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## Police in America: Ensuring Accountability and Mitigating Racial Bias Feat. Paul Butler

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**Police in America: Ensuring Accountability and  
Mitigating Racial Bias**

KEYNOTE ADDRESS held at Northwestern Pritzker School of Law, Thorne Auditorium, 375 East Chicago Avenue, Chicago, Illinois, on the 13<sup>th</sup> day of November, A.D. 2015.

KEYNOTE SPEAKER: MR. PAUL BUTLER, Professor of Law, Georgetown University Law Center (Washington, D.C.).

PROFESSOR BEDI: Okay. Welcome back, everybody. We are going to get started with our keynote speaker.

I am Sheila Bedi, and I am an associate clinical professor here and an attorney with the Roderick and Solange MacArthur Center. I have the tremendous honor of introducing our keynote speaker, Professor Paul Butler.

Professor Butler is one of the most incisive, frequently quoted scholars on the issues of race, racism, and the law, white supremacy, and our justice system. He is a Professor of Law at the Georgetown University Law Center. And before he was a professor, Professor Butler worked as a Federal prosecutor. And there, he focused on public corruption, and he also prosecuted gun and drug cases.

One of the many things that distinguishes Professor Butler's scholarship and commentary is the way that he draws on his own experiences as a black man who has interacted with the justice system in a variety of contexts, and the way that he understands that poor communities of color are the true experts on the justice system and are the true sources of expertise about what reform needs to look like.

I first became inspired by Professor Butler while I was in Mississippi, working to reform brutal conditions in the youth prisons in the state. One day I was driving back from prison after a particularly troubling visit where I was feeling a lot of despair and an overwhelming sense that as a country, we were never going to fully understand the extent and the breadth of the devastation of mass incarceration and policing on our communities and on our youth.

As I'm driving away from the prison, I hear Professor Butler giving an interview on NPR about his book, "Let's Get Free: A Hip-Hop Theory of Justice."

During this interview, Professor Butler plays a clip of a Soulja Boy song. And I suspect this is the first time Soulja Boy had ever been played on NPR. The clip was played because Professor Butler was trying to demonstrate the ways that hip hop reflected the reality of the black experience. And he explained that you can look at all these other areas of popular culture: you can look at country music, you can look at the vampire novels, and you would never know that mass imprisonment and the epidemic of police brutality exists. Yet when you look at hip hop, it's everywhere. It's ever present.

And these young black artists, through their art, were documenting the human rights atrocities of mass imprisonment, over-policing, police brutality.

This was in 2009. And Soulja Boy was a Mississippi-based artist. And the young men who I had just left revered him - absolutely revered him.

To hear this scholar on NPR recognize the truth of the art that sustained these young men and tie that truth to the need for transformational change, well, it just gave me incredible hope. And it was hope that I tried to provide to the young men I was working with and for at the time. Professor Butler has developed some of the most provocative, righteous, and revolutionary theories of change – from calling for jury nullification as a protest against the drug war to analyzing stop-and-frisk practices and finding that they alone, without any violence, amount to a theory of torture. We are grateful that Professor Butler accepted our invitation to be here. And I know we are all looking forward to his address. So thank you.

**PROFESSOR BUTLER:** Good afternoon. Thanks to the Journal of Law and Social Policy and to Professor Sheila Bedi for that very kind introduction. So good afternoon, ladies and gentlemen. My name is Paul Butler. And I represent the United States. I was just here at the law school on Tuesday for a debate about prosecutorial power, and I mentioned that when I was a prosecutor, that's how I started my opening statement. I represented the government in criminal court in the District of Columbia, and I used that power to put black people in prison, and Latino people, and poor people. Like a lot of prosecutors, that was pretty much all I did. During the time that I did that work, I learned some things—things that changed the ways that I felt about my responsibilities as a lawyer, as an African-American, as an American, and as a person who wants to make a difference in this world. So on Tuesday, I talked about what I learned about the power of prosecutors, and that is that they're more part of the problem than the solution.

Today, I want to talk about the law. And I'm afraid that my conclusion is the same. The law is more part of the problem than the solution. My remarks are going to be based on a Law Review article that's coming out next year in Georgetown, and also, a book that's not scholarly. It's for the people. It's called, "The Chokehold: Policing Black Men", and it drops next year.

The idea in both the scholarly work and "The Chokehold" is that the system is working just like it's supposed to. Ferguson is not an example of bad-apple cops. Ferguson is an example of police work. And that's why some of the remedies that we're going to talk about today—some of the legal remedies—they're not going to work. They're premised on the idea that the system is broken. But when you understand that it's working the way it's supposed to, then you understand that there is nothing to fix. The problem is not illegal police misconduct; the problem is legal police conduct.

To make this case, the Justice Department's Ferguson report is my Exhibit A. The City of Ferguson has about 21,000 people. Two years ago in 2013, the cops obtained warrants for 33,000 criminal offenses. There were literally more crimes in Ferguson than there were people. The majority of these arrest warrants were for people who had traffic tickets that they weren't able to pay, so they got warrants issued. Other offenses were those such as walking in the roadway. That's what the cops originally stopped Michael Brown for. There is actually an offense in Ferguson called high grass and weeds.

