

1979

## Address to the Fellows of the American Bar Foundation

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*Housing and Urban Development (Washington, D.C.)*

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### Recommended Citation

Patricia R. Harris, Address to the Fellows of the American Bar Foundation, 30 S. C. L. Rev. 485 (1979).

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## ADDRESS TO THE FELLOWS OF THE AMERICAN BAR FOUNDATION

PATRICIA R. HARRIS\*

*Secretary of HUD Patricia R. Harris presented this speech to the Fellows of the American Bar Foundation at their Midyear Meeting in New Orleans, Louisiana, February, 1977. The topic of her speech was constitutional commitment to minorities; she concentrated her discussion on Professor Raoul Berger's historical approach to the same subject in his Government by Judiciary: The Transformation of the Fourteenth Amendment. His reply follows.*

There is a significant difference between the concept of *noblesse oblige* under which the aristocracy attempts to take care of the lower classes and the concept of community service in which each citizen contributes to the commonwealth on the basis of individual resources and concerns. The community served may be local, national, or international, but the service rendered is not for personal gain, not on the basis of condescension, but rather it is for the achievement of agreed-upon goals of greater understanding, better service, peace, extension, and improvement of human life, or any goal on which two or more persons can agree in this society of volunteers.

The history of this country is a history of volunteerism and service by persons of diverse professions and interests but with common concern for the quality of life in the community. In the early history of this country, from the Boston Tea Party to the Philadelphia Convention, public men set the course of this nation through a judicious blending of the concern for personal self-interest and a recognition that the rights of others must be protected if self-interest is to be effectuated. This understanding that the self-interest of the majority at any given time may be required to give way to the best interest of minorities or of individuals is manifest throughout the Constitution and the Bill of Rights. From the historic compromise on the composition of the Senate making tiny Rhode Island the senatorial equal of mighty Virginia to indeed the infamous but very real twenty-one year

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prohibition of interference with the slave trade to the absolute prohibition of the restriction of freedom of speech and the establishment of religion, the rights of minorities in this nation have been ensured against the tyranny of the majority.

The public men who were the founding fathers of this nation were aware of the consequences of the unchecked tyranny of the majority. As freeborn Englishmen, they found themselves by their likes ignored and mistreated by their freeborn peers in England. They sought to guard against the repetition in this country of a condition in which the short-run interests and passions of the majority could overrun the real interests of minorities.

Alexander Hamilton would brook no possibility of rule by majority fiat. "The mass of the people," he said, "seldom judge and determine right." Although the estimate of the quality of people's judgment was different, there was certainly no dispute from James Madison on the need to form a nation in which the rights of minorities prevailed over any tyrannical social policy the majority might wish to impose. Mr. Madison wrote in the Tenth Federalist Paper, "Complaints are everywhere heard that measures are too often decided not according to the rules of justice and the rights of minor parties but by the superior force of an interested and overbearing majority." He stated, "Therefore, either the existence of the same passion or interest in a majority at the same time must be prevented or the majority having such coexistent passion or interest must be rendered by their number and local situation unable to concert and carry into effect the schemes of oppression."

While we do not know what the effect would have been on the drafting of the Constitution of the presence of the pen and personality of Thomas Jefferson, there is no doubt that Jefferson himself had he been present would have agreed with the need to protect the minority. It was also made plain by the authors of the Constitution that specific guarantees of individual liberty were omitted from the basic document only because it was believed they were adequately secured by the common law. Indeed as you will recall, Hamilton in the Federalist Papers expressed concern that to explicitly set them down would be in effect, to limit them. But when some states were hesitant about creating a new government without any reference to basic liberties, the Bill of Rights with each enumerated right reaffirming the central need to protect the individual and minority against a crushing majority, each one was adopted without hesitation.

Clearly, the founding fathers thought primarily of political and religious minorities. But the fact that blacks, Indians, and to a lesser degree, women were not the subject of their concern does not negate the important fact that from the beginning this nation's public persons and public documents have accepted the validity of the proposition that there are matters on which the majority can work its will only by the very serious, tedious, and difficult route of amendment to the Constitution. Even clearer was the restriction against majority interference with the security of the individual. Only by a constitutional amendment can the right to be secure in their persons, the right to persuade, the right to disagree, the right of the individual to worship, and to be free from cruel and unusual punishment be denied.

