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CIVIL RIGHTS IN THE 1990's

John R. Dunne*

When I look over the roster of distinguished leaders of our profession that have delivered the Max Schmertz lecture, I feel very privileged to have been invited here to participate in a program which links a proud family with a great institution — the Hofstra University Law School which, in an incredibly brief period, has become one of the nation's leading law schools — a truly important center of scholarship, learning and public service.

Since last Fall, when Professor Burton Agata called to invite me to be with you today, I have thought long and hard about what I might cover. I considered the troublesome issue of how, within constitutional bounds, to encourage minority scholarships; or whether

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* Assistant Attorney General, Civil Rights Division, U.S. Department of Justice. This address was delivered by Mr. Dunne on March 25, 1992, at the Hofstra University School of Law, as the 1992 Max Schmertz Distinguished Professor of Law Lecturer.
and how to strengthen historically Black colleges in America; or the world commitment to international human rights which is developing so vividly from Capetown to Vladivostok; or even the question of mandatory pro bono for law students, as well as for lawyers — clearly, all important and timely issues. But I decided instead to stick to what took me from Long Island to Washington and talk more broadly about the Federal Civil Rights laws which the Department of Justice is charged to enforce and what I see will be the challenge of their effective enforcement during the final decade of this century.

While Holmes told us that “the life of the law . . . [is] experience”,¹ I believe that the strength of the law is its ability to adapt to change; and in the almost forty years since Brown v. Board of Education² change has been the vehicle for bringing a higher degree of justice not only into the lives of African-Americans but into the lives of all Americans who have suffered from both mindless prejudice and the deliberate indifference of those in authority.

It was not really all that long ago that Apartheid was legal and enforced in many parts of the United States. Jim Crow laws, the legacy of Plessy v. Ferguson,³ maintained a system of racial suppression in the South. Schools were segregated by law and practice.⁴ Especially in the South, Black citizens, barred from exercising their 15th Amendment protections⁵ and simply exiled from the system, had little or no political clout. Employment, housing, public amenities, and access even to Federal programs were frequently restricted on a racial basis.⁶

But six decades later, the foundations of Jim Crow were dealt a mortal blow when a unanimous Supreme Court reviewed the pernicious effects which segregated public schools had on Black children

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3. 163 U.S. 537 (1896).
4. Id. at 544-545.
5. U.S. Const. amend. XV states in pertinent part:
   § 1: The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
   § 2: The Congress shall have the power to enforce this article by appropriate legislation.
and declared in Brown that in the field of public education, “separate but equal” had no place.⁷ And although that ruling was limited to public education, the spirit of the decision condemned other forms of segregation in the South and it called into question the equally painful but often more subtle forms of discrimination found elsewhere in America.

The Supreme Court, however, did not have the tools to dismantle the entire system of institutionalized discrimination, and its schedule of “all deliberate speed”⁸ seemed to put off a national sense of urgency to eradicate both the programs and the vestiges of a legacy of shame. And so, faced with “massive resistance”⁹ and general political indifference to deprivations of other basis human rights, for the next decade, the Civil Rights movement took to the streets to make the promise of Brown a reality, to awaken the nation’s conscience as they had awakened to the evil of discrimination so that we, as one people united, could once and for all put an end to racial segregation, subordination and oppression.

Although those who called for equal rights were often met with billy-clubs, firehouses guard dogs, and, at times, bombs and bullets, they persevered in their fight, and slowly began to win the attention and support of a theretofore seemingly indifferent nation.

By the mid-sixties, “the American dilemma” of race relations, earlier described in such agonizing depth by Gunnar Myrdal,¹⁰ had finally been placed on the national agenda and the world watched intently to see whether structural social change could actually be achieved through the rule of law.

