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## SYMPOSIUM ON CONTEMPORARY PERSPECTIVES ON CIVIL RIGHTS AND CIVIL LIBERTIES

### INTRODUCTION

#### WHITHER "SILVER WRITES"?

The Honorable Denise R. Johnson\*

It has been almost thirty years since Congress passed the Civil Rights Act of 1964.<sup>1</sup> Then the goals of the civil rights movement seemed clear, and the methods to achieve them were straight-forward—prohibit discrimination and assure voting rights for African Americans. Although these goals became a part of national policy enforced by the federal government, individual, as well as institutionalized, forms of resistance to them were overt, arrogant and violent. The enemy was, therefore, easy to identify and target. Now, many years later, the inadequacy of the early civil rights laws is apparent. The resistance has proven more stubborn, more subtle and more widespread, the movement itself has splintered, and hate crimes are on the rise. There are far more claimants (e.g., women, African Americans, Hispanics, Native Americans, gay men, lesbian women, disabled persons) and within the claimant groups, there are strong tendencies to reject, or at least stand apart from, the assistance of people of good will from majoritarian groups. The increasing factionalism of the movement, and the intractability of the resistance, with its subtle and protean nature, have all worked to shatter whatever consensus there was as to how to achieve the fulfillment of the goal of civil rights for all.<sup>2</sup>

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\* Associate Justice, Supreme Court of Vermont.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

2. James Farmer, founder of the Congress of Racial Equality, cited polls which indicated that 75% of the majority supported the civil rights movement in 1963 after the March

The current lack of consensus on national civil rights policy is nowhere more apparent than in the Civil Rights Act of 1991.<sup>3</sup> Touted as a victory for the civil rights movement, the Act instead reflects the compromises of a Congress that is no longer fully committed to the eradication of discrimination in the marketplace. Congress fought bitterly for two years over what was, essentially, a false issue—whether the bill imposed quotas based on race and gender. Initially, it was passed by the Congress, but President Bush vetoed the legislation, and the veto was sustained. Although Mr. Bush remained adamant in his refusal to condone legislative “quotas,” within days of the Hill-Thomas debacle, a compromise was reached in an apparent effort to heal the wounds of the Senate, and appease women and minorities who opposed the nomination of Judge Thomas.<sup>4</sup> It is hardly a victory for disadvantaged groups.

With the passage of the Act, Congress claimed to turn the clock back and restore the status quo existing before several decisions of the United States Supreme Court significantly limited the ability of minorities and women to redress employment discrimination. The legislative statement of purpose mentions only *Wards Cove Packing Co. v. Atonio*,<sup>5</sup> but analysis of the Act shows that it overturns at least six additional decisions that have had various impacts on the enforcement of civil rights.<sup>6</sup>

#### The Act affects remedies under Title VII of the 1964 Civil

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on Washington. This broad support allowed the passage of strong legislation to address civil rights problems, but the consensus is now lost. Sheldon M. Stern, 'A Time to Adjust,' *BOSTON GLOBE*, Apr. 9, 1992, at 21.

3. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

4. Speeches about the bill on the floor of the Senate reflect its preoccupation with the Thomas confirmation hearings. One Senator, an opponent of the legislation, remarked that the goal of the legislation was to “soothe internal conflict, not meet external needs. It was to seek the protection of political cover in an agreement where all could claim victory, and none would be forced to claim responsibility.” 137 CONG. REC. S15,333 (daily ed. Oct. 29, 1991) (statement of Sen. Coats).

5. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The 1991 Civil Rights Act states as one of its purposes the “codification of] the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court . . . prior to *Wards Cove Packing Co. v. Atonio* . . . .” Civil Rights Act of 1991, § 3(2).

6. *EEOC v. Aramco*, 111 S. Ct. 1227 (1991); *West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. A.T. & T. Technologies*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The statement of purpose states the Act is passed “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” Civil Rights Act of 1991, § 3(4).

Rights Act,<sup>7</sup> the Americans with Disabilities Act,<sup>8</sup> and a Reconstruction Era Civil Rights Act, which prohibits discrimination on the basis of race in the formation of contracts.<sup>9</sup> But, in important respects, the Act gives with one hand and takes away with the other.

