Have We Overcome the Obstacles to Racial Equality?
Now Is the Time—A Call to Action

By C. Elisia Frazier

It has been an honor to serve as chair of the Section of Individual Rights and Responsibilities. I am especially excited about the focus of my term as chair—“More to Overcome: Civil Rights in the Twenty-First Century.” This year’s theme and the theme for this issue were chosen to remind us that while progress has been made to protect the civil rights for everyone, there is much work left to do. Under the leadership of the co-chair of the Section’s Civil Rights committee, Sheila Thomas, and the expert and tireless guidance of Division Director Mary Smith, the Section is hosting a series of panels called “Debunking the Myth of a Post-Racial Society.” These panels serve as a basis for discussions that challenge the notion that we are living in a post-racial society in the wake of the election of President Barack H. Obama as the first African-American president of the United States.

We began our activities with our fall 2010 meeting in Memphis, Tennessee, and will end in Toronto, Canada, where we will celebrate the twentieth anniversary of the Thurgood Marshall Award by recognizing the achievements of civil rights stalwart Elaine R. Jones. Also, be sure to attend in Toronto the final two panels in our series—Presidential Showcase program “More to Overcome: Civil Rights in the Twenty-First Century,” which will feature four past Thurgood Marshall awardees discussing the civil rights movement, past, present, and future, and our final panel on “Debunking the Myth of a Post-Racial Society.”

The notion of a post-racial society suggests that we no longer need to focus on civil rights and that everyone has an opportunity to succeed based on individual efforts. However, the statistics suggest otherwise. One only need look at education, health care, housing, employment, and the criminal justice system to know there is much work left to do. As my fellow Section officer, Myles Lynk, says, “we cannot rest on our laurels because we have no laurels to rest upon.” Yes, we have achieved milestones, but we do have miles to go before we rest. NOW IS THE TIME, and I challenge you to join us as we collaborate with community groups, civil rights organizations, and other professional disciplines to ensure barriers for all members of our society are eliminated and that we can one day truly say that we are living in a post-racial society.
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Human Rights (ISSN 0046-8185) is published four times a year by ABA Publishing for the Section of Individual Rights and Responsibilities (IRR) of the American Bar Association, 321 N. Clark St., Chicago, IL 60654-7598. An annual subscription ($5 for Section members) is included in membership dues. Additional annual subscriptions for members are $3 each. The yearly subscription rate for nonmembers is $18 for individuals and $25 for institutions. To order, call the ABA Service Center at 800/285-2221 or e-mail service@americanbar.org. The material contained herein should not be construed as the position of the ABA or IRR unless the ABA House of Delegates or the IRR Council has adopted it. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the prior written permission of the publisher. To request permission, contact the ABA’s Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.html. Postmaster: Send notices by Form 3579 to Human Rights, 321 N. Clark St., Chicago, IL 60654-7598. Copyright © 2011, American Bar Association.
Rebuilding Civil Rights Enforcement

By William Yeomans

Since its creation in the Civil Rights Act of 1957, the Civil Rights Division (Division) of the U.S. Department of Justice has been the principal enforcer of our nation’s federal laws prohibiting discrimination. The Division’s work frequently has engendered controversy, and too often its mission has carried it to the juncture of law, policy, and partisan politics. For the most part, however, a bipartisan consensus in support of enforcement of core civil rights protections preserved the Division’s effectiveness. This consensus, however, proved inadequate during the presidency of George W. Bush, as enforcement activity diminished sharply and partisan considerations affected law enforcement and personnel decisions.

Enforcement of the law—particularly the laws prohibiting discrimination on the basis of race—declined precipitously. For example, during the first twenty months of the Obama administration, the Division filed twenty-nine cases alleging employment discrimination. During its first twenty months, the Bush administration filed just one such case. The Division went five years without filing a case pursuant to section 2 of the Voting Rights Act (the main provision authorizing lawsuits) to assist African American voters. It was not until 2006, when the Division was finally faced with the prospect of congressional oversight, that it broke this drought. During this period, however, the Division filed its first ever section 2 case alleging that African-American officials discriminated against white voters in Mississippi. United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007), aff’d, 561 F.3d 420 (5th Cir. 2009).

The Bush administration enforced section 5 of the Voting Rights Act, which requires covered jurisdictions to approve election changes before they can go into effect, for partisan gain. It delayed without justification preclearance of a Mississippi redistricting plan with the knowledge that delay would allow a federal district court to enter an alternative plan favoring Republicans. It precleared a mid-decade Texas congressional redistricting plan orchestrated by former Rep. Tom DeLay to favor Republicans, despite a unanimous finding by career attorneys that it would harm minority voters. It precleared a Georgia law requiring that voters show particular photo identification, despite the conclusion of the career staff that the law disadvantaged minority voters. A federal district court eventually struck down the law as the equivalent of a poll tax, and the state was forced to adopt a less draconian version. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The Division enforced the National Voter Registration Act to purge voters, but ignored enforcement of the act’s provisions that expand access to registration.

As the U.S. Justice Department’s inspector general and Office of Professional Responsibility found, the Bush administration unlawfully introduced partisanship and ideology into the hiring of career attorneys. See U.S. Dep’t of Justice, An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division (2008), available at www.justice.gov/oig/special/s0809a/final.pdf. It abolished the longstanding hiring structure, largely excluding career employees from the process and placing hiring in the hands of political appointees who, too often, hired career attorneys on the basis of ideology and partisan affiliation. The Bush leadership also reassigned career attorneys involuntarily because they were not viewed as sufficiently conservative. By 2006, some 55–60 percent of career attorneys had left the Division, including many of its most experienced litigators. Changing Tides: Exploring the Current State of Civil Rights
Brain Drain
The Division suffered a brain drain that left it short of expertise in key areas, such as the ability to put together a complex pattern or practice case against a large public employer, or the experience to take on the complexities of a major investigation into lending discrimination. Fortunately, the Division has lured back some experienced attorneys and has recruited others from public interest groups and private practice.

Complicating matters, many of the attorneys hired through the system that deemphasized merit in favor of partisanship remain in place. Doubtless, some will perform adequately, but others will not carry their weight, because of either lack of ability or hostility to vigorous law enforcement. Some attorneys may work from within to undermine the Division’s new leadership, while others have already chosen to go public with their complaints and feed a hostile political environment.

Hostile Political Environment
Opponents of the Obama administration in the media, Congress, and the U.S. Commission on Civil Rights have proven eager to discredit the Division. They have chosen as their primary vehicle allegations that the Division inappropriately dismissed voter intimidation complaints involving the New Black Panther Party (NBPP). The incident arose on Election Day 2008 in a heavily African-American precinct in Philadelphia. Two African-American men in paramilitary garb, one of whom carried a baton, stood outside a polling place. In the morning, a police officer arrived and told the man carrying the baton to leave, which he did. The other man had official credentials to serve as a poll watcher and was allowed to stay. No voter complained of intimidation.

Yet, spurred by partisan activists, Fox News covered the incident extensively. The same team of attorneys who previously had sued black officials in Mississippi for voting discrimination and who had obtained their positions during the era of politicized hiring in the Civil Rights Division quickly developed and filed a lawsuit pursuant to section 11(b) of the Voting Rights Act against the two men standing outside the polling place, the national head of the NBPP, and the New Black Panther Party itself. Career officials who ran the Division until Obama’s political appointees arrived determined that the evidence did not support the complaints against the unarmed poll watcher, the NBPP, or its leader, who had denounced the actions of the two men, but they approved seeking an injunction against the man with the baton.

As the Department of Justice’s watchdog Office of Professional Responsibility subsequently found, the decision to dismiss the complaints fell comfortably within the discretion afforded the Division’s leadership. The evidence was thin, the harm was unsubstantiated, and section 11(b) is a particularly inapt tool for addressing election day voter intimidation. It allows only for injunctive relief, which inevitably will be entered long after election day. Indeed, the provision has proven so ineffective that the Division has invoked it only four times since its enactment in 1965.

The U.S. Commission on Civil Rights, however, launched an investigation, which even one of its Republican members denounced as a partisan effort to attack President Obama. See Ben Smith, A Conservative Dismisses Right-Wing Black Panther “Fantasies,” POLITICO (July 16, 2010, 5:48 P.M.), www.politico.com/news/stories/0710/39861.html. The Commission’s investigation, the continuing coverage of agenda-driven media, and the vigorous oversight of a Republican House of Representatives will pose a continuing challenge to the Division’s ability to enforce the law.

Depleted Judiciary

While Obama has done an extraordinary job of identifying diverse nominees—after his first twenty months in office, 44 percent of his nominees were women and 44 percent were
nonwhite—he has, for the most part, shed away from nominees identified with civil rights and civil liberties issues. Alliance for Justice, The State of the Judiciary/The Obama Administration: The First Twenty Months 3 (2010). The exception is Goodwin Liu, who finally withdrew his nomination after an extended filibuster. And his nominees have been, on average, older than those of President Reagan, George H. W. Bush, and George W. Bush. Micah Schwartzman, “Not Getting any Younger,” Slate (May 26, 2011), www.slate.com/id/22955971.

The Civil Rights Division, therefore, faces courts with overloaded dockets and growing delays. It also faces a judiciary whose overall ideological composition is unsympathetic to its work. Indeed, when Obama was inaugurated, 59 percent of federal judges had been appointed by Republican presidents, who openly sought to reshape the judiciary in a conservative mold. After the first twenty months of the Obama administration, the judiciary remained composed of 59 percent of judges appointed by Republican presidents. Id. at 6.

**Difficult Legal Landscape**

While the Civil Rights Division was somnolent, the Supreme Court made its job more difficult. Although nearly every aspect of the Division’s enforcement authority has been affected, major decisions in a few core areas demonstrate the impact:

**Voting**

Section 5 of the Voting Rights Act requires that covered jurisdictions seek preclearance before implementing any election change. Shortly after Congress renewed this provision in 2006, the tiny Northwest Austin Municipal Utility District Number One (NAMUDNO) filed suit, claiming that it should not be covered, but, if it were, Congress had exceeded its authority in enacting section 5.

Although the Court held 8–1 that the act’s language should be interpreted to allow jurisdictions such as NAMUDNO to bail out from coverage, the Court’s opinion expressed doubts about the act’s constitutionality and appeared to send a message to Congress that the act might not survive a second round of scrutiny. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2516 (2009). Two new constitutional challenges are moving through the U.S. District Court for the District of Columbia. *Shelby Cnty., Ala. v. Holder*, No. 10-0651, 2010 WL 3700839 (D.D.C. Sept. 16, 2010); *Laroque v. Holder*, No. 10-0561, 2010 WL 3719928 (D.D.C. May 12, 2010).

