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A PERSPECTIVE ON CIVIL RIGHTS CHALLENGES*

Deval L. Patrick†

Our job in the Civil Rights Division of the Department of Justice is to enforce the laws that protect the civil rights of people of all backgrounds and races. We do our part in this by fully and fairly enforcing all laws for which we have responsibility, without favor and without fear. Vigorous, generous and principled enforcement is a substantial step forward from our recent past. But we are committed to moving even farther than that. While we are dedicated to this mission, and are confident that it can be achieved, in many ways our job has never been harder. Because if we are not careful, the national consensus in support of the great and continuing struggle for civil rights in this country will unravel.

At the age of thirty-nine, I am more of the 60s civil rights movement than I ever was in it. But it had a deep effect on my life. Not just in tangible ways — but in intangible ways as well. I remember the time when I first heard Dr. Martin Luther King speak. He was addressing a crowd at a park on the South Side of Chicago, not far from where I grew up, and my mother took my sister and me to see him.

I think I was about six or seven years old then. And candidly, I can't remember a single word he said. But I do remember the deep solemnity of the occasion. I remember the sense that something important was happening. I remember how at that moment I felt connected to all of the other people in that park — people like me, of limited means but limitless hope. I remember feeling the power of that hope and how it made us feel motivated to give shape and purpose to the lives we were all trying to lead.

There was a time, I think, when all of America felt the hope of Dr. King's message, when the problems we had created for ourselves were not viewed as beyond our capacity to care about and to solve.

In one way or another all Americans were touched by the power of the 60s civil rights struggle. For there was never any denying the simple justice that it was finally all about. It was about making good

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on the American promise of freedom, defined by equality, opportunity and fair play.

In that sense, the 60s civil rights movement in the United States represented the best of American ideals. It produced countless acts of courage and compassion — acts both great and small. Its dramas are now triumphantly written in the annals of history:

- * How an African American railroad porter's son named Thurgood Marshall brilliantly conceived and executed the strategy that would convince the Supreme Court to end racial segregation in the public schools.
- * How an African American woman named Rosa Parks, tired at the end of a long day's work, refused to give up her seat to a white person on a Montgomery, Alabama bus and sparked a boycott that brought Jim Crow to its knees.
- * How the world was introduced to the power, the passion and the thoughtfulness of a young clergyman named Martin Luther King, Jr., who captured America's conscience with an eloquent plea from a Birmingham jail cell.
- * How brave men and women from all walks of life and all parts of the country sacrificed their bodies and, too many times, their lives to ensure that every citizen could vote.

For centuries, American ideals of equality, opportunity and fair play have been confounded by the politics and practices of division and exclusion. Slowly, painstakingly and over many decades, men and women of goodwill and perspective, people like Judge Liss and many other graduates of the University of Baltimore School of Law — people who face up to the gap between our reality and our ideals and come down on the side of our ideals — have pressed for, cajoled and demanded progress in closing that gap. But as a nation, we are not there yet.

For it is undoubtedly true that legions of racial and ethnic minorities and women feel less of a sense of opportunity, less assured of equality and less confident of fair treatment today than in many, many years. Now, society's collective thinking on the meaning of opportunity seems to begin and end with the topic of affirmative action, and little of that debate is constructive. Now, the specter of opinion polls and political agendas overshadows basic concepts of fair play and due process. The notion of equality is never even mentioned in public discourse today, as if avoiding the subject avoids the problem. Some openly question whether the civil rights movement has gone too far and behave as if the history of America is a history

of discrimination against white men. And others, including many African-Americans and Hispanic-Americans, are wondering whether integration was ever a valid goal.

They see intolerance on the rise. They see efforts to dismantle what national consensus we have on civil rights today and to divide us along racial lines for political advantage or worse. And let me assure you, these anxieties are not unique to minorities and women. They are shared by all Americans of goodwill and perspective, of every race, ethnicity, creed and gender. The People are wondering and watching anxiously, like some of you perhaps, to see whether this country is about to make a giant lurch backward in its struggle for equal opportunity and fundamental fairness.

In this peculiar and, in some respects, irresponsible environment, the growing national debate on affirmative action is taking place. Reduced to pungent but pointless soundbites, fortified by myth but little useful data, fueled by the politics of division, this Nation is grappling with a profound question: whether its sad legacy of exclusion, based on race, ethnicity or gender, is really behind us; and, if not, whether we have the collective will to do anything about it. For such a critical issue, one so closely linked to the question of what kind of society ours will be, the debate lacks virtually any sense of perspective. It is why, in my view, affirmative action has a symbolic significance out of proportion to its practical impact.