The city is about two-thirds black, and if you look at the orange on the charts — those are the number of African-Americans—that's the percentage of black people who are getting arrested for these super low-level crimes. I hope you've all read the Ferguson Report. You can get it online for free. If you haven't, please do. It's powerful because it tells stories. It's this interesting use of narrative in a government report.

It's kind of like the 9/11 Commission Report, which the government also issued, except the 9/11 Report is about a conspiracy to perpetrate violence against the state. The Ferguson Report is about a conspiracy by the state to perpetrate violence against black people. The 9/11 Report reads like something that Tom Clancy would write because the stories are wild. They're almost unfathomable. It was kind of far-fetched to think that a group of 21 people could coordinate to fly airplanes into national monuments. People called the 9/11 Report stranger than fiction.

The Ferguson Report is different. For a lot of African-Americans, it hurts because it feels so familiar. It's not Tom Clancy, it's Toni Morrison writing a story just like the story that your grandmother told you. I remember two of the stories from the Ferguson Report. "She called the police because he was beating her up. By the time the police got there, he was gone. The police looked around and said, 'Well, does he live here?' She said, 'Yes, he does.' They said, 'Well, his name is not on the occupancy permit. You're under arrest.'" That happened to another woman who said that after that experience, she would never call the police again. She didn't care if she was being killed.

The other story is about Mike who is chilling out in his car after playing basketball in a public park in Ferguson. The police roll up, and for no reason, think he might be a pedophile. They ask to search his car. And Mike, citing his Constitutional rights, declines. That's when they ask him for his name and ID. He tells them his name is Mike. His ID says his name is Michael. They arrest him for filing a false report or making a false declaration. They also charged Mike with seven other minor offenses, including not using a seat belt. Mike was sitting in a parked car. And, of course, Ferguson ignited when the police killed an unarmed African-American man named Michael Brown. And then, Ferguson reignited when the officer who killed Michael Brown was not brought to justice.

There were a series of cases, including Eric Garner in New York, in which African-American people and Latino people have been the victims of violence by the police. And the police officers who killed Eric Garner are still on the street.

There is a widespread sense that there is a race and crime problem. These images are from a series called "Anxious Men" by the artist, Rashid Johnson. A lot of the discourse on race and crime is focused on African-American men, but it's important to acknowledge that many other groups experience violence by the police as well. The "Say Her Name" campaign has lifted up the experiences of African-American women. Now, Latinos, native Americans, poor white people, immigrants, transgendered people of color, they've all had similar experiences with the police.

One of our challenges is to remember that, and at the same time, remember what intersectionality teaches us, that there might be some particular kinds of experiences that black men have that are different because they're black and they're men. But intersectionality also warns us that if there is a race problem, that the male part of the race problem is going to get more attention. So it's important to acknowledge that black men experience a particular kind of subordination in the criminal justice system, but the claim

is not that it's somehow the worst. The claim is that in some ways, it's different, and in some ways, it's like what other people experience.

So okay. There is this moment now where I think everyone understands that there is a race and crime problem. There is not a lot of agreement on what the problem is. So I think it's important to articulate what we mean by "the problem" because depending on what the problem is, there is going to be different ideas about what the fix is.

So I've identified four main or primary articulations of what the problem is. Let's unpack these and then think, "What's the argument?" And then, if you think this is the problem, then what's the remedy?

A lot of people say the problem is about the way that African-American men perform masculinity. If brothers would just act right, then they wouldn't have to worry about getting shot by the police or stopped and frisked.

Here is a version of that argument from the conservative pundit, Bill O'Reilly, and Don Lemon on CNN:

(Video played as follows:)

"MR. O'REILLY: The reason there is so much violence and chaos in the black precincts is the disintegration of the African-American family.

MR. LEMON: He's got a point. In fact, he's got more than a point. Bill?

MR. O'REILLY: Raised without much structure, young black men often reject education and gravitate towards the street culture, drugs, hustling, gangs. Nobody forces them to do that. Again, it is a personal decision.

MR. LEMON: He is right about that, too. But in my estimation, he doesn't go far enough because black people, if you really want to fix the problem, here is just five things that you should think about doing. Here is No. 5. And if this doesn't apply to you, if you're not doing this, then it doesn't apply to you. I'm not talking about you. Here is No. 5. Pull up your pants. Some people, a lot of them black, gave me flak for saying that recently on "The Wendy Williams Show."

If you're sagging, it means—I think it's your self-esteem is sagging and who you are as a person, it's sagging. And young people need to be taught respect. And there are rules. Sagging pants, whether it's Justin Bieber or no-name Derrick around the way, walking around with your ass and your underwear showing is not okay. In fact, it comes from prison when they take away belts from the prisoners so that they can't make a weapon."

