UNIVERSITY OF CALIFORNIA
CENTER FOR SOCIAL JUSTICE
SYMPOSIUM
"Rekindling the Spirit of Brown v. Board of Education: A Call to Action"
November 13-14, 2003

Panel: **Honorable Mario G. Olmos Law and Cultural Diversity Memorial Lecture**

Lecturer: **Elaine R. Jones, President and Director-Counsel, NAACP Defense and Education Fund (LDF)**

Date: **November 13, 2003**

RB. --Dean at the law school here, and it is my distinct pleasure and honor to welcome you to the Olmos Lecture. Probably the phrase "distinct pleasure and honor" has been so overused, has become hackneyed, but in fact I really, sincerely mean it today. It is a pleasure to be a part of this lecture, which has become a signal event in the law school calendar, a chance to stop and think about the big issues, for old friends to get together, reminisce about old battles, to plan strategies and to think about future victories and instill hope in each other.

And it's also a genuine honor for me to be in the front of the room with these three folks, with Mary Louise Frampton from the Center for Social Justice, always fighting for the right. I've watched her as interim dean maneuver with little money, but great resourcefulness to make wonderful things happen. [applause] In a second I'm going to turn it over to Professor and Former Justice Cruz Reynoso, a graduate of Boalt from '58 and a man who embodies not just scholarship but a sense of honor and probity that runs far beyond anything that I could ever hope to achieve, but can always serve as a model. [applause]

And finally our speaker, Elaine Jones. Last Friday I had lunch with an old friend, and he knows that I'm someone who cares a great deal about public speaking, and I'm someone who cares about passion and beauty in the making of great rhetoric. And he said, "You know, I was in New York a few weeks ago for the Brennan Center Awards and I got a chance to see Elaine Jones give a speech. Listen to me, Bob, if you ever get a chance to hear this woman, travel as far as you need." So I've come down from my office. [laughter]

But it is truly an honor, on behalf of the Boalt Hall community I want to welcome you all and celebrate the life of Mario Olmos and this lecture

series. So let me turn it over to a man I am proud to introduce, Professor and Justice Cruz Reynoso. [applause]

CR. Thank you very much, dean. I've been asked to say a few words about Mario Olmos. You know, when you have a lecture called Olmos or you see a name of a building, one should wonder what's behind that name. And I knew Mario Olmos very well. The late 1960s and early '70s were an exciting time at Boalt Hall. I was then the director of a legal services program called California Rural Legal Assistance, and I was asked to come and teach a seminar here at Boalt Hall. Well, several times we had to evacuate the building because there were bomb threats. Other times there was a phalanx of police on the campus that I had to walk around to get to Boalt Hall, and there were student strikes.

And on one occasion I got called by Mario and some others, Latino students were having some problems apparently with the dean. I don't know why deans have all these problems. Dean Hallback, who is a great person, I had a very good relationship with him, there were many problems we had to work out, and they were worked out, but on one occasion I was called when things were getting particularly intense and I was asked to come and mediate the issues that were at hand. And so I thought, "Ah, they're calling me because of my great mediation skills, right?"

So I went there and Mario said, "Well, Mr. Reynoso, you can just sit here," and then the dean was here and the students were here, and they started talking, and my sole job was to sit there like a potted plant. Apparently just my presence, maybe because I got along with the students and with the dean was enough to have them speak civilly to one another and try to work things out. So that may have been my most successful mediation I ever did by sitting there and doing nothing.

But Mario was a student of the law as a student, as you might guess. A very good student, invited to be part of the law review, declined to join the law review because he wanted to spend time working with the students who were somewhat less talented than he, to get them through law school, because they were really fine individuals who would make fine lawyers, but still needed to get through a place called Boalt Hall and the bar, that great institution we have at the bar exam to be able to practice. So you could see the devotion that he had to those interests broader than himself even in law school.

Then he went on to practice with an outfit called California Rural Legal Assistance with his then wife, now widow Mary Louise Frampton. They graduated in '71, and then he practiced in Fresno. Sadly, he died young because of an auto accident, and the thought was by Mary Louise and

others who love Mario to establish this annual lecture in his name, because he was a person who felt passionately about the role of the law in making this life of ours and this community of ours a little bit better day by day, if we worked at it hard. That's what he believed and this is a reminder, these lectures are reminders of the great ideals that we have for ourselves in this country, and the reality that if we work hard at it, we indeed have a chance of getting the reality of this country a bit closer to that ideal. Thank you very much.

