

IV
ADDRESS

By Christopher F. Edley, Jr.
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of The American Law Institute
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of The Mayflower, Washington, D.C.,
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President Roberta Cooper Ramo presided.*

President Ramo: Ladies and gentlemen, welcome to a remarkable lunch in what has been a completely remarkable Meeting of The American Law Institute. I am happy to report that when I thought everybody would be sort of tired and they'd had enough fun, we heard at our sign-in desk today, "Dean, we're sorry, the Edley lunch is sold out." (*Laughter*)

Let me introduce our important speaker of the day, ALI member Chris Edley.

I looked up this morning, Chris, and I saw in the back of our room, in Restitution, my law-school dean, Phil Neal, 90 years old, Adviser to Restitution, who is actively engaged in our work. This must bode so well for you. I always thought being a dean of a law school was the second hardest job in the world, being President of a public university was what I thought was the hardest job in the world. It is clear, to my surprise, that being a dean, and I look at our own Dean Lance Liebman and other deans we have among us, is actually quite good for your health in spite of what you think might be happening to your coronary arteries.

You have Dean Edley's bio in your materials, but I thought I needed to do a little more research. You had so many Wikipedia entries that I finally gave up after 143. What is so important about Chris is this: at the same time he is an important academic, he writes major big-thinking, big-view pieces about areas of enormous importance, one of which he will speak about today, he is a charismatic dean who has been willing to do one of the most important things a dean can do, and that is stand up for his faculty, even when some of them have espoused views that are not popular.

Dean Edley understands that his role as a dean includes the necessity not just to raise a little money these days but, in a university that is under siege, to make sure that the experience of his students, the productivity of his faculty, and the meaningful work that all of that together gives to our country is not in any way diminished. He was willing to fly all the way across the country to speak to us today, at a time of great difficulty for the university and at a time we know not so easy for any academic to leave their institution for any reason.

I am very, very honored to have him here today. I told him speaking would count as two ALI Meetings, Lance, and so we have to remember that.

I always wanted, Chris, to be the president of a university—that was why I went to law school—but after I had been on the board of regents, I got over it very quickly. (*Laughter*)

But if I had known that I could have had a senior policy adviser like you, I would have definitely changed my mind.

Ladies and gentlemen, the dean of one of our great law schools, Chris Edley. (*Applause*)

Dean Christopher F. Edley, Jr.: Thank you very much, and let me dispense with the throat clearing and go right to my comments, because we have so little time and I have so much confusion to sow. (*Laughter*)

So here is the title that I gave Lance Liebman a couple of months ago [“Race and Law in the Obama Age”]. I have no idea what I had in mind, but let’s try this. Several months ago, a reporter asked me whether I thought that Obama should launch a race initiative analogous to President Clinton’s race initiative in the late ’90s, during which I served as a consultant to the President.

There are three pillars, it seems to me, of such an initiative. The first is presidential leadership, and Clinton certainly provided that now and then on issues of race. And for Obama, I said to the reporter, this is a no-brainer in a sense; he provides leadership just by breathing. The impact on the society of having an African American President on the evening news, on the front page of the newspaper, day after day after day, I believe will simply be transformative of the views on race that so many Americans, indeed so many people around the world, will have, particularly younger people.

Such an initiative also has to involve policy initiatives, quite obviously. One of the shortcomings of Clinton’s initiative, of course, is that the policy initiatives, well, not so much, and the principal reason for that is that much of the White House staff, and at times the President

himself, were in the grips of a moderate to conservative Democratic party ethos in which it was considered poor form or at least poor politics to talk about race. Because race continues to be a dividing line in our politics, it is always better to change the subject and talk about something else.

Hence, for example, earlier in the '90s, when the Congress was considering legislative action to repeal federal affirmative-action programs, there was a faction at the White House, Rahm Emanuel being one of the leaders of it, who believed that it was very important for Clinton to take this opportunity to condemn race-sensitive forms of affirmative action and instead shift to a focus on economic class. Ultimately, Bill Clinton rejected that advice and came out with his "Mend it, don't end it" speech.

