

3-1-2020

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### Recommended Citation

Thompson, Anthony C. (2020) "Stepping Up to the Challenge of Leadership on Race," *Hofstra Law Review*. Vol. 48: Iss. 3, Article 9.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol48/iss3/9>

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## STEPPING UP TO THE CHALLENGE OF LEADERSHIP ON RACE

*Anthony C. Thompson\**

### I. INTRODUCTION

First and foremost, I want to thank you for inviting me to deliver this keynote address. I applaud your choice to participate in a conference on difference and leadership because these are critical issues that deserve our best thinking and our collective attention. I have watched with great interest as organizations from global businesses, to law schools, to court systems have begun embracing the concept of diversity and inclusion. Setting diversity and inclusion as operating goals in our institutions is long overdue and an important step toward addressing chronic equity issues in our society.

But as I celebrate the attention and intention around such efforts, I also have a worry. I am concerned that, as we work toward the inclusion part of the effort, we are rushing a little too fast past the diversity component. As a country, we have been quite anxious to define diversity as “diversity of thought,” “diversity of experience,” and, yes, even “gender diversity” as a way of avoiding the difficulty and discomfort of examining racial diversity. But we, as lawyers and leaders, need to learn to get comfortable in that discomfort. Because as much as we might

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† This speech was delivered on November 8, 2019, at the Association of the Bar of the City of New York, as a part of a symposium entitled “Leading Differently Across Difference: A National Conference on Training Lawyers as Leaders” hosted by the Maurice A. Deane School of Law at Hofstra University and the school’s Freedman Institute. The transcript of Professor Thompson’s address has been lightly footnoted and styled for publication by the Author, along with the Editors of the *Hofstra Law Review*.

want to hope that we have reached the point where we can skip to questions of inclusion and belonging, our conversation about race and racism is far from over. And, in fact, it needs to deepen.

Everywhere we look today—at the news, the economy, the legal system, and American culture—there is overwhelming evidence that race operates as the great American dividing line. In fact, it is not hyperbolic to say that race remains the defining issue of our time. As individuals and communities, our relationship to society and our perceptions of race are profoundly shaped by race itself. Race confers privilege on some and stacks unwarranted burdens on others.

Many who enjoy the benefits of wealth and place would like to deny that we have built our society on privilege, but power in this country is all about preserving privilege. Privilege is the process that allows individuals to maintain advantages they have garnered through institutions that have historically been discriminatory. Privilege allows those same people to discriminate against others without hating them. Privilege provides cover for racism.

In fact, racism and privilege are so embedded in our day-to-day American life that we often miss how they manifest. Race defines economic opportunity, and it also sits at the core of economic inequality in this country. Education, which was once the great American equalizer, has almost lost its transformative ability. Instead, racism infects our educational system at all levels. At the primary and secondary school levels, we siphon off talented youth by steering them into elite schools and gifted programs, but we see that even in a diverse city like New York, those programs continue to exclude children of color. Across the country we have all watched as our public education system has become deeply re-segregated. When people of color manage to navigate all of those obstacles that we erect at the primary and secondary levels, they still face challenges. Once young people of color enter professional school, and especially in the legal profession, there are many who still question their abilities and their right to be there.

Race sits at the core of our justice system as well. As a country, we pride ourselves on our legal system and we continue to claim that justice is blind. But on a daily basis, that claim is exposed as fiction because the experience of justice in this country is wholly dependent on—and misshaped by—race. Race cleaves the country into two competing visions of who is dangerous and who is not; who has power and who does not; who enjoys the benefits of generational wealth and who does not; who is entitled to voice and who is not.

As a nation, we have never been willing to address racism, its history, or the fact that it is still part of our DNA. My former mentor,

colleague, and dear friend Professor Derrick Bell believed in the permanence of racism in America.<sup>1</sup> Many denounced that view as unduly pessimistic.<sup>2</sup> As we approach the end of the first quarter of the twenty-first century, I move closer to Derrick's view. Our country has a structural inability to address our nation's greatest challenge, and if we want Derrick's words to become less prophetic, we need to embrace them as a call to action.

The time has come to break down structures that enable racism and to build toward a country that faces its racial legacy and its racist present if we hope to become a more inclusive society. The time has come for our profession to begin the Herculean task of stepping up and addressing race in America and recognizing racial justice work as a central component of what we do as lawyers and as leaders. Racial equity must be envisioned, must be built, and it must be nurtured. And that is fundamentally a leadership task. That is what I want to discuss with you today.

As we set ourselves on this important path, we will need to be clear about the racialized context in which we are operating. When we step back and consider the pervasive nature of race, privilege, and racism, we begin to see the contours of the immense struggle that we must undertake and embrace. At a minimum, our struggle involves a narrative battle, a battle over place and power, and a battle over voice and value. This is, in the end, a battle for the soul of our country.

## II. THE LEADERSHIP TASK

Today, we are in the midst of a referendum on leadership. The 2016 national election and the United Kingdom's "Brexit" vote ushered into power a brand of populist leader that played to—and exacerbated—divisions and racial suspicions.

These new leaders appealed to white male arrogance and fear and drew on an equally strong emotional need to blame. What they offered their supporters was a protection of privilege. They promised to "take back control" of government by wresting power away from immigrants, away from people of color, and away from anyone interested in a

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1. See Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelations or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573, 583 (1993). See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (arguing that racism is a permanent and integrated part of American society through use of stories and historical examples).

2. See, e.g., George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 275 (2004).

multicultural vision of governance. In my book, *Dangerous Leaders: How and Why Lawyers Must Be Taught to Lead*,<sup>3</sup> I predicted that those populist leaders would likely enjoy short-lived success only to collapse in the end.<sup>4</sup> Here's why: Appealing to the basest instincts may work as a short-term campaign tactic, but those divisive actions do not empower or enable those leaders to lead. Effective leadership depends on uniting, inspiring, and moving others toward a greater common goal. Racial diversity is such a goal.

As we experience the fallout from the actions by these pretenders to power, it is not acceptable for the rest of us to sit back and wring our hands. We grumble when we read stories about the racist comments and actions by the current inhabitant of the White House, but then we go about our daily business—we shake our heads when we learn of an act of intolerance at our firm, our school, or our office but then we get back to work. Quiet disapproval is just not enough. We attend meetings and re-commit to equality, but, once again, even that choice is ultimately meaningless unless we also step up into a leadership role.

We must exercise leadership by challenging the manifestations of racism and privilege wherever they raise their head. Otherwise, racial intolerance and inequality will continue to pervade our national existence and warp the soul of this country.

Our leadership task is to create zero tolerance for racism. It is time for us to stop accepting the day-to-day racism that marks and disfigures American life. How many times have we in this room chosen not to speak out because it might upset others? In our families, we avoid difficult conversations because we do not want to upset the family gathering.

At work, we ignore or dismiss the casual microaggressions by a colleague because “that is just who he or she is.” We choose not to make others uncomfortable, all the while, allowing others to spew racist views without consequence. The leadership task involves making those who would engage in acts of intolerance uncomfortable. They need to understand the pain that even microaggressions can inflict. We need to call out acts of intolerance and relentlessly challenge systems that reinforce racial dominance and subordination. That is what leaders do.

Leadership means actively seeking out life experiences and diversity different from the leader's. If we look at American society, while we have witnessed profound advancement on some issues of

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3. ANTHONY C. THOMPSON, *DANGEROUS LEADERS: HOW AND WHY LAWYERS MUST BE TAUGHT TO LEAD* (2018).

4. *Id.* at 169.

gender, we have regressed on race. Finally, and perhaps most importantly, leadership means actually doing something. The time for reflection, rhetoric, and inaction is over. We should challenge ourselves in this space to move forward on the issue of race. For lawyer leaders, this means more than talk. It means answering the hard question of what we will measure, because what we measure matters. It means judging ourselves, our profession, and our work by our deeds, not our words.

