

SPEECH

“WE ARE ON THE MOVE”

Second Annual Dr. Martin Luther King, Jr. Lecture

January 20, 2009

by
*Gerald Torres**

Professor Torres explores the idea of “racial literacy” by working through a series of examples where being able to “read” race mattered. Reading race correctly helped policy makers and advocates understand the real problem and helped craft solutions that were generally beneficial by addressing structural defects not just individual bad actors.

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I. AN INTRODUCTION BY DEAN KLONOFF

I want to welcome everyone here to our annual Martin Luther King, Jr. Lecture. It is an incredible day to be having this event. It is just an amazing day—an historic day. I want to begin by thanking Stoel Rives Law Firm for making this program possible. As I said at lunch, not only have they provided the financial support for the program, but they have provided enormous brain power, horse power. We had three people from Stoel Rives participate at lunch in a panel discussion. It was just a fabulous discussion—very invigorating and rigorous—and so I cannot thank the people at Stoel Rives enough for making this all possible. I would like to begin by introducing Pam Jacklin from Stoel Rives, whom I

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have been working very closely with these past couple of years on the Martin Luther King, Jr. lecture program, and she will introduce our guest speaker tonight. Please give her a warm welcome.

II. PAMELA JACKLIN: WORDS FROM A COLLEAGUE

Good evening. For those of you who are here for the second time today, thank you for coming back. I think you will find it worthwhile. For those of you who are here for the first time, welcome and I am glad that you came. Our speaker tonight is Gerald Torres—the second Martin Luther King, Jr. lecturer at Lewis & Clark Law School. Many of you know him better than I since he has been here teaching more than ten summers. Based on what I saw today in the first talk, you are very lucky indeed to have Professor Torres as a member of your community. He is an incredibly provocative thinker and an engaging personality, and that is a good combination for a professor. He is also a practicing lawyer who has done much during his career. We learned today that thirty-one years ago he turned down a job offer from Stoel Rives, my law firm. That is our loss. Professor Torres said at the time that he wanted to see if he could make it as an academic, and it appears that he has.

He is well known as an advocate and a practitioner of critical race theory. He and Lani Guinier, whom I am sure is well known to all of you, wrote a book called *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*.¹ It is an important book worth your attention. In addition to his work teaching at the University of Texas, and prior to that at the University of Minnesota, he has also been active in a number of organizations. As a past president of the Association of the American Law Schools, Professor Torres has worked with the Environmental Law Institute of the National Petroleum Council—an interesting appointment for someone who is both an academic and an environmental lawyer. Professor Torres received the 2004 legal services award from the Mexican American Legal Defense and Educational Fund for his pro bono work.² Professors Torres and Guinier are working on a new book called *Changing the Wind*, which we are all looking forward to reading. His lecture tonight discusses the thesis that will be explored in the new book. He tells me that the title comes from the notion that one always says politicians decide what stands to take by testing where the wind is coming from. So, if you want to change society you had better change the wind. We will hear more about this and his theories now. Thank you for coming and welcome Professor Torres.

¹ LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2003).

² Press Release, University of Texas at Austin, Professor Gerald Torres Receives Legal Service Award from MALDEF (Aug. 13, 2004), http://www.utexas.edu/law/news/2004/081304_maldef.html.

III. ON THE FUTURE: PROFESSOR TORRES

Since Ms. Jacklin mentioned it, one of the interesting things during my appointment to the National Petroleum Council is that the chairman of the Council at the time was Vice President Cheney.³ He was in private life at the time, but he served as the chairman while I sat on the Council. It was actually a very interesting time.

I want to thank Stoel Rives for making this lecture possible. Any chance to come out to Portland is a blessing. When given the opportunity, I generally leap at it. Portland is one of my favorite cities. I currently live in Austin, and Austin has been going through some growing pains. When I have spoken to the city leaders there, I tell them that we are right at the tipping point where we could be Portland or we could be Los Angeles, and they ought to go visit each city and then make a choice because we could go one direction or another. We are really right on the cusp. I have no question about which direction we ought to go, and I wish that I could grab them and bring them with me to Portland so they could see which direction we ought to go. Because my personal physician was trained here in Portland, I owe more than just good memories and good spirits to Stumptown. I owe my good health to Portland as well.

