

Intro:

Mr. Chief Justice, may it please the court. It's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

Intro:

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Leah Litman:

Hello and welcome to Strict Scrutiny, your podcast about the supreme court and the legal culture that surrounds it. I'm Leah Litman and I'm joined by not one, not two, but three special guests this week for a very special summer episode that I think dovetails nicely with our last summer episode with Sherrilyn Ifill, who helped Kate and me break down the court's aversion to acknowledging the relevance of race and the legal profession's ho-hum, go along to get along attitude about that.

Leah Litman:

This episode is going to be about diversity, or lack thereof, in the appellate bar and some of the consequences of that lack of diversity. But we're also going to be highlighting some awesome organizations, initiatives, projects and cases that are designed to address that lack of diversity. To help do that, I'm joined by Amir Ali, Devi Rao, and Tiffany Wright.

Leah Litman:

Amir is the Deputy Director of the Supreme Court and Appellate Program of the MacArthur Justice Center. Devi is Supreme Court and Appellate Counsel at the MacArthur Justice Center, and Tiffany is a senior associate at Orrick in the Supreme Court and Appellate practice. Both Tiffany and Amir are on the board of directors of a great new organization, the Appellate Project.

Leah Litman:

Now I could probably spend an entire episode on any one of your individual accomplishments, but just to briefly introduce you all a little bit more to our listeners. Amir has also taught at Harvard and Georgetown law schools and argued and won one of my favorite Supreme Court cases, *Welsh versus United States*, a habeas case on the retroactivity of *Johnson and Garza versus Idaho*. Devi clerked for Justice Ginsburg, and before coming to MacArthur, was a partner at Jenner & Block where she worked on a significant number of cases involving conditions of confinement and medical and mental health treatment.

Leah Litman:

Tiffany clerked for Justice Sotomayor and before that, Judge Tatel, and she has the rare honor of being a law clerk whose judge is willing to publicly acknowledge that you changed or persuaded your judge about the outcome of a particular case. She's also one of the lawyers on the fantastic qualified immunity petition *Taylor versus Riojas* that I mentioned at the end of our episode with Sherrilyn. It was also just announced that she's going to be co-teaching an appellate litigation clinic at Howard University School of Law.

Leah Litman:

So with that monster introduction, welcome to Strict Scrutiny Devi, Amir and Tiffany.

Devi Rao:

Thanks for having us.

Leah Litman:

Devi and Amir, I guess I'll ask you to start out by telling our listeners a little bit about the MacArthur Justice Center, what it is and what kind of work you do there.

Devi Rao:

Thanks Leah. The MacArthur Justice Center is a civil rights organization which for over 30 years has been bringing cutting edge suits on a wide range of issues like police accountability and reform, first amendment, criminal justice issues and the civil rights of people in incarceration. Amir and I both work for the supreme court and appellate program which is a relatively new initiative that takes that same impact litigation model and applies it as the courts of appeals and at the Supreme Court.

Amir Ali:

Another way to think about what we do, I think a lot of us think about impact litigation as using lawsuits to effect social change. Normally, we think about it as bringing new lawsuits. Our organization focuses on criminal justice work. So that could be a suit against the government or a police department or a prison to change the practices of that particular organization or defendant in these suits, and that is totally righteous work which is so important.

Amir Ali:

We, in our Supreme Court and appellate program, get our impact a different way by establishing new precedent on appeal that will govern large and often multiple jurisdictions. So, to give an example, when a person is brutally beaten by the police or by a prison guard and a federal district court throws the suit out on a ground that we think is wrong, we have the mandate to get involved on appeal, and if we win and we get an opinion in our favor, we change the rules of the game going forward for people who suffer those same abuses.

Leah Litman:

So what's the problem that you all are trying to address at MacArthur?

Amir Ali:

One way to look at it is to zero in on the Supreme Court and criminal justice issues before the Supreme Court in particular, where the law's developing at its best in a random fashion, and at its worst, in a way that systematically disadvantages victims of civil rights abuses and criminal defendants.

Amir Ali:

So let me start with the random part. I think, as many of your listeners will know, the Supreme Court generally waits until there is a conflict between courts of appeals on a legal issue before the Supreme Court intervenes and gets involved. When a conflict arises or, more specifically, when a lower court judge says that a conflict has arisen, the case has a pretty high likelihood of going to the Supreme Court, but that is often without consideration as to whether that is a good case to go to the Supreme Court;

one that accurately reflects the equities at stake for victims of civil rights abuses and criminal defendants in our cases.

Amir Ali:

I said that it is at worst systematically disadvantageous to those same communities because if you look at the other side of the v in these cases, it's state and federal governments, and those parties are very strategic about what cases they will bring to the Supreme Court. You have one side that's playing sophisticated chess, and the other is playing 1000 different games of checkers.

