The Civil Rights Revolution*

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Editor's Preview: James Madison warned that every word of our Constitution "decides a question between power and liberty." In the following remarks by U. S. Commission on Civil Rights Chairman William B. Allen, delivered on the Hillsdale campus in the fall of 1988, we have also been warned that in the name of "civil rights," we may be using the Constitution and our legal system to curtail the liberties of all Americans.

Chairman Allen points specifically to the 1964 Civil Rights Act which was meant to guarantee nonpreferential and color-blind treatment, but which has been used to guarantee the opposite. He proposes a return to the ideas of equal citizenship for all, "without a special bracketing called 'civil rights.'"

Clarence Pendleton was of course a dear friend to all of us, and his sudden passing is perhaps itself a significant civil rights revolution in this United States. He had accomplished what virtually no one expected at the time of his appointment by President I Reagan in 1982. That is to say, Chairman Pendleton brought the question of civil rights to the forefront of the minds of the people of the United States. He ignited a debate, and launched a dialogue which made the entire question of affirmative action, the question of minority business set-asides, the question of comparable worth, and so many of the other disputed points of the civil rights agenda questions of immediate interest to us.

"Penny," as he was known, made clear once and for all that these matters have to be resolved, not in the cloakrooms on Capitol Hill, not in the privileged suites of civil rights organizations, but in communities throughout America. They raise issues which will continue to concern all of us until the day when, happily, there will no longer be need for a civil rights movement.

Does it seem odd that I look forward to a day when we might no longer express anxiety about civil rights? Understand, then, that I mean nothing inhumane or unfriendly by that statement. The existence of a civil rights movement presupposes a serious deficiency in our political life. The hallmark of American citizenship ought to be equal rights of citizenship, without a special bracketing called "civil rights." We should all carry out the activities of citizenship without regard to special efforts to guarantee those same activities either to particular groups of citizens or indeed to the country in general.

Black progress in America

The title of this talk is "the civil rights revolution." In that sense it invokes changes fairly wrenching in the common life we live—changes experienced not only in the past generation but indeed since the beginning of this century. I select the beginning of this century (rather than

since the War of American Union) for the simple reason that a transformation took place in the aftermath of the 1896 *Plessy v. Ferguson* decision. That decision created the peculiar problem of civil rights, which is to be distinguished from the general problem of guaranteeing the equal protection of the laws, in the language of the 14th Amendment, and which was of course the objective in the immediate aftermath of the War.

Following the War and Emancipation there was a fairly vigorous effort in this country to realize the promises of the Declaration of Independence as those promises were restated through the 14th Amendment. Many things occurred about which Americans were justifiably proud and particularly in the lives of the ex-slaves. There was a spontaneous flowering of entrepreneurial activity and indigenous development of educational mechanisms—schools, teachers, and even the onset of university education to a significant degree. Communities had formed structured expectations built upon recognized moral practices and certainly congruent with the hopes and ambitions encouraged thereby.

By the beginning of the 20th century it seemed sure that the ex-slaves would succeed rapidly, mounting the ladder which had therefore been characteristic of immigrants to the country. The scene then changed abruptly. Things changed not because of *Plessy v. Ferguson* but concurrently with that decision. Justice Brown announced the decision of the majority, and spoke of a sociological attitude, a prevailing environment that fostered separation. He did so quite accurately, for what had happened toward the end of the last century was that deliberate efforts had been undertaken to obstruct the manifest progress of the ex-slaves.

Such efforts aimed not merely to end their entrepreneurialism, even among themselves, but to stop in its tracks all evidence of progress. Nowhere was this more manifest—and perhaps more deliberate—than in the realm of education. An additional factor deepened the harm dramatically, for at this time was introduced the first broad commitment to public education in the United States. Many historians have noted how well the United States functioned prior to this time, without a broad commitment to compulsory public education and with education being primarily a matter of choice. I do not mean to deny the evidence of serious, early 19th century efforts to elaborate a public school ideology—conspicuous in places such as Boston, Philadelphia, and Cincinnati. Nevertheless, by the start of the present century there was still not in place a broad, general commitment to compulsory public education, placing everything under the control and power of the state.

Jim Crow & the Civil Rights Dilemma

Everything changed at the start of this century, concurrently with the new emphasis on diminishing the opportunities of ex-slaves and their offspring. Thus, a specific result of placing the total control of education in the hands of the states concurrently with the separate but equal doctrine was to augment difficulties for them that then lived primarily in the South. They began to move North, but it became no easier to mount the ladder of success in the context of the American tradition.

