

SUMMARY REPORT

Equal Justice Society Brown Bag “*Race, Law and Social Science*”

August 2, 2004
San Francisco, CA

- What are the impacts of the U.S. Supreme Court’s recent “war on terror” and federalism cases on civil rights and liberties?
- How can we use social science research to advocate for social justice and challenge existing legal frameworks?

Over 60 people from the San Francisco Bay Area legal and social science communities attended the Equal Justice Society brown bag on August 2, 2004 to discuss these critical issues. The speakers were Professor Troy Duster of the University of California at Berkeley and New York University and Professor Pamela Karlan of Stanford Law School. The following is a brief summary of the discussion and contact information, provided by the EJS staff.

SPEAKERS

Troy Duster

Troy Duster is Professor of Sociology and Senior Fellow at the Institute for the History of the Production of Knowledge, New York University and he also holds the title of Chancellor's Professor at the University of California, Berkeley. He is the former Director of the American Cultures Center, and founding Director of the Institute for the Study of Social Change, both at the University of California, Berkeley. He has been a Visiting Professor or Visiting Scholar at Stockholm University, the University of British Columbia, the London School of Economics, Williams College, the University of Melbourne, and Columbia University. His books and monographs include *The Legislation of Morality* (1970), *Aims and Control of the Universities* (1974), *Cultural Perspectives on Biological Knowledge* (co-edited with Karen Garret, 1984), *Backdoor to Eugenics* (2003, 2nd Edition), and (co-author of) *Whitewashing Race: The Myth of a Colorblind Society* (2003). He is also the author of numerous articles on theory and methods published in the *American Sociologist*, *Temps Moderne*, and *Politics and the Life Sciences*.

Dr. Duster has been a member of the Assembly of Behavioral and Social Sciences of the National Academy of Sciences; the Committee on Social and Ethical Impacts of Advances in Biomedicine, Institute of Medicine; the Special Commission of the Association of American Law Schools; the Commission on Meeting the Challenges of Diversity in an Academic Democracy; and the Science Advisory Panel, National Institutes of Health, Research, on

Violence. He is currently a member of the Board of Directors of the Social Science Research Council (2004), and President-elect of the American Sociological Association (2004).

He is the recipient of a number of research fellowships including awards from the Swedish Government, a Guggenheim fellowship, and a Senior Research Award from the Ford Foundation. He has been a member of the National Advisory Council for Human Genome Research (1996-1999), the Board of Directors of the Association of American Colleges and Universities (1997-2003) of which he served as Chair (2002-2003), and was also a member and then Chair of the National Advisory Committee on Ethical, Legal and Social Issues in the Human Genome Project (The ELSI Working Group). Along with Jerome Karabel, Dr. Duster co-directed a multi-year grant from the Ford Foundation on the effects of the end of affirmative action on the University of California.

Professor Duster earned his Ph.D. in 1962 from Northwestern University.

Pamela Karlan

Pamela Karlan is the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School where she teaches classes on constitutional law, constitutional litigation, and the Supreme Court term. She also co-directs the Stanford Supreme Court Litigation Clinic. Professor Karlan has clerked for Justice Harry A. Blackmun of the U.S. Supreme Court and Judge Abraham D. Sofaer of the U.S. District Court, Southern District of New York. Professor Karlan was Assistant Counsel for the NAACP Legal Defense & Educational Fund and currently participates in the organization as a Cooperating Attorney. Professor Karlan is also currently the Commissioner of the California State Fair Political Practices Commission. In 1997, the American Lawyer named her one of the Public Sector 45.

Selected publications of Professor Karlan include: *The Law of Democracy: Legal Structure of the Political Process*, rev. 2d. ed. 2002 (with Samuel Issacharoff and Richard H. Pildes), *Civil Rights Actions: Enforcing the Constitution*, 2000 (with John C. Jeffries, Jr., Peter W. Low and George A. Rutherglen), and "Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases," 43 *Wm. & Mary L. Rev.* 1569 (2002) (Cutler Lecture).

