

## 2021 Black Lawyers Matter Conference<sup>SM</sup>: Welcome and Introduction/Opening Speaker

### FULL TRANSCRIPT

**Voiceover:** 2021 Black Lawyers Matter Conference<sup>SM</sup> presented by LSAC, University of Houston Law Center, and SMU Dedman School of Law, in collaboration with the conference planning committee. Recorded October 15, 2021. Welcome and Introduction/Opening Speaker.

[Upbeat music plays and fades out]

**Kellye Testy:** Well, good morning everyone. I want to welcome you to the 2021 conference, [2021] Black Lawyers Matter [Conference]. I'm Kellye Testy, the President and CEO of the Law School Admission Council. And it's a great honor this morning to open our conference and to let you know how thrilled we are to have partnered with all of you to bring this forward. We have a wonderful audience of almost 2,000 people registered today for [2021] Black Lawyers Matter [Conference] 2021. And I am very pleased to now introduce the first welcoming speaker, Dean Leonard Baynes, from the University of Houston School of Law. Dean Baynes is a national expert in areas of diversity and equity, and he has been a very effective leader for equity, both at Houston and prior at St. John's, where he had a pipeline program that we were so incredibly impressed by, and everyone nationally has both respected it and modeled it, in many ways. So Dean Baynes, with that, I want to thank you for convening last year's event with Dean Collins, and let you know how pleased we are to now make this an annual event, and I'll turn it to you for your welcome.

**Leonard Baynes:** Thank you so much, Kellye, it's great to be here. And many thanks to the Law School Admission Council for partnering with UH Law and SMU Dedman School of Law to co-convene [2021] Black Lawyers Matter [Conference] 2021, Building Inclusive Excellence in Legal Education and Employment. So last year after the tragic deaths of George Floyd and Breonna Taylor and so many other African Americans who found themselves dead under those acting under color of state law, SMU Dean, Jennifer Collins, and I, felt we need to do something about the situation. And last year held our first conference on this issue, focusing like a laser beam on the under-representation of African Americans and other people of color in the legal profession. We can't have justice without adequate representation. We cannot have justice without adequate representation. And again, as I said in the beginning, we're delighted to partner with Law School Admission Council now as a co-convener, and a terrific planning committee of several deans at many other law schools across the nation. The under-representation of Black lawyers has a long history in our society. 71 years ago, the U.S. Supreme Court in Sweatt versus Painter, found that it was unconstitutional for the University of Texas Law School to reject Black applicants solely because of their race.

So think about it. There were laws that allowed law schools to discriminate against Black applicants based solely on the color of their skin. At that time, those laws were pervasive in the South and in the North, they may not have been that much better, but in the South there were laws actually that prevented Black law students from attending these law schools. So again, think about it. If you are an aspiring law school student in the South, at that time you would have to go north to those law schools that accepted Black applicants in order to get a legal education. You'd have to travel north to try to find your destiny. And the challenge of course is that how many people could really afford that?

The state schools weren't available to people. So the law which was designed to protect all Americans and treat all of us fairly, instead treated some of us very differently. Fortunately, the Supreme Court overturned those laws, and since then quality has become a much more talked about bedrock principle of our nation when it comes to African Americans and other underserved groups. These changes came about mostly through the efforts of exceptional civil rights lawyers, like Thurgood Marshall and Constance Baker Motley of the NAACP, as well as other civil rights leaders who literally put their lives on the line for the U.S. to change laws, to make us a more equitable nation. But the whole essence of the protests of 2020 revolved around the continued disparity and under-representation of African Americans often leading to tragic criminal justice outcomes. Almost 70 years after Sweatt, with Blacks constituting almost 13% of the U.S. population, African Americans still make up less than 5% of the legal profession, as do Hispanics, who are at 19% of the U.S. population also make up about 5% of all lawyers in the U.S. In 2020, only 7.7% of first year students were Black at our nation's law school. And almost 20% of that number are enrolled in the six historically Black law schools across the nation. This means that in historically White law schools entering classes, are on average only 6% Black.