I tried to talk Dean Klonoff out of scheduling this talk today knowing that it would coincide with the inauguration of President Obama and, after hearing his speech this morning, I realize that my talk can be nothing but a digestif or something that you might have after a good meal rather than the main course itself.⁴ Thus, I hope it functions at that level, at least. So, keeping with the spirit of the inauguration, I want to begin by quoting a couple of people because it does really frame both the theme I think that President Obama touched on in his inaugural address today, but also in the campaign. I think it is important to focus not just on the speech that he gave today, but on the nature and structure of his campaign. As I talk today, I want you to think about the way in which the campaign was put together and the kind of mobilization that had to occur for a relatively unknown first-term senator from Illinois, not to say first-term African-American senator, not to say first-term, forty-six-year-old senator from Illinois, to take it into his head that he could actually be President of the United States and beat someone as well-heeled and seemingly invincible as Hillary Clinton for the nomination and ultimately beat whoever the Republicans put up in opposition. I have known Hillary Clinton since I worked for the Children’s Defense Fund and she was

³ JOSEPH A. PRATT ET AL., VOICE OF THE MARKETPLACE: A HISTORY OF THE NATIONAL PETROLEUM COUNCIL 53 (2002).

⁴ Barack Obama, President of the United States, Inaugural Address (Jan. 20, 2009), *available at* <http://www.whitehouse.gov/blog/inaugural-address>.

President of the Board.⁵ I know her to be a formidable candidate. So for him to take up that challenge meant on some really deep level that the idea of hope as the motivating or commanding theme for his campaign was the fundamental hope and belief that he held for himself that he could get the task done. That personal hope could then be translated into public hope for national renewal.

Thus, I turn to Charles Black. This is Charles Black talking about Abraham Lincoln. I recur to Black and to Lincoln not just because President Obama took the Oath of Office on the Bible that President Lincoln took his initial Oath of Office on, but because I want it to be clear that when Lincoln was making what sounded like rhetorical political arguments he was, in fact, making legal arguments. Arguments from the Fourteenth Amendment represent political arguments that have been converted to law through whatever process we currently determine to confer legitimacy. Thus when we argue about the meaning of the Fourteenth Amendment, it is important to revisit the political substructure of what became law without forgetting that ultimately you are not having a strictly political debate. You are speaking in the idiom of law. So, here is the quotation:

“Now he belongs to the ages.”

These words of Stanton, on his learning that Lincoln had died, assure us that we are not done with Lincoln. He belongs to our ages, gone and to come. His is the spirit I have invoked to quicken this book.

In one of his best-remembered sayings, he hopefully foretold that “this nation, under God, shall enjoy a new birth of freedom.” Lincoln did not use such words lightly.

The distinct event after his death that seemed to announce this “new birth of freedom” was the opening passage of the Fourteenth Amendment, recognizing, as clearly and as broadly words could do, the “privileges and the immunities of the citizens of the United States.” These “privileges and immunities” are set out, with becoming breadth, in the Declaration of Independence, the lode-star of Lincoln’s life.

Eight years after Lincoln died, our Supreme Court, in the *Slaughterhouse Cases*, did its best to bring to nothing his sacred prophecy. The country has accepted, for a time, that terrible deed.

But the spirit and mind of Lincoln belong to the ages, out of the power of any Court, or of one short period of history, to bring them to nothing. When we are ready, we can take up the work to which he continues to beckon us. If we do so, we will be treading the ways of his journey, from his reverence for the Declaration of Independence to his vision at Gettysburg.

⁵ Children’s Defense Fund, Board of Directors Emeritus, <http://www.childrensdefense.org/who-is-cdf/cdf-board-of-directors/emeritus.html> (last visited Jan. 14, 2010).

When you will, you can join the supreme company of his great soul.⁶

Charles Black was not just cobbling together rhetorical flourishes, he was summarizing his historical vision. The United States is not an old country. For those of you who are young, it is probably hard to imagine, but for people my age and maybe older it is not far beyond living memory that we could have conversed with people who were, in fact, slaves or the immediate descendents of slaves, but who were freed by the amendments that Charles Black and President Obama referred to. The President took the Oath of Office on the steps of the building that was constructed by slaves so that the history that Black was referring to was not just a metaphorical run of history, but a living history. It was a time that if we joined hands together we could touch, but it is also hopeful because he invites us to join with a great soul on a journey that began at the imperfect founding. So now, if you will indulge me, I want to turn to one of my favorite poets: Mary Oliver. Some of you may or may not know her work, but her naturalism captures some of the optimism that I think inheres in the world and stands as a refutation to the pessimism or cynicism that is so often fashionable. Her poem:

Why I Wake Early

Hello, sun in my face.
Hello, you who make the morning
and spread it over the fields
and into the faces of the tulips
and the nodding morning glories,
and into the windows of, even, the
miserable and the crotchety—

best preacher that ever was,
dear star, that just happens
to be where you are in the universe
to keep us from ever-darkness,
to ease us with warm touching,
to hold us in the great hands of light—
good morning, good morning, good morning.