When, a couple of years later, this idea of a race initiative arose again, similarly people in the White House said, No, no, no. Why do you want to talk about that? Talk about jobs; talk about the Middle East; talk about Monica Lewinsky. No, not that, (*laughter*) but talk about—I mean, there are so many other things that you could be spending your time talking about, don't talk about race. What's that going to do for us with swing voters?

Well, therefore, there was not a lot developing in the policy realm that one could say was advancing the cause of racial justice. For Obama what might we expect? And that's where I am going to go with this talk.

The third pillar was something that we referred to in the Clinton Administration as racial dialogues. This is the conversation on race, this is the effort to have a zillion people around the country thinking hard about issues of race, and I have to plead guilty as being one of the people who instigated this, but my reasoning was sort of like this.

When I was summoned down to the White House just after Clinton was reelected, it was February of '97 and Clinton had just given his State of the Union address. During his reelection campaign, he had said over and over again that he wanted to be the President who presided over an America walking across this bridge to the 21st century,

and he wanted us to be one America walking across this bridge to the 21st century, and we were going to be one America going—and he just kept repeating this “one America” thing, and he loved it, and he just kept saying it. He used it in the Inaugural, then he used it in the State of the Union address, and then he sat down with his aides and he said, “What is this one America thing? Is the—I mean, shouldn’t we do something? What, what—” And that’s what led to the race initiative.

So in this first meeting, when the chief of staff was explaining that the President wanted some initiative that would actually help advance the idea of one America, the easy thing to do was to say, well, you know, it has to include policy initiatives. But I said it’s simply not going to be enough if we don’t have the moral and political consensus necessary to actually adopt and implement those policies, so we have to have a strategy for thinking about the ways in which you create a community that is strong enough so that people believe enough about the importance of each other to adopt the policy measures we are talking about. So let’s make it a double-barreled initiative in which we try this community-building exercise, hence the dialogues, billions of them; incredibly boring.

This may have helped a little bit, but the basic problem, now thinking about an Obama strategy, is that we just don’t know how to do it well, and this, to me, is one of the great and, I might add, researchable issues, the problems of community formation, of identity formation, as predicates for the moral and political consensus necessary for policy issues in this realm.

These are the pillars that Obama needs, but on each of them there are problems, so let me talk about some of the key problems, A, B, and C. There are three.

A is for Appomattox, B is Bull Connor, and C is for choo-choo train, which is my way of remembering *Plessy v. Ferguson* [163 U.S. 537 (1896)].

So here is the difficulty.

Appomattox. Now I say Appomattox Redux because the reality is although we fought a Civil War and the idea of a union was trium-

phant, the claims of states' rights remained extraordinarily powerful in our national politics, and they are an important drag on the effort to formulate and execute national aspirations. In many domains, from health care to education to insurance regulation to, I mean, you name it, but particularly in the area of social policies related to race, this is a major difficulty.

And in education, in which states only became significant players after passage of the Elementary and Secondary Education Act in 1965 [Pub. L. No. 89-10, 79 Stat. 27 (1965)], and the federal government only slowly became a substantial actor in the decades hence, localism continues to reign supreme despite the fact that there are over 15,000 counties, a bazillion school districts, there are over a thousand school districts in California alone, but notwithstanding the national, indeed international, imperative for quality education for all, localism reigns supreme.

The second problem is that Bull Connor's dead. Americans simply don't believe, by and large, that problems of discrimination remain serious, and showing them research from audit studies, tester studies, or research on implicit bias is simply not persuasive to most ordinary Americans. One consequence of that is that the antidiscrimination paradigm for pursuing racial justice has, to some extent, lost its practical and, more importantly, its political and moral energy.

Now, I believe, of course, that substantial efforts must be made to reclaim and renovate those strategies, but it also seems to me they need to be supplemented with what I call no-fault regulatory rights in the area of racial justice, and I will elaborate in just a moment.