Hamilton had observed in the 15th Federalist Paper that government has been instituted “because the passions of men will not conform to the dictates of reason and justice without constraint”.¹¹ Could a peaceful reformation of American life and customs be achieved two hundred years later, through legislation and law enforcement? Could the nation’s government respond to Dr. Martin Luther King, Jr. who, during that painful decade urged the nation: “To rise from the dark and desolate valley of segregation to the sunlit path of racial justice.”¹²

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⁷. 347 U.S. at 495.
⁹. Id.
It is fair to say that the following decade did bring a national response of peaceful change and justice through the rule of law. In quick succession, Congress passed the Civil Rights Act of 1964 to guarantee all persons the right to public accommodations, education and employment without regard to race, color, sex, religion or national origin. The following year came the Voting Rights Act which, Chief Justice Warren observed in *South Carolina v. Katzenbach*, "marshalled an array of potent weapons" against the insidious and pervasive evil of racially discriminatory voting rules which had been perpetrated in certain parts of our country through, "unremitting and ingenious defiance of the Constitution." And in 1968, Congress enacted the Fair Housing Act, prohibiting discrimination in the sale or rental of housing.

Following that flurry of initiatives, the decade of the seventies was a time of testing to determine whether these legislative responses were adequate to the challenge. Federal examiners registered Black voters, while Department of Justice lawyers went to court to enjoin systems of voting discrimination. The doors of institutions of White academia were opened to Blacks and theretofore segregated enclaves began to provide housing for black families.

Then came the 1980's, a period of change for the Civil Rights laws as court decisions and practical experience demonstrated the need for change. In 1982, in response to the Supreme Court's narrow interpretation of the 15th Amendment in its application to the Voting Rights Act in *Mobile v. Bolden*, Congress amended Section 2 of the Voting Rights Act to prohibit practices that result in voting discrimination, even if those practices were not intended to discriminate.

16. *Id.* at 337.
17. *Id.* at 309.
20. 446 U.S. 55, 65 (1980)(stating that the Fifteenth Amendment does not entail the right to have Black candidates elected but prohibits only purposeful discriminatory denial or abridgement by government of freedom to vote "on account of race color, or previous condition of servitude").
Congress responded in similar fashion after the Supreme Court in *Grove City v. Bell*22 limited the scope of Title IX's prohibition against sex discrimination by schools that receive Federal funds. The Civil Rights Restoration Act of 198723 made it plain that schools which receive any Federal funds may not discriminate in any of its programs.

And again, after a series of Supreme Court decisions limiting and weakening the Title VII protections against employment discrimination, most notable the Court's decisions in *Patterson v. McLean Credit Union,*24 *Wards Cove Packing Co. v. Atonio,*25 and *EEOC v. Aramco,*26 Congress passed, and President Bush signed, The Civil Rights Act of 199127 to clarify and strengthen the remedies for victims of unlawful harassment and discrimination in the workplace.

During the same period, Congress passed additional Civil Rights laws initiatives: The Indian Civil Rights Act;28 extension of the Voting Rights Act29 to protect Hispanic, Asian and Native American voters; The Civil Rights of Institutionalized Persons Act of 1980;30 The Civil Liberties Act of 198831 to compensate Japanese Americans who had been interned during World War II; the Fair Housing Act Amendments of 1988;32 The Hate Crime Statistics Act;33 and The Americans with Disabilities Act.34
Thus in the course of nearly three decades, through a combination of presidential leadership, congressional action, vigorous enforcement and judicial interpretation, the three centuries-old practices of segregation and discrimination were replaced by stronger laws protecting Civil Rights — laws which have irreversibly changed and strengthened the character of American society.

Take just one example of change — that of political participation. In 1964, in the deep South states of Georgia, Alabama, Mississippi, and Louisiana, only twenty-two percent of Black persons of voting age were registered, while the rate for whites was seventy percent. By 1988, Blacks had closed to within six or seven percentage points in Georgia, Alabama, and Mississippi, and in Louisiana the Black registration rate was actually two percentage points higher than that of Whites.

Minority office holders have been transformed from a rare exception to a common occurrence. According to the Voter Education Project, as late as 1968 there were only about 250 Black elected officials in the entire South. By January of 1990, the number of Black elected officials in the South had increased to just under 5,000.

This phenomenon is attributable, in part, to the enactment of the Voting Rights Act which was the beginning of the end of disenfranchisement. In this regard, let me pause a moment to clear up a common misunderstanding of the Voting Rights Act and how we enforce its provisions in the context of legislative redistricting. Our objective is not to maximize the number of minority elected officials in this country by forcing the creation of districts in which minority candidates are assured of victory. That is not what the Voting Rights Act is about. Rather, what we are attempting to do is remove the structural barriers which deny minority voters a fair opportunity to elect candidates of their choice. The Act is intended to protect the rights of voters and not the ambitions of candidates. And the increase in the number of Black elected officials across America is simply a by-product of those efforts. We will continue to press to enforce the protections of the Voting Rights Act as well as all of the other statutes over which we have principal responsibility.