Professor Karlan received her JD, MA and BA all from Yale University.

THE CONTEXT

Since the 1950s, the political right wing of the United States has been on the rise, affecting policy, laws and public discourse through strategic campaigns to both eliminate the civil rights gains of the last century and curb contemporary efforts to advance access to justice for all. The Equal Justice Society seeks to combat this assault on civil rights and equal protection by building on the strengths of past movements for social change and through the advancement of innovative legal strategies and public policies toward equal justice. Just as historically, legal scholars successfully coupled with social scientists to show that segregation had a negative impact on White and Black Americans in *Brown v. Board of Education*, there remains today a pressing need for more alliances between legal theorists/practitioners and social scientists to eliminate discriminatory laws and policies.

I. WHAT ARE THE IMPACTS OF THE U.S. SUPREME COURT'S RECENT "WAR ON TERROR" AND FEDERALISM CASES ON CIVIL RIGHTS AND LIBERTIES?

A. 9/11's Influence on the Courts

i. Rumsfeld v. Padilla, 124 S. Ct. 2711 (Decided June 28, 2004)

The question in this case is whether or not a U.S. citizen arrested on U.S. soil can be held incommunicado on grounds that he is an enemy combatant. The Supreme Court dodged the issue by saying that Padilla filed his case in the wrong court. Padilla has now filed the correct habeas and the magistrate judge has given the government a long time to respond. It will be a long time before Padilla gets a decision.

ii. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (Decided June 28, 2004)

The question in this case is what to do about a U.S. citizen who is held overseas (in this case in a detention facility in Guantanamo, Cuba). The Supreme Court ruled that federal courts have habeas jurisdiction over these cases and the government has to give Hamdi some kind of hearing before they hold him as an enemy combatant. The moderate right wing of the Court held that while the president does have the power to hold U.S. citizens as "enemy combatants," Hamdi has a right to some kind of neutral decision maker to decide whether he is in fact an enemy combatant. Justices Stevens and Scalia joined to say that the Constitution requires that unless Congress suspends the writ of habeas corpus- thereby effectively permitting executive detention- the only way to detain a U.S. citizen for giving aid to the enemy is to try him criminally. Justices Scalia and Stevens went on to say that since Hamdi was not tried and habeas corpus was not suspended, then there was no authorization at all for holding Hamdi and he must be freed.

iii. Rasul v. Bush, 124 S. Ct. 2686 (Decided June 28, 2004)

The Supreme Court held in this case that habeas jurisdiction of the U.S. does extend to Guantanamo. The U.S. government argued that Guantanamo was not U.S. territory. However, the U.S. has had a lease on Guantanamo since the Spanish-American war. The problem with this decision is that while the Supreme Court held that federal courts do have jurisdiction over Guantanamo, the Court declined to clarify what federal courts are supposed to do in dealing with the cases of the detainees.

iv. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (Decided June 29, 2004)

This case involves a Mexican doctor who was kidnapped at the direction of the Drug Enforcement Agency and tried in the U.S. for his role in the murder of a federal agent. The doctor was acquitted of all criminal charges and brought suit against the U.S. government. The Supreme Court held that neither the Federal Tort Claims Act (FTCA) nor the Alien Tort Statute (ATS) provided a remedy for the alien and that the exception to the FTCA applied because the harm (false arrest) occurred in Mexico regardless of whether conduct in the U.S. was the proximate cause of the harm. Further, while the jurisdictional scope of the ATS extended to recognition of limited claims for violations of the law of nations, the alien's brief illegal detention prior to his transfer to lawful authorities did not amount to a violation of a well-defined norm of customary international law.