Section 5 is central to the Division’s enforcement program. While the Division rarely interposes a formal objection to a proposed change, its existence significantly influences the behavior of covered jurisdictions. Section 5 is particularly important following the decennial census when jurisdictions redraw electoral districts. The Division will be faced with scores of redistricting submissions, while the constitutionality of section 5 remains under challenge.

**Employment**


Because of its resources and expertise, the Division often has led the way in challenging the use of written tests by large public employers, notably police and fire departments. In *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), the Court complicated that task by holding that New Haven, Connecticut, engaged in intentional discrimination against white firefighters when it refused to certify the results of an exam for promotions to lieutenant and captain, pursuant to which no African Americans qualified for promotion and no Hispanics qualified for promotion to lieutenant. The Court stated that the city could not walk away from the test results without a strong basis in evidence that the test had an unlawful discriminatory impact under Title VII of the Civil Rights Act of 1964. The strong basis in evidence requirement is the same high standard the Court imposes to sustain race-conscious affirmative action.

Ominously, the Court set the twin pillars of Title VII’s enforcement structure—disparate impact and intentional discrimination—at odds with each other by reasoning that efforts to avoid disparate impact could result in intentional discrimination in violation of Title VII. Although the majority left the question open, Justice Antonin Scalia, in concurrence, stated that Title VII’s disparate impact standard is inconsistent with the Equal Protection Clause and forecast that the Court would eventually have to address the issue.

Finally, after announcing this new standard, rather than follow its customary practice of remanding the case to the lower courts for its initial application to the facts, the Court held the test valid. In doing so, the Court disregarded the Equal Employment Opportunity Commission’s (EEOC) Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. pt. 1607 (2010).

*Ricci* will chill voluntary efforts to avoid disparate impact discrimination, which will increase the need for vigilance by the Division and the EEOC. The case also implies doubts about the validity of the EEOC Guidelines and announces that conservatives on the Court will press to invalidate Title VII’s disparate impact provision, as inconsistent with equal protection. All of this will make the Division’s efforts to combat discriminatory selection methods more difficult.

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Illegal Racial Discrimination in Jury Selection
A Continuing Legacy

By Bryan Stevenson

Since Reconstruction, when Congress outlawed racial discrimination in jury service, 18 U.S.C. § 243, and the Supreme Court condemned the restriction of jury service to whites, Strauder v. West Virginia, 100 U.S. 303 (1880), in response to pressure for representative juries, the antidiscrimination struggle has shifted from challenging the total exclusion of minorities from the jury rolls to confronting racial bias in the jury selection process at trial, specifically the prosecution’s use of peremptory strikes to exclude jurors of color.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court ruled that jurors cannot be excluded on the basis of race and held that, where circumstances at trial support an inference of discrimination in the use of peremptory strikes, the prosecutor must explain why she excluded African Americans, and, if she fails to give a legitimate, nonracial reason for each strike, the trial court can conclude the prosecutor acted on the basis of race and put the struck jurors back on the jury venire. Id. at 100.

In the quarter century since Batson, its inadequacy to eradicate racial discrimination in jury selection has become readily apparent. As Justice Thurgood Marshall noted, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” Id. at 106.

People of color not only have been illegally excluded but also denigrated and insulted with pretextual reasons intended to conceal racial bias. African Americans have been excluded because they appeared to have “low intelligence”; wore eyeglasses; were single, married, or separated; or were too old for jury service at age forty-three or too young at twenty-eight. They have been barred for having relatives who attended historically black colleges; for chewing gum; and, frequently, for living in predominantly black neighborhoods.

In a South Carolina case, the prosecutor said he struck a black potential juror because he “shucked and jived” as he walked. These “race-neutral” explanations and the tolerance of racial bias by court officials have made jury selection for people of color a hazardous venture, where the sting of exclusion often is accompanied by painful insults and injurious commentary.

Unvarnished racial bias drove higher reversal rates in the few years following Batson, but many offices responded by training prosecutors to mask their exclusion of minorities from juries. Prosecutors in Dallas County, Texas, maintained a decades-long policy of systematically excluding African Americans from jury service and codified it in a training manual. Miller-El v. Dretke, 545 U.S. 231, 264 (2005).

Similar efforts to avoid detection while excluding people on the basis of race have continued in many jurisdictions, resulting in the ongoing under-representation of people of color on juries. For example, from 2005–09, prosecutors in Houston County, Alabama (which is 27 percent black), used peremptory strikes to remove 80 percent of the African Americans qualified for jury service in capital trials.

The documented and continued exclusion of people of color from juries is evidence of an acceptance of racial bias in too many courts across the United States today. Prosecutors who illegally exclude people of color from juries face few, if any, consequences or even public scrutiny. Courts, bar associations, and legislatures should play a role in enforcing antidiscrimination laws and deterring misconduct; district attorneys should not tolerate violations of the law by their prosecutors; and the Justice Department and federal prosecutors should enforce 18 U.S.C. § 243 by pursuing actions against district attorney’s offices with a history of racially biased selection practices.

Full representation of all cognizable groups can be achieved during the next five years by implementing widely available procedures—including supplementing source lists for jury pools and utilizing computer models that weight groups appropriately—to ensure that racial minorities, women, and other groups are fully represented in jury pools.

Finally, discrimination in individual courtrooms is a local problem for which local solutions can be highly effective. Community groups should exercise their constitutional right to attend public criminal trial proceedings and document the exclusion of minorities from jury service. Especially in jurisdictions with a history of systematic exclusion, bearing witness to the conduct of local officials is a powerful and necessary step in holding them accountable and ultimately changing their behavior.

While courts sometimes have attempted to remedy the problem of discriminatory jury selection, in too many cases today there continues to be indifference to racial bias in jury selection. This problem has persisted for far too long, and respect for the law cannot be achieved until it is eliminated and equal justice for all is realized.

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The Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6, is often heralded as the most effective civil rights law ever adopted. The law was enacted in 1965, during the height of the civil rights movement, when state-sponsored discrimination overtly and systematically denied blacks the right to vote. Today, there are those who cite the election of Barack Obama as the nation’s first black president as evidence that the act has served its purpose and is no longer needed.

Yes, Obama received the largest popular vote on record. And, yes, his electoral vote total was at the higher end of the spectrum. Despite these impressive vote totals, however, Obama lost every Southern state that is fully covered by the preclearance provisions of section 5 of the Voting Rights Act. Just as there are those who contend that Obama’s historic election is a sign that the nation has reached racial equality in politics, there are others who argue that Obama’s losing across the South is indicative of the racially polarized voting that still exists, and that the Voting Rights Act is still very much needed.

The onslaught of litigation by forces seeking to weaken voting rights protections for people of color suggests that, for some, the election of the nation’s first black president may be as much a reason to turn back the clock as it is for others a cause for celebration.

**Key Provisions of the Voting Rights Act**

Section 2 is the key provision of the Voting Rights Act that applies nationwide to prevent dilution of minority voting strength. Section 2 prohibits any “standard, practice, or procedure” that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a). Section 4(f)(2) of the act also prohibits discrimination on the basis of membership in a language minority group. 42 U.S.C. § 1973b(f)(2).

Section 5 is the temporary provision of the Voting Rights Act that requires that certain state and local jurisdictions—mostly, but not exclusively, in the South—are required to secure approval from the federal government before any change related to voting or elections can take effect. 42 U.S.C. § 1973c(a). Congress has reauthorized section 5 four times, most recently in 2006. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). Under section 5, covered jurisdictions must demonstrate to either the U.S. Department of Justice or a three-judge panel of the U.S. District Court for the District of Columbia that the proposed change does not have a discriminatory purpose and would not leave minority voters in a worse position than if the change did not occur. Section 5 applies to redistricting plans.

Redistricting is the process by which congressional, state legislative and local districts are redrawn after every decennial census to account for population shifts during the previous decade.

Reapportionment is the process by which the 435 seats in the U.S. House of Representatives are reallocated among the fifty states each decade, based on the official decennial census count. The 2010 census count confirmed that the nation’s population is continuing to trend toward growth in the South and the West, the two regions of the country where the largest numbers of people of color live.

Eighteen states are impacted by the 2010 reapportionment of congressional seats, and seven of those eighteen are subject in whole or in part to preclearance under section 5. All of the section 5 states that are gaining seats are in the South—Texas (gaining four seats), Florida...
(gaining two seats), and Georgia and South Carolina (gaining one seat each). And one of the states that is losing a seat (Louisiana) is also in the South. See Interactive map & tables at www.nytimes.com/interactive/2010/12/21/us/census-districts.html.

Redistricting and reapportionment are about the formal allocation of political power. As famed abolitionist and public intellectual Frederick Douglass is quoted as saying: “Power concedes nothing without a demand. It never has, and it never will.” This is why there has been redistricting litigation that ended up in the U.S. Supreme Court in every decade since the 1960s, most of it originating in the South.

Challenges of the Last Decade

While it had always been assumed that redistricting could happen only once a decade, immediately after each decennial census, in *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), the Court held that it was perfectly appropriate for the Republican-controlled Texas legislature to engage in mid-decade redistricting, even though the legislature clearly did so to gain partisan advantage.

Although the Court did not find the partisan manipulation in *Perry* unconstitutional, it did find in favor of the Latino plaintiffs on their vote dilution claim. The legislature had drawn a redistricting plan that dismantled an existing majority Latino district that had afforded Latinos an opportunity to influence elections, the district must afford the group an opportunity to elect its candidate of choice.

Another case in North Carolina will impact how district lines are drawn this cycle. In *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), the Court held that to prevail on a section 2 vote dilution claim, the plaintiff’s racial or ethnic minority group must constitute a numerical majority of the voting age population of the district in question. After *Bartlett*, those districts where a minority group is less than 50 percent of the population but can still elect its candidate of choice are not protected by the Voting Rights Act. The potential impact of this reinterpretation of section 2 is readily apparent when considering that fifteen of the forty members of the Congressional Black Caucus (in the 111th Congress, 2009–10) were from districts where the black population is less than 50 percent.

A second Texas case of note from the last decade is *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*, (2009). The NAMUDNO case was filed the day after the last reauthorization of section 5. To the surprise of many, the Court declined to hold section 5 unconstitutional. It did so because it disposed of the case on a narrower ground. The case is nevertheless important because, although the Court did not decide the issue, it raised serious questions about the constitutionality of section 5.