[applause]

MF. I'm both thrilled and honored to welcome Elaine Jones, the president and director counsel of the NAACP Legal Defense and Education Fund as our Olmos speaker here today, and to open the symposium on rekindling the spirit of Brown vs. Board of Education. When we were first planning the symposium, we knew that it was Elaine Jones' voice that we wanted and needed to hear first. And that's in part because of all that she has achieved as one of the nation's most prominent civil rights lawyers and leader of both the old and the new civil rights movements.

But what makes Ms. Jones so special is not just her accomplishments, but the strength of her character. She is an extraordinary human being whose courage, dedication, passion for social justice, intellect and vision is an example to all of us. We read with admiration that she was the first female African-American graduate of the University of Virginia Law School. But we need to stop and think about what that really means. Yes, it's an enormous accomplishment, but what did she have to go through to not only be the first graduate, but remember to be the first attendee, to be the first and only woman of color at the University of Virginia Law School at a time when it was state policy to pay students to receive their education out of the state, how hard that must have been, how tough she had to be in that position?

And then a mere two years after she graduated from the University of Virginia Law School, to be counsel of record in the landmark case of Fuhrman vs. Georgia that I'm sure all the students here have read, that abolished the death penalty in most of our states for over a decade. She was counsel of record on that case amid threats from the Ku Klux Klan. So to do that two years after she graduated from law school took not only exceptional intellect, it also took extraordinary courage. She channeled that courage and determination and intellect into a professional life at the NAACP Legal Defense and Education Fund, first as a staff attorney and more recently as its leader.

She did that after turning down very tempting offers from major law firms that would have made her rich and famous. That shows a true passion for

social justice. And we see her vision in what she did and what she has done at the fund to constantly be broadening the mission of the fund so that it evolves as the times evolve to always be adapting, to always be looking over the hill to the next challenge. So as the judiciary became more conservative, she became a legislative advocate in addition to a litigator. And she was instrumental in the passage of all of the major federal civil rights acts in the '80s and the early '90s, last one being 1991, haven't been any really since that time.

And as the legislative arena became more and more hostile, she realized that she again had to broaden the mission of the fund to include economic empowerment, environmental justice, health care issues and other issues that go beyond litigation and legislative advocacy. And then there's her political savvy. What other national civil rights leader, with everything on her plate would have pursued and won the first African-American seat on the Board of Governors of the ABA? Can you imagine the magic that she did there and the hearts and minds that she changed in that august institution? [laughs] She's laughing.

In the same way that when she joined a federal administration, she did it under a Republican president in the Department of Transportation. Can you imagine the effect she had there? Last, I want to talk about one other aspect of her character that she and I have talked about, and that is her unfailing optimism, her capacity for hope, her sense of humor in the midst of despair. She and I are contemporaries. So Brown vs. Board of Education came down when we were both in elementary school, and we remember vividly when the Civil Rights Act of 1964 was passed.

And from our perspective in those days, both black and white, we just anticipated that we would see rapid and continuous progress, and that in our lifetimes there would be true racial equality in this country. Little did we anticipate that now, all these years later we would be fighting the same battles, and that in the 21st century many of our schools would be even more segregated than they were before Brown vs. Board of Education. Can you imagine how Ms. Jones must have felt as she was writing the foreword in 1997 to the book on dismantling de-segregation, The Quiet Reversal of Brown vs. Board of Education?

Anyone else would have despaired, become embittered, become pessimistic. Not Elaine Jones. Even today, and you'll see it as she gets up here, she is so hopeful, she's looking for the next challenge, she's so invigorating, and I think that you will see why we decided months and months ago that she had to be the very very first speaker that you would hear at this symposium and set the tone for this entire event on rekindling the spirit of Brown vs. Board of Education, a call to action. Elaine Jones. [applause]

EJ. Thank you very much. Thank you. Oh, Mary Louise makes me sound so noble and so accomplished. [laughter] And you know, I don't see myself as either of those things. And we'll talk about the University of Virginia, how I fell into that and got stuck. [laughter] But looking on a different level, I do really appreciate the opportunity to be here. I appreciate the generous introduction from Mary Louise, and once we start believing our own press, then we're in real trouble, and so I haven't gotten there yet. It's also, dean, it's a pleasure to meet you, it's also good to see so many of you in the audience, old friends and new, and how…How many are getting, are you getting class credit for this or is this purely a voluntary action?