For example, the Act reaffirms, rather than reverses, a major holding of the *Wards Cove* case, that plaintiffs alleging disparate impact discrimination may not establish a prima facie case by using statistical imbalances in the employer's work force and the surrounding community.<sup>10</sup> In other words, plaintiffs may not use the "bottom line" to make an initial showing that the employer is discriminating, but must challenge specific practices of the employer and must persuade the court that each practice has a discriminatory impact. This is the anti-quota provision of the legislation, which addressed a Republican fear that "non-discriminating" employers could be sued if their work force did not reflect the percentage of women and minorities in the surrounding area. What plaintiffs were given in return was the opportunity to shift the burden of persuasion to defendants, if plaintiffs persuaded the court that certain practices had discriminatory impacts. *Wards Cove* required defendants to meet only a burden of production. Now, defendants must persuade the trier of fact that its discriminatory practices are "job-related" and a "business necessity." It is obvious that the public policy concern here is more with the employer than with the victim.

Moreover, regardless of whether the amended statute will more positively affect employers or victims in court, the law provides no incentive whatever for employers to take affirmative steps to implement a policy of non-discrimination. Common sense, and a wealth of experience, tell us that if women and minorities are grossly underrepresented in an employer's work force, based on a comparison with qualified workers in the area in which the business is located, the most likely explanation is discrimination. There

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7. Civil Rights Act of 1991, § 107(b) (amending 42 U.S.C. § 2000e-5(g)).

8. *Id.* In amending 42 U.S.C. § 2000e-5(g), the 1991 Civil Rights Act also changes the enforcement section of the Americans with Disabilities Act, which states: "The powers, remedies, and procedures set forth in . . . 42 U.S.C. [§ 2000e-5(g) . . . shall be the powers, remedies, and procedures this title provides . . ." Americans with Disabilities Act, Pub. L. No. 101-336, § 107, 104 Stat. 327, 336 (to be codified at 42 U.S.C. § 12117).

9. Civil Rights Act of 1991, §§ 101-102 (amending 42 U.S.C. § 1981 and adding § 1981a).

10. *Id.* § 105 (to be codified at 42 U.S.C. § 2000e-2).

are many subtle ways that employers send the message that women and minorities need not apply, without ever turning such applicants away. The reaffirmation of *Wards Cove* states clearly that we have abandoned the notion that employers are the key players in the enforcement of non-discrimination policy, for without incentives, policy will be enforced only through external means, namely lawsuits, with a minimal chance of success.

Another example of the Act's ambivalence is the revision of the *Price Waterhouse* test. In *Price Waterhouse v. Hopkins*, the Court held that even though a plaintiff proved that discrimination was a substantial factor in the employment decision challenged, an employer could prevail if it showed that it acted on other, legitimate motives to deny the plaintiff the employment opportunity. Section 107 of the Act overrules this holding, stating that an unlawful employment practice is established when the complaining party demonstrates that an impermissible factor was a motivating factor, even though there may have been others. The punch line is that if an employer demonstrates that it would have taken the action, absent the discrimination, the plaintiff wins, but only declaratory and injunctive relief, attorney's fees and costs. No damages may be awarded and the plaintiff may not be reinstated, promoted, or paid back wages.

The revised *Price Waterhouse* test has the potential to affect substantial numbers of disparate treatment cases because most involve mixed motives. The plaintiff pleads discrimination and the defendant pleads poor work performance or disciplinary problems on the job. The defenses may be meritorious and coexist with discriminatory motive. Even the plaintiff with the cleanest work record may suffer, in the evaluator's mind, from a lack of qualifications. Thus, few disparate treatment cases pass the old "but for" test. Apart from the fundamental question of whether courts can really ferret out the weight of factors that bore on an employment decision that was infected with discrimination, one has to wonder whether there is a plaintiff willing to invest the time, effort and serious emotional involvement required by this type of litigation to win fees for a lawyer.

One of the more serious deficiencies of federal employment discrimination law, and one civil rights advocates hoped to change, was its failure to permit, under Title VII, more than equitable relief. The new Act expands relief for intentional discrimination cases to include compensatory and punitive damages, in addition

to any other relief already authorized.<sup>11</sup> Presumably, this will allow the recovery of emotional distress damages resulting from discriminatory acts of employers. Coupled with the right to demand a jury trial,<sup>12</sup> this appears, at first blush, to be a significant victory for plaintiffs; however, "restrictions apply."

Section 102(b)(3) sets forth the limitations on the *sum* of compensatory and punitive damages. The limits range from \$50,000 for a respondent with between 15 and 100 employees to \$300,000 for a respondent who has more than 500 employees. Notwithstanding that the number of employees may have little to do with the net worth of the employer, the provision tries to ensure that no employer will be "hit too hard," and imposes an unfair, differential system of penalties for employers guilty of the same conduct.