A lot of this is attributable to the zealous pursuit of U.S. News & World Report rankings, that cause law schools to put a premium on rankings over law school diversity. But that is no excuse. We all have a moral and civic responsibility to do so much more. But it's not just law schools that are undiverse, major law firms lack diversity. Major law firms are undiverse with only maybe 5% of the associates who are Black, and 2% of the partners who are Black, and even smaller number of equity partners who are Black. The federal judiciary is woefully undiverse. In fact, the last president's judicial appointments were 85% White, 76% men, only eight of those appointments were Black to the District Court and none were confirmed to the U.S. Court of Appeals during the last president's administration. In fact, law itself is the least diverse profession in the nation. As we pole vault to a diverse future where a majority of the population will be a minority by 2044. Isn't it truly ironic that the law, which was used to advance equality and diversity, the law that worked to break down these barriers of segregation, is in fact the worst at integration? But it goes more than that. The diversity of people at law schools is very thin, in a recent article by Bennett Capers, a professor at Fordham, he called the law schools as having White spaces with very few Black and Hispanic or Asian faculty students and staff, and that when students of color approach these spaces, they're overwhelmed by the Whiteness in comparison with the rest of society. In addition, there have been studies about students seeing racially sanctioned inequality in our society, and that the criminal justice system, when students are studying about this, they see no remedies for their lived experience like with stop and frisk. In the cases that the students often study, they repeatedly see inequality is often unaddressed and baked into the system. And in fact Professor Shaun Ossei-Owusu describes this phenomenon as racial gaslighting, and he's of the opinion that sometimes law school education is intellectually violent towards students of color. Incidents from summer 2020 show that we have to do a much better job in making our society more diverse, making law more diverse and making our legal spaces more diverse.

There's been tremendous progress over the past year, I will admit, we've seen a record number of African American women deans, an increasing number of African American editors-in-chief of flagship law reviews, but we need to do more and we need to make sure that these gains endure and that we continue on a path to racial progress. So I'm glad that we are here today, that you'll get a sample of our offerings from a menu of options to consider a sort of how-to kit to make your law schools and place of employment, more diverse. You'll get a sample of panels on who's educating tomorrow's lawyers, curriculum and pedagogy. Re-envisioning the hiring process for new lawyers, practice best practice in lawyer retention and career development and next steps. Again, our goal is to open eyes, but also provide strategies for the future to make our profession the most diverse, not the least diverse. It is after all, our legal profession's birthright, since we open the doors for others,

that we need to make sure that we continue to keep those doors open and to keep the doorway full throttle to the future. So thank you so much. I turn it back to Kellye, and many thanks for all you for being here today.

**Kellye:** Thank you so much, Dean Baynes, for those inspiring words and even more so for your wonderful leadership on so many fronts. It's a pleasure for me now to introduce Mr. Robert Grey. And at the current time, Mr. Grey serves as the president of an organization known as LCLD, the legal council, excuse me, Leadership Council on Legal Diversity. And this organization is just terrific. And it's made up of more than 350 corporate legal officers and law firm managing partners. All who've dedicated themselves to advancing diversity in the legal profession. Mr. Grey prior was a partner at the law firm of Hunton, Andrews and Kurth and is currently senior counsel to that firm and is really a leader of no match in the legal profession in many ways. Mr. Grey was the president of the American Bar Association. I believe the second African American to hold that post. He was appointed by President Obama to the Legal Services Corporation Board, and he continues, I believe to serve on that board. Mr. Grey, you have been a wonderful leader for our profession, and I am really honored to welcome you and to hear some words from you today, as we begin our conference.

**Robert Grey:** Thank you, Kellye, and thank you dean, and all of the LSAC family and community for the opportunity to be with you today. As Kellye said, LCLD, which if you google LCLD, I see that I'm frozen. [Laughs]

**Kellye:** We can still hear you.

**Robert:** Okay, good. If you google LCLD you will see that the link to our organization will come up first. Here's what I'd like to share with you. The managing partners in general council of LCLD and Kellye, we have now surpassed 400 members. So reached another milestone during the COVID period. Have all indicated that it is important for us to pay very close attention to the pipeline. And so LCLD has a mentoring program, the national mentoring program, where we match lawyers in our member organization, both law departments and law firms, with law students around the country. Last year, we matched 1,000 students with lawyers in our member organization. This is important, and it goes to the dean's recommendation that if we're going to make a difference, it's going to have to be all hands on deck. And we, as lawyers who are practicing are going to have to make sure that we reach back and share our experience, our wisdom, with those who aspire to be like us. And so the mentoring program has been going on now for over eight years. And we are in 33 cities, and in many law schools throughout the country. So take a look at the website and see if we are not in a city near you, to see if you can participate in that program, we'd love to have you. The second pipeline program is the 1L Scholars Program, and that is our summer intern program. When LCLD started in 2009, really in the middle of the recession. And when a lot of law firms and law departments were cutting back on particularly 1L internships, LCLD through the leadership of Brad Smith, who is now the president of Microsoft, who was then general counsel said, "Let's double down on this idea of reaching out to our members and asking them to increase the number of 1L scholars." They did so, and we started with a modest number. 40. Today we have 600 1L scholars in our member organization. It's important for us to start early and to show that we are in this to win it. And so the mentoring program and the 1L scholars program, are flagship operations in connection with law school, that LCLD is engaged.