Current Challenges

Among the major issues that will impact this round of redistricting are (1) the constitutionality of section 5 and (2) whether total voting age population or citizen voting age population is the dataset used to draw districts.

Section 5 Still Under Attack

Shortly after the NAMUDNO case, three cases were filed in the federal district court in the District of Columbia challenging the constitutionality of section 5: *Georgia v. Holder*, Case No. 10-1062; *Shelby County, Alabama v. Holder*, Case No. 10-00651; and *Laroque v. Holder*, Case No. 10-0561.

The Georgia case was settled after the attorney general agreed to pre-clear the state’s proposed change. The Laroque case, which involves a local jurisdiction in North Carolina, was dismissed on the grounds that the individual plaintiffs lacked standing. However, the plaintiffs have appealed. As of January 31, 2011, cross-motions for summary judgment were pending in the Alabama case. It remains to be seen whether either the Laroque or the Alabama case reaches the Supreme Court and, if either does, whether it will be in time for a decision that impacts this redistricting cycle. Clearly, this is the plaintiffs’ goal.

There has been redistricting litigation that ended up in the U.S. Supreme Court in every decade since the 1960s.
During the proceedings for re-authorization of Section 5, voting rights advocates argued that the mere fact that the law exists prevents many jurisdictions from adopting procedures that they otherwise would have. If the Court declares section 5 unconstitutional, many voting rights advocates are concerned that covered jurisdictions throughout the South and elsewhere will revert to tactics that keep voters of color from electing their candidates of choice.

As the then-president of the American Civil Liberties Union testified while explaining the litigation report on the 293 voting rights cases in thirty-one states that her organization had participated in since the 1982 reauthorization, “in the absence of section 5, minority voters would become increasingly marginalized during the redistricting process and elected officials would be more inclined to adopt voting changes that disadvantage minority voters.” Voting Rights Act: Evidence of Continued Need. Hearing before Subcommittee on Constitution of House Committee on Judiciary, 109th Cong., 2d Sess., at 40 (2006) (testimony of Nadine Strossen); see also id. at 47 (testimony of Honorable Joe Rogers, Comm’r, National Commission on the Voting Rights Act & former lieutenant governor of Colorado).

**Anti-immigrant Sentiment Infects Voting Rights**

Other pending litigation is challenging the use of total voting age population data to draw districts and arguing that only the citizen voting age population (CVAP) should be considered. Last year, in *Lepak v. City of Irving*, Case No. 10-0277 (N.D. Tex.), individual voters sued, alleging that the city’s newly created majority Latino district violated the principle of one-person one-vote because the CVAP in the district was substantially less than the CVAP in each of the other districts. The city had created the Hispanic district in response to earlier litigation that found that its at-large system of elections diluted Hispanic voting power. As of January 31, 2011, cross-motions for summary judgment are pending.

During the last decade, Texas experienced the largest population growth of any state in the nation—4.2 million new residents. Nearly two-thirds (63.1 percent) of this increase was due to an increase in the Latino population. The 2010 Reapportionment and Latinos, Pew Hispanic Ctr. at 5, 7 (Jan. 5, 2011) http://pewhispanic.org/files/reports/132.pdf.

Texas also has the second largest number of unauthorized immigrants in the nation, behind California. Unauthorized Population Trends, National and State, 2010, Pew Hispanic Ctr. 14, 15 (Feb. 1, 2011) http://pewhispanic.org/files/reports/133.pdf. The focus on citizenship in *Lepak* is not coincidental but is being driven, at least in part, by the anti-immigrant sentiment plaguing much of the country. While all noncitizen residents obviously are not unauthorized, and all unauthorized residents are not Latino, most unauthorized residents in Texas, and nationally, are in fact Latino.

Because the Constitution requires that reapportionment must be based on total population, CVAP cannot be used for this purpose. However, an analysis of reapportionment using CVAP for illustration purposes only is instructive as to the impact of using CVAP, instead of total population data, to draw districts once the number of districts is determined.

Texas’ record growth earned it four new congressional seats, the most of any state. Although the 2010 census did not ask about citizenship, estimates based on other U.S. Census Bureau data are that if citizenship is taken into account, Texas would have gained only two new congressional seats, not four. Instead of keeping the same number of congressional seats, California would have lost five seats, and the reapportionment would have been different for twelve additional states. See www.polidata.org/census/st010nca_cit.pdf. Thus, whether total population data or CVAP data are used has huge implications for those jurisdictions that have substantial numbers of residents who are not citizens.

### Reform Efforts

Litigation may also result this cycle from changes in the manner in which redistricting is done. While redistricting is done in most states by legislators, a few states have other procedures in place—and most of these states have relatively small minority populations. (For state-by-state information, see Nat’l Conference of State Legislatures, Redistricting Law, 2010, at Appendices A–D (Nov. 2009).)

**STATES COVERED BY SECTION 5 OF THE VOTING RIGHTS ACT**

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In the Aftermath of Electing Our First Black President

By Judge D’Army Bailey

The election of Barack Obama gave hope to millions of African Americans and Progressives in America that the first black president meant we were entering a new era in American politics, an era of heightened tolerance and racial acceptance. The euphoria many felt in the aftermath of his election reflected the yearning to move closer to Dr. Martin Luther King Jr.’s famous prophecy of that “day when people will not be judged by the color of their skin, but by the content of their character.” For a brief moment, the American people had hope that dramatic change might truly come.

In the aftermath of the election of the first African-American president, media pundits had a field day with the speculation that this election would be the first gesture in a “post-racial society.” The broad bi-racial coalition that elected Obama made it seem briefly that slowly, step-by-step, minorities (blacks especially) were easing toward inclusion and real acceptance in America. But far from ushering in a new age of hope and equality, the election of Barack Obama seems instead to have unleashed the worst in American politics. Was there a true shift in the American heart toward inclusiveness? While the picture currently is very bleak, it is important to withhold judgment until the fog of partisan politics diminishes.

Much of what we have seen over the last several months has been a carefully orchestrated opposition to Obama and any pursuit of a post-racial America. This is not a natural reaction to the historic election of a black president. Even so, Obama has been remarkably successful, demonstrating just what a threat his legislative agenda is.

Those of us who were on the front lines of the civil rights actions of the early sixties remember how the likes of Orval Faubus, George Wallace, and Ross Barnett then asserted that the Brown v. Board of Education of Topeka decision, 347 U.S. 483 (1954), violated states’ rights. We remember Gov. Wallace standing on the steps of the Capitol of Alabama ordering the state troopers to close all the schools in the state rather than submit to court-ordered integration mandated by Brown. Today, these assertions of states’ rights, and the rash of Tenth Amendment sovereignty legislation proposed by nearly twenty states, are really an effort to repeal integration and empower white communities. It was Gov. Wallace himself who said that he should not have said, “Segregation now! Segregation tomorrow! Segregation forever!” but rather, “States’ rights now! States’ rights tomorrow! States’ rights forever!”

The Tenth Amendment to the U.S. Constitution broadly states that all rights not allocated to the federal government are reserved to the states. At nearly every conservative venue, the “states’ rights” rallying cry is being touted as the antidote to an expansionist federal government. Even though we fought a grotesquely bloody war over this very issue 150 years ago, some of today’s candidates for public office are emboldened to talk seriously about secession as a viable option, and a disturbing percentage of the electorate snaps it up like political opium. A refusal to listen to other points of view or any information that might conflict with the party line characterizes this modern iteration of the states’ rights movement.

For those of us dedicated to the cause of civil rights, the increasing calls for states’ rights are code words for a direct attack on the progress African Americans have made during the last fifty years. None of us for a minute thinks that blacks had to go before the electorate of each state, bowing to state sovereignty, as the gay community is being forced to achieve its civil rights, we would today have the freedoms we possess. We are, as a result of this resurgence of white bigotry, in my opinion, at the greatest racial divide since the Civil War.

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School Integration Efforts After *Parents Involved*

By Erica Frankenberg, Genevieve Siegel-Hawley, and Adai Tefera

More than three years ago, the U.S. Supreme Court issued the *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) ruling, a 5–4 decision striking down two districts’ voluntarily implemented school integration plans. The Supreme Court decision subsequently threatened many integration efforts across the country. Today, a host of constraints—legal and otherwise—help shape the contours of the post-*Parents Involved* landscape.

Paradoxically, as school districts grapple with these varied constraints, we know more than ever about the importance of preventing racially segregated schools and the benefits that students—and society—receive from diverse schools. In fact, the Supreme Court, in its 2007 decision, acknowledged this evidence as producing “compelling” reasons for districts to adopt policies to further integration.

We tracked media accounts of school districts’ policies related to diversity, nearly 600 articles in thirty-nine states during the course of one year. Though not an exhaustive review, this article synthesizes major themes in policymaking, beginning with an overview of some of the ways the federal government is influencing districts’ school diversity efforts. We then describe more local developments across the country, as school districts continue to grapple with legal and economic limits on strategies aimed at creating diverse schools.

Federal Role in Desegregation: Enforcement, Oversight, and Incentives

Desegregation Orders and Unitary Status
School districts with court-ordered desegregation plans or negotiated settlements were not directly impacted by the *Parents Involved* decision. Only once the court declares a district “unitary,” signaling that its system of segregated schools has been fully eradicated, is it subject to the legal restrictions of *Parents Involved*.

Districts under federal desegregation oversight might decide to (or not to) press ahead for unitary status as they observe the evolution of how unitary districts are affected by the Supreme Court’s 2007 decision. Interestingly, in a switch from the federal government’s position during the Bush administration, the federal government has recently opposed unitary status motions by several districts. One such example is in Decatur, Georgia, where the U.S. Department of Justice (DOJ) joined the plaintiffs in opposing the district’s petition for unitary status.

On the other hand, during the past year a number of districts were declared unitary, extending a trend that began nearly two decades ago. Many of these districts are located in the South. They include Orange County, Florida; Burlington, North Carolina; Chicago, Illinois; Vermillion Parish, Louisiana; Philadelphia, Pennsylvania; Crosby Independent School District (ISD), Texas; Galveston, Texas; Ector County ISD, Texas; Memphis-Shelby County, Tennessee; Bertie County, North Carolina; and Little Rock, Arkansas.

A handful of districts have continued to work to comply with prior school desegregation cases. In some places, the courts are granting districts partial unitary status for certain desegregation factors, while requiring continued oversight of others. Other districts are developing post-unitary plans, which they agree to prior to being released from court oversight. Tucson, Arizona, was declared unitary after developing a post-unitary plan that district officials believed would help them continue integration efforts. Plaintiffs question whether the district will continue desegregation efforts without court enforcement.
Voluntary Integration Efforts and the Courts

In addition to districts that are implementing desegregation to comply with remedial court requirements, a handful of school districts have worked to implement policies to comply with legal decisions or to defend their current integration efforts when challenged in court.

