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Symposium Address: Racial Justice in the 1980s

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SYMPOSIUM ADDRESS

RACIAL JUSTICE IN THE 1980's

JULIUS L. CHAMBERS*

I want to talk to you about three things this evening. I will be brief. The first hardly needs to be mentioned: we are facing some very difficult times today. Reverend Chavis has talked about a number of these struggles. I will comment on them from a legal perspective. The second point is that, as we face these challenges today, we are in a difficult position because of the lack of commitment among lawyers, the lack of legal talent, and the lack of resources among lawyers willing to respond. The third is that we

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Anne T. Dowling of the NAACP Legal Defense and Educational Fund, Inc. and Paul C. Ridgeway of Campbell University School of Law provided research assistance for this article. The text of this article is derived from an address given at the John J. Broderick Civil Rights Symposium. The symposium was presented by the Campbell University Law Students Civil Rights Research Council on April 3, 1985.

1. Dr. Benjamín Chavis, Director of the United Church of Christ Commission on Racial Justice, spoke on the need for viewing the criminal justice system in terms of widespread social transformations. “[The criminal justice system’s] fundamental purpose is to assist, in a very specific and restrictive way, the maintenance of the status quo. Therefore I believe that we cannot talk about change, reform or transformation, without at the same time becoming involved in the social transformation itself.” Dr. Chavis detailed racial disparity within prison systems, inadequate legal counsel for the poor of all races, the increasing frequency of racially related violence, and United States policies in South Africa. In concluding, Dr. Chavis said: “Peace is not the answer for war, peace is the presence of justice. Our nation spends too much of its vast resources in preparing for war, and too little on the pursuit of justice. . . . We must lift this burden from our shoulders together, hand in hand.”

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must see our task as the civil rights lawyers of the late 1930's and 1940's did when they looked for ways to overcome Plessy v. Ferguson.² We face a somewhat different challenge today; but, with the same determination and commitment that those lawyers had in the thirties and forties, it is possible for us to respond as successfully in the 1980's as they did. It is extremely important that, as we undertake today's challenge, we preserve the process and the substantive rights that we have achieved in the past.

I was asked in April of 1984 if I would consider leaving North Carolina to work with the NAACP Legal Defense Fund in New York.³ I had worked with a firm in North Carolina for over twenty years.⁴ I was raised in North Carolina. It is my home. I will always love this state and its people. It was a hard decision, but as I reflected on what was developing in the country, on the resources available to respond to these developments, I thought it would be a truly demanding challenge—one I could not pass up. So I accepted.

Today, when I learned about the death of a very dear friend—Kelly Alexander, Sr.⁵—I recalled that decision and began

². 163 U.S. 537 (1896). Plessy, who claimed to be seven-eighths caucasian and one-eighth African, was arrested for riding in a “white only” train coach in violation of a Louisiana statute. Plessy argued that the conviction and the establishment of racial categories violated his 14th amendment equal protection rights.

The State argued that while Plessy was excluded from the white coach, by the same token whites were excluded from the black coach. The coaches, the State argued, were identical in every respect.

The Supreme Court accepted the State's argument. Justice Brown, for the majority, held that “no doubt the law had been passed in good faith and for the promotion of the public good, rather than for the oppression of or injury to any group of citizens.” Thus, the United States entered the twentieth century officially sanctioning the “separate but equal doctrine.”

Only Justice Harlan dissented to the Plessy holding: “But in the view of the Constitution, in the eyes of the law, there is in the country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind.” Id. at 559, (Harlan, J., dissenting).

³. Since its establishment in 1940, the LDF has been a significant partner in the struggle for equal justice. Under the direction of Thurgood Marshall (1940-1961), Jack Greenberg (1961-1984), and now, Julius Chambers, the LDF has provided free legal assistance to those seeking equality in education, voting, employment, housing, health care and the administration of justice.

⁴. Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, of Charlotte.