We have other initiatives within LCLD to deal with practicing law. We have an associates program called Pathfinder, and a fellows program for those who are more advanced, usually eight to 15 years out of law school. It is not enough for us to train lawyers, it is important that our institutions, our organizations, our members go beyond good intention to intentional actions. And so LCLD started

this year an initiative called Leaders at the Front. Leaders at the Front is designed to cover three important areas. One, we must be transparent about what we're doing. And so each member is asked to produce a pledge that is published on the website, and you can see those pledges under Leaders at the Front. Second, those pledges should address areas of impact that can help transform the profession in terms of its effort to engage in a meaningful diversity, equity and inclusion practice.

And third, that there must be measurable results. It's great to engage in an initiative, it's another to determine what impact it has had by measuring the results. And then finally, every member is asked to state their personal commitment to DE&I. Transparency, areas of impact, accountability, and measurement, we think are essential for organizational development to match talent development. With that, we were charged when we first started that in our first 10 years, that we would touch the lives of 10,000 individuals in the development of their careers. Last year, year before last, we celebrated that, we did touch the lives of 10,000 individuals of law students and lawyers through our programs. Now we seek a higher platform. Not only do we want those individuals to succeed, but we want our organizations to be very intentional about their efforts to improve the lives of those individuals. I want to close with this, Kellye. I want to encourage those law students to be very intentional about their career. You have to show initiative, it's a two way street. We can ask our organizations to do more, but you also have to step up to the plate. Oliver Hill was my mentor. He graduated number two in his class from the Howard Law School in 1933. The person who graduated number one that year was Thurgood Marshall. Oliver Hill said, "Robert, practicing law is a full contact sport. You are either on the field trying to score, or you are a spectator." You as a law student, as an aspiring lawyer, you have to show initiative. You have to own your career and by doing so, it empowers you. If you show initiative, you get notes. If you show initiative it builds confidence, if you show initiative, you're using your voice. If you show initiative, people will ask you to be a leader. Showing initiative is critical to your success. If your organizations are intentional, and you show initiative, it's not at the end of the day who you know, it's who knows you that makes a difference. I am so excited for all of you. If somebody said, what would you like to do if you could start your career all over again, I'd say I want to be a lawyer. Being a lawyer is important to the institutions of our democracy. Lawyers are what make a difference in fairness and equity in our country. Being a lawyer is a great thing. I look forward to welcoming many of you to the profession, always know my door is open. We are here together, we are in it to win it. Thank you, Kellye.

**Kellye:** Thank you so much, Mr. Grey. Being a lawyer is indeed a great thing, and it is a great thing that you decided to become a lawyer. Thank you for all that you do. I'm so grateful. It is a pleasure for me to introduce the next speaker, who will also welcome you today, and this is my colleague at the Law School Admission Council, Angela Winfield, our chief diversity officer. Ms. Winfield joined us from Cornell University, where she was a leader there for DEI, and herself a wonderful lawyer before that. I want to tell you that in joining LSAC, it was one of the things that I was so just delighted to do was to welcome Angela into our staff and as my colleague. So with that, Angela, I want to thank you for all the leadership you provide in so many ways to the legal profession, and to legal education, and now to welcome you this morning for your opening remarks. Angela Winfield.

**Angela Winfield:** Thank you Kellye, and thank you everyone. Good morning, it is an absolute pleasure to be with you for this 2021 Black Lawyers Matter Conference. And I am really thrilled and delighted to share with you what the phrase Black Lawyers Matter means to me, and to what it means to the country and our democracy. The words Black Lawyers Matter is not just a clarion call that our race, my race, the Black race matters. It is so much more. It is confirmation that the Black race and Black lawyers make a difference. It's validation that clients, large and small, individuals wealthy and poor, will and should rely on the sage advice that Black lawyers can provide. And the sage wisdom and perspective that Black lawyers bring to the profession. Today, I want to share some thoughts on three areas that will continue to impact the legacy of Black Lawyers Matter. First,