In 2009, a new student assignment plan was implemented by Jefferson County (metropolitan Louisville), Kentucky, to comply with the Parents Involved decision. A legal challenge to the plan last year was eventually dropped by the plaintiffs, although a recent lawsuit has challenged the plan under state law. The district engaged in extensive outreach, allowed some students to remain in their previously assigned schools, and educated the community about the new plan and its rationale.

In June 2010, a district court judge ruled in favor of Lower Merion, Pennsylvania’s redistricting efforts. The district argued that race was only one of several factors that the district considered in reassigning a predominantly African-American neighborhood, and therefore complied with Parents Involved. More recently, the Legal Defense Fund and the DOJ filed amicus briefs supporting the judge’s final decision to uphold Lower Merion’s use of race in the redistricting process, but finding fault with the judge’s reading of Parents Involved.

Finally, in summer 2009, the California State Supreme Court allowed a lower court decision to stand regarding the legality of Berkeley, California’s voluntary integration plan, ending several years of litigation to defend the race-conscious plan in a state that has banned the use of racial preferences in governmental decision making.

Charter Schools Interfering with Desegregation Efforts

Dangling millions in funding before cash-strapped states, the Obama administration pressed for the expansion of charter schools last year. However, some communities were reluctant to sign on to the recent push for charters, citing potential conflicts with desegregation goals.

Arkansas state law prohibits the approval of charter schools that may delay, hamper, or undermine desegregation efforts in a school district. In the midst of Little Rock and nearby Pulaski County’s unitary status proceedings, several district officials protested the establishment of new charter schools because such action would interfere with efforts to gain unitary status.

Five school districts in Georgia were suing the state and the Georgia Charter Schools Commission over the establishment of charter programs. Several of the school systems filing to block charter programs raised questions about potential conflicts with desegregation mandates. Likewise, in East Feliciana Parish, Louisiana, the district court recently approved the opening of a charter school in the district, which is still trying to comply with the court’s desegregation order. The charter school will be required to report the composition of students and faculty to ensure compliance with the desegregation efforts.

Office of Civil Rights/Federal Investigations

Traditionally, the Department of Education’s Office of Civil Rights (OCR) has been a major part of the federal government’s efforts to enforce school desegregation. Secretary of Education Arne Duncan announced in 2010 that he would reinvigorate OCR, which, in recent years, had brought few cases.

Last summer, OCR found that a new charter school in Beaufort, South Carolina, was disproportionately white compared to the surrounding district. Beaufort County has operated under a negotiated settlement with the Department of Education since 1970 and requires OCR approval whenever a new school is opened. To get approval, the charter school offered admission to any nonwhite students on the waiting list, and by 2011–12 needed to have a school enrollment much closer to the district’s composition.

In December 2009, the DOJ filed charges against the Walthall County, Mississippi, school district, which had been operating under a negotiated settlement with the federal government since 1970. The DOJ found that the district permitted student transfers—primarily to white students—which led to racially identifiable schools. The district was largely prohibited from granting transfers and required to implement a random assignment of students to schools.

Federal Incentives for District Integration Efforts

Less-noticed federal funding opportunities from the Obama administration—and with fewer resources—were two competitive grants related to furthering school integration. The first was a program to provide school districts with technical assistance to help devise student assignment policies that complied with Parents Involved. In fall 2009, eleven districts were awarded funding over a two-year period. Orange County, Florida, for example, is using the grant funding to develop a post-unitary plan, while Jefferson County, Kentucky, will augment its efforts to develop a new student assignment plan.

The second federal funding opportunity came with the new Magnet Schools Assistance Program funding cycle. The Obama administration reemphasized reducing racial isolation as a funding priority for grant recipients. To enhance their eligibility, several districts adopted changes in terms of new magnet schools and broader district policy.

In Minnesota, a Twin Cities–area district is developing plans for three additional magnet schools. Champaign, Illinois, adopted a voluntary desegregation policy to demonstrate its commitment to integration in the hopes of gaining additional funding to develop magnet programs in three elementary schools.
Community Mobilization

During the past year, communities across the country have raised their voices about school integration. Parents, community groups, activists, and voters mobilized in an effort to preserve, promote, or do away with student assignment plans seeking to achieve diverse schools. Community sentiment ran the gamut from Seattle, Washington, where parents reacted somewhat negatively to a new neighborhood-based assignment plan to Wilmington, Delaware, where members of the black community marched for more local control of schools.

One of the most widely publicized community protests occurred in North Carolina. Last year’s hotly contested school board election in Wake County resulted in the election of four Republican-backed candidates who ran on an antidiversity platform. The new five-person majority swiftly moved to dismantle the district’s longstanding efforts to maintain diverse schools over the vocal opposition of community and civil rights leaders.

After voting to strike down the socioeconomic status-based assignment policy, the school board crafted a plan that prioritizes neighborhood schools. Potential legal challenges to the school board’s neighborhood plan loom large and community outcry continues. Encouragingly, the Raleigh Chamber of Commerce suggested a new assignment plan that seeks to balance the number of high- and low-achieving students at each school. There is some evidence that the school board and community may coalesce around this new plan.

The Continued Impact of the Economic Crisis

Of the hundreds of news articles we examined during the past year, nearly one-third dealt with budget issues faced by school districts. The economic collapse of 2008 led to shrinking state budgets, which in turn forced many school districts to make cuts in transportation to magnet schools and prompted school closures and district consolidation. Cutting programs such as magnet schools and/or limiting transportation may hamper the effectiveness of school integration efforts.

Magnet Schools: Cuts and Closures, but New Possibilities

Magnet schools continue to be the largest set of choice-based schools in the country and are pivotal to many school districts’ efforts to create desegregated, high-quality educational options for students and their families. While research continues to show numerous positive academic benefits for students attending magnets, magnet schools are among districts’ programs threatened by decreasing budgets. Magnet programs sometimes incur additional costs beyond regular schools because of unique offerings or extra transportation expenditures.

Districts such as Arlington, Virginia, and Aldine ISD in Texas debated cutting magnet programs, while Ware County, Georgia, voted to close one of the state’s best magnet programs. These decisions mobilized parents in support of the magnet schools and against the districts’ proposed cuts. In Hartford, Connecticut, two interdistrict magnet schools faced the loss of state desegregation funding because they had too many urban students, which could force the schools to cut programs and/or students.

Seattle, Washington, and Albany, Georgia, are making efforts to open new magnet schools to attract students from across their respective districts by utilizing unique themes. Furthermore, districts in Louisiana and Indiana increased funding for new schools, including new magnets in Tangipahoa Parish, Louisiana.

Transportation

Transportation is a key component to racial integration efforts, especially in districts with highly segregated housing patterns. Transportation is especially critical for the success of magnet schools, which are designed to attract students from across a district. Yet, school districts are making cuts to transportation. In what is partly an effort to quell rising transportation costs amid declining budgets, districts have also considered moving away from student assignment plans promoting integration and toward the promotion of neighborhood schools. Neighborhood school policies typically have detrimental effects because of increased levels of school segregation in areas displaying high residential segregation.

The school board in Bibb County, Georgia, tentatively approved a budget for 2011 that ended bus travel for 350 magnet school students, a decision that may disproportionately harm low-income and African-American students and reduce the diversity of magnet school programs. In Las Cruces, New Mexico, and Fairfax, Virginia, school boards considered eliminating transportation for magnet school students and students attending schools outside their attendance zones. Critics suggested that such plans would undo the gains of the last two decades.

The school board in Lee County,
Florida, agreed to conduct a study on how to cut transportation costs for students under the district’s school choice plan, in which thousands of students participate. The superintendent has said he won’t reconsider neighborhood schools because they would tear the community apart and could lead to a civil rights lawsuit.

Consolidation
Finally, the most common budget theme during the past year dealt with district consolidation. Proponents of consolidation often argued that it would not only save money, but also streamline district processes to be more efficient. Importantly, consolidated school districts that encompass a larger share of the metro’s student enrollment may have more opportunity to craft stable, diverse schools. Districts under court order must also demonstrate that such efforts will not harm desegregation compliance.

A number of states considered school district consolidation in response to budget deficits, including Michigan, Kansas, and Mississippi. In Tennessee, the Memphis School Board voted to surrender the school system’s charter and consolidate with Shelby County, its neighboring suburban district. The vote was prompted by Shelby County’s decision to seek “special school district status,” effectively preventing future efforts to consolidate the city and suburban school systems and cut the funding Memphis currently receives from the county’s tax base. Shelby County officials are currently looking toward the state legislature to prevent the merger.

Conclusion
The Parents Involved decision reflected a deeply divided Supreme Court, with four justices strongly supporting voluntary integration efforts and four justices strongly opposed. Justice Anthony Kennedy’s opinion decided the issues and explicitly accepted some kinds of desegregation strategies. Yet, the divided decision confused many educators about what did remain legally permissible.

In 2008, the Bush administration sent a letter to school districts accurately interpreting the Parents Involved decision in a way that suggested only race-neutral means of pursuing integration would be legal. As President Obama took office, civil rights groups and other stakeholders anticipated that his administration would be more supportive of integration efforts, including issuing new guidance to replace the previous 2008 letter. In the third year of the Obama administration, however, no such guidance about voluntary integration has been issued.

This overview of the continuing impact of Parents Involved suggests an urgent need for financial support and clear federal guidance outlining what is allowable for districts interested in promoting voluntary desegregation.

For more information and citation, please see the memo that this article is adapted from at http://civilrightsproject.ucla.edu/legal-developments/court-decisions/school-integration-efforts-three-years-after-parents-involved.

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Rebuilding
continued from page 4

Education
For many years, the Division focused on desegregation of the nation’s public schools. The Division was a party to and monitored hundreds of desegregation decrees, returning to court where necessary to request further relief. As the possibilities for further relief diminished, courts dismissed an increasing number of decrees, often with the understanding that jurisdictions voluntarily would continue court-ordered assignment plans. The Supreme Court dashed many of these expectations in Parents Involved v. Seattle School District No. 1, 551 U.S. 701 (2007), in which it invalidated voluntary race-conscious school assignment plans in Seattle, Washington, and Louisville, Kentucky, making it much more difficult to achieve and maintain meaningful desegregation.

The Court puts pressure on the Division to resist release of jurisdictions from desegregation decrees when doing so will result in the dismantling of race-conscious assignment plans and increase the likelihood of resegregation.

