Where We Have Been, Are Now, and Seem to Be Going

by

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What I have to offer in this session is a highly personal retrospective on the past, perspective on the present, and prospective on the future. I'm going to start squarely in the middle with some personal recollections from 1966, when I spent the Summer after my first year of law school working on civil rights cases, and then go to a more general theme.

I. Where We Have Been

A. The Summer of 1966

I became interested in the possibility of practicing civil rights law during the mob resistance to the integration of the University of Mississippi, the desegregation of lunch counters, and the Freedom Riders. That seemed like a good fight to be in. It appealed to the Irish in me.

I was also reading a thirteenth-century epic by Langland, called PIERS PLOUGHMAN. The title character was a sort of Everyman, traveling the landscape in a sort of pilgrimage. He complained bitterly about lawyers, because they demanded money for getting

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I am grateful to my former firm, Lieff, Cabraser, Heimann & Bernstein LLP, for the assistance needed to prepare this paper. LCHB's web site is www.lchb.com.

justice for their clients, when justice was their clients' direct right from God. This idea appealed strongly to my impractical side.

So I went to law school, and then had the great good fortune to be able to live my dream.

My first experience working on civil rights cases was in Louisiana in the Summer of 1966. I was sent to New Orleans by the Law Students' Civil Rights Research Council, which was trying to provide resources for lawyers working on civil rights cases in the South. I worked with a black law firm, Collins, Douglas & Elie, and with the Lawyers' Constitutional Defense Committee.

1. ***Hicks v. Crown Zellerbach / Local 189 v. United States***

That summer after my first year of law school was principally divided among four activities. *First*, I worked on the employment discrimination class action against the Crown Zellerbach plant in Bogalusa that became *Hicks v. Crown Zellerbach*, 49 F.R.D. 184 (E.D. La., 1968), and *Local 189, Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The issues in the case involved racially segregated water fountains, restrooms, locker rooms, and lines of progression. All lower-paid jobs were held by blacks and all higher-paid jobs were held by whites. In the same production department, there were racially separate lines of progression, and black employees could not move from the lower-paid line to the higher-paid line without losing their seniority. The Eastern District of Louisiana had never had a case like that before, and the judge held status conferences every two weeks. In the first part of the Summer, LCDC was staffed by volunteers from the North that gave up their vacations to do these cases, so at every status conference I was accompanied by a different lawyer. The judge and I grew quite friendly. Halfway through the Summer, Richard Sobol came down from Arnold & Porter for the long term, and things settled down.

2. Establishing *Plessy* Claims in School Desegregation Cases

Second, I worked on school desegregation cases. In the Summer of 1966, the way that public schools were desegregated was called "freedom of choice," and it often operated at the rate of one or two additional grades per year. Under this slow system, desegregation was slow in coming, and all of the burden of desegregation lay on individual black families—brave parents and children who had to make individual requests to transfer to the "whiter" school, and who knew that the consequences could easily include loss of employment, night riders firing into their homes, crosses being burned on their lawns, and walking past a gauntlet of angry white parents on the way to school. Some black children transferred, but the majority remained in the segregated black schools. And the school boards liked that just fine.

Twelve years after *Brown v. Board of Education*, 347 U.S. 483 (1954), some Louisiana school districts had not yet been sued, and most rural districts had not yet had substantial levels of integration. Lawyers could not do much then about the night riders and loss of employment. Title VII had just gone into effect, but its prohibition of retaliation covered only retaliation for opposing or complaining of employment discrimination, and had nothing to do with retaliation for sending one's child to a white school. There was no known legal recourse.

What we could do is make continued racial segregation much more expensive. Across the South, civil rights lawyers were amending to their school desegregation cases by adding counts under *Plessy v. Ferguson*, 163 U.S. 537 (1896), demanding that students in the remaining all-black schools receive the same education as students in the predominantly-white schools.