In the long run, the limitation on damages may not benefit employers. Because the damage limitations may not compensate many plaintiffs, they will pressure the courts to continue the development of tort law in the employment context, where the damages are unlimited. One of the disadvantages to employers is that judge-made law does not give the same kind of notice of proscribed conduct that statutes do. But, as long as statutory remedies are limited, employers can expect to defend themselves against an increasing variety of employment torts.

The Act does overrule *Patterson v. McLean Credit Union*,<sup>13</sup> a decision that illogically restricted a Reconstruction Era Civil Rights Act<sup>14</sup> (section 1981) prohibiting racial discrimination in contracting, to the formation of the contract. In the employment context, section 1981 was available only to address racial discrimination in hiring; it did not extend to any racially motivated conduct in the performance of the contract, such as sexual harassment, promotion, or discharge. Section 101(b) corrects the problem by redefining the terms "make and enforce" contracts to include "performance, modification and termination, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

Interestingly, the damage limitations of section 102(b) do not apply to causes of action under section 1981, except to prevent the

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11. *Id.* § 102 (to be codified at 42 U.S.C. § 1981a(b)).

12. *Id.* (to be codified at 42 U.S.C. § 1981a(c)).

13. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

14. 42 U.S.C. § 1981 (1988).

recovery of double damages under section 1981 and Title VII. This results in unequal treatment for victims of employment discrimination because the damages will be uncapped for racial discrimination, but capped for discrimination based on sex, age, religion, national origin and handicap.

The new Civil Rights Act is not all negative, but it is fair to say that it does not, and perhaps cannot, address some of the fundamental problems in the enforcement of civil rights. First, anti-discrimination laws, past and present, have not been very successful in reaching the subtle, less overt kinds of discrimination that are easily hidden. Although the effect on the victim is the same, subtle discrimination can be intentional, or it can be the result of unconscious and careless prejudice carried out by seemingly well-intentioned people.<sup>15</sup> This is discrimination that appears in the guise of decisions on the merits, which are easily sustained on the decisionmaker's subjective evaluation. The changes in the law increase, rather than decrease the difficulties in proof of these cases. Second, the Act does not touch the most controversial and divisive civil rights issue facing the country today—affirmative action. We cannot reach these issues by enacting laws until we reach some consensus about policy. Until then, we cannot begin to move forward as a nation with the singular purpose that ought to command our policy on equal rights.

Four of the pieces in this symposium attempt to offer pathways from this intellectual and public policy morass. All are symptomatic of the loss of cohesion that now characterizes the civil rights struggle. None offers a direct course of action. Rather, they treat issues that must be antecedents to action—how to view, how to conceptualize, how to evaluate civil rights issues. In this sense, they deal with the fundamental nature of the problem.

In *The Moral Confusion of Affirmative Action Jurisprudence or When Will We Learn to Bear the Shame of Guilt?*, Professor Kate Nace Day, drawing on works of literature, psychology and jurisprudence, offers a moral justification for affirmative action. She argues that the disadvantages that affirmative action can inflict on "innocent whites" do not equal an injustice, thereby rejecting the rationale the Supreme Court has used to depart from its original conception of moral responsibility for desegregation. Law, Day

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15. Emily Calhoun, *Workplace Discrimination: Truthfulness and the Moral Imagination*, 16 VT. L. REV. 137, 138 (1991).

points out, is founded on the morality of guilt and duty, that is, the duty to punish specific transgressors for wrongs done to others. But denying African Americans membership in the moral community through segregation is a failure within the morality of aspiration and shame. Thus, in cases in which the law itself has sanctioned or mandated the exclusion of human beings from the community on the basis of race, there is little question of individual guilt. Rather, there is a violation of the ideals of human aspiration, which produces shame. The cathartic required to redress shame cannot be punishment, but transformation. Almost by definition, in such cases, transformation requires inclusion. Hence, Day concludes that the remedy of affirmative action is a moral one, based on the morality of shame and aspiration.

The other three pieces deal with questions of experiential, rather than moral, imperatives. Professors Leslie Bender and Daan Braveman, in *Impassioned a Civil Rights Course*, write about their effort to imbue the study of civil rights laws with the spirit that informed the struggle of the 1960s. They took their inspiration from the beautiful poetry of Alice Walker, in particular, *Silver Writes*, a poem she wrote during that period about crashing racial barriers. According to the authors, Walker felt the term civil rights “‘could never adequately describe our longings and our dreams, or those of the non-black people who stood among us’ because the term is ‘totally lacking in color’ and ‘has no poetry.’” The authors share with us their educational goals and design for a course that includes a historical analysis of “‘who ‘we the people’ aren’t,” the meaning of privilege and subordination or oppression, and a critical analysis of a rights-based approach.

