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## ARTICLES

### THE FUTURE CIVIL RIGHTS AGENDA: SPECULATION ON LITIGATION, LEGISLATION, AND ORGANIZATION

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The current period is a propitious time to assess the efficacy of civil rights litigation and to chart the course of future developments. A number of commentators have, indeed, undertaken the task of evaluating prior accomplishments and anticipating future obstacles.<sup>1</sup> Some of these efforts have come in the context of honoring the 200th anniversary of the American Constitution. Other groups sense that advances in civil rights have reached a turning point marked by a confusing mixture of successes and failures. To these observers, successful future initiatives must be informed by a collective culling of the fruitful strategies from those that were not productive. Problems confronting those historically subjected to discrimination and prejudice have a new character that calls for fresh, careful, and disciplined analysis. The raw material is available for a full assessment. Legislation of the 1960's has fostered over twenty years of active civil rights litigation, much of which occurred at the "last word" stage of the United States Supreme Court. Also, comprehensive research continues regarding the status of minorities to assist in gauging the effectiveness of civil rights enforcement efforts.<sup>2</sup> We also have

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This Article began as a summary report to the Lawyers' Committee for Civil Rights Under Law of their conference held in 1987 in which many leading litigators and scholars in the civil rights field participated. The thinking of the participants became the springboard from which many of my own ideas were generated. I am particularly indebted to Mr. William Robinson, the current Dean of the Law School of the University of the District of Columbia and the former Executive Director of the Lawyers' Committee for his support.

1. See, e.g., Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707 (1985) (focusing on developments in housing and employment discrimination).

2. The United States Commission on Civil Rights is an independent, bipartisan agency, established in 1957, which has developed studies to assess the impact of federal policy on

the benefit of retrospection to test the optimistic, and perhaps naive, premises underlying civil rights statutes and subsequent litigation.

This Article focuses on the current law regarding civil rights in education, employment, immigration, and voting with regard to blacks and Hispanics. Discrimination against other groups (for example, females, the elderly, the handicapped) is not explored except to the extent necessary to illuminate discrimination against black and Hispanic minorities. The magnitude of the subjects under discussion imposes this limitation, and any omission is not a comment on the importance of other forms of discrimination. Housing discrimination is not addressed because Congress enacted a new federal statute as this Article developed.<sup>3</sup> The statute has broader coverage and a vastly improved remedial structure as written,<sup>4</sup> but no body of litigation and re-

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abating discrimination on the grounds of race and national origin. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS COMMITMENTS: AN ASSESSMENT OF ENFORCEMENT RESOURCES AND PERFORMANCE* (Clearinghouse Publication 82, 1983); U.S. COMM'N ON CIVIL RIGHTS, *THE ECONOMIC PROGRESS OF BLACK MEN IN AMERICA* (Clearinghouse Publication 91, 1986). Private research organizations have also been active. The National Urban League has published the "State of Black America" yearly since 1977, and the Joint Center for Political Studies in Washington, D.C. does excellent research on current problems facing black Americans.

Black Americans apparently have been the subject of research studies more frequently than Hispanics. As of 1988, for example, no organization had performed a major in-depth study of employment and national origin similar to Freeman's study of blacks. R. FREEMAN, *CHANGES IN THE LABOR MARKET FOR BLACK AMERICANS, 1948-72*, 67 (Brookings Papers on Economic Activity No. 1, 1973); see A. SMITH, C. CRAVER & L. CLARK, *EMPLOYMENT DISCRIMINATION LAW* 66 (3d ed. 1988). The term "Hispanic" covers seven groups, which differ from one another in socioeconomic terms, thus making generalization less useful. Hispanics generally are classified racially as "white," but some of the groups have persons darker than some African-Americans, and may have black American or American Indian ancestry. This may compromise a precise delimitation of the group in those research studies which rely on self-identification. Moreover, a large portion of Hispanics illegally arrive in the country and thus may avoid identification and study to protect themselves against deportation.

3. The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C.A. §§ 3601-3616 (West Supp. 1989)) [hereinafter FHAA].

4. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1982 & Supp. V 1987)) [hereinafter Title VIII], prohibited housing discrimination based on race and national origin. The FHAA addresses two shortcomings of Title VIII; namely, it expands coverage and strengthens enforcement procedures. The FHAA bars discrimination against the handicapped, which may cover persons with AIDS, a disease that blacks have contracted in greater proportions than whites. 42 U.S.C.A. §§ 3604-3606. The FHAA also bars discrimination against children, which, in essence, is a form of racial discrimination because minority households are more likely to have children than nonminority households. *Id.* The most important improvements may be remedial and procedural. The Department of Housing and Urban Development (HUD) is no longer limited solely to conciliation, but may now generate a United States Department of Justice civil action on behalf of an aggrieved individual (thus also ending the previous limitation of the Justice Department to "pattern and practice" litigation). *Id.* § 3610(c),(e). HUD officials may also secure an expeditious hearing before an administrative law judge. *Id.*

search exists yet to measure its actual impact and effectiveness. The Article briefly summarizes the state of the law in each area identified above, but primarily attempts to delineate new or unresolved problems of minorities, and to suggest new ideas for litigation, legislation, or advocacy group reorganization. This Article also attempts to gather together the ideas of other commentators on the civil rights scene and critique those warranting some qualifying commentary. This latter purpose entails some discussion of the law as a vehicle for ameliorating poverty.

## I. EDUCATION

Because the early strategists and architects of the legal front of the civil rights movement focused most of their energies and resources on attacking legal apartheid in education, it is appropriate to begin by exploring that era's legacy of current problems of segregation and discrimination in schools. At that time, litigation to end inferior education resulting from segregation was tactically sound. A large portion of white Americans probably felt, in varying degrees of intensity, a troubled ambivalence about the morality of racial subordination of blacks. The exposure of segregation as a desire to deliberately deprive young people of an education probably deepened that ambivalence, generating a wider pool of acceptance for a United States Supreme Court decision to end state-sanctioned segregation in public schools.<sup>5</sup> Internal debates raged within civil rights litigators' circles as to whether the United States Supreme Court was ready for a frontal demand for full integration or whether continually chipping away at the "separate-but-equal" doctrine was the wiser course.<sup>6</sup> Fortunately, those urging an attack on segregation as an inherent denial of equal protection carried the day, and the Court also held unconstitutional a host of laws imposing racial segregation on other aspects of communal life.<sup>7</sup>

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§ 3612(d)(2). Furthermore, the FHAA raises the \$1,000 cap imposed on punitive damages under Title VIII to \$10,000 for a first violation, \$25,000 for a second violation, and \$50,000 for a third violation. *Id.* § 3612(g)(3). See generally *Recent Developments—Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249 (1989).

5. The United States Supreme Court also understood that public acceptance of the decision on school desegregation was crucial. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court sought to appeal to the moral conscience of the American public. See R. KLUGER, *SIMPLE JUSTICE* (1976).

6. See Carter, *The NAACP's Legal Strategy Against Segregated Education*, (Book Review), 86 MICH. L. REV. 1083 (1988).

7. See, e.g., *Lee v. Washington*, 263 F. Supp. 327 (M.D. Ala. 1966) (ending racial segregation in prisons), *aff'd*, 390 U.S. 333 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating statute prohibiting interracial marriage); *Mayor of Baltimore v. Dawson*, 220 F.2d 386 (4th Cir.) (ending racial segregation in public beaches and bath houses), *aff'd*, 350 U.S. 877

During the early civil rights movement, the rationale was fairly straightforward in terms of the natural positive impact that desegregation in education would bring. Maintenance of racial segregation relied critically on state support and dismantling that support in education was viewed as the key to freeing blacks from disadvantages in other areas. Equal educational opportunity would lead to enhanced skills and capabilities, which would lead to better vocational and professional opportunities. Enhanced employment would naturally result in higher income and concomitant equality in all other areas of social life.

This straightforward common sense scenario typifies the prognosis made in confronting racial discrimination in the other areas this Article examines, including employment, voting, and amelioration of poverty. The actual course of developments in the educational field demonstrates how a plausible, well-intentioned agenda can become undone or deflected by an unanticipated, underlying complexity in achieving widespread social change through legal action.

*A. The Consequences of the Court's Shifting Desegregation Strategies Since Brown*

*Brown v. Board of Education*<sup>8</sup> marked the first formal United States Supreme Court acknowledgement that racially segregated public schools violated the equal protection clause of the fourteenth amendment.<sup>9</sup> Immediate and complete cessation of unconstitutional conduct is the usual remedy once the Court has found a violation. However, in *Brown*, the Court permitted the process of desegregation to proceed gradually, "with all deliberate speed."<sup>10</sup> The Court implicitly recognized the massive reorganization of facilities, students, and teachers and the social-psychological adjustment that the decision would engender. In fact, resistance over the ten years following *Brown* proved to be the outcome. By 1964, only one-third of primarily border southern school districts had desegregated, and only 1.2% of black children attended schools with white children in the deep south.<sup>11</sup>

The Supreme Court demanded speedier and more complete compliance with *Brown*. The Court held that school boards had an affirmative duty to achieve a unitary system and thus could not rely exclusively on student-initiated "freedom-of-choice" plans which resulted in minimal desegrega-

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(1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (ending racial segregation on public golf courses).

8. 347 U.S. 483 (1954).

9. *Id.* at 493; see also U.S. CONST. amend. XIV.

10. 349 U.S. 294, 301 (1955), *modifying* 347 U.S. 483 (1954).

11. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 33 (1977).

tion.<sup>12</sup> Moreover, the Court could no longer accept the "deliberate speed" formula, for the duty to fully desegregate existed "now."<sup>13</sup> Accordingly, the Court also held unconstitutional evasive schemes, such as the effort of a state to underwrite the costs of white students attending segregated private schools.<sup>14</sup>

The Court then moved from its post-*Brown* posture of confrontation toward a systematic approach; specifying with precision the ways in which a de jure segregated system was to be transformed into a unitary system. This approach created wider splits on the Court, and produced opinions containing more ambiguities and limitations on remedies than had been apparent previously. *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>15</sup> the first case in this vein, cautiously authorized reference to the proportion of blacks to whites in a school system as a starting point in determining progress toward desegregation, but quickly added that no specific degree of race mixing was required.<sup>16</sup> While the Court would consider a school system fully desegregated even where previously established one-race schools remained, the Court still urged school officials to seek the fullest level of desegregation possible.<sup>17</sup> School officials were permitted to gerrymander school district lines within "limits," but the Court never defined the parameters of those limits.<sup>18</sup> The Court permitted busing of students to achieve desegregation, but vague references to "health" and "the educational process" restrained complete reliance on this tool.<sup>19</sup>

Perhaps the most serious curtailment of remedies to achieve school desegregation occurred in *Milliken v. Bradley*.<sup>20</sup> A closely divided Supreme Court held that where plaintiffs proved de jure segregation in a single urban school district, surrounding suburban school districts, absent proof of segregation that affected the urban district, could not be drawn into the plan in order to achieve more complete desegregation.<sup>21</sup> In justifying this conclusion, the Court claimed to be respecting the long-standing history of local control and autonomy exercised by school boards.<sup>22</sup> This reasoning ignored the fact that

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12. *Green v. County School Bd.*, 391 U.S. 430, 438-41 (1968).

13. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

14. *Griffin v. County School Bd.*, 377 U.S. 218, 231-32 (1964).

15. 402 U.S. 1 (1971).

16. *Id.* at 24.

17. *Id.* at 26.

18. *Id.* at 28.

19. *Id.* at 30-31.

20. 418 U.S. 717 (1974) (5-4 decision).

21. *Id.* at 744-45.

22. *Id.* at 741.

education was a state responsibility and that any meaningful integration of students could not be achieved without resort to the suburban districts.

By the time *Milliken* was decided, an enormous population shift had intensified in most urban areas with a sizeable black student population. White occupants of urban areas moved to suburban areas or made greater resort to private schools for their children when they remained in an urban area.<sup>23</sup> Thus, unless plaintiffs could prove that suburban school districts participated with an urban school district in establishing or maintaining segregation, *Milliken*, in effect, assured that the "white flight" would successfully thwart effective school integration. The Court, in *Swann*, also said that although a school system may have been segregated deliberately at one time, if resegregation occurred through demographic shifts, and without state encouragement, the school board had no further obligation to reorganize to resecure integration.<sup>24</sup> Presently, approximately 85% of African-Americans live in metropolitan areas, and over two-thirds live in central cities.<sup>25</sup> As of 1980, African-Americans represent more than 40% of the population in seventeen cities.<sup>26</sup> Thus, *Swann* allows a high degree of intra-urban segregation to go unremedied absent proof that governmental action fostered the segregation. Moreover, because the Court has always required proof that a deliberate state policy or practice resulted in racial segregation in schools, northern and western school systems, which have never had a legally reinforced dual school system, may not be constitutionally required to counteract de facto segregation.

### *B. Critical Response: Toward Abandonment of Coerced Desegregation*

Given the pattern of demographic shifts and legal developments, discussion among civil rights advocates has begun to splinter in a number of directions which attempt to define the most fruitful responses. One direction has, so far, been largely unsuccessful at the United States Supreme Court level. As large-scale de facto racial and ethnic segregation began to characterize many northern, midwestern, western, as well as southern, school systems, civil rights advocates began to target disproportionate school district per-pupil expenditures. They argued that a state's maintenance of some school

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23. The suburban move was underway before *Brown* and was often generated by other governmental initiatives, but the response to school desegregation added an impetus to the process. See E. LARSON & L. McDONALD, *THE RIGHTS OF RACIAL MINORITIES* 101 (1980).

24. 402 U.S. 1, 25-27 (1971).

25. JOINT CENTER FOR POLITICAL STUDIES, *THE METROPOLITAN AREA FACT BOOK, A STATISTICAL PORTRAIT OF BLACK AND WHITES IN URBAN AMERICA* 6 (K. McFate, ed. 1988).

26. *Id.* at 21.

districts, which received substantially lower per-pupil outlays than other districts because of a taxing scheme that favored districts with wealthy property owners, violated the fourteenth amendment's equal protection clause.

The United States Supreme Court denied this claim in *San Antonio Independent School District v. Rodriguez*.<sup>27</sup> The Court in *Rodriguez* set the backdrop for another direction by finding that the Texas system of financing public education did not discriminate against any identifiable traditionally suspect, disadvantaged class,<sup>28</sup> that it did not absolutely deprive any one of state-sponsored education, and that affirmance would thus be an unwarranted intrusion into the way "Texas has chosen to raise and disburse state and local tax revenues."<sup>29</sup> In rejecting the equal protection claim, the Court issued a "cautionary postscript," warning of the "unprecedented upheaval . . . [that] abrogation of traditional modes of financing education" would cause.<sup>30</sup> In conclusion, the Court did, however, write that "innovative thinking as to public education, its methods and its funding" as a means of assuring greater equality of opportunity was necessary.<sup>31</sup>

Professor Derrick Bell, probably the most comprehensive and active scholar in the civil rights field today, claims that on a nationwide basis, at least as of 1975, the overall achievement record of black children in desegregated schools had not improved.<sup>32</sup> He has espoused the view that the current agenda should emphasize a demand for higher quality education in predominantly black schools. Bell bases his claim on a lack of definitive data proving that excellence cannot be achieved in predominantly black schools that are not the product of state-coerced dualism.<sup>33</sup> Bell argues that one must correct the other deficiencies which accompanied the segregated school systems, in addition to racial separation, in order to upgrade the quality of education of black children.<sup>34</sup>

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27. 411 U.S. 1 (1973).