PROFESSOR BUTLER: Okay. That's enough of the clip. So it's true that—well, I should say the practice of sagging, what it means is contested, but a lot of people attribute it to prison, the idea that in some prisons, they take away your belt and your shoestrings because prison is such a miserable place, they're concerned that you're going to kill yourself if you have access to that material, so your pants sag. So why would people want

to pay tribute to folks who are in prison? It's about social norms, so we can talk about that a little bit in the Q and A if that's something that you're interested in. But, you know, in some ways, it's easy to kind of lampoon Bill O'Reilly especially and even Don Lemon on this idea that the problem is black men, we're the folks who need fixing. But there is also a liberal articulation of this idea as well. So this is the President, speaking at Morehouse College.

(Video played as follows:)

PRESIDENT OBAMA: Morehouse has taught you to expect more of yourselves. Inspire those who look up to you to expect more of themselves. We know that too many young men in our community continue to make bad choices. And I have to say, growing up, I made quite a few myself. Sometimes I wrote off my own failings as just another example of the world trying to keep a black man down. I have a tendency sometimes to make excuses for me not doing the right thing. But one of the things that all of you have learned over the last four years is there is no longer any room for excuses. I understand there is a common fraternity creed here at Morehouse: Excuses are tools of the incompetent used to build bridges to nowhere and monuments of nothingness. Well, we've got no time for excuses, not because the bitter legacy of slavery and segregation have vanished entirely. They have not. Not because racism and discrimination no longer exist. We know those are still out there. It's just that in today's hyper-connected, hyper-competitive world with millions of young people from China and India and Brazil, many of whom started with a whole lot less than all of you did, all of them entering the global work force alongside you, nobody is going to give you anything that you have not earned.

Nobody cares how tough your upbringing was. Nobody cares if you suffered some discrimination. And moreover, you have to remember that.

PROFESSOR BUTLER: I had kind of an indirect exchange with Valerie Jarrett where I told her, a reporter, that it was impossible to imagine Hillary Clinton going to Wellesley or Smith and saying, "Nobody cares how much discrimination you suffered, forget about that, that glass ceiling." And Valerie, through the reporter, said back to me that she was sure that Hillary Clinton actually would say that at Wellesley or Smith. So I guess, hopefully, we'll have an opportunity to find out.

So if you think this is the problem, then what's the fix? So I say the fix is my brother's keeper, right? The fix is fixing African-American men.

The second articulation of the problem is that the main race problem is under-enforcement of law. And the academy of the person who's famous for this idea is Randall Kennedy, who teaches at Harvard. So he looks at the history of African-Americans in criminal justice and says for most of the history, the law hasn't protected African-Americans from violence by white people or violence by other African-Americans. Law enforcement in this view is a public good. It's like a park. It's like a school. It's silly for a group to have too much of it because it's doing some constructive work. So here is

another version of that idea. This is an argument between Rudy Juliani, the former Mayor of New York City, and Mike Dyson, my colleague at Georgetown.

(Video played as follows:)

MR. JULIANI: I find it very disappointing that you're not discussing the fact that 93% of blacks in America are killed by other blacks. We're talking about the exception here.

A VOICE: Well, look. First of all—

(Simultaneous speaking.)

MR. JULIANI: The significant—

A VOICE: It's a trust issue.

A VOICE: Look.

MR. JULIANI: We are talking—we are talking about the significant exception, 93% of blacks are killed by other blacks.

A VOICE: Let me tell you—let me respond to that.

MR. JULIANI: I would like to see—

(Simultaneous speaking.)

MR. JULIANI: I would like to see the attention—I would like to see the attention paid to that that you are paying to this and the solutions to that.

PROFESSOR BUTLER: So three quick bones here, two bones to progressives, and one bone to conservatives. The first bone to progressives, the problem with Juliani's equation—you hear this all the time—you know, they all complain when the police kill someone. They don't complain when African-Americans kill other African-Americans. We know that's not true. You can't go to, let's say, an African-American church on a Sunday without hearing that fact bemoaned, how many of our children are dying in the street at our own hands. But now, when that happens, those crimes are prosecuted. When police, on the other hand, kill unarmed African-Americans, those crimes are not prosecuted. So that's the complaint. The bone to conservatives, some people say that because most crime is intraracial, that black-on-black crime isn't really a thing. They say we don't talk about white-on-white crime, so why should we talk about black-on-black crime? So I want to push back a little bit on that. African-American men are about 7% of the population and responsible for somewhere around 45% of offenses that are labeled violent. Now, there is lots of ways to think about and challenge, and I do in the book that's coming out, how we think about what's violent and how we think about what's

dangerous. But there are a lot of crimes that I think most people would agree fall into that category. And in most of those crimes, African-American men are over-represented.

So the third bone to progressives, the reasons why we have to be concerned about this violent crime, in addition to the impact that it has on our community, is also because of our concerns about mass incarceration and race disparities. A lot of the discussion about mass incarceration is focused on the war on drugs. If the United States didn't lock up anybody for any drug crime—using, selling, trafficking—we would still be the world's largest jailer. And the race disparities would probably be worse, not better. So we have to fix violent crime. It doesn't mean we have to fix it with locking up everybody for as long as we can, but we have to address that issue. That's the only way we're going to end mass incarceration. But if you think under-enforcement is the issue, then the main fix is more enforcement. It's stop and frisk. It's order maintenance policing.