Devi Rao:

So law firms are looking for circuit splits and they want to get cases before the court for all the reasons that your listeners will be familiar with. It's a fancy thing to do. It's something that people want to participate in and it's really important, for the cases that are there to have high quality representation before the court, and so that's really great. But we're sort of filling a different need at the systematically Justice Center. We're trying to be intentional about the development of the law on issues that we care about, and, as Amir said, trying to develop the law before it reaches the court.

Devi Rao:

So for example, once there's a circuit split, it's generally thought that eventually the Supreme Court will have to step in, but if we can stop a circuit split from developing, like using precedent in one jurisdiction and trying to get that same result that we think is good in another court of appeals. If we can do that, then the Supreme Court doesn't need to weigh in and we get a result that binds everywhere in the country, and that's one of the ways in which we are sort of strategically trying to develop the law.

Leah Litman:

Yeah, and just to contrast some of those incentives with some of the incentives that might exist in private practice. So in private practice, sometimes lawyers have incentives to develop a circuit split in order to take a case to the Supreme Court or they have an incentive to get a case to the Supreme Court no matter the underlying facts, and no matter how likely it is they think an issue is going to win at the Supreme Court. Just to get an argument at the court and get the experience doing that, and that isn't always a good thing for the development of the law. So I take it that that is part of what you all are trying to be more strategic about and counteract.

Amir Ali:

Yeah, absolutely. We have a list of issues where there is currently no circuit split and we are racing to make sure that we are the ones who get to litigate the issue and that no split arises.

Leah Litman:

Yeah, and just one other anecdote, which is I know another way that lawyers sometimes think about cases that get to the Supreme Court. Sometimes when there's a new nominee to the Supreme Court, that person will have written about an area of law or an issue while they were a court of appeals judge. So even if there's not a circuit split on that issue, this might be their pet project, and it might be the case that we actually don't want to give cases to allow, let's say, Justice Gorsuch or Justice Kavanaugh to further some of their pet projects even if, again, doing so would be a way to get a case at the Supreme Court and get a Supreme Court argument.

Leah Litman:

So Tiffany, I guess I'll ask you the same question both about the kinds of work that you do at Orrick and also about a new initiative that you're a part of, The Appellate Project.

Tiffany Wright:

Yeah, I am in the Supreme Court and Appellate practice at Orrick. I feel really blessed and lucky to have pretty diverse and interesting docket of work, including maintaining an active pro bono practice that deals with a lot of civil rights issues. You mentioned the qualified immunity petition. I've also worked with MacArthur recently on a Batson issue involving Black Lives Matter. So I think I've been able to strike gold in having an appellate practice in a law firm that I'm really happy with and proud of.

Tiffany Wright:

I'm on the board, as you mentioned, with Amir of the Appellate Project or TAP as we call it, and the mission of TAP is pretty simple. We just believe that our highest courts, both in terms of the judges who are on the bench and the advocates who are appearing before them should reflect the diversity that we see in your communities. TAP tries to accomplish this with three forms of programming. One is something we call an incubator which is starting next year. It's an intensive summer fellowship program for diverse law students who are typically underrepresented in the appellate bar.

Tiffany Wright:

The second part of our programming is educational outreach. So we are connecting with law students of color, particularly first generation lawyers, to spread the word about appellate work and why it's something you should be interested in and about appellate related opportunities like clerkships and judicial internships and so forth. Finally, the clinic, which you mentioned a little bit in the introduction, but we are launching or it starts next week, an appellate focused civil rights clinic at Howard University School of Law that me and my good friend, Ed Williams, will be working on together. We're just excited to give black students a voice in this appellate process and work on issues that are important to us and make sure that that voice is included when courts are considering those issues.

Leah Litman:

So I guess that's probably a great segue into part of what was unifying the work of The Appellate Project and the MacArthur Justice Center, which is just the lack of diversity in the appellate bar and on our appellate courts. I know that that is an issue that both... can I call it TAP, too?

Tiffany Wright:

Yes.

Leah Litman:

Okay, awesome. That both TAP and the MacArthur Justice Center are concerned with. Part of the reason this is concerning is, of course, the high stakes of appellate cases that Amir was gesturing toward. They don't just resolve the issue in a particular case. Instead, they generate law for any kind of case that might arise anywhere on a given issue.

Leah Litman:

I think it's an unfortunate reality that we have to acknowledge that both the appellate bar and the appellate courts are astonishingly not diverse and they are not really getting more diverse. So I pulled some figures to give our listeners some sense about how this works, and not all of these statistics are going to be specific to appellate work in particular, but if you look at the US attorney nominations for this administration and sometimes the US attorney nomination will be a gateway to an appellate judgeship, of the 93 US attorneys, seven are women and two are black. There have been no black court of appeals judge nominees and there have been over 50 court of appeals judge nominees. There have been over 200 judges confirmed by this administration, and Vanita Gupta has estimated that over 70% of those judges are white men. Just 28 of those judges are people of color.