Watch, now, how I start the day
in happiness, in kindness.⁷

I think these quotations join hands together because it takes the hope that led Obama to be where he is today and the hope that Charles Black had that we can redeem the promises that were made in the Declaration of Independence and the Civil War Amendments and links

⁶ CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 167–68* (1999).

⁷ MARY OLIVER, *WHY I WAKE EARLY* 3 (2004).

them with the hope that I think you can feel every morning when you wake up. Every day *is* a new day.

What I want to talk about today is some of the advice that I gave when I was called on by the transition team to write something for the civil rights transition part of the transition team. One of the reasons we were asked to contribute was that in Iowa then-candidate Obama held up a book on the podium and said, “You know, I have been reading this book, it is about a canary in a coal mine,” and proceeded to talk about the book Professor Guinier and I wrote.⁸ The fact that candidate Obama later went on to become President Obama makes it even more exciting, but it was not just that the President liked our book; it is that he thought we offered practical ideas about dealing with the problem of race in twenty-first century America. So what did we say? We said that race is a way of seeing how institutions work. It makes things visible that would otherwise be invisible.⁹ Race is a political rather than a biological category.¹⁰ It is not real, but it has real consequences.¹¹ Dealing with the reality of those consequences without pretending that you have discovered anything essentially true about any particular person or group, but without shying away from the group impact of the social relations that race has produced is the challenge of social policy.¹² There are those on all sides who will resist this approach and these simple insights.

Thus, I turned to Charles Black and I turned to Mary Oliver. Most of what you are going to get now is really going to be a prosaic at best and mechanical, but a lot of it really does pivot on the symbolism that Obama represents. Dean Klonoff pointed out to me today that one of the things Martin Luther King, Jr. predicted just before he died was that we would have a black president within twenty-five years.¹³ Well, you know he died in 1968.¹⁴ The University of Texas was not fully integrated until 1971.¹⁵ The school my children go to was the first integrated boarding school in the south and it was integrated in 1973. So for someone to say in 1968 that he could see in twenty-five years there being a black president is a sign of hopefulness in the American spirit that is breathtaking. Just breathtaking. Now twenty-five years, of course, is another number that comes up for those of you who follow civil rights jurisprudence. Twenty-

⁸ See generally, GUINIER & TORRES, *supra* note 1, at 11.

⁹ *Id.* at 14–16.

¹⁰ *Id.* at 19, 300.

¹¹ *Id.* at 171–72.

¹² *Id.* at 258–59, 300–02.

¹³ Interview by Bob McKenzie, BBC, with Martin Luther King, Jr. (1964), available at http://news.bbc.co.uk/2/hi/programmes/world_news_america/7838851.stm.

¹⁴ Hanes Walton Jr., *King, Martin Luther, Jr.*, in 2 ENCYCLOPEDIA OF RACE AND RACISM 213 (John Hartwell Moore ed., 2009).

¹⁵ See generally, Joe Drape, *Changing the Face of Texas Football*, NY TIMES, Dec. 23, 2005, at D1 (discussing the difficulty of fully-integrating the University of Texas, particularly the sports programs).

five years is the number that comes up in *Grutter v. Bollinger*.¹⁶ Justice O'Connor suggested in *Grutter v. Bollinger* that we will allow race to be taken into account in admissions to higher education, certainly law school, but that in twenty-five years the need for such consideration is likely not to be necessary. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹⁷

A couple of things happened when Justice O'Connor made that prediction. First, there was much disbelief, but the other thing that happened was that a series of questions were formed and now knowing that Martin Luther King, Jr. had that enormous reservoir of hope to suggest in 1968 that in twenty-five years there could be a black president puts a different spin on the challenge that Justice O'Connor launched in *Grutter*. What, you have to ask, has to be different in this country for that prediction that she makes in the *Grutter* opinion to be true? What has to change? The questions are not how do we reaffirm all of the struggles that we have been through over affirmative action or how do we reconfirm the victories that we have had in various courtrooms or how do we get the Supreme Court to re-establish the vitality of the doctrinal wins that we have secured? Instead, the questions are much deeper and in many ways much harder. They are about how we make the world the kind of place that it has to be such that her prediction can, *in fact*, come true. What Charles Black's insight suggests is that the answer comprehends that inquiry as both a legal question and as a socio-economic-political question.