And it means that as academics, law firm lawyers, judges, prosecutors, defenders, and those that care about this profession, we must ask ourselves what we will do when we leave here. It is not about what conversations we will have, but rather what will we actually *do* to make a change. Frankly, for those of us who have spent our lives in the trenches of the battles for racial justice, it is time to move from assuming the best intentions to “trust . . . but verify.”

While the #MeToo movement has been successful in creating a zero-tolerance mentality towards sexual harassment in the workplace, we have been less successful in our ability to limit day-to-day racism. It is time for us to stop accepting the day-to-day racism that marks American life. Many of us in this room, in this profession, and in this country recognize that racism is not disqualifying. Racism, even outright, overt racism, does not disqualify us for political appointment, does not prohibit us from television sponsorship, and does not affect how we are judged. Indeed, racism is accepted as a part of our everyday lives.

One of our tasks here in New York, today, is to determine how we will be judged as we look back on the work in which we engaged. What will our metrics for success look like? And how will we make an impact?

In 2019, the law focused on leadership in a concentrated way. The American Bar Association has examined the role of lawyers as leaders. The Association of American Law Schools continues to focus its energy on thinking deeply and seriously about what it takes to make lawyers leaders.

How do we do that? We, as leaders, must stand firm and refuse to vote for someone who equivocates on racism; we must teach in our schools the history of racism and how it has been grafted onto our systems and structures; we must insist that someone who espouses racist views will not be promoted or rewarded while holding such views. That’s what it means to lead.

As lawyers, we are given the opportunity to shape the law and to shape the systems that touch the day-to-day lives of all people across the country. We have seen first-hand the need to limit the law where it

oversteps its bounds and to add protections where it fails to protect the needs and interests of the powerless in our society. We, as teachers, prosecutors, defenders, judges, law firm lawyers, and solo practitioners, have roles to play in the courtrooms, backrooms, and board rooms to make clear that racial justice is a key part of our progress as individuals and as a nation.

To do that, lawyers as leaders in the twenty-first century need to be intersectional. Leadership no longer means having a lone, all-knowing, and all-powerful individual at the top of a pyramid making decisions in a command-and-control environment. My definition of leadership takes issue with that view. Exercising effective leadership does not depend on hierarchy or position. We can lead from anywhere in the organization, and to lead effectively, we do not need to be all-knowing or heroic. Rather, leadership means putting ourselves in the middle of intersecting and even competing attitudes, listening to—and learning from—the exchange. Through the creative tension that emerges when cultures and experiences collide, effective leaders can begin to see problems differently. Engaging with people whose perspectives have been born from a different set of experiences and life lessons is what enables leadership. Only by understanding a range of perspectives, seeking out a range of points of view, and incorporating decision-making processes that reflect the diversity of our nation can we begin to move forward in our effort to change the way that racism infects our society.

As lawyers, we are uniquely positioned to lead that change. We have unmatched access to the corridors of power. Our profession has served as the launching pad for leaders throughout time. There are over 200 lawyers in Congress, over half of the United States presidents have been legally trained, and there are lawyers in governors' offices, state houses, and local governments throughout the nation. It is time to act on those opportunities. The leadership task is not just to assume those positions but to ensure that we act intentionally in those positions as leaders for racial justice. And, quite frankly, those in positions of authority need to better reflect the rich diversity of our nation because they still do not. We have the ability to help young lawyers of color see themselves in those roles and to help them embrace new paths they can take.

But all of this starts by measuring ourselves against the goal of racial equality. We must ask ourselves as a profession, what are we doing to enable a robust conversation on race? What are we doing to halt racist behavior in its overt and casual forms? What are we doing to exercise leadership at the intersections of race, power, and privilege? It

is time to take a hard look at ourselves to see how we measure success. Because what we measure matters. That is our leadership task.

Once we have accepted that task, there are three battles we need to wage: (1) we need to engage in a fundamental narrative battle over race, (2) we need to wage a battle over place and power, and (3) we need to win the battle over voice and value.

Let us start with the narrative battle over race. Because, quite candidly, we are losing that battle as we speak. Let me offer a few examples. Ann Coulter referred to people from the Middle East as “camel riding nomads” and said that Egyptians have an “aversion to bathing.”<sup>5</sup> Laura Ingraham has promoted<sup>6</sup> the white supremacist “replacement” conspiracy theory cited by the Pittsburgh synagogue shooter,<sup>7</sup> she has defended<sup>8</sup> the racism of Rep. Steve King (R-IA) and praised him as “one of [her] heroes on the issue of immigration,”<sup>9</sup> and she has attacked<sup>10</sup> Supreme Court Justice Sonia Sotomayor’s heritage as un-American, even though Justice Sotomayor and her family are from Puerto Rico.<sup>11</sup> Tucker Carlson has said that “Iraq is a crappy place filled with a bunch of, you know, semiliterate primitive monkeys.”<sup>12</sup> They spew this racist rhetoric without shame, all the while crafting a narrative

5. *Ann Coulter Says Muslims ‘Smell Bad’*, COUNCIL ON AM.-ISLAMIC REL. (Mar. 9, 2004), [https://www.cair.com/ann\\_coulter\\_says\\_muslims\\_smell\\_bad](https://www.cair.com/ann_coulter_says_muslims_smell_bad).

6. See Jason Campbell & John Kerr, *How Fox News Tries to Mainstream a White Supremacist Conspiracy Theory*, MEDIA MATTERS FOR AM. (Apr. 30, 2019, 9:57 AM) [https://www.mediamatters.org/fox-news/how-fox-news-tries-mainstream-white-supremacist-conspiracy-theory?redirect\\_source=/blog/2019/04/30/how-fox-news-tries-mainstream-white-supremacist-conspiracy-theory/223586](https://www.mediamatters.org/fox-news/how-fox-news-tries-mainstream-white-supremacist-conspiracy-theory?redirect_source=/blog/2019/04/30/how-fox-news-tries-mainstream-white-supremacist-conspiracy-theory/223586); Mediamatters4america, *How Fox News Tries to Mainstream a White Supremacist Conspiracy Theory*, YOUTUBE (Apr. 30, 2019), [https://www.youtube.com/watch?time\\_continue=2&v=-CHaSGaUAk8&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=2&v=-CHaSGaUAk8&feature=emb_logo).

7. See Campbell & Kerr, *supra* note 6; Mediamatters4america, *supra* note 6; see also Jeremy W. Peters et al., *How the El Paso Killer Echoed the Incendiary Words of Conservative Media Stars*, N.Y. TIMES (Aug. 11, 2019), <https://www.nytimes.com/interactive/2019/08/11/business/media/el-paso-killer-conservative-media.html>.

8. Cristina López G. & Alex Kaplan, *Steve King Has Been Racist for Years, and Right-Wing Media Have Defended Him Every Step of the Way*, MEDIA MATTERS FOR AM. (Jan. 17, 2019, 11:18 AM) [https://www.mediamatters.org/rush-limbaugh/steve-king-has-been-racist-years-and-right-wing-media-have-defended-him-every-step?redirect\\_source=/research/2019/01/17/steve-king-has-been-racist-years-and-right-wing-media-have-defended-him-every-step-way/222558](https://www.mediamatters.org/rush-limbaugh/steve-king-has-been-racist-years-and-right-wing-media-have-defended-him-every-step?redirect_source=/research/2019/01/17/steve-king-has-been-racist-years-and-right-wing-media-have-defended-him-every-step-way/222558).

9. *Id.*

10. Ellie Sandmeyer, *Laura Ingraham’s Attacks on Sonia Sotomayor Miss Her All-American Heritage*, MEDIA MATTERS FOR AM. (Feb. 4, 2014, 2:26 PM), [https://www.mediamatters.org/laura-ingraham/laura-ingrahams-attacks-sonia-sotomayor-miss-her-all-american-heritage?redirect\\_source=/blog/2014/02/04/laura-ingrahams-attacks-on-sonia-sotomayor-miss/197915](https://www.mediamatters.org/laura-ingraham/laura-ingrahams-attacks-sonia-sotomayor-miss-her-all-american-heritage?redirect_source=/blog/2014/02/04/laura-ingrahams-attacks-on-sonia-sotomayor-miss/197915).