This case has relevance to the Abu Ghraib prison tortures. Perhaps the Court's ruling was influenced by a desire to avoid opening the U.S. courts to lawsuits against federal officials when their misconduct occurs overseas. There may be fear that this would open a floodgate of suits because of the way the U.S. is conducting the "war on terror". On the other hand, the ATS and FTCA are substantive law that enables people who have been victims of war crimes and crimes against humanity to bring suit. The Court in this case however, ruled that the plaintiff doctor could not meet the substantive burden the ATS lays out.

v. United States v. Flores-Montano, 124 S. Ct. 1582 (Decided March 20, 2004)

The Supreme Court ruled here that the government (police, federal agents, etc) has the authority to conduct suspicionless inspections at the border, including the conduct here-disassembling the defendant's gas tank. The Court's decision may well have been influenced by post-9/11 concerns with the security of the border. .

vi. Illinois v. Lidster, 124 S. Ct. 885 (Decided January 13, 2004)

The Supreme Court here ruled that roadblocks erected by police in the course of seeking witnesses for a crime are constitutional and do not raise 4th Amendment concerns because the stops interfered only minimally with liberty of the sort the Fourth Amendment sought to protect. Each stop required only a brief wait in line. Police contact consisted simply of a request for information and the distribution of a flyer. The Court reasoned that an information-seeking stop was not the kind of event that involved suspicion, or lack of suspicion, of the relevant individual and thus a presumptive rule of unconstitutionality did not apply.

vii. Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, (Decided June 21, 2004)

The question before the Court in this case was whether or not the state can make it a crime to not identify yourself to police who have a reasonable suspicion for stopping you. An individual cannot resist producing identification because he or she has not done anything wrong. The Supreme Court held that the Terry stop, the request for identification, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment, because the request for identity had an immediate relation to the purpose, rationale, and practical demands of the Terry stop. Also, the request for identification was reasonably related in scope to the circumstances which justified the Terry stop. And it declined to find a Fifth Amendment violation given the facts of the case.

viii. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (Decided June 14, 2004)

The plaintiff (Mr. Newdow) sued his daughter's school district for their policy of requiring the recitation of the pledge of allegiance. The plaintiff argued that the pledge's use of the language "under God" violated the Establishment and Free Exercise Clauses of the First Amendment. The Supreme Court held that the plaintiff did not have standing to challenge the school district's policy because he is not the legal custodian of his daughter.

The relationship between this case and 9/11 concerns the Supreme Court's decision, for "prudential" reasons, not to reach the merits. The outrage sparked by the 9th Circuit's

decision in *Newdow*'s favor would be even greater if the decision was upheld after 9/11, given the renewed important symbolism of the flag and the pledge of allegiance. And given existing precedent, if the Supreme Court had decided to reach on the merits it would most likely have had to hold that the policy requiring the recitation of the pledge with the words "under God" was a violation of the establishment clause.

B. Federalist Revolution of the Rehnquist Court

While those on the Right, including various Supreme Court Justices, argue that their decisions that restrict federal statutes are actually an attempt to protect values of "federalism," this argument does not hold water. In fact those who are in the vanguard are also those who are most likely to preempt state law.

For example, the pro-federalism justices are also the justices who are least deferential to state decision to engage in affirmative action. And the Supreme Court struck down the Massachusetts Burma law [*Crosby v. National Foreign Trade Council*, 530 U.S. 363 (June 19, 2000)] which limits purchasing by the state government and provides a 10% preference for bids from companies that avoid doing business in Burma. The Court held that under principles of conflict preemption, the MA Burma law undermined the intended purpose of, and was preempted by, the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act.

i. *Frew v. Hawkins*, 124 S. Ct. 899 (Decided January 14, 2004)

Texas was sued for violating aspects of Medicaid law that dealt with early childhood dental health. State officials had entered into a consent decree, which was more detailed than the statute itself. When the state didn't carry out what it had promised and was sued, officials claimed sovereign immunity. The Court held, however, that state immunity did not bar enforcement of the consent decree since the decree was a federal court order that resulted from a federal dispute and furthered the objectives of federal law, and the officials voluntarily accepted the obligations set out in the decree

ii. *Tennessee v. Lane*, 124 S. Ct. 1978 (May 17, 2004)

This case shows that the experiences of the Justices truly influence their decision-making. Here, Mr. Lane, who used a wheelchair, was unable to make his court appearances because the courtroom was not accessible to persons in wheelchairs. He sued for damages when he was cited for failure to appear. The Court held that the long history of discrimination against disabled individuals, particularly in accessing the courts, allows Congress to abrogate sovereign immunity.