Conclusion
Restoring and reforming the Civil Rights Division will require wise management to surmount internal challenges, political skill to fend off partisan attacks, progress in appointing judges, and exceptional lawyering to protect rights in a challenging legal environment. All of these qualities are in short supply, but the urgent need to restore our nation’s vigorous protection of civil rights demands that Americans work to summon them all.

William Yeomans is a fellow in law and government at American University Washington College of Law. He served in the Civil Rights Division from 1981–2005 as a trial attorney, deputy assistant attorney general, chief of staff, and acting assistant attorney general. From 2006–09, he served as chief counsel to Sen. Edward M. Kennedy on the Senate Judiciary Committee.
Justice for All? Challenging Racial Disparities in the Criminal Justice System

By Marc Mauer

There are many indicators of the profound impact of disproportionate rates of incarceration in communities of color. Perhaps the most stark among these are the data generated by the U.S. Department of Justice that project that if current trends continue, one of every three black males born today will go to prison in his lifetime, as will one of every six Latino males. (Rates of incarceration for women overall are lower than for men, but similar racial/ethnic disparities pertain.) Regardless of what one views as the causes of this situation, it should be deeply disturbing to all Americans that these figures represent the future for a generation of children growing up today.

This article will first present an overview of the factors that contribute to racial disparity in the justice system, and then it will recommend changes in policy and practice that could reduce these disparities without compromising public safety.

In order to develop policies and practices to reduce unwarranted racial disparities in the criminal justice system, it is necessary to assess the factors that have produced the current record levels of incarceration and racial/ethnic disparity. These are clearly complicated issues, but four areas of analysis are key:

- Disproportionate crime rates
- Disparities in criminal justice processing
- Overlap of race and class effects
- Impact of “race neutral” policies

Disproportionate Crime Rates

A series of studies conducted during the past thirty years has examined the degree to which disproportionate rates of incarceration for African Americans are related to greater involvement in crime. Examining national data for 1979, criminologist Alfred Blumstein concluded that 80 percent of racial disparity could be explained by greater involvement in crime, although a subsequent study reduced this figure to 76 percent for the 1991 prison population. (Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743, 751 (1993).) But a similar analysis of 2004 imprisonment data by sentencing scholar Michael Tonry now finds that only 61 percent of the black incarceration rate is explained by disproportionate engagement in criminal behavior. (Michael Tonry & Matthew Melewski, The Malign Effects of Drug and Crime Control Policies on Black Americans, 37 Crime & Justice 1 (2008).) Thus, nearly 40 percent of the racial disparity in incarceration today cannot be explained by differential offending patterns.

In addition, the national-level data may obscure variation among the states. A 1994 state-based assessment of these issues found broad variation in the extent to which higher crime rates among African Americans explained disproportionate imprisonment. (Robert D. Crutchfield, George S. Bridges & Susan R. Pitchford, Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity, 31 J. Res. Crime & Delinq. 166, 179 (1994).) Thus, while greater involvement in some crimes is related to higher rates of incarceration for African Americans, the weight of the evidence to date suggests that a significant proportion of the disparities is not a function of disproportionate criminal behavior.

Disparities in Criminal Justice Processing

Despite changes in leadership and growing attention to issues of racial
and ethnic disparity in recent years, these disparities in criminal justice decision making still persist at every level of the criminal justice system. This does not necessarily suggest that these outcomes represent conscious efforts to discriminate, but they nonetheless contribute to excessive rates of imprisonment for some groups.

Disparities in processing have been seen most prominently in the area of law enforcement, with documentation of widespread racial profiling in recent years. National surveys conducted by the U.S. Department of Justice find that while African Americans may be subject to traffic stops by police at similar rates to whites, they are three times as likely to be searched after being stopped.

Disparate practices of law enforcement related to the “war on drugs” have been well documented in many jurisdictions and, in combination with sentencing policies, represent the most significant contributor to disproportionate rates of incarceration. This effect has come about through two overlapping trends. First, the escalation of the drug war has produced a remarkable rise in the number of people in prisons and jails either awaiting trial or serving time for a drug offense—increasing from 40,000 in 1980 to 500,000 today. Second, a general law enforcement emphasis on drug-related policing in communities of color has resulted in African Americans being prosecuted for drug offenses far out of proportion to the degree that they use or sell drugs. In 2005, African Americans represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense.

Evidence of racial profiling by law enforcement does not suggest by any means that all agencies or all officers engage in such behaviors. In fact, in recent years, many police agencies have initiated training and oversight measures designed to prevent and identify such practices. Nevertheless, such behaviors still persist to some degree and clearly thwart efforts to promote racial justice.

Overlap of Race and Class Effects
Disparities in the criminal justice system are in part a function of the interrelationship between race and class and reflect the disadvantages faced by low-income defendants. This can be seen most prominently in regard to the quality of defense counsel. While many public defenders and appointed counsel provide high-quality legal support, in far too many jurisdictions the defense bar is characterized by high caseloads, poor training, and inadequate resources.

In an assessment of this situation, the American Bar Association concluded that “too often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent.” (ABA Standing Comm. on Legal Aid & Indigent Defendants, Gideon’s Broken Promise: America’s Continuing Quest for Racial Justice, (2004).)

The limited availability of private resources disadvantages low-income people in other ways as well. For example, in considering whether a defendant will be released from jail prior to trial, owning a telephone is one factor used in making a recommendation so that the court can stay in contact with the defendant. But for persons who do not own a phone, this seemingly innocuous requirement becomes an obstacle to pretrial release.

At the sentencing stage, low-income substance abusers are also disadvantaged compared to defendants with resources. Given the general shortage of treatment programs, a defendant who has private insurance to cover the cost of treatment is in a much better position to make an argument for a nonincarcерative sentence than one who depends on publicly funded treatment programs.

Impact of “Race Neutral” Policies
Sentencing and related criminal justice policies that are ostensibly “race neutral” have in fact been seen over many years to have clear racial effects that could have been anticipated by legislators prior to enactment. Research on the development of punitive sentencing policies sheds light on the relationship between harsh sanctions and public perceptions of race. Criminologist Ted Chiricos and colleagues found that among whites, support for harsh sentencing policies was correlated with the degree to which a particular crime was perceived to be a “black” crime. (Ted Chiricos, Kelly Welch & Marc Gertz, Racial Typification of Crime and Support for Punitive Measures, 42 Criminology 359, 374 (2004).)

The federal crack cocaine sentencing laws of the 1980s have received significant attention due to their highly disproportionate racial outcomes, but other policies have produced similar effects. For example, a number of states and the federal government have adopted “school zone” drug laws that penalize drug offenses that take place within a certain distance of a school more harshly than other drug crimes.

The racial effect of these laws is an outgrowth of housing patterns. Because urban areas are more densely populated than suburban or rural areas, city residents are much more likely to be within a short distance of a school than are residents of suburban or rural areas. And because African Americans are more likely to live in urban neighborhoods than are whites, blacks convicted of a drug offense are subject to harsher penalties than whites committing a similar offense in a less-populated area. A state commission analysis of a school zone drug law in New Jersey, for example, documented that 96 percent of the persons serving prison time for such offenses were African American or Latino. (New Jersey Comm’n to Review Criminal
**Sentencing, Report on New Jersey's Drug Free Zone Crimes and Proposals for Reform (2005).**

### Recommendations for Policies and Practices

As indicated above, racial and ethnic disparities in the criminal justice system result from a complex set of policies and practices that may vary among jurisdictions. If we are committed to reducing unwarranted disparities in the system, it will require coordinated efforts among criminal justice leaders, policymakers, and community groups. Following are recommendations for initiatives that can begin to address these issues.

#### Shift the Focus of Drug Policies and Practice

State and federal policymakers should shift the focus of drug policies in ways that would be more effective in addressing substance abuse and would also reduce racial and ethnic disparities in incarceration. In broad terms, this should incorporate a shift in resources and focus to produce a more appropriate balance between law enforcement strategies and demand reduction approaches emphasizing prevention and treatment. Specific policy initiatives that would support these goals include expanding public health models of community-based treatment that do not rely on the criminal justice system to provide services; identifying models of drug offender diversion in the court system that effectively target prison-bound defendants; repealing mandatory sentencing laws at the federal and state level to permit judges to impose sentences based on the specifics of the offender and the offense; and expanding substance abuse treatment options in prisons and providing sentence-reduction incentives for successful participation.

#### Provide Equal Access to Justice

Federal and state policy initiatives can aid in “leveling the playing field” by promoting equal access to justice. Such measures should incorporate adequate support for indigent defense services and provide a broader range and availability of community-based sentencing options.

These and similar initiatives clearly involve an expansion of resources in the court system and community. While these will impose additional short-term costs, they can be offset through appropriate reductions in the number and duration of prison sentences, long-term benefits of treatment and job placement services, and positive outcomes achieved by enhancing family and community stability.

**Adopt Racial Impact Statements to Project Unanticipated Consequences of Criminal Justice Policies**

Just as fiscal and environmental impact statements have become standard processes in many areas of public policy, so too can racial impact statements be used to assess the projected impact of new initiatives prior to their enactment. In 2008, Iowa and Connecticut each enacted such legislation, which calls for policymakers to receive an analysis of the anticipated effect of proposed sentencing legislation on the racial/ethnic composition of the state’s prison population. If a disproportionate effect is projected, this does not preclude the legislative body from enacting the law if it is believed to be necessary for public safety, but it does provide an opportunity for discussion of racial disparities in such a way that alternative policies can be considered when appropriate.

A similar policy is currently in use in Minnesota, where the Sentencing Guidelines Commission regularly produces such analyses. Policies designed to produce racial impact statements should be adopted by legislative action or through the internal operations of a sentencing commission in all state and federal jurisdictions.

#### Assess the Racial Impact of Current Criminal Justice Decision Making

The Justice Integrity Act, first introduced in Congress in 2008, is designed to establish a process whereby any unwarranted disparities in federal prosecution can be analyzed and responded to when appropriate. Under the proposed bill, the attorney general would designate ten U.S. attorney offices as sites in which to set up task forces composed of representatives of the criminal justice system and the community. The task forces would be charged with reviewing and analyzing data on prosecutorial practices and developing initiatives designed to promote the twin goals of maintaining public safety and reducing disparity. Such a process would clearly be applicable to state justice systems as well.