11. *Id.*

12. Michael Brice-Saddler & Eli Rosenberg, *Fox News Host Tucker Carlson Uses Racist, Homophobic Language in Second Set of Recordings*, WASH. POST (Mar. 11, 2019, 9:41 PM), <https://www.washingtonpost.com/arts-entertainment/2019/03/12/new-tucker-carlson-audio-released-this-time-using-racist-homophobic-language>.



that dehumanizes people of color. They use well-worn stereotypes and racist imagery. They build on the narrative of white supremacy by making clear that people of color are not deserving of humane treatment because they are less than human.

And these media personalities hold their audiences, hold their sponsors, and hold onto their ability to sell this narrative by broadcasting these views—often without comment or correction—into the living rooms of families across the country.

Not only are we not winning this battle, we are barely even in the fight. It is not enough to turn off Fox News and turn to CNN. The people we need to reach are listening to the stations we are tuning out.

We need to enter the space they are staking out and fight to change the narrative. We do not have the luxury of simply conceding this battle.

We also need to fight the battle over place and power.

This battle is likely to be fought in the criminal justice system. I hope you will indulge me a bit as I do a slightly deeper dive into the justice system because how we deploy the justice system, set policy that governs it, and how we allow it to be so racialized speaks volumes about power and place.

Let me start with the question of whose voice has power in that system. In the last year or so, we have witnessed an epidemic number of calls to the police essentially for being black or brown in public. “Permit Patty,”<sup>13</sup> “BBQ Becky,”<sup>14</sup> and a litany of other individuals have called the police because they believed black or brown people did not belong in their spaces. These callers fully expected the enforcement arm of our justice system to patrol and enforce the racial boundaries of place. Make no mistake, these calls had nothing to do with an eight-year-old who happened to be selling water without a permit in front of a San Francisco apartment building.<sup>15</sup> The calls had everything to do with the fact that this eight-year-old was a person of color. And the white callers believed they had the power to enforce who was allowed in the neighborhood and who was not, who had power and who did not, who had the right to be in a particular place and who did not. Police agencies have done nothing to curtail this day-to-day racism. People of color just

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13. See Niraj Choksi, *White Woman Nicknamed ‘Permit Patty’ Regrets Confrontation over Black Girl Selling Water*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/permit-patty-black-girl-water.html>.

14. See Christina Zhao, ‘BBQ Becky,’ *White Woman Who Called Cops on Black BBQ, 911 Audio Released: ‘I’m Really Scared! Come Quick!’*, NEWSWEEK (Sept. 4, 2018, 5:42 AM), <https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057>.

15. See Choksi, *supra* note 13.

end up having to endure it. But those are just the latest manifestations of the ways that the criminal justice system maintains a racist status quo. It is the use of the law, law enforcement, and criminal justice policy that fully illustrates America's tolerance for racism.

### III. CRACK AND POWDER RACIAL DISPARITIES

Perhaps one of the best places to examine how we accept day-to-day racism is the story behind the 100-to-1 crack cocaine to powder cocaine federal sentencing disparity. The history was part of the War on Drugs that we now know was part of the law and order campaign that was a cover for a racially-motivated assault on communities of color originating in the Nixon era.<sup>16</sup> It came about as part of a political frenzy that was the on-ramp to the current mass incarceration.<sup>17</sup>

In the wake of the death of basketball superstar Len Bias from a drug overdose and in front of the 1986 midterm elections, Congress passed the Anti-Drug Abuse Act of 1986.<sup>18</sup> The Act, among other things, established mandatory minimum sentences triggered by certain amounts of cocaine. Under the Act, possessing 100 grams of powder cocaine was considered equivalent to possessing only one gram of crack cocaine.<sup>19</sup> In 1988, Congress focused again on crack cocaine, establishing a five-year minimum sentence for simple possession of crack.<sup>20</sup>

During this time, it became clear that while there was no pharmacological difference between crack and powder cocaine, there was a dramatic racial difference in their prosecutions. While whites were more likely than any other racial group to use crack, more than eighty percent of federal crack defendants were African American.<sup>21</sup> In Los

16. See Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 331–48 (2012); Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22, 22. "We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities." Baum, *supra*.

17. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1247, 1249–51 (1996).

18. Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abuse Act of 1986 and Retroactive Application of the Fair Sentencing Act of 2010*, 87 TEMP. L. REV. 645, 646, 649 (2015).

19. *Dorsey v. United States*, 567 U.S. 260, 266 (2012).

20. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 11 (2002).

21. Joseph J. Palamar et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, DRUG & ALCOHOL DEPENDENCE, 2015, at 109; Dan Weikel, *War on Crack Targets Minorities over Whites: Cocaine: Records Show Federal Officials Almost Solely Prosecute Nonwhites. U.S. Attorney Denies Race Is a Factor*, L.A. TIMES (May 21, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-05->

Angeles, for example, one of the most diverse cities in the country, *not a single* white person was convicted of a crack cocaine offense in federal court from 1986 to 1995. At the same time, hundreds of white people were convicted for crack offenses in state court, where the sentences were much lighter.<sup>22</sup>

By 1995, the nation was aware that the disparate racial effects of the 100-to-1 ratio were severely harming African Americans and that the ratio had no basis in science.<sup>23</sup> Notwithstanding that fact, President Bill Clinton refused to veto a bill that maintained the 100-to-1 ratio.<sup>24</sup> In 2010, we got a glimpse into the nation's willingness to tolerate a degree of racism when, with the Fair Sentencing Act, the 100-to-1 ratio was reduced to 18-to-1.<sup>25</sup> By then, a consensus had emerged that the 100-to-1 ratio was excessive and unjust. Even commentators that deny the existence of mass incarceration admit that the 100-to-1 ratio was not based in reality and does not serve an objective purpose.<sup>26</sup> Even actors that typically did not get involved in controversial political issues, like federal judges and the American Bar Association, took the position that the 100-to-1 ratio needed to be changed.<sup>27</sup> The resulting 18-to-1 disparity was what the lawmakers deemed "acceptable." However, the new 18-to-118-to-1 ratio did not apply to people sentenced under the old 100-to-1 ratio. The First Step Act, passed in 2018, makes the 18-to-118-to-1

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21-mn-4468-story.html.

22. Weikel, *supra* note 21.

23. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v-vi, viii (2002). Eventually, a consensus emerged that the 100-to-1 ratio was unjust, helped along by the 1995 Sentencing Commission Report that recommended scrapping the 100-to-1 ratio and highlighting the racial disparity that the ratio produced. *Id.* A 1996 study that concluded that the effects of crack and powder cocaine are so similar as to make the punishment discrepancy "excessive" also helped build this consensus. See Christopher S. Wren, *Less Disparity Urged in Cocaine Sentencing*, N.Y. TIMES (Nov. 20, 1996), <https://www.nytimes.com/1996/11/20/us/less-disparity-urged-in-cocaine-sentencing.html>.

24. See Gary Marx, *Race Is at Center of Crack-Sentencing Debate*, CHI. TRIB. (Oct. 30, 1995), <https://www.chicagotribune.com/news/ct-xpm-1995-10-30-9510300131-story.html>; see also Charisse Jones, *Crack and Punishment: Is Race the Issue?*, N.Y. TIMES (Oct. 28, 1995), <https://www.nytimes.com/1995/10/28/us/crack-and-punishment-is-race-the-issue.html>.

25. *Obama Signs Law Narrowing Cocaine Sentencing Disparities*, N.Y. TIMES: THE CAUCUS (Aug. 3, 2010, 12:55 PM), <https://thecaucus.blogs.nytimes.com/2010/08/03/obama-signs-law-narrowing-cocaine-sentencing-disparities>.