I'd rather think that no, you're here because, class credit has nothing to do with it and you're here because you want to see if this lady has anything to say. Now, I look at this topic of the conference, Rekindling the Spirit of Brown vs. Board of Education. Rekindling means that something has died or something needs a fire or match lit to it, I mean that the flame has ebbed. And so I hope that's not the case. I hope that's not the case because we are coming off a big-time victory in the Supreme Court of the United States. [applause] And I'm going to tell you how big it is, because not only that, look what you've done to Prop 54, you have buried it, you have buried it. [applause]

And it's not as if we don't learn lessons from these occasional defeats that we get. Prop 209 was a wake-up call, and had the strategy been a little different, I think we could've turned that one around as well. But you know, fool me once, you know, shame on you. Fool me twice, shame on me, we don't go that way [again]. And it was a very sophisticated strategy, not a whole lot about race and… You know, you're talking about issues that impact a larger community. You know, health issues and how do we have the medical research done so we can determine who suffers from what kind of illnesses and what kind of research we need to do?

I mean arguments that appeal to a larger population. Now, that is a challenge for us, especially as we deal with issues dealing with race and ethnicity. It's a tough challenge, but it's one we have to meet if we're going to move anywhere. Now, someone came up to me after the Supreme Court argument in Michigan, and they said, "Oh, Elaine, what luck that it was Michigan. The Supreme Court could have heard some other case." And I said, "Luck? Luck? No, no, no, you're missing some very important information. We in the community, the larger community who care about these issues have known for at least seven or eight years that the Supreme Court was going to take a case having to do with affirmative action." We didn't know whether it was going to be in the context of employment or whether it was going to be scholarships or

whether it was going to be higher education, but we know Bakke, today Bakke is 25 years old, and we know what we faced throughout the '80s.

And you had a very vigorous Justice Department trying to turn the clock back and have been doing it for the past 20 years. And so it was inevitable that a case was going to go through the Supreme Court of the United States, and we just didn't know the context. Well, what does that mean? It means you don't just sit and wait for it to happen. You don't just say, you know, all right, the court's going to take one, and if it takes one, and if it's not one that we brought, we'll have to file the amicus or try to affect the outcome. No. You get in there early, and you want to say, it's just as Thurgood and the counsel in Brown, it's the same strategy they employed, that was a strategy.

These victories are not accidents. All right, the strategy on Michigan. Hopwood was the first case, remember? And when Hopwood was decided in 1996, the University of Texas case, the Fifth Circuit Court of Appeals just simply overruled the Supreme Court in Bakke. Now, I didn't know the Court of Appeals could do that, but that's the position that they took. You know, race is impossible, virtually impossible for race to be compelling, that it could meet the test under the 14th Amendment, and that race could never be a compelling interest. And so universal taxes, no, this program is unconstitutional, the 14th Amendment.

Court discussed at length Bakke, Justice Powell's opinion even called it a lonely opinion. I like that, lonely opinion, the Fifth Circuit wrote, Judge Jerry Smith, whoever that is, I have to go back and look him up. And he went on, and the dissent, Judge [Weime] in the dissent, it was quite interesting. The dissent said, "Well, I wouldn't just go as far as this. You've taken this issue too far, the question is not whether race could ever meet the compelling interest test, but whether in this case, on these facts this is a [inaudible] program."

Balanced, reasonable. In other words, don't try to overrule the Supreme Court. Well, the circuit wasn't listening, and that's what happened. So now we're in trouble in Hopwood because when you get these cases, when a public university is sued, who is supposed to defend it? The attorney general, that's right, the attorney general of the state, attorney general of the state is supposed to defend the university, unless the [inaudible] coughs up the money and gets his own counsel and does his own thing. Well, that's what happened in Hopwood, University of Texas, attorney general Dan Morales, press conferences, litigation about press conference, press conferences, about, I don't think there was a strategy, but about how difficult the case was and how he would do the best he could and blah blah.

Meanwhile, [inaudible] we tried to intervene in Texas, to represent the interests of the students of color. Opposed our intervention, "You can't come in," you know, and so we had to fight and work with MALDEF and try to get in the best we could and affect some things. Fought us tooth and nail. All right, now the case goes out to the Supreme Court of the United States. Ladies and gentlemen, I'm very nervous. The Supreme Court of the United States on Hopwood, you get a case in the Supreme Court with no trial or summary judgment on an issue like this, you got real problems.

Without a fully [developed] record, you're just asking for trouble. And so here we were on our way to the Supreme Court, and many were saying in the larger community, the academic community, the legal community, our [inaudible] and education community, social science community, "Well, we want the court to take the case and put this issue to rest once and for all." And I was saying, "No, please, no, no, not this case." And so when Justice Ginsberg wrote, she wrote, when they decided [inaudible] she wrote, "We review judgments, not opinions, not decisions, we review judgments." In other words, the program had changed between the time it got from the circuit up to the Court of Appeals, so there was nothing to review.