⁵. Kelly Alexander, known as “a pioneer of the modern phase of the civil rights movement in the South,” served as the head of the North Carolina chapter of the NAACP for thirty-six years. He was a member of the NAACP national board of directors from 1950 until his death, serving as vice chairman in 1983 and
to remember the problems we faced several years ago when I first met Kelly.

I was a freshman as North Carolina Central—North Carolina College, at that time—and I was on the way home on a bus to a metropolis in Montgomery County that is about an hour and a half ride from here. If you have not traveled very much, you have not heard of this place. It is Mt. Gilead, my home town. I had paid my dollar and ten cents to ride from Durham to Mt. Gilead on a Trailways Bus. I sat down somewhere in the middle of the bus. When we got to Carthage, some white people got on the bus and the driver told me to move to the back. I insisted on staying where I was, and the driver insisted on my getting off the bus.

Well, I got off the bus in Carthage, about forty miles from my home, and I called Kelly Alexander. I told him that the bus driver wanted me to move to the back of the bus, but that I would not move. I stood up for my rights. Kelly said that was the right thing to do. “Well, Kelly,” I said, “the only problem is, I don’t have enough money to get home.”

He worked out a way for me to get to Mt. Gilead. From that day until his death, I learned a lot from Kelly Alexander—about the patience that is needed in addressing these problems, the determination that is required, the skill that is necessary, and the commitment that must come from all of us. Because of that lesson, I am proud of that experience and will always cherish it.

Let us look at what we are dealing with today. Two months ago, we were advised that the United States Department of Justice was beginning to review—or would soon announce its position regarding—some existing cases that included provisions on affirmative action. We were told that the Department was examining three hundred and fifty cases. We began efforts to find out which ones were under review. We were refused the information. Later we learned that the Department had identified forty-six cases involving affirmative action plans that it argued were in violation of the Constitution, and that the Department was writing to the relevant jurisdictions stating that they must reconsider and modify those plans. Again, we asked for the names of those forty-six jurisdictions, as well as any others that were being reviewed; again, we were rebuffed. We filed a lawsuit to get the information under the provisions of the Freedom of Information Act. Last week, we were


6. NAACP Legal Defense Fund, Inc. v. United States Dept. of Justice, 612 F.
advised that we were entitled to the information and were given the forty-six names. Today, the Department of Justice publicly announced the names of the forty-six jurisdictions involved.

One of the cases involves the State Highway Patrol of North Carolina. The Department contends that the consent decree in that case, which began as *Johnson v. The North Carolina State Highway Patrol*, in some way violates the constitutional rights of white members of the highway patrol; the Department has requested that the State agree to modifications of that consent decree.

At the same time, the Department has begun an attack on existing minority set-aside programs, contending that they also violate the constitutional rights of white citizens. The Department asserts that affirmative action in minority set-aside programs cannot be instituted unless an established constitutional violation of an identified victim is being remedied. The Department is using the Supreme Court's decision in *Memphis Firefighters Local Union No. 1784 v. Stotts* as the basis for these actions and is now pro-


8. The consent decree, reached December 16, 1980, established several affirmative requirements regarding the hiring and promotion policies of the Highway Patrol. Included in these requirements are the hiring of a full-time recruiter who is a minority member and eight back-up minority recruiters, recruiting efforts at predominantly minority and female colleges and universities, providing that 50% of the openings in each Patrol Basic School be made available to qualified black applicants and 25% to female applicants, written examinations valid under Title VII testing guidelines, and promotion policies consistent with length of service and screenings consistent with Title VII guidelines.

9. The "minority business enterprise" provision of the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701 et seq. requires that, absent administrative waiver, at least 10% of federal funds granted for local public works projects be used by the state or local grantee to procure services or supplies from businesses owned by minority group members. *Id.* at § 6705(f)(2). *See also Fullilove v. Klutznick*, 448 U.S. 448 (1980), holding that the 10% minority set-aside provision was plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remediating the present effects of past racial discrimination. *Id.* at 482.