28. *Id.* at 25-28.

29. *Id.* at 40.

30. *Id.* at 56.

31. *Id.* at 58.

32. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 480 (1976). Prof. Bell cites N. St. John as stating: "During the past 20 years considerable racial mixing has taken place in schools, but research has produced little evidence of dramatic gains for children and some evidence of genuine stress for them." *Id.* at 480 n.31 (quoting N. ST. JOHN, SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN 136 (1975)).

33. Bell, *supra* note 32, at 479 n.25.

34. *Id.* at 487-88. Bell argues that blacks were not only separated from whites, but black schools were deprived of adequate and equal resources and parents were not involved in the development of school policy. These deficiencies could be corrected even if black students remained in predominantly black schools. *Id.*



The evidence conflicts on this extremely controversial issue. Other civil rights strategists assert that integration is critical to improved educational performance by minorities.<sup>35</sup> For example, some studies show that black youngsters who have moved to predominantly white schools have higher achievement levels than youngsters left behind in the single-race environment.<sup>36</sup>

Professor Bell has not given sufficient attention to two critical factors in his provocative study. First, Bell does note one study in which some public schools were able to teach poor children basic skills, but much of the data shows that the socioeconomic levels of the students' families heavily influences success in education. Irrespective of students' race, schools attended exclusively or predominantly by youngsters from poor families have lower achievement levels than schools in which the students come from middle or upper-class families.<sup>37</sup> Bell mentions the experience of Dunbar High School, a black high school in Washington, D.C., which reputedly produced a fair number of students who performed at superior academic levels and subsequently achieved professional excellence.<sup>38</sup> However, the children of black middle-class families attended the school because segregation was being enforced at the time.<sup>39</sup> As black middle-class families increasingly leave black ghetto areas, we confront the more problematic task of educating youngsters in a single-race *and* single-class environment.

Professor Bell also fails to offer comment on the collateral consequences of an integrated education that will not occur in a single-race school. In an integrated situation, minority students potentially learn the extra-academic social and cultural modes of the majority community (and vice versa) and develop personal alliances that give access to information, jobs, or other opportunities. The general goal of racial harmony and understanding is dis-served by distance and isolation of the races during the formative years. It is true that in newly integrated schools there have been instances of internal segregation of black students by the authorities or by the black students themselves. Although resistance to desegregation by school officials who

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35. Taylor, *The Crucial Role of Education in Achieving the Civil Rights Goals of the 1980's*, 37 RUTGERS L. REV. 961 (1985).

36. See *id.* at 965-66.

37. Hodgson, *Do Schools Make a Difference?*, in *THE INEQUALITY CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE* 26 (D. Levine & M.J. Bane eds. 1975). The study Bell cites was unpublished, so it cannot be evaluated against other published works. It is possible that special and concentrated efforts were engaged to counteract the negative environmental factors.

38. Bell, *supra* note 32, at 479 n.25.

39. See Sowell, *Black Excellence - The Case of Dunbar High School*, 35 PUB. INTEREST 3, 5-6 (1974).

would never have initiated the process themselves is natural, that resistance merely calls for monitoring and vigilance by civil rights organizations. The problem of racial hostility does not exist solely in the white community, and black students must confront their own feelings of distrust and fear—at least in an integrated school they can test themselves in this regard. After all, upon leaving school, blacks will have to interact with whites in the working world.

### *C. The Lawyers' Role in Contemporary Reform*

#### *1. Non-Litigation Participatory Approaches: The Washington Lawyers' Committee on Civil Rights Under Law Model*

However one comes out on the merits of the value of integrated education versus improved quality education in de facto segregated schools, Bell correctly notes that the bulk of minority youngsters currently attending schools in racial or ethnic isolation and the course of United States Supreme Court decisions to date do not augur for much more desegregation in the future.<sup>40</sup> Given this state of affairs, it might be fruitful to model prospective efforts along the lines adopted by the local Washington, D.C. unit of the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee).<sup>41</sup> This organization has supplied legal support for newly-organized parent groups formed to seek improvements in their local educational establishments. Attorneys have contributed to these groups' successful efforts to force schools to make repairs and improvements rendering the premises usable and safe.<sup>42</sup> In addition, they have helped to form and to counsel parent groups on effective intervention in the budget and collective bargaining processes. These groups have achieved substantial increases in financial commitments to schools and teacher salaries and have had an impact on improved teacher accountability.<sup>43</sup> Attorneys have also structured a parent-supervised fund to which local corporations have made contributions.<sup>44</sup> The fund was designed to enable a community with many low income families to provide additional educational options, much in the way that middle-class families supplement a school system's resources with their own contributions. The bulk of the lawyers' activities did not involve litigation, but rather the rendering of legal advice as, in effect, "house counsel" to parents' groups and establishment of

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40. Bell, *supra* note 32, at 478-80.

41. See Sellers, *Public Education Legal Services Project: A Private Sector Initiative in the Area of Public Education*, 27 How. L.J. 1471 (1984).

42. *Id.* at 1483-84.

43. *Id.* at 1485-86, 1489.

44. *Id.* at 1486, 1490-92.

a cooperative relationship with the board of education and the superintendent of schools.<sup>45</sup>

2. *New Directions in Litigation: Alternate Sources of a "Right" to Education*

The Lawyers' Committee strategy stresses nonlitigation approaches. However, some suggest that litigation in a recast form may recoup the defeat sustained in *San Antonio Independent School District v. Rodriguez*, the constitutionally based school finance case.<sup>46</sup> The losses in that case may have flowed, in part, from the Court's view that no constitutionally based "right" to education existed and that no standards existed upon which to measure the state's educational failures in minority-dominated schools.<sup>47</sup> Recent reform legislation, however, has sought to establish minimum standards for student performance.<sup>48</sup> Efforts to establish a student's "right" to state educational support adequate to ensure that the student will have the capacity to meet the new standards may be based upon this type of legislation. Under this approach, deficient public schools would violate state law if they produce a disproportionate number of failing students.<sup>49</sup>

It may be argued that in *Rodriguez*, the Supreme Court merely addressed the need to tolerate relative disadvantages between student performance in different school districts in deference to the local control principle, while leaving unanswered the question of whether there was a federal constitutional right to a bedrock of minimally adequate education.<sup>50</sup> The argument in favor of recognizing such a constitutional right might be reinforced by reference to the impact that the absence of an adequate education has on a

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45. For early experiments with this new role on behalf of lawyers working with disadvantaged groups, see Clark, *House Counsel for the Poor—An Experiment in Clinical Legal Education*, 17 *How. L.J.* 614 (1973).

46. 411 U.S. 1 (1973); see also *supra* text accompanying note 27-31.

47. In *Rodriguez*, the Court said: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35. The Court also questioned whether higher financial expenditures in a school district automatically translated into a higher quality education. *Id.* at 23-24.

48. JONES - WILSON, *The State of Urban Education*, in *THE STATE OF BLACK AMERICA* 1984, 95-118 (1984) (by 1978, 36 states had adopted some minimum standards for student performance); see also Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 *HARV. C.R.-C.L. L. REV.* 55 (1987).

49. For a full and careful development of this new approach in arguing for a "right" to education, see Chambers, *supra* note 48.

50. 411 U.S. at 54-55. The Court's statements on a constitutional right to education may be dictum because the State of Texas in *Rodriguez* claimed that they provided a minimally "adequate" education for all children and the Court found that the plaintiffs had not refuted the State's assertion. *Id.* at 24.

citizen's capacity to exercise other constitutional rights, such as the right to free speech or the right to participate in elections on an equal basis.

All of these suggestions are subject to criticism. One could seriously question the likelihood of success of the federal constitutional claims. Recently, the United States Supreme Court further reinforced the position that the fourteenth amendment does not obligate a state to neutralize poverty as a barrier to state educational benefits when it ruled that there is no duty to provide busing for children to attend public schools when indigent families cannot afford the fee charged.<sup>51</sup>

While some state courts provide a more hospitable forum to pursue claims on behalf of the disadvantaged than the Supreme Court, it may be necessary to question the ultimate impact of the recent legislation adopted under the banner of "reform" before pursuing such litigation. Retaining students who perform poorly in a grade may have a "no nonsense, get tough" ring, but practically, such a reform could accelerate the rate of school dropouts by youngsters who feel humiliated and defeated. Further, pursuit of state law claims presents a difficult question regarding the adequacy of possible remedies. Some educational experts report that the precise changes that must be instituted to achieve a higher quality of education are unclear, especially for youngsters from disadvantaged backgrounds. For example, despite conclusions suggested by a common sense appraisal, some research finds no consistent and clear improvement in student achievement solely through devoting greater financial resources to the public schools.<sup>52</sup>

The picture, however, is not completely bleak. Some initiatives have demonstrated success, including active involvement of parents in the direction of schools, recruitment of bright, motivated teachers who do not cast negative projections on minority students in terms of the students' potential, and maintenance of minimum levels of orderliness and discipline.<sup>53</sup> However, a number of other methods of organizing or administering a school system exist that have received energetic support from some educators but have been rejected strenuously by others. The list of controversial methods include voucher systems to permit parental selection of schools, stiffened graduation requirements, and merit pay for or competency testing of teach-

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51. *Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481 (1988).

52. H. AVERUCH, S. CARROLL, T. DONALDSON, H. KIESLING & J. PINCUS, *HOW EFFECTIVE IS SCHOOLING? A CRITICAL REVIEW AND SYNTHESIS OF RESEARCH FINDINGS* xii, xiii (1972); *see also infra* text accompanying notes 55-59.

53. *See TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL ELEMENTARY AND SECONDARY EDUCATION POLICY, MAKING THE GRADE* (1983). Considerable evidence demonstrates that the Head Start program, providing pre-first grade education, has given poor and minority youngsters educational gains which have been sustained over time. *See also* J. OGBU, *MINORITY EDUCATION AND CASTE* (1978).

ers.<sup>54</sup> The frequent claim that other socioeconomic conditions besides poorly structured schools contribute to produce high dropout rates, lowered achievement scores, and disrupted classes in minority schools, compounds the problems of choosing the most efficacious means of improving education. Young people in ghetto neighborhoods confront peers who devalue education and who may rely on crime and violence to solve problems. These students are also more likely to come from broken homes and lack adequate housing, medical care, and nutrition. All of these conditions manifest themselves in the school system in a manner that short-circuits or impairs the teaching process.

Given the uncertain availability of judicial remedies for these problems when presented in their full dimensions, it is possible that a court, even a state court, may hesitate to attempt a resolution viewing them as legislative problems rather than judicial problems. One branch of scholarship, however, suggests that the most obvious and immediate legislative response — devoting increased resources to education — may not be the most effective means of securing the collateral economic benefits of an adequate education.

#### *D. The Uncertain Effect of Increased Educational Expenditures*

The work of a group of social scientists under Christopher Jencks' leadership poses a serious challenge to the common premise that increased financial resources to schools will indirectly, but substantially, diminish the gap between white and black incomes.<sup>55</sup> After a study of the Coleman Report,<sup>56</sup> Jencks concluded that, despite a steady decrease in the gap in material resources and personnel expenditures between black and white schools, an enormous gap remained between black and white incomes.<sup>57</sup> Jencks suggested that direct income redistribution policies more effectively reduced poverty than providing schools with greater resources.<sup>58</sup>

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54. See JONES-WILSON, *supra* note 48, at 105-10.

55. C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS & S. MICHELSON, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 29, 93-97, 188-90 (1972) [hereinafter C. JENCKS].

56. OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) [hereinafter COLEMAN REPORT]. The report found that there were minimal differences between the physical facilities, formal curricula, and measurable characteristics of teachers between black and white schools and that these small differences had little effect on the significant differences between black and white students' performances on standardized tests. The key variable appeared to be the lack of access to resources that poor black students had compared to classmates from affluent homes.

57. C. JENCKS, *supra* note 55, at 23-29. "Neither family background, cognitive skill, educational attainment, nor occupational status explains much of the variation in men's incomes." *Id.* at 226.

58. *Id.* at 230-32.

The Jencks' thesis has been subjected to strenuous attack and reinterpretation. His conclusions do not go so far as to suggest that a lack of scholastic credentials do not operate as a *barrier* to securing employment. Rather, he maintains that increased educational expenditures did not amount to strong determinants of post-school incomes *within* particular groups *once a person had obtained employment*.<sup>59</sup> Therefore, improvements in schools that decrease dropout rates, for example, might very well affect access to employment, and consequentially, income. And because unemployment is disproportionately visited upon minorities, lack of a gateway educational credential will definitely adversely affect these groups. If Jencks correctly asserts that income redistribution policies are a more efficacious way to confront poverty, then we are again pointed to the arena of legislation. But while most legislators would have little difficulty enacting modest increases in educational expenditures, civil rights activists choosing Jencks' course face the more difficult political challenge of influencing various elected bodies to reorient public policy in the direction of income redistribution.

## II. EMPLOYMENT

Those who resist racial and ethnic integration of schools, and most assuredly of residential neighborhoods, do so not solely because of racial and ethnic prejudice, but in part because of their hostility to the concomitant integration of the lower class with middle and upper classes which educational and residential integration would produce. Assertion of hostility along class lines is often muted in American society by the myth that we are a classless society with fluid status largely determined by an individual's intelligence, industry, and initiative. According to this stereotype, poverty visits only the lazy, the unambitious, and the parasitic. Indeed, one determinant of status may be the extent to which an individual can create physical distance from the poor by changing neighborhoods or schools. As long as these attitudes sustain themselves, African-Americans and Hispanics will encounter barriers to integration into middle and upper-class institutions.

Litigation aimed at eliminating discrimination in employment opportunities appears to offer a natural, if indirect, means of overcoming these perceptual barriers, thus achieving widespread institutional integration. Logic suggests that as African-Americans and Hispanics ascend the income ladder

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59. To illustrate, white workers earn about 50% more than black workers. But the best paid fifth of all white workers earns more than 600% more than the worst paid fifth. This distance between *white* workers is not explained by differences in the quality of education. See Hodgson, *supra* note 37, at 39.

they will command the financial resources necessary to secure housing in white suburban areas and will achieve school integration as a consequence of residence.

Despite substantial advances since passage of Title VII of the 1964 Civil Rights Act,<sup>60</sup> however, this hope remains unrealized. Focusing solely on the black community, outlawing open, racial discrimination in employment has substantially improved the economic fortunes of vast numbers of blacks. Yet these improvements have been isolated and have not benefited the entire black community. Indeed, evidence shows growth in the proportion of the black population living below the poverty line, as well as an intensification of poverty, since the 1970's.<sup>61</sup> Some other data shows evidence of retrogression in the last ten to twelve years, running across the Carter and Reagan administrations.<sup>62</sup> Professor Alfred Blumrosen, however, points to data showing nearly 25% of the minority workforce in higher paying jobs in 1980 than they would have been under the occupational distribution that existed in 1965.<sup>63</sup> Therefore, the passage of Title VII and the subsequent litigation it fostered has apparently had some positive impact in terms of opening employment opportunities for some portions of the black community. We now face the challenge of expanding those opportunities to members of the burgeoning underclass.