So how do we get there? Well, the first thing is to ask: What does race mean? Or put another way, what work does race do when we invoke it in an explanation or an argument? One of the points we made in *The Miner's Canary* is that race allows us to see structural exclusion and it allows us to see the obvious social barriers that exist and the obvious socio-economic inequalities that exist.¹⁸ It allows us to see those barriers that disproportionately affect people of color, but it also misleads us because we sometimes think that because they seem to disproportionately impact people of color, they only affect people of color.¹⁹ Thus, they lead us to craft remedies that are specific to a class of people and that has undermined the creation of cross-alliances that are necessary to produce the structural changes that will systematically transform the institutions to reduce structural exclusion.²⁰

I want to be very clear that despite the changes we have witnessed, this is not the time to claim that we have transcended race. Despite the fact that we have elected an African-American President, we have not

¹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

¹⁷ *Id.*

¹⁸ GUINIER & TORRES, *supra* note 1, at 48–49.

¹⁹ *Id.*

²⁰ *Id.* at 117–19.

transcended race as a barrier to full social equality. Race still operates as a powerful social fact that because of its historic role in our history has a potent impact on the life chances of individual persons. For example, “[r]esearchers have found that being raised in poor neighborhoods plays a major role in explaining why African-American children from middle-income families are far more likely than white children to slip down the income ladder as adults.”²¹ Black children, even middle-class children were more likely to be raised in a poor neighborhood than white children.²² Thus, while having a black President might mean that individual racial animus is lower, it does not mean that racial issues have gone away (the birth-certificate movement is proof of that) and it does not mean that the structural issues associated with long-term racial stratification have been eliminated. What Professor Guinier and I have suggested is that we need to learn how to be racially literate. What is racial literacy? Racial literacy may seem like a funny term, but all it means is that we need to learn how to read race.

Professor Guinier and I define racial literacy in the following way. First of all, racial literacy includes race consciousness and abjures color blindness because, in order to function as a diagnostic tool in the way that I just suggested, you have to notice the ways in which race works structurally.²³ I will have more to say about that in a moment, but it also functions diagnostically as a tool for understanding the limitations of both law and politics for social change. The method that Lani and I have coined for this analysis is called demosprudence. I will explain demosprudence shortly. Racial literacy also recognizes that race has an identarian content that is different from racial consciousness, but is a source of political mobilization.²⁴ What this means is that race is still, for some people, a source of social, political, and personal identity.

Consciousness of race helps you diagnose how social and economic institutions are working. Race neutrality, however, when you are creating remedies remains important both to address the structural implications of the problem you are diagnosing and to mobilize structural allies in the solution. Let me give you one example. Many of you will not see this as a particularly good example, but I think it is instructive. In Texas there was a case called *Hopwood v. Texas*.²⁵ The opinion in *Hopwood v. Texas* outlawed affirmative action in all of its forms.²⁶ The Attorney General extended the reach of the court’s opinion and the court said, in essence, that there will be personal liability for any university official that is

²¹ Alec MacGillis, *Neighborhoods Key to Future Income, Study Finds*, WASH. POST, July 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/26/AR2009072602347.html?hpid=moreheadlines>.

²² *Id.*

²³ GUINIER & TORRES, *supra* note 1, at 29–31, 42–49, 74–82.

²⁴ *Id.* at 29–30, 81–82.

²⁵ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

²⁶ *Id.* at 934.

disobeying the court’s injunction.²⁷ People took this admonition very seriously.

The response to the challenge of the decision was very interesting. Two things happened: first of all, a group of lawyers convened and tried to figure out a way to mount a legal challenge to the case that we could take up to the Supreme Court. While this was going on, another thing happened; a parallel group of people assembled and started looking at the admissions data. They asked, “Who does the University of Texas serve?” They figured out two things that were true about the University of Texas. One is that the median income of the parents of the students who attend the University of Texas is sixty percent higher than the national average.²⁸ That, believe it or not, is not a representative cross section of income of the average families of the state of Texas.