10. 104 S. Ct. 2576 (1984). In *Stotts*, black plaintiffs and the Fire Department had entered a consent decree for the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. Without admitting discrimination, the consent decree established an interim hiring goal of filling 50% of the Department's job vacancies with qualified blacks, and it attempted to ensure that 20% of the promotions in each job category be given to blacks. The
ceeding at a break-neck pace to challenge affirmative action across-the-board.

But, let me make another point about the North Carolina Highway Patrol case. I brought that case eleven years ago. At the time, very few blacks worked as highway patrolmen, and no black highway patrolman had ever advanced beyond an entry level job. Consent decree contained no provision for layoffs, but by virtue of an earlier consent decree, seniority was to be computed, for the purposes of promotion, transfer, and assignment, "as the total seniority of that person with the City."

Financial troubles ensued for the City, and it had to lay off many employees. Layoffs were to be based on the "last hired, first fired" rule, pursuant to the seniority system. If a senior employee's position were eliminated, he could "bump down" to a lower ranking position. Because these layoffs would adversely affect blacks, the district court enjoined this layoff plan "insofar as it will decrease the percentages of black" employees. Thus, some non-minority employees with more seniority than minority employees were laid off or demoted.

The Supreme Court held that the injunction was improper and could not be justified as an effort to either modify or enforce the consent decree. The Court could not order the violation of a bona fide seniority system because § 703(h) of Title VII "permits the routine application of a seniority system absent proof of an intention to discriminate." 104 S. Ct. 2587 citing International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 352 (1977). "If the individual members," the Court held, "of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster." However, "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination giving rise to the consent decree, and none had received an award of competitive seniority. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the original 1980 decree. Thus, the Court concluded, the court of appeals had imposed on the parties something that could not have been ordered had the case gone to trial and the plaintiff there proved that a pattern or practice of discrimination existed.

The broad language of the Stotts opinion has provided impetus for federal agencies charged with enforcing the Civil Rights Act of 1964 to validate heretofore unofficial policies. Both the Justice Department and the Equal Employment Opportunity Commission have since adopted the precise "mere membership" language of the Stotts decision as a statement of their policies. See, e.g. United States Department of Justice, Legal Activities, 18-9 (1984-85); Statement of the United States Commission on Civil Rights, July 11, 1984. Professor Thomas McCoy of Vanderbilt University Law School sees Stotts as the "first piece in the puzzle. These changes at the Supreme Court and the Cabinet level will eventually be seen as the first pieces in the dismantling of affirmative action.” Assault on Affirmative Action, TIME (p. 19-20, Feb. 25, 1985).
They were excluded through the use of tests, through the use of "character investigations," or through the discretion allowed officials in selecting individuals for promotion.

Were blacks excluded because of lack of qualifications? Or was it race that kept blacks from getting jobs with the highway patrol? Was it race that prevented blacks from being promoted to sergeant? The record in the case and the record in North Carolina show that black people have been systematically excluded from the highway patrol simply because of their race. 12 There is no way to deny it. Do you know there are no black commanders in the highway patrol? If hiring and promotion are based on qualifications, why is it farfetched to assume that a black person can head the highway patrol?

So, when you hear the Department of Justice argue that affirmative action is wrong and that race-conscious remedies are wrong, do not be fooled into believing that the Department is doing so because it is interested in a racially-neutral Constitution or racially-neutral constitutional application of practices by the states. What the Department is interested in when it seeks to turn back the limited progress blacks have made in this state and this country is politics.

Look at other situations. Look at the administration of criminal law in this country. When I first started practicing law, we did not have a black judge anywhere in the state; we did not even think about it. We did not have a black district attorney anywhere in this state—and did not even think about it. We had a few blacks occasionally serve on juries—usually through some mistake. Blacks were not part of the system of criminal justice. Why were they excluded? Was it because of race? The only way we got black judges was through insisting that race—past discrimination—be considered. 13 It was race-conscious remedies that put blacks on juries. 14

12. At the time Johnson was filed, there were 1110 Highway Patrol uniformed personnel. Of these, 29 were black, 4 were Indian, and 1 was Hispanic. There were no females. All of the minority employees remained at the lowest rank, the trooper. By Aug. 13, 1979, there were 40 black personnel, with two having advanced to the second-lowest rank, sergeant. The first black was hired by the Highway Patrol in 1967, the second and third in 1969. From 1965 to 1979, the Patrol hired 1127 white males, 3 white females, 49 black males, 15 Indian males, and 1 Hispanic male.