### Conclusion

While reasonable people may disagree about the causes of racial disparities in the criminal justice system, all Americans should be troubled by the extent to which incarceration has become a fixture in the life cycle of so many racial and ethnic minorities. The impact of such dramatic rates of imprisonment has profound consequences for children growing up in these neighborhoods, mounting fiscal burdens, and reductions in public support for vital services.

These developments also contribute to eroding trust in the justice system in communities of color—an outcome that is clearly counterproductive to public safety goals. It is long past time for the nation to commit itself to a comprehensive assessment of the causes and remedies for addressing these issues.

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The Civil War and Its Uncivil Impact in the Current Struggle for Civil Rights

By Barbara R. Arnwine

A recent line in the Denver Post on the subject of revisionist history was striking—although the saying follows that “winners write history,” “when it comes to the civil war, losers write the history.” This is a poignant example about how people are subjected to those who distort the past and, hence, shape the future of the country in a way that hinders progress.

These distortions are particularly dangerous when reflecting upon the 150th anniversary of the Civil War. Somehow, “anniversary” does not seem the appropriate word for this indelible mark on the nation’s history. Anniversaries are generally events to commemorate, cherish, and, in fact, celebrate. True, lessons of the Civil War should be remembered for what it was, but not celebrated with distorted history of what it was not. This nation cannot move forward with a civil future without an honest discussion of slavery and other issues that mark an uncivil past. There are many key ways in which a distorted history of the Civil War negatively informs present status and limits future progress, as highlighted below.

Misinformation included in school textbooks serves as an egregious example of how distorting the past negatively affects the future. This is illustrated by an overt example in Virginia, where a fourth-grade social studies textbook alleged that thousands of blacks fought for the Confederacy during the American Civil War; many historians, of course, dispute this claim. This is yet another attempt to downplay the role of slavery in the Civil War and focus on misrepresented notions of black complicity in what these texts might have children believe was simply a “states’ rights” movement in the South.

Texas provides another lowlight in the fight against misinformation in schools. The Texas School Board recently approved texts that exalt the so-called positive aspects of slavery and perpetuate a watered-down version of the civil rights movement. The NAACP and the Texas League of United Latin American Citizens recently filed a complaint noting these texts as not only inaccurate, but also discriminatory. The complaint is important because it is a reminder of the stigmatizing effects such falsehoods have on African-American youth and the disservice it does for youth of all races, who will hopefully improve upon the mistakes of the past rather than subvert them.

The consequences of such subversion are witnessed in the manifestation of the complete mishandling and outright disregard of race by many prominent legislators. Some in the Tea Party, for example, prey upon the ignorance of others to perpetuate inaccuracies that hurt political discourse. Their fervent resistance to the Obama administration along with their cries to take “their” country back reek of ignorance at best, racism at worst. Rep. Michele Bachmann (R-Minn.) recently went so far as to say, in reference to people arriving in America, “it didn’t matter the color of their skin . . . their language . . . their economic status . . . once you got here, we were all the same.”

What it ultimately points to is misinformation and miseducation on fundamental staples of civics and politics. Like many who reflect upon the Civil War as a states’ rights issue when blood of slaves dictates otherwise, many justify the current movement as one based on those same states’ rights, while their actions and rhetoric make one second-guess their forthrightness. The recent reading of the Constitution at the swearing-in of the 112th Congress illustrates another example. Again, history was distorted by reciting the amended version, which bypasses the issue of slavery and citizenship for African Americans. While learning and improving upon history are great, simply editing it as necessary does the country a disservice.

Finally, the perpetuation of racial jokes and stereotypes should be noted. Sometimes it is not just school boards and politicians that make mistakes; it’s peers and friends who might be allowed to pass on offensive jokes and stereotyping. Revisionist history of the past might make such jokes seem alright because of the thinking by some that African Americans did not suffer as much as originally thought. Hence, this represents the danger in revising the Civil War. Slavery is not only disregarded, as it was then, but the years of damage it did to African Americans and the nation as a whole in perpetuity also are ignored. If the importance of slavery is mitigated, the importance of the civil rights movement and the continued fight for desegregation and against institutional bias are also mitigated. If history is simply to be celebrated in part and reflected upon only jokingly, does society really learn?

Celebrations of the Civil War continued on page 24
Congress and the Supreme Court’s Conflict over Antidiscrimination Law

By David B. Oppenheimer

In the current era, when Congress starts writing antidiscrimination legislation, the five conservative members of the Supreme Court, and their allies throughout the federal judiciary, start to sharpen their blue pencils. As fast as Congress can expand civil rights, the federal bench can redact them.

There was a time in American history, not so long ago, when progress in antidiscrimination law came from the courts, not Congress. And in the 1960s, Congress and the Supreme Court shared a unified vision supporting civil rights. Yet, by the late 1970s, the Court had changed, and its decisions increasingly rejected efforts by Congress to protect the rights of women and minorities. What happened?

Equal Protection Limitations

In the 1940s, the NAACP, under the leadership of Thurgood Marshall and Charles Hamilton Houston, developed a litigation strategy aimed at undermining Plessy v. Ferguson (1896). After a series of victories in cases finding facilities unequal, and thus impermissible even under Plessy, they fully succeeded in 1954 in Brown v. Board of Education of Topeka, which found that “[s]eparate educational facilities are inherently unequal.” A series of cases soon followed finding equal protection violations in cases of segregated public transit systems, hospitals, libraries, parks, and other publicly owned facilities.

Under Brown, the Fourteenth Amendment, with its guarantee of equal protection, became the nation’s most important source of antidiscrimination law. It provided a constitutional mandate that states and their subdivisions and agents refrain from treating persons and groups of persons differently without good cause. As formulated under Brown, when inequality is directed at a discreet and insular minority, the state’s conduct is subject to “strict scrutiny” to determine whether the inequality is (1) justified by a “compelling governmental purpose” and (2) “narrowly tailored” to achieve that purpose.

But in the post-Brown era, an increasingly conservative Supreme Court limited the equal protection principle through three doctrines. First, it only applies to discrimination by the state and its subdivisions and agents (the “state action” requirement). Second, it is limited to intentional discrimination (the “intent” test). Third, the Supreme Court has recently read the principle as applying with nearly as much force to policies favoring minority groups as those disfavoring them (the “colorblindness” doctrine), thus narrowing the ability of Congress and the states to take affirmative actions to promote opportunities for disadvantaged minorities. Because of these limitations, the most common sources of U.S. non-discrimination law are statutes, regulations, and executive orders, which are also in danger of being limited, as they are increasingly subject to rejection by the Court.

Antidiscrimination Legislation Through the Decades

In the 1960s, Congress enacted four major civil rights statutes. Along with their implementing regulations and an executive order, they remain the principal sources of statutory antidiscrimination law in the field of sex, race, age, and ethnicity discrimination. Three of these four statutes can be tied to the progress of the social movement for civil rights, and...
the strained, yet critical working relationship between Rev. Dr. Martin Luther King Jr. and President Lyndon B. Johnson.

The first of the statutory acts was the 1964 Civil Rights Act, which was initially introduced during the President John F. Kennedy administration in response to the Birmingham, Alabama, crisis but was passed following the longest Senate filibuster in U.S. history at the urging of his successor, President Johnson. The act prohibits discrimination based on race, color, religion, or national origin by private and public entities for access to public accommodations (such as hotels, restaurants, and theaters); and prohibits discrimination based on these same factors (race, color, religion, national origin) or sex by private employers of fifteen or more employees. It prohibits discrimination based on race, color, or national origin by publicly funded educational institutions and by public entities that receive funds from the federal government. In 1972, it was amended to prohibit employment discrimination by public, as well as private, employers.

The employment discrimination prohibition (Title VII) was initially broadly construed by the U.S. Supreme Court and circuit courts of appeal, which held that the act applies to facially neutral policies that have a disparate impact (subject to affirmative defenses for business necessity and job relatedness); the burden of proof is easily shifted to the employer; harassment, including sexual harassment without economic consequences, is covered by the prohibition of discrimination; and the class action device is favored. But subsequent decisions have cut back on each of these principles and raised a variety of roadblocks, setting off a series of longstanding disputes with Congress, which has amended the employment discrimination section several times to reverse decisions by the Court.

In 1965, on the heels of the Selma, Alabama, crisis, Congress passed the Voting Rights Act, providing for federal oversight of states and communities with a record of suppressing minority voting. The act was reauthorized in 1970, 1975, 1982, and 2006, but the Court has shown increasing skepticism about its legitimacy.

Also in 1965, President Johnson issued Executive Order 11246, which prohibits private companies providing goods or services to the federal government from discriminating based on race, and requires them to establish “affirmative action” programs and policies to increase the number of minority employees and subcontractors. This expanded an earlier Executive Order (10925) by President Kennedy, which is generally identified as the initial source of the U.S. policy of affirmative action. Here again, the Court has become skeptical of the legitimacy of such policies.

In 1967, Congress passed the Age Discrimination in Employment Act, protecting workers over age forty from age discrimination.

In 1968, in the days following King’s assassination, Congress passed the Fair Housing Act, prohibiting most housing discrimination based on race, color, religion, or national origin. And later that same year, the Supreme Court found that the long-dormant 1866 and 1867 Civil Rights Acts, prohibiting private racial discrimination, which had been ignored since the end of Reconstruction, remained valid.

Since 1968, Congress has passed several laws intended to broaden federal civil rights, either to include more groups or, with increasing frequency, simply to reverse Supreme Court decisions. In 1972, Congress extended the prohibition of discrimination by educational institutions to prohibit sex discrimination (Title IX). In 1973, Congress passed the Rehabilitation Act, which prohibited government employers and contractors from discriminating on the basis of disability. In 1975, Congress passed the Education for All Handicapped Children Act, subsequently renamed the Individuals with Disabilities Education Act, which requires public schools to provide equal access to students with disabilities. In 1990, Congress passed the Americans with Disabilities Act, prohibiting discrimination in employment and requiring access to public accommodations for persons with disabilities. In 1994, Congress enacted the Violence Against Women Act.

Responding to Supreme Court decisions narrowing civil rights, in 1978, Congress passed the Pregnancy Discrimination Act, reversing the Supreme Court’s decision that “pregnancy discrimination” was not “sex discrimination” under the 1964 Civil Rights Act. In 1990, Congress passed a Civil Rights Restoration Act to reverse several Supreme Court decisions, but it was vetoed by President George H. W. Bush. It was repassed and signed in a slightly different form in 1991. In 2008, the American with Disabilities Act was amended to reverse several Supreme Court decisions limiting its effect.

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, reversing a Supreme Court decision that held that the statute of limitations in pay cases ran from the first pay disparity, even if the plaintiff didn’t know she was being paid less than her male co-employees. It was the first bill signed by President Barack Obama.