Professor Alex M. Johnson, Jr. and Eileen M. Blackwood, in very different pieces, write about the value to be accorded particular voices—those of color and of women—when they speak about issues of race and sex discrimination. Professor Johnson, in *Scholarly Paradigms: A New Tradition Based on Context and Color*, argues that the traditional, neutral academic paradigm for evaluating scholarly legal works, a paradigm that disregards the speaker’s context, is too narrowly circumscribed to evaluate “‘impassioned and subjective” voices, whether voices of color, of women, or other minority groups, when they speak about issues unique to their experience. He contends that “‘voices of color,” for example, should be evaluated based on authorial intent and context, not solely on the objective “‘merits” of the work. Indeed, Johnson questions the

application to *all* scholarship of a single construct which is based, historically, on an interpretative model developed by a dominant group. Thus, Johnson argues for sensitivity to context and voice when those elements are directly related to the value of the work.

Blackwood uses the framework of perspective based on experience to argue that courts should employ a subjective, rather than objective, standard in deciding sexual harassment claims. In *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, Blackwood argues that as long as we use concepts like "objectivity" and "reasonableness," concepts that have historically been defined by men, not women, we will not alter the status quo of sexual persecution of women because the standard for judging the offending conduct will be inherently male, not female. She suggests that if a woman suffers insult, indignity and job discrimination on the basis of sex, the law should protect her, whether or not the trier of fact concludes she is acting as other "reasonable" women would. Blackwood argues that the rationale on which the concept of reasonableness is based, that employers must be protected from the super-sensitive plaintiff, is without merit, since it is no different from the plaintiff with the "eggshell skull" that has been accepted for many years in the law of torts. Blackwood substitutes the reasonableness test for one that judges whether the harassment was unwelcome and resulted in harm.

The remaining pieces in this symposium cover a variety of subjects. Professor Robin D. Barnes, in *Scholarly Discourse*, replies to Johnson's essay on *Scholarly Paradigms*. She disagrees with Johnson that the legal community has reached any consensus as to a neutral, evaluative paradigm, and recognizes that even if the academy could agree on the components of one, it could not eliminate the effect of individual political value judgments on the interpretation of a piece of work. She makes the important point, which I hope will not be lost on legal scholars, that the current legal scholarship has little or no value to the practicing lawyer or judge because it is directed toward the theoretician or scholar and not the legal problem solver. Barnes urges minority professors to produce legal scholarship, and argues that such scholarship should be embraced, not because of the color or gender of its author, but because the scholarship challenges "universal notions of equality of opportunity, freedom of choice and free will."

In *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, Carl F. Stychin argues for the exclusion

of gay male pornography from the feminist anti-pornography attack because gay male pornography is not defined by the gender differences prominent in sexual relations between men and women. The author views gay male pornography as political expression that becomes protected speech.

In an essay on speech, *The Voice of the Little People—A Lost Value in Commercial Speech Analysis*, Professor Robert C. Hunter traces the development of constitutional protection for commercial speech under the First Amendment, from the 1940s to the present. Hunter's thesis is that the Supreme Court has shifted the balance of power on these issues to the government and to wealthier businesses and individuals with access to more advanced technologies. In the process, the Court, Hunter argues, has left behind the interests of the "little people." Hunter proposes that the Court consider the relative wealth of the speaker, as it did in the early days of commercial speech jurisprudence, and permit the government to regulate commercial speech only when it is fraudulent, misleading, or coercive.

Finally, Professor Richard O. Brooks decries the failure of the current environmental law regime to stem government-sponsored pollution. In his article, *A Constitutional Right to a Healthful Environment*, Brooks develops a theoretical basis for a constitutional right to a healthful environment. Although he recognizes that the values of life and protection of health are nationally shared values, and that a federal right makes sense, he concludes that the adoption of amendments to state constitutions may be more successful and more desirable. The adoption of rights at the state level may be more effective because they will, necessarily, be related to local environmental and enforcement issues.

To achieve America's promise of equality of rights and equality of opportunity for all has proved even more difficult than it appeared in the often bitter, yet seemingly promising, days of a generation ago. As is reflected in a number of pieces in this symposium, we are in many ways back to ground zero—searching for common ground on which to stand before the next significant forward march can begin. To find the necessary consensus, and then to formulate and implement the policies that will bring us nearer to the goals that must underlie it, is an altogether urgent task. It is a matter not only of simple justice, with which we in the legal profession must be particularly concerned, but also of self-interest for our society as a whole. Without the full acceptance and integration

of all peoples into the society, we will continue to be both materially and spiritually impoverished.