, last week a three-judge court from the United States Court of Appeals for the Fifth Circuit, an all-white, three-judge panel, decided that the University of Texas Law School's affirmative action program

violated the Fourteenth Amendment to the Constitution.⁸ One of the things that those judges said was that you cannot infer anything about a person by looking at the color of their skin.⁹ That is the fundamental tenet of the Fourteenth Amendment. The court's decision was based on the premise that admitting a certain number of, or giving an admissions preference to, African-American or Mexican-American students does not necessarily translate into an increase in diversity of viewpoints in the law school. But in some ways we are all a living testament to the fact that this is just false.

The legal profession is unquestionably different today than it was 100 years ago because of the presence of more women. It is unquestionably different today than it was 100 years ago because of the presence of more attorneys of color. It was certainly clear to me, in hearing the presentations this morning, that the academy is unquestionably different from what it was ten years ago when I was in law school. There are more people of color in the academy today who are bringing some of their life perspective, some of their own background and experience, into the classroom and are using them to analyze an array of topics, including topics that are not overtly about race. One of the things that they are aware of, in ways that their colleagues, however well intentioned, may not be aware of, is that there are racial implications in many subjects that they may not think of as being overtly racial. As we heard this morning, Dorothy Brown talked about tax law and noted that we will never uncover the hidden effects of race if we do not question the impact of race on subjects that are not overtly racial. The difference between her and any number of people who have taught tax law before is that she was willing to ask a question, and she is beginning to get some answers.

I think that, reasoning from the statistics that I shared earlier, there are several things that concern me right now about the legal profession. The most obvious and, to me, the most important is that we may have reached our high. I would hate to think that 3.3% of all lawyers in this country being African-American is as many as we will ever see. However, we must acknowledge a very real trend in the law that has been accepted at this point by two federal courts of appeals,¹⁰ and that is a rejection of the kind of

8. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

9. See *id.* at 946.

10. See *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3354 (U.S. Oct. 31, 1996) (No. 96-679); *Hopwood*, 78 F.3d 932.

affirmative action admissions programs and standards that made it possible for many of us, including me, to go to law school.

If we are serious about looking at the issue of the status of lawyers of color in the profession and want to see 3.3% not as the high point of African-Americans in the profession, but as the beginning and the tip of the iceberg as far as what we can achieve in terms of diversity, the most urgent question is how we are going to respond to the judicial rejection of the legal principles that made it possible for the kinds of affirmative action, admissions, recruitment, and financial aid programs that many of us benefitted from, to continue. The search for that response is beginning now.

If you are in the academy, it is certainly possible to participate in developing a response to the judges at every level of the federal judiciary today who are currently saying that the time has come to stop considering race. I want to suggest that at least part of what we may need to do is move to thinking more seriously and advocating more seriously about the next level of response. We have assumed, and conceded, for perhaps too long, that the conventional wisdom about standards for academic success or the criteria that are appropriate for people to be admitted to law schools, or their qualifications or their performance, are all inflexible and invariable.

One of the things that was really exciting to me this morning was hearing scholars discuss ways that they are challenging the orthodoxy of the institutions in which they work. They are challenging the orthodoxy of legal academia in general and the way law has been taught for the last 200 years. They are saying, "I am here now, and I am thinking about it differently. I am bringing a different set of perspectives to this, and, guess what, you missed something. Let's talk about that now."

I think the time has never been more urgent to make these changes, and people are beginning to do so. We must also start to do this with regard to questions about admissions and student performance. We know, or there are many studies that suggest, that high LSAT scores, for example, do correlate with *something*. That something is not success as a lawyer. That something is not bar passage. That something is not even academic performance over the life of a student's entire legal career or their law school career. That something is first-year grades. I think it is critical for us to begin to ask: Why does our inquiry end there? Why is it acceptable for a school to define its mission and select the people who ought to partake in that mission and influence that mission solely on the ba-

sis of one year of performance in a three year program? It makes no sense. But we have not challenged this selection process, at least in part because there were other ways of getting around it. What I am suggesting is that some of the ways we have been able to circumvent law school admissions policies that emphasize LSAT scores are increasingly being cut off.

In certain parts of the country, where the rejection of affirmative action principles has not yet begun in broad scale among the judiciary, this erosion may not have happened. We must, of course, continue to fight the judicial trend of rejecting affirmative action. In the meantime, however, I do think we have got to begin to look at responses that do not depend entirely on getting good judges or that do not depend entirely on whether we can get that crucial fifth vote on the Supreme Court. The reality is, whether you look at the *Adarand Constructors*¹¹ decision last term, or the congressional re-districting decisions—*Shaw v. Reno*,¹² *Miller v. Johnson*¹³—or any number of other decisions from the Supreme Court over the last five years, affirmative action is certainly under-active. And yet, I am not content to believe we have reached our pinnacle.

It is clear that we need to ask whether there is a real and meaningful relationship between what we have assumed are the necessary qualifications for a job and what is actually required to do that job successfully. For example, although it is assumed that you have to have been a federal practitioner with a big firm to be a federal judge, big firms rarely do federal in-court litigation. This questioning of old assumptions is already happening in the work place, and it is time for it to happen in the legal academy. Part of the process will be to question whether the accepted criteria have, in fact, been applied and whether they are realistic.