So part of my Summer was spent gathering the facts that proved inequality. I used the Louisiana Department of Education statistics for each school district, showing that the amounts spent per student were six times higher in the "white" schools than in the "black"

schools, that there were new school buses for white students but old and unsafe ones for black students, that white students had schoolbooks and black students did not, and so forth. "In 1945, the South was spending twice as much to educate each white child as it was per black child. It was investing four times as much in white school plants, paying white teachers 30 percent higher, and virtually ignoring the critical logistics of transporting rural Negroes to their schoolhouses. In 1944, the seventeen segregating states spent a total of $42 million busing white children to their schools; on transporting colored children, they spent a little more than one million dollars." RICHARD KLUGER, SIMPLE JUSTICE (Vintage Books, New York, 1977) at 256–57. In each Louisiana parish (county) I examined in 1966, the school district spent about six times as much per white student as it did per black student. Even the most conservative judges had to issue such orders, and maintaining segregation started to cost a lot more money than it had previously cost.

3. <u>Starting New School Desegregation Cases</u>

Third, I spent part of the Summer traveling around northern Louisiana with the deputy director of the Southern field office of the Congress of Racial Equality, meeting with black parents in school districts that had not previously had desegregation cases, explaining the opportunities and risks of their filing such a case in their districts, and getting the ball rolling when the parents decided to proceed. They were among the bravest people I have ever met.

4. <u>The Meredith March from Memphis to Jackson, Mississippi</u>

Fourth, I participated in the last part of James Meredith's march from Memphis to Jackson, Mississippi, which he had begun but which others finished for him after he was shot just outside Memphis. A three-judge Federal court struck down the law forbidding demonstrations on the State Capitol grounds, but had held that we could not go up onto the steps. I remember the line of Mississippi State Troopers circling the building. Half of them had

bayonets, and half had machine guns. They would motion marchers over as if they wanted to talk, and then club them senseless with their rifle butts when someone responded. Then others would have to duck under the rifle butts to drag the victims to safety. And the FBI stood around, taking notes.

That was my introduction to workers' rights and civil rights. Now for the more general theme.

B. Prelude

We live in a flow of changes. Sometimes, we have to step aside to think for a moment to know where we've been, so that we can figure out where we're going.

At the turn of the Twentieth Century, workers had very few protections, and employers had very few constraints. There was little or no safety legislation at either the State or Federal level, and the courts tended to throw out what little there was. State-law protections were thrown out as burdens on commerce, and Federal protections were usually thrown out as exceeding the powers of the Federal government. A few Federal protections survived where it was intimately connected with interstate commerce, such as railway safety legislation

There were few unions, and they had even fewer rights. Strikes were routinely enjoined. Employers routinely forced applicants and employees to sign contracts promising not to join unions, just as employers today routinely force applicants and employees to sign arbitration agreements.

At the turn of the century, there was no known protection against racial or gender discrimination in employment. While 42 U.S.C. § 1981 was on the books, there was no awareness of any possible utility it might have in fighting employment discrimination.

For the first four decades of the century, the effort to redress the imbalance of power between employers and employees consisted largely of attempts to protect the rights of employees to engage in collective action, including forming unions, organizing unions, and creating and protecting a legal right to strike.

Government contracts were another source of progress. Government contractors were required to pay their employees regional minimum wages even before passage of the 1938 Fair Labor Standards Act required the payment of a nationwide minimum wage. The regional minimum-wage requirement was imposed in the Public Contracts Act of 1936, 49 Stat. 2036, and was upheld in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

President Roosevelt signed the first executive order banning racial discrimination in employment by defense contractors. Executive Order 8802, 6 Fed. Reg. 3109, signed on June 25, 1941. It was limited in scope, but during the war was expanded to cover all contractors. It was dissolved in 1946. Presidents Truman and Eisenhower also issued executive orders banning racial discrimination by government contractors.

C. <u>At the End of World War II</u>

At the end of the Second World War, employees had some limited safety protections, but their principal protection lay in combining with other employees into labor unions. The Federal statutory protections for labor unions led the Supreme Court to conclude that labor unions had a duty of fair representation toward their members, and that discrimination against members of a particular race or ethnic group breached that duty. *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).

At that time, this country was largely segregated. For much of the Twentieth Century, even the American Bar Association limited its membership to whites. When it received an application from a person of unknown race, it sent a member to check the race of the applicant. Racially segregated schools, lunch counters, restaurants, hotels, transportation, and even drinking fountains were the norm in a large part of the country.