Second, there are approximately 1,500 high schools in Texas. Seventy-five percent of the seats in the freshman class were historically filled each year by students from just 150 high schools, largely from the suburbs of Dallas, Houston, San Antonio, and Austin.²⁹ There were some counties in rural west Texas that had never in the history of the University of Texas sent students to UT.³⁰ Ever. They sent their taxes to UT, but they never sent their students. So the Mexican-American caucus convened a meeting with the rural Republican caucus and the African-American caucus, and they attempted to figure out a way to increase the representativeness of the student body. So they came up with what came to be called the Texas 10 Percent Plan (TTP).³¹ The plan is simple: if you graduate within the top ten percent of your class from an accredited Texas high school, you are eligible to attend the University of Texas at Austin or any public university in Texas. Now, of course there was a great hubbub concerning the TTP. The concern was about this: the high schools are not equal. The high schools in suburban Austin, suburban Dallas, suburban Houston, and suburban San Antonio are better than the high schools in Muleshoe, Dimmitt, Levelland, or Del Rio. They are just better and why is that? Well, because the ratio of spending between the poor public schools and the richest public schools was historically about 700 to 1 and the Texas Supreme Court ruled that, under the Texas State Constitution, that discrepancy was unconstitutional.³² The legislature accordingly had to develop a plan to equalize spending. Though it struggled, the legislature could not come up with a plan to

²⁷ *Hopwood v. Texas*, 861 F. Supp. 551, 584–85 (W.D. Tex. 1994); *see also* Letter Op. Att’y Gen. 97-001 (Feb. 5, 1997).

²⁸ *See The American Freshman: Forty-Year Trends: 1966-2006*, HERI RESEARCH BRIEF (Higher Educ. Research Inst., Los Angeles, Cal.), Jan. 2008, at 2, *available at* <http://www.heri.ucla.edu/PDFs/pubs/briefs/40yrTrendsResearchBrief.pdf>.

²⁹ Lani Guinier & Gerald Torres, *Credit Bush Doesn’t Deserve*, NY TIMES, Aug. 8, 2000, at A27.

³⁰ *Id.*

³¹ Texas 10 Percent Plan, TEX. EDUC. CODE ANN. § 51.803 (Vernon 2006).

³² *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392, 397 (Tex. 1989).

equalize spending over a fifteen-year period; so the students continued to go to these unequally funded schools and had performed, nonetheless, as well as they could within the schools to which they were assigned. So, yes, it is true that these schools were not equal, but the students were doing as well as they could do. The answer to the people who said that the TTP was not fair is that the students did everything that was asked of them. If they got a substandard education, it was because the legislature had failed to fund their schools adequately, though they were constitutionally obligated to do so. If these students cannot go to the University of Texas—for which their parents have been paying taxes and their grandparents and their aunts and their uncles for generations—because their schools are under-preparing them, the unfairness is not in the TTP, but in the educational structure itself. We now have ten years of history of the TTP. Let us see what we have discovered in ten years.

We have discovered that students admitted from these low-performing high schools under the TTP outperform students who would otherwise be predicted to be the academic leaders.³³ Though they are not required for admission, all students are still required to take the SAT and ACT. The idea behind the requirement was that we would be able to identify those students who might need remedial work to succeed at a school like UT. What that data allowed us to see, however, is that these TTP students are consistently outperforming students who score 200 and 300 points higher on the SAT who are not admitted under the TTP.³⁴ What it tells the admissions department is that perhaps they did not know everything they ought to know about what it takes to admit students who can compete and excel in a university like the University of Texas. What it created was a great deal of humility in the admissions office. Before the TTP, they thought you could construct the Texas Index (a combination of SAT scores and high school grade point average with the GPA normed for SAT), rank the students based on that Index, and admit a class. That Index would be the equivalent of objective merit. Now, the TTP creates another competing measure and it turned out that these students are outperforming the other students. A perplexing situation, to say the least. The students admitted under the TTP had a higher rate of persistence.³⁵ Persistence is the rate at which your students return for their sophomore year.

³³ Scott Jaschik, *Texas Limits '10%' Admissions*, INSIDE HIGHER ED, June 1, 2009, <http://www.insidehighered.com/news/2009/06/01/texas>.

³⁴ Larry R. Faulkner, *Class Rank Predicts Student Success*, USA TODAY, Apr. 5, 2002, <http://www.texastop10.princeton.edu/publicity/general/USA%20Today.04.05.05.pdf>.

³⁵ Marta Tienda & Teresa A. Sullivan, *The Promise and Peril of the Texas Uniform Admission Law*, in THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA 155, 165–66 (David L. Featherman et al. eds., 2010), available at http://theop.princeton.edu/reports/forthcoming/PromiseandPeril_TiendaSullivan.pdf.