Another part of this process is that those of us who have gained access must be willing to make it clear that the criteria should be reexamined. We need to encourage our institutions to be more open minded, to be more critical of what it is that we say the academic mission of the institution is and how that mission interacts with the admissions criteria that we set. It has begun to happen in terms of hiring in the academy, and it is beginning to happen in the legal profession. It certainly is time for it to happen in terms of access to legal education. It is very critical that it happen right now,

11. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

12. 509 U.S. 630 (1993).

13. 115 S. Ct. 2475 (1995).

given the real possibility that affirmative action programs may come under increasing attack and, in some instances, may be abandoned by institutions that are unwilling to fight the battle all the way to the Supreme Court.

I think this raises a really compelling issue. One of the things that the federal government is struggling with is what the recent court decisions on affirmative action mean in practical, mechanistic terms. The federal government must determine what effect these decisions will have on human resources, offices for federal agencies, and for contracting officials in federal agencies in terms of what they can do to try to maintain the progress that has been made in including more contractors of color and more diversity in the federal work force.

I think something that Judge Johnson said earlier brings this issue home. The problem is that people are more comfortable hiring people who are like themselves, whether it is to work with them in the same office, or to do a construction project such as paving the highway in the local community. I think that one of the solutions to this problem is to try to use available opportunities to institutionalize, as Mr. Carter is doing, a selection process that demonstrates that everybody does not have to be from the same background or have gone to the same schools in order to achieve an effective work-place. So, in the face of the erosion of affirmative action, our challenge is to really try to develop and institutionalize selection criteria and processes that will make it possible to ensure that we are not capped at 3.3% of the profession. Thank you.

THE HONORABLE JACQUES LEROY*

Let me first express my real joy at having been a participant in this conference. It has given me the opportunity to achieve great intellectual and human gains, and I have met people whom I will certainly never forget. Let me not forget to thank Leonard Baynes, very warmly, for putting together an event at which, indeed, so many gains could be garnered in such a short time.

I would like to stress two things in trying to tie together the experiences that I have had to the topics which we have been discussing. That is: what do you find when you "get there," and once you get there, what do you do?

We know that it is not easy to be a practicing lawyer, or to become a judge in this Commonwealth. The Massachusetts Supreme Judicial Court's Commission on Racial and Ethnic Bias in the Courts was instituted some time in August of 1990, and issued a report four years later.¹ The report very candidly acknowledged that Massachusetts, which has the oldest Supreme Court in the nation, still does not have a black justice on its Supreme Judicial Court. Additionally, at the time that the report appeared, out of 328 judges in Massachusetts, only twenty-nine were minorities.² The report also pointed out that the minority populations, mostly those of different linguistic backgrounds than English, were clearly disfavored.³ The report acknowledged that minority lawyers were not treated adequately in the court system.⁴ The report noted that, indeed, litigants who have any contact with the courts would be exposed to an absence of diversity in certain areas.⁵ The report noted the importance of having more minority judges.⁶ So, now we know the facts.

Now, when you make it "there," what is it that you do? How do you fulfill your responsibility, and how does all of this tie in with what we have been discussing this weekend? That is where I would like to concentrate my very few words. Yesterday we talked about

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1. SUPREME JUDICIAL COURT, COMM'N TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS, EQUAL JUSTICE: ELIMINATING THE BARRIERS (1994).

2. *See id.* at 10.

3. *See id.* at 34-35.

4. *See id.* at 117.

5. *See id.* at 149.

6. *See id.* at 108-09.

the vast diversity among *us*. And clearly, when you hear me speak, you know we have vast diversity among us. As soon as I open my mouth, you know that I am somewhat different. Yet, I am one of you, and there is no way I can segregate myself from you. I have an accent. It is obvious I was not born here. After a certain age, you can hardly ever lose your accent. So, there are certain aspects of yourself over which you have no control and that you cannot put in a closet because they are so obvious. We cannot control our "*pour soi*."

The "*en soi*," the "ego," the "self," is something different. But, you may not even have control over that. Take, for example, the concepts of empathy, objectivity, and hunch, of which we spoke yesterday. They are all tainted with ego. It was Berta Hernández who first brought up the term indivisibility. Later on we heard from Cheryl Ikemoto how hard it was to achieve objectivity, and throughout the morning, we heard about the concept of empathy. All of these concepts are very important in the life of a judge.

If you posit and accept Justice Cardozo's great warning about the impossibility for anyone to tame his or her ego to such an extent that the achievement of objectivity would become easy, well then we understand that we cannot tame that ego. That ego contains all of these aspects of ourselves which are, at once, different and yet the same. They are different because we belong to a different race and ethnicity; we have different historical experiences. They are the same because we share the same perception. We may be seen as different, but we are certainly grouped together. And the obvious fact is that I am not white. I may be different from another black person, but what difference does that make?