The third articulation of the problem is unfairness and this is what we hear most from the Justice Department under President Obama. Here is President Obama himself thinking about what the issue is.

(Video played as follows:)

PRESIDENT OBAMA: American life that remains particularly skewed by race and by wealth, a source of inequity that has ripple effects on families and on communities and, ultimately, on our nation and that is our criminal justice system.

PROFESSOR BUTLER: So community relations, or police-community relations, is the concern. And the way to deal with the problem is to improve relations. That actually worries me some, so I'm going to have more to say about that in a bit. However, the final articulation of the problem is discrimination, specifically white supremacy. It's about social control of African-Americans. That's what mass incarceration does. And this is what we hear from Michelle Alexander in "The New Jim Crow," and a different articulation than the Black Lives Movement, another articulation from Ta-Nehisi Coates. And if this is what the law does, specifically the criminal law, then what's the role of the police? From this point of view, I don't think anyone breaks it down better than KRS-One in this old school classic. Let me first present you with evidence of this.

Again, most of you know that the United States is the world's leading jailer. We want to be—this is how many people are locked up per 100,000. The sweet spot is around 200. If you believe in some kind of, I don't know, natural theory of criminality, it's around 200 per 100,000. That's where we were at most of our history until the 1970s. That's where a lot of nations are now.

So we want to be somewhere between Spain and Brazil, around 200. We shot way up beginning in the 1980s. And for African-American men, again remembering 200 is the sweet spot, you can see that we African-American men are literally off the charts. So now, again, thinking about, if you see this as the issue, then what's the role of the police?

Now, we get the old school classic.

(Video played as follows, per Google Play Music:)

See ya, cause I would never be ya.  
 Be a officer? You wicked overseer!  
 Ya hotshot, want to get props and be a savior.  
 First show a little respect, change your behavior.  
 Change your attitude, change your plan.  
 There could never really be justice on stolen land.  
 Are you really for peace and equality?  
 Or when my car is hooked up, you know you want to follow me.  
 Your laws are minimal 'cause you won't even things about lookin' at the  
 real criminal.  
 This has got to cease 'cause we be getting hyped to the sound of da police!  
 Woop-woop!  
     That's the sound of da police. Woop-woop!  
     That's the sound of the beast. Woop-woop!  
     That's the sound of da police. Woop-woop!  
     That's the sound of the beast.  
 Now here's a little truth. Open up your eye.  
 While you're checking out the boom-bap, check the exercise.  
 Take the word 'overseer' like a sample repeat it very quickly in a crew for  
 example.  
 Overseer, overseer, overseer, overseer.  
 Officer, Officer, Officer, Officer.  
 Yeah, officer from overseer. You need a little clarity?  
 Check the similarity.

PROFESSOR BUTLER: So if this is your view of the problem, then what's the fix? The fix is ending mass incarceration. It's ending the race disparities. It's eradicating white supremacy.

So again, four different ideas about what the problem is. Since this is a conference at a law school, I want to think about the role of the law now in addressing these problems. So we're lawyers. How much should we expect the law to create racial justice or even racial equality?

This isn't the first time that we've asked this question. A lot of us became lawyers because we were inspired by the Civil Rights Movement of the 1950s and '60s with the great lawyers like Constance Baker Motley and Thurgood Marshall who brought the *Brown v. Board of Education* case. They were the architects of and lawyers in this long campaign to end segregation.

Although I said '50s and '60s, the Civil Rights Movement started way before that, in the 1920s, at Howard Law School, with careful planning. And they won *Brown v. Board of Education*. The Supreme Court said separate but equal is unconstitutional. It was the signature victory of the Civil Rights Movement. But now, if you're a low-income African-American child who attends public school in the typical American city, God help you. So the green line is the percentage of black kids who are going to majority white schools in the South. This is in the South, so not so different. The numbers aren't that different in the North. You can see in 1954, zero. It went up quite a bit. And then, it went way down. So now, it's somewhere, slightly above 20%. Around 80% go to segregated

schools. What happened? Why didn't the law work right? There is a school of jurisprudence that tries to explain some features about law and race.

The critical race theory has a set of claims, corresponding in popular discourse to a lot of what Ta-Nehisi Coates is saying and thinking about. One is that white supremacy is embedded in our law. It's not a zero-sum game. When African-Americans lose, some other people win. Those people are white people. So the law exists to enforce this stratification. Whenever there is a gain, the gain is temporary. And then, there is retrenchment. So this is what a lot of legal scholars have been saying about how the law works. I think it explains *Brown*, for example, the failure of schools to actually really desegregate.

But critical race theory also has some, I guess you could say, optimistic ideas about what law might do sometimes. The interest convergence idea is that when African-Americans or other groups articulate what they want in a way that corresponds or benefits with what white folks want, then that's how they win. A lot of people have theorized *Brown v. Board of Education* that way. It was an effect of the Cold War, is the idea. The United States was roundly being criticized around the world for being all high and mighty about our democracy when African-Americans were being treated like second-class citizens. So there is some great scholarship that actually has some smoking gun evidence about how that was important to the Court in its decision.