We would not have known all of this if the TTP had not existed. But the other thing that is true, and which ought to be a tremendous benefit for the University in a democracy, is that every senate district in Texas is now represented in the freshman class. The only downside is that private schools have stopped ranking, but students who attend private schools tend to have more options anyway, and those schools could elect to rank their students.

All that discussion was to demonstrate a racially neutral solution to what was thought to be a racial problem. Who are the allies now? Commentators thought that people who wanted to defend access would have been African-Americans and Mexican-Americans; it turns out the champions of the TTP are those caucuses, but the real champions are rural Republicans. The poster children for the TTP plan are the poor white kids from West Texas, not the black kids from the fifth ward of Houston or the Mexican kids from Del Rio; they are the white kids from Muleshoe. Now this is just one example, but, by keeping racial neutrality as a measure, it allows you to test the fair applicability of the structural solution where race is a precipitating factor in designing a solution. We would not have noticed this problem if we had not noticed the extent to which racial discrimination was a problem at the University of Texas. So, race consciousness allowed us to diagnose structural exclusion, and we chose a race neutral solution to solve the problem. Now, this is not going to happen everywhere, but what it allows you to do is to test racial literacy by going from the particular to the general and back again because it forces you to not mistake what you are witnessing. This problem is not an individual problem. It is not the problem of a bad heart, not that bad hearts do not exist; it is not the problem of the person who makes bad choices, not that bad choices do not exist; but, in analyzing the issue, you do not center the analysis on the individual. And I am not saying that people cannot make bad choices—people make bad choices all the time—but you do not try to solve a social problem with an individual-driven solution. A structural problem requires a structural solution. I am not saying that you take all responsibility away from individuals, but what you do not do is locate what are really structural problems in individuals.

What racial literacy allows you to do is to see the structural problems. Racial literacy is the first step in a three-step process. Now, what that leads us to is what we call democratic merit, which is linking merit to democratic values. What is democratic merit? Democratic merit just means recognizing that merit is not a free-floating objective value in the universe, but it is tied to other things that we value. If we did not value how fast you could run 100 meters, Usain Bolt would be meaningless to us.³⁶ We would not have the Prefontaine trail down in Eugene if we did

³⁶ Christopher Clarey, *In Bold Style, Bolt Rewrites 100-Meter Record Book*, NY TIMES, Aug. 17, 2009, at D1 (reporting Usain Bolt breaking 100-meter world record).

not value middle distance running in a state like Oregon.³⁷ But democratic values, what we value and what we call merit, are tied together and what racial literacy does is it allows you to ask yourself questions about how those are tied together. So if I go back to the TTP for a minute, what it allows you to do is to tie the mission of the university to the admission policies that the university was applying. And there are still people that think that it is not fair, but at least the goal that the university was trying to achieve is more closely aligned with the actual policies that it is applying.

Let me give you another example and it is far less controversial: the G.I. Bill.³⁸ The G.I. Bill is another example of democratic merit. We value people who are willing to put themselves on the line for the things that we value and, when they come back to this country, we ought to be there for them either through veteran's benefits or through providing them access to education, and the new G.I. Bill that was just passed reflects that. We passed that bill because we equate things in one realm with things we value in another realm. So when I say democratic merit, all I am talking about is being very conscious of the fact that merit is not a free-floating signifier, but it is tied to other values. You cannot talk about it as though it is like helium or hydrogen or an element that you can discover. It is something that we create out of things we value and we need to be conscious about how we value them and what role they play in the construction of our institutions.

Democratic merit is tied to democratic values. Let me give you another democratic value that we need to think about. One would be nationalizing, maybe I should say constitutionalizing, the right to vote because currently there is no constitutional right to vote. The states run national elections according to their own rules. I mentioned earlier today that I am board chair of the Advancement Project.³⁹ Before the election in November, we had lawsuits in various states to try and prevent states from disenfranchising otherwise eligible voters from being able to cast their ballots in the presidential, congressional, and senatorial elections. Let me just give you an example: Ohio had determined that it would deal with provisional ballots on a county-by-county basis.⁴⁰ You could live in a northern county and it would be one rule; if you lived in a southern county, it would be another rule. There was no uniformity. I spoke to the Attorney General, and in our brief conversation I said that all you need is one rule that will apply statewide and you will eliminate any potential complaints. Moreover, you have legal authority under the Ohio State Constitution to propound such a rule. I said I did not care what the rule

³⁷ Oregon Track Club, Eugene-Springfield Runners' Map, http://www.oregontrackclub.org/images/runnersmap_07.pdf (last visited Jan. 14, 2010).