The third issue, C, is simply the fact of what is arising, which is our new form of separate but equal. We, by and large, have given up on integration. It's just too hard. I mean, I am reminded of this, my favorite *New Yorker* cartoon; I think it ran back in the '60s. I was in middle school or—I have no idea why I was reading *The New Yorker*, probably I was just reading the cartoons, but there was a bureaucrat-looking guy sitting behind a desk, and there were three boxes on the desk and one box said "In," pile of papers; the next box said "Out," pile of papers;

then there was another box that said “Too Hard,” and the pile went way up (*indicating*). (*Laughter*)

Because we do have this tendency that, when the problem seems too hard, we would rather spend our time working on something we think we can do something about, someplace where we can be effective, all right, and integration is certainly one of those. Even within the domain of racial justice, it’s just so damn hard. To the extent we accept that, we are moving towards separate but equal, but I’m not going to talk about that, because it’s too hard. (*Laughter*)

So here’s what I mean by no-fault racial justice. Think about the Clean Air Act [42 U.S.C. §§ 7401-7671q]. Think about the Clean Air Act. You drive down the street. There is a smokestack. It is spewing gunk. You don’t search for some malicious intent, you don’t search for some morally culpable vice president to put in the stockade, you simply say, well, that’s unacceptable. Fix it. Here’s the standard. Here’s the penalty if you don’t.

We will have a public-policy purpose, we will balance economic concerns and public-health concerns, employment concerns and capital concerns, but we will decide what our goal is, and we will hold you to it, and it will be enforceable. In that sense, it is not a search for blameworthiness; it is social and economic engineering.

The same with financial institutions. You have a capital requirement and you impose it on the financial institution not only after you have found some evildoer taking extraordinary risks on CDOs [collateralized debt obligations], God forbid, instead we simply say, look, this is part of doing business. You want to do business, you gotta be this safe. Here’s how to do it; here are the penalties if you don’t do it. It’s not about moral culpability; it’s about social and economic engineering.

Now my contention is that, in a whole range of social and economic contexts, this approach to thinking about racial justice provides a possibility for augmenting our antidiscrimination paradigm with something that is not so morally freighted but something that we can perhaps engineer to make important advances in attacking the disparities that are the most prominent evidence of racial injustice.

Now if we are going to define no-fault racial-justice regulatory rights, we have to do a lot in terms of defining procedural elements. For example, will you have only public enforcement or will you have private rights of action, will you have attorneys' fees, all those kinds of issues, will there be administrative adjudication, will there be—you get the picture.

But you also have to define the substance of the claims, so here is an example of what one will have to do. Think about No Child Left Behind [20 U.S.C. §§ 6301-7941], which will be up for reauthorization probably next calendar year. No Child Left Behind represents an opportunity to close racial disparities in education achievement and attainment and to take action to close those disparities without a predicate of discrimination. It is simply a judgment that these disparities, like the public-health problems in air pollution, that these disparities are no longer acceptable in our society, and we want to take carefully engineered measures to close those disparities.

Well, designing the parameters for an enforceable right includes, among other things, thinking about, well, is this about adequacy or is this about equity, and how are we going to measure it and to what standard of performance?

Here are two examples. If you think about high-school dropouts, and you imagine that, in the successor to No Child Left Behind, we try to create an enforceable racial-justice claim designed to destroy the dropout factories that are so common in inner-city high schools, so you might think, in box number one, take as the adequacy metric the persistence of each age cohort in moving through high school. You look how many people start ninth grade; you see how many people finish twelfth grade with a diploma and how quickly they do it. That is the measure. And by the way, you need a zillion footnotes to flush it out so that it is not gamed. We've tried.

Second, what is the norm going to be? Well, suppose the norm for adequacy is going to be graduation, what is the graduation rate within five years? It's got to be at least 65 percent. Sixty-five percent of each cohort has to graduate high school, okay, so I just picked that. That is

our social goal; that is our policy goal. That is the pollution standard to which we want to hold the electric utility.

What is the equity metric? The equity metric you might decide as the difference, the delta, between the graduation rates of underrepresented minorities and the graduation rates of whites, and then, as the norm, you might decide, well, how close does the graduation rate for minorities have to be to the graduation rates for whites?

Okay, so I just walked you through an example of one sort of parameter and how one might go about creating a statutory no-fault regulatory right to a system that optimizes your opportunity to graduate from high school.