26. See, e.g., S. COMM. ON THE JUDICIARY, 115TH CONGRESS, NOMINATION OF STEPHANOS BIBAS TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT QUESTIONS FOR THE RECORD (questions from Sen. Diane Feinstein); Stephanos Bibas, *Prisoners Without Prisons*, NAT'L REV., Sept. 21, 2015, at 27, 28.

27. See *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 110th Cong. (2008).

sentencing ratio retroactive. As a result, the 18-to-1 disparity is the current law.

But those are just the latest manifestations of the ways that the criminal justice system maintains a racist status quo. While this decision was disturbing, it was certainly not new or unexpected, particularly among those of us who have spent our lives fighting the racialized operations of the criminal justice system. In many ways, the defining moment of racism in the criminal justice system was the decision by the U.S. Supreme Court in *McCleskey v. Kemp*.<sup>28</sup> That case, which my colleague Tony Amsterdam quite accurately labeled the *Dred Scott* decision of the criminal justice system,<sup>29</sup> remains one of the most striking examples of our tolerance for racism. For those of you less familiar with *McCleskey*, this was a 1987 decision by the U.S. Supreme Court upholding the capital conviction of Warren McCleskey.<sup>30</sup> McCleskey presented a sophisticated and comprehensive data set by Professor David Baldus showing the “racially disproportionate sentencing” of the Georgia death penalty scheme.<sup>31</sup> Specifically, the statistics show that race had infected Georgia’s administration of justice in two ways: individuals who killed white victims were more likely to be sentenced to death than individuals who killed black victims and black people convicted of murder were more likely to be sentenced to death than white people convicted of murder.<sup>32</sup> Despite overwhelming evidence in support of his claim, the Court concluded that it was not enough to overturn the guilty verdict without showing a “racially discriminatory purpose.”<sup>33</sup>

Some readers of the *McCleskey* decision view it as authorizing racism—permitting prosecutors and jurors to provide communities of color with fewer protections than they provide white communities.<sup>34</sup> Indeed, a majority of the Court—four dissenters plus Justice Scalia—

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28. 481 U.S. 279 (1987).

29. Anthony G. Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007).

30. *McCleskey*, 481 U.S. at 319-20.

31. Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 50-51, 53 (2011); see David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1658-59 (1998).

32. *McCleskey*, 481 U.S. at 287; Baldus et al., *supra* note 31, at 1659-60; Hashimoto, *supra* note 31, at 50-51.

33. *McCleskey*, 481 U.S. at 298-99.

34. See, e.g., Weikel, *supra* note 21.

acknowledged that racism was in play in the justice system.<sup>35</sup> But McCleskey was still put to death.<sup>36</sup>

Scholars by and large have viewed *McCleskey* as one of the foremost examples of the Court's historically-flawed understanding of race. The decision merely revealed their lack of an emotional response to black lives,<sup>37</sup> unconscious racism,<sup>38</sup> microaggressions,<sup>39</sup> and their naïve understanding of racial discrimination.<sup>40</sup> More broadly, the decision highlighted the Court's "fear of too much justice" in the criminal justice system,<sup>41</sup> fear of line drawing,<sup>42</sup> and fear of death penalty abolition.<sup>43</sup> Of particular importance was the Court's unwillingness to apply the methods for proving discrimination, both systemically and in *McCleskey's* case, which courts commonly use in both jury and employment discrimination cases.<sup>44</sup>

The Court's rhetoric "displays a complacency disturbingly reminiscent of the Court's race relations opinions around the turn of the century."<sup>45</sup> The Court's review of Mr. McCleskey's claim of racially-biased capital sentencing fails to acknowledge or even make reference to "the perspective of blacks, either as crime victims or as victims of discrimination."<sup>46</sup> "The system's discriminatory impact is accepted as constitutionally (and morally) tolerable. The discrimination has no apparent victim."<sup>47</sup>

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35. Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 528 (1995).

36. *Id.*

37. Amsterdam, *supra* note 29 at 47; Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1060, 1060 n.65 (2013).

38. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 767, 767 n.50 (2012).

39. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1572-76 (1989).

40. Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 595-96 (2011); John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 689, 704-06 (2014).

41. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1413-14 (1988).

42. See Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 119-20 n.251 (1984).

43. See Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 789-90, 872-73 (2010); Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 382 (2010).

44. *McCleskey v. Kemp*, 481 U.S. 279, 293-97 (1987).

45. Kennedy, *supra* note 41, at 1418.

46. Davis, *supra* note 39, at 1573.

47. *Id.* at 1574.

Perhaps the clearest message on how the U.S. Supreme Court addresses race can best be seen in Justice Scalia's memorandum to the Conference.<sup>48</sup> He actually stated that he did not believe there was insufficient proof of disparate treatment based on race.<sup>49</sup> Indeed, Justice Scalia acknowledged that unconscious racial bias permeated Georgia's criminal justice system, from juries to prosecutors.<sup>50</sup> From Scalia's point of view, however, unconscious racism was simply an "ineradicable" reality that the courts should ignore.<sup>51</sup> Challenging the opinion's thin pretense that no correlation with race could be discerned, Scalia stated baldly: "I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal."<sup>52</sup> For Scalia, the issue was not a lack of proof of systemic racial bias.<sup>53</sup> The issue was that it was legally irrelevant in his view.<sup>54</sup> For Scalia, racism is simply part of the world in which we live and the system in which we operate.<sup>55</sup> Even when the stakes include state decisions to kill, he did not find racism to be intolerable.<sup>56</sup>

The Court recognizes that racism is a pervasive problem but does not accept any responsibility for addressing it or ferreting it out in the criminal justice system unless it can be shown that there was individual purpose against an individual accused.<sup>57</sup>

The question then becomes: what can we do as lawyers and as leaders? Racism, even embedded in judicial opinions, must not be left unaddressed. Part of our work is that our profession must take up issues of race head on.

And, finally, we must engage the battle over voice and value, which arguably is our most important leadership work. Wherever we see power being exercised, there are still too few voices of color present. In the criminal justice system on a daily basis, decisions are being made that affect the lives and life trajectories of countless people of color.

And still, there are precious few decision-makers who are of color and are in positions to shape or, at the very least, challenge the decisions routinely being made.

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48. Chemerinsky, *supra* note 35, at 528.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

In my book, I highlight a few prosecutors' offices that not only have racist pasts, but continue to use peremptory strikes in jury trials to get to an all-white jury even in communities with large of-color populations.<sup>58</sup> This process opens the prosecutors to *Batson v. Kentucky*<sup>59</sup> challenges on appeal, but, at the trial level, their behavior enables them to secure convictions more easily against defendants of color. But, today, I want to highlight another equally troubling phenomenon that has so often gone unchallenged over the years: the fact that we have come to accept judges who make racialized judgments and assumptions even while on the bench.

The Supreme Court is not the only place where we see an acceptance of day-to-day racism; judges in America's trial courts routinely exhibit behaviors that are not deemed disqualifying or even unacceptable. One only needs to examine the Harris County, Texas (where Houston is located) bench for an example of day-to-day racism that is routinely accepted.<sup>60</sup> For years, State District Judge Michael McSpadden, a felony court judge, directed magistrate judges to deny personal bonds to all newly arrested defendants.<sup>61</sup> In explaining his reasoning to the *Houston Chronicle*, McSpadden said that he did not think defendants would show up for court, or that they would commit other crimes if released.<sup>62</sup> Of felony defendants, he said that:

The young black men—and it's primarily young black men rather than young black women—charged with felony offenses, they're not getting good advice from their parents. Who do they get advice from? Rag-tag organizations like Black Lives Matter, which tell you, "Resist police," which is the worst thing in the world you could tell a young black man . . . They teach contempt for the police, for the whole justice system.<sup>63</sup>

Concerningly, McSpadden was not the only judge with such a policy.<sup>64</sup> The *Houston Chronicle* found that at least thirty-one current

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58. THOMPSON, *supra* note 3, at 62-64.