is that the U.S. needs more lawyers. The second is a trifecta of issues affecting legal education. And third, is the fact that we, as an industry and individuals must be guided by a north star. First, the U.S. needs more lawyers. If you look at any news site or newsfeed, it is obvious that our country and the world is a very inequitable place, from the large disparities in wealth and access to health, education and so many other areas, there's more work that needs to be done. And lawyers are well positioned to help make these changes in our justice system, in laws, in providing and breaking down barriers, lawyers have done this. Lawyers have the training and expertise to right these wrongs and to provide access to entire segments of the U.S. population. To this point, it was a lawyer who stood before the Supreme Court and argued that separate is not equal. It was lawyers on the Supreme Court who reviewed that case and made the decision. It was a lawyer who stood again before the Supreme Court and argued that marriage equality was a right for all and lawyers who decided that. Lawyers are an important part of our society and our democracy and we need more lawyers. But listen closely, we don't need just any lawyers, we need more Black lawyers. the U.S. needs more Black lawyers from every identity and background and perspective. the U.S. needs more Black lawyers that are from the LGBTQ+ population, more Black lawyers that are straight. the U.S. needs more Black lawyers that are able-bodied, needs more Black lawyers that are disabled. We need more Black lawyers. Anything less is unacceptable in a country that proudly promotes itself as the oldest and most enlightened democracy on Earth. Anything less is unacceptable because it will simply perpetuate the inequities that have currently existed. And it will also perpetuate these statistics. 13% of the U.S. population identifies as Black or African American yet only 5% of lawyers are Black or African American. 5% of U.S. adults identify as gay lesbian or something other than straight. Yet 2.5% of lawyers are out as being part of the LGB population. And a statistic that I find particularly disturbing is that 26% of the U.S. population identifies as having a disability, yet law firm associates and partners of them, only 1/3 of 1% identify as having a disability. This is prima facie evidence that we need Black lawyers in all demographics in the profession. Because when we talk about Black lawyers, or at least when I talk about Black lawyers, I'm talking about all Black lawyers, all Black law students, all aspiring attorneys and law students who are Black or of color. We need them, we need you all in the profession. The second issue that will impact the legacy of Black Lawyers Matter are the three trifecta of issues that are facing legal education today. First, standardized testing, second, the need to reinforce the pipeline. And three, intersectionality. Let's begin with standardized testing. The LSAT® serves a very important purpose and there is a strong and proven correlation of 0.60 between the score on the LSAT and first year performance in law school. For some minoritized candidates, this can be a door opener, and a way for them to demonstrate their skills and capabilities. However, we still do need more support and resources to ensure that every student and every Black student aspiring to attend law school and become a lawyer has access and appropriate preparation to be able to perform their best. I also believe that we need to look hard and expand how we view and assess what is required to attend law school. Another legal education challenge is the pipeline and the need to connect individuals at each stage of their journey, and to provide support at each stage of their journey. We need to stop doing standalone, feelgood programs, and really think about how we connect those stages and the people involved in the pipeline. For instance, this conference itself is connecting the folks we're leading in law schools with the folks who are leading in the employment sector. It is so important that we coordinate, collaborate, align, and reinforce and strengthen the pipe that is bringing forward our diverse attorneys, our Black lawyers. We need to continue to pursue zealously, outcomes and impact that make a difference for our students and our prospective attorneys. And third, yet another challenge is intersectionality, and this is what I was talking about when I shared those statistics about not only race, but sexual orientation, gender identity, and disability. We need to support minoritized students. We need to support our Black students, regardless of their identity. We need to provide holistic support to Black students. It is unacceptable for a Black woman or man or gender neutral person to have to go to one place for service and get support to be seen and heard because of their race and another entirely separate system or support program to get support because they

are a part of the LGBTQ population, or because they have a disability, we need to serve and support the entire person that are our Black lawyers and our Black law students. There's a lot of progress that has been made over the years and decades, but there is much more that needs to be done. And we need to be bold. We need to look closely at what we have done, what works and what hasn't worked, and we need to embrace the things that have worked and try things to see what progress we can make, because I believe we can and will make progress. The third issue that will impact the legacy of Black Lawyers Matters is that there is a need to identify and hold true to our north star. And it is not lost on me and should not be lost on any of us, the meaning and significance of the north star when talking about Black lawyers and Black people in the U.S. The north star signifies liberation, it signifies freedom, progress and growth. As Dean Baynes mentioned, that Black lawyers had to go north for opportunities to actually attend law school. And we need to continue to keep our eyes focused on north, on progress, on how we advance access, equity and justice. And that is why I am so delighted and so thrilled to be a part of this, and to welcome you to here to this [2021] Black Lawyers Matters Conference because as I started, and it's not just a clarion call, it is the truth. Black Lawyers Matter. Thank you so much. And Kellye, I will turn it back over to you. Kellye: Thank you so much, Angela, incredibly inspiring words. And I so appreciate all the work you're doing to advance equity in our legal academy and throughout our profession. As you noted, it takes all of us working at every point along the pipeline from prelaw to practice, to have the impact that we all want to have to make. Well, I really want to thank each of the speakers this morning that opened the conference with wonderful welcomes, Dean Baynes, Mr. Grey, and Angela Winfield. Thank you so much for being with us. And it's a pleasure now for me to turn this over to Dean Dan Tokaji from the University of Wisconsin School of Law. He is the Fred W. and Vi Miller dean, and professor at the University of Wisconsin, and as noted, serving as their dean at this time. He came there from the Ohio State University's Moritz College of Law. And the dean is an expert in election law, widely cited in the media, published over 50 books and articles, and himself has also served as a civil rights lawyer and brought many cases as well. So dean, thank you for being with us today and I'll turn it to you to introduce our keynote speaker.