Nevertheless, we had just finished a war against Nazi Germany, the most racist nation in history. It may well be that our revulsion at all that regime stood for caused the shift in thinking that made the civil rights revolution possible. A number of States enacted their laws against employment discrimination during this period, but they did not have much effect.

D. The 1950s

The decision in *Brown v. Board of Education* was the start of a fundamental change in legal protections. Individuals had rights they could exercise as individuals, not just as members of groups.

The aftermath of the decision was also important. *Brown* was among the few Supreme Court decisions to touch directly the lives of millions, or to provoke widespread resistance by State and local officials. The Court's and the Federal government's response to such resistance—including *Cooper v. Aaron*, 358 U.S. 1 (1958), calling out Federal marshals, Federalizing the Arkansas National Guard, and protecting small children walking to school in the face of jeering mobs—taught important lessons about the meaning of the Constitution and what being American requires of us.

More States enacted laws against employment discrimination, but they still did not have much effect.

E. The 1960s

The modern structure of statutory protections against employment discrimination began to take shape in the 1960s.

In 1963, Congress enacted the Equal Pay Act, 29 U.S.C. § 206(d), to forbid gender discrimination in pay for work of the same skill, effort, employment, and responsibility, performed under the same working conditions. In addition to governmental enforcement, individual women could bring their own lawsuits.

In 1964, Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, with an across-the-board prohibition of employment discrimination based on race, color, sex, national origin, or religion. Congress did not believe that there would be many charges, because State fair-employment agencies commonly received fewer than twenty charges a year.

In 1965, President Johnson issued Executive Order 11246, barring racial discrimination in employment by government contractors. The order was later amended to cover gender discrimination as well.

In 1967, Congress enacted the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, barring age discrimination against applicants or employees over the age of 40.

F. The 1970s through the 1990s

In 1972, Congress amended Title VII to extend its protections to Federal, State, and local government agency applicants and employees. Equal Employment Opportunity Act of 1972.

In 1973, Congress enacted the Rehabilitation Act of 1973, barring disability discrimination against Federal employees and against the employees of government contractors and grantees.

In 1978, Congress enacted the Pregnancy Discrimination Act of 1978, amending Title VII to make clear that discrimination based on pregnancy is gender discrimination.

In 1990, Congress enacted the Americans with Disabilities Act of 1990. Title I of the ADA bars disability discrimination in employment. 42 U.S.C. § 12101 *et seq.*

In 1991, Congress enacted the Civil Rights Act of 1991, Pub. L. 102–166, rejecting the limiting constructions the Supreme court had imposed on § 1981 and Title VII in several cases in its 1989 Term, and strengthening Title VII and the ADA by providing for limited common-law damages for intentional violations, and providing for their extraterritorial application to American employees of American employers. It extended the protection of antidiscrimination laws to more governmental employees and to employees of Congress.

In 1993, Congress enacted the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, providing for unpaid time off under certain circumstances.

II. Where We Are Now

A. Substantial Statutory Protections

There are clearly substantial statutory protections against employment discrimination, although there are gaps.

State fair-employment laws, such as the California Fair Employment and Housing Act, sometimes provide protections greater than those that can be found in Federal legislation.

B. Common-Law Protections

Many States have recognized common-law rights of employees that add substantially to statutory protections. These include negligent supervision and retention, rights to

be free from wrongful discharge, contractual rights to continued employment absent good cause, and, even in some States that embrace the more free-wheeling theories of "at will" employment, the right not to be discharged in violation of public policy.

Good lawyering has enriched our field a great deal, has lent dignity to minorities, to women, to older and disabled employees, and to all workers. It has redressed somewhat the imbalance of power between employers and employees.

C. The Ultimate Protection

The largest achievement of the civil rights revolution has not been in these specific protections, however. The largest achievement has been in our hearts: in our sense of what ought to be, and of what it means to be American.

While much remains to be done, much has in fact already been done. No other nation in the world could have accomplished as much change as the United States has in the past half century with as little violence as there has been here.

D. The Plaintiffs' Bar

The advent of fee-shifting has allowed many more lawyers to take civil rights cases. In the 1960s, it was not unusual for only one or two law firms in a State to handle all of the civil rights cases that were brought in that State. Today, this would be unthinkable.