#### *A. Title VII and the Court: Progress and Retrenchment*

Under the current federal statute prohibiting employment discrimination, few opportunities for progressive litigation that would benefit the plaintiff class remain. The statute is now so mature and developed in interpretation that any areas of uncertainty which could be clarified to benefit the plaintiff class appear to have been exhausted, and any future advances will probably require new or amended legislation, especially in light of some recent decisions of the United States Supreme Court.

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60. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

61. The most comprehensive documentation can be found in W. WILSON, *THE TRULY DISADVANTAGED—THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 46-62 (1987). See also Lauter & May, *A Saga of Triumph, A Return to Poverty: Black Middle Class has Grown but Poor Multiply*, L.A. Times, Apr. 2, 1988, § 1, at 16, col. 1 (Since 1969, the percentage of black men, ages 25 through 55, who earned less than \$5,000 rose from 8% to 20%).

62. See Williams, *Urban League Says Blacks Suffered Loss Over Decade*, N.Y. Times, Jan. 15, 1988, at A10, col. 1.

63. Blumrosen, *Rethinking the Civil Rights Agenda: Impressions of the Rutgers Law School Conference*, 37 RUTGERS L. REV. 1117, 1122 (1985).

With the exception of a few recent cases,<sup>64</sup> courts, including the Supreme Court, have liberally construed the statute to facilitate its remedial goals. *Griggs v. Duke Power Co.*,<sup>65</sup> the most important Title VII case to date, established a very critical doctrine declaring unlawful those employment practices that have a disparate and adverse impact on minorities and females unless the employer can demonstrate that reliance on such practices achieves some valid employment goal.<sup>66</sup> *McDonnell Douglas Corp. v. Green*<sup>67</sup> established a simple and direct procedure enabling a plaintiff to sustain a prima facie case when alleging intentional discrimination.<sup>68</sup> The Supreme Court also established a rough presumption that a prevailing plaintiff was entitled to an award of back pay and attorney's fees, and made the defendant's recovery of attorney's fees more difficult.<sup>69</sup>

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64. See *infra* notes 70-71, 73-76 and accompanying text.

65. 401 U.S. 424 (1971).

66. *Id.* at 436. The Court recently extended the *Griggs* analysis to encompass screening by subjective evaluation where the net effect is a disparate impact. *Watson v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777 (1988). There are, however, conclusions and some ambiguous language that may be troubling from a plaintiff's perspective. For the first time, the Court clearly stated that after a plaintiff establishes a prima facie case through showing that an employment practice adversely affects his group, the burden of proof does not shift to the defendant (as the dissent vigorously argued). The defendant must merely produce enough evidence to create an issue of fact. Moreover, the plaintiff has the duty of identifying, with precision, the particular employment practices that caused the disproportionate loss of a job opportunity or benefit when a number of factors influence the employment decision. This holding could be criticized on the ground that this information is more accessible to the defendant. The Court also claimed that tests need not *always* be validated to prove that they are measures of characteristics needed to perform the job, but did not make clear the circumstances under which the relaxation of this requirement would occur. The lack of clarity was compounded by the citation to *Washington v. Davis*, 426 U.S. 229 (1976), which was decided under the equal protection component of the due process clause of the fifth amendment, and thus did not apply the more stringent limitations of the "business necessity" concept utilized in Title VII cases.

67. 411 U.S. 792 (1973).

68. *Id.* at 802. To establish a prima facie case, the complainant must show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.*

69. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1492 (1989), reinforced this trend by overruling lower court decisions that barred the prevailing plaintiff from recovering attorney's fees if he did not succeed on the "central issue" in the case. The Court stated that plaintiffs may recover attorney's fees if they prevail on "any significant issue." *Id.* at 1493. Although the case involved an interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), the courts have often interpreted the attorney's fees portion of Title VII as having the same goals as 42 U.S.C. § 1988. See, e.g., *Salone v. United States*, 645 F.2d 875, 879 (10th Cir.), *cert. denied*, 454 U.S. 894 (1981); *Denton v. Boilermakers Local 29*, 673 F. Supp. 37, 52 (D. Mass. 1987).



A few decisions prior to the 1988-89 Supreme Court term giving the civil rights plaintiffs' bar cause for distress have either generated congressional amendments to Title VII or have not had lasting consequences. For example, in *General Electric Co. v. Gilbert*,<sup>70</sup> the Court interpreted the term "sex" as excluding discrimination against females on the basis of pregnancy,<sup>71</sup> but Congress quickly amended the statute to provide such protection.<sup>72</sup> In *International Brotherhood of Teamsters v. United States*,<sup>73</sup> the Court held that seniority systems which had a disparate impact did not violate Title VII because Congress had sought to preserve seniority systems against such attacks in a special provision of Title VII.<sup>74</sup> This decision has a diminished influence as time passes because it basically preserves the (unfair, if not unlawful) advantage given to that small portion of the population who have seniority credits accumulated as a consequence of being hired prior to 1964, when minorities and females were discriminatorily barred from many areas of employment. *East Texas Motor Freight Systems, Inc. v. Rodriguez*<sup>75</sup> raised concerns that the Supreme Court was imposing stringent limitations on the breadth of the class that a plaintiff could represent.<sup>76</sup> However, the ruling could reasonably be interpreted as merely requiring that the plaintiff represent only the class of persons who have suffered from the same kind of discrimination (e.g. hiring vs. promotion) visited on that plaintiff. If a particular practice is systematic and ongoing, the plaintiff should be permitted to locate and join others who have endured discrimination in other facets of the employment process to broaden the scope of the class action. Moreover, the Equal Employment Opportunity Commission (EEOC) is not bound by class action restrictions and has authority to bring a suit that encompasses any and all discriminatory practices engaged in by a given employer.<sup>77</sup>

The EEOC employs broad supportive interpretations of Title VII in areas that have not been fully litigated, and the courts give some deference to these interpretations.<sup>78</sup> Moreover, despite some initial threats from the chairperson of the EEOC during the Reagan administration, the interpretive guidelines promulgated during earlier administrations, which give extensive

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70. 429 U.S. 125 (1976).

71. *Id.* at 136.

72. See Pregnancy Discrimination Act, Pub. L. No. 95-555, § 701(k) Title VII, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

73. 431 U.S. 324 (1977).

74. *Id.* at 353-55.

75. 431 U.S. 395 (1977).

76. *Id.* at 404-05.

77. 42 U.S.C. § 2000e-5(a) (1982).

78. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). But see *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 89-90 (1981) (refusing to give full effect to an EEOC interpretation because it conflicted with an earlier interpretation).

protection to classes protected under the statute, have not undergone wholesale revision.<sup>79</sup> With three ominous, recent exceptions,<sup>80</sup> the Court has generally assured plaintiffs access to a wide range of affirmative action relief.<sup>81</sup>

Some of the affirmative action cases, however, involved close decisions. Professor Eleanor H. Norton, a former chairperson of the EEOC, prophetically cautioned just prior to the 1988-89 term that the "danger lies in the scraping, trimming, and chipping away that could reduce the potency of these [affirmative action] decisions as they are interpreted in decisions yet to come."<sup>82</sup> During the 1988-89 term, a conservative majority emerged on the Supreme Court that possibly will end the liberal, pro-plaintiff interpretations of civil rights statutes and the fourteenth amendment which have occurred in the past. President Reagan, appointing three justices to the United States Supreme Court, is generally charged with breaching much of the bipartisan support for civil rights that existed over the course of twenty years following passage of the 1960's civil rights legislation. The Court, with the new Reagan appointees, decided five cases: *Wards Cove Packing Co. v. Atonio*,<sup>83</sup> *Martin v. Wilks*,<sup>84</sup> *Lorance v. AT&T Technologies, Inc.*,<sup>85</sup> *Patterson v. McLean Credit Union*,<sup>86</sup> and *Jett v. Dallas Independent School District*.<sup>87</sup> These cases all interpret civil rights statutes in a manner that may prompt civil rights organizations to demand legislative redress. A sixth case, *City of*

79. See Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 707-08 (1988).

80. See *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989) (discussed *infra* notes 101-04 and accompanying text); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (placing modifications on affirmative action relief); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

81. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (supporting affirmative action); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (same); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (same).

82. See Norton, *supra* note 79, at 700. See generally, WOMEN EMPLOYED INST., JUSTICE DENIED: THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UNDER THE REAGAN ADMINISTRATION, reprinted in *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 99th Cong., 2d Sess. 184-213 (1986). For the most comprehensive documented analysis done, see N. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988).

83. 109 S. Ct. 2115 (1989). Each of the five cases interpreting civil rights statutes had the narrowest majority possible, showing the impact of President Reagan's last appointee, Justice Kennedy.

84. 109 S. Ct. 2180 (1989).

85. 109 S. Ct. 2261 (1989).

86. 109 S. Ct. 2363 (1989).

87. 109 S. Ct. 2702 (1989).

*Richmond v. J.A. Croson Co.*,<sup>88</sup> also adverse to the claims made on behalf of minorities, involved an interpretation of the fourteenth amendment.

Of all these cases, *Wards Cove Packing Co.* may pose the greatest difficulty for plaintiffs under Title VII. Indeed, the Court held that even after a plaintiff proves that an employment practice has had an adverse impact on minorities, the burden of proof does not shift to the defendant employer to show that the practice fulfilled a legitimate business purpose, but rather continues to rest with the plaintiff who now bears the additional burden of proving that the practice did not serve any valid business goal.<sup>89</sup> In *Martin*, the Court held that a consent decree approving an affirmative action plan was not res judicata with respect to white employees who had not been a party to, or an intervenor in, the litigation.<sup>90</sup> In *Lorance*, the Court held that when a plaintiff claims that a seniority plan discriminates against minorities, the plaintiff must, for purposes of the statute of limitations under Title VII, challenge the plan when it is adopted, not when it is implemented.<sup>91</sup>

Next, the Court decided *Patterson*, which held that section 1981 of the Civil Rights Act of 1866 continues to prohibit discriminatory refusals to enter into a contract, but does not govern discriminatory implementation or practices once the contract is in place.<sup>92</sup> Finally, the Court in *Jett* held that an employee who alleges discrimination may not sue public employers under the section 1981 claim of respondeat superior.<sup>93</sup> Rather, the Court required the plaintiff to prove (as required under section 1983) that the state official who made the employment decision had policy making authority or was acting pursuant to government policy.<sup>94</sup>

These cases provide an opportunity for a legislative response. Which case represents the best candidate remains highly speculative because, in some instances, a clear judgment as to whether a case creates serious roadblocks to remedies against discrimination may only emerge after future litigation. Therefore, extensive comment on these cases would be premature. Moreover, securing legislative redress may also be difficult because the cases resolve matters with a "technical" cast that some members of Congress may feel are best left to the courts.

*Wards Cove*, however, seemingly presents the greatest need for amending Title VII. Individuals proceeding through private counsel may, as a practi-

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88. 109 S. Ct. 706 (1989).

89. 109 S. Ct. 2115, 2126 (1989).

90. 109 S. Ct. 2180, 2188 (1989).

91. 109 S. Ct. 2261, 2268-69 (1989).

92. 109 S. Ct. 2363, 2372-73 (1989).

93. 109 S. Ct. 2702, 2721 (1989).

94. *Id.* at 2722.

cal matter, be unable to afford the cost of retaining experts to carry the burden of proving that a business practice serves no legitimate goal. Moreover, the defendant who has adopted the allegedly discriminatory business practice is in a better position to prove the need for the practice.<sup>95</sup>

*Patterson* and *Jett*, although less urgent, also create a need to address the limitations that the Court has placed on section 1981. In *Patterson*, the Court declined to overrule *Runyon v. McCrary*,<sup>96</sup> which had previously interpreted section 1981 as prohibiting private entities, such as employers, from discriminatorily refusing to enter into contracts with minorities. Exploration continues concerning the range of discriminatory commercial relationships which, despite not being designated as "employment," and, therefore, escaping the reach of Title VII, may be prohibited by section 1981 as "contractual." Overruling *Runyon* would have stifled this exploration. For example, section 1981 may reach appointments to the board of directors of a corporation or the retention of a host of independent contractors such as arbitrators and sports agents. However, the *initial* problem in most instances for minorities is securing these contractual opportunities, and *Patterson* did not preclude reliance on section 1981 for these types of cases.<sup>97</sup>

*Jett* also may not present a need for legislative action. Under *Jett*, if an official engages in the kind of intentional employment discrimination one would have to prove to prevail under section 1981, even absent proof of a governmental policy, such conduct would violate Title VII.<sup>98</sup> Moreover, the statute, because it was passed in a post-slavery context, is limited to race-based claims. As a result, generating broad support for amendment to Title VII, which in practical terms would be viewed as benefiting only blacks, would be difficult.

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95. See Professor Robert Belton's insightful comment: "A review of the discrimination cases also suggests that the burden of proof issue may well be the battleground upon which some judges are attempting to repudiate the disparate impact theory of discrimination." Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1209 (1981).

96. 427 U.S. 160 (1976).

97. *Patterson* asserted a claim of racial harassment by her employer. The claim did not entail a refusal by the employer to enter into a contract of employment because of race. As a result, the Court reasoned that section 1981 did not provide a cause of action. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372-73 (1989). It is not, however, a complete response to reason that *Patterson* could have pursued this claim under Title VII. Unlike section 1981, Title VII does not permit damages solely for harassment. However, it may be difficult to secure an amendment to section 1981 to negate *Patterson* to allow damages for racial harassment unless activists also seek an amendment to Title VII to permit damages for sexual harassment, the latter of which may present a more widespread problem.

98. *Jett*, 109 S. Ct. at 2722.

*Martin* has been criticized because it potentially will destabilize longstanding affirmative action decrees. However, the decision may merely state the unremarkable proposition that persons cannot have their legal rights determined without having their day in court.<sup>99</sup> Indeed, proponents of an amendment to preclude a nonparty from attacking a decree might meet opposition from those claiming that such an amendment would violate due process of law.

*Lorance* also may not generate support for amending Title VII. Despite the defeat the *Lorance* plaintiffs suffered, subsequent plaintiffs now know that when an employer adopts a seniority system that adversely affects them, they must immediately file suit.<sup>100</sup> At most, one might seek an amendment that shifts the challenge date to the date of implementation if the discriminatorily impacted plaintiff cannot ascertain the adoption date. Early litigation, however, does present some advantages because a court will determine the legality of the seniority system before anyone relies on the system to distribute benefits to employees, thereby avoiding a difficult unraveling process.

Finally, the Court in *Croson* held that an affirmative action ordinance designed to guarantee minority businesspersons a portion of city contracts violated the fourteenth amendment because the city had failed to establish an adequate record of prior discrimination against such businesspersons to justify an explicitly racial remedy.<sup>101</sup> Only the arduous process of a constitutional amendment can correct this case. The wisdom of attempting an amendment would be suspect because the Court soundly reasoned (arguably) the proper factual predicate for an affirmative action plan.<sup>102</sup> Indeed, an article the Court cited by Professor Drew Days, a former head of the Justice Department's Civil Rights division and who is widely respected in civil rights circles, probably supplied the theoretical underpinning of the de-

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99. *Martin v. Wilks*, 109 S. Ct. 2180, 2184 (1989).

100. *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261, 2268-69 (1989).

101. *City of Richmond v. J.A. Croson, Co.*, 109 S. Ct. 706, 727 (1989).