13. While serving as a judge of the U.S. District Court (E.D. Pa.), United States Court of Appeals (3rd Cir.) Judge A. Leon Higginbotham, Jr., addressed the historical background of black jurists:
Anyone looking at the under-representation of blacks on juries could not help but find that constitutional violations were excluding them. How can anyone believe that there is no longer a need for race-conscious remedies? The only way we are going to get blacks fairly represented in the judicial system in this state, with its history of past discrimination, is through race-conscious remedies. One would think that everyone would acknowledge that.

In 1971 the Supreme Court reviewed several cases involving school desegregation. It looked at the issues that are being raised anew by the Department of Justice, for example, the propriety of race-conscious remedies for past discrimination. In one decision, written by the Chief Justice, the Court said it is appropriate and, indeed, necessary to consider race in devising a remedy where race has been a factor in the constitutional violation. How can we de-

Since 1844, when Macon B. Allen became the first black lawyer to be admitted to the bar of any state, and since John S. Rock was admitted to the bar of the United States Supreme Court on February 1, 1865, black lawyers have litigated in the federal courts almost exclusively before white judges . . . . In fact, in the "good old days" before William H. Hastie was appointed in 1949 to the United States Court of Appeals for the Third Circuit, white litigants throughout America were able to argue before a judiciary from the United States District Court to the United States Court of Appeals to the United States Supreme Court without encountering a single black judge along the entire judicial route; for until Judge Hastie's appointment there were no black Article III judges. In fact, until 1961 . . . no President had ever appointed a black as a United States District Court judge.

G. Ware, From the Black Bar: New Perspectives on Black America, 68-9 (1976).

Judge Higginbotham presented these remarks in reply to several defendants' motion that the judge be disqualified because he was black, the defendants white, and the matter being one of racial discrimination. Commonwealth of Pennsylvania v. Local Union No. 542, International Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974).

14. See, e.g., State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948) (overturning superior court's refusal to quash bill of indictment where names were printed on the list of prospective jurors in black ink if white, and red ink if non-white, and no black person had ever served on a grand jury in the county).


16. "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment
segregate schools or devise remedies to compensate for the exclusion of minorities from various jobs unless we consider race? Otherwise, there is no remedy.

Members of Congress, members of the judiciary know this. Yet, we have a bill that has been introduced by United States Senator Orin Hatch that states there is a need to look forward; it calls for us to forget about the past. Let us assume that everything is equal and consider how we go forward from here—to go forward from today, without benefit of constitutional remedies. The exclusion of minorities and women from various jobs and opportunities would continue—just as it had in the past—unless we have race- and sex-conscious remedies. Equally troubling is that some courts have begun to look with favor on the argument that race should not be a factor in devising a remedy even for a proven constitutional violation.

Nevertheless, in every case but one in which the Justice Department is attacking affirmative action based on the ruling in Stotts, the courts have rejected the government’s argument. Courts have pointed out that the decision in Stotts is limited. They have said that race-conscious remedies are necessary, and that race will continue to be used. Other cases are making their way up to the Supreme Court and we will see how the Court rules on them. If the Court accepts the Justice Department’s argu-

of their constitutional obligation to eliminate existing dual school systems.” N.C. State Board of Education, 402 U.S. at 46.

ment, if the Court accepts what Senator Hatch is proposing in his bill, 22 if the Court accepts what the Justice Department is proposing in the Norfolk School case, namely that school districts can return to "neighborhood" schools, 23 then we are turning back the clock—back to where it was before Brown v. Board of Education. 24