At one point the issue was raised that judges sometimes decided out of hunches. My position is that this is really not so. We do research the law, and we do search for objectivity. The problem is that objectivity is always an ideal. All you can do is try to attain it in the context of diversity and in the context of a judiciary which is mostly dominated by non-minority ethnics.

When you are dealing with a court, such as the Springfield District Court,⁷ which has jurisdiction over Springfield, West Springfield, Agawam, and Longmeadow, you understand that the population of litigants coming before the court is extremely diverse. How does a person with a minority background function as a judge who must make decisions regarding people of very diverse back-

7. Hampden County, Commonwealth of Massachusetts.

grounds? I turn them to the concept of empathy. When ill-conceived, empathy might be in contradisposition to objectivity, especially when it is an emotional urge that leads you to award for someone or against someone. But to me, empathy, if it is not to be contradictory with objectivity, simply means that you pay more careful attention to the circumstances of a case and the characteristics of the litigants in front of you. Empathy then becomes a tool of analysis. And it is in many circumstances that a district court judge, whose docket is really ninety percent criminal, will have to exercise that kind of empathy—an empathy that is neutral but systematic—because if you are going to approximate objectivity, you must do so, not only as to the law, but also as to the persons to whom that law applies.

For example, a criminal matter which clearly is going to be tried to a jury often involves various pretrial motions and motions *in limine*. At this stage, the exercise of empathy becomes critical. Indeed, examination of Fourth Amendment determinations regarding the admissibility of evidence seized as a result of a stop-and-frisk or custodial stops illustrates the importance of the concept of empathy. It is in those determinations of whether the evidence is admissible that you really have to exercise empathy in a systematic way.

For example, in the case of a stop-and-frisk, all the prosecution has to show is a reasonable suspicion that a crime was afoot. That suspicion is considered well-grounded if it is based on location and evasion. That is to say, if the defendant was caught in a high crime area, or high drug area, and if the defendant showed any behavior that could be considered evasive when confronted by the police, the suspicion is considered well-grounded.

Now, you know that “high crime areas” have become synonymous with inner-city neighborhoods. And neighborhoods are places where people live, places where they have a right to be. Now, think of evasiveness and reconsider that defendant who has had previous contacts with the police in his residential neighborhood and who has literally refused to make himself available to the police at a time of confrontation. You understand that you really have to look at motions to suppress with an empathy that is systematic and that looks at all of these various aspects. Indeed, a motion to suppress is dispositive of the case, particularly when you are dealing with drugs, because if you suppress the evidence on the basis that the stop-and-frisk was improper, well then, there is no evidence and there is not much of a case left for prosecution. But your

oath requires that you deny the motion if the legal standards have been met by the police.

If you consider motions *in limine*, when the standard is not whether the Fourth Amendment rights of the defendant were violated, but rather whether the prejudicial effect of the evidence would far outweigh its probative value, you have to exercise the same care. Why, for example, should certain criminal records, mostly dealing with the same crime for which the defendant is going to be tried, be accepted into evidence? Yes, there is a certain probative value to having such evidence, but what about the prejudice? You have to be very careful when dealing with that kind of issue, certainly in the midst of trial when impeachment of the testifying defendant is raised. Indeed, you have to be equally empathetic towards defendants who are not minorities. This is true not only because you have to be fair, but also because we have a new population of defendants appearing before the district courts who have not often appeared here before. We now have Russian defendants, Polish defendants, and Vietnamese defendants. You have to show them the very same empathy that you would apply to a defendant who is from the same ethnic or racial minority group as yourself, or to other non-minority defendants. In that sense, you tend to achieve, at the same time, both fairness and objectivity in your holdings.

Clearly, judges and most lawyers do not publish as extensively as members of the academy. Members of the academy are the ones who bring forth certain rules of analysis which allow the judge to make decisions that have a strong basis. In this regard I would suggest the reading of David Harris's excellent article in the *Indiana Law Journal*,⁸ which contains a very interesting critical analysis of the issue of stop-and-frisk. The article shows how the theory has evolved from the requirement that articulable facts be demonstrated, taken with all of the reasonable inferences that could be made from those facts that would warrant the deprivation of liberty. The theory has evolved significantly to the extent that the standard now includes: first, not only location and evasion, but also great deference to the police officer who first determines that it is a high crime area, second, whether there was evasiveness, and third, whether there was any kind of danger.

Once you "get there," you must really try to make your being

8. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

there significant. To a judge, sworn to uphold the law, and who cannot legislate, the use of empathy as an analytical tool is very helpful. In particular, empathy allows a minority judge to approach the ideal of objective fairness by helping him to pay close attention to the circumstances of cases of which he has a unique understanding.

I would like to conclude by thanking the members of the academy for the kind of work that they are doing. That the *Indiana Law Journal* article is one that was written from the perspective that we heard so much about yesterday and today illustrates that empathy can and should be applied in civil matters as well. As Renée Landers has stated, the interaction between the academy and the judiciary, and between the academy and the public, can only be beneficial to members of the public and, specifically, to members of the various minorities about whom we have been talking this week. Thank you.