102. The Supreme Court held, for the first time, that state action which disadvantages whites will be subjected to strict scrutiny, even if the municipal legislation is designed to repair discrimination against minorities. *Id.* at 723. The Court opens itself to serious criticism because it has said previously that the strict scrutiny standard applied only when a group had been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). This hardly describes the class of white, male businessmen whom the plaintiff represented in *Croson*. However, the Court's jurisprudence on the equal protection clause will unlikely be seen as a paramount target for a constitutional amendment, especially given the current controversy surrounding affirmative action and claims of "reverse discrimination."

cision.<sup>103</sup> Moreover, the Court in *Croson* appeared to accept the proposition that Congress might legislate affirmative action plans on a slimmer factual basis than states and municipalities.<sup>104</sup> Thus, perhaps federal legislation is the least problematic way to achieve increased contractual opportunities for minority businesspersons.

*B. Reforming Antidiscrimination Law and Procedure: Lessons  
from Labor Law*

*1. Creating a Right of Immediate Relief and the Problem  
of Displaced Workers*

Numerous opportunities exist to improve plaintiffs' relief and to streamline enforcement of employment discrimination laws. These departures can probably only be achieved by legislation. The EEOC, under the Reagan administration, proposed that discriminatory refusal of employment entitled a plaintiff to back pay and immediate hiring or reinstatement, even if it required the discharge of the person given the position the plaintiff sought.<sup>105</sup> In the circuit courts that have dealt with the issue, the law is fairly settled that the plaintiff must await the development of a vacancy before he can be hired.<sup>106</sup> The stance of the circuits, however, does not make the plaintiff whole because postponing job experience may detrimentally affect an employee with respect to subsequent promotions and other opportunities.

The remedial provisions of Title VII were modeled on those of the National Labor Relations Act (NLRA),<sup>107</sup> and the courts have relied on decisions by the National Labor Relations Board (NLRB) as a guide for the interpretation of Title VII where they find an analogous problem.<sup>108</sup> Under the NLRA, refusing to hire or discharging a person solely because of his engagement in lawful union activity constitutes an unfair labor practice.<sup>109</sup> If such an unfair labor practice charge is found to have merit, the employee

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103. *Croson*, 109 S. Ct. at 719 (citing *Days*, *Fullilove*, 96 YALE L.J. 453 (1987)).

104. 109 S. Ct. at 719-20.

105. See 29 C.F.R. § 1613.271(a)(3)-(4) (1988); see also Equal Employment Opportunity in the Federal Government; Complaints of Discrimination, 52 Fed. Reg. 41,920-22 (1987) (EEOC comments regarding back pay and immediate rehiring).

106. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 n.11 (1984) ("[l]ower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs").

107. 29 U.S.C. §§ 151-168 (1982).

108. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-21 (1975). Indeed, the Court in *Franks v. Bowman Transportation Co.* said: "To the extent that there is a difference in the wording of the respective [remedial] provisions, § 706(g) [of Title VII] grants, if anything, broader discretionary powers than those granted the [NLRB]." 424 U.S. 747, 769 n.39 (1976).

109. 29 U.S.C. § 158 (1982); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

has a right to immediate reinstatement, even if reinstatement means that another person who received the job during the dispute would be bumped.<sup>110</sup> Likewise, employees who strike in protest of an unfair labor practice have a right to reinstatement over workers hired as replacements during the strike.<sup>111</sup> Arguably, Title VII and the NLRA do not address perfectly analogous circumstances. Immediate hiring or reinstatement may be necessary in the NLRA context in order to prevent employees *other* than the complainant from being intimidated into avoiding union activity. Similarly, the knowledge of racial or gender discrimination *and* a long *delayed* remedy may likewise deter minorities or women from seeking employment with a discriminating employer who appears to have successfully flouted the law in practical terms.<sup>112</sup> Moreover, the labor movement has found that even broader remedial relief inadequately deters unfair labor practices in which employees have lost employment. Thus, the unions pushed, unsuccessfully, for stiffer relief (double back-pay) in labor reform legislation in 1978.<sup>113</sup>

Any new legislation seeking to perfect the plaintiff's remedy should address the "innocent victim" problem by giving a displaced person a cause of action against the employer. Relief may take the form of continued pay until the displaced person finds suitable, substitute employment. While a displaced person may not suffer as fully as a victim of arbitrary discrimination, the discriminating employer has still placed the displaced worker in a position of innocent and detrimental reliance and has improperly raised the displaced employee's expectations.<sup>114</sup>

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110. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 54 (1954).

111. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286 (1956). Workers who end a strike designed solely to improve working conditions (economic strikers) have to await a vacancy when others have been hired in their place. The Court has held that hiring a replacement is not, in itself, an unfair labor practice, but is merely a legitimate and lawful countermeasure to the strike, thus permitting the delay. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938).

112. The possibility is greater that a replacement, hired because of employer resistance to unionization, may have more "notice" of the fact that he is coming into a place involved in a labor dispute than a person who is hired when another has, without his knowledge, refused jobs discriminatorily on the grounds of race or national origin.

113. See Bredhoff, *Labor Law Reform: A Labor Perspective*, 20 B.C.L. REV. 27, 56 (1978).

114. Innocent persons who are discharged under the proposed amended civil rights legislation may have an independent cause of action in some states for breach of contract. The Court, in an analogous situation, said that such suits under state law are preempted by the NLRA where an innocent party is discharged pursuant to a NLRB order to reinstate an employee whose firing was an unfair labor practice. *Belknap, Inc. v. Hale*, 463 U.S. 491, 512 (1983). The proposal here, however, would give a *federal* cause of action and not remit the innocent parties to the vagaries of state laws.

## 2. *Authorizing EEOC to Conduct Hearings and to Grant Injunctive Relief*

Another reform ripe for legislative action would be to grant the EEOC authority equivalent to that vested in the NLRB; specifically, to hold adversarial hearings and to issue cease and desist orders.<sup>115</sup> This authority was part of the original Title VII proposal, but was withdrawn in a compromise to assure passage of the legislation.<sup>116</sup> Therefore, at present, the EEOC only has authority to file suit in federal court.<sup>117</sup> Given the experience with Title VII and the fact that substantial elements of the business community have learned to live with it, it is possible that opposition to the proposal has diminished.<sup>118</sup> A number of commentators have speculated that an EEOC empowered with cease and desist orders might obtain speedier resolutions similar to the relative dispatch with which the NLRB resolves matters before it.<sup>119</sup> Experience, however, prompts a caveat that the option of private suits, as an alternative remedy, precludes a monopoly over enforcement by an administration that might be hostile to the goals of the reformed legislation.

The foregoing discussion of plaintiffs' remedies in litigation and of the NLRB's independent remedial powers raises a critical collateral question as to whether it is counterproductive for the EEOC to focus too much of its energy on individual cases in federal court or whether broader regulatory and enforcement roles should be mandated. However, even if it is more desirable for private attorneys to pursue most of the individual cases rather than the EEOC, current conditions point to a pressing need for measures to strengthen the plaintiff's bargaining and litigation position. The measures proposed here would make prompt and full relief a meaningful option and would reduce the present loss of momentum in the progressive evolution of civil rights law.

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115. 29 U.S.C. § 160(a)-(m) (1982 & Supp. V 1987).

116. See 109 CONG. REC. 13,127 (1963) (statement of Rep. Robert Kastenmeier of Wisconsin); see also H.R. REP. NO. 914, 88th Cong., 2d Sess. 42, 57 (additional views of Rep. Kastenmeier and Rep. George Meader of Michigan), reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2411, 2426.

117. 42 U.S.C. § 2000e-5(f) (1982).

118. See *Affirmative Action: Joint Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 99th Cong., 1st Sess. 223-39 (1985) (testimony of the National Association of Manufacturers supporting affirmative action).

119. See Clark, *Insuring Equal Opportunity in Employment Through Law*, in RETHINKING EMPLOYMENT POLICY 173, 185-88 (D. Bawden & F. Skidmore eds. 1989). Prof. Eleanor Norton (a former Chair of the EEOC) cautions that under the Reagan Administration a case backlog has developed, so the agency would have to be given sufficient resources to handle the new responsibility. See Norton, *supra* note 79, at 681 n.3.



### C. Revitalizing Private Social Action Litigation

Despite the fact that the EEOC has had authority, since 1972, to file suit in federal court,<sup>120</sup> the majority of employment discrimination actions have been brought by private attorneys and public interest law firms.<sup>121</sup> During the Reagan years, the number of complaints filed with the EEOC increased, yet the EEOC has filed suit in the federal courts less frequently than under prior administrations.<sup>122</sup> The slackened performance of the federal agency appears to be attributable to poor management, reliance on the quicker route of compromise settlements in one-on-one cases, and major reductions in funding and staff.<sup>123</sup> For the most part, only a new administration that returns to a bipartisan commitment to vigorous enforcement of the civil rights laws can address these matters.

A dwindling number of major class actions brought by "private attorneys general" has exacerbated the Federal Government's abdication of an aggressive enforcement role. As a stopgap, if not a substitute measure, creation of a system of private incentives and information analysis could help to offset the slowdown in public enforcement by revitalizing private antidiscrimination litigation.

#### 1. Liberalizing the Award of Plaintiffs' Attorneys' Fees in Antidiscrimination Suits

The average plaintiff in an employment discrimination case lacks adequate financial resources to support litigation, especially complex, class action litigation. Generally, plaintiffs' attorneys take such cases on a contingent fee basis, but attorneys' increased reluctance or inability to absorb the risks that the fee arrangement presents; namely, the failure to recover attorneys' fees, has presented plaintiffs with insurmountable obstacles. The requirements for enhancing attorneys' fees to reflect the fact that Title VII cases are taken

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120. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(f) (1982).

121. Private attorneys handled the following major cases: *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

122. See N. AMAKER, *supra* note 82, at 110. Amaker notes that:

The number of cases EEOC has taken to court has declined visibly from the Carter years. . . . The sharpest decline initially was in the so-called systemic or pattern-or-practice cases, which fell from 62 in fiscal 1980 to 0 in fiscal 1982 and then increased to 10 in fiscal 1983.

*Id.*

123. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT REQUIREMENTS 17-18 (1987).

on contingency are very stringent.<sup>124</sup> Moreover, even when a plaintiff prevails, protracted litigation delays an often inadequate fee. A court may deny attorney's fees if the plaintiff's judgment is not more favorable than the pre-trial settlement proffered by the defendant.<sup>125</sup> A court may approve a settlement in which the plaintiff receives full relief in damages, but the defendant simultaneously demands denial of payment of the plaintiff's attorney's fees.<sup>126</sup> Each policy may have an arguably reasonable goal.<sup>127</sup> The net effect in both cases, however, is that the plaintiff's attorney may receive *no* compensation even when the plaintiff prevails, whereas the defendant's attorney is *fully* compensated even when the defendant loses. Also, in both instances, the plaintiff's attorney faces the potentially uneasy position of having concern for his fee compete with his client's interests. Either the attorney is pushed towards urging acceptance of a less than adequate settlement or contracts for a portion of the plaintiff's recovery to cover a fee, thereby creating the impression on the part of the plaintiff that his attorney, not the defendant or the court, rendered him less than "whole."<sup>128</sup> Legislation could relieve the plaintiff's attorney of these unfair pressures on recovery of an attorney's fee.

The United States Court of Appeals for the Third Circuit formed a task force that reported: "Fee awards for recent years in the social action context have been so discouraging that few attorneys will accept a civil rights case."<sup>129</sup> Employers' attempts to push plaintiff's attorney's fees down to the lowest possible levels have resulted in an enormous amount of litigation sur-

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124. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 727-31 (1987). Multipliers or other enhancements of a reasonable lodestar fee to compensate plaintiff's attorney for assuming the risk of loss is impermissible under the usual fee-shifting statutes. Even if the typical fee-shifting statute is construed to permit enhancement of the lodestar for risk assumption, there should be evidence in the record and a finding by the trial court that without risk enhancement plaintiff would have encountered "substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 731.

125. *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985) (U.S. Supreme Court interpretation of Rule 68 of the Federal Rules of Civil Procedure).

126. *Evans v. Jeff D.*, 475 U.S. 717, 734-38 (1986).

127. The goal is obviously to discourage needless litigation where the plaintiff cannot secure greater relief through a trial. *Marek*, 473 U.S. at 10-11. Also, it may not be totally unreasonable for a defendant to bargain for a certain sum, setting a bottom line in terms of financial exposure. *Evans*, 475 U.S. at 734-38.

128. See Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (a criticism that increased pressures for pretrial settlement may merely reflect the superior strength of the employer); see also Note, *Evans v. Jeff D.: Putting the Squeeze on Private Attorneys General*, 9 GEO. MASON U.L. REV. 389 (1987) (criticizing the Court on the ground that its interpretation will discourage attorneys from representing civil rights plaintiffs).

129. Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 249 (3d Cir. 1985) (footnote omitted).

rounding the question of plaintiff's attorney's fees.<sup>130</sup> Plaintiff's counsel have had to resist, albeit successfully, claims that nonprofit public interest law firms should receive *no* fee because they regularly handle cases without charging the clients or that they should be compensated on a lower level than private practitioners.<sup>131</sup> Defendants have unsuccessfully claimed that a plaintiff should recover *no* attorney's fees if a defendant prevailed on a "significant issue," or if the court determined it was not the "central issue" in the case.<sup>132</sup> Such efforts are perhaps understandable from the defendants' point of view, although the fees some employers expended on their own counsel in such efforts must have equaled or surpassed the amounts originally in dispute. As the litigation becomes less cost-effective for a given defendant, it must have an ideological thrust of disabling Title VII litigation in the future. Even more startling is the initial approval these efforts have received from the ostensibly neutral agents—the federal district courts.<sup>133</sup> Fortunately, courts of appeal and the United States Supreme Court have reversed some of the more restrictive rulings.

Nevertheless, the Supreme Court has sometimes been unresponsive to plaintiff's claims for attorney's fees. The Court has denied plaintiff's attorney compensation for an optional state administrative proceeding that preceded an ultimately successful suit brought under the nineteenth century Civil Rights Act in the federal court.<sup>134</sup> The Court has also denied plaintiff's recovery of attorney's fees against an intervenor even though plaintiff was the "prevailing party" and the plaintiff's attorney expended additional efforts in answering claims that the intervenor unsuccessfully asserted.<sup>135</sup> The employers' counsel, however, are fully compensated on a continuing basis in all of the above circumstances, and the defendants' attorneys run no

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130. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); see also *supra* notes 124-26 and accompanying text. To stem the tide of litigation around attorney's fees, the Court favors standards that are clear and easily applied because, as the Court stated in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), "[a] request for attorney's fees should not result in a second major litigation."

131. See *Blum v. Stenson*, 465 U.S. 886, 892-93 (1984).

132. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1492-93 (1989).

133. See generally Kimble, *Attorney's Fees In Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners*, 69 MARQ. L. REV. 373 (1985-86) (discussing restrictions lower courts have placed on the award of a plaintiff's attorney's fees).

134. *Webb v. Board of Educ.*, 471 U.S. 234, 244 (1985). But cf. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67-71 (1980) (holding that plaintiff's counsel *can* be compensated for handling state administrative proceedings prior to a suit under Title VII in federal court because such proceedings are contemplated under that Act).

135. *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2736-39 (1989).

risk of noncompensation because they are not forced to take cases on a contingent fee basis.