For much remains to be done to make the promise of our Civil Rights laws a reality for all Americans. I believe that, in the 1990's as America becomes an increasingly multi-racial society, the emphasis will shift from the legislative halls back to the courtrooms as the Justice Department and concerned citizens and community groups strive to enforce and to make fully effective the existing Civil Rights laws. Specifically, let us look at some of the challenges which lie
before us in the areas of housing, employment, and education.

Although racial discrimination in housing has been illegal for more than twenty years, it continues to be practiced, particularly in new and more subtle forms. Accordingly, we will, for the first time, augment our enforcement efforts by hiring testers to verify complaints of discrimination in the provision of rental housing and to identify landlords who engage in discrimination.

In addition, we are investigating the mortgage lending practices of banks to determine whether their marketing practices or their rejection of mortgage loan applications from minority borrowers at a higher rate than applications from non-minority borrowers are due to discrimination or to legitimate credit considerations. We consider this a very important matter and Congress has recognized that equal access to housing may well depend on nondiscriminatory access to credit, a right which is guaranteed both by the Fair Housing Act and the Equal Credit Opportunity Act.

The Fair Housing Act Amendments of 1988 now prohibit housing discrimination against the disabled and we have successfully sued several local governments for failing to make reasonable accommodation within their zoning laws which otherwise prevent establishment of group homes for retarded or mentally ill persons. The Amendments also prohibit discrimination against families with children under the age of eighteen, unless the housing is genuinely designed to serve only older people. As a result, we will continue to file suits against landlords who refuse to rent to families with children — a growing practice particularly recurrent in trailer parks, which is particularly hard on the increasing number of single parents who are trying to raise families on their own and who are rapidly joining the ranks of our nation’s homeless. The law does recognize the legitimacy of the needs and desires of senior citizens, but schemes that corrupt that exception will not be permitted to stymie the Congress’ stated goal of fair and open housing.

The newest and perhaps the most challenging area of responsibility of the Civil Rights Division will be in the enforcement of the landmark Americans with Disabilities Act (the “ADA”), which

outlaws discrimination against the largest, poorest, least employed and least educated minority in America — the disabled. The law now requires reasonable accommodation of the disabled community's special needs by employers, businesses and providers of state and local government services. While the law will make the landscape of American life more accessible for the 43 million Americans with disabilities, it is also intended to change the way we think about the disabled — to focus on them as people, and not on their disabilities.

The enforcement provisions of the ADA, as they apply to places of public accommodation and to state and local governments, became effective this past January and the employment protections will be in effect in July. We now have authority to bring law suits to enforce the law by seeking not only injunctive relief, but also compensatory damages and, in some cases, civil fines. We will use the weapon of litigation sparingly, however, for it is our enforcement policy first, to educate and negotiate, and then to litigate only when these efforts have proven unsuccessful to bring a facility into compliance. We will only initiate lawsuits of general public importance against carefully targeted and selected entities who refuse to comply with this new and very sweeping law. It is a policy which has the support of disability advocates and the law's sponsors, and should result in the public's strong support of its goals.

Although under the ADA and Title VII we can bring employment discrimination suits only against state and local government employers, the legal precedents that we establish will help shape the nation's work environment as a whole, and will be increasingly important as women continue to enter non-traditional jobs such as in law-enforcement and other criminal justice roles and seek to break through the very real glass ceiling.

The central issue in the great majority of our employment cases has been the use of tests and other selection devices that have had a disproportionately adverse impact on minorities or women without demonstrably assisting the employers in choosing the best qualified people. And rather than just running to court in response to a com-

44. 42 U.S.C. § 2000-e(5)(f) (1988). However, while the Attorney General can only prosecute state and local government employers, the Equal Employment Opportunity Commission ("EEOC") may pursue prosecution of other covered entities which are not state or local employers. See 42 U.S.C. § 2000-e(5)(f) (1988).
45. See, e.g., Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991)(holding that Sheriff's
plaint, we have been working with public employers to help develop solid employment tests that are truly job-related — thus eliminating the need to resort to some questionable devices such as the use of separate lists, race norming and quota hiring.