Another example, I won't walk through the details, might be to look at immigration and customs enforcement if you were worried about, oh, pick a state, Arizona, all right. (*Laughter*) And you might think, okay, so what, what's the metric? The metric might be identification stops; we want to see what is the hit rate. They stop people and, in fact, they are in the country illegally.

You might ask, well, what is the norm? You want to make sure that the norm, again, just social engineering, we—so I'm putting aside whatever the constitutional calculations might be, either facially or as applied, and I am simply saying, as a no-fault regulatory strategy for ensuring the degree of fairness we think appropriate in the administration of justice, we want to make sure that the hit rate is at least 35 percent. Pick a number, right, we can have a debate. Thirty-five, 35 percent. If it is lower than that, it is too oppressive.

Then you might think about—okay. Well, you get the idea, you can see on the chart, so you have to work through these things, and in the process you are implicitly defining what you believe to be racial justice.

Now why will it be so difficult to accomplish all of this? Well, in part, it is because of A, B, and C. We don't care enough about each other because we are segregated. The localism means that we have horrible wars, not entirely partisan but just horribly fought wars about

the role of the federal government, with many people saying just write checks, many Democrats saying no unfunded mandates. If we want to close the achievement gap, the federal government has to write a check. Interestingly, interestingly, when we say that the states must provide counsel to an accused felon, when we say they must provide due process to anybody, procedural due process, we don't say, "But don't worry, you don't really have to do it unless we write you a check, unless we bribe you to fulfill your obligations."

Now it's true those are constitutional, but have we reached the point where, on issues like education, if the state wants the responsibility and in its constitution promises its people access to a public education, what ought that to entail, not constitutionally but in terms of statutory grants in aid, and of course Bull Connorism?

It will be difficult, because of Bull Connorism, because when push comes to shove, will the White House staff, will blue-dog Democrats, will moderate Republicans, if they still exist, believe that it makes sense to talk about race, believe that it makes sense to impose politically and fiscally on states and school districts in order to advance goals of racial justice? Well, it's tough, because Bull Connor, you may have heard, he's dead.

Nevertheless, I think that this regulatory-justice strategy is smart, not only in escaping the politics of blame, because it actually starts to create a set of tools to attack what, in my youth, we used to refer to as structural racism. Now this term, which I never particularly cared for, is being revived by white executives at foundations, and since I am a dean, I am thinking about this, (*laughter*) and it seems to me, in an effort to try to give some coherence to this notion of structuralism, first of all I'd separate two kinds. I mean, there is the structural racism that manifests itself in our culture, the implicit-bias research would be an example of that, and then there is the structural racism that manifests itself in the operation of our institutions, otherwise known as institutional racism. And that's what I want to focus on here, because the cultural stuff, that's too hard.

So the institutional stuff, one way, the way that I think about it in my twisted mind, is this. Run a regression equation and on the depen-

dent variables say what explains, I want to explain the distribution of goodies in society, all the goodies in society. So on the right-hand side of the equation, I am going to list all the variables that I think might explain how the goodies get distributed. That first variable is race, so I am going to have a dummy variable in there for race, that's the B, right. And then I add in all these other things that explain the distribution of goodies, like education, family status, any exposure to the criminal-justice system, health status, endowments from your parents, social, economic, intellectual endowments from your parents, your immigration status, dot dot dot, all these explanatory variables.

Well, guess what happens? Guess what happens? If you string out all of these explanatory variables, B, the coefficient for race, becomes statistically insignificant, or kind of heads in that direction, to which some people will say, well, that shows you, race isn't important anymore.

Structural racism is another way of saying, no, no, no, no, you don't get it. What is race? It is not biological, it is a social construct. How is it constructed? Answer: It's all these explanatory variables. This is what it means to be black. This is what it means to be Latino. All you've done in these explanatory variables—not all you've done, but one of the big things you've done, is you have captured all the things that are about race in America except pigment. Except pigment.

So in a way, it's not about animus, it's about the ways in which—I'm sorry, here's something, tracking. Tracking. There is an argument that tracking really became important in this country when schools were desegregated, and it became important when schools were desegregated because it became a way to separate black kids from the white kids.