The law here is not fully developed because fee-shifting is unusual in American civil litigation, thus resulting in judicial caution in awarding counsel's fees. However, discouraging attorneys from taking plaintiffs' cases expresses, in the most effective way possible, hostility toward the goals of employment discrimination legislation. Congress should end this indirect hostility by adopting legislation establishing attorney's fees at a set level and giving the courts additional guidance in awarding them. These levels and guidelines should encourage a sufficient number of attorneys and firms to represent victims of employment discrimination.

The goal of such legislation should be to move plaintiff's counsel toward the position of defendant's counsel. Perhaps bar associations or the EEOC could canvass the fee structure of the area's largest firms, which handled tort cases on a contingent fee basis, and the courts could set plaintiff's counsel's fees using the hourly fee practices that have allowed those firms to function profitably. Alternatively, plaintiff's counsel in a given case could elect compensation equal to defendant's counsel's hourly rate.

Plaintiffs' attorneys complain that even when the fee is ultimately deemed adequate, it is obtained at the end of litigation, which may have lasted three or more years. Plaintiffs, unlike defendants, usually cannot advance an interim fee to their counsel to compensate for the extensive amount of time sometimes necessary to develop fully an employment discrimination case. Plaintiff's limited resources invite time-consuming, dilatory tactics on the part of defense counsel (who can usually bill his client on an ongoing regular basis), which exhaust the opposition and force surrender or an unfavorable compromise.<sup>136</sup> One means of equalizing these disparities would be legislation establishing a loan fund, administered by the EEOC, upon which attorneys could draw in the early stages of litigation. Plaintiffs' counsel could replenish the fund at the conclusion of the case upon award of attorney's fees.<sup>137</sup>

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136. Professor Blumrosen suggests that an administrative hearing officer should possess the power to limit discovery to foster the expedition of a case. See Blumrosen, *Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. REV. L. & SOC. CHANGE 297 (1984-85). One wonders how this would work in practice. Except for the most clearly irrelevant requests, how can a hearing officer determine that a litigant should not have some information, which is, at least arguably, pertinent to a claim or defense? Moreover, the courts now have authority to regulate the scope of discovery, but it has not operated as an effective restraint on protracted litigation.

137. Such a fund would approximate, for the plaintiff's counsel, the conditions under which defense counsel operates. Therefore, the EEOC should, in its discretion, forgive loans contracted in cases that the plaintiff lost, so long as a reasonable basis for the suit from the

## 2. Access to Interpretive Economic Data

All of the above suggestions assume that active, pervasive discrimination in employment continues and that additional resources and procedural reforms would enhance prospective plaintiffs' ability to mount large-scale cases. Macroeconomic data tends to show a continuing wide disparity between the incomes of white males as compared to women and minorities, who have been traditionally subjected to discrimination.<sup>138</sup> Neutral factors like differential education, training, or work experience do not fully explain the continuing disparity, thus raising a suspicion that arbitrary, discriminatory factors play a role.<sup>139</sup> However, the picture is now much more complex and fraught with analytical difficulties than in 1964 when Title VII was passed.

Commentators point to a number of structural changes in the American economy, unrelated to overt discrimination, which may operate functionally as barriers to substantial improvement of the economic status of women and minorities. Analysts say that America is rapidly moving towards an increasing polarization between low and high income groups with a shrinking middle class.<sup>140</sup> However, they advance myriad and sometimes contradictory explanations for this disturbing phenomenon. Indicators suggest that job growth will occur at either end of the spectrum—with professional, high-tech and high-skilled positions, and conversely, a vast number of low-skilled, low-paid service jobs.<sup>141</sup> Some say American companies have had to retreat from the manufacturing sector because of increased competition from foreign countries.<sup>142</sup> Others say American companies transfer jobs abroad to take advantage of lower labor costs and less stringent regulation in third world countries.<sup>143</sup> Some speculate that the growth of lower-skilled jobs in

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attorney's perspective existed at the outset. In effect, this fund would place private attorneys on a similar plane with staff counsel at the EEOC, who receive salaries regardless of the outcome of the case, and the agency has to reimburse defendants only where the suit is frivolous.

138. U.S. COMM'N ON CIVIL RIGHTS, UNEMPLOYMENT AND UNDEREMPLOYMENT AMONG BLACKS, HISPANICS AND WOMEN 55-56 (1982); COMMISSION ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, ASSEMBLY OF BEHAVIORAL AND SOCIAL SCIENCE, NATIONAL RESEARCH COUNCIL, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D. Treiman & H. Hartmann eds. 1981).

139. See sources cited *supra* note 138.

140. RETHINKING EMPLOYMENT POLICY, *supra* note 119, at 23-25.

141. See Jeffries & McGahey, *Equity, Growth and Socioeconomic Change: Anti-Discrimination Policy in an Era of Economic Transformation*, 13 N.Y.U. REV. L. & SOC. CHANGE 233, 248-50 (1984-85).

142. See Thurow, *The Disappearance of the Middle Class*, N.Y. Times, Feb. 5, 1984, at F3, col. 1.

143. See Squires, *Response: Private Investment as an Equity Issue*, 13 N.Y.U. REV. L. & SOC. CHANGE 283 (1984-85).

the suburbs and the decline of such jobs in the inner cities, where the bulk of the minority population lives, causes, in part, the plight of minorities.<sup>144</sup> Some suggest that the plight of women is based on their choosing (or being channelled into) female-dominated jobs, which subsequently creates an "overcrowding" resulting in depressed wages.<sup>145</sup> Others dispute a number of these hypotheses. Regarding women's depressed wages, for example, the female-dominated nursing profession is recently experiencing severe labor shortages, but the shortages have not prompted an escalation of wages.<sup>146</sup> A Civil Rights Commission Report finds that suburbanization of jobs did not fully explain the disparity in income between blacks and whites, for the disparities remained constant upon comparison of the incomes of blacks and whites who worked in the same suburbs.<sup>147</sup>

In order to effectively shape an employment litigation program for the plaintiffs, attorneys and plaintiffs' supporters must have access to economists and other experts to help weigh and evaluate various studies which may bolster or undermine the agenda. In the early days of litigation, public interest advocates pursued the very visible, open practitioners of racial and gender exclusion. Even the EEOC did not have a very carefully developed and sophisticated program, guided by developing economic trends, for targeting employers. Today, where discriminatory practices are less overt, sophisticated analysis of economic data may be required to account for continuing income disparities and lack of vertical mobility. Foundations that support anti-discrimination litigation should build into their grants to public advocates a component for non-legal expertise for long-range planning.

#### *D. The Role of Private Advocacy Groups: Reviving the Economic Boycott*

One of the unfortunate side effects of the passage of civil rights legislation has been the displacement of social action generated by lay persons. The remedial focus of a comprehensive statutory scheme lulls the lay public, as well as civil rights lawyers, into believing that active litigation is the only response necessary to eradicate discrimination. Indeed, sophisticated employers may ultimately welcome putting the problem in a legal-administrative framework when they learn that their superior resources in that terrain may dilute and blunt the social protest. If delay, cost, and inadequate attorney's fees subvert class actions under Title VII, civil rights organizations would be well advised to reinvigorate the economic boycott against compa-

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144. See W. WILSON, *supra* note 61, at 7-8, 42.

145. See Jeffries & McGahey, *supra* note 141, at 273.

146. See Clauss, *Colloquium: Employment Discrimination in the 1980's*, 13 N.Y.U. REV. L. & SOC. CHANGE 225, 229 (1984-85) (Keynote Address).

147. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 123, at 56.

nies that continue to show employment patterns of segregation or exclusion of minorities and women from better paying jobs. Detecting which enterprises engage in these practices can be problematic. It is not accidental that companies with federal contracts employ a higher proportion of minorities and women than companies that do not have such contracts.<sup>148</sup> The potential for losing a federal contract under the executive order program must exert some pressure on these companies to change their prior employment patterns. Civil rights organizations should not be forced to rely on individual complaints to identify the companies to be boycotted because the EEOC regularly receives bi-annual reports from companies nationwide on their employment of women and minorities. Under current Title VII law, this information is not available to the general public, and only a person who has filed a charge with the EEOC may request and receive notice of a right to sue.<sup>149</sup> Congress should amend the statute to permit any person access to such data as a matter of public interest. Because the data are submitted to a public agency, a claim of confidentiality is not a substantial argument against disclosure.

Under the NLRA, employers have a duty to supply data pertinent to the collective bargaining process.<sup>150</sup> Unions could possibly demand employment information based on that duty. A union could bargain for an end to discriminatory employment practices, and thus demand information that reveals past discriminatory practices. Indeed, unions arguably have an obligation to eradicate such practices under the duty of fair representation, at least where there is some colorable claim that employers discriminated against current employees. Unions and civil rights organizations need to work closely because they share many of the same goals now that the seniority question has faded from importance.<sup>151</sup> This would be one concrete way for unions to demonstrate a good faith desire for such coalition by joining with civil rights organizations. The fact that unions, however, represented

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148. CITIZENS' COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY 123-24 (1984). The Office of Federal Contract Compliance at the U.S. Department of Labor conducted a study in 1983 of 77,000 companies with over 20 million employees. The study found that female employment had increased by 15.2% and minority employment by 20.1% between 1974 and 1980 for federal contractors, with only a total employment growth of 3%. *Id.* By contrast, minority employment increased only 12.3% and female employment by 2.2% at non-contracting companies over the same period, despite the fact that these companies had a larger growth in total employment of 8.2%. *Id.* at 124.

149. 42 U.S.C. § 2000e-8(e) (1982); *see also* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981).

150. 29 U.S.C. § 158(a)(5) (1982); *see also* NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967) (NLRA requires employer to furnish information to the union).

151. *See supra* text accompanying notes 73-74.

only 20% of the workforce in 1980,<sup>152</sup> demonstrates the need for legislation that requires the bulk of employers to give the public the needed information. Pending an amendment, civil rights organizations should initially target for boycott companies that refuse voluntary disclosure of the information.

A boycott could serve a number of collateral goals. Where a particular company's products or services make it feasible, a boycott accompanied by picketing could capture "free" broadcast time and news attention. Organizers might enlist college and high school students for the picketing because those students have flexible schedules and do not face discharge for participation. Organizers could ask minority, feminist, and public-spirited organizations to supply lists of their memberships to a central civil rights organization that could forward mailings about the targeted companies to interested organizations and enlist the support of other organizations in an economic boycott. This might have the positive side effect of harnessing the energies of the growing minority middle class not currently engaged in social action. Moreover, it enlists the support of these individuals in a cost-free manner, posing no threat to pursuit of their careers. At most, interested individuals could urge their organizations (fraternities, sororities, professional minority organizations, etc.) to provide membership lists and financial support to a civil rights organization that would take the lead in developing the criteria and strategy for targeting companies. Boycotts have been utilized in the past, but this Article suggests more focused, controlled, widespread, and sustained action. Such an effort would definitely need lawyers because picketing and boycotting would have to be kept within legal boundaries to prevent (or defend against) any counter-offensives, such as those which occurred around the NAACP civil rights boycotts in Mississippi.<sup>153</sup>

Controls should be integrated to deter charges of corruption and protect the integrity of the boycott effort. Officials of the civil rights organization might, for example, commit themselves to refrain from taking contributions, employment, or any indirect benefits from a company until three years after the end of a boycott. A formal charter of the controls on the organization leading the boycotts, drafted by lawyers with expertise in ethical problems,

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152. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 (1983).

153. Merchants in Mississippi sued the NAACP, charging that the organization had violated the state's antitrust law when it conducted an economic boycott of business establishments to protest racial discrimination. The litigation lasted ten years before the Supreme Court found that the application of the antitrust laws, under the facts in the case, would violate the first amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). The complexity and length of this litigation, however, shows the need for careful legal advice. See *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 171-75 (1982).



could be made available to the media and participating organizations. A means of monitoring a targeted company's compliance with equal employment opportunity requirements, which was not always done in past boycotts, would be an absolute necessity.

The boycott tactic could, for various reasons, reach a number of situations untouched by litigation. The boards of major corporations, faculties and trusteeships of major universities, and staffs of major think tanks, for example, do not yet reflect a fair proportion of minorities and women. With respect to universities and think tanks, the boycott should focus on the major benefactor corporation. "Employment" under Title VII, however, may not include corporate directorships. Moreover, with regard to high level positions, the courts have taken a stance of deferring to the employer's judgment when filling a post which calls for a high degree of subjective evaluation.<sup>154</sup> An organization conducting a boycott need not meet a formal standard of "proof" acceptable to a court. It can simply make a commonsense demand that employers exercise reasonable efforts to correct the absence of minorities and women.

### III. IMMIGRATION

Hispanics,<sup>155</sup> the second largest minority group in the country, comprise the largest group of recent immigrants (lawful and unlawful) to this country.<sup>156</sup> If present trends continue, they will equal or exceed the African-American population in the country by the 1990's.<sup>157</sup>

With the exception of immigrants from Cuba, Hispanics generally have an economic profile analogous to African-Americans; as a group, Hispanics suffer high unemployment and significantly lower income in comparison to whites who are not recent immigrants.<sup>158</sup> The group, however, faces some

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154. See, e.g., *Tuft v. McDonnell Douglas Corp.*, 581 F.2d 1304 (8th Cir. 1978); *Frausto v. Legal Aid Soc'y*, 563 F.2d 1324 (9th Cir. 1977); see also Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 976-78 (1984).

155. "Hispanics" as used here encompasses recent immigrants, and their children, from Puerto Rico, Mexico, Cuba, or other South and Central American countries or persons from Spanish-speaking countries who married native American Indians (Chicanos).

156. 83.1% of Americans are white, 11.7% are black, and persons of Spanish origin are the next largest minority group at 6.4%. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION - GENERAL POPULATION CHARACTERISTICS 12 (1983). Mendes, *Profiting From a Changing America*, FORTUNE, Oct. 2, 1988, at 45; Bonafede, *Voter Turnout — How Many and Which Ones — Could Decide Presidential Race*, 16 NAT'L J. 404, 409 (Mar. 3, 1984).

157. G. GILDER, WEALTH AND POVERTY 124 (1981); Baker, *In Tomorrow's America, Se Habla Espanol; Hispanic U.S.A.: Breaking the Melting Pot*, BUS. WK., May 23, 1988, at 18.

158. Newman, *A Profile of Hispanics in the United States Workforce*, MONTHLY LAB. REV., Dec. 1978, at 3.

unique employment problems because of illegal residence or, for some lawful residents, lack of citizenship. The United States Supreme Court has upheld state legislation barring aliens from service in any governmental position that entails the formulation, implementation, or interpretation of public policy on the grounds that citizenship is a "rational" minimal test of sufficient allegiance and loyalty to the country and the state.<sup>159</sup> An executive order also bars aliens, with some limited congressional exceptions, from employment with the Federal Government in the competitive service.<sup>160</sup> This citizenship barrier is particularly unfortunate because public employment has always been a refuge of minorities from high levels of discrimination in the private sector. Advocates should continue constitutional challenges to the citizenship limitation on public service because of its arbitrary nature. Very close votes in some cases reflect the high degree of controversy in Supreme Court decisions on this issue and indicate fair prospects for success.<sup>161</sup>

Some immigrants may secure access to public employment if they can qualify for citizenship as a result of the amnesty provisions of the new Immigration Reform and Control Act of 1986 (IRCA).<sup>162</sup> Many immigrants, however, have had difficulty availing themselves of the right to permanent residency offered under the law. The statute required persons to prove that they had unlawfully resided continuously in the United States since January 1, 1982.<sup>163</sup> The Immigration and Naturalization Service (INS) reportedly imposed stringent proof of residency requirements in some areas, and because employers of aliens often violate a number of labor laws (e.g. minimum wage, unemployment tax), they may not have been inclined to cooperate in supplying documentation.<sup>164</sup> The difficulties some immigrants

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159. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 444-47 (1982) (probation officers); *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979) (public school teachers); *Foley v. Connelie*, 435 U.S. 291, 297-300 (1978) (state troopers). But cf. *In re Griffiths*, 413 U.S. 717, 722-27 (1973) (state may not bar a resident alien from taking a state bar examination).