59. 476 U.S. 79 (1986).

60. See Gabrielle Banks, *Harris County Judges Told Hearing Magistrates to Deny No-Cost Bail*, HOUS. CHRON. (Feb. 23, 2018, 8:24 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-judges-told-hearing-magistrates-to-12704731.php>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* "Among those listed in the documents with no-bond policies are former judges Ryan Patrick, now the U.S. Attorney for the Southern District of Texas; former Harris County District Attorney Mike Anderson, now deceased, and his wife, Devon, who succeeded him in office after his death; and state Sen. Joan Huffman." *Id.*

and former judges had such a policy.<sup>65</sup> In 2016, local judges granted no-cash bonds to only 6900 out of 80,000 people arrested.<sup>66</sup>

Public Defender Howard Finkelstein wrote a letter to Broward's chief judge asking that Judge Gehl of Broward County, Florida not be allowed to return to the bench after a series of racist outbursts.<sup>67</sup> In one instance, Judge Gehl insinuated that a Jamaican American public defender must smoke because she has dreadlocks.<sup>68</sup> In another instance, when the public defender for a Jamaican defendant asked Judge Gehl to withhold adjudication so that the client would not be deported, Judge Gehl reportedly said that she did not care and told the man to "[g]o back to Jamaica!"<sup>69</sup> Judge Gehl also reportedly told a private attorney that "Mexicans do love their beer."<sup>70</sup> Judge Gehl, who retired shortly before Finkelstein's letter, was also a member of the Judicial Qualifications Commission.<sup>71</sup>

An investigation revealed that Judge Michael Eakin, a Pennsylvania State Supreme Court Justice, sent many emails that contained sexist and racist content.<sup>72</sup> He sent eighteen emails from 2008 to 2014 that denigrated women or people of color.<sup>73</sup> One email contained jokes about Tiger Woods's ethnicity,<sup>74</sup> and another contained commentary disparaging President Obama.<sup>75</sup> While it is not clear what the exact content of the emails were, Justice McCloskey Todd, one of Judge Eakin's colleagues, said that she was offended "by the derogatory stereotyping and mocking of racial, ethnic and religious groups, as well as gays and lesbians."<sup>76</sup> *The Philadelphia Inquirer* described his emails

65. *Id.*

66. *Id.*

67. Brittany Wallman, *Judge Gehl's Comments Draw Fire from Public Defender*, SOUTH FLA. SUN SENTINEL (May 26, 2010, 1:43 PM), [https://www.sun-sentinel.com/sfl-mtblog-2010-05-judge\\_gehls\\_comments\\_draw\\_fire-story.html](https://www.sun-sentinel.com/sfl-mtblog-2010-05-judge_gehls_comments_draw_fire-story.html).

68. Bob Norman, *Got Dreadlocks? The Judge Gehl Story*, NEW TIMES BROWARD-PALM BEACH (May 27, 2010, 8:59 AM), <https://www.browardpalmbeach.com/news/got-dreadlocks-the-judge-gehl-story-6467698>.

69. *Id.*

70. *Id.*

71. *Id.*

72. Chris Mondics, *Justice Eakin's Offensive Emails Led to His Downfall*, PHILA. INQUIRER (Mar. 15, 2016, 1:42 PM), [https://www.inquirer.com/philly/business/20160316\\_Justice\\_Eakin\\_s\\_playful\\_side\\_may\\_have\\_led\\_to\\_his\\_downfall.html](https://www.inquirer.com/philly/business/20160316_Justice_Eakin_s_playful_side_may_have_led_to_his_downfall.html).

73. *Id.*

74. Mark Scolforo, *Supreme Court Justice Michael Eakin Faces Possible Suspension in Pennsylvania*, NBC PHILA. (Dec. 21, 2015, 4:37 AM), <https://www.nbcphiladelphia.com/news/politics/Justice-Michael-Eakin-Email-Scandal-Pennsylvania-Supreme-Court-363108661.html>.

75. Mondics, *supra* note 72.

76. Karen Langley, *Pa. Supreme Court Sends Review of Justice Eakin's Email to Conduct Board*, PITT. POST-GAZETTE (Nov. 2, 2015, 11:57 PM), <https://www.post-gazette.com/news/state/2015/11/02/Pennsylvania-Supreme-Court-No-discipline-for-judge-Eakin-who-exchanged-offensive->



as “sprinkled with racist, misogynist, and ethnic insults.”<sup>77</sup> Facing a hearing before the Court of Judicial Discipline, Judge Eakin retired.<sup>78</sup> By retiring, a tactic used by a number of judges with racist behavior,<sup>79</sup> he was allowed to avoid accountability, keep his benefits, and never address the underlying racist conduct.

Richard Cebull, the Chief U.S. District Judge for the Ninth Circuit,<sup>80</sup> first attracted attention in 2012 for forwarding an email about President Obama on a courthouse computer.<sup>81</sup> The email contained a racist joke that compared President Obama to a dog.<sup>82</sup> In an interview, Judge Cebull acknowledged that the email was racist but said that “I didn’t send it as racist, although that’s what it is. I sent it out because it’s anti-Obama.”<sup>83</sup> He said that he could “understand why people would be offended.”<sup>84</sup> Judge Cebull retired shortly after the Ninth Circuit Judicial Council issued a confidential order and memorandum on the incident.<sup>85</sup> The report, which was made public two months later, revealed that Judge Cebull sent hundreds of racist and sexist emails over a period of four years on the same work computer.<sup>86</sup> The report did not quote the emails but stated that “a significant number included jokes or commentary disparaging African Americans, Native Americans, Latinos—especially illegal immigrants—and women, and a few were antigay.”<sup>87</sup> However, the report did not find any evidence of judicial bias.<sup>88</sup>

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emails-kane/stories/201511020136.

77. Mondics, *supra* note 72.

78. *Id.*

79. See Mark Sherman, *Federal Judges Have a Way to Make Investigations Disappear*, U.S. NEWS (May 10, 2019), <https://apnews.com/c593d922bf264cb683ff89a87aad5a14>.

80. *District & Bankruptcy Courts*, U.S. CTS. FOR NINTH CIR., [https://www.ca9.uscourts.gov/district/district\\_bankruptcy\\_courts.php](https://www.ca9.uscourts.gov/district/district_bankruptcy_courts.php) (last visited May 18, 2020); *Judges & Judgeships – Richard F. Cebull*, U.S. CTS., <https://www.uscourts.gov/judicial-milestones/richard-f-cebull> (last visited May 18, 2020).

81. Elie Mystal, *Judge Who Sent Racist Email Sent Lots of Racist Emails . . . Probably Because He’s Racist*, ABOVE L. (Jan. 21, 2014, 1:23 PM), <https://www.abovethelaw.com/2014/01/judge-who-sent-racist-email-sent-lots-of-racist-emails-probably-because-hes-racist>.

82. MJ Lee, *Judge Admits to Anti-Obama Email*, POLITICO (Mar. 1, 2012, 6:14 AM), <https://www.politico.com/story/2012/03/fed-judge-admits-to-anti-obama-email-073486>.

83. *Id.*

84. *Id.*

85. Ryan J. Reilly, *Richard Cebull, Federal Judge Who Sent Racist Obama Email, Retires*, HUFFPOST (Apr. 3, 2013, 11:11 AM), [https://www.huffpost.com/entry/richard-cebull-retires\\_n\\_3006753](https://www.huffpost.com/entry/richard-cebull-retires_n_3006753).

86. Bob Egelko, *Judge Richard Cebull Sent Hundreds of Racist E-Mails, Panel Says*, SFGATE (Jan. 20, 2014, 5:33 PM), <https://www.sfgate.com/nation/article/Judge-Richard-Cebull-sent-hundreds-of-racist-5160325.php>.