And the idea of ratchets is that there is some implements that can do some good, so this is kind of under-theorizing the critical race theory, so this is what I want us to think about during the Q and A, which we're getting to soon.

So affirmative action, some critics say it actually did some good. The Voting Rights Act, it did some good. So again, my colleague at Georgetown, Mari Matsuda, her word for these kinds of progressive instruments is ratchets. So we know that now, in pop culture, "ratchet" has a different meaning, doesn't it?

But I see my friend, Deb Tuerkheimer, here. So Deb, now you know that it was actually a compliment when I said I thought your last article was really ratchet. So critics think that there could be advances, but they have to be framed as things that help white people. And that's even when they happen, they're not going to make a huge difference. Is that true?

So to test that proposition, I wanted to look at pattern and practice investigations that are brought by the Justice Department. So you all know now that when something goes down in a place like Baltimore or Ferguson, what do people want? They want the Feds to come in, the Justice Department.

And when the Justice Department comes in, what it does is this investigation of how the police work. This tool has only been around for about 20 years. There haven't been a lot—I think maybe around 50 or 100 of the 18,000 police departments in the country have been subject to these kinds of investigations. But it actually provides a kind of nice set of data for us to think about what happens.

So typically, what the Department does is enter into an agreement with the police, or sometimes, it sues them, and a court makes the police do certain things. So often, they involve some kind of civilian oversight of the police, some kind of additional training for the police so they know how to do things like more responsibly use their weapons or more responsibly deal with people who are mentally ill.

So what are the results? The results are—well, I won't characterize them. I'll let you think about them. So Los Angeles is often cited as a success story. So after the department came there, after the Feds came in, there was less police violence. There were more stops that resulted in arrests. The way that we scholars think about this, the hit rate, that's a good thing because when the police stop people who are actually carrying contraband, that means that they're using a proxy other than race.

Often, we see in places like New York, the police are more likely to hit when they stop white people than when they stop African-Americans because when they stop African-Americans in searches, all they're doing is going on the fact that we're African-American, and sometimes, that you're young and male. With white people, they actually use more police strategies, so that's why the hit rates are higher.

So that happened in L.A. And as a result, the community, the black and Latino people in the community, felt a lot better about the police. Again, I'm going to come back to that idea in a moment.

So let's look at some other concerns. Often, they're short term. So this is from last week's, or actually, this week's New York Times. The number of police shootings in L.A. in the last year has doubled. What else has happened? There are a lot more police stops of people in L.A. than there were before the pattern and practice investigation. And for African-Americans, we're about 7% of the population of L.A. Police, prosecutors, and jailers are still serving as the government for these people.

So what does this mean? The investigations, the pattern and practice investigation, this ratchet, it works. It's a good thing, even if what it does is, in the short term, reduce the number of unarmed people who are killed by the police. That's an affirmative good thing.

Now, we do have to be concerned though about these other kinds of effects. So here is where I'm getting near the end. And I want to make my main point. These other effects exist, not because of illegal police misconduct, but because of legal police conduct. The police and prosecutors in L.A. and Chicago and the District of Columbia, they're busy imposing racial order. They're busy imposing white supremacy. So we could explain how this works or think about how this works with a bunch of different actors in our justice systems, but I want to think about the Supreme Court since that's who we focus on a lot in law school. So there is this famous article by a Harvard law professor named Michael Klarman where he looks at criminal procedure cases from the 1920s and '30s in which blacks in the Southern states have been denied basic rights. So the Scottsboro men, they didn't have a lawyer at their capital case or they had an extremely ineffective, inadequate lawyer.

And the Court said in that case, "If you're an illiterate person, and you're being tried for a crime for which the punishment is death, you have to have a lawyer." That was the first time in which the Court had made a finding like that.

Now, it was a colorblind judgment. But in this article, Michael Klarman says the Court was thinking about race. The Court was trying to do racial justice. And Michael Klarman, in this article, he points to a number of other criminal procedure cases and says, again, the Court pretends like it's doing criminal procedure, but it's really doing racial justice.

So what I'm doing is making the same claim, but kind of the mirror image. The Court is still now pretending like it's doing criminal procedure, but it's talking about race. It's thinking about race. It's thinking about how to control African-American men.

In this project, the Court makes it perfectly legal for black lives not to matter to the police. So these superpowers allow the police to stop Michael Brown in Ferguson for walking in the roadway, and Eric Garner in Staten Island for selling a loosie cigarette. And they allow the police to kill them if they reasonably believe that they're a threat.

So the superpower to kill, that comes from a case in which a man was stopped by the police for speeding. He was in Atlanta. He should have stopped, but he didn't. He took off. The police took off after him. They couldn't make him stop. What did they do to make him stop? They rammed his car down a ravine. He survived, but he became a paraplegic.

So he went to the court and said, "Well, gee, they could have stopped—if they're saying they were able to use deadly force because I was a danger, they could have stopped the danger just by stopping chasing me." And the Court said, "Well, they're not required to do that. As long as you were creating a danger to the public, which the Court said he was by the way he was driving, they're allowed to kill you in order to stop that, even if the crime, the original crime, is speeding."