The nation's largest organization of plaintiffs' employment discrimination attorneys is the National Employment Lawyers Association. Less than twenty years old, it has about 3,500 members. Its State and local affiliates add hundreds more. The ATLA Employee Rights Division has about 800 members. While I was at the Lawyers' Committee, we published

a free issues newsletter for plaintiffs' employment discrimination attorneys; we had almost 7,000 recipients on our list.

The advent of fee-shifting has also enabled many attorneys to take occasional plaintiffs' cases. Even some defense attorneys take an occasional plaintiffs' case. In this State, one case that stands out is a case of gut-wrenching racial discrimination complicated by a vast array of defenses. *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994), a case involving the New York State Division for Youth, was extremely ably handled by Bond, Schoeneck & King, a firm that generally represents management.

E. The Defense Bar

This may come as a shock to many members of the audience, but I credit the defense bar for a major part of the progress that has been made. There may be tens of thousands of lawsuits filed annually, but there are many scores of millions of employees. The work of management attorneys in counseling their clients, in developing better personnel standards and systems, in establishing internal complaint procedures and opportunities for review, have done much to make the promise of the law real in many workplaces.

My own experience with retaliation claims is an indicator of the role of defense counsel. Large companies normally have counsel, and use them in the ways described. While discrimination still happens, it is occasionally—but in my experience not commonly—accompanied by retaliation. Public-sector workplaces relatively seldom have counsel performing the roles described, and retaliation is in my experience far more common.

To the plaintiffs' attorneys in the audience, when you have a case in which the defendant was represented early on by an attorney, and in which there has been no retaliation, remember that your opponent may be the one to thank.

The role of defense counsel in making the civil rights revolution real is further illustrated by the fact that most defense attorneys accept the legal obligations of their clients even if they disagree on particular legal questions and on the facts. This makes it possible to resolve cases far more quickly and fairly. Just think what the field of employment law would be like if defense counsel took the approach of defense attorneys in the school desegregation cases.

F. The Swamping of Administrative Procedures

No enforcement agency has resources equal to its task. Over the last decade, the EEOC and State and local fair employment practice agencies have together received anywhere from 80,000 to 100,000 charges of discrimination annually, making it difficult to spend much time on any charge.

Those who remember the EEOC in the early 1970s will recall that the agency investigated fairly few charges, but did a fair job on those it investigated. Its conclusions were supported by real facts, interview statements, and detailed findings. These made it easier for the respondent to decide whether to conciliate, for the charging party to decide whether to continue, and for potential counsel to decide whether to take the case.

G. The Swamping of the Courts

A direct consequence of the lack of detailed findings is that substantial numbers of charging parties have to file suit to find out what happened. Employers are too close-mouthed about the reasons for their actions, often for good reasons but with the unfortunate side effect that charging parties feel discriminated against even when they have not been, and have to file suit before they find out the real reasons for their problems.

Unlawful discrimination occurs in too many instances, but too many of the claims filed in court are too thin to survive. The failure of the administrative system, and the failure of plaintiffs' counsel, to screen claims adequately is a major problem for civil rights.

The lawyer with a solid claim on behalf of a real victim of discrimination has to swim upstream against a tide of judicial presumptions of lack of merit born of having seen too many unwinnable claims brought by lawyers who failed to screen their cases or who could not get a straight answer from the employer that they could use in advising their client whether to proceed.

Picture yourself as representing a sexual or racial harassment client with the best claim ever brought, as you come before a judge who has tried or granted summary judgment to five dud cases in a row. It cannot be said too often: bringing thin cases, or maintaining them after discovery has shown their thinness, hurts the cause of civil rights.

H. Judicial Actions Having a Nullifying Effect

Plaintiffs' lawyers believe many judges substitute their own judgments for those of the jury, and grant summary judgment as a docket-clearing device. I am personally a strong believer in the proper use of summary judgment by both sides, and I believe that bringing thin cases or pleading thin defenses invites the grant of a perfectly proper summary judgment motion. At the same time, a fair reading of some judicial decisions inescapably to the conclusion that cases are being dismissed on no basis more substantial than what the judge would decide, if the judge were the jury. *E.g.*, *James v. New York Racing Ass'n*, 233 F.3d 149 (2d Cir. 2000); *Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000).

The Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133 (2000), should do much to restore a proper balance.

I. Mandatory Arbitration

Arbitration can be a perfectly appropriate means of resolving some employment cases where this means of proceeding is the conscious choice of both sides, but it does not seem

to me that "cram-down" arbitration "agreements" can ever be appropriate, any more than the old "cram-down" agreements not to support a union were ever appropriate. *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001), by holding that such agreements are enforceable under the Federal Arbitration Act, has at last shown Congress that a legislative solution is essential. The decision may mark the high-water mark of cram-down employment arbitration.

Employers that believe they can escape judicial oversight often think they can get away with slanting the arbitration in the way they desire through their power to select the provider of arbitration services, through the inevitable desire of that provider to please the employer that unilaterally decides whether to renew its contract, and through limiting statutory protections in the course of imposing arbitration: limiting discovery, limiting remedies, and limiting review. *See, e.g., Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). It is hard for employers to resist such heady temptations. This is why plaintiffs' attorneys across the nation will fight to protect the human dignity of workers and the meaning of civil rights legislation by seeking a ban on such cram-down agreements, and will continue to fight until they prevail, just as unions fought to protect the human dignity of workers by fighting—until they prevailed—to ban cram-down anti-union "agreements."

This is a real problem.

J. <u>There is No Going Back on Our New Sense of "What Ought to Be"</u>

As described above, law <u>can</u> change hearts and minds. The sense that we can never allow a going back to the way we used to be is frequently mentioned by members of focus groups put together by civil rights groups.

It was an important reason for enactment of the Civil Rights Act of 1991. That legislation rejected numerous Supreme Court decisions that Congress saw as turning back the

clock on civil rights. Indeed, just before the the Senate passed Sen. Danforth's compromise that as the 1991 Act, Senator Danforth stated:

> [W]hat was wrong in 1989 was not simply that the Supreme Court wrongly decided a half dozen cases, some of them dealing with technical issues such as how to define business necessity. What was wrong was that in the year 1989 the Supreme Court chose to turn the clock back, and that can never happen in civil rights; it can never be allowed to happen.

137 Cong. Rec. S15500 (daily ed. Oct. 30, 1991).

In a sense, our nation has been through a revolution of the mind, a second emancipation. This does not mean that we always act in accordance with our ideals, but those ideals have been revitalized over the last two generations. They have strengthened us as a people, and these assurances of their permanence can give us all a strong sense of hope for the future that our actions will come into closer and closer conformity with our shared ideals.

III. Where We Will Be

A. The Nature of Our National Journey

First, as a nation we focused on the rights of employees in combination and, after the Second World War, on their rights individually.

If we look at the broad sweep of antidiscrimination legislation, it looks more like the product of a conscious plan than could have been planned, or even recognized, at the time. It is in fact a rising tide that shows no signs of ebbing.

Over the last half century, Congress, State and local legislatures, and the courts have made more and more stereotypes impermissible as a basis for personnel and other actions. More and more, employees—and each of us in all facets of civil society—are to be judged not on the basis of who we are, but on the basis of what we can do. That heightening of our moral sense has become part of what identifies us as Americans. It is a core part of achieving the American dream.

No other country in the world has even attempted such large-scale change, let alone made substantial progress in achieving it. Following our model, many nations, such as those in the European Union, have signed aspirational treaties or enacted aspirational legislation, but ordinarily without providing any very effective means of enforcement. The unenforceable guarantee of equal pay in the Treaty of Rome is an example. Britain, as usual, stands alone in not only following our lead aspirationally but in enacting enforceable rights to be free from racial and gender discrimination in employment and in some other areas.

B. <u>. . . and its Destination</u>

Considering the direction in which we have been traveling, it seems clear to me that the next big step will be the prohibition of discrimination based on sexual orientation. As with all of the antidiscrimination statutes, there will be some exceptions and some limiting language in order to get it through. I've been proud to have worked with some people with the Human Rights Campaign and the Leadership Conference on Civil Rights on some of these ideas. No one can safely predict when it will happen, or what the specific terms of the legislation will be. But given the development of a national sense that people should be judged not by what they are or believe, but what they can do, I believe that this will be the next big step towards realizing the American dream.