160. Exec. Order No. 11,935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 app. at 521 (1982). The order has been upheld against constitutional challenges in *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

161. For example, *Ambach*, 441 U.S. at 69, was decided by a five to four vote.

162. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered titles and sections).

163. 8 U.S.C. § 1255a(a)(2) (Supp. V 1987).

164. Senator John H. Chafee recently commented that immigration deportation policy differs from one region to another and that "the result of this lack of coherent national policy has been that immigrants in some areas are treated leniently while in other areas they are treated quite harshly." Dewar, *Senate Votes Protection for Aliens' Kin*, Wash. Post, July 13, 1989, at A4, col. 1. A number of studies have shown that a large portion of employers breach child labor laws, overtime payment requirements, and health codes when employing aliens. See Waldinger, *The Occupational and Economic Integration of the New Immigrants*, 45 LAW & CONTEMP. PROBS. 197, 210 (1982). In *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), the United States Court of Appeals for the Eleventh Circuit reversed the United States

have faced in obtaining permanent residency reveals a need for a statutory amendment giving a new period for registration under the new rules for permanent residency.

The IRCA imposes sanctions against employers who employ persons who illegally reside in the country.<sup>165</sup> During the debate prior to the IRCA's passage, some speculated that this provision might generate discrimination against all persons bearing any indicia of being Hispanic.<sup>166</sup> Practitioners in the field do not report much evidence of this form of discrimination since the passage of the Act.<sup>167</sup> However, employers reportedly have been discharging persons who cannot document their rightful presence in the country.<sup>168</sup> The reports also suggest that while some of the discharged persons do leave the country, many attempt to remain despite the loss of work.<sup>169</sup> It is difficult to imagine how such persons will sustain themselves, particularly because the intensification of poverty in the Hispanic community in recent years compromises the traditional reliance on relatives and friends as a meaningful alternative while pursuing other work.<sup>170</sup>

The severe hardship of family breakup may also be an indirect result of the new immigration legislation. Indeed, some immigrants who qualified for

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District Court for the District of Alabama's holding that an employer is not obligated to observe the minimum wage laws when employing undocumented workers. The circuit court thus removed one incentive for employers not to cooperate when aliens seek documentation to become citizens. See also Comment, *Protection for Undocumented Workers Under the FLSA: An Evaluation in Light of IRCA*, 25 SAN DIEGO L. REV. 379, 395-96 (1988) (discussing the reversed district court opinion).

165. 8 U.S.C. § 1324a (Supp. V. 1987).

166. See H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 49, 90, 216, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653, 5694, 5752; Comment, *IRCA's Antidiscrimination Provisions: Protections Against Hiring Discrimination in Private Employment*, 25 SAN DIEGO L. REV. 405, 405-06 (1988).

167. The author has received informal reports to this effect from some civil rights practitioners. The matter, however, will be documented by the U.S. Comptroller General. The Comptroller must prepare an annual report through 1990 that examines whether the Immigration Reform and Control Act of 1986 (IRCA) has produced a pattern of discrimination on the basis of national origin. If the Comptroller reports that such a pattern exists and Congress agrees by passing a joint resolution, the employer sanctions under the IRCA will terminate within 30 days. 8 U.S.C. § 1324a (Supp. V 1987).

168. See *League of United Latin Am. Citizens v. Pasadena Indep. School Dist.*, 662 F. Supp. 443 (S.D. Tex. 1987) (employer fired four undocumented aliens when he discovered that they had used false social security numbers to secure employment); see also *Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1458 (1983).

169. See Wilkerson, *2 Decades of Decline Chronicled by Kerner Follow-up Report*, N.Y. Times, Mar. 1, 1988, at A12, col. 2.

170. Between 1970 and 1980, the number of Hispanic poor rose by 73%, from 500,000 to 900,000. The Hispanic community experienced setback at an even faster rate than the black community in this aspect, for black poverty rose by only 24%, from 1.4 million to 1.8 million. Wilkerson, *supra* note 169.

permanent residence under the 1986 Act may have refused to register because they were afraid of triggering the deportation of other family members who did not qualify. This type of family disruption may subject the new immigration legislation to an attack on constitutional grounds. The issue exists not only for those persons in a family who cannot convert from undocumented status to lawful residence, but also for the relatives of permanent residents who presently reside outside the country.

United States immigration laws limit total immigration to 270,000 annually, with no more than 20,000 from any specific nation.<sup>171</sup> Immediate family members of citizens (spouse and minor children) are exempt from these numerical and national limits, but immediate family members of permanent resident aliens are bound by the restrictions.<sup>172</sup> Therefore, a permanent resident alien, particularly one from a nation with a high immigration rate to the United States, must wait an estimated eight years before his family can join him. This forced separation and consequent family disruption could form the basis for a constitutional challenge.

The United States Supreme Court has recognized the right of persons under the due process clause of the fourteenth amendment to have control over family decisions, uninterrupted by governmental intrusion. In *Moore v. City of East Cleveland*, the Court registered its strongest support for a claim based on family unification.<sup>173</sup> In *Moore*, the Court held unconstitutional an ordinance that restricted occupancy of single family dwellings to the immediate nuclear family, thereby prohibiting a grandmother from living with her two grandsons.<sup>174</sup> Justice Powell, writing for a plurality of the Court, noted that when government undertakes "intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate."<sup>175</sup> Justice Powell then carefully examined the importance of the governmental interest asserted and the extent to which it was served by the challenged regulation and concluded that the city's interests in avoiding overcrowding, excessive traffic congestion, and excessive burdening of East Cleveland's public school system were only tenuously related to the ordinance's limitation of occupancy of a single family dwelling unit to the immediate family.<sup>176</sup> Notably, the Court found the substantive due process liberty interest to extend beyond the immediate nuclear family, recognizing the sanctity of the family as a deeply-rooted tradition, and noting that "[e]specially in times of adversity,

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171. 8 U.S.C. §§ 1151-1152 (1982 & Supp. V 1987).

172. *Id.* §§ 1151(a)-(b), 1101(a)(27) (1982 & Supp. V 1987).

173. 431 U.S. 494 (1977).

174. *Id.* at 506.

175. *Id.* at 499.

176. *Id.* at 499-500.

such as . . . economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."<sup>177</sup> This latter point has particular relevance for the circumstances of most recent immigrant Hispanic families and accurately conveys the importance of the unity of such families. If an alien claimed a constitutional right to have immediate family members in the United States, the government could respond that it does not prevent unification of the family because the alien could leave the United States to rejoin his relatives. However, in *Moore*, the Court implicitly refused to sustain the argument that the grandmother and grandchildren could move to a town where the zoning accommodated their families, thus achieving family unification.<sup>178</sup>

The primary impediment to recognition of such a due process liberty interest in normal family life on behalf of an alien results from the extreme judicial deference given to Congress in matters governing immigration.<sup>179</sup> The courts only reluctantly enter an arena that may potentially impact on foreign relations. The cases treating these claims, however, do not display the quality of careful consideration. Moreover, the more recent case of *Plyer v. Doe*,<sup>180</sup> which invalidated legislation that would have barred undocumented alien children from public schools, may signal a readiness by the Court to assay the social impact of the immigration laws on the constitutional rights of aliens.<sup>181</sup>

#### IV. VOTING RIGHTS

##### A. *The Voting Rights Act of 1965*

The Voting Rights Act of 1965,<sup>182</sup> a legislative reform that dominated the agenda of the civil rights movement in the late 1950's and early 1960's, contains two major provisions—it prohibits election devices and techniques used to disenfranchise blacks and other minorities (e.g. literacy tests), and it requires some jurisdictions to seek clearance of new election procedures from the Justice Department to prevent resort to any new covert forms of discrim-

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177. *Id.* at 505.

178. *Id.* at 500 (by implication) and 550 (White, J., dissenting).

179. See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977). Fortunately, at this writing, the Senate had voted to grant a stay of deportation and to authorize work for spouses and minor children of legalized aliens, if they were in the United States when the Immigration Reform Act was passed on November 6, 1986. See Dewar, *supra* note 164.

180. 457 U.S. 202 (1982).

181. *Id.* at 241. For a full development of the constitutional arguments, see Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253 (1988).

182. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973-1973p (1982 & Supp. V 1987)).

ination.<sup>183</sup> A dramatic increase in the number of registered minority voters has led to phenomenal growth in minorities occupying public office.<sup>184</sup> An enlarged minority electorate enhances the possibilities for achieving the legislative reforms called for in this Article in education and employment.

Minority plaintiffs also rely on the fourteenth amendment to invalidate election systems such as at-large elections in which all candidates compete against each other instead of in smaller single-member district elections. At-large elections dilute the strength of minority voting blocks. In *City of Mobile v. Bolden*,<sup>185</sup> however, the United States Supreme Court held that plaintiffs bear the heavy burden of proving under the fourteenth amendment *and* the Voting Rights Act that the challenged electoral system was adopted with the *intention* of diluting or neutralizing the minority vote.<sup>186</sup> In 1982, Congress amended the Voting Rights Act to permit proof of a history of racial voting patterns which operated to exclude minority candidates from election as a basis for invalidating an election system.<sup>187</sup> This amendment establishes a "results" test as opposed to the *Bolden* "intent to discriminate" test. In *Thornburg v. Gingles*,<sup>188</sup> the United States Supreme Court sustained the amendment and allowed racial polarization as primary proof that a particular electoral system prevented minorities from occupying public office.<sup>189</sup>

New areas ripe for challenge exist, and the courts will have to determine whether the 1982 amendments to the Voting Rights Act will support these challenges. Plaintiffs recently attacked election procedures in single-member districts, claiming that run-off systems are unlawful, advocating the adoption of cumulative voting, or claiming that legislative reapportionment plans have failed to preserve intact concentrations of black voters.<sup>190</sup> Defendants will meet these challenges by relying on a portion of the 1982 amendments that specifically disclaims a per se absolute right on the part of minorities to

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183. 42 U.S.C. §§ 1973, 1973a(b)-(c), 1973c (1982).

184. See Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 *FORDHAM L. REV.* 93, 97 (1983).

185. 446 U.S. 55 (1980).

186. *Id.* at 66-67.

187. Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982) (codified at 42 U.S.C. § 1973 (1982)).

188. 478 U.S. 30 (1986).

189. *Id.* at 54-61.

190. On the latter issue, see *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (holding that an annexation of an all white area to an all white city constituted a "change" in voting practice and procedure that had to be cleared by the Justice Department). The United States Supreme Court sustained an injunction against the annexation based on the District Court's finding that the city had not satisfactorily explained its move where there was a history of racial discrimination and the city had refused to annex a nearby predominantly black neighborhood. *Id.* at 464.

election results equal to their proportion in the population.<sup>191</sup> Commentators also argue that drawing all minority voters into small enclaves presents a danger to minority interests because minority voters will lose the capacity to influence elections in white-dominated areas and, therefore, will have less incentive to exercise the vote in high proportions in elections affecting only their districts.<sup>192</sup> Voter dilution claims may possibly be extended to other elections besides those in which legislative representatives are chosen, such as judicial or school board elections.

*B. Beyond the Voting Rights Act: Removing Impediments  
to Participatory Democracy*

Testing the limits of the Voting Rights Act, a very sound strategy, has possibly produced the maximum benefits that the strategy offers. Therefore, activists need to formulate a larger agenda. Many of the changes that will improve the condition of minorities, especially the poor, require litigation that addresses issues other than discrimination. Whether the status quo regarding the electoral system has features which impede the participation of low-income persons (regardless of race or ethnic background) or which impede the assertion of new and progressive ways of organizing society that may provide more security and opportunities for disadvantaged persons is a worthy line of inquiry.

Participation in American elections, in comparison to our western European counterparts, is shockingly low, and has declined steadily for a number of years.<sup>193</sup> Some general features of our electoral system, most notably registration, deter voting, and groups whose interests are adversely affected should challenge those features in litigation. Registration practices vary widely from state to state: one state requires no registration,<sup>194</sup> some states provide for registration by mail,<sup>195</sup> some states permit registration on the day of election,<sup>196</sup> others close registration one month prior to an election,<sup>197</sup> one state requires registration in a municipality and in the county where the

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191. 42 U.S.C. § 1973(b) (1982) ("[p]rovided, [t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

192. See, e.g., A. THERNSTROM, WHOSE VOTES COUNT—AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 233-41 (1987).

193. See generally F. PIVEN & R. CLOWARD, WHY AMERICANS DON'T VOTE 5 (1988); Burnham, *The Appearance and Disappearance of the American Voter*, in ELECTORAL PARTICIPATION 35, 37-44 (R. Rose ed. 1980).

194. N.D. CENT. CODE § 16.1-02 (1981).

195. ALASKA STAT. § 15.07.050 (1976); CAL. ELEC. CODE § 303 (West 1977).

196. ME. REV. STAT. ANN. tit. 21-A, § 122(4) (Supp. 1988); MINN. STAT. ANN. § 201.061(3) (West Supp. 1989).

197. ALASKA STAT. § 15.07.070(d) (1988); D.C. CODE ANN. § 1-1311(g) (1987).

municipality is located;<sup>198</sup> and others grant local registrars wide latitude in choosing hours and places of registration so that practices vary *within* a state.<sup>199</sup> Although the prevention of voter fraud ostensibly justifies the registration process, evidence indicates that states with the *least* restrictive practices do not report higher incidences of fraud, have often lowered their election costs, and, more importantly, show a higher voter participation.<sup>200</sup>

The long history of the use of voter registration as a means of thwarting electoral participation by blacks and newly-arrived immigrants should serve as a constant reminder of potential abuse. The Voting Rights Act attempts, in part, to address that history. The poor today, however, remain disproportionately unregistered in comparison to other class elements in society.<sup>201</sup> This is not simply a product of their apathy or disinterest, but reflects the manner in which state officials have structured and administered voter registration.<sup>202</sup>

Moreover, registration centers often change or are poorly advertised, and when organizations try to secure regular registration centers at places that the poor frequent, such as welfare, food stamps, and unemployment centers, they have met concerted resistance and harassment from state officials.<sup>203</sup> For example, as Congress considered adoption of the Economic Opportunity Act of 1964, mayors from around the country, both Democratic and Republican, lobbied Congress to prohibit voter registration explicitly in antipoverty agencies.<sup>204</sup> The time may have arrived to challenge registration per se as an unconditional restriction on the right to vote.<sup>205</sup> Although the Supreme Court has treated the registration process as a matter for individual state's discretion, the same conditions proved no obstacle to the Court's constitutional intervention in the "political" controversy surrounding the one-man,

198. MISS. CODE ANN. § 23-15-35 (Supp. 1988). *But see* FLA. STAT. ANN. § 98.041 (West 1982) (*prohibiting* dual registration).