What I have said about employment, affirmative action, and minority set-asides applies to criminal law enforcement. I will not belabor the statistics about the disproportionate number of minorities in penal institutions, 25 or about the way capital punishment is imposed in this country. 26 The Legal Defense Fund publishes a document every few months about the death-row population in the United States. With only one exception, death penalties have been imposed in the past five years in this country solely in states of the former southern confederacy. 27 Death penalties in this country in

22. See supra note 17.
24. 347 U.S. 483 (1954). When Minnie Jean Brown, a six year old black child, sought admission to her predominantly white neighborhood school in Topeka, Kansas, and was refused, her parents brought suit on equal protection grounds against the school board. The school board contended that while schools were segregated, their facilities were equal with relation to buildings, teacher salaries, curriculum, and other measurable attributes. The Supreme Court squarely confronted the question of whether segregation, even with completely equal facilities provided, was contrary to the equal protection clause of the Constitution.

In a unanimous decision, Chief Justice Warren held that the mere act of separation on a racial basis was impermissible:

[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

347 U.S. at 495.

25. According to U.S. Department of Justice figures, as of December 31, 1983, 46% of the prison population in the United States was black whereas blacks comprise 12% of the total U.S. population at large. For every 100,000 black males, 1445 are imprisoned compared to 225 white males per 100,000. In the South, 53% of the prison population is black, with blacks comprising 19% of the population at large. In North Carolina, 56% of the prison population are minorities. These statistics have remained essentially unchanged since 1978. Department of Justice, Bureau of Justice Statistics, Prisoners in State and Federal Institutions on December 31, 1983, 7, Fig. 12 (Aug. 1984).

26. As of March 1, 1985, there are 1479 inmates on death row. Of those, 619 are black (41.85%), 84 are Hispanic (5.68%), 18 are Native American (1.22%) and 5 are Asian (0.34%). Death Row, U.S.A., NAACP Legal Defense and Educational Fund, Inc. (March 1, 1985).

27. Of the 38 persons executed from 1980 to April 1985, only one, Steven
the past five years—and before—have been imposed in a clearly racially discriminatory manner.

Those of you who read capital punishment cases in criminal law should look at the Eleventh Circuit Court of Appeals’ decision in McClesky\(^28\) which rejected an argument that capital punishment in Georgia was being imposed in a racially discriminatory manner.\(^29\) We are bringing that case up to the Supreme Court. I think that the evidence in McClesky clearly establishes the discriminatory application of the death penalty in Georgia.\(^30\) But, that is only one indication of how criminal justice has been administered; only

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Judy (Indiana), was executed outside of the southern states. Florida has executed 11 persons, Louisiana—7, Georgia—6, Texas—6, Virginia—2, North Carolina—2, Alabama—1, Mississippi—1, and South Carolina—1. Death Row, U.S.A., supra note 26, at 3.


29. Both the district court and court of appeals focused on a study by Professor David C. Baldus, a comprehensive and exhaustive attempt to model factors contributing to the imposition of the death penalty in the State of Georgia. Professor Baldus conducted two surveys of offenders between 1973 and 1978, the first measuring all persons convicted of murder and the second sampling those convicted of murder or voluntary manslaughter. The study measured as many as 500 variables.

The district court, for a number of reasons including questions concerning the validity of various assumptions and methodologies employed by the researchers, found that the statistical evidence was insufficient to support the claim of unconstitutionality in the death sentencing process in Georgia. The court of appeals affirmed on this point, admitting that while the capital justice system is not perfect, it need not be perfect in order to be constitutional. 753 F.2d at 887-99.

30. Judge Clark, in his dissent, viewed the Baldus study as demonstrating that “[o]ne can only conclude that in the operation of this system the life of a white is dearer, the life of a black cheaper.” 753 F.2d at 920 (Clark, dissenting). Judge Clark looked not at the racial disparity based upon the race of the defendant, but rather upon the race of the victim. “These figures show a gross disparate racial impact—that where the victim was white there were 11% death sentences, compared to only 1.3 percent death sentences when the victim was black. Similarly, only 8% of white defendants compared to 22% of black defendants received the death penalty when the victim was white.” Id. at 920.