Now, I didn't want to get emotional about it, I didn't want to rush into court and kiss her right away. I calmed down and said, "Well, so [inaudible] deny." Next case, coming up. And this case had been percolating around for a while. [Piscataway], case out of New Jersey. Employment context. White teacher, black teacher, a situation in which there was a layoff. Wygant had already spoken to layoffs, I don't know what people are reading when they decide to lay all of this on affirmative action, but the Supreme Court had already spoken about the question of layoffs and said, "No, no, you don't use race in the layoff context."

All right, so here is the white teacher, the black teacher, the layoff situation. The white teacher laid off, and the black teacher kept with the stipulated reason, stipulated in the record, "Kept because she was black." Thank you very much, lawyers, thank you. Stipulated, "Kept her because she was black." You look at that, later, within a few months the white teacher was rehired. Now we've got the issue. It goes up, district court rules against, the lawsuit was brought, because of impermissible use of race. The Piscataway school district loses, it goes up to the third circuit, they lose in the third circuit. I wake up one morning and see the Supreme Court has granted cert in the Piscataway case.

Now, Piscataway had a tortured history, I didn't even know what to do with Piscataway. If I were a judge on somebody's court somewhere and you brought me Piscataway, I would have had real trouble trying to decide

Piscataway in favor of the school district on that record, which was nonexistent, plus the stipulations of counsel. But little details are missing. The African-American teacher had a Master's, the white teacher did not, not in the record of course. Stipulated she's kept because of her race. The facts make a case, and you look at that and you saw, that case was on its way to defeat.

If Piscataway had gone to the Supreme Court of the United States, what would've happened is it would have been a loss, yes, it would have been a loss. No, I don't have to waffle, don't have to find a gray area, maybe, maybe not, no, it would have been a loss. And being a loss in this context, I doubt that we would have seen a Michigan. I woke up 4:00 one morning and looked around the room and said out loud, the Supreme Court had granted cert in the case, I said, "You know, Supreme Court's not going to hear this case." One person can make a difference, folks, one person, if you care enough. And we have resources at our fingertips that we don't even know we have, but first we have to have the will to act. And I just said I don't know how, it's not been done before, here the court has granted cert and [set it] for argument, cert's granted, set it for argument and I'm saying that the court's not going to hear it. The court didn't hear it, and had to figure out how.

First you look at the case, you see the only thing in the case is money, it's not about any injunctive relief or any systemic relief. It's money. The teacher was laid off for a few weeks and she was brought back, so she's owed back pay and that's counsel fees in that case, but that's it. Now, how do you, yet you could have a legal rule from the Supreme Court that could wipe out the whole notion of diversity for years to come. So the question is what do you do? First you go to the lawyers, you go to the lawyers, you say, "Look, fellas, on this record, this is a loss and it's going to do serious damage across the country. Business, the military, employment, education, all with this. And so what can we do about this?"

Now, when lawyers get the opportunity to argue in the Supreme Court of the United States, you have an uphill battle. Win or lose, they want to be heard in the high court. I mean the lawyer for the district, school district told me, "Now, this is very important," and he thought it should go forward. The lawyer for the white teacher, I went to him and he said, "Well, you know, I hear all of this, but I bought a $2,500 suit." I'm telling you, "I bought a $2,500 suit and I'm going to be heard." [laughter] It sounds on its face ridiculous, but important issues turn on these little personal peccadilloes such as this, "I bought a $2,500 suit."

So we had to find a way, first to find out what the case was worth. What is it worth, what is her back pay worth? What'll counsel be? What do the lawyers have in terms of the timing of the case? Figure that out. And then

somebody is found who is a good Samaritan or two or three who will come up with those dollars and get the lawyers to agree. What else gets them to agree? When we are involved in these issues that impact on social justice in ways that are incalculable, we have issues that we cannot lose, we cannot lose. And to be in that situation, you really have to be willing to do what it takes to get lawyers to come to the table.

It's a coalition effort. LDF cannot go off and do what it wants in this kind of litigation. Neither can the ACLU or MALDEF or any other litigator, you have to consult. If you really are litigating in the public interest. We don't have time for Rambo tactics, too much is at stake. And so that's what we had operating in the Piscataway case. And finally I had to find out, you had to get the attention of the lawyer, he had to understand that it was in his long-term economic interest that he come to the table and settle this case. And so he understood it, the case was settled, and then it was headlines, New York Times, Washington Post, "Piscataway settles."

Well, the case settled, yes, but then they wanted us to come on the media, come on Nightline and talk about settling the case. Details are important. The Supreme Court hadn't yet dismissed the writ, the case had settled, but the court has to determine what happens. Can you see me on Nightline when the Supreme Court still has jurisdiction on the case talking about how we got the case settled? No. I kept my mouth shut. [Kwais Nfume] from the NAACP went on Nightline, and since he really didn't know what was going on, it didn't have anything to do with it.

