HANDOUT THREE: **THE PROMISE OF THE LAW THREAD, INTERVIEW ARCHIVE**

Directions: Underline key phrases and new details as you watch and listen to the interviews

STEPHEN BRIGHT

Well, the great promise after the Civil War, of course, was the Fourteenth Amendment, and the Fourteenth Amendment provided that there was to be equal protection of the laws, and the purpose really was to protect the freed slaves and to protect the people during Reconstruction from being detained and imprisoned and otherwise dealt with by Southern communities. But almost immediately, the Supreme Court turned that around by saying it required state action, and therefore, the people who participated in the Colfax massacre were not entitled, in fact that the law protected the Ku Klux Klan from the government, not the people who were victimized from the Ku Klux Klan.

That's remarkable. Then later, the court said you had to prove motive that if you were denying people the vote or denying people their rights in some way, you had to prove the motive and the intent, which is almost impossible to prove. And so basically, you have, and this is something that I try to get across to my students, you have these laws and cases that sound very good on the face of it. When you look at what you actually have to prove, it's a very hollow promise. It doesn't live up to what we say we have in this country when we say equal justice under law.

STEPHEN BRIGHT

The criminal courts in the South have throughout our history played a role in racial oppression in the United States. There's no getting around it, enforcement of slavery, convict leasing where you brought people into court on some minor charge like loitering, and then leased them out to the plantations and the turpentine camps and the coal mines around Birmingham, whatever. Jim Crow, enforcing Jim Crow, that a black person could be shot dead by a white person and would probably never be tried for that. Mass incarceration, where we are today. Lynching and terrorism, in which the perpetrators of these murders were never tried or brought to justice at all.

And this was going on on a grand scale in the South. So the courts have really been used to perpetuate white supremacy and to disenfranchise black people. I've been to courts where you see black people pleading guilty, getting probation in felony cases, because they know this is disenfranchising all these people. Of course, you're taking a huge number of people out of the population, 2.2 million, and that's destroying people. It's destroying families, and it's destroying communities. Yet that's what the criminal courts in the Southern part of the United States, generally all over the country, but particularly in the Southern part of the states have been carrying on.

STEPHEN BRIGHT

Well, there's a huge difference between law and justice. Law says that "If a person misses a deadline by a day even though it's an innocent mistake, that person is going to be denied any relief in the happened in that case." Law says that "We allow prosecutors to strike black people in picking juries and try cases to all white juries." Justice would say, "The jury would be representative of a community and would be a diverse jury." The law doesn't say that. You can look at time after time, the law says that, "We're going to have prosecutors who are absolutely immune from any misconduct while they're in office." Justice would say, "We'll look at those things and do whatever's appropriate to deal with some of the really egregious prosecutorial misconduct we've seen and particularly in death penalty cases."

What evolved in the courts after very good success in challenging death sentences, and the courts were setting aside a number of death sentences. Both the United States Supreme Court and also the regional court that covers Georgia, Alabama, and Florida was setting aside a number of cases. Increasingly as that happened, the Supreme Court led by Justice Rehnquist, later with the help of Justice O'Connor started adopting, excuse me, all of these procedural ways of avoiding reaching the merits of issues in these cases. The court kept, as Justice Marshall pointed out, this became just an airtight way of avoiding looking at the issues. That increased the number of executions because increasingly, people were being denied a hearing in the courts because of some procedural rule that the Supreme Court had made up. This is not the work of Madison and Jefferson and those folks. This is the work of Rehnquist and O'Connor and other people on the Supreme Court and Scalia and so forth at that time. Increasingly, as Justice Stevens said at one point, "The court had lost its way in a procedural maze of its own making." That's exactly what happened. Unfortunately, Congress then got in on the act and passed a law to make it even harder for the courts to examine issues and decide them. The result now is that very much of the fighting in court is about whether you can even get to the issue and decide it on the merits.

BRYAN STEVENSON

I really do believe that hopelessness is the enemy of justice. Justice prevails where hopelessness persists. The Supreme Court was hopeless about what it could do to protect black people who were facing enslavement, so they created these rulings. The Congress and the Courts got hopeless after emancipation, but what they could do to create racial equality in this country. People in the North were hopeless about what they could say to stop these brutal lynching that were talking place across the region. We allowed states to segregate people, to codify racial segregation and hierarchy because we didn't think there was any chance that we could do anything better.

Then the United States Supreme Court in 1987, the upheld the death penalty despite overwhelming evidence of racial bias because they were hopeless about what our justice system could do to eliminate racial discrimination. It is that loss of hope that is motivating, at least me, to want to talk about slavery, and genocide, and lynching, and segregation. Even though it's brutal and difficult, there's something unbelievably hopeful about the stories of people who would endure this brutality, who would live with this threat and terror. Who would navigate the brutal, violent, humiliating segregation that many of my people have had to navigate, and still say, "I want to be an American. I want to succeed. I want to create justice in this country. I'm willing to create ways of living together with people who are different than me." The hope of that story is the strength of this nation, but we're not gonna understand that strength until we understand what has threatened it, what has shaped it. So yeah, I think it's important that we understand all the brutal, all the ugly details, 'cause those are things that actually give rise to what might allow us to one day claim something really beautiful.

STEPHEN BRIGHT

During the time that Bryan first came here, we were having pretty remarkable success in the courts challenging death sentences. About somewhere in there, the NAACP Legal Defense Fund started putting together the evidence showing just what we were seeing every day in our work, which was these grave racial disparities and the infliction of the death penalty in Georgia, that you were 4.3 times more likely to get the death penalty in a case where you had a white victim and a black defendant. All that was presented in the case of Warren McCleskey. That ultimately was appealed to the United States Supreme Court.

I would say the decision in McCleskey, sort of like the Dred Scott decision, was one of the most dismaying decisions in the history of the United States Supreme Court. The court said that racial disparities are inevitable, and that there was no need to deal in any depth. The court made several very disturbing findings. One, it was inevitable. Two, that if we got into the racial disparities for the death penalty, we would have to look at the racial disparities with all other kinds of sentencing, what Justice Brennan in his dissent called, "the fear of too much justice."

The other that there were procedures in place that were supposed to minimize the risk of race discrimination, but the court never examined the procedures to see if they actually worked or not. This is something only lawyers could come up with to say, "We'll have procedures to minimize the risk of race, but we won't ask whether those procedures first of all were even employed, and secondly, whether they worked or not." In McCleskey, one of the procedures they pointed to wasn't even adopted until long after Warren McCleskey's trial. It's a 5-4 opinion, very close and a very, very dismaying opinion for anybody who trusted the courts to come through in a situation like that.