**Dan Tokaji:** Thank you so much, Kellye. I want to begin by thanking LSAC as well as the University of Houston Law Center, SMU Dedman School of Law and my fellow members of the [2021] Black Lawyers Matter [Conference] Planning Committee for putting this wonderful event together. It's fantastic to see so many of you here today. Here at the University of Wisconsin Law School, we feel especially privileged to be part of this event because it is so close to the center of our mission. And our traditions here, we're very proud of our legal educational opportunities program here, which has been in effect opening opportunities and promoting inclusion for over 50 years. Our Hastie Fellowship is a program that many of the leading scholars of color in this country have gone through. We were also right here on our Madison campus, the place where the seminal 1989 Critical Race Theory Conference occurred. And we're very proud of our tradition in that respect as well. So it's a particular privilege for me to introduce our speaker today. U.S. District Judge Vanessa Gilmore. She is our opening keynote speaker. She has been a federal judge in the Southern District of Texas since 1994. She was the youngest federal judge on the bench at the time of her appointment. She is a graduate at the University of Houston Law School and was the first University of Houston Law Center graduate to serve on the federal bench [indistinct]. She's a true Renaissance woman as well. In addition to having received many civic awards for her community service, is a published author. Her books include "You Can't Make This Stuff Up: Tales from a Judicial Diva" and a work of fiction called "Saving the Dream". She has announced her retirement from the bench effective January of 2022. And though she will be greatly missed in that capacity, we hope this will give her more time to participate in events like this, teaching and inspiring the next generation of not only Black lawyers, but all lawyers and leaders. In her remarks today, she's going to address racial disparities in judicial clerkship, sentencing and other areas. I'm hoping there may be some time for questions. If you do have questions for Judge Gilmore, you can feel free to put them in the Q&A, we have until just about

11:00 today and so I don't want to delay further in introducing and welcoming Judge Gilmore, please take it away.

**Hon. Vanessa D. Gilmore:** Well thank you so much, Dean Tokaji, I appreciate it. And I'm grateful to be here and to have the opportunity to speak morning. And yes, I hope that I will still be called upon after I have retired to participate in opportunities like this. The LSAC is a leader in this area and explaining and showing us how to enhance the pipeline in both legal education and employment. I hope that through my remarks today that maybe I could talk a little bit about the why, why it is important and some of the things that those of us in the judiciary have done to try to make this inclusion a possibility in the court system and in the legal system generally. When Ruth Bader Ginsburg died, I mourned her passing. I was a tremendous fan of Justice Ginsburg. And I almost considered going to Washington DC for her funeral services to pay respects with many of my other judicial colleagues, but COVID held me back. I decided I would just watch it on TV like many others did. An enduring image from that service was the picture of more than 100 of Justice Ginsburg's former law clerks standing on the steps of the Capitol, where she lay in repose. And one of my law clerks who knew what a big fan I was of Justice Ginsburg called me to make sure that I had seen the picture and to say, wasn't that just remarkable? And my reply to her was that I saw the picture and that it was actually really very depressing to me because what I saw in that image, I saw through a different lens than my White law clerk did. And what I saw was that there were dozens of people standing there that day and that not one single one of them was Black. I just didn't know what the statistics were on that. So I decided that I would look it up and I discovered something that I probably could have lived the rest of my life without knowing. And that is that Justice Ginsburg in her 25 years on the Supreme Court had only hired one African American law clerk. And then in her 13 year tenure on the U.S. Court of Appeals for the District of Columbia, that she had not hired any. So in 38 years, she'd only found one African American student that she felt was qualified to be her law clerk. That person, Paul Watford, is now sitting as the United States Circuit Judge on the United States Court of Appeals for the Ninth Circuit. And to add sort of salt to the wound for me, because I admire Justice Ginsburg so much, just to hear just yesterday, Katie Couric admitting that she deleted part of an interview with Justice Ginsburg saying that athletes protesting brutality against Black lives by kneeling showed quote, "Contempt for a government that has made it possible for their parents and grandparents to live a decent life, which they probably could not have lived in the places they came from." And I thought, ouch, when I heard that comment because if this woman, who is often derided as being one of the most liberal justices doesn't understand and appreciate the value of Black lives and the need to protect them, the need for discussions like this that we're having today could not be more clear. But it is not just Justice Ginsburg that has a lack of diversity in terms of her clerkship hires. The 2019 statistics show that clerkships largely remained White. And that students of color are having a difficult time breaking into this area. As you can see by this statistical chart from 2019 of the nearly 3000 law students who became judicial law clerks in all types of clerkships from state to federal, that 75% or more were to White only, and only 7 to 9% were to Black students. And the opportunities available to former judicial law clerks are innumerable. People beat my door down every year to try to get the young people that have been serving as judicial law clerks in our courts. Judges don't like to admit this, but the judiciary is where the brightest legal minds in the country go to become clerks to the judges. We rely on our clerks and they have a big influence on the perspective that the judiciary has. Black Lawyers Matter, because if you're not at the table you are on the menu. The perspective of lawyers affects the rulings that we make as judges. And as one example, according to Bob Woodward's book on the Supreme Court entitled "The Brethren". The justices of the Supreme Court had initially voted five to three to uphold a conviction of the boxer, Muhammad Ali, for violating the Selective Service Act, for not reporting for duty in the military. However, Justice Harlan, who was responsible for writing the majority opinion became convinced that Ali's claim to be a conscientious objector was sincere after reading background material on the Black Muslim doctrine that was provided by one of his law clerks. As a result, Justice Harlan changed his vote