Leah Litman:

Those are the courts and part of the pipeline to the courts. If you look at who's arguing before the courts, that's not so great either. So 156 times lawyers argued at the Supreme Court this past term. 13% of those cases were argued by women. How many of those women were women of color, it's difficult to get precise numbers. We have talked about on this show, Jessica Mendez-Colberg, who had an astonishingly powerful colloquy with the chief justice inviting the court to overrule the insular cases in the PROMESA argument, but other than her, I'm not sure that there was another woman of color arguing at the court this past term.

Leah Litman:

So, that is the problem that we are dealing with. This is a problem that extends not just on matters of sex and race, but also on gender identity and sexual orientation. There have been 13 openly LGBTQ judges. 10 were appointed by President Obama, two by President Trump and one by President Clinton. Judge Vaughn Walker was appointed by George Bush, and he is gay but he came out after he retired. So again, this is the nature of the problem, and I would love to hear from any of you about why this problem is so concerning and the ripple and systemic effects this has for the development of the law and the legal profession as well.

Amir Ali:

I could not be more proud to be associated with The Appellate Project and TAP and what it's trying to achieve. The fact of the matter is that appeals decide real issues that affect real people and for the system to be legitimate, it is essential that it be representative of the communities it affects. I can share a personal anecdote as to why this is so important to me, and it's a recent one. It goes back to Trump v. Hawaii and the litigation over the president's Muslim ban.

Amir Ali:

I think when people, particularly Supreme Court bar members, look back and think about this case, they think of it as a time that the whole Supreme Court bar came together, and that's true. I mean you had virtually every major law firm involved on the side of the petitioners.

Leah Litman:

Our listeners can't see this. I'm making faces as Amir says the entire Supreme Court bar came together on this issue. I just want to note that this statement is going to be complicated as Amir is about to-

Amir Ali:

Let me caveat that by saying that a lot of the private Supreme Court bar came together in that case, and you had most major law firms representing clients at least on the side of the petitioners. Maybe with some exceptions that Leah will point out. But more importantly, what I think about is back to the day of oral argument in the case. A lot of your listeners will know there's a special line to get into oral argument and a special section in the court for members of the Supreme Court bar. For most major cases, that line begins in the middle of the night the day before or even days earlier sometimes, and even for unpopular cases. For a tax case or a patent case, people will aim to get to the court pretty early.

Amir Ali:

In this case in *Trump v. Hawaii*, the line did start the night before. It started about 3:00 AM and you have a handful of people in line, most of whom specifically advocate on behalf of Muslim people. But as the clock continued, it remained a handful and didn't get longer. It turned out that on that day, you could have slept in and showed up at something around, what I've got is about 9:15 or 9:20 in the morning and still walked right into the Supreme Court section of the gallery. That really struck me. I mean you've got several million Muslims in the United States. You have nearly two billion in the world, and you have a case that's about expressed animus towards that community and not enough people to fill the bar section or create a line.

Amir Ali:

So to the extent the whole bar came together, what was missing was Muslims, the people who represented the community that had the most at stake in this case.

Devi Rao:

So Leah, you talked a minute ago about the statistics of US attorney appointments and judicial appointments, and that's really important because we've gotten to a point with our nomination process for judges where there is roughly one background of a judge, and it's law firm, US attorney's office and civil appellate or the SG's office. All very prestigious, competitive places that have not traditionally been diverse.

Devi Rao:

It's rare now for folks to come from nonprofit organizations or public defender's offices, and that was to a large extent true during the Obama administration as well. This is not necessarily a new problem, although they were more concerned about diversity and increasing diversity in the bench, but Justice Ginsburg was confirmed 96 to 3 and she came from the ACLU Women's Rights Project. It's totally unthinkable now that someone with that background would be probably up at all, let alone confirmed almost unanimously.

Devi Rao:

So we've got this narrow pool of people coming into these positions of power to be making decisions that have real and lasting impact in people's lives. So I guess just one other anecdote here is that I remember during that period where Justice Ginsburg was the only woman on the court, there was a case about a strip search of a 13 year old girl by school officials. After argument, she made a comment in the press along the lines, "Well, my colleagues have never been 13 year old girls," and it really was clear to her that the actual impact of the court's decision on real lives was probably not going to be lost on them, but they weren't really able to empathize with someone in that position.