We all have to understand that some Americans feel that they are being forced to pay for others' past sins, that affirmative action unfairly gives special preferences to minority groups, that we should simply declare ourselves a "colorblind" society in which neither whites nor minorities receive either benefits or burdens on account of race. Not all of the people urging this "colorblind" ideal are obstructionists. Some are thoughtful people of goodwill, if perhaps a little naive. For these people, it is simply time that our society stops thinking in racial terms. As fellow citizens, we owe these folks at least an effort to understand their perspective. Without that, we cannot hope to engage meaningfully in the debate.

Of course, not all the critics have the best of motives: some are and have always been obstructionists — even when it came to attempts to outlaw old-fashioned Jim Crow laws. Some are first-degree hypocrites, who called affirmative action "right" in the recent past but who now attack it as self-evidently "wrong." These are the folks who say that all we must do is enforce the anti-discrimination laws and who then cut the guts out of the laws or underfund the agencies responsible for enforcement. These are the folks who say that "the problem" is not race, it's economics, and who then bad-mouth and vote against every anti-poverty initiative. Some are engaged in simple, rank race-baiting, and are trying to gain political advantage by stirring the affirmative action pot in 1996 the way some

stirred the Willie Horton pot in 1988. Some refuse to acknowledge any difference — despite Supreme Court decisions and plain Congressional terms — between affirmative action (which is lawful) and quotas (which are not). They see quotas in every affirmative action plan the way a child sees monsters in every dark closet. They serve to inflame rather than to contribute to understanding or to constructive action.

Supporters of affirmative action, including many minorities, are suspicious that “colorblindness” is just a high-sounding concept intended to block society’s progress toward equal opportunity. For many minorities, the call for “colorblindness” has a surreal quality to it: we are claimed to receive undeserved special privileges, while we know that hardly a single white person would willingly trade places with any one of us today.

One newspaper commentator, Andrew Ward, has described in an allegory the hypocrisy that many minorities see in calls for “colorblindness”:

The White team and the Black team are playing the last football game of the season. The White team owns the stadium, owns the referees and has been allowed to field nine times as many players. For almost four quarters, the White team has cheated on every play, and, as a consequence, the score is White team 140, Black team 3. Only 10 seconds remain in the game, but as the White quarterback huddles with his team before the final play, a light suddenly shines from his eyes. “So how about it, boys,” he asks his men, “what do you say from here on we play fair?”

It seems to me that one way that perspective fails us in this debate is that we do not define what we are talking about. Affirmative action is really a range of remedies. At one end of the spectrum, there is affirmative outreach and recruiting — casting a broad net, in both traditional and non-traditional quarters for qualified minorities and women to compete. Hardly anyone opposes that — at least openly. At the other end of the spectrum, there is what might be called affirmative “spoils division” — where hard and fast numbers of spaces in schools or workplaces are specifically reserved for members of certain groups, regardless of qualifications. This is perhaps the most widely opposed kind of action. Indeed, these are the quotas that I and everyone else in the Clinton Administration have denounced and that the courts have rejected fairly consistently.

The real debate, it seems to me, is over a method in the middle. This is what I will call affirmative “consideration” — where race, ethnicity or gender is a factor, but is not necessarily dispositive, in evaluating qualified candidates. This kind of affirmative action guarantees nothing. It supports merit. It emphasizes qualifications. It

embodies flexibility and the aspirations of an integrated workplace or school. This kind of affirmative action is what the early proponents, Republicans and Democrats, have supported.

And yet I see divided support today for this method of affirmative action, for two reasons. First and foremost, without a doubt, in some forms and on some occasions, it has just not worked. Lazy, sloppy or overzealous employers or school administrators have on occasion turned such efforts into a numbers game, abandoning merit and quality and good judgment in favor of the numerical straight-jackets we label "quotas." Minority-owned firms "fronting" for majority firms to get contracts, or other petty abuses, and illogical contractor certification requirements do occur.

We must face these problems without flinching. We must fix them. And in the Federal system we will. But that should not lead us to scrap the principle any more than contractor abuse in defense procurement should lead the Air Force to stop buying planes or than the election of an undistinguished Congressman should lead us to abandon Democracy.