*Whren*, that's a case in which the Court says it doesn't matter what the subjective reason, why the police really want to stop you, as long as they have an objective reason. So I'll tell you how *Whren* plays out in the street.

I teach criminal procedure. I have a buddy who's a cop. He lets my students go on ride-alongs where they sit in the back of his car and observe his police work. He plays this game with them called, "Pick a car." He says to my students, "Pick any car you want, and I'll stop it."

He's a good cop. He waits until he has a legal reason. It never takes him more than four or five minutes of following a car. He can stop anybody he wants. And we know how the police use that power. And then, the superpower to arrest. Mrs. Atwater lived in Iowa. She got pulled over by the cops because she wasn't wearing a seatbelt. A cop knocking on the window, looking at her kids in the back, "Why aren't you wearing a seatbelt? Don't you know that's a crime?"

She got arrested and taken to jail, booked, mug shot, all of that. The funny thing was even if you're guilty of driving without a seatbelt in Texas, you can't go to jail. And the maximum fine is \$50. So she said to the Supreme Court, "Well, gee, if you can't go to jail for something if you're guilty, why should you be able to go to jail if you're arrested for it?" The Court said, "No problem. Being arrested is about something different than being punished. It's perfectly fine. Anything that you can—that's a crime—and states can make whatever they want a crime pretty much. You can be arrested".

And again, that leads to Michael Brown, walking in the roadway. That leads to Eric Garner's loosie cigarette. That leads to walking in the roadway in Ferguson. So when the police told her, "If your boyfriend doesn't live here, you're under arrest," that's legal.

But when the police told Mike, "You're under arrest for making a false declaration because your name is Michael," that's how the system is supposed to work.

So I'm going to end here. But I want to try to be a little bit more optimistic. I do think it's true if we understand that the system is not broken, then we have to be more

thoughtful about what we're trying to do with remedies, what we're trying to do, what it means to fix something that's working the way it's supposed to.

So the reason why I'm more optimistic now, again, she is the appellant in the case. But again, we know that that leads to this, and to this, which is why I'm more optimistic. So this is not your grandfather's racial justice movement. I have a lot of respect for that movement. It's why I got to go to college and law school and why I have my job. And I love the art from it and the music. I grew up hearing, We shall overcome. I shall not be moved. But this movement, it has a different anthem.

Deejay Chris, if you will.

(Audio played as follows, per azlyrics.com):

Alls my life I has to fight,  
nigga. Alls my life I...Hard  
times like God. Bad trips like:  
"God!" Nazareth, I'm fucked up.  
Homie you fucked up. But if God  
got us then we gon' be alright.  
Nigga, we gon' be alright. Nigga,  
we gon' be alright. We gon' be  
alright. Do you hear me, do you  
feel me? We gon' be alright.  
Nigga, we gon' be alright. Huh?  
We gon' be alright.

PROFESSOR BUTLER: It's a little different from "We Shall Overcome," isn't it?

It's making a difference. So I think we're having this moment now where people, a diverse group of people are starting to come together in order to make a difference. So what the police need to do now when we think about reform and the law, what we really need the police to do is to just stop it, right, to stop that shit.

If they want to make a difference, then they should stop stopping so many people, they should stop arresting so many people, they should stop prosecuting so many people, and they should stop putting so many people in jail. And our task is to think of how we get the police to stop that. And in that effort, this chart makes me optimistic.

So the New York police were out of control with stop and frisk, just like the Chicago police are right now. And there was litigation brought to make them follow the Constitution.

And the judge issued her opinion in 2013. That's my favorite year in the chart because the judge didn't enter, didn't issue the opinion until August. But stops were going down by the police, way down, well before August. So what we did with this movement in New York is to make the police stop it. The law was a part of it, but the law wasn't the main thing. Activism, taking it to the streets, electoral politics, people getting arrested, all of that made a difference.

So again, I think the law, the court case, it was one part of the tool. I'm not sure that it was the most important part. Again, community anger, community mobilization—that made the difference.

And finally, in the end, reform is not enough. We need fundamental transformation. And, in fact, I think we have to be careful about how we think about reform. So I mentioned I was going to come back to this chart. What I was going to point to is the slide that says that after the Justice Department investigation in Los Angeles, two-thirds of the African-Americans and Latinos are either happy or very happy with what the Justice Department has done. Two-thirds of blacks and Latinos in L.A. think the police are either doing a good job or a very good job.

My friends, the police in L.A. are not doing a good job or a very good job. Two-thirds of the African-Americans and Latinos in L.A. should not be happy with them. So one of the purposes of reform is to calm the natives when the Justice Department comes in. And it serves that purpose well. But in the end, if two-thirds of the blacks in L.A. think that the police are doing good or excellent work, then they have been took, had, bamboozled, hoodwinked.

So I'm going to try this one more time, then I'm going to just end with two final clips about what we need to do. And I've kind of been critical of the President, so now, I'm going to give him some props. So this is an intervention in – this is his speech at Selma at the 50th anniversary of the march on Selma. And when he was thinking, when he was talking, the way a lot of people heard this was that he was thinking about Donald Trump, who had recently said that he didn't think that the President really loves America. So what some folks thought he was doing in this clip is responding to Mr. Trump.