Any discussion of employment rights will invariably focus on the nettlesome issue of affirmative action. It is still unclear just what effect the Civil Rights Act of 1991 will have on affirmative action. On the one hand, the amendments to Title VII say that they are not intended to affect otherwise lawful affirmative action programs. On the other hand, some of the amendments have the potential to produce a practical impact on affirmative action.

The courts will be asked to decide whether a provision of the Act, which addresses the issue of mixed-motive hiring decisions and which was intended to overturn Price Waterhouse v. Hopkins, actually limits or expands the use of affirmative action. Specifically, Section 107 of the Act states that Title VII is violated whenever race or sex is a “motivating factor” in an employment decision. Taken literally, this provision would seem to render unlawful many forms of affirmative action which generally require some consideration of race or sex. A later section of the Act, however, states that nothing in the Act “shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.” And the so-called Dole Memorandum, which President Bush directed Federal officials to use as authoritative interpretative guidance, declares that “this legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs.” Thus, it is an open question whether an affirmative action plan that relies on sex or sex as a motivating factor is “otherwise in accordance with the law.”

Another affirmative action issue is in the field of education, namely, minority scholarships. It seems clear that some minority scholarships will remain lawful, particularly those that redress some

Department Sergeant examination had a disparate impact on women); Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140 (2d Cir. 1991)(holding that Police Department examination had a disparate impact on minorities).

identifiable past discrimination. It may prove relevant to any analysis to distinguish between those scholarships in which race may be considered as one of many factors in the awarding process and those that are designated exclusively for the members of a single race; between those that depend on private funds and those that depend on state funds; and between scholarships established by state governments and those set up by the Federal government. While these are questions that likely will be answered over the next decade, we will not have to wait very long for answers in some still unfinished business in the area of education. The Supreme Court in Brown described education as “perhaps the most important function of state and local governments” and “the opportunity of an education, where the state has undertaken to provide it, is a right which must be available to all on equal terms”.

The Civil Rights Division has a particular interest in higher education and is currently engaged in litigation with the states of Mississippi, Louisiana, and Alabama in which we seek to open historically White state university systems to minority students and to insure that the historically Black state colleges — schools which have traditionally trained the leadership of the Black community — receive fair and adequate public funding. Last Fall, the Mississippi case, United States v. Mabus, was argued before the Supreme Court and any day now we will hear just how far the Constitution requires a state to go in order to eradicate the vestiges of a legacy of discrimination. We believe the state has to do more than merely open up admissions to its superior, previously all-White schools on an equal basis — that it must enhance its support of both facilities and programs of the previously under funded historically black colleges which are an important element of Southern higher education and which meet the cultural as well as academic needs of many African-American youths. As we said in our brief to the Court: “The reallocation ... of programs and courses must be done in a way that does not place the burden of desegregation discriminatorally on Black students, teachers and administrators.”

I believe we can confidently say, and with a tinge of pride in our system, that, over the course of the past two generations, enormous change has been accomplished in our nation through the rule of law. But as our society continues to change and rearrange its priorities

54. 347 U.S. at 493.
and redefine its national purpose, much remains to bring about true justice to all Americans.

I began my career in government in the courts of this County — in a courthouse whose entrance bears the inscription “Justice is God’s idea and Man’s ideal”. Madison expressed the ideal in a similar vein in Federalist Paper 51, when commenting of the duty of a free government to protect Civil Rights: “Justice is the end of government, it is the end of civil society; it ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in its pursuit.”

Webster defined it a bit more simply but no less loftily: the goal of justice is to be right, to be fair and to be correct. I believe that America as a nation wants to be right and correct, I am equally certain that we at Justice are sufficiently modest to realize that, while we may not always be right, we have an unswerving commitment to seek fairness, particularly in the vigorous enforcement of our nation’s Civil Rights laws. Like the poor, prejudice and discrimination will always be with us. But we must never, never forget the challenge which Dr. King left the nation: “[W]e will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.” Thank you.