87. *Id.*

88. *Id.*

A complaint filed by several civil rights groups in 2013 alleged that Judge Edith Jones of the Fifth Circuit Court of Appeals made racist comments in a public lecture.<sup>89</sup> Although there were no cameras at the lecture, six witnesses signed affidavits saying that Judge Jones said that “racial groups like African-Americans and Hispanics are predisposed to crime” and are more likely to be involved in violent or “heinous” crimes than people of other races.<sup>90</sup> She also reportedly said that it is an “insult for the U.S. to look to the laws of other countries like Mexico.”<sup>91</sup> Judge Jones disputed the wording of the comments, and the complaint was later dismissed by a panel of federal judges, who concluded that misconduct was not established by a preponderance of the evidence.<sup>92</sup>

Jitendra Shah, a plaintiff appearing before Judge Lynn Hughes, a U.S. District Court Judge in the Fifth Circuit,<sup>93</sup> asked the Fifth Circuit Court of Appeals to remove Judge Hughes from his case because of racist remarks during a pretrial conference.<sup>94</sup> Shah, who is of Indian descent, sued his employer under the Civil Rights Act of 1964 for discrimination on the basis of race and national origin.<sup>95</sup> Shah alleges that during a pre-trial conference, Hughes stated that Indians are “Caucasian” and said, “That’s why Hitler used the swastika.”<sup>96</sup> He also quoted Eleanor Roosevelt saying that “staffs of one color always work better.”<sup>97</sup> Judge Hughes defended his comments, and asserted that he has Indian friends: “The court’s asserted hostility to Indians would surprise its immigrant or first-generation Indian doctors, friends, law clerks, and interns.”<sup>98</sup> The appellate court denied Shah’s petition and Judge Hughes

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89. Jordan Smith, *Judge Edith Jones: Blacks and Hispanics More Violent*, AUSTIN CHRON. (June 4, 2013, 1:50 PM), <https://www.austinchronicle.com/daily/news/2013-06-04/judge-edith-jones-blacks-and-hispanics-more-violent>.

90. Will Weissert, *Texas Judge Allegedly Said Blacks and Hispanics Commit More ‘Heinous’ Crimes*, BUS. INSIDER (June 5, 2013, 10:11 AM), <https://www.businessinsider.com/judge-edith-jones-accused-of-racism-2013-6>.

91. *Id.*

92. Lise Olsen, *Judicial Panel Dismisses Complaint Against Judge Edith Jones*, HOUS. CHRON. (Feb. 20, 2015, 12:48 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Committee-dismisses-complaint-against-Judge-Edith-6090579.php>.

93. John Council, *Plaintiff Asks for Recusal of Judge Lynn Hughes for ‘Biased and Bigoted Statements’*, TEX. LAW. (Sept. 3, 2013, 3:28 PM), <https://www.law.com/texaslawyer/almID/1202617872723>.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Forrest Wilder, *Federal Judge Still Overseeing Discrimination Case After Bizarre Race Remarks*, TEX. OBSERVER (Sept. 23, 2013, 1:09 PM), <https://www.texasobserver.org/federal-judge-still-overseeing-discrimination-case-bizarre-race-remarks>.

remained on the case.<sup>99</sup> Judge Hughes was earlier reprimanded by the Fifth Circuit for dismissing a racial slur regarding fried chicken as “political” and saying that “no black individually and no blacks collectively owns [sic] the sensitivity rights to fried chicken or anything else.”<sup>100</sup>

While there are numerous other instances of judges acting in ways that promote, accept, or exhibit day-to-day racist behavior, perhaps the most disturbing area of accepting racism is in the legal academy. Racist conduct by law professors often leads students to the incorrect belief that there should be no limits on the classroom or public discourse as long as it is couched in terms of “academic freedom.”

When we examine the public statements of Professor Amy Wax of the University of Pennsylvania Law School, who was teaching both courses in the mandatory first-year curriculum as well as upper-level seminars,<sup>101</sup> we see an example of how day-to-day racism is treated in the academy. In 2017, Professor Wax and Professor Larry Alexander of the University of San Diego published an op-ed in *The Philadelphia Inquirer* that many regarded as racist.<sup>102</sup> The op-ed, titled *Paying the Price for Breakdown of the Country’s Bourgeois Culture*, argues broadly that the bourgeois cultural script that reigned from the late 1940s to the mid-1960s allowed for productivity, educational gains, and social coherence.<sup>103</sup> In the op-ed, the authors assert:

All cultures are not equal. Or at least they are not equal in preparing people to be productive in an advanced economy. The culture of the Plains Indians was designed for nomadic hunters, but is not suited to a First World, 21st-century environment. Nor are the single-parent, antisocial habits, prevalent among some working-class whites; the anti-“acting white” rap culture of inner-city blacks; the anti-assimilation ideas gaining ground among some Hispanic immigrants.<sup>104</sup>

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99. *Id.*

100. *Id.*

101. Derek Hawkins, *Penn Law Professor Who Said Black Students Are ‘Rarely’ in Top Half of Class Loses Teaching Duties*, WASH. POST (Mar. 15, 2018, 8:49 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/15/penn-law-professor-who-said-black-students-rarely-perform-well-loses-teaching-duties>.

102. See Amy Wax & Larry Alexander, Opinion, *Paying the Price for Breakdown of the Country’s Bourgeois Culture*, PHILA. INQUIRER (Aug. 9, 2017, 4:01 PM), <https://www.inquirer.com/philly/opinion/commentary/paying-the-price-for-breakdown-of-the-count-rys-bourgeois-culture-20170809.html>; see, e.g., *Penn NLG Statement on Professor Amy Wax*, NAT’L LAWS. GUILD, PENN L. CHAPTER (Aug. 25, 2017), <https://nlgpennlaw.wordpress.com/2017/08/25/penn-nlg-statement-on-professor-amy-wax>.

103. Wax & Alexander, *supra* note 102.

104. *Id.* The authors go on to write that:

These cultural orientations are not only incompatible with what an advanced free-market

In a later interview with *The Daily Pennsylvanian*, Wax explicitly stated that Anglo-Protestant culture is superior: “I don’t shrink from the word ‘superior’ . . . . Everyone wants to go to countries ruled by white Europeans.”<sup>105</sup> Professor Wax drew headlines again when she stated in a video interview with Brown University economics Professor Glenn Loury that “I don’t think I’ve ever seen a black student graduate in the top quarter of the class, and rarely, rarely in the top half. I can think of one or two students who’ve scored in the top half in my required first year course.”<sup>106</sup> The University of Pennsylvania refuted the veracity of her statements, suggesting that she was factually incorrect, and removed Wax from first-year teaching duties.<sup>107</sup> However, she was allowed to continue teaching upper-division courses.<sup>108</sup>

Most recently, Wax came under fire for comments she made in a speech at the National Conservatism Conference about cultural distance nationalism, which she defines as “[t]aking the position that our country will be better off with more whites and fewer nonwhites.”<sup>109</sup> In a later interview, Wax said that she was trying to explain why conservatives are afraid to advocate for cultural distance nationalism, because “people on the left are going to interpret your neutral criterion as a racial one.”<sup>110</sup>

Professor Brian McCall of the University of Oklahoma published a book titled *To Build the City of God: Living as a Catholic in a Secular Age*.<sup>111</sup> Among other things, the book argued that women should not wear pants and that African American studies and women and gender

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economy and a viable democracy require, they are also destructive of a sense of solidarity and reciprocity among Americans. If the bourgeois cultural script—which the upper-middle class still largely observes but now hesitates to preach—cannot be widely reinstated, things are likely to get worse for us all.

*Id.*

105. Dan Spinelli, ‘Not All Cultures Are Created Equal’ Says Penn Law Professor in Op-Ed, *DAILY PENNSYLVANIAN* (Aug. 10, 2017, 5:15 PM), <https://www.thedp.com/article/2017/08/amy-wax-penn-law-cultural-values>.