I think he was intervening in a different debate. He had been in this dialogue with Ta-Nehisi Coates. Ta-Nehisi Coates says, “White supremacy is imbedded in the United States of America. It's part of what it means to be American. If we get rid of white supremacy, then we don't have the United States as we would recognize it.”

So remember that. And listen to the President. He's thinking about what the marchers at Selma did and what they meant for the identity of this country.

Please, sir.

(Video played as follows:)

"PRESIDENT OBAMA: What greater expression of faith in the American experiment than this, what greater form of patriotism is there than the belief that America is not yet finished. But we are strong enough to be self-critical, that each successive generation can look upon our imperfections and decide that it is in our power to remake this nation to more closely align with our highest ideals."

PROFESSOR BUTLER: And that's what we have to do. We have to remake, not reform, we have to transform. So if you were at the debate on Tuesday, in closing, you heard me say that my name is Paul Butler, and I represent the United States. That's again how I used to start my opening statement. Now, I clearly don't think that what I was doing was the best way to represent the United States.

So in closing, I want to send a shout-out to all the people in this room who are lawyers and activists and organizers who are representing the United States of America in a much more productive way.

So whether you're doing it through the Black Lives Matter movement, or you're bringing court cases, you should understand that you are making a difference. You are the Underground Railroad conductors and lunch-counter protesters of our day. And so, again, you may not get to say when you go to court that you represent the United States like I did, but every day, you represent its highest ideals and its best values. And for your work, I thank you. For your work, that's why I'm optimistic that, "We gon' be alright."

And in that spirit, I want to end with Lauryn Hill and Nas. This is a song you've heard a lot, but now, I want you to think of this as a song about prison abolition.

(Audio played as follows, per azlyrics.com):

"I'd open every cell in Attica  
send em to Africa. If I ruled  
the world. Imagine that, I'd  
free all my sons, I love em love  
em baby."

PROFESSOR BUTLER: Thank you.

We have a few minutes I think for comments and questions. I'm a law professor, so it's my job to provoke people. I've talked to people who were provoked, so what do you think? Comments, questions?

A VOICE: She's part of this, too. But I'm with a group that's called Stop Mass Incarceration Network. And this is our sign-up sheet. For the next three weeks, we're going to have an action every week.

November 22 is the anniversary of the murder of Tamir Rice, a twelve-year-old child playing in a park in Cleveland. If we're not out in the street on that day, then we are not doing what Mr. Butler is encouraging us to do. And we're not continuing what was so important in this last year. So we want to go forward with that.

And then, of course, December 3 is the one-year anniversary of when Mr. Garner, Eric Garner, was killed. And in between, we're going to be boycotting that Black Friday with a Black Lives Matter Friday. But anyway, I don't have leaflets. I do have the sign-up sheet. I'll just say come out to Tribune Plaza, or I guess it's called Pioneer Plaza, at 2:00 p.m. on November 21st. We

thought we'd jump the gun and go out for Tamir on Saturday because there will be thousands and thousands of people out on Michigan Avenue, just a few blocks from here, so be there, 2:00 p.m.

One question I have is that it seems that we have an absolutely unprecedented mass incarceration problem and an absolutely precedented race problem in a sense that if you compare conditions now to, say, apartheid South Africa, you know, to Mississippi in the 1850s, precedents, even worse precedents are there.

And yet, when it comes to mass incarceration, there is really nothing in world history that compares to the United States right now. So if racism is sort of the primary, almost exclusive driving factor of mass incarceration, how does one explain that sort of dichotomy between a very deeply precedented race problem and a less precedented mass incarceration problem?

PROFESSOR BUTLER: Well, my explanation is that incarceration, as a method of punishing people, is historically new. So prison, using prison to punish people, was invented in Pennsylvania in the late 1700s. And the idea was it was intended to be a more humane alternative to the way that people were punished before prison, which was by killing them or hurting their bodies or banishing them from the community.

So what we're trying to do and what's really been the focus of a lot of scholarship and activism over the last 200 years, again, relatively recent in terms of world history, is how has the experiment worked. And Sheila mentioned my fondness for hip-hop. I don't think anyone is laying it down better than hip-hop artists that the prison experiment has been a miserable failure. It's cruel. It's counterproductive because it just causes people to be worse when they come out than when they go in. And it's inhumane.

So again, the answer to your question, sir, is we're just figuring out now or just looking at prison as a—it's relatively new as an instrument. The other thing that happened though is the revolutionary movements against the other kinds of racial subordination that you mentioned, let's think about slavery and Jim Crow segregation, especially what the Civil Rights Movement did is to stigmatize over racial discrimination.

Again, that was partly instrumental. We had to do that as a matter of law in order to maintain our standing on the world stage. But also, I think it did some good, the Civil Rights Movement did, and again, in making old-fashioned racism, race bias, socially unacceptable.