Time goes on. Time goes on. Decades go on. Nobody, almost nobody would claim that today a justification for tracking in high school is to segregate children. They would have some other story about how it promotes this or that, all right? So there is no racial animus currently operating in tracking, but it is a form, it is an aspect of structural racism in the sense that it replicates the original discrimination, and it locks in the patterns of disadvantage and disparity.

You won't get at tracking very easily in the antidiscrimination paradigm. You need something like no-fault regulation, where we make

a judgment about whether it is good or bad education policy, and here's what that looks like, and it was intended as a handout, but I simply want to give this to you because it demonstrates that, despite just being a lawyer, I can use Power Point. (*Laughter*)

I think the right way to conceptualize structural racism is to think about, in the upper right-hand corner, different sectors or institutions. Look at them. Feed it through a prism, like a prism that separates white light into its rainbow components, a prism composed of a dozen different methodologies, methodologies borrowed from economics, from statistics, from social psychology, media content analysis, whatever, all the methodologies of the behavioral and social sciences we can imagine.

Analyze what is going on in education and health care in these institutions, and diagnose what is happening around issues of race, and that produces this tall column in the middle, and what we observe, bias and discrimination, disparities, disparate impacts, isolation and segregation, social-capital deficits, attitudes and expectations differentials, political-power and influence differentials, media, a whole set of things.

This is the symptomatology of structural racism, and only a couple of those things have to do with discrimination as conventionally defined, meaning that if we really want to attack it, if the Obama Administration really wants to attack it, it needs a different set, an additional set of legal tools, hence I believe the importance of no-fault regulatory strategies.

I am out of time, so I won't tell you about the visitor from Mars, but I will say that, with respect to prognosis, the best hope in Congress for moving in this direction, the best hope in Congress will be the rise of political influence of Latinos and the hope that cooler heads, calm heads will prevail in the Republican party, and they will want to avoid a decades-long realignment in which the Hispanic vote flows to the Democrats in much the same way that the African American vote does. That would really be a death knell for the Republican party as we know it, and if they want to avoid that, then we may see some bipartisan cooperation in this form of no-fault racial-justice regulation.

For the Obama Administration, it is clear to me that rather than race-specific policy initiatives, the right strategy forward, I mean yes, civil-rights enforcement should continue, but the marquee agenda is to pursue things like education reform, health-care reform, financial-institution reform for the unbanked, etc., pursue these other social and economic strategies with a racial lens in mind, so that you seek out and take advantage of opportunities to attack the symptoms of structural racism. The Community Reinvestment Act [of 1977, 12 U.S.C. §§ 2901-2908,] in the financial sector is sort of an example of that from decades ago. We need a new round of efforts in that field.

For Americans generally, and I want to end on this note, the prognosis, I think, is one that I borrow from Al Gore. When I was working with President Clinton, in the early '90s, and Vice President Gore, on the review of affirmative action that led to "Mend it, don't end it," one day I was doing a Socratic discussion with them, which is the way we did it for about six months. It was just fabulous, they were great students, (*laughter*) true, true. We were playing with the *Piscataway* case, a Third Circuit employment case [*Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted sub nom. *Piscataway Twp. Bd. of Educ. v. Taxman*, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997)], and I was pushing them on how they would approach the *Piscataway* case. Gore announced his position, and I said, "Well, why?" And he said, "Well, . . ." "But why?" And he said, "Well, . . ." And I said, "But why?" And he said, "Well, I don't know, I think it probably has something to do with my religion." And I said, "Well, what?" And he said, "Well, I'm not sure, let me think about it."

A couple of weeks later, we were in another meeting, and he said, "You know, I think I figured it out." "Okay, what's that?" He said, "I think, you know I'm a Southern Baptist, you know, I think that this is a little bit like sin. We are taught that humans are born with this innate, they will sin, and it's like, this, it's just there, and with respect to race and racial differences, I think that it's innate. I think that we have this tendency to distrust, to be suspicious, to even hate based upon differences like color, and I think it's there, it's kind of coiled in your breast like a serpent," he said, "and it's waiting for some event that triggers it,

and it comes out, and it comes out as bias or prejudice or hate, and, and it's just there." And he said, "But, just like sin, the fact that the risk is there doesn't mean you give up; it means you have to be prepared, as with sin, to struggle against it every day, every day. It's a post-Enlightenment fantasy," he said, "to think that you can just read a book, take a course, make a friend," I would now add vote for a President, "and suddenly you are healed, you are cleansed, you will sin no more. No. It's a constant struggle."