resulting in the conviction being overturned. Black lawyers are not just important in the area of the judiciary. Though that's just another little aside, Supreme Court law clerks get like \$400,000 bonuses when they leave and my clerks get big bonuses too. It's not just important in terms of where lawyers are in the judiciary, membership in the 117th Congress, the current Congress of nearly 440 some odd members there are a couple of vacancies right now. Shows that nearly 175 of those members are lawyers that makes up about 40% of the members of the current Congress. And here in Texas, the numbers are comparable in the state legislature in terms of the makeup of the number of lawyers that are there. It becomes important in so many areas. Dean Tokaji, who's an expert in election law will understand how important the presence of different perspective is in the legislature in drawing the lines. Right now, there's a big dispute in Texas on drawing the congressional district lines. And if everybody is not at the table, then some people are going to be on the menu. And there's a big dispute right now in terms of the way that the proposed lines are going to be drawn even here in the state of Texas, and having all of those different perspectives at the table is very important. And I know the dean can attest to that. But Black Lawyers Matter, the why is because the impartiality of the judiciary is at risk if there's not a diversity of perspectives and experience. A lack of diversity impacts the impartiality of the courts and does nothing to instill confidence in the fairness of the judiciary. On the contrary, it leaves a number of observers believing that the courts are as partisan as other branches of government. Generally speaking as judges, we pushed back against the idea that we are partisan, or that we are biased in any way. Whenever we get a high profile case, the first thing that happens is people want to see who you were appointed by as some sort of litmus test of your background, and we push back against that all the time. But the reality is implicit bias, sometimes also called unconscious bias, which is defined as a relatively unconscious action of prejudice judgment, including implicit attitudes towards stigmatized groups, is something that all of us have as part of our makeup. That's the dictionary definition, but let me show you how it might happen in the context of the work that I do. When I went on the bench, in 1994, we sentenced under what was known as the sentencing guidelines, promulgated by the Sentencing Commission. And that was a regime that was put in place to try to make sentencing more fair so that everybody would understand that they wouldn't get a sentence from one judge that was completely different from another judge based on factors that they could not account for. And then the Supreme Court made a decision in a pair of cases, one called United States versus Booker in 2005, and the mandatory sentencing guidelines became advisory. And that meant that judges could sentence within the advisory range, or they could use their own discretion in fashioning a sentence that they believe was appropriate, meaning that they could depart upward or downward in the sentencing guidelines. The reality was, what happened was that that new discretion resulted in a number of problematic trends. It didn't take long, by 2006, the Department of Justice had already found an increasing sentencing disparity based on race and geography with Black offenders receiving sentences that were 4.9% higher than White offenders. Interestingly, the Department of Justice was most concerned about sentences that were below the guideline and wanted to promote a mandatory minimum guidelines sentence. Most everyone else though who noticed the disparity, the ACLU in particular, was concerned with the racial disparities in sentencing. And by 2010, the Sentencing Commission has already started conducting studies that found that Black men received sentences that were 23% longer than White men. And that Hispanic men were receiving sentences that were almost 7% longer than White men. But 2014, after the ACLU had submitted written testimony to the Human Rights Commission, the United States Sentencing Commission decided that we needed to start doing something to track this statistical data. And so they decided to do a regression model looking at the entire system, looking at all cases involving all defendants, citizens and non-citizens, all offense types and all sentence types. And what they discovered by doing the study that they did was that the disparities that the judges were being accused of was borne out in the statistical data. And that Black defendants in each period, before and after Booker, were receiving sentences that were generally 19% higher than White defendants. And that in non-government sponsored below guideline sentences, that Black defendants were as much as a 17 to 25% less likely to get a below