In a recent study by the Dallas Times Herald, results indicated that people who murder whites are prosecuted more frequently and are being put to death at 11 times the rate of those who kill blacks. In states where death penalty has been imposed, a killer of a white has one chance in nine of a death sentence, while a killer of a black has one chance in 20. Dallas Times Herald (Sunday, Nov. 17, 1985).
one indication of how minorities have perceived—I think correctly—the way that criminal law has been imposed. And therein is the dilemma.

Let me talk about minority perceptions of the criminal justice system. In major urban areas in this country, every black group with whom I have spoken puts drugs as the major problem affecting the community. Yet many people are afraid, despite the problems caused by drugs in their community, to talk about the problems because of the disdain in which they hold the criminal justice system.

For one thing, there is the question of judges. As Mr. Reagan begins to appoint judges to the courts, it is incumbent on him to worry about the fact that only two blacks are included among one hundred forty-six persons he has appointed to the federal judiciary. Today, there are another one hundred and five vacancies. I am sure he appreciates the need for the court to at least appear fair to those who are going to be affected by its decisions.

Another problem that troubles me is the decreasing number of lawyers who can afford to become involved in public interest, civil rights and civil liberties work. I am concerned about the lack of commitment or interest among young lawyers. One reason I was glad to speak at Campbell was the opportunity to make a plea for you to consider becoming involved in this kind of work, though I assure you that it is not an easy task. Let me give you an example.

When I began practicing law several years ago, financial assistance from a foundation that thought it was important to help minorities practice civil rights law in the South enabled me to establish an interracial law firm in North Carolina. The Legal Defense Fund originated and operated the program for eight years—then it could no longer fund the program. People thought there were enough lawyers in the South willing to take on these cases. Do you know how many minority lawyers we have in this country? Less than six percent. Do you know how many are involved in this kind of work? Less than one percent and the number is decreasing. Do you know why? They cannot earn enough to survive in this kind of work.

32. According to the January 1984 United States Bureau of Labor Statistics, Employment and Earnings, of the 651,000 practicing lawyers and judges in the United States, only 2.7% are black and 1.0% are Hispanic.
I have traveled through thirteen southern states and I have talked to a number of lawyers, black and white. They simply cannot afford to take on civil rights cases; their clients cannot afford to bring them. It is an interesting phenomenon. We have a 1964 Civil Rights Act that says thou shall not discriminate in employment. But who can afford to exercise his or her rights under the Act? Do you know what it costs to litigate an employment discrimination case? You used to be able to litigate one for less than five thousand dollars. Today, you would do well to litigate one for less than fifty thousand dollars. In fact, if you are bold enough to bring a class action, you would do well to litigate it for less than a half-million dollars. Do you know any clients who can afford that? How do you get paid? Well, if you win, eventually you get paid.

However, the Department of Justice and the Association of Attorneys General are now advocating that you ought not be paid any more than seventy-five dollars an hour. Consider the mathematics: You bring a case in 1985. If it is a typical employment discrimination case, you may get it resolved in 1990 or the year 2000—if you’re lucky. Five, maybe ten years later you will be paid at the rate of seventy-five dollars an hour—very few lawyers can survive under those conditions. Understandably, lawyers flee from practicing in this area.

It is distressing to count the number of minority law firms, and the number of minorities in law firms. It was 1969 before a black became a partner in a major law firm in New York.