Because LDF and the NAACP are separate, we're completely separate organizations, and he wanted the press, so he could go ahead and go and it didn't affect anything we were doing. All right. Now, that Piscataway, out of the way. Now, here we come University of Georgia. On its way to the Supreme Court of the United States, everybody wants to get the affirmative action case, Center for Individual Rights files a lawsuit against the University of Georgia. Now, ladies and gentlemen, if ever there's been discrimination at an institution of higher education, it's at the University of Georgia. [laughter] A cursory reading will show you of Georgia's deep racial history in public higher education.

But records don't make themselves, lawyers have to develop it, you have to get your experts and your social scientists and your demographers and develop your record. Well, in Georgia we had a situation where the attorney general was responsible for defending the University of Georgia. Attorney General had decided that he wanted to be governor one day, and to be governor one day did not mean vigorously defending an affirmative action case at the University of Georgia, these cases don't get you votes. And so here we are, arguing with him, trying to intervene on behalf of the

black and brown students who enrolled at the university, he's fighting us all of the way.

The evidence that he would not develop, the evidence on the remediation, not the diversity rationale which the court went on in Michigan, but the remediation rationale. The university will make the diversity argument, that's their First Amendment argument, you know, to have the student body, that's the university's right. LDF is in there pushing the remediation argument, which is the right of the student, the right of a student in being included. And when we are in the case, it pushes the court closer to a diversity position, because they don't want to come over here where we are.

So we got in the case, but the state didn't work with us to help us stay objective to everything we tried to put in, as we were trying to develop the evidentiary record. That case was lost in the district court. Went up to the Court of Appeals, guess what? Lost again. Then the attorney general announces, because it's good press, that he's going to go to the Supreme Court of the United States to defend the rights of these African-American students and Latino students and the University of Georgia. Looks good, good press, and the fact that you [inaudible] record in the court below, nobody's paying attention to that. But you are going to save us now in the Supreme Court of the United States.

Press conference, of course. So this was 9/11. Three of us, I got on the plane with the associate director counsel of the Legal Defense Fund and the head of my education section at LDF. Big jumbo jet out of La Guardia, we got the 9/11 flying to Atlanta, big, empty plane with six people on it. And so we told the people, "Look, you can at least let us fly first class." We go to Atlanta, meet with the attorney general. Now, he's somewhat impressed by this, he's somewhat impressed. But my point to him is let's talk over here. I said, "We've been in this case with you for a couple years now, and I haven't gone public. You want to be governor one day. I don't see how you'll become governor without your base." First African-American attorney general. How does one become governor when the op-eds are written and the speeches are made and the people really understand what's going on?

And he heard me. And the next week he got on a jumbo jet and came to New York, we became new best friends and we were able to work out a settlement with the University of Georgia. He did not seek cert in a review by the Supreme Court of the United States and we were able to settle the affirmative action plan. We had been in the Michigan case all along. In Michigan, Michigan was doing all that a university can be asked to do. They were doing all and more. The president of the University of Michigan, who was Dean of the law school at the time the lawsuit was

filed, he later became president of the University of Michigan, now he's president of Columbia. The dean of the law school who succeeded Bollinger, Jeff Layman has now become the president of Cornell, and Marvin Princeloff, the general counsel of the university, I mean there was university-wide support for the defense of that case.

Now, they had some problems. You know, a university has a lot of pressures on it, especially a public university. You've got a board of trustees, the law school was sued, as well as the undergraduate school, college was sued. On campus there were debates, and there was a lot of turmoil about this case within Michigan. Eventually, Michigan, because the leadership stayed on point, the leadership stayed on point and understood that what they were doing was momentous, and yet paying through the nose for having done, that money came out of Michigan's pocket.

So they stayed with the case, LDF intervened in the case, in the undergraduate case. We could not intervene in the law school case because my deputy had been on the faculty of the University of Michigan when the program, the law school affirmative action program was adopted. And so we had a lawyer witness problem in that sense, and he could not be a part of it. But we stayed with the case throughout. Now, the day of lawyers going to court with briefcases, coming out with a [novel league] of theory and going to change the world, if there ever was a day such as that, and I don't know that there ever was, that day is over, because these issues are campaigns, they are campaigns.

You know, Brown was a campaign. And when you are engaged in a campaign, you have to use your political power, you have to use the media, you have to use all of the intellectual force and power at your disposal, you have to be organized, you have to know what your goals are, you have to be clear about your mission, you have to have the resources, because we've been fighting against the campaign that has been organized since the early 1980s. Now, it means pooling resources, it means deciding what the strategy is and understanding that it's your grassroots, your grass-tops, it's all of the people engaged in the community.