Devi Rao:

So, as these cases involving excessive force come before the court, these are people who, for the most part, their interaction with police officers are the really lovely Supreme Court police officers who they see every day and who keep them safe. So it's a little bit hard to think that these people who... I think they're trying to do their best, but if all these people come from these narrow backgrounds, they're not getting the full range of the American experience and the human experience. They're not bringing that to their judging, and it's important to have diversity on the bench and diversity in the lawyers representing their clients before the federal courts.

Tiffany Wright:

I think I have two answers to why it matters or why we should be concerned. I mean the first one is probably the most personal to me. I think that representation alone just for representation's sake is very important. I certainly exist as a lawyer because when I was seven years old and I was still reeling from the most devastating event in my life, my father's murder, I met a black lawyer who helped me and who said to me that this is a career that you can have. This is something you are capable of and it changed my life.

Tiffany Wright:

So I think that the mere presence of diverse people in the appellate bar makes young people who don't come from privilege or come from anything really feel like this is something that they can have. Equally important is not just our presence, but that our perspectives are centered in cases that disproportionately affect black and brown people. I always think back to the moment, it was before my first year of law school when I first read Florida versus Bostick, which was this case about the drug interdiction program where a police officer gets on a bus armed with a badge and a gun and corners a person on the back of the bus. The question for the court is does that person feel free to end that encounter with the police, and the court says yes.

Tiffany Wright:

Now, you read that opinion, it sounds like they're applying totally neutral legal principles. It's all very sterile. It sounds very reasonable, and if you have never known what it's like to be in fear of your life every time you encounter a police officer, that opinion sounds reasonable. But for those of us who have the opposite experience like Justice Marshall in the dissent, that opinion is ridiculous because no one in that position who looks like me would feel like I can end that encounter.

Tiffany Wright:

So when you don't hear our perspective, and only we can truly tell our stories and give our perspective in a way that is most impactful and persuasive, when you exclude that, then you end up with reasoning that is foreign to the people whose lives are governed by these opinions.

Leah Litman:

I just want to tie something you said, Tiffany, to something that I think, Amir, you said earlier, which is that some of these opinions on extremely important questions of race and equity and inclusion lack the perspective of the people most affected by them. That is in part a product of a lack of representativeness of the appellate courts and the appellate bar, but I think it relates to something, Amir, that I was needling you about when you were talking about the Supreme Court bar being all in on

the side of the challengers of the Muslim ban, which is that to a large number of people in the Supreme Court bar, the issue wasn't particularly personal.

Leah Litman:

So there wasn't that much of a cost to saying, well, okay the arguments on the other side are reasonable, right? I think I'm right, but let's engage in this good, fun, old fashioned debate about this theory of presidential power and the appropriate standard of review or consular reviewability and it's totally okay to engage with the person on the other side as if this just doesn't have any real effect, and it's just like a friendly debate.

Leah Litman:

I do think that the ability to engage with the other side and dissect arguments and have a conversation is really important, but I also think it's fair and important to be able to attribute an argument that someone is making to their choice and to say well, you have to own the consequences of that, and if those consequences are a disproportionate effect on particular communities, then we should talk about that and maybe not regard this as just a fun, friendly debate over a theory that will have no real impact on people's lives. This has just become a personal pet peeve of mine, which is maybe why I saw it in the remarks that you were making.

Tiffany Wright:

Well no, I think that's important. I think it's a privilege to be able to engage in this as just an intellectual puzzle and an intellectual game. It's not a privilege that I have, it's not a privilege that people of color have because this is our lives. So we can't engage in I'm going to vote this way in this case to amass political capital because it doesn't cost me anything personally and not realize that that really hurts people and that there are people where your political gamesmanship is a real problem. So I think it's a privilege to engage in that and a privilege that a lot of us don't have.

Leah Litman:

Yeah. I think it's particularly problematic for people to exercise that privilege to use that to advance themselves professionally and personally given that it is not available equally to everyone. In order to make the profession, in part, more diverse and equitable, some of us need to relinquish that privilege or acknowledge when it exists. Anyways, okay.

Leah Litman:

So just to point out how this issue might have particular consequences on cases that we have talked about on this show, when you think about this last term, so Amir mentioned the Muslim ban case Trump v. Hawaii. We have talked at length on this show about the DACA case and particularly the court's eight to one rejection of the equal protection argument saying that there was no plausible allegation that the DACA rescission was motivated by racial animus or invidious discrimination. The court also increased the standard for plaintiffs to prove racial discrimination under section 1981 and Comcast, that opinion was unanimous.