34. See, e.g., 42 U.S.C. § 2000e-5(k), which provides: “In any action or proceeding under this title [42 USC §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.”
35. United States Deputy Attorney General Carol E. Dinkens, for example, spoke before the Senate’s Subcommittee on the Judiciary in favor of Senate Bill 2802. The bill would amend the Criminal Justice Act, 18 U.S.C. § 3006(A)(d)(1) and (2) and modify all federal statutes, such as Title VII, 42 U.S.C. §§ 2000e et seq. (1982) and the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982), that authorize awards of attorneys’ fees against federal, state and local governments. The bill sets a maximum rate of 75 dollars per hour and specifically precludes the use of multipliers or bonuses to augment any awards. Statement of Carol E. Dinkens, Deputy Attorney General before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, concerning S. 2802, The Legal Fees Equity Act, Sept. 11, 1984.
36. Amalya Kerse, currently a judge of the Second Circuit U.S. Court of Appeals, was named as a partner of Hughes, Hubbard & Reed in 1969. See gener-
five more years before the second black became a partner. Two months ago, I met with blacks who were partners in major law firms in New York. There are now ten. And that is New York, a liberal city. Do you know how many blacks are partners in major white law firms in North Carolina? Or South Carolina? Or Chicago? A handful. The problem is so acute that even the American Bar Association, a bastion of moderation, got disturbed. Blacks in the law are being limited, not because of their skill, but because they are black.

Every time I hear someone tell me otherwise—that the lack of minorities is due to a lack of black lawyers with marketable skills—I tell them about my experience. I practiced in North Carolina. I graduated from Chapel Hill. Did I get a job offer? I went to Columbia Law School for a masters degree. Frank Thomas, who is now president of the Ford Foundation, finished Columbia Law School at the same time. Did he get a job on Wall Street? He could not get a job in New York. I could not get a job in North Carolina. We couldn’t get those jobs solely because we were black. Why isn’t the Attorney General talking about that problem? How can we forget about these issues and be told to look to the future when these problems remain? It is imperative that you consider entering civil rights and civil liberties litigation: I think our country’s future depends on it.

Today, at Columbia Law School, twenty-five percent fewer blacks are applying for admission than in past years. At Harvard,
there are fifty percent fewer applications from black students. What is happening? I was deeply discouraged, but then Jack Greenberg\(^4\) started a program at Columbia to place students in public interest law jobs for the summer. At a meeting describing the program, we had a packed audience—over three hundred students showed up. That program is now placing sixty students for the summer in places like South Africa, the Phillipines, India, North Carolina, New York, and Washington. The program is oversubscribed. So there is some interest, but not enough.

A third and final point. I litigated a particular case for many years.\(^4\) It involved four hundred black employees with an employment discrimination claim. After a complete victory—a Supreme Court decision, a very broad-reaching affirmative action plan, back pay, and attorney fees—only one hundred of those four hundred black employees ever moved up into better jobs. Was the problem race? No, it was not. Three hundred black employees simply could not qualify to move up. They lacked the skills and training. I litigated another case involving housing discrimination.\(^4\) I represented one individual, and again we won. But the majority of blacks in that community still live in inadequate housing. Some school districts are still segregated and cannot possibly be integrated. I have looked at the educational programs within some of these schools. What I saw were programs worse than those I had in segregated schools prior to 1954. What is happening to black children in the urban public schools of America is worse than—or at least as bad as—what black children suffered in the South and elsewhere before *Brown v. Board of Education*\.\(^4\) Sixty-eight percent of the black male students in New York drop out of school and never get a high school diploma. As we look at the performance of black students on SAT scores, we see that students are not being prepared to get into college—and the problem is getting worse.

In closing, I want to mention a third challenge that faces us today that is somewhat different. I think it is possible for us to

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4. Jack Greenberg was Mr. Julius Chambers’ predecessor as director-counsel of the NAACP-LDF having served for 23 years. He is currently a professor of law at Columbia University School of Law and established its International Human Rights Summer Internship Program.


42. American McKnight v. Romney, (M.D.N.C. 1967) (no docket number available).

demonstrate that economic discrimination, just like that by race and sex, ought be proscribed by the equal protection clause. Some have suggested that the better argument is that economic discrimination ought to be proscribed under the privileges and immunities clause or that we ought to find protection in the ninth amendment. Nevertheless, I think that within the Constitution there are provisions that would allow one to begin to address that problem.