Michigan would not have been won just with lawyers going to court. This engagement of the students all over this country made a difference. The engagement of the press, people writing the op-eds, you know, the meetings with the editorial boards and others, it was a massive, public, political, legal and social campaign. That's how you can win these victories. Now, what are we faced with now? Brown, we know what Brown did. We know that Brown really was the five cases. Well, help me,

it was Virginia, Kansas, South Carolina, then DC and Delaware. It's no accident that it was those five, there's no accident about that.

Small staff in New York, [Carly Motley] and Thurgood Marshall, and you had Lou Pollock who's on the southern district of New York who was one of the Brown counsel, Jack Weinstein, eastern district of New York, one of the Brown counsel. Bill Coleman, living in Washington DC, one of the Brown counsel. Oliver Hill, Thurgood Marshall's graduate, they graduated together in the class of 1933 from Howard Law School. Oliver's 96 years old, I talk to him every week, one of the Brown counsel. And they reached out, they were creative in their thinking. Bob Carter, southern district of New York, Bob now is about 85.

Bob Carter, who was Thurgood's assistant, who litigated up and down this country throughout the '40s and '50s on these education cases. And when they tried to take the list of the NAACP to see who the membership were, Bob did all that as assistant. Jack Greenberg came to the Legal Defense Fund in 1949, was at the Legal Defense Fund, and when Thurgood left in 1961 to go on the Second Circuit Court of Appeals, Jack Greenberg succeeded Thurgood as director-counsel of the Legal Defense Fund. [Constance [inaudible] Motley], serving on the southern district of New York, Judge Motley now is about 82, the first woman.

You know, an organization that has been able to do the things we do, why? Because one of the things is we practice what we preach. We argue and promote diversity, but we believe in it. It's reflected on our staff. I couldn't dream of having a legal team with everybody looking like me. I need Asian-American lawyers, Latino lawyers, white lawyers, I need both genders, I need everybody at the table because we're handling these jury trials, arguing before these judges, you have to know how people think.

********END OF SIDE A********

********BEGINNING OF SIDE B********

EJ. Now, that's not only with the staff, it's with our board. The Legal Defense Fund came into existence in 1940, don't tell anybody you heard from that nice lady at the NAACP I'm the Legal Defense Fund, we're separate. NAACP came into existence in 1909. LDF was born out of the NAACP in 1940 because the lawyers got separately incorporated. The lawyers will get tax-exempt status, the NAACP could not, business reasons, you know, you understand. And we could get tax-exempt status, and we were the first organization, law firm to be a non-profit law firm. The courts of New York thought it was an oxymoron, they couldn't understand the concept. Lawyers working for nothing, they couldn't get that. [laughter]

But we were represented by Paul Weiss, Bill Dewinn who will be 90 years old the First of December was our counsel, and stayed with us for over a year to make sure we were able to become incorporated as a 501(c)3 non-profit law firm. Now, it's also reflected strategically, because strategy means everything, in our clients. Yes, our issues are racial and ethnic inclusion, one of our big issues now is this runaway incarceration system we have here that just is beyond anything we've ever known, and something we've created on our watch.

A lot of these issues we can say, "Well, our grandparents or great-grandparents did that, we had nothing to do with it." We had a lot to do with this prison system, which started in the mid-'80s. It started really with the Rockefeller drug laws, and then when Congress got in the act in the mid-'80s when Lynne Bias died and the crack [pile] and cocaine and all of that, it just went through the roof. So now we've got two million folk incarcerated, we're ruining budgets, absolutely ruining budgets, the money's coming out of the budgets of higher education and going into the prison system. So that's a major issue for the Legal Defense Fund.

But as you look at these issues and what we're called upon to do, when I talk about diversity of clients, it's not the race of the client, and although I tell you, most of our clients are black and brown, and in some instances Asian, but some of our clients have been white. Why? Because it is the issue that that client raises. We had a case, it's in the Supreme Court, Supreme Court decision, McKinney versus Nashville Banner, sometime in the '90s, I don't remember the year. McKinney versus Nashville, Ms. McKinney, white female, 60 years old, working for a corporation in Tennessee.

She thought she was about to be fired, and unjustly so, and she wanted to assert her rights under the Age Discrimination Act. To protect herself, Ms. McKinney took home some documents from the corporation to prove that they would've been acting unlawfully. She brought home the documents, and during the course of her deposition it was learned that she had taken the documents, and that is an automatically dismissable offense from the corporation. So the corporation argued to the district court, "Look, we didn't discriminate, but even if we did, that discrimination was negated by the fact that she took home the documents." And so the court created a new rule called the After Acquired Evidence Rule.