Leah Litman:

I could list additional examples we talked last episode with Sherrilyn about how three justices suggest it was somehow uncivil or distasteful to discuss the racist history of non-unanimous jury rules in Oregon

and Louisiana, but this is an issue, again, that could have real substantive consequences for the law. We see it not just in the way that the court is deciding cases, but also in the public commentary surrounding them. In my view, we see this particularly on voting rights cases or policing cases where you have members of the Supreme Court bar and public commentariat saying, well, okay, this is just a general principle of noninterference in elections, and of course, we want legislatures to be deciding these questions about elections.

Leah Litman:

It's like, okay, I can agree with that in theory, but if, in fact, that principle means we are going to be telling black voters in Milwaukee you have a choice to either vote in person and face the risk of a deadly disease that disproportionately affects your community or not vote at all, I guess I don't think that principle should carry as much weight or oomph as you are ascribing to it.

Leah Litman:

One other thing, actually, while I'm on this. So last episode I mentioned that this episode is going to dovetail with our last one. Sherrilyn Ifill mentioned how the chief justice sometimes selectively responds to attacks on judges and didn't respond, for example, when the president said that Judge Curiel was not able to judge the case because he was, quote, "Mexican." Something else that the chief justice, and really the appellate bar, has not responded to is the murder of Judge Salas's son and the shooting of her husband that was carried out by I think someone who was motivated by racism and misogyny.

Leah Litman:

The fact that that attack was motivated by this hatred that is going to disproportionately affect certain communities is an important thing that is happening in the federal courts that is probably worthy of our attention and the chief justice's as well.

Leah Litman:

Okay. So we've already kind of touched on this, but maybe worth specifically unpacking some of it. I guess I'd like to talk more about what are some of the driving forces behind the lack of diversity in the appellate bar, appellate courts or people arguing before the appellate courts, if any of you would like to just offer some starting thoughts there.

Tiffany Wright:

So I think the point that you were making a second ago about how the chief justice has sort of made it... and not just the chief justice but several members of the court have made it distasteful to talk about race when we are in legal opinions, I think that plays out in cases, but it also plays out in our social environment in appellate practice. There is a reluctance to discuss the issue. It makes people uncomfortable, and I have been in the appellate community for about six years. I have lots of black and brown friends who've been in the community for quite a while, and we have experienced and seen each other experience explicit, targeted racism as well as implicit bias.

Tiffany Wright:

There are always our white colleagues who sort of tiptoe into our offices and whisper, "I'm so sorry that happened. That's outrageous. It's so unfortunate," but that's it. There is nothing to be done, even by

people who are in a position of power to do something and if we want to make it public that we've had this experience, then we are the problem, and we are acting out of place.

Tiffany Wright:

So we've had a Me Too movement that involved a reckoning on gender discrimination and sexual harassment and when are we going to have the same reckoning with racial discrimination as it exists in a legal community and the appellate community specifically. I think until that happens, we can do all the recruiting work we want to do. We can develop the largest pipeline and none of it matters if we don't root out and destroy the racism that plays out on a daily basis in appellate practice.

Tiffany Wright:

So I think that the personal and social environment is a huge contributing factor to why this exists.

Leah Litman:

Yeah, and just picking up on the analogy to Me Too, as someone who has thought a lot about the Me Too movement and the legal profession specifically, one of the challenges that I feel like I've encountered and I've seen other people encounter is just the insularity of the legal profession makes people nervous about raising concerns about someone else's behavior or an institutional structure because it's such a small world, and people are so quick to forgive and just accept someone's behaviour as oh, well they're great in other ways or this is just a necessary cost of their genius. I think that those similar insularity dynamics and closed network of the appellate profession are probably, and equally if not more, significant barrier to discussing issues of race and racial equity in the profession too.

Devi Rao:

So Leah, I think it's insularity as you describe it. I think it's also sort of an extreme version of collegiality where the bar really prides itself on everyone being very friendly and supportive and I think that there is that, and it's a very great community, but it also papers over some of the issues and makes it very difficult to talk openly about some of the problems. It's like bringing race up is some how uncivil or because it makes people uncomfortable it's not the thing that is supposed to be done.

Leah Litman:

I am so glad you are sounding the civility alarm Devi. This is a personal, again, just aggrieved point for me. The civility problem, I see it as in part an incentive not to bring up issues of race or to note when a certain statement or action reflects either explicit targeted racism, as Tiffany suggested, or implicit bias. It is instead an incentive to traffic in conversations that have no stakes for people. So let's have a super involved debate about whether you are a one space after a period person or a two space after a period person. I have strong views about that, but those can't be the only conversations we are having as an appellate community because that allows us to paper over more serious, substantive views that have really exclusionary and subordinating effects.