106. Glenn Loury & Amy Wax, *The Glenn Show: The Downside to Social Uplift*, *BLOGGINGHEADS.TV* (Sept. 11, 2017), <https://bloggingheads.tv/videos/47536?in=49:07>.

107. Hawkins, *supra* note 101.

108. *Id.*

109. Zack Beauchamp, *Amy Wax, “National Conservatism,” and the Dark Dream of a Whiter America*, *VOX* (Jul. 23, 2019, 8:30 AM), <https://www.vox.com/policy-and-politics/2019/7/23/20679172/amy-wax-white-national-conservatism-yoram-hazon-y-racism>.

110. Isaac Chotiner, *A Penn Law Professor Wants to Make America White Again*, *NEW YORKER* (Aug. 23, 2019), <https://www.newyorker.com/news/q-and-a/a-penn-law-professor-wants-to-make-america-white-again>.

111. BRIAN M. MCCALL, *TO BUILD THE CITY OF GOD: LIVING AS CATHOLICS IN A SECULAR AGE* (2014); Drew Hutchinson, *OU Law Professor, Associate Dean Expresses Homophobic, Sexist Views in 2014 Book*, *OU DAILY.COM* (Sept. 30, 2018), [http://www.oudaily.com/ou-law-professor-associate-dean-expresses-homophobic-sexist-views-in/article\\_b023ece8-c50b-11e8-8678-a71250ce7740.html](http://www.oudaily.com/ou-law-professor-associate-dean-expresses-homophobic-sexist-views-in/article_b023ece8-c50b-11e8-8678-a71250ce7740.html).

studies are nonsense subjects: Why is Dante's *Divine Comedy* a classic and not an obscure black woman's scribbling of a ditty in sub-Saharan Africa? Why is Latin a 'classic' language and not Ebonics of South Los Angeles? With such questions as these they long ago ripped Latin out of our schools.<sup>112</sup> While Professor McCall resigned from his administrative position as Associate Dean for Academic Affairs after a 2018 story by *OU Daily* which included a number of excerpts from the book, he continues to teach at the law school.<sup>113</sup>

In addition to individual law school professors that engage in behavior that could be considered racist, there are institutions that have allowed this behavior to go unabated.<sup>114</sup>

Professor Todd Henderson suggested that Justice Sotomayor was nominated to the Supreme Court because of her ethnicity.<sup>115</sup> In response to a *Slate* piece that argued that Justice Brett Kavanaugh's background and reputation as a "nice guy" is irrelevant to his judicial nomination,<sup>116</sup> Henderson tweeted: "I'm old enough to remember when a second-class intellect like Sotomayor got onto the Court because her Latinness gave us insight into her soul."<sup>117</sup> He explained to *The Washington Post* that "[m]y point was merely that she [was] nominated based more on her backstory than on the quality of her judicial opinions. This means to me that Justice Kavanaugh's backstory, although very different, might be relevant, too."<sup>118</sup> Henderson later deleted his Twitter account.<sup>119</sup> The

112. Hutchinson, *supra* note 111.

113. K.S. McNutt, *University of Oklahoma Law Professor 'Saddened, Regrets Disturbance'*, OKLAHOMAN (Oct. 4, 2018, 5:00 AM), <https://oklahoman.com/article/5610535/university-of-oklahoma-law-professor-saddened-regrets-disturbance>.

114. See Allana Akhtar, *42% of US Employees Have Experienced or Seen Racism at Work. It's the Latest Example of How Diversity Efforts Are Falling Short, Especially in America.*, BUS. INSIDER (Feb. 10, 2020, 9:37 AM), <https://www.businessinsider.com/glassdoor-42-of-us-employees-have-witnessed-or-experienced-racism-2019-10>; Colleen Flaherty, *2 More Emory Law Professors Reportedly Said the N-Word in Class*, INSIDE HIGHER ED. (Sept. 17, 2019, 3:00 AM), <https://www.insidehighered.com/quicktakes/2019/09/17/2-more-emory-law-professors-reportedly-said-n-word-class>.

115. *UChicago Law Prof Says Sotomayor Got on Court Because She's Latina, Wipes Twitter*, CHI. MAROON (Aug. 8, 2018), <https://www.chicagomaroon.com/article/2018/8/8/uchicago-law-prof-says-sotomayor-got-court-shes-la>.

116. Dahlia Lithwick, *No More Mr. Nice Justice*, SLATE (Aug. 6, 2018, 5:24 PM), <https://slate.com/news-and-politics/2018/08/brett-kavanaugh-supreme-court-it-doesnt-matter-that-trumps-appointee-is-a-nice-guy.html>.

117. *UChicago Law Prof Says Sotomayor Got on Court Because She's Latina, Wipes Twitter*, *supra* note 115.

118. Erin B. Logan, *Law Professor Said Sotomayor Nominated to SCOTUS for 'Latinness.' Then He Deleted Twitter.*, WASH. POST (Aug. 9, 2018, 8:54 PM), <https://www.washingtonpost.com/news/grade-point/wp/2018/08/09/law-professor-said-sotomayor-nominated-to-scotus-for-latinness-then-he-deleted-twitter>.

119. *See id.*

University responded by saying that it “does not limit the comments of faculty members nor mandate apologies for such comments, unless there has been a violation of University policy or the law.”<sup>120</sup>

Professor Paul Zwier of Emory University School of Law attracted attention in 2018 for using the N-word during a tort class discussion of intentional infliction of emotional distress.<sup>121</sup> The incident attracted attention because the slur was not used in the case he was discussing, and Zwier used the word during a cold call with a black woman student.<sup>122</sup> Zwier later said that he should not have used the full slur, but explained that his educational purpose in doing so was to “show how the common law evolves along with the understanding of words, using the ‘N word’ as an example.”<sup>123</sup> As a result of this incident, Zwier was removed from the classroom for the rest of the semester, and the school implemented required training for all faculty and staff.<sup>124</sup> However, just a few months later, Zwier reportedly used the N-word again, this time during office hours with a student.<sup>125</sup>

Another example of racism in the academy is the social media of Professor Glen Reynolds of the University of Tennessee at Knoxville. Professor Reynolds attracted media attention with his response to a protest over the death of Keith Lamont Scott, an African American man killed by a police officer.<sup>126</sup> Replying to a tweet from a television news station in Charlotte, showing protesters on Interstate 277, Professor Reynolds tweeted, “Run them down.”<sup>127</sup> Twitter temporarily suspended Reynolds’s account but unblocked it after he agreed to delete the offending tweet.<sup>128</sup>

Professor Lawrence Connell of Widener University School of Law became the focus of a number of complaints while utilizing controversial

120. *Id.*

121. Kathryn Rubino, *Law School Professor Drops the N-Word in the First Week of Class*, ABOVE L. (Aug. 27, 2018, 2:14 PM), <https://abovethelaw.com/2018/08/law-school-professor-drops-the-n-word-in-the-first-week-of-class/?rf=1>.

122. *Id.*

123. *Id.*

124. *Id.*

125. Kathryn Rubino, *Law School Professor Who Dropped the N-Word in Class Is Back at It*, ABOVE L. (Nov. 12, 2018, 12:10 PM), <https://abovethelaw.com/2018/11/law-school-professor-who-dropped-the-n-word-in-class-is-back-at-it/?rf=1>.

126. Megan Boehnke, *USA TODAY Suspends University of Tennessee Law Professor’s Column over Charlotte Tweet*, KNOXVILLE NEWS SENTINEL (Sept. 22, 2016), <http://archive.knoxnews.com/news/local/twitter-suspends-glenn-reynolds-account-after-tweet-urges-motorists-to-run-down-charlotte-protesters-394398621.html>; Mark Washburn et al., *Family, Police See Different Tale in Same Videos*, CHARLOTTE OBSERVER (Sept. 22, 2016, 6:11 AM), <https://www.charlotteobserver.com/news/local/crime/article103367547.html>.