So under the After Acquired Evidence Rule, created by the district courts to get cases off the docket, under the After Acquired Evidence Rule, Ms. McKinney is out of court. Goes up to the Sixth Circuit Court of Appeals, Sixth Circuit Court of Appeals reaffirms the district court and says she's out. Her lawyer comes to the Legal Defense Fund and he says, "Look, I really need some help with this case. We want to go to the Supreme Court, we want LDF to help us write a cert petition and get involved in the

case." Now, we have a limited budget, $14 million a year, that's it. That's the whole country, $14 million a year.

All right, so that means our case selection has to be very, very careful. Thurgood had those same problems, had to be very careful about case selection. Now, I looked at that. I said, "Now, why should we help Ms. McKinney?" First, age discrimination. Although the race and ethnicity statutes are different and are treated differently, I call these statutes sister statutes. The age discrimination statutes, the disability statute, race and ethnicity and gender statutes, I call them sister statutes. I care about what happens to either one of those statutes because it can come back to affect me. So I need to be very, very careful about what goes on.

So I said, "All right, this is something to look at and to look at very closely." Next, age, I said, "Well, if we were coming up in the context of race or gender, the court may have a few problems understanding what we're talking about." But age, the Supreme Court ought to understand this issue. [laughter] They ought to, not as to whether or not she [prevail], it's whether or not she gets her day in court, you know, whether she can survive a summary judgment and get to put on her case, that's what we're talking about here. And so then I looked at it, I looked at it and I said, "You know, it's maybe better in the high court to have this issue arise in this context, because if I let it seep into the law in this statute, I'm going to see it in a race or gender or ethnicity or disability statute. I'm going to see this procedural rule used to wipe out civil rights claims."

And so we took the case on the stipulation of agreement with the lawyer. We said, "Look, we'll take the case, we will bring you to New York, we will moot you, give you your moot court and see that you are ready to argue the case. We will write the cert petition to get the court to grant cert. We don't know that they will, we'll do the best we can. But if we don't think you are able to argue this case, we want you to agree now that you will let another lawyer argue it. And that is a condition upon which we will take it," and that's testing whether or not he really cares about his client's winning. And he said yes.

Came up to New York, mooted him, we wrote the cert petition, the Supreme Court granted cert. Went in, he argued the case, second [shed] by one of the LDF lawyers, came back, we won that case 9-0, 9-0. That's the end of the After Acquired Evidence Rule. But all I am saying is in all of these cases, we have to employ, especially in the 21st century, what we didn't have to employ as much of in the middle of the 20th century, and that is coalition and that is the kind of lawyering that involves your colleagues and the kinds of discussions that you have to sustain. Because you're in these cases for victory.

You know, I looked at the census and it shows you, we have come a long way. Latinas weren't even counted in the census. Now, you know Latinas existed prior to 1980. [laughter] You know that. I mean we know that, I'm sure there's evidence of that. According to the census, I looked at the 1930 census, the 1940 census, 1950 census, '60, '70, N/A under Latino, N/A. 1980 census, then I see a 6.4%. And then in 1990 I see a 9.0, and then in 2000 I see 12.5. That's progress there, it's [diminimous], because sometimes I don't know whether it's a good idea to be counted or not.

But now at least the nation recognizes that all of us are here, which is a start. But as we, in terms of this call for action, as we look at Brown vs. Board of Education and we see where the country has gone, the Supreme Court stuck with Brown in 1954, in Brown II in 1955, [pro curium] opinions throughout the '50s and '60s. The Supreme Court really reaffirmed in a ringing voice, in Cooper vs. Erin and in Swa vs. Charlotte Meklinberg. Up until 1972, the Supreme Court stayed the course. But what happened then was what usually happens in cases involving social justice. Politics becomes involved.

And the Nixon administration was not happy with school de-segregation and bussing as a remedy. You can see it throughout the Justice Department, throughout the actions of ATW, just read the history and you can see it. Well, then we, after we see the court beginning to tire, we look at San Antonio School District vs. Rodriguez, a very important case, 1973, filed out of Texas, opinion by Justice Powell, we all know it. It attacked the Texas system of financing public education.

Initiated by Mexican-American parents whose children attended the Edgewood independent school district. Complaint filed in summer of '68, three-judge court in '69, went straight to the Supreme Court. The panel rendered its decision in '71 and argued in October of '72 before the Supreme Court decided March of '73. Now, people are amazed when we tell them, across the country, "You know, education is not a fundamental right, it's not a fundamental right that's articulated and as far forcefully and clearly stated in the Constitution of the United States." If you have any doubt about that, go back and read Brown, where that's made clear. And also read Rodriguez.