³⁸ Servicemen's Readjustment Act of 1944 (G.I. Bill), Pub. L. No. 78-346, 58 Stat. 284 (1944).

³⁹ Advancement Project, Board of Directors, <http://www.advancementproject.org/about/board-of-directors.php> (last visited Jan. 14, 2010).

⁴⁰ OHIO REV. CODE ANN. § 3505.183 (West 2007).

is. I am relatively indifferent as long as it is fair and uniform, but that in all events a single rule will save you a lawsuit because if the election is close and 10,000 people complain that they were disenfranchised, as was complained in the last election, there is going to be a lawsuit. But they did not adopt a single rule. Why not?

Of course, I cannot be sure, but my conjecture is that a single rule was a non-starter because there were local politics at play. Because of the vagaries of local politics, a national election was held hostage to local rules that were crafted to satisfy parochial concerns. One thing that seems to make sense to do is constitutionalize the right to vote, rather than leaving it to the county chairman of each state. If you read the last two sentences of Article II of the Fourteenth Amendment:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁴¹

What does that suggest to you?

National elections should be governed by a uniform rule. Let us say I am in Indiana and the state wants to adopt a voter ID program. Because of the voter ID program, people who cannot afford to go the twenty miles that they have to go to get an ID will be disenfranchised. So people, otherwise eligible, would not be able to vote. Have they committed a crime? Are they part of a rebellion? Have they been disenfranchised? Have they lost the right to vote in a national election? Should not the Constitution protect a privilege and immunity that flows from national citizenship?

Let me give you an example. What we all say is a moral threshold for the criminal justice system is that it is better for twelve guilty men to go free than for a single innocent man to be punished. I am not sure that most Americans believe that anymore, but we certainly continue to say it. It is a moral-first principle in criminal law. Liberty is so important that we ought to hold the state to its burden of proof and, if the state does not satisfy their burden, then the guilty ought to walk rather than putting the innocent or the non-proven guilty in jail. In voting, it is the complete opposite. We would rather potentially disenfranchise forty-three thousand people in order to avert the possibility that one hypothetical

⁴¹ U.S. CONST. amend. XIV, § 2.

person might cast a fraudulent ballot. That was the proof that was raised in the Indiana case. There was no proof that a fraudulent ballot had ever been cast, but there was proof that up to forty-three thousand otherwise eligible voters could potentially be denied the right to vote under the proposed voter ID rule. Would we rather convict forty-three thousand innocent people rather than let a single guilty person go free? Well, why not?

One good reason is because it offends our basic sense of justice and decency. But public norms of justice and decency are produced by a legitimately constituted democratic state. It seems incumbent upon us to inquire into the legitimacy of the government that imposes its rules on us. Rules about participation are about as basic as you can get. If democratic legitimacy depends upon participation of the people who are going to be subject to the rules that democratically constituted government produces, do you not think what we ought to care about is the nature of the polity those rules are constituting? The rules that government produces have an impact on our liberty and our property and any of our due process rights. Do you not think that we ought to protect those interests as well as we possibly can?

One of the things we think we want to do is to protect transparency. Now, why do we want to do that? Because we want the rules to be as legitimate as possible and that means the people who are subject to the rules ought to be able to participate in their making. All of us can commit to a procedure that we determine is fair, and we will live with the results of that procedure. Even if we disagree with the result of the procedure, if we agree that the procedure is at least minimally fair and does not exclude our capacity to participate and does not exclude our capacity to prevail for all time, then we can live with an occasional defeat. What the commitment to democratic values suggests, and this is why President Obama's inaugural address today was so important and this is why the campaign that Obama ran was so important, was that he engaged people who were not previously engaged. This is why the caucus states were so important because it was not just about getting people to cast a ballot on a single day. It was getting people to sit there for hours and to talk to one another, face one another in a room, to persuade one another to vote, to stand up for candidates.

Minnesota was a caucus state and, during the time I lived there, I have to say that I loved it, in part because you had to sit there in a room with your neighbors and argue about the candidates. What we ought to do is make the system more participatory. We ought to be more vigilant in protecting the liberty of our citizens by enhancing their right to participate in elections rather than curtailing it.