However, a few years earlier in *Bd. Of Trs. Of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (Decided February 21, 2001) the Court held that Title I of the Americans with Disabilities Act does, in fact, "exceed Congressional authority" -- at least when it comes to telling states what to do in employment matters. Chief Justice Rehnquist wrote that the "ADA's legislative record fails to show that Congress identified a history and pattern of irrational employment discrimination by the States against the disabled." So while there is no real difference between *Garrett* and *Lane* it is significant what the Justices perceive as discrimination in their own experiences.

II. HOW CAN WE USE SOCIAL SCIENCE RESEARCH TO ADVOCATE FOR SOCIAL JUSTICE AND CHALLENGE EXISTING LEGAL FRAMEWORKS?

Typical interaction of social scientist and lawyer: Lawyer approaches social scientist to testify in a case when the lawyer has a specific and concrete agenda and wants the social scientist merely to provide support for what the lawyer wants the court to accept. There is very little transformative potential in these interactions. Looking more broadly, there are two kinds of social science research that bear on legal theory.

A. *Working Inside the Existing Framework*

- i. Shaping the collection of data: Example-**disparate impact**. In the last 10-15 years, the Court has drastically reduced the capacity to use data sets to demonstrate disparate impact to show discrimination. Instead, by requiring that a demonstration of racial discrimination can only be made if the accused has revealed conscious intent, the Court has re-shaped the kind of evidence that can be introduced.
- ii. But it is very difficult to find “the smoking gun” that reveals **conscious intent**. Usually the intent evidence that is found is inadvertent, such as a tape recording by a disgruntled employee in the Texaco case, or a document that was by chance discovered. By staying inside the frame of establishing intent, social scientists’ collection of data will be more narrowly constricted – perhaps even requiring anthropological fieldwork of several years in the making.

B. *Frame breaking*

- i. Collection of data in this instance **challenges the frame** of legal thinking. For example, *Plessy v Ferguson* (Jim Crow laws) was the law of the land for a half-century, but the collection of massive amounts of compelling data to show that this legal theory is a fiction created a strong challenge. *Brown v Bd of Education* did just that. Thus, by continuing research over the next few years that demonstrates massive disparate impact – even with no smoking gun of intent – might have the same effect in the long run. (It did take more than 50 years to overturn *Plessy*.)
- ii. Professor Richard Sander of UCLA School of Law is publishing a study in which he has taken data from law schools around the country to argue that it is better for brown and black students to be down a notch in law school admissions because this way they will maintain higher GPAs and pass the Bar at higher rates. In order to challenge a study like this, an effective counter must challenge the assumptions of his framework. To remain inside the frame of Sander’s analysis (individual benefits and costs to individual black and brown students) is to concede a flawed understanding of the broader purposes of legal training – which could as well be understood as being about social benefits and the commonwealth.
- iii. **Death penalty and race** is a good example of an arena with a high potential for frame-breaking. There have been many cases where the Supreme Court has been ruling that racial disparities in the way the death penalty is administered are not that important even though in the last 30 years very good data show that there is a much greater likelihood that Black Americans will be sentenced to death in

homicide cases (if and when the victim is white). The Supreme Court has chosen to ignore data showing racial patterns, and has instead insisted on an individual case-by-case assessment of fairness. However, if this information continues to be collected, coupled with further DNA research and investigation (as in the Illinois suspension of the death penalty, and the more than 140 exonerations using DNA evidence, and the revelations of the Houston scandal with DNA labs) these can have a cumulative impact on the death penalty as a viable option. That is, in demonstrating the combination of the fallibility of the process with the racial disparities in administration of the death penalty, legal scholars and social scientists have the potential of working together to show how frame breaking is possible.

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