Rodriguez says very clearly, he said [inaudible] said, first he cites Brown and says, "In Brown a unanimous court recognized that education is perhaps the most important function of state and local governments. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time." We are very good with lofty sayings. Quote from Brown, "Compulsory school attendance laws and the great expenditures for education both demonstrate and recognize the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the

armed forces. It is the very foundation of good citizenship." This is language right out of Brown.

"Today it is a principle instrument in awakening the child to cultural values and preparing him," or her, my amendment, "For later professional training, and in helping him," or her, "To adjust normally to his," or her environment. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it is a right which must be made available to all on equal terms."

Now, that's the Supreme Court in Brown. Now, the Supreme Court in Rodriguez, the Supreme Court said on this question, "Education of course is not among the rights afforded explicit protection under our federal constitution, nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state's social and economic legislation."

In other words, we've been scrambling, as you are in California looking at these state constitutions, trying to find some remedies under state law to get some equal education opportunity to these students of color locked into these school districts. LDF looked at all of, read every state constitution in the country and looked for the one with the most favorable provisions some years ago, and it was Connecticut. So we filed a lawsuit in Connecticut to protect the children of Hartford under the state constitution to get those kids equal, some equal quality education. After 12 years of negotiating, we ended up with a settlement last year, which is not a bad settlement. It requires Hartford in four years to make sure that at least 40% of its students are in a de-segregated environment and that there is really considerable change that one can see within the next four years.

But it leaves it up to legislatures. In the end, when you file these lawsuits eventually, under state constitutions and trying to get resources in those school districts, you're going to end up in the state Supreme Court and with the state legislatures. And prying money in this economic environment out of those legislatures is not an easy thing to do. But these are the challenges. What remains after the Supreme Court decision in Michigan? Well, Michigan, as I said is a good win, but you know, some will argue that it does not affect scholarships. It affects education, higher education, the right of the university, First Amendment rights of the university, but it does not impact let's say race-based scholarships, many will argue.

Now, if we eventually end up with a system that we eliminate scholarships for high achieving black and brown students on a 14th Amendment equal

protection basis, then the scholarships I'm about to name will be [good] scholarships. Scholarships for students of the Roman Catholic faith, scholarship for descendents of early Dutch settlers, scholarship for students, American Citizens, Canadian descent, scholarship for students of Greek descent from middle income families, scholarship for students born in Hong Kong, scholarship for students from Taiwan, scholarships for females who do not use tobacco, scholarship for students of Chinese or Japanese descent, scholarships for students of Huguenot ancestry, scholarships for deserving students of Italian descent from upstate New York, scholarships for students who are lineal descendents of Confederate soldiers and scholarship for descendents of signers of the Declaration of Independence. Now, all of those would be [fine] if you come up with a rule that says the 14th Amendment prohibits race-based scholarships. Just think about that. But that may be the next battle we have to fight.

We already lost that one in the Fourth Circuit Court of Appeals some years ago, back in 1993. But it's still an important issue. It is important to be engaged. It is important to make an assessment, don't view the problem as being too big. Don't, all of these social issues are huge, but Margaret Mead told us that it's thoughtful men and women who are committed who make the difference, and I believe that.

Our 26th president, Teddy Roosevelt, to paraphrase Teddy, he said, "You know, it's not the critic who counts, it's not the one who points out how the strong man or woman stumbles, or how the doer of good deeds might have done them better. The credit belongs to the man or woman who is actually in the arena, who strives valiantly, who knows the great enthusiasms and the great devotions and spends himself or herself in a worthy cause, so that his or her place should never be with those cold and timid souls who know neither victory nor defeat." I ended up at the University of Virginia from the Peace Corps, two years in Turkey, and I applied to Virginia because Virginia had the rule, as many states did, especially in the South.

If you were "qualified" to go to the public institution of higher education, then the state would pay your way to a school of your choice. My classmate before me who's now a senior faculty member at Georgetown applied to the university a couple years ahead of me, and the university paid her way to Harvard. So I applied from the Peace Corps, I said, "Well, I'm on my way to Harvard." I applied to the University of Virginia from Istanbul, Turkey and they called my bluff.

They admitted me. Virginia admitted me. And so now you have, you apply and you admitted, now you have to go. You know, they had never seen anything like you before, the school was all-male. The undergraduate school was all male, no women were admitted, were in Virginia when I… I mean, it was something, it was truly something. But I

was [inaudible] because I had spent two years in Turkey in the Peace Corps. So after Istanbul, Charlottesville was a piece of cake. Thank you all very very much. [applause]

******END OF TRANCRIPT******