**Congress vs. the Supreme Court**

The revisits and revisions by Congress listed above were necessary because, beginning in the late 1970s, congressional expansion of antidiscrimination law has been resisted by an increasingly conservative Supreme Court. For example, in the *Griggs* case (1971) the Court initially held that Title VII prohibited not only intentional but also unintentional (or “adverse impact”) discrimination. The Supreme Court limited this doctrine in 1989, though it was restored by Congress in the Civil Rights Act of 1991.

Similarly, in the *McDonnell Douglas* case (1973), the Court held that the claimant’s burden in an employment discrimination case was
easily shifted to the defendant, but a line of cases beginning in the 1980s restricted this holding. In several cases, the Court has rejected congressionally authorized affirmative action regulations requiring government contractors to attempt to use more minority and women-owned subcontractors, on the grounds that the regulations interfered with the equality rights of white men.

The Court had initially broadened the prevailing view of the reach of the sex discrimination prohibition in the 

Brown case (1954) when it held that sexual harassment in the workplace is unlawful sex discrimination, even when it causes no tangible economic effect. But in the 

Burlington case (1998), it provided defenses for employers that have undercut the effectiveness of sexual harassment claims.

Brown itself has come under fire. When it was decided, Brown was widely understood to condemn segregation because it caused harm to the segregated minority children. Efforts by school boards to achieve integration were applauded. But now a majority of the Court views the Equal Protection Clause as concerned with the state’s paying attention to race rather than segregating children based on race. Thus, the Court recently held that efforts by school districts to prevent racial segregation of schools by assigning students based, in part, on their race, violates the Fourteenth Amendment. As if repeating a truism, Chief Justice John Roberts equated desegregation with discrimination, complaining with apparent exasperation that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

In several cases, the Court has restricted federal antidiscrimination law by finding that Congress exceeded its constitutional authority. Thus, the Court has held that Congress acted improperly in extending the protections of the Age Discrimination in Employment Act and the Americans with Disabilities Act to state government employees. And the Court ruled that Congress exceeded its authority when, in the Violence Against Women Act, it created a federal court civil claim for damages for women who were victims of sexual violence.

In two recent cases expected to have a dramatic effect on employment discrimination cases, the Supreme Court in 2007 and 2009 reinterpreted the procedural requirements for pleading a claim in federal court, overruling long-standing precedent. The new interpretation requires plaintiffs to plead many more facts to avoid dismissal, which is particularly difficult in cases where an employer/defendant is in possession of most of the relevant information. A third case in 2009 exacerbated the problem by requiring a higher degree of proof in age discrimination cases. It is already being extended by the lower courts in disability discrimination cases. Bills have been introduced in Congress to require courts to return to the earlier standards.

**Beginning in the late 1970s, congressional expansion of antidiscrimination law has been resisted by an increasingly conservative Supreme Court.**

**State Law Takes a Stand**

One response to the Court’s efforts to scale back federal antidiscrimination law has been an increase in reliance on state law. Several states, beginning with New York in 1945, and including New Jersey, Massachusetts, Illinois, and California, had enacted antidiscrimination statutes prior to the federal 1964 Civil Rights Act. The federal law recognized that these state laws provided an independent basis for relief.

For example, a 1982 decision by the California Supreme Court permits claimants to be awarded emotional distress and punitive damages, in an amount determined by a jury. Federal law first permitted the award of emotional distress and punitive damages in the 1991 Civil Rights Restoration Act, and limits the damages awarded to $250,000. Thus, although the state and federal courts have concurrent jurisdiction over employment discrimination cases, a study (by this author) of employment discrimination jury verdicts in California reveals that nearly all reported verdicts were in cases tried in state court, rather than federal court.

State law may cover types of discrimination for which there is no protection under federal law. For example, nearly half the states prohibit employment discrimination based on sexual orientation and many also offer the same protection in the area of public accommodations and/or housing, while federal law does not. Some states offer protection from discrimination based on political viewpoint or expression, a protection offered under federal law only to public employees. While the federal antidiscrimination employment statute applies only to employers of fifteen or more employees, some states cover smaller employers. (California’s statute applies to employers of five or more employees and prohibits harassment by all employers, regardless of size.)

And although the public enforcement agencies that assist discrimination claimants are nonpartisan and required to be nonpolitical, many civil rights advocates believe that in times when the federal executive branch is controlled by conserva-
tives, claimants may receive greater assistance from some of the state antidiscrimination agencies.

Local governments may also pass antidiscrimination legislation, which may expand (but not contract) rights under state and federal law. Many large cities, including New York, Chicago, Los Angeles, and San Francisco, have their own antidiscrimination laws with administrative agencies to enforce them.

In some states, the state constitution may have broader equality guarantees than those provided under the federal Constitution. For example, under the California Constitution, actions may be brought against private parties, as there is no “state action” requirement, and all persons are provided a right to pursue an occupation without discrimination based on sex. This provision has been held to apply in situations where the state and federal statutes are, for various reasons, inapplicable.

In many states, the common law of torts and contracts provides additional sources of equality law. These sources may be favored by claimants at times because they may supply longer statutes of limitations; because they may not be subject to an exhaustion of administrative remedies, as required by some antidiscrimination statutes; or because they apply to employers too small to be subject to the antidiscrimination statutes.

Under tort law, in appropriate cases, discrimination claimants may bring claims of defamation, assault, battery, negligent hire, negligent supervision, wrongful discharge in violation of public policy, and myriad related theories. Many of the early developments in U.S. sexual harassment law developed as tort law prior to the recognition of sexual harassment as a form of sex discrimination prohibited by the antidiscrimination statutes. In some states, these tort theories (or some of them) may expose the defendant to emotional distress and/or punitive damages in amounts higher than those recoverable under the antidiscrimination statutes.

Discrimination may also be regarded as a breach of the employment contract, or a breach of the implied covenant of good faith and fair dealing, which is generally regarded as an unstated term in U.S. contracts. In most states, however, contract claims are a last resort for claimants because they only permit the remedy of economic damages and probably don’t permit shifting attorney fees.

As long as a majority of the Supreme Court, and the rest of the federal bench, remains reliably conservative on civil rights, new laws passed by Congress may have a short shelf life. A person making a claim of discrimination is wise to cast a wide net in the search for remedies, rather than relying on only the federal civil rights statutes, because as quickly as Congress is expanding these rights, the U.S. Supreme Court is restricting them.

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This article was originally delivered as a keynote address for the Legal Seminar on the Implementation of EU Law on Equal Opportunities and Anti-Discrimination, October 6, 2009, Brussels, Belgium. A previous version of this article was published in the European Anti-Discrimination Law Review, No. 10.

**Aftermath continued from page 9**

This nightmare of racial prejudice has been purposefully reawakened because the American presidency, historically owned by white men, was suddenly usurped by a black man. He may be, as he likes to say, the American Dream come true. He may be a truly decent man, a loving father and loyal husband, and a brilliant Constitutional Law professor. But he is also a real threat to the illusion of white power continuity. As the most powerful man in the world, President Obama represents that which should not be: a black man in the seat of white authority and power. The white power brokers have come to understand that the election of Barack Hussein Obama, far from being the beginning of a post-racial society, was a liberal coup d’état. Compounding this conundrum, it is now clear that white society understands that it is fast becoming the American minority. Demographics are trending toward a white minority by 2040. Far from being emblematic of the dream of post-racial politics, for the white power brokers, Obama is the harbinger of an unimaginable minority status.

As blacks, we have witnessed, endured, and learned to flourish in the aftermath of the worst that the Anglo-European patriarchs have inflicted on us across five centuries. Perhaps as the white population loses its dominant majority status, there will be an inevitable affirmation of a less racially divided America. But, as we have seen, that inevitability will not come without determined resistance.

We in the civil rights movement have met such resistance before, and we must continue to meet it with firm resolve and insistence that the American legal system do what is right to protect the freedoms of all Americans regardless of race.

We should not despair that we are not likely to see a post-racial America in our lifetimes. We must inspire our youth and rally our forces with truth, faith, courage, and strategic wisdom to fight back. I was in Memphis on a cold overcast day April 8, 1968 at an outdoor memorial rally in front of City Hall for Dr. King, assassinated just four days earlier. Walter Reuther, the United Auto Workers leader, took to the podium: “Wipe away the tears,” he exhorted, “there is work to be done.”

Judge D’Army Bailey, a graduate of Yale Law School, joined the law firm of Wilkes & McHugh, P.A. after retiring from his position as a circuit court judge in Memphis, Tennessee.
Debunking the Myth of a Post-Racial Society

By Sheila Thomas

The concept of the topic of debunking the myth of a post-racial society began in Fall 2009 as part of a discussion among members of the Civil Rights Committee of the Section of Individual Rights and Responsibilities, of which I am a co-chair. What inspired the conversation was the pronouncement by the media and political commentators that the election of President Barack Obama was evidence of a post-racial society. This premise is contradicted by evidence that people of color continue to be at the bottom of the socioeconomic ladder and by the prevalence of racial issues in the headlines. Consequently, the committee decided to organize a panel discussion during their Annual Meeting where panelists would discuss current civil rights issues in criminal justice, education, and employment.

Right on cue, last summer on the eve of what became one of several debunking the myth of the post-racial society panels, the Obama administration forced Shirley Sherrod, an African-American woman, to resign as the Georgia State Director of Rural Development for the U.S. Department of Agriculture because of a misleading tape of a speech she had given before an NAACP chapter. While this incident was widely covered by numerous news agencies, there were other stories during the same summer that went unnoticed about people of color who lost their livelihoods, their homes, and, in some instances, their freedom as a result of institutional discriminatory practices. Since the Annual Meeting, there have been repeated reminders that we do not live in a post-racial society, which have served as the basis for panel discussions in Memphis, Tennessee, and Atlanta, Georgia.

Just as I was beginning to write this article, I had another stark reminder of the way institutionalized discriminatory practices can change the course of an African-American’s life and how justice is denied. Recently, I was at the U.S. Supreme Court to hear the argument in a case. The courtroom was packed with attorneys, journalists, interested parties, and tourists. As is its practice, members of the Court read aloud the majority opinions in cases rendered that particular day. Justice Clarence Thomas, known for his reticence on the Court, in a booming voice read the second of two opinions rendered that day. The case Connick v. Thompson was a section 1983 case involving a man who had been imprisoned for eighteen years, fourteen of which were on death row, for a crime he did not commit. The Court in a 5–4 majority opinion held that Thompson had failed to meet the “deliberate indifference” standard to establish his claim that the white Orleans Parish prosecutor Harry Connick had violated his Fourteenth Amendment right to due process when Connick failed to train prosecutors in his office on the requirements of Brady v. Maryland, directing prosecutors to produce exculpatory information to the defense. Justice Thomas made few references to the underlying facts, and at no point did he mention Thompson’s race, which I strongly suspected was African American, but he made special note more than once that there was no evidence of a pattern of failure to train. The end result was that, by a 5–4 majority, the highest court in the land had snatched away a $14 million jury verdict in favor of Thompson, affirmed by the Fifth Circuit Court of Appeals.