Leah Litman:

The civility incentive also valorizes this idea that we should be able to agree with people no matter their views and even when we're on other sides of the debate. That's great in a lot of ways, but just to take an example that is playing out in the news, there was that horrible, racist pile of shit column in Newsweek where someone was arguing that Kamala Harris actually is ineligible to run for president. I think most

people in the appellate bar would say, well you don't have to say that's an argument that's in good faith, and you can say that's a racist pile of crap and that's fine.

Leah Litman:

But then we tolerate so many other arguments and behaviors and positions that have similar consequences of suggesting certain people aren't welcome or just not acknowledging affects on particular communities, and the hitting people over the head with the norm that you need to be able to agree with people on the other side no matter what they're saying is great in a lot of applications, but maybe overinclusive in some respects.

Tiffany Wright:

I've seen it playing out around recent events after George Floyd's murder. I mean it was silence from the appellate community about that, but then when there was property damage, that seemed easier to talk about. We can talk about the graffiti on our law firm's insured, leased building, but we can't talk about a man being tortured to death on camera because that's somehow less comfortable to talk about. So it's just like we prioritize our comfort and our civility over actual pain and death that's happening to people. So it's a really unfortunate thing that does play out in the community.

Tiffany Wright:

The other thing I think that we really need to deal with I think is the role of actual institutional and systemic racism in this particular segment of the legal community. So systemic racism are processes and procedures and institutions that disadvantage people of color, and one part of the admission price to appellate practice fortunately or unfortunately, is judicial clerkships, particularly fancy ones on the Supreme Court or certain courts of appeals. Black people, Latinos, Native Americans are woefully underrepresented among Supreme Court clerks specifically. We have to talk about that and make it an action item to the extent that we can.

Tiffany Wright:

For example, Justice Ginsburg has had one black clerk in 40 years on the federal bench. None in the 13 years that she was on the DC circuit and just one since she's been on the Supreme Court for 27 years. Justice Alito has had just one. So this is a problem because what that does is it continues to shut out certain segments of the community from the most powerful places in our profession and that's really unacceptable.

Tiffany Wright:

I think this term, just this past term, we had the first Native American law clerk ever. That is unconscionable and unthinkable, and we should all be ashamed of that. That is how systemic racism plays out and keeps the appellate community largely male and largely white.

Amir Ali:

Yeah. I'll just add that I think right now people are at least purporting to have this be a moment of reckoning when it comes to race. We're looking at corporations to do things, and hopefully they will take meaningful actions. But I think this is a moment for the legal profession to look inwards at its own practices. I think that the appellate bar arguably has more to do than anyone else, and I'm really just piggybacking on what Tiffany said here, but a lot of legal organizations are looking for the shiny

credentials. The appellate bar looks for every single shiny credential and to have 10 of them, right? Top law school, clerkship, spend time in appellate practice.

Amir Ali:

The systemic problems at each of these steps, they stack. Each of these can be an in crowd thing and for people who know math or statistics, this is not additive or subtracting at each step. This is multiplying at each step. So I think that it's a moment of reckoning and introspection for our bar right now.

Leah Litman:

The Supreme Court clerkships are also going to be tokens to do additional work in the appellate bar and Justice Ginsburg's black law clerk that you mentioned went on to become a court of appeals judge. So this is part of why these clerkships are important. But I also feel like I would remiss to note that maybe something that needs to happen is revisiting the importance of some of these credentials just because I think right now, if I am advising a student on applying to clerkships, I need to tell them that some number of court of appeals judges and Supreme Court justices select for ideology, and if they're selecting for an ideology for which, let's say, fewer women or people of color subscribe to, that itself is going to have an exclusionary effect on who gets access to these important credentials.

Leah Litman:

If we know that is happening, then continuing to rely on those credentials as a way to get access to the profession and different segments of the profession is I think a real problem. Again, when you know that those credentials are going to be awarded in ways that have disproportionate effects on particular communities.

Amir Ali:

Here, here.

Devi Rao:

When we're talking about the gatekeeping role of these fancy credentials, I think we really need to talk about some of the most prestigious positions in the appellate world and that's in government. So notably the SG's office, civil appellate, criminal appellate. These are places that are not particularly diverse, which isn't to say they're not trying, but I think it's hard. There's this self-reinforcing thing happening here where you see the folks who are employed at these places, you see the folks who are arguing before the Supreme Court and they don't look like you. So you think I'm not going to bother applying.

Devi Rao:

Or I've had people say to me, "Well, I didn't clerk on the Supreme Court, so I can't even bother throwing my hat in the ring," which just means that the number of people who think that they're qualified are very few and those people are the people who look like the people who are already there. So I think I would encourage everyone to apply and I would encourage those offices to do what they can to think a little bit about their criteria for hiring and so who is not getting shuffled to the top of the stack and not really getting real consideration.