127. Boehnke, *supra* note 126.

128. *Id.*

criminal law hypotheticals. In at least ten hypotheticals, he made the school's dean, a black woman, a victim of a shooting; in another hypothetical, he made her a drug dealer.<sup>129</sup> A faculty panel that investigated the matter said that Connell should not be fired.<sup>130</sup> Connell's lawyer said that the dean is "too thin-skinned" and "wanted to get rid of a conservative professor."<sup>131</sup> Connell later faced complaints by students under the school's harassment and discrimination code, also for allegedly inappropriate hypotheticals.<sup>132</sup>

Racist conduct by law professors and microaggressions inside and outside the classroom have far-reaching impacts. These comments transform learning environments into uncomfortable and unsafe spaces. Our classrooms are intended to be places that prepare students for the legal system, but in doing so, they should not devolve into places that are hostile and that teach students that such comments are appropriate or at least permissible. In evaluating the teaching performance of professors of law, we ought to consider whether their behavior is racist. We ought to include in promotion criteria and tenure awards whether the professor created a classroom that was open or hostile based on race. And once someone has tenure and exhibits racist behavior, that person should have to attend training on diversity and should be monitored and coached about how to create a less hostile environment.

We need to ensure that there are greater numbers of students of color in the classrooms, and we need to ensure that they do not have to carry the burden of learning in a classroom that is hostile to them. We need to teach white law students how to be better allies such that they call out racism and question professors when they engage in this sort of behavior so that the onus does not always fall on the victim of the microaggressions and racist behavior.

#### IV. TEACHING LEADERSHIP IN THE LAW

And for those of you who are professors in the room, I believe we have an obligation to teach leadership in our law schools and to infuse

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129. Debra Cassens Weiss, *Law Prof Faces New Complaints over Hypotheticals Involving Dean's Murder*, A.B.A. J. (Mar. 17, 2011, 1:06 PM), [http://www.abajournal.com/news/article/law\\_prof\\_faces\\_new\\_complaints\\_over\\_hypotheticals\\_involving\\_deans\\_murder](http://www.abajournal.com/news/article/law_prof_faces_new_complaints_over_hypotheticals_involving_deans_murder).

130. Martha Neil, *Panel Says Law Prof Shouldn't Be Fired over Hypothetical Involving Dean's Murder*, A.B.A. J. (Mar. 11, 2011, 12:26 AM), [http://www.abajournal.com/news/article/panel\\_says\\_law\\_prof\\_shouldnt\\_be\\_fired\\_over\\_hypothetical\\_involving\\_deans\\_mur](http://www.abajournal.com/news/article/panel_says_law_prof_shouldnt_be_fired_over_hypothetical_involving_deans_mur).

131. Debra Cassens Weiss, *Law Prof's Job on the Line for Using Hypotheticals Involving Dean's Murder*, A.B.A. J. (Feb. 14, 2011, 4:54 PM), [http://www.abajournal.com/news/article/law\\_prof\\_job\\_on\\_the\\_line\\_for\\_using\\_hypotheticals\\_involving\\_law\\_deans\\_murder](http://www.abajournal.com/news/article/law_prof_job_on_the_line_for_using_hypotheticals_involving_law_deans_murder).

132. Cassens Weiss, *supra* note 129.

those leadership lessons with information that prepares our students to address the challenge of racism in our country. In teaching fundamental leadership skill development, we are focusing on the development of competencies such as self-awareness, self-direction, agility, communications, collaboration, and emotional and social intelligence. All of these competencies are consistent with, and arguably necessary for, the formation of a professional identity. They are also important as we look to prepare lawyers to work toward building a society that cherishes and expects racial equity.

It does not matter where you look—law schools, law firms, the bench, non-profits, prosecutor and defender offices—we remain a deeply segregated profession. We are not at all reflective of the clients we serve *or* the communities and cities in which we practice. We are not prepared to lead in the ways that our nation and the world demand. In my research and writing on leadership, I have come to believe that the ability to think broadly and clearly about our leadership role and the ability to think and act beyond the limits of our individual expertise and experience are keys to becoming good leaders. In my book *Dangerous Leaders*, I outline five central traits necessary to becoming successful lawyer leaders.<sup>133</sup>

First among these skills is for us to do away with the notion that the lawyer leader is some all-knowing individual able to put him or herself into the shoes of everyone else.<sup>134</sup> Particularly as lawyers, we love to hear Atticus Finch in *To Kill a Mockingbird*<sup>135</sup> tell his young daughter Scout that “[y]ou never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”<sup>136</sup> But as much as we admire the sentiment, that just is not good enough. You cannot imagine an experience or perspective if you have lived a life totally divorced from that reality; you can listen and learn about it and begin to adjust your perspectives, but only if you seek out individuals with life experiences, perspectives, and skills that are dissimilar to those you personally possess. That is how we create true diversity. And yes, including people whose views are born of a different set of experiences often means that the conversations will be challenging and less comfortable than if we surrounded ourselves with people who look like us and think like us. But we have to fight the tendency to create and foster homogeneity among our teams and in our profession.

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133. THOMPSON, *supra* note 3, at 10-11.

134. *Id.* at 10.

135. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

136. *Id.* at 32.



Second, and related but substantively different, we as leaders should seek out perspectives from unlikely sources.<sup>137</sup> What do I mean by that? Relying on the most experienced and those who have tenure within an organizational culture reinforces the existing culture, reproduces existing patterns, and protects the status quo. Seeking out and engaging “newcomers” is helpful in building mental, emotional, and operational agility. Listening to and valuing the ideas of those who have not been acclimatized to the organizational culture allows for a fresh look at what the organization is doing and perhaps raises new unexpected questions and approaches to chronic issues within the organization.

Third, in my experience, lawyer leaders often speak about the value of collaboration but rarely engage in it.<sup>138</sup> In fact, when lawyers speak about collaboration, what they really mean is “teaming.”<sup>139</sup> In teaming, the group that is working together will often have the same interests, the same rewards, and the same goals. That is not collaboration. Collaboration hurts. It means giving up something for a greater good. That means that you might have to give up your idea to support someone else’s.

You might have to forego credit to let someone else get the recognition. You might have to sacrifice what you would otherwise prioritize in service of the greater good. Collaboration with people whose views differ from yours may help us get to better solutions.

Fourth, as leaders, we should be suspicious of easy agreement.<sup>140</sup> What I mean here is that as lawyer leaders, we tend to value consensus and the ease of reaching a shared view. But for leaders, quick assent should be a warning sign that we have not fully explored the issue, its challenges, and other solutions. When leaders really grapple with tough issues like race, there is no quick or easy solution. If the problems of race were easy, we would have solved them by now. So, remembering that each option has ramifications and opposing considerations or trade-offs is critical to get to a workable set of solutions.

Finally, as lawyers, much of our work happens behind closed doors, out of the view of the public. Lawyer leaders must not only act with moral courage but must also put checks and balances into their leadership processes which reinforce that goal.<sup>141</sup> One of the personal characteristics that stands out for many lawyers is their great ambition:

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137. THOMPSON, *supra* note 3, at 10-11.

138. *Id.* at 11.

139. *Id.*

140. *Id.*

141. *Id.*

The desire to continue to grow, achieve, and prosper and to be seen as a successful leader. This sometimes leads to faulty decision-making. Establishing practices, procedures, and safeguards here will help to ensure that in the sometimes-conflicting issues of personal and political ambition and the decisions that one should make as a lawyer leader, are not compromised and we look to do what is good for the whole, not just what is good for us as individuals. Leadership, in its most basic form, means sacrificing personal goals for the greater good.

I hope that you will join me in this critical moment in time and accompany me in the fight for racial diversity and racial equity. It is indeed an immense struggle that I hope we will individually and collectively undertake and embrace. If we wage the battle over narrative, over place and power, and over voice and value, I believe we have a chance to save nothing less than the soul of our country.

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