Poverty among Americans, black and white, is increasing in tremendous numbers. We do not yet have a court finding that provides protection from discrimination against the poor. I think it is possible to look at this as a racial matter. Or, as I have discussed with the president of the National Organization of Women

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<tr>
<th>Below Poverty Level</th>
<th>Below 125% of poverty level</th>
</tr>
</thead>
<tbody>
<tr>
<td>All persons</td>
<td>24.1</td>
</tr>
<tr>
<td>White</td>
<td>16.7</td>
</tr>
<tr>
<td>Black</td>
<td>7.1</td>
</tr>
<tr>
<td>FHH, NHP*</td>
<td>10.4</td>
</tr>
</tbody>
</table>

* FHH, NHP are families with a female head of household, no husband present.

Families and individuals are classified as being above or below the poverty level using the poverty index originated at the Social Security Administration in 1964 and revised by the Federal Interagency Committee in 1969 and 1980. The index is based solely on money income and does not reflect food stamps, medicaid, public housing, or other non-cash benefits. The poverty thresholds are updated yearly to reflect changes in the Consumer Price Index. The following are representative threshold poverty levels in 1983: single individual: $5,061; two persons, one household, under 65 years of age: $6,697; three persons: $7,938; four persons: $10,178. The 125% poverty level, which encompasses those individual and families on the borderline of acute poverty, is, for example, $6,326 for a single individual. Current Population Report, Series P-60, No. 138.

*47. Id. See especially black percentiles versus white percentiles as reflected in the census data.
Legal Defense Fund, as a race-sex matter. Somewhere in this audience, in this law school, in the legal profession today, are those who will begin to address the growing problem of the plight of the poor, white and black, and to develop some legal means for providing some redress.

Consider this example. In one community in this country, schools spend, on the average, a hundred and fifty dollars per student per year, compared with an average of two thousand dollars per student in another school district. Is that a violation of the Constitution? Would you expect the student on whom a hundred and fifty dollars is spent to be getting an education equal to that of the student on whom two thousand dollars is spent? Is there a way to challenge that? Or does San Antonio v. Rodriguez provide the

49. Id. See especially female head of household data as reflected in the census data.
50. 411 U.S. 1 (1973). The Court upheld a school funding scheme which provided that neighborhood school districts provide a substantial portion of the revenue of local schools. The clear effect was that poor neighborhood children were deprived of the educational benefits available to children of more affluent neighborhoods. While the Court recognized the discriminatory effect of the scheme, it refused to apply a strict level of scrutiny and analyzed the scheme merely in terms of rationality.

Justice Marshall dissented. One of the elements of his dissent questioned the failure of the majority to classify the deprived class as a "suspect class." "The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process." Id. at 105 (Marshall, J., dissenting, citations omitted), citing U.S. v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). Further, "[t]his Court has frequently recognized that discrimination on the basis of wealth may create a classification of suspect character and thereby call for exacting judicial scrutiny." Id. at 117, citing Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 807 (1969).

Justice Marshall pointed out that wealth classifications are distinguishable from classifications of race, sex or alienage. Id. at 121. "The 'poor' may not be seen as politically powerless as certain discrete and insular minority groups . . . [and] . . . it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens." Id. at 121-22. "Thus," Justice Marshall stated, "we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected." Id. at 122, citing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

Justice Marshall concluded this portion of his dissent by holding that where an individual school child was discriminated against as a result of that over which
answer? Is there another way to interpret San Antonio v. Rodriguez? Would introducing race in San Antonio v. Rodriguez have provided protection? It is a question you ought to ponder. Can the privileges and immunities clause, or the ninth amendment, provide a way to guarantee the right to equal education?

Those are some challenges that we are trying to address now at the Legal Defense Fund. I think that the progress we make in race relations in the years to come will depend on the success that we have in evolving these legal principles—just as it did for the civil rights lawyers in the 1940's who brought about the successful challenge to Plessy v. Ferguson\(^{51}\) that culminated in the Brown decision.

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the individual has no control, namely group wealth as opposed to personal wealth, and such discrimination is no reflection of the individual's characteristics or his abilities, strict scrutiny is mandated. Id. at 123.

51. 163 U.S. 537.