Amir Ali:

I'll just add to that that I think it is difficult to disconnect the lack of diversity in some of these offices to the substantive positions that they are talking. We've talked already about the present administration and the Muslim ban, the DACA case, the census case, and I think it is true that a number of those cases, the goal really was to disguise animus against communities of color and communities of color would see it that way and would not be ecstatic about furthering those goals.

Amir Ali:

But let me just say that it is not limited to this administration. As part of the national conversation we're currently having in the wake of George Floyd, we had a conversation about some of the systemic drivers that perpetuates violence against black people. Just to give an example, and there are many, but one of the things that showed up on those shortlists was qualified immunity, and you've talked about qualified immunity on this podcast before. It's a defense that state actors can raise in these excessive force cases among other cases. It was identified as one of the systemic problems that perpetuate violence.

Amir Ali:

If you look at the SG's office across all administrations and state AG's offices across administrations, if you work for one of these office, you are expected to push that further. I think again we're all looking for what are the corporations going to do, what are these other bodies going to do. I think and I hope that these offices will look inward and start thinking about why are we making this argument? Why are we pushing this argument that we don't have to make? Maybe you think you do because your boss does, but odds are there is something you can do about this, and I don't think that those conversations are happening and they need to.

Leah Litman:

So I would love to hear about some of the cases that I know you all are working on right now or projects. I know that MacArthur is counsel in the juvenile resentencing case that is the follow on to Malvo from last term, Jones versus Mississippi, and I'd imagine that before that case is actually heard or before it's decided, you're probably not going to be discussing the merits to that case, but I just want to note that for our listeners.

Leah Litman:

But I'd love for you to share with our listeners some of the appellate projects that you all are working on right now or other projects that you're interested in.

Amir Ali:

Okay. Well we have so many exciting cases. I'll flag just a couple. One petition we have pending that'll be considered at the long conference is a case called Phipps v. Idaho. It comes out of the Supreme Court of Idaho. This case concerns a rule from a US Supreme Court case called Michigan v. Summers which was a narrow rule that said that when police officers are executing a search warrant and the execution team is going in and they've got the warrant founded on probable cause to believe that drugs are present, that they can detain the residents of that place.

Amir Ali:

What the Idaho Supreme Court did in this case is adopt a rule that applies in the whole Ninth Circuit, and they extended that limited rule to apply to routine residents checks for anyone who's on community

supervision. So parole or probation, and not just the residents, but any visitor who happens to be present as well. So you have those major expansions. I mean, taking a rule that has relatively limited application and expanding it to one which touches the lives of, quite literally, hundreds of thousands of people and on a very routine basis.

Amir Ali:

Another case to flag, actually a pair of cases dealing with excessive prosecutorial delay. One case, *Harris v. Maryland*, the state of Maryland delayed for 20 years before indicting our client. The vast majority of those years, about 16 of them have garnered no new evidence in the case and just sat on that. Then after multiple witnesses had died, after they failed to preserve certain evidence, brought an indictment against him. So we challenged that under the due process clause.

Amir Ali:

Then, hard to imagine, but we have a case in which there was also a 20 year delay, except in that case, *Lambert versus Louisiana*, the delay took place between the time of conviction and sentencing. So our client was locked up at Angola Penitentiary in Louisiana without a sentence for two of the offenses for which he was convicted for 20 years. It had dramatic impact on his life. Wasn't eligible to get a GED for that 20 years, wasn't eligible for various jobs and other privileges that every other prisoner at Angola would be entitled to. All of those go into his ability to seek clemency and other relief, and all of that deprived just because they never pursued a sentence against him for 20 years. Both of those are petitions before the court right now.

Tiffany Wright:

Well I'll be anxiously awaiting to see what happens in Taylor, the qualified immunity petition. I have my theories on why the court didn't take it up this past term. We'll see if that changes, but I think, especially in this moment now that we see that there probably will not be a legislative solution to qualified immunity, that this would be a good time for the court to step up.

Tiffany Wright:

I'm also watching Torres, which is going to be argued by Kelsi Corkran, the question of if you are shot by the police but get away after being shot, whether a seizure has occurred for fourth amendment purposes. We'll be closely watching that. Also DeRay Mckesson's case about whether or not if you are leading or organizing a protest whether you can be held accountable for things that happen that other people do with that protest consistent with the first amendment. I am really curious to see what happens with that.

Tiffany Wright:

Of course, really excited about the work that TAP and the Howard Clinic will do this fall with the students. So that's what I'm looking forward to for this upcoming term.

Devi Rao:

Taking a step back from the court and its work, one thing that I have been spending some time on and I'm excited about is actually, I feel hopeful about the next generation of appellate lawyers and I feel like there is the ability for the representation piece that Tiffany talked about could be real.