This background shapes for us the civil rights problem and shows why, in fact, it became a civil rights problem leading to a revolution. It is not the legacy of slavery (a mistake which is all too often repeated) that creates the civil rights problem. The legacy of "Jim Crow" consciously adopted created the civil rights problem. Some would allege that such policies were adopted because former slaveholders desired to maintain a *de facto* slavery. Whether this were the case or not, we ought to direct our attention instead to the devices they had to resort to in

order to impose "Jim Crow." For in selecting their means they did more than merely to degrade ex-slaves; they began the process that most gravely imperiled traditional republican practices in the United States.

First and foremost, reliance upon the agency of the state was necessary. "Jim Crow" meant interfering with the right of contract—the freedom to make and enforce contracts through legal processes. Secondly, it meant establishing arbitrary state power to determine the educational future of young people—a power so strong it obstructed private as well as public schools (not merely with respect to American blacks but with respect to Americans generally; the openness for private education was not solidly re-established in law by the Supreme Court until 1922 in *Meyers v. Nebraska* and, subsequently, *Pierce v. Society of Sisters* in 1925).

"Jim Crow" acquired a patina of legitimacy, even respectability, through its dependence on the state. Woodrow Wilson made "Jim Crow" national policy, not just a regional aberration, rigidly segregating the civil services and the capitol itself.

Despite this, American blacks managed to get some kind of education, and earn some kind of living. They found ways to build families and lives for themselves. A Commission on Civil Rights study revealed that the income gap between white and black males from 1940 to 1960 narrowed significantly, due in part to World War II but also in the period afterwards. What is important in this is not that "Jim Crow" is to be regarded as a trivial injury. It is not. Nevertheless, under the "Jim Crow" regime and when the pressures were at their worst, people still found a way to make progress, to carve islands of security, to carve out that sense of personal worth and dignity which guaranteed that there would still continue to operate in this country the highest notion of the American ideals—the principles of the Declaration of Independence.

Things changed after 1960. They changed in ways which are still scarcely comprehensible, because they seemed to change all at once. In 1964 petty apartheid was swept from American life with the stroke of a pen. I was driving from California to Florida in that summer of '64, just after the Civil Rights Act was passed. Then, for the first time in my life, I was able to contemplate stopping at any restaurant or motel I came across.

Some people dismiss the notion that removing signs of petty apartheid is of any significance, but, believe me, it is extremely significant for anyone who has ever had to live with the indignity of searching all over town for a restaurant or motel that has the "colored" sign above it. Were the other deep injustices of "Jim Crow" removed? That's another question.

When we talk about the "civil rights revolution," we usually speak in terms of a series of legislative acts beginning in 1964 and continuing through the Voting Rights Act of 1965, the Fair Housing Act of 1968, and so on, right up until today, with the so-called Civil Rights Restoration Act of 1988. In fact, we seem to pass some piece of civil rights-related legislation every year—to many people that *is* the civil rights revolution!

While this revolution indeed changed the face of America by wiping out petty apartheid, in other respects it seems to have had no effect whatever (and sometimes even negative effect). Obviously, more and more blacks can be seen on television, in corporate boardrooms, in once all-white neighborhoods. Without minimizing these genuine and important strides towards equality, I suggest that we have actually regressed to the mentality of "Jim Crow" once again, and as a direct result of the "civil rights revolution." Today we stand as near the psychology and

sociology which prevailed at the period of "Jim Crow" as we have ever stood since it was first installed.

Segregation in the Democratic Party

Look at the most recent presidential race in which the campaign of Jesse Jackson played a major role. Jackson's campaign isolated American blacks within the Democratic Party. The press talked constantly about the significance of a black candidate, but it completely missed the consequence of this racial politics. For years we have taken it for granted that blacks were isolated to the Democratic Party, but not within it; as long as we thought blacks were predominantly Democrats, and the Democrats were the majority party, there was always the assumption that blacks were diversely spread among a majority of Americans having diverse opinions and backgrounds and therefore not isolated *within* the Democratic Party.

Well, this year we know that is not true. We know that within the Democratic Party American blacks are completely segregated. How do we know? The Democrats were offered a vast array of presidential candidates to choose among—candidates reflecting all kinds of opinions and visions of what America ought to be. Yet, black Democrats voted at a rate of more than ninety percent, that is to say, almost exclusively, for the black candidate. Their vote was not responsive to the ideological diversity within the party. Within the Democratic Party, it is presently impossible to appeal to black party members except in terms of race. Psychologically, socially, and politically we are standing at precisely the same point where we stood when the "Jim Crow" regime was first installed.

Why has this fate befallen the United States, despite the fondest hopes of its people, and what can be done about it, if anything? We did not go wrong with the first legal victory of the civil rights revolution: the 1964 Civil Rights Act is an exquisite expression of the principle of equality and its prerequisites—fairness, nonexclusivity, nonpreferential treatment, and color-blindness.