So what that meant is that there had to be a colorblind way to do race work. There had to be a colorblind way to do racial subordination. And again, as I suggested, the law, it turns out, is particularly adept at that. And I think people get that when they think about the Michael Klarman article and they understand it in a positive way that, yeah, the Court was thinking about race, even though it was during a criminal procedure.

So again, I suggest that now, the Supreme Court is thinking about criminal procedure or pretending to be doing criminal procedure, but it's really doing race in the opposite way.

In the paper, I try to prove that claim in ways that I don't have time to go into here. But the short answer is that in these cases, it's always predicted to the Court that there is going to be this racial effect.

So you saw Mrs. Atwater, a white lady from Iowa with the two kids. In that case, just as every other case, the Court is told, you know, it's not going to really be about her at the end of the day. It's going to be about young black and Latino folks at the end of the day. And the Court doesn't usually disagree with that. It just says, "Well, you know, there is nothing we can do," or "It's their fault."

And then, it happens. It happens over and over again. So again, it's an explicitly racial project by the Court that has this, you know, handy, colorblind, relatively new instrument called incarceration; a long answer to a really important question. Any other quick questions? Yes, ma'am.

A VOICE: I want to thank you for your speech. I really found it very intriguing. I think because we have law students here, but I also want to say one issue that we say is really that economic inequality. And, you know, that we cannot—not all of us can be civil rights attorneys, but we can be attorneys who support poor people and poor African-

American people to be kind of a better course in the clients because I think that it is the economic disparities play an enormous role. It's very much about race. I'm absolutely not questioning that. But I think it's also very much about class. And I think there, we really need to stress, give back power and other energy.

PROFESSOR BUTLER: And if the discourse is about inequality and, let's say, class inequality, and again, I think we have to learn from the history of the law and racial justice what works and what doesn't work.

In some instances, I'm concerned about like the rights discourse. I think lawyers make a huge difference. When I was writing an article about the 50th anniversary of Gideon, that's the case that says if you're too poor to afford a lawyer, the government will get a lawyer for you, it will pay for one for you, the 50th anniversary of that case, and I was interested in how it worked.

And I uncovered this startling, scary, data point. If you want to avoid going to prison, if you don't want to go to jail, you're better off being a black man tried in Florida in 1962 without a lawyer than you would be as a black man being tried in Chicago in 2015 with a lawyer. The latter guy is more likely to go to jail.

So that's not an argument against lawyers—we need lawyers—but it is a caution that lawyers have to be really thoughtful about what they're asked in these reform movements. And we don't need nebulous things like rights, right. We need material things like cash money and resources and investments in our community. And to the extent the lawyers can help get those things, that's what makes the difference. How about one last question? I saw your hand up there.

A VOICE: I really just want to say I appreciate you actually mentioning to start a new culture and breaking down what we're taught because as many lawyers as are sitting in this room, everybody is continually reading the same curriculum that like our founding fathers have like created to oppress a lot of people in this nation. I really believe that there is an important - it's an important piece and asset to have lawyers in the world. But as much time as you can like spend reading books and actually trying to figure out what it means to actually understand the answers of a black life having a meaning or mattering to someone, you should also put forth efforts to actually stepping outside of your comfort zone or your boundary and going into the communities, Facebooking someone, Snapchatting someone who you are trying to intentionally help other than fighting from your comfort zone because you will really never—you could really never understand someone else's oppression if you never are really in their shoes and actually have to live as this person, as a young black person, as a young undocumented person.

But if you really, really want to help, you have to really like look at yourself and be real with yourself to figure out if you are doing everything that you can because we have to remember the day, era of Jim Crow law, all those things were being changed, those people went without taking resources from people who were like actually oppressing us.

You have to come as a community. Like all of these people here, I do not see enough people here who could actually benefit from hearing this information other than people who are going to school who already hear this on a daily basis. Like be inclusive. And actually, when you see someone on the train or you drive past someone, or you're scared going through a neighborhood that you have to go through to go teach at a school,

to hold a conference or something, stop being and stepping out of your comfort zone to create a new culture because if we keep writing off the culture that already exists, we're not going to get any-fucking-where at all.

PROFESSOR BUTLER: You know, it's a really important point. I do think it goes both ways.

So lawyers and activists and people who have been doing this for a minute, we have a lot to learn, but we also have a lot to teach. You know, we've done some good work. You know, I see people like Sheila and Craig here who have been in the trenches for years, and they have a lot to share with these new activists. And sometimes, the media tries to create this sense that we're not all on the same page. And I don't think that's true. That's never really been true of our communities, our progressive communities, our African-American communities.

We certainly have internal dissensions and, you know, we fight sometimes. But, you know, I think we get along more than we don't get along. And the reason why I think that's important is because now, we do have this moment where folks are paying attention. And so, we want to seize that moment and do the best we can. So in the exchange between Mrs. Clinton and the young man from the Black Lives Matter movement, I actually thought Mrs. Clinton won that exchange.

And I thought that if, you know, we think more about what our skills are as lawyers advocating, getting messaging, making arguments that are persuasive to a bunch of people, you tell us what we need to advocate for. And we'll help you. We'll listen to you. We'll follow you. But we can also teach you how to be better advocates.

Thank you.