Devi Rao:

Amir and I have been hiring for fellowships or putting together fellowship applications with students and the quality of students, the diversity of students that we've been seeing apply into our organization has just really been humbling to see, and to see all these great students, many of whom we're losing to other organizations. So it's like these people have multiple offers and options and I'm just really excited about all the work that these folks are going to do, and the change that they're going to bring to the appellate community. So look forward to that in, I don't know, five years.

Leah Litman:

So what advice would you have to law students or lawyers in the interim five year period who are looking to do something about diversity in the appellate bar?

Tiffany Wright:

So for law students, I would say don't count yourself out. I think a lot of times women and people of color tend to assume that you're not qualified for things that you are definitely qualified for. I know I told TAP's founder, Juvaria Khan, that I was not going to apply to supervise the clinic because I was not qualified. I had not taught before and she told me that that was silly, and I applied anyway. I'm glad that I did because obviously somebody thought I was qualified, but I notice that that's a pattern with myself. I had to be prodded to apply for every clerkship I ever got and everything because I just assumed that I wasn't in the group of people that was most qualified for it.

Tiffany Wright:

So law students, don't do that to yourself. Go out there, apply for what you want and work hard for it. Then get involved. I mean TAP is here. Reach out to us. We will be trying to reach out to you, but get involved in that type of programming and get to know your professors. All of the advice that people tell you about law school is really important, but the number one thing is don't count yourself out.

Leah Litman:

Amir or Devi, do you want to add anything?

Amir Ali:

I was going to say, and Tiffany already said it, but look out for TAP programming. It's one of the resources that you can benefit from. We're going to be talking about why diversity matters in the appellate bar. We're going to be talking about what it takes to succeed in the appellate bar, what appellate lawyers do, the stakes in these cases, and it can be a resource going forward for learning more about why you should consider doing this work and why it matters.

Devi Rao:

So in addition to the things that law students can do and more junior attorneys can do, I'd actually like to focus on things that more senior attorneys can do to increase diversity here, which is make space for more junior attorneys, for women, for attorneys of color. If the client wants you, the more senior head of the appellate practice to argue the case, suggest a younger person for the job. Suggest diverse attorneys for board seats, elite professional organizations that may be requesting nominations. Amplify the voices of women and diverse attorneys in meetings. Give them credit for their ideas.

Devi Rao:

Most importantly, think about these issues, scrutinize your own actions and ask how you can do better and what else you can do. Doing nothing isn't neutral. It's acquiescing to and aiding in the system that exists that helps certain people and hurts others. So I think that the increasing diversity in the appellate bar is not just something that diverse lawyer's need to focus on. It's something that everyone should be focusing on.

Tiffany Wright:

I can just add a couple of things to that. I love all of those points. I would say also think about how you can get involved. Are there law students that you can mentor, and this is something that TAP does, sort of connect law students with mentors. Are there organizations that you can donate to? I mean TAP runs exclusively on donations and funding and this sort of initiative takes a lot of resources. So think about affirmative steps that you can take even outside of your everyday practice to try and fix this issue.

Leah Litman:

So one other initiative I wanted to highlight is the recently formed Law Clerks for Diversity, an organization that is formed to address the underrepresentation of minorities and other diverse populations in federal clerkship. So they are launching a limited mentorship program where they pair applicants navigating the clerkship hiring process with current and former law clerks for mentorship and guidance. Beyond that formal mentorship program, they're also going to be holding feedback sessions on preparing cover letters and writing samples and other information sessions and networking events that will be open to people who aren't a part of their mentorship program.

Leah Litman:

So we will share a Google document on our website as well as on Twitter for current and former law clerks interested in volunteering as mentors and law students and recent graduates who are interested in clerking for them to sign up. They're currently reviewing applications they received from their earlier July deadline, but they will have the program operating and accepting applications on a more rolling basis soon and will also be advertising their more open events as well.

Leah Litman:

You can follow them on Twitter @clrks4diversity and that's C-L-R-K-S, number four, diversity or email lawclerksfordiversity@outlook.com. That's all spelled out. So law, clerks, F-O-R, diversity @outlook.com and it was founded by two clerks, Danielle Barondess and Steven Arango, who are both wrapping up district court clerkships and Danielle's clerking on the Ninth Circuit next year. You can also follow them on Twitter by searching for them.

Leah Litman:

So, thank you all so much for appearing on the show Devi, Amir and Tiffany. Thanks to our producer, Melody Rowell. Thanks to Eddie Cooper for our music and thanks to law student Bella Pori for some research related to this episode. Thanks everyone. Come back any time.

Amir Ali:

Thank you.

This transcript was exported on Aug 19, 2020 - view latest version [here](#).

Tiffany Wright:

Thank you.

Devi Rao:

Thanks for having us.