Yet, in the implementation of this law, our country turned its back on the very language of the law itself. We began to make excuses for preferential treatment, for race-sensitive rather than color-blind action. Our colleges and universities now demand to know every potential student's and teacher's race before deciding if there is a place for him. And the University of California at Berkeley proudly announces to the candidate it deigns to accept, "You are an affirmative action admit!" Our newspapers and television broadcasts cannot mention a black individual without also mentioning his race, as if it lent special significance to the story.

Regional race-consciousness has been displaced by a national preoccupation with race. Its defenders purport to employ race benevolently, but, then, there was a "positive good" school of slavery also. Our new era of race consciousness makes the whole concept of equal rights of citizenship more elusive than ever before.

The Equal Rights of Citizenship

Our duty is to propose a solution to our difficulties. But let us begin by acknowledging that there remain civil rights problems. They are no longer the problems of this or that group of people. They are now rather the problem of what the legitimate powers of state are with respect to any particular people. In order to guarantee fair access to the advantages of our society certain minimal things are required. We must, for example, enforce the freedom of contract. What that means is that, any time two parties willing to make a contract can agree to do so, we must

prevent either public or private interference in those contracts on the basis of race, ethnicity, religion, etc. And we need laws with teeth in them to enforce that right.

What are laws with teeth in them? They are not laws that multiply the teeth of bureaucrats, but rather laws which provide opportunities for victims to vindicate their own claims. In the past quarter of a century we have depended instead on bureaucrats, on watchdog regulatory agencies, and on administrative procedures. What a mess it has become! Who can say what the right remedy is in school integration cases, given our history? The fact is, no one can state clearly what it is the citizen has a right to in school cases. Has one a right to attend a school in which the other pupils look different than he? Need the numbers be perfectly balanced? Has one a right to attend, or even not to attend, any certain school? Do Americans enjoy the right to choose a school?

No one can answer these questions with any degree of confidence today, because the entire area has been reduced to chaos by the litigation, legislation, and regulation of the past twenty-five years. More broadly than that, however, I submit *no one* knows what our civil rights are! No lawyer, no civil rights activist, no congressman, can tell us. There exist today nearly 150 separate statutes and amendments dealing with such rights, and sometimes in mutually exclusive manners. The number of agency regulations is far greater. At least thirty- seven federal agencies are concerned exclusively with civil rights, while many others have functions related to it. Add to that all the state laws, regulations and agencies, created piecemeal and without any coordination, and you can divine the cause of the chaos.

I have not even mentioned all of the Supreme Court decisions on civil rights. Here is a question: “Do you have a right to enter into a contract with anyone you choose, even if they refuse?” How would you answer? Of course, you would say no. But in *Runyon v. McCrary* the 1866 Civil Rights Acts was interpreted to mean that people can in fact impose contracts on unwilling partners. In this particular case, a private school was forced to accept students it preferred to turn down, which may or may not have been unfair, but which certainly should not undermine the right of contract.

The Court went wrong here because of a wrong turn taken in our nation. We began this process immediately after passage of the 1964 Civil Rights Act, under the influence of the view that this society owed it to the descendants of its slaves to take an active, positive hand in shaping their places in life. The theory was that there was a designated place for American blacks, and that that place could be attained only if there were sufficient governmental exertion, sufficient affirmative action (to use the language generically and not just in terms of a particular program).

Rather than entrusting American blacks to carve out their own destinies, to chart their own courses, and to vindicate their own rights, we decided to lodge matters in “superior” hands. We reinvented slavery. And older form had been declared unconstitutional, so a new one was substituted in its place. To prefer slavery to self-reliance, it was necessary to blind ourselves to the best established traditions of Anglo-American jurisprudence. In 1866 the first civil rights laws depended on those traditions, and preferred tortious litigation to bureaucratic regulation. Since that time, however, we have consistently treated tortious litigation as contra-indicated in discrimination cases. It would seem more than coincidence that such an approach would leave people’s fates in their own hands, while our preferred approaches do the opposite.

Because of the wrong choice made in remedies to civil rights problems, we are threatened today by renewed imposition of "Jim Crow," and one which will completely destroy the United States Constitution in the process. I think, therefore, that it's high time we re-examined the methods employed to reach our goals. We must look with a comprehensive eye upon the entire edifice of civil rights legislation and regulation, replace it with a single, non self-contradictory code, and bring a new luster to those methods or remedies which serve both to vindicate individual claims and to bolster our common traditions. The civil rights revolution will have become a revolution to destroy our rights, unless we alter its direction and secure a salutary and permanent focus in our rights—the equal rights of citizenship.

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