guidelines sentence. And that when they did get a below guidelines sentence, it was still 16.8% higher. They wondered why this had happened and they decided to go ahead and do a study and part of doing this study was for purposes of judicial education. The reason that judicial education becomes so important is because many of the judges that were imposing these new disparate sentences were not particularly focused on what they were doing. And there was a great desire to try to help the judiciary look at itself in terms of the things that it was doing. I had related at one of our sentencing workshops that we do for federal judges, a story about what happened when one of my colleagues and I were both sentencing defendants in the Enron litigation, after the fall of the Enron corporation. And there were several criminal cases filed. And one of my colleagues sent it to a gentlemen that was involved in one of the fraud cases. And in that the prosecution had asked for a 30 year sentence, but in imposing a two and a half year sentence, okay, he indicated that he was moved to leniency because of the defendant's reputation because White collar criminals can't tolerate lengthy prison sentences. At sentencing he said, "An ignominy of a conviction and the sentence by one person who commits a crime of this type is quite different from what is tolerated with respect to other offenses where the ignominy of a conviction is not that serious." In other words, his view was that some people were more embarrassed by the stigma of going to prison than others. Other defendants aren't embarrassed, he told me, because in their neighborhoods everybody goes to prison so nobody cares. I just really could not believe that that was his actual belief about this. And we had many conversations about the implicit bias that was present in his attitude about how some people, white collar criminals should be sentenced, versus other people, because of the difference in the neighborhoods that they came from. So I was asked to present this study to all of the judges, to about half of the judges in the United States, federal judges. And I expected some pushback as a result of presenting this information, but to my surprise, most of my colleagues embraced the thought that we all needed to look at ourselves and to be more conscious of what we were doing and to think of ways that we could be more reflective in the kind of thought process that we went through, and not just sentencing, but in the entire way that the judiciary looks at the way that we deal with cases in the court. One of the things that we decided to do was look at how implicit bias plays out in the courtroom. It's not just in criminal cases, but it's also in civil cases. One of the things that we noticed is that it happens in both in the criminal path and in the civil path. And that in the civil area, one of the things that we thought was most important was jury selection and composition. For many years, I tried to change the way that we select our jury pool. And we had always traditionally only picked our jury pool through voter registration records. After doing many studies, I found that the current trends were to expand where we got our jury pools and to pick people, not just from voter registration records, but also from driver's license records. And so that's what we did. We actually voted this year to change our voter pool from just juries picked from voter registration to include other means of identification, and in this instance, state ID holders and driver's license, and found that that was the current trend among many courts in the United States. That has already gone into effect, and it has increased the diversity of our jury pool. But even in increasing the diversity of our jury pool, what we realized that we also needed to be involved in jury education about implicit bias. And so we have started doing things, including the use of videos and jury instructions on implicit bias to try to help our jurors understand the importance of leaving their unconscious bias and stereotypes at the door when they appear for jury service. All of these new methods and techniques have been employed to try to increase not just diversity inclusion, but also to decrease bias, both conscious and unconscious, in the way that our cases are handled in our court. Some of the instructions that we give actually asked our jurors to consider their own discrimination and to consider their own bias in terms of their own background, religious beliefs. And those have been very helpful and interesting. And we've had a lot of comments, both a lot of positive feedback from jurors in this regard. And these are examples of some of the instructions that we now give. A video was even made by the Western District of Washington that is showed to all jurors, prospective jurors, to help them understand the whole concept of unconscious bias. And this has been something that has been able to be promoted as a result of more attorneys of color being

involved in helping us understand the kinds of things that happen in court, both consciously and unconsciously. And that is part of the why, because without people being able to be there to give this kind of input and help people understand the nature of some of the things that happens in the context of our cases, I think that this kind of information would likely be lost. I think I may finish up a little bit early in terms of my comments and maybe take some questions, dean. I could go on a lot longer, but I think I'd better stop because I could talk all day.

**Dean Tokaji:** Well, thank you so much, Judge Gilmore, you did a magnificent job of cutting through so much material in a really incredibly short period of time. I've been scanning the Q&A and hopefully we'll have time for you to answer at least a couple of questions. If there are others, people should feel free to write them down. And if you have time, Judge Gilmore, maybe you can answer them afterwards in writing.