Only during Justice Ginsburg’s dissent did those of us in the courtroom get a real sense of the full story of what had happened to Thompson that led him to pursue a section 1983 claim. Justice Ginsburg explained that after Thompson was in prison for fourteen years for robbery and murder convictions, an investigator in a desperate attempt to stop Thompson’s execution discovered...
exculpatory blood evidence related to the robbery that the prosecutor on the case had failed to produce, as required by Brady v. Maryland. She also revealed that in a police report, an eyewitness had described the person who had committed the murder of which Thompson had been wrongly convicted was 6 feet tall with close-cut hair; Thompson was 5 feet, 8 inches tall with an Afro. She further described how the prosecutor’s office withheld both the exculpatory blood evidence and the police report that would have proven that Thompson was not guilty of robbery or murder.

As I listened, I recognized that Justices Ginsburg and Thomas told very different versions of the facts in their opinions. However, in both opinions, the fact that Thompson is African American was either not mentioned or mentioned only through a reference to his hairstyle. However, there had been no doubt in my mind that Thompson was African American before Justice Ginsburg read her dissent because he was incarcerated in the South and on death row.

My presumption was based on well-established facts. It is well documented that a disproportionate number of those housed in correctional facilities are people of color. As the NAACP recently reported, although African Americans and Latinos are one-third of the population, 58 percent of all prisoners are members of these two groups. Moreover, the disproportionate number of people of color in the prison system is not a coincidence. Instead, as others have shown, it is the direct result of a carefully orchestrated “War on Drugs” that has resulted in a criminal justice system that incarcerates black and brown people for drug offenses that whites often are permitted to address through drug treatment and rehabilitation efforts.

The U.S. Supreme Court’s omission of Thompson’s race seems to reflect a discomfort with including the fact that Thompson, an African American, was denied his freedom for eighteen years while the white prosecutor, who undisputedly withheld exculpatory evidence, got off scot free. Thompson is yet another example of the fact that we do not live in a post-racial society and how our society has decided that the best way to deal with thorny issues, such as the mass incarceration of people of color, is to simply not mention their race when discussing issues related to inmates in prisons across the country.

Unfortunately, the mass incarceration of people of color imprisoned in state and federal prisons is not the only way American society has denied and ethnic minorities’ rights based on the idea of a post-racial society where race is not an issue, and color blindness is the norm. Despite the election of Barack Obama, people of color continue to lag behind whites in education, housing, and employment. Recent census data reflect that over 25 percent of African Americans and Hispanics live in poverty while 9.4 percent of non-Hispanic whites live in poverty. Whites also earn a median income of $51,861 while African Americans and Hispanics earn a median income of $32,584 and $38,039, respectively. In addition, the high school dropout rates for African Americans and Hispanics are higher than the rate for whites.

Not surprisingly, the unemployment rate of 15.5 percent for African Americans is almost two times the rate for whites. For those who are able to find work, employment discrimination can be a problem. However, as a plaintiff’s employment attorney, I have watched as the number of attorneys willing to represent clients with race claims drop significantly because of the perception that judges and juries will not find race discrimination in a legal climate where many courts require more and more evidence to support a finding of discrimination. The most egregious example of this is the Eleventh Circuit Court of Appeals decision in Ash v. Tyson Food, which held in two separate instances that use of the term “boy” to refer to grown African-American men was not sufficient evidence to support a jury award of over $1 million for race discrimination, despite the well-documented history of the use of the term to demean and humiliate. The Eleventh Circuit ruled the same way a second time, despite the U.S. Supreme Court’s specific holding that in some instances the use of the term “boy” may be sufficient to establish discriminatory animus in a Title VII case. The case is now pending before the Eleventh Circuit while the court determines whether to grant an en banc hearing.

These statistics and legal outcomes paint a picture of a society in which race and ethnicity still matter, despite the fact that an African-American president sits in the White House. They also illustrate attitudes of denial and “so-called” color blindness that lead to the false conclusion that it is mere coincidence that people of color continue disproportionately to be excluded from many of the rights and privileges of society that whites often take for granted.

At the same time, it is important to recognize that there have been gains for people of color in the last five decades. People of color now vote in greater numbers as a result of voting rights gains. There are people of color, including the president of the United States, who now fill political, economic, and legal positions of power. However, these gains cannot overshadow the fact that much still needs to be done to improve large segments of communities of color in the country. For this reason, it is important that efforts to continue the gains made are persistent, organized, and focused to ensure that in this current decade those who have been locked out and ignored may enjoy the rights and privileges of a free, just, and fair society.

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Redistricting

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Nonetheless, reform advocates have been successful in changing the way redistricting will be done in two of the nation’s largest states, which also have among the largest populations of people of color.

In 2008, California voted by the narrowest of margins (50.9 percent) to create a citizens commission to draw its state legislative districts. Last fall, Californians voted to extend the commission’s authority to draw congressional districts as well. Redistricting reform advocates in Florida tried several years ago to create a commission to draw district lines but failed to get it on the ballot. Last fall, however, they were successful in having voters adopt criteria that legislators must follow in drawing congressional and state legislative districts.

Observers across the country will be watching to see how the process unfolds in California and Florida. Opponents of California’s commission view it as fundamentally antidemocratic to place redistricting decisions in the hands of private citizens who are not elected by, and therefore not accountable to, voters. Other activists question the intense push for reforms just as the numbers of legislators of color who would otherwise be making redistricting decisions are reaching critical mass.

Many are also concerned that, while Florida’s new criteria may be neutral on their face, the combination of competing criteria and the lack of definitions for these criteria may result in redistricting plans that infringe on the ability of minority voters to elect their candidates of choice. One thing that many observers do agree on: The reforms adopted in California and Florida increase the likelihood of litigation.

In short, as the country enters this redistricting cycle, voting rights law and applicable procedures remain unsettled. If history is any predictor of the future, at least one of the cases likely to result from this redistricting cycle will end up in the Supreme Court.

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Civil War

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should not be taken as simply benign accounts of the past. As reported by the Charleston County Herald during an observance in Charleston, South Carolina, in December 2010, Mayor Joe Riley remarked in a speech that “the cause of this disastrous secession was an expressed need to protect the inhumane and immoral institution of slavery.”

He was interrupted by a person in the audience who yelled, “You’re a liar!” The irony in this response is palpably emblematic of the struggle faced today. The past must be acknowledged for all its imperfections and transgressions. Those who don’t learn from history are doomed to repeat it.

Barbara R. Arnwine, executive director of the Lawyers’ Committee for Civil Rights Under Law since 1989, is internationally renowned for contributions on critical justice issues, including the passage of the landmark Civil Rights Act of 1991. She is a prominent leader in the civil rights community and continues to fight for the preservation of affirmative action and diversity programs.
And that is the way, I think, LDF functions when something adverse happens to us, for example *McCleskey* [*McCleskey v. Kemp*, 481 U.S. 279 (1987)]. We felt *McCleskey* was a disaster. You don’t make a better record than that. The Supreme Court wasn’t willing to go where the record led them regarding the disproportionate impact of race on the imposition of the penalty of death and to have Justice Powell say what he said about *McCleskey*. *McCleskey* was a 5–4 case with Justice Powell voting against our claim. And, I understand, at the end of his life Justice Powell indicated if he had to do it over again, *McCleskey* was the one vote he would change. And so, it should have been 5–4 the other way. So, what happens is you get energized, and it goes from generation to generation. These victories don’t come easily, and when they do come, they can be taken away as quickly as you gain them, because courts interpret the law and courts change. What is helpful now, if Thurgood Marshall is right and Jack Greenberg is right—the political side, the legislative side—when Congress passed that 1976 law about nonprofits being able to get involved in political activity, legislative activity, without jeopardizing their tax-exempt status, that was very important. And that enabled us to also get involved in a limited way in the legislative side of things. So, that too makes a difference.

Also, our information, [and the] public education requirement that is in our charter helps us to go out and educate others and explain. We do not only have to be lawyers, we have to be able to communicate with people, with rank-and-file people, on what these issues are and what they mean. If you cannot do that, you can never be a complete LDF lawyer; you have to be able to stand in front of the Supreme Court and make your arguments, as well as in front of a Baptist Church down in Tuscaloosa, Alabama, and explain what the issue is in language that the people can understand the importance of the issue.
human rights hero

Interview with Elaine R. Jones

By Stephen J. Wermiel

This interview of Elaine R. Jones, leading civil rights lawyer for four decades, was conducted by Stephen J. Wermiel, chair of the Human Rights editorial board, to honor Jones, who will receive the 2011 Thurgood Marshall Award at a dinner on August 6 at the ABA Annual Meeting in Toronto. This interview also marks the selection of Jones as Human Rights Hero for this issue.

Jones was director-counsel and president of the NAACP Legal Defense Fund (LDF) from 1993–2004, the first woman to hold the post once occupied by Thurgood Marshall. From 1977–93, she ran the Washington office of the LDF.

The full version of the interview can be found online at www.americanbar.org/publications/human_rights_magazine_home.html.

SW: Did Thurgood [Marshall] inspire you in any particular way?

EJ: I quote a Swahili warrior song that I love which says, “Life has meaning only in struggle. Triumphs and defeats are up to the gods, so let us celebrate the struggle.”

And what our staff, I think, gets is the struggle. Brown was a twenty-five-year struggle from 1929 when Charlie Houston went to Howard and Thurgood and Oliver Hill were in his first class as dean of the law school, all the way up to 1954. So, they laid the groundwork. It was interesting; when Charlie Houston died at 54 in 1950 (because his heart gave out—he worked himself to death), that is when Thurgood and the team filed all of those state Brown cases. Houston had filed the D.C. case before he passed, so the D.C. case was pending. However, at the time of Houston’s death, the rest of the cases had not yet been filed. All of them were filed immediately after Charlie’s death. . . . So it was as if Thurgood and the team were energized by Houston’s passing and were determined to do something to show that Charlie’s life and his strategy mattered.

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