So my prognosis for the American people is they will fail utterly at dealing with difference, as has every society throughout human history, unless somehow we learn better ways to struggle with it every day, and that is something that a great leader can help us to do. Thank you all very much. (*Applause*)

President Ramo: Chris says that he has time, and we have time, for just a few questions, so if anybody has one, we don't have microphones but—oh, we do have microphones. Right back there is the first question. Please. Would you say who you are just so—

Professor Paul M. Secunda (Wis.): Sure. I am Paul Secunda. I am a professor at Marquette Law School, and I specialize in labor and employment.

This morning, on CNN, there was a troubling study that was put out, saying that the economic disparity between darker-color individuals and lighter-color individuals has actually grossly expanded, from being twice as much difference, 40,000-20,000, to now a quadruple difference as of 2007, and if people are interested, this was put out by Brandeis University, so 80,000 to 20,000. That's one point.

Dean Edley: It was wealth, wasn't it? It was wealth?

Professor Secunda: It was wealth, it was wealth.

Dean Edley: Right.

Professor Secunda: And the second thing they did was they did a study with children where they had pictures of dolls that looked exactly the same, except they had different pigment, and children were asked to point to the dolls that were the bad dolls.

Dean Edley: Right.

Professor Secunda: And both white and black children—

Dean Edley: Right.

Professor Secunda:—more often than not pointed to the darker-colored dolls.

Dean Edley: Right.

Professor Secunda: So I am wondering, in addition to what you have explained, what role parents and those who are raising children have in your paradigm that you have explained to us today.

Dean Edley: Right, so what is—the reason they released this study was to coincide with my talk today, (*laughter*) because those two issues, the wealth-disparity point and the doll study, which of course is reminiscent of the Ken Clark doll study that supported, allegedly supported *Brown v. Board* [of Education, 347 U.S. 483 (1954)], those illustrate the two dimensions of structural racism, right. One is a set of institutional practices that recapitulate economic disadvantage, and the other has to do with implicit bias that children pick up very, very early, very, very early.

My kids, seven and eight, in a fabulous, very diverse elementary school, already, all right, it's one-third Anglo, one-third Hispanic, one-third African American, a few Asians thrown in, a fabulous school in Berkeley, public school in Berkeley, but already it's coming, it's coming, and it starts with some stereotypes and blah, blah, blah, and skin color and hair and all the rest of it.

Culture is hugely powerful. Parents are a factor but not the only factor, so the parents could be saints but they will still go to the school yard, which means that it is not enough just for the parents to be saints, all the adults in that community have to be smart enough to read, anticipate, react, and there are not effective professional-development programs for teachers in this regard.

That is one reason—I was serious when I said that that third pillar of the race initiative, the one about dialogues, I just think it is so impor-

tant. It is so important. It is not what we do, right. The best that we could come up with was school integration and the contact hypothesis. Well, we tried that, sort of, but not really, so we really need some strategies, and, of course, it will be lawyers who figure out how to implement it, but it's the other social and behavioral sciences that will have to give us the ideas, and then we can help figure out how to build the strategies, the institutions, to execute it. But thank you for the example.

President Ramo: Wait, there is a microphone coming for you.

Unidentified Speaker: Oh, yes.

President Ramo: No, no, no, no, I'm sorry. The lady who had her hand up, please.

Unidentified Speaker: I would just like to follow up with that question by asking another question. To what degree would your paradigm exercise extend to media, controls over representation of race through media?

Dean Edley: Right. The answer is yes, certainly, “absolutely positively” but, well, it will never—on my fabulous slide about structural racism, on the far left side, I talked about possible federal policy responses, state policy responses, and private responses, because I think that there are obviously limits to, there are limits to the public role and—there we go, on the—whoops. Sí, se puede.