**Hon. Gilmore:** I do.

**Dean Tokaji:** But here's the first one. "As someone who has an interest in becoming a judicial clerk, what things can I do to become more competitive with my counterparts? What chances do I have to make myself stand out amongst an already large divide?"

**Hon. Gilmore:** Great, I'm glad somebody asked that question. Two or three things. One, I'm going to be speaking to both the students and the law schools. One, law schools are not doing enough to encourage and make students aware of potential opportunities for judicial clerkships. Many students of color, do not even understand what a judicial clerkship is. They've never heard of it. They don't know anything about it. And I think that schools could do more to encourage people to understand the process. Because if you understand the process, one of the things that you would do is to start at the very beginning of your legal law school career to make yourself an attractive candidate. That means the kinds of internships that you look for. You can get an internship after your first year of law school, working for a judge, and if you have that on your resume, that is something that judges look for as a candidate that they might be interested in hiring. Sometimes hard to get clerkships at law firms at the end of your 1L year. The judge is always looking for students. Most of my interns are people that are at the end of their 1L year, because at the end of your 2L year, you're already looking at firms. And so you're really not interested in an unpaid judicial clerkship. So looking for the opportunity to have a clerkship at the end of your 1L year makes you more attractive. Getting involved in moot court and mock trial, makes you more attractive. Doing some community service work makes you more attractive, being involved, in activities that show that you have an interest outside of yourself makes you more attractive to me. I look for five things in judicial law clerk candidates. Do they have clerkship experience? Have they had law review experience? I look at what their writing sample looks like. If your writing isn't on point, if your writing is poor, you're not going to get a clerkship opportunity. Have you clerked for a judge and have you done some community service work? Those things are important to me and I think all of those things could help you.

**Dean Tokaji:** Fantastic. Hopefully we'll have time for at least one more question.

**Hon. Gilmore:** All right.

**Dean Tokaji:** What can we do to eliminate the disparities in sentencing to which we alluded? Getting rid of mandatory minimums, do we have any information on the role of the plea bargains play in that disparity, and I recognize that as a sitting federal judge, there may be limitations on your ability right now to get into policy questions, so we may have to wait for a part of your answer until after January, 2022 when you retire, but to the extent you can answer.

**Hon. Gilmore:** Well, no, actually to be honest with you, when the Sentencing Commission did that study with the multivariate regression analysis to try to help judges understand the disparity issue. I was actually invited to San Diego to give a completely different speech on recidivism. And when I got there, they sprung the study on me and said, "Oh, you're going to talk about this." And I said, "Wait, what? I'm talking about disparity in sentencing? I haven't read this study." They said, "Well, yeah, you stay up tonight and write a new speech." And so I did. And I said, "Why am I the one that's getting picked to do this?" I said, "I see how it is. The Black girl's got to tell their colleagues that they're being biased." And they said, "Yeah, that's how it is." [laughs] And I said, "Okay." And I did do that and I have continued to speak on that issue because you know, we talk about other people being engaged in bias but when you point the finger at somebody else there's three fingers pointing back at you. And so one of the things I think is important is judicial education. When I came back and started giving that speech on implicit bias in the courtroom and in sentencing, judges in the State Court in Houston reached out to me and asked me to come and give that speech to them. They have incorporated all of those, a number of the things that we came out with a solution for jury instructions. When you're talking to people and talking to them, giving jury instructions to jurors and saying, "Don't be guilty of implicit bias." And you have to keep saying that over and over again, sometimes people want to think that it is conscious prejudice that is always the thing that is making people make the decisions that they're making, even judges or prosecutors in plea bargains. Sometimes it is not that, it is literally not giving it that much thought, unconscious bias. It's just implicit bias based on your background and the people that you're usually with. So education of the judiciary, education of prosecutors and education of jurors all goes hand in hand towards hopefully decreasing some of that disparity.

**Dean Tokaji:** Wonderful, well, thank you so much, Judge Gilmore. I see a bunch of other questions in the chat.

**Hon. Gilmore:** I'll go into the chat and you try to answer some of those if I can.

**Dean Tokaji:** That's wonderful and I know that if we were all live together, and hopefully we can have this conference in person next year, we would all be rising for a standing ovation right now. We really are very grateful for your sharing your wisdom with us. And with that, let me turn it over to Dean Baynes keeping us on track to moderate the next session.

[bright upbeat music]

**Voiceover:** Thanks to our sponsors! The American Bar Association, Association of American Law Schools, and the National Association for Law Placement. The 2021 Black Lawyers Matter Conference<sup>SM</sup> is presented by LSAC, University of Houston Law Center, and SMU Dedman School of Law, in collaboration with the conference planning committee.

[music fades]