The second reason that support for affirmative consideration is divided, it seems to me, is because of skillful, ill-intentioned rhetoric. The advertising industry has taught us that repetition and shock value are two of the most successful ways of convincing someone. So, isolated abuses or misuses of the principle of affirmative action — like the ones I mentioned above — have become prevailing myths. We are left to believe that there is a wholesale disenfranchisement of the opportunities of presumably more "deserving" Americans simply because they are not minorities. But the facts do not bear this out. Of all the claims of employment discrimination filed in Federal court in the last four years, a tiny fraction were claims of discrimination against white men, and fewer than a handful of those cases were found to be meritorious. The Equal Employment Opportunity Commission reports that fewer than 2% of the claims pending there are claims by white men.¹ The Supreme Court has consistently rejected the view that all affirmative consideration is unlawful discrimination *per se*, most recently in the case of *Adarand v. Pena*.²

Let me say a word or two about the *Adarand* case. While it has been received as a blow to affirmative action in particular and to civil rights advancement in general, it is important to understand what the Supreme Court actually said — and what it did not say.

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1. BRIEFING BOOK ON THE STATUS OF EQUAL EMPLOYMENT OPPORTUNITY IN THE AMERICAN WORKFORCE, p. 5 (prepared by the United States Equal Employment Opportunity Commission's Office of Communication and Legislative Affairs, March 24, 1995).
 2. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

The Court did not dismantle affirmative action. Seven justices explicitly rejected the extreme position proposed by Justices Scalia and Thomas that affirmative action programs are always unconstitutional. The Court did not even dismantle set-asides. In fact, the Court made it clear that the government has the power to continue to take affirmative action against the unfortunate legacy of slavery, segregation and discrimination in this country. Justice O'Connor even suggested that the government has a *duty* to address such issues.

The *Adarand* Court simply ordered the Federal government to meet the same rigorous standard for affirmative action programs that state and local governments have been forced to meet for several years. We will vigorously defend those Federal affirmative action programs that satisfy the new stricter standards, and we will work to modify those programs that do not. As the President has said, "mend it, don't end it."³ Today, it is more important than ever that we maintain perspective on affirmative action. We all must share in the responsibility to understand and to articulate what affirmative action really is and why it is a useful part of the struggle for equality under the law.

Remember, discrimination based on race, ethnicity and gender is still with us. The society we live in belies all the purported special treatment for minorities and women. The unemployment rate for black males is still twice as high as for white males. Even college-educated black and Hispanic men, as well as women of every race and ethnic background, are paid less than comparably educated, comparably trained white men. It is still harder for black people and latinos — and in some cases, for women — to rent apartments, to get a mortgage, to get hired or promoted, and, in many places, even to vote, than for white people. At last year's celebration of Black History Month at the United States Department of Transportation, while the crowd was led in singing a Negro spiritual, some members of the staff took up a chorus of Dixie. You all read about the "Good Ol' Boys Round-up," didn't you? I still get followed in department stores and harassed by the police. I still have trouble hailing a cab in most major cities. These accumulated indignities nag at my personhood every day — even in my rarified life. Imagine what effect it has on the life and mind of a young African American or Latin American man or woman who knows less about hope and faith than I do.

I do not accept that every condition that afflicts minority communities today is explained by race. But I do not believe that we are free of acts and sometimes patterns of racially-motivated unfairness.

3. President's Remarks at the National Archives and Records Administration, 31 WEEKLY COMP. PRES. DOC. 1255, 1263 (July 19, 1995).

And I am skeptical that declaring ourselves "colorblind" in law will make our society "colorblind" in fact. I am not talking about any so-called "culture of victimization." I am talking about facts. This country may be a truly "colorblind" nation one day, but we are not there yet. And our economy, to say nothing of the fabric of our civic society, cannot survive without all of our contributions.

Until that day arrives, we must continue to support efforts to open up our society and to ensure that all Americans have an equal opportunity to participate in it. This means that more struggle lies ahead. But progress in civil and human rights has been a struggle for all of human history. It will continue to need strugglers. And it will need idealists. It will need you.

It will need you to keep this struggle in the larger context of what makes this nation what it is. People have come to these shores from all over the world, in all kinds of boats, and have built from a wilderness the most extraordinary society on earth. We are most remarkable, not just because of what we have accomplished, but because of the ideals to which we have dedicated ourselves. And we have defined our ideals, over time, with principles of equality, opportunity and fair play. For this, at the end of the day, like it or not, we are an inspiration to the world.

Civil rights is the struggle for those ideals. It is hardly about some abstract racial spoils system. It is about breaking down artificial barriers of whatever kind to equality, opportunity and fair play. It is about assuring everyone a fair chance to perform. It is about redeeming that fundamentally American sense of hope. It is about affirming our basic values and aspirations as a nation.