Okay, so on the far left you have boxes, I have federal, state, and private. Oh, it's not up there. (*Laughter*)

Oh. Well, I can see it. (*Laughter*)

President Ramo: Here, I'll be the box.

Dean Edley: Oh, I unplugged it. Never mind. Okay, but my point is that after you see the diagnoses, that was the tall green box, after you see the diagnoses, (*laughter*) after you see the symptomatology, then you formulate policies, responses, some directed towards federal action, some towards state or local action, but some are private sector, family, businesses, whatever, and we have to figure out what those better practices should be and devise nongovernmental strategies for bringing

them about. I mean, the government can coach, can help, can teach, but obviously the First Amendment issues are very serious, as are practical issues. Government can't, shouldn't try to do everything, period.

President Ramo: One last question, the gentleman who stood up before.

Unidentified Speaker: Oh, let's go to the practicalities. When designing your no-fault strict-liability standard, it is the same in schools, tell me something about the benchmark. Why children's achievement including or excluding Asian Americans, please?

Dean Edley: Repeat.

Unidentified Speaker: Will it take into account, say, white communities, white-children achievement, outcomes, but including or excluding Asian Americans?

Dean Edley: Asian Americans?

Unidentified Speaker: Yes. What will be the benchmark of your no-fault liability approach?

Dean Edley: Well, that is another lecture, that is another lecture, but did you specifically ask about Asian Americans? Oh, well look, here's the thing with Asian Americans.

I have known this for ages, but living in California these past six years has really brought it home to me. We need a serious political and scientific movement to disaggregate this category of Asian Americans, and the fact of the matter is that there are very important and large Asian subcommunities that are tremendously disadvantaged and in economic and social circumstances every bit as bad as those facing African Americans and Latinos. Lumping them all together, I think, is hiding a lot of human misery and lost potential, and even California does it, and it is a serious problem with the data systems. So what I am in favor of is a level of disaggregation that reflects the social realities, and if you miss out on the fact that Southeast Asians are suffering, that English language learner programs are not being made available despite *Lau v. Nichols* [414 U.S. 563 (1974)], so that is my response on that.

In the education realm, which is what I know best, I am perfectly prepared to offer to any interested member of Congress my suggestions about the parameters, the specific parameters and the key variables I think, but the point I would make is this is actually an occasion for the discussion about what we mean by justice. On my slide, for example, I used the figure 80 percent, I think with respect to dropout rates I suggested, well, let's make sure that the dropout rate for underrepresented minorities is at least—strike that, is no more—strike that, too. Make sure that the graduation rate for underrepresented minorities is at least 80 percent of the graduation rate for whites.

Why did they pick 80 percent? Because that is the guideline that is used in EEO [equal employment opportunity], in the EEO context under Executive Order 11246, just arbitrary, they use sort of an 80/20 rule. But one could imagine having a different rule, and a lot depends upon doing the research to see, well, what are the distributions and what is it reasonable to expect in terms of institutional adjustment. And what we think this decade may not be as bold and pushy as what we would adopt next decade, just as was the case with pollution regulation, where over time we tried to build a compliance culture and an engineering support system that would allow us to make improvements for the public health, I think the same thing has to happen in all of these contexts, so it requires less blame laying with patience but also with enforceability.

The only reason I end with this is because, as some of you know, Barack Obama was a student of mine when I was teaching at Harvard, and he, well, let's just say he wasn't what you see today. He really was kind of lost and lacking in ambition and so forth, (*laughter*) no self-confidence, (*laughter*) and he would come in and he'd say, "Professor Edley, I just don't think I can do it, I just, I don't know how to go on, I just don't think I can do it," and I would tell him, "Yes, you can. Yes, you can." (*Applause*)

President Ramo: Chris, let me say that at The American Law Institute we are not allowed to have a box that says "Too Hard." You have begun a process for us to start discussing what our role in these key issues of the day should be, and I am extremely, extremely grateful to you.

So now we have to go discuss a different kind of unjust enrichment and ¡Sí, se puede!