199. *See, e.g.*, LA. REV. STAT. ANN. § 18:133 (West 1979) (discretion to choose places of registration); MD. ANN. CODE art. 33, § 3-2(a), (c) (1986) (discretion to choose hours).

200. Kerstein, *Unlocking the Doors to Democracy: Election Process Reform*, 15 FLA. ST. U.L. REV. 687, 695-709 (1987).

201. P. KIMBALL, *THE DISCONNECTED* 16 (1972) ("Voter Participation has always exhibited a high correlation with education and income.").

202. *See, e.g.*, R. WOLFINGER & S. ROSENSTONE, *WHO VOTES?* 61-65 (1980) (discussing various techniques used to limit voting through registration requirements).

203. F. PIVEN & R. CLOWARD, *supra* note 193, at 178-79, 192-200.

204. *Economic Opportunity Act of 1964: Hearings on H.R. 10440 Before the Subcomm. on the War on Poverty Program of the Comm. on Educ. and Labor*, 88th Cong., 2d Sess. iii-iv (1964).

205. *See generally* Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615 (1987) (challenging voter registration as a per se restriction of the right to vote).



one-vote issue in *Baker v. Carr*.<sup>206</sup> Furthermore, incumbent politicians of either party have no incentive to change the status quo. Unregistered persons have no influence over these officials who loath expanding the electorate for fear that they could introduce a quantum of new voters their next opponent could recruit.

Other election practices, such as the unnecessary purging of voters from registration rolls and refusal to expand election hours to non-work periods, should face attack as undue restrictions on the right to vote. Some states silence the electoral, political voice of persons who have been convicted of a crime.<sup>207</sup> These states justify curtailing some constitutional rights of prisoners as necessary and natural incidents to incarceration, but barring voting during and after imprisonment hardly seems to serve any necessity. In general, incarceration should serve the state's needs for security, rehabilitation, and deterrence.<sup>208</sup> Indeed, denial of the right to vote seems to disserve the goal of rehabilitation and deterrence of prisoner unrest because it undercuts prisoners' ability to petition elected officials, as a constituency, about inhumane conditions in the prison.

The Supreme Court, however, refused to validate an equal protection attack on the use of criminal convictions as a bar to voting in *Richardson v. Ramirez*.<sup>209</sup> The Court held that because section 2 of the fourteenth amendment structured a reduction of representation for seceding states that denied blacks the right to vote for reasons other than participation in a crime, then the framers of the amendment must have assumed that loss of the right to vote upon conviction did not amount to a per se denial of equal protection under section 1 of the amendment.<sup>210</sup> However, *Ramirez* does not exhaust the possibilities of attack on this practice. Where the disqualification is expressed in general terms (e.g. "crimes of moral turpitude") a variance in

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206. 369 U.S. 186, 232 (1962).

207. See ALA. CONST. art. VIII, § 182; ARIZ. CONST. art. 7, § 2; DEL. CONST. art. V, § 2; FLA. CONST. art. 6, § 4; IOWA CONST. art. 2, § 5; KY. CONST. § 145; MD. CONST. art. I, § 4; MISS. CONST. art. 12, § 241; N.M. CONST. art. VII, § I; TENN. CONST. art. I, § 5; UTAH CONST. art. IV, § 6; VA. CONST. art. II, § 7; WYO. CONST. art. 6, § 6; ARIZ. REV. STAT. ANN. § 16-101.5 (1984); DEL. CODE ANN. tit. 15, § 1701 (1981); FLA. STAT. ANN. § 97.041 (West 1982); MD. ANN. CODE art. 33, § 3-4(c) (1986); see also Note, *The Disenfranchisement of Ex-felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1300 n.1 (1989).

208. For example, one may argue that a state may bar persons convicted of a crime involving election fraud or abuse from voting as a deterrent to future improprieties. This rationale would obviously not justify the exclusion of persons convicted for passing a bad check or driving an auto recklessly, which disqualifies a person in some states. See, e.g., MISS. CONST. art. 12, § 241 (forgery).

209. 418 U.S. 24 (1974).

210. *Id.* at 54; see U.S. CONST. amend. XIV.

application between counties may violate equal protection. The Court expressly declined to resolve this issue in *Ramirez* because the state court below had not ruled on the claim.<sup>211</sup> Moreover, enumerated felonies leave the state without a "compelling state interest" in abridging the right to vote when a state cannot show a basis for denying the right to vote upon conviction for some crimes and not others, another claim not foreclosed by *Ramirez*. Furthermore, southern states, where approximately one-half of the black population resides, retain a conviction as a bar to the vote.<sup>212</sup> A state that adopts criminal conviction as a disqualifier in order to disproportionately disenfranchise blacks violates equal protection guarantees.<sup>213</sup> The equal protection provisions of a state constitution make the disability existing in a statute vulnerable to attack where the textual problems of section 2 of the fourteenth amendment to the Federal Constitution would not exist. In this context, the claim should go beyond *Ramirez* to include persons *presently* incarcerated. The state court should, arguably, sensitize itself to the equal protection claims of persons wholly dependent upon the state and who, by definition, are excluded from the political process that they might otherwise rely upon to address the issue.

Many citizens perceive a lack of fundamental difference between the two major parties, and a sense that campaigns do not focus on vital issues, causing nonparticipation in the electoral process. The deliberate structure of electoral systems often makes the entrance of dissident candidates or third parties into the electoral process exceedingly difficult.<sup>214</sup> Consequently, the public remains uneducated about reforms, which may be critical to minorities and significant portions of the white community alike, that neither of the major parties willingly advances. The time has come to invalidate arbitrary impediments to participation of new political parties through litigation.<sup>215</sup>

Many commentators charge that contributors of large financial donations have greatly compromised the autonomy of candidates and elected officials. Unfortunately, the United States Supreme Court has barred restrictions on the amount of funds that corporations and wealthy individuals may expend in elections on the grounds that such spending constitutes a form of

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211. 418 U.S. at 56.

212. See, e.g., ALA. CONST. art. VIII, § 182; GA. CONST. art. 2, § 1, ¶ 3; MISS. CONST. art. 12, § 241; N.C. CONST. art. VI, § 2(3); VA. CONST. art. II, § 1; LA. REV. STAT. ANN. § 18:102 (West Supp. 1989); N.C. GEN. STAT. § 163-55(2) (1987); VA. CODE ANN. § 24.1-42 (1985); see also Note, *Disenfranchisement of Ex-felons: A Reassessment*, 25 STAN. L. REV. 845 (1973) (attacking disenfranchisement of felons as unconstitutional).

213. See *Hunter v. Underwood*, 471 U.S. 222, 231 (1985).

214. M. PARENTI, *DEMOCRACY FOR THE FEW* 172-95 (5th ed. 1988).

215. See Kerstein, *supra* note 200, at 695-709.

"speech."<sup>216</sup> If the composition of the Supreme Court changes sufficiently, the new Court should revisit this issue.

## V. FAMILY ISSUES—POVERTY

Debate among scholars and lawyer-activists has increasingly focused on the fear that civil rights law as traditionally defined and practiced is increasingly remote from, or irrelevant to, the growing underclass of minorities who grow ever more intensely mired in poverty. Moreover, scholars speculate that the very success of civil rights laws, for African-Americans at least,<sup>217</sup> has created a sizeable middle class that increasingly distances itself from the African-American poor in income, and consequently, in place of residence, place and quality of schooling, social interaction and life experiences.<sup>218</sup> The distancing phenomenon not only deprives the African-American ghettos of the moderating influence of persons with middle-class aspirations, but recruits many whites *and* middle-class African-Americans to the view that the African-American underclass solely or primarily bears responsibility for its own deteriorating condition through a perverse refusal to adopt middle-class values.<sup>219</sup> This sort of abandonment deprives the black ghetto not only of constructive role models, but, more importantly, of local leadership.<sup>220</sup> While the African-American poor may have provided many of the foot soldiers for the early civil rights battles, the college-educated or middle-class portion of the community provided black leadership. With a few notable exceptions, such as the labor union movement or recent battles on behalf of the homeless, the "invisibility" of the white poor may result from an absence of leadership consistently and exclusively focusing public attention on their problems. Robert Heilbroner, in fact, speculates that the primary problem in obtaining public support for social welfare programs is the perception that

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216. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

217. This Article limits itself to African-Americans because I have not seen fully documented developments of the same phenomena regarding Hispanics, Asian-Americans or Native Americans. The variables that might influence such development, such as common religion or second language, immigrant status, and cultural norms, need extensive exploration beyond the scope of this Article.

218. See W. WILSON, *supra* note 61, at 110; see also F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977).

219. See T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 46-48 (1984) (arguments that the plight of the black underclass results from their failure to achieve appropriate levels of education and to adopt values of hard work and discipline). For careful development of this point, see Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

220. See F. PIVEN & R. CLOWARD, *supra* note 218, at 331-32.

blacks exclusively or primarily benefit even though the white poor also benefit.<sup>221</sup>

#### A. *Eradicating Poverty Through Constitutional Rights Litigation*

Civil rights organizations, particularly those comprised of lawyers, must now reconsider a shift of resources to revive and renew the 1960's initiative to use legal strategies to fight poverty. The most recent research and writing of the astute sociologist William J. Wilson reinforces the appropriateness of this focus.<sup>222</sup> Wilson has developed an analysis convincingly arguing that the class level of a portion of the minority community has become a heavier determinant of their disadvantaged condition than racial discrimination.<sup>223</sup>

Jean and Edgar Cahn, writing in the early 1960's, gave birth to the then revolutionary idea that the poor had a plethora of undiscovered "rights" under the law, and that rather than merely functioning as a passive, minimal defense operation (as some claimed was the style of legal aid societies), lawyers could go on the offensive and create new rights in major test case litigation to attack broad institutional practices.<sup>224</sup> Legal service programs burgeoned and began operating in the Cahn mode. Indeed, a number of startling breakthroughs in terms of new rights recognition resulted, and often these rights, grounded in the Federal Constitution, received permanent status. This approach to poverty reversal was criticized as inherently limited because the constitutional decisions were often only process oriented, and did not, indeed could not, generate the kind of redistribution of financial resources toward the poor, which some commentators perceived as the prime problem.<sup>225</sup> Two hostile, federal administrations have greatly curtailed the financial resources available to legal service corporations and their

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221. Heilbroner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD?* 288, 296-301 (E. Rostow ed. 1971).

222. See W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978).

223. *Id.*

224. Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317 (1964).

225. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process forbids the state from imposing a fee on an indigent to secure a divorce where the state monopolizes the means for dissolving a marriage); *Tate v. Short*, 401 U.S. 395 (1971) (the equal protection clause bars a state from resorting to imprisonment when an indigent is incapable of paying a total fine where there is a less intrusive alternative, payment in installments); *Thorpe v. Housing Auth.*, 386 U.S. 670 (1967) (tenant of federally assisted housing project is entitled to notice and opportunity to be heard prior to eviction). *But cf.* *Morris v. Williams*, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967). Earl Johnson, a one-time head of the Office of Economic Opportunity (OEO) Legal Services notes that the *Morris* case saved \$210 million for welfare recipients. Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 *MINN. L. REV.* 211, 219 (1973).

research centers, which generated the most creative litigation, making the revival of such an approach more difficult than ever.<sup>226</sup> There remains, however, active scholarship and literature devoted to legal strategies to assist the poor.

Poverty law litigation in the abstract, especially with a Federal constitutional dimension, presents a very attractive route because it skirts the alternative of having to push for legislation aimed at addressing poverty during a period of huge federal deficits. The poor now face somewhat the same position as blacks when they sought relief from their condition through the Federal Constitution under *Brown v. Board of Education*. The poor, a minority of the voting public in every state, have no financial resources to lobby, and the general public views the poor with great ambivalence regarding the legitimacy of expending more resources on them.

The major problem with the suggested approach is the serious doubt regarding the receptiveness of the current Supreme Court to further mine rights of the poor under the Constitution. The Critical Legal Studies (CLS) movement has actively cautioned against continuing to pursue the definition of a community's or a group's needs in terms of "rights." One scholar claims that "civil rights" without a concomitant commitment to changing the class structure, which functionally continues the subordination of blacks, represent a formal and often empty "opportunity" for blacks in particular.<sup>227</sup> Minority scholars make telling criticisms of this analysis, saying that it largely understates the strategic value that the "rights" approach has had and continues to have, for the black community in confronting the crudest aspects of oppression. Moreover, the CLS scholars, to date, have remained barren of proposed pragmatic alternative legal strategies.<sup>228</sup>

Professor Charles Black recently argued that the Constitution still remains a viable means of requiring the rectification of poverty.<sup>229</sup> Professor Peter B. Edelman offers the most recent, comprehensive exploration of the

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226. See Rosenblatt, *Legal Entitlement and Welfare Benefits*, in *THE POLITICS OF LAW* 262, 275 (D. Kairys ed. 1982) ("it has been possible for the Reagan administration and the 97th Congress to enact massive reductions in benefits and legal rights not only in AFDC and Medicaid, but also in . . . Legal Services").

227. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

228. Crenshaw, *supra* note 219, at 1349-69; Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Skepticism and Solipsism*, 13 WM. MITCHELL L. REV. 685 (1987). But see Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987). Hodgkiss, however, refutes this criticism and asserts that a number of critical scholars have suggested "legal theories and practices that can bring about change." *Id.* at 570 n.6.

229. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986).

issue. Edelman has no illusion about the current Court and states frankly that it would "surely not adopt the ideas advanced in [his] Essay."<sup>230</sup> He and others, however, have noted that extensive time for discussion, speculation, and refinement of ideas around potentially emerging constitutional doctrine fosters their absorption and later adoption.<sup>231</sup> However, the more delicate and critical questions are the appropriate forum and the content and timing of litigation. Edelman has some suggestions on interim litigation strategies, and others will be developed here.

Edelman's argument, in summary, centers on due process and equal protection. As to the former, he claims that the Constitution provides a right to minimal income in subsistence terms, to secure the basics of food, shelter, and medical care.<sup>232</sup> The fact that the Constitution has no provision explicitly addressing poverty or that the "original intent" of the Framers of the Constitution did not include addressing poverty does not defeat the claim because both conditions have existed for other constitutional rights which the Court has now firmly accepted.<sup>233</sup> Moreover, some of the rights the Court has recognized as "fundamental" or possessing some value that the government cannot arbitrarily jeopardize, such as freedom of speech or the right to political participation, are *less* critical than the right to survive or cannot be exercised effectively under conditions of extreme poverty and deprivation. The Court has not maintained a distinction between a state's interference and a state's failure to act affirmatively to protect a right when they have recognized a constitutional right,<sup>234</sup> and therefore, should not bar the demand of state intervention here.

The new dimension that Edelman seems to contribute to the scholarship on this issue revolves around his equal protection argument.<sup>235</sup> Edelman argues that the poor face becoming an entrenched and permanent minority estranged from electoral activity and bereft of political concern by the majority of the population who are not poor, such that the poor ought to be

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230. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987).

231. See, e.g., Krislov, *supra* note 225, at 245.

232. Edelman, *supra* note 230, at 23-25.

233. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (recognizing right to marry); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing right to privacy).