I know, as you do, that future progress depends on the next generation, just as today's progress depends on us. Civil rights, as one friend puts it, is "a relay race for justice."⁴ Our forward movement as a society depends on the clarity and the perspective with which the next generation views the challenge and the creativity with which they undertake to address it. And that, in turn, depends on whether they understand and embrace American ideals of equality, opportunity and fair play and whether they are inspired to act on them.

Last spring I found myself thinking a lot about the state of American ideals and idealists. I am still relatively new to Washington, and I noticed that in the springtime, the city is full of tourists, especially school children on class trips. The spring days are warm and long, the azaleas and dogwoods are in their glory, and school children from across the country come to see their nation's capitol. Seeing these children dressed in the style they call "grunge," speaking

4. The author would like this source to remain anonymous.

their own special slang, standing in the Capitol Rotunda asking where the nearest McDonald's is, one might incline to wonder about whether the next generation will produce many idealists, many great statesmen and stateswomen, many compassionate leaders.

But I know they are there. They wear the dress, walk the walk, and talk the talk of their time — just as each of us has in ours. But some harbor a latent idealism beneath their contemporary version of “cool” — just like some of us. Some find themselves a little embarrassed by the simple majesty of the Declaration of Independence at the National Archives or a little uneasy when reading the messages engraved on the walls of the Lincoln Memorial. Some linger a moment or two longer than the rest in the Capitol Rotunda, taking in the meaning of that scene. And in that embarrassment and unease, in that extra moment of thoughtfulness, lies a seed of idealism, waiting to grow.

If we do not nurture that idealism and encourage its growth, if we do not summon forth “the better angels of [their] nature”⁵ as others have in our time, then the purveyors of mendacious rhetoric and cynical politics will win the day — and at an unspeakable cost.

In my time and in others' there were national purposes, like civil rights, and national heroes, like Martin Luther King, who called upon our idealism and met this nation with a challenge of conscience. And in fits and starts of courage and pain, we responded to that call and reached across our differences, if only for an instant, to grasp our common humanity.

Today, as in all other times, the human spirit is the same. Young people still harbor idealism, a little shyly, perhaps, and with veiled reticence. Even in the bleakest places, children look for a reason to hope. What shall we offer them? Who will call forth their idealism? Who will set his or her own discouragement and weariness aside long enough to light a fire of purpose under another? What will history say of the legacy and the challenge we pass on to them? And what will your answer be?

While we debate the abstract merits of “colorblindness,” there are millions of young people all over this nation, children who are left out and left back, who will never become doctors or lawyers or teachers or police officers or much else. Their latent idealism will never be freed to grow into compassion and action because there was no friend, no teacher, no lawyer, who, by action or example, quietly inspired them, showed them how to look up, not down, helped them to see their stake in their own and their neighbors' dreams, touched a life (like the folks in that Chicago park so many

5. Abraham Lincoln, First Inaugural Address, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (Roy P. Basler, ed. 1953).

years ago) in some private, but powerful, way or gave someone else a reason to hope. This is the public interest at stake today.

And what must we teach the next generation, if not also our own? That civil rights is, as it has always been, a struggle for the American conscience. And that we all have a stake in that struggle. So, when an African-American stands up for a quality, integrated education, he stands up for all of us. When a Latin-American stands up for the chance to elect the candidate of her choice, she stands up for all of us. When a person who uses a wheelchair stands up for an accessible apartment, she stands up for all of us. When a Jew stands up against those who vandalize his place of worship, he stands up for all of us. Because civil rights is still about affirming our basic values and aspirations as a nation. It is still about the perennial American challenge to reach out to one another — across the arbitrary and artificial barrier of race, across gender, across ethnicity, across disability, class and religion, across our fear and hopelessness — to seize our common humanity and to see our stake in it.

This is a defining moment in history: our young people are increasingly alienated from civic society, and too many of the rest of us have let cynicism and selfishness define our lives. From my travels in this job, I can confidently report that people all over this country are looking for a reason to hope and are watching anxiously to see if we are still the society we dedicated ourselves to become. I say let them look to us, to you and to me, and let history record that we in our time faced our challenges remembering who we were and believing finally “that [we] are more than our brother’s keeper; that, on this earth, [we] are his savior and he is ours.”⁶

6. Burton Blatt, *Exodus from Pandemonium: Human Abuse and a Reformation of Public Policy* 259 (1970), quoted in Stanley S. Herr, *A Humanaut’s Legacy: Burton Blatt and the Origins of the Disability Rights Movement*, 33 *Mental Retardation* 328, 331 (1995).