The addition of the great Civil War Amendments eliminating slavery, granting citizenship with due process protection, and the right to vote to the disposed black minority confirmed the constitutional pattern of restricting the degree to which the majority might work its will upon the minority. So clear was the constitutional intent to protect minorities that in the early years of the Republic Calhoun devised a doctrine of concurrent minorities that deserves more contemporary analysis than has been accorded to it. This purpose of the Constitution and the Bill of Rights with the Civil War Amendments to restrain the ability of the majority to eliminate or restrict the rights of political, religious, or racial minorities called into serious question the revisionist theories of commentators who looked solely at social conditions existing at the time of the adoption of the Constitution with respect to the issues that are being considered by the courts today. That the Constitution's genius has been the clarity of its general purpose to create a more perfect union does not in any way negate the document's intent that it be applicable to a reality known at any given time as that reality relates to the role of individuals and minorities.

It will not surprise you that I disagree with the premise that the Constitution has been worked too hard in search of rights that are not really there. My concern with this thesis is not only that it wrongly disparages the recent accomplishments of the law, but also that it complements a current intellectual trend toward withdrawal from public activity. The founders of this nation clearly sought to create a society which could maintain social cohesion through the means of a written constitution. And now that we are at last on the verge of applying constitutional principles to all

segments of the society, the prospect is threatened by theories that we have come this far by mistake.

The current popularity of a revisionist commentator's attack on modern interpretations of the fourteenth amendment in my case in point. This well-known professor insists that constitutional law must stick to the fundamentals, to the written language of the Constitution itself, and the historical record of the times in which these words were written. "The courts," he says, "cannot tamper with social policy because they were never granted such power." The legal developments of the past quarter century, according to him, have been the result of basic error.

I differ with the professor on the substance of his theory. I believe that the theory does not account for the overriding concern of the framers of the Constitution with the protection of minorities. Modern recognition of the vitality of the due process and equal protection clauses finally gives meaning to a precise and unanimous desire of the founding fathers—the desire to ensure the rights of individuals and minorities to be heard, to be recognized. Minorities were expected to have the same protection of the law as does the majority.

When the thirteenth, fourteenth, and fifteenth amendments were adopted, the authors of these amendments could not, to be sure, predict the ensuing social consequences. Perhaps then, as Professor Berger believes, they did not intend to outlaw segregation because they did not then see it as it came to be. But they surely intended, as our Supreme Court has said, that freed black people enter into the social compact with the same political rights as the rest of the people in this country. They could not have tolerated a social policy which would condone lynchings, deprivation of fair trial, suppression of the right to protest. They could not, had they been able to predict the future, sanction the development of a system of education of the black people into a status of second-class citizenry, a result that mocked their effort to confer on the ex-slaves the rights of free men.

What was acceptable to the founding fathers or to those who dealt with the constitutional issues just a century ago would not be acceptable to them today had they been given access to the knowledge available to us today. I will remind you that the president of the Constitutional Convention and the first president of the United States died what is now believed to be an untimely death largely because of the opening of his veins by his physicians—a bleeding, an acceptable practice at that time. Does any-

one in this room have any doubt that today such action would be at least manslaughter and probably murder? Just as we now know that bleeding for any ailment is unacceptable medical practice and to be prevented, we know that certain political and social practices with respect to minorities are and should be unacceptable.

I believe that the significance of the political rights embodied in the due process and equal protection clauses was clear from the beginning. The historic frustration in the nation's constitutional development was not in defining these terms. Rather the problem was that for most of this nation's history segments of the population have through various devices been excluded from sharing these concepts.

It is very difficult in the light of history to accept the thesis that the Supreme Court's interpretations in upholding minority access to the full protection of the law and striking down the laws and practices which create gross inequities in treatment under the legal process was inconsistent with the intent of the authors of the Constitution. In fact, it is not the