We gave advice in three areas: education, voter protection, and data collection. Education because we feel it has been neglected, and I have a list of quite specific proposals for higher and elementary school educational changes. Educational changes at the lower level are obviously in need of support, primarily with the states that go beyond the No Child

Left Behind Act of 2001.⁴² No Child Left Behind is not necessarily a bad idea. The thing that was left out and otherwise got lost in the debate is the way that Texas made their version of No Child Left Behind work. Rewards were based on raising the highest low score, so it is not based on raising the highest score in the school on the year-to-year comparison; it is based on raising the highest low score on the year-to-year comparison so the incentive is for the principal to encourage the teachers to focus on bringing up the bottom of the school.⁴³ This enabled Texas to move from being near the bottom in reading and math to being fourth in the nation in educational reform.⁴⁴ It was quite a remarkable achievement. That incentive structure was left out of the federal program, but the idea of rewarding people for raising the bottom, I think, is an important piece of it. What Texas did was recognize the structural flaw in the way the rewards are distributed.

We need data collection that allows us to see how institutions are working for people of color largely to use it for the diagnostic purposes that I suggested earlier and then to frame race-neutral remedies by identifying likely structural allies as I suggested earlier.

Let me conclude by clarifying the ideas of race consciousness and race neutrality. There are a couple of things that are true about American culture and one is that there is a racial history to American life that we are exploring and discovering and continue to discover that there are distinct expressions of both race and ethnicity in American cultural life that need to be understood and explored differently. So, for instance, when I say race neutrality what I mean is that there is a script about race in this country that has divided black people from everyone else and has used a binary structure as the model for structuring racial and ethnic relations between white and non-white people generally. We have to recognize it and struggle against it. If you adopt the standard script, it prevents you from making the kinds of political alliances that are necessary to make deep institutional change. That is one of the things that drives the work that Lani and I are doing.

One of things that we have recognized is that legal change is insufficient unless there is a corresponding cultural change. So if you are going to make structural change, long-term structural change, you have got to have both legal change and cultural change and so in our new book we are looking at environmental law, the women’s movement, as well as race and the property rights movement. We are looking at all of those things and we are trying to examine all of them so that when you

⁴² No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

⁴³ House Research Organization, Texas House of Representatives, *Texas Adapts to Requirements of No Child Left Behind Act*, INTERIM NEWS, Nov. 3, 2004, at 2–4, available at <http://www.hro.house.state.tx.us/interim/int78-10.pdf>.

⁴⁴ THOMAS B. FORDHAM INSTITUTE, HOW WELL ARE STATES EDUCATING OUR NEEDIEST CHILDREN? THE FORDHAM REPORT 2006, at 108 (2006), available at <http://www.edexcellence.net/doc/TFR06FULLREPORT.PDF>.

say that race neutrality has a white face you know part of that is a tactical historical decision.

In fact, it does not just have a white face. It has a white face in the Texas legislature for obvious reasons. If it is going to win in the Texas legislature, it is going to win because the representative from far West Texas gets up at the eleventh hour and starts reading the names of students from the various districts who would not have gone to the University of Texas but for the TTP from all of the legislative districts in the state. He starts reading the students and suddenly your constituents know that they would not have been there except for the TTP. In that case, race neutrality had a white face. That is certainly true, but I also think that the fact of slavery and the fact of the structure of black and white relations in this country has dominated the structure of race relations of this country so that I do not think of the structure as white and non-white. I think of it as black and non-black. This structure is the dominant paradigm for race relations so that non-blacks, non-whites, and non-black people of color are offered what we called in our previous book "the racial bribe."⁴⁵ That is the technique to offer you incentives to disassociate yourself from black people.

One promise that Obama has is that the cost of associating yourself with black people is now not as high. There is actually a benefit now to associate yourself with black people in a way that will allow alliances to be formed that will permit structural changes to occur. Now, with Mexican-Americans for instance, there is another issue that is different, and I have not studied the various Asian immigrants as deeply, but for Mexican-Americans it is a different issue. Mexican-American residents and citizens in this country include those who have been here since the Mexican-American War and new immigrants. So you have Mexican-American cultures constantly being reinvented and refreshed by contemporary Mexican culture being brought into the United States. That presents a dynamic that is different and presents a range of separate issues that I have not really analyzed. I have talked about Native Americans only tangentially, and Native Americans are a different case altogether and have to be considered apart from the racial politics that I am talking about. That, however, is a separate lecture.

Thank you.

⁴⁵ GUINER & TORRES, *supra* note 1, at 224–29.