234. Edelman, *supra* note 230, at 25, 38-43.

235. See *id.* at 43-48; see also Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

considered a "suspect" class meriting judicial intervention.<sup>236</sup> Moreover, the poverty they endure is not generally a product of individuals who merely lack the initiative to cope in a free market, but rather has been heavily impacted by a host of governmental activity which indirectly developed, intensified, and reinforced poverty. Therefore, the Court can now impose on the government an affirmative obligation to relieve the poor of the most dire circumstances of poverty through provision of a minimal subsistence income.

Edelman understands fully the institutional and political limitations on the Court and outlines the arenas that probably remain within the province of the Congress or state legislatures. He acknowledges that some dicta in recent cases do not augur well for his arguments, and thus, further action in the federal courts, at least around the most controversial claims, may be contra-indicated at this time.<sup>237</sup> He suggests exploration of litigation under state constitutions and state law.<sup>238</sup> For example, some fruitful litigation has occurred in state courts mandating provision of shelter for the homeless.<sup>239</sup> Civil rights organizations might seek a grant to contract for extensive and careful research of each state's constitutional provisions, and the potential for litigation thereunder, affecting any facet of poverty. It is possible that some legal service programs have done some of this work, but because they do not now have fully staffed backup research units, a local office actively involved with a steady flow of walk-in clients may find this kind of research too time-consuming.

A consistent premise running through Edelman's article is that no prospects of future democratic action to eliminate poverty remain. As stark poverty afflicts a smaller portion of the population in sheer numbers, the poor have less electoral clout. Moreover, by definition they do not have great financial resources to discipline and intimidate elected officials or candidates in need of campaign funds.<sup>240</sup> Nor can they create favorable public opinion through control of, or by purchasing access to, the media.

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236. Edelman, *supra* note 230, at 35. For an elaboration of this line of argument, see Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

237. Edelman, *supra* note 230, at 40; *see, e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980) (denying that the government has an obligation to fund medically necessary abortions).

238. Edelman, *supra* note 230, at 41-42.

239. *See McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987) (where city provides emergency housing to the homeless, the housing must meet minimum standards); *Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983) (granting writ of mandamus directing Department of Welfare to provide emergency shelter, food, and medical care to the homeless); *see also* Werner, *Homelessness: A Litigation Roundup*, 18 CLEARINGHOUSE REV. 1255 (1985).

240. *See generally* P. STERN, *THE BEST CONGRESS MONEY CAN BUY* (1988) (examines the extent to which politicians have become dangerously dependent upon financial contribu-

However, an inherent "Catch-22" dilemma undermines Edelman's ideas. One wonders whether the very conditions that he describes as permanent for the foreseeable future—namely an inert, invisible, and isolated poor—may effectively preclude consideration of the new constitutional doctrine he proposes. Commentators have suggested that a context of emergency or social protest and struggle by ordinary citizens exerts an influence, unarticulated by Supreme Court decisions, which stimulates emergence of new doctrine.<sup>241</sup> Well-reasoned arguments (often developed by academicians), while essential, rarely serve as the prime motive force. The labor movement and the Depression in the 1930's framed the Court's refusal to find a Constitutional mandate for a laissez-faire economic regime.<sup>242</sup> The second stage of the women's movement preceded the Court's reinterpretation of the fourteenth amendment, which facilitated its response to claims of sex discrimination.<sup>243</sup>

Professor Harold McDougall, using the civil rights movement as a paradigm, hypothesizes that new ways of "making" law now exist, but that such mechanisms heavily depend upon citizen-generated dialogue ("the interpretative community") at the outset. Thereafter, progress is extended and maintained by the unique way in which public interest lawyers function ("the implementation community").<sup>244</sup>

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tions from political action committees). Moreover, the Court recently reinforced the unconstitutionality of measures limiting financial expenditures in electoral activity. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (expenditures of political action committees).

241. Kairys, Book Review, 126 U. PA. L. REV. 930 (1978). "The periods of stringent protection and enlargement of civil rights and civil liberties correspond to the periods in which mass movements posing a credible challenge to the existing order have demanded such rights." *Id.* at 943; see also e.g., *Hague v. C.I.O.*, 307 U.S. 496 (1939). *Hague* established for the first time the doctrine that the state could not arbitrarily bar citizens from using the public streets to engage in free speech. The Court, in effect, narrowed *Davis v. Massachusetts*, 167 U.S. 43 (1897) which had held to the contrary. *Hague* occurred in the context of active labor union agitation.

242. The Court, in *Texas & N.O. Ry. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930), overruled, in effect, the doctrine announced in *Adair v. United States*, 208 U.S. 16 (1908), that it was unconstitutional for the Federal Government to prohibit an employer from discharging a worker because of his union affiliation. See H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT HARTLEY - A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 10-19 (1950).

243. *Frontiero v. Richardson*, 411 U.S. 677 (1973); see Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, 117, 130-39, in *THE POLITICS OF LAW - A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982) (discussing the break that *Frontiero* represented from previous Supreme Court equal protection doctrine regarding females).

244. McDougall, *Social Movements, Law and Implementation: A Critical Dimension for the New Legal Process*, (forthcoming 75 CORNELL L. REV. Issue 1 (1989)).



### B. *Implementing the Constitutional Litigation Strategy*

If the analysis that breakthroughs in expanding protective constitutional doctrine depend upon an active social movement is correct, one wonders whether and how activists can generate such a movement on behalf of the poor. This presents a serious dilemma because group formation requires leadership, and such leadership optimally emerges from the group itself. However, extreme poverty exacts a devastating toll on personality, and simple individual and family survival demands an enormous expenditure of energy. Thus, these demands severely drain human resources needed for more long-range group goals. Moreover, strong incentives exist for natively bright persons in the ghetto to apply their intelligence, with cunning and shrewdness, toward crime and other forms of exploitation.

It may now be necessary for lawyers to step in and perform two roles—quasi-leader and quasi-legal technician. As quasi-legal technician, the lawyer may serve as a spark for mobilization of the disadvantaged. While a number of commentators have counseled against “high risk” constitutional litigation because of the prospects of a loss, at least one commentator has another view:

[T]he mere assertion of the [constitutional] right, regardless of initial success in the courts, may be useful as a political issue around which to organize poor blacks, for litigation and other means of advocacy foster social reform more effectively when used as an instrument of political mobilization than when used merely for asserting and realizing rights.<sup>245</sup>

Perhaps lawyers in the legal service programs and volunteers from the private bar could also perform this role of quasi-leader.<sup>246</sup> The legal service programs face one strong impediment—enormous caseloads that preoccupy staff lawyers, making them unavailable for organizing efforts.<sup>247</sup> Both legal

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245. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 242 (1982).

246. See *supra* text accompanying notes 41-45 for a discussion of The Washington Lawyers' Committee's participation with parent groups regarding education issues.

247. The adamant reluctance of Legal Services Corporation (LSC) to orchestrate political activities in pursuit of a broader civil rights agenda because of a shortage of resources is aptly illustrated by a recently proposed federal regulation that would prohibit recipients of LSC funding from becoming involved in litigation, research, or any other activity related to redistricting. See 54 Fed. Reg. 10,569 (1989) (proposed Mar. 14, 1989).

While erosion of voting rights poses one of the greatest and most direct threats to empowerment of the poor, as this Article has argued (see *supra* notes 193-216 and accompanying text), the current LSC believes that its focus should be on “providing quality day-to-day legal assistance to eligible poor clients facing specific legal problems.” *LSC Proposes Regulation Prohibiting Redistricting*, Legal Serv. Rec., Mar./Apr. 1989, at 1, col. 1. Furthermore, it believes that “redistricting activities are contrary to LSC's congressional mandate to provide basic legal

service programs and private volunteers face another impediment, namely that traditional legal education inadequately teaches and develops organizational skills. Specially designed post law school training could, perhaps, address the latter concern. Reform litigation aimed at building a constitutional right (either federal or state) which would require the state to appoint *and* compensate counsel for indigents in *civil* cases might ameliorate the case overload burden. States now enforce such an obligation in practically all criminal cases. Some states tentatively support the claim in civil cases where the courts have characterized the indigent as facing the loss of a very important right, such that due process or equal protection requires the appointment of counsel.<sup>248</sup> Extending the concept of appointed and compensated counsel to its outer limits, primarily under state constitutions for the foreseeable future, would relieve the caseload pressures on local legal service offices, thus freeing them for the organizing tasks outlined above.

A larger problem exists, however, impeding representation of the poor through legal action. If the poor are afforded advantages in isolation from other segments of the population, generating the needed financial and human resources or effecting a change in the ambivalent attitude of the public at-large towards the poor will become even more difficult than at present. A shift in public attitudes generated by past movements may be critical to the acceptance of new doctrines by higher courts that may be silently sensitive to anti-democratic institutions' criticisms. One must wonder whether the structure of current civil rights advocacy groups or Legal Service offices will adequately meet the tasks of the future or whether larger and broader-based public interest firms would be a more efficient vehicle.

Despite its focus on discrimination against blacks, the Civil Rights movement, especially up to the passage of the 1960's legislation, drew support from many segments of the populace outside the black community. Indeed, those organizations of the 1960's, which either became or were perceived by the public as turning sharply "nationalistic" or "ultra-extremist," lost public support and collapsed (e.g. Student Non-Violent Coordinating Committee, Black Panther Party). Moreover, the new civil rights legislation protected many groups other than blacks. For example, while Title VII included women in a back-handed attempt to derail the legislation,<sup>249</sup> the subsequent

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assistance to the poor" and that such political activity "diverts resources from eligible clients to ineligible members of affected populations." *Id.* at 7, col. 2.

248. Redfield, *A Statutory Proposal Compensating Attorneys Appointed to Represent Indigent Civil Defendants*, 28 SANTA CLARA L. REV. 195, 200-04 (1988).

249. *Developments in the Law—Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971); see also 110 CONG. REC. 2,581 (1964) (remarks of Rep. Green).

utilization of the statute by women gave them protection against employment disadvantages unique to, or more pressing for, their group (e.g. sexual harassment, exclusion of pregnancy as a medical benefit). Some may argue that the black movement has its strongest ally in the feminist movement.<sup>250</sup> The Court's holding in *Griggs v. Duke Power Co.*,<sup>251</sup> which was initially designed to protect blacks by removing standards that were irrelevant to job performance, has provided the impetus for business to look more carefully at common, long standing practices to judge their true efficiency. White male executives primarily benefitted from the Civil Rights Act barring discrimination on the basis of age. The resulting improvements for large portions of the population other than minorities has probably secured protections for blacks as part of our legal landscape.

Public interest firms ought to highly prioritize advocacy that benefits the poor and minorities *and* concomitantly can show other public benefits. For example, litigation to secure a right to counsel on behalf of indigents in civil cases could extend to a demand for state subsidization of counsel for persons from the lower-middle and middle classes who could not afford the substantial attorney fees associated with civil and criminal litigation. Professor Alfred Blumrosen argues that civil rights organizations must now engage a very broad spectrum of laws that may impact more intensely on minorities and the poor, but which, with appropriate reforms, would bring relief to a broader spectrum of the public.<sup>252</sup> For example, the shift of jobs abroad in major industries, like steel and automobile manufacturing, especially affects minorities. Blumrosen advocates a push for tariff policies that would raise the wages of foreign workers, thus diminishing them as a pool of cheap labor.<sup>253</sup> Similarly, Professor Cornelius Peck suggests that legislation requiring public representation on the boards of directors of major corporations, such as the steel corporations, would assure public scrutiny of important moves (e.g. plant closings) that affect a community.<sup>254</sup> Peck also suggests extension of our laws prohibiting the interstate shipment of goods made by child labor or in violation of minimum wages to foreign commerce as another way to prevent unfair competition from exploited foreign workers.<sup>255</sup> Blumrosen recommends that civil rights advocates concentrate on tax pol-

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250. See Bergman, *Is There a Conflict Between Racial Justice and Women's Liberation?*, 37 RUTGERS L. REV. 805 (1985).

251. 401 U.S. 424 (1971).

252. Blumrosen, *supra* note 136, at 307.

253. See *id.* at 308-10.

254. Peck, *Roundtable Discussion: Where Do We Go from Here?*, 37 RUTGERS L. REV. 1111, 1114 (1985).

255. *Id.*

icy, bankruptcy, antitrust and drug abuse laws, as future arenas for concern.<sup>256</sup>

In this spirit, the public interest law firm of the future should staff, or engage in active consultation with, attorneys educated in a number of areas that they have not previously seen as relevant (e.g. tax law, international law, criminal law, and communications law) to determine whether alternative ways of litigating or amending legislation exist that would have desirable benefits. For example, no one in the civil rights community appears to have suggested amendments to the tax code to permit adjustments for successful plaintiffs in employment discrimination cases who must pay higher taxes because they recover back pay covering a number of past years in a single year. As another example, a municipality can purchase, under eminent domain, the plant of a company threatening to shut down, thus averting widespread unemployment in a community.<sup>257</sup> The development of rights to basic security in the international law context should relate to domestic American law. A civil action under the Racketeer Influence and Corruption Act (RICO)<sup>258</sup> possibly could protect migrant workers from corporations that persistently break the criminal laws designed to protect such workers. Greater consultation and interaction between civil rights specialists and those possessing other kinds of expertise might result in a cross-fertilization of ideas and a richness of approaches.

The presence of lawyer-journalists, and other persons with expertise in negotiating with the media, could possibly enhance the work of a public interest firm. The drift of public opinion toward a more conservative vein, prompted largely, according to William J. Wilson, by the heightened visibility of conservative writers with much greater resources than their liberal counterparts, has caused much of the despair about ameliorating the condition of the poor and minorities.<sup>259</sup> In order to achieve some of the goals outlined in this Article, liberal writers will have to reassume the prominence they had in the early 1960's. One analyst hypothesizes that fewer liberal intellectuals actively engage in public discourse because so many are now in academe, and the requirements for tenure and professional respect do not encourage less-than-scholarly publication in popular journals and magazines.<sup>260</sup> Professors Edelman, Michaelman, and Ely carefully and elo-

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256. Blumrosen, *supra* note 136, at 307-08, 311-12.

257. Lynd, *Towards a Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property*, 22 HARV. C.R.-C.L. L. REV. 13, 24-26 (1987).

258. 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987).

259. See W. WILSON, *supra* note 61, at 13-18.

260. R. JACOBY, *THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME* 4-7 (1987).

quently argue for a constitutional right to relief from extreme poverty; however, their writings appear in professional journals not accessible to the lay public—even the educated lay public. Thus, the task of public communication and explication of new social reforms could devolve on the staff of public interest institutions, like the Lawyers' Committee.

With some exceptions, public institutions cannot rely solely on journalists in the mainstream media, who often lack a full appreciation of all the intricacies of the law. Hence, the persons best-suited for the tasks described herein would be lawyer-journalists. In addition to good writers with a legal background, this approach would also require persons who have special expertise in gaining entry into the media and in "staging" events accessible and clear to the public. Legal material can be especially problematic on this score. The civil rights movement could not have survived without its "unpaid staff" who worked for the television and print media. The legal and moral issues were simpler then—something more sophisticated is needed now. Obviously, many of the reforms suggested throughout this Article unequivocally require a nurturing and mobilization of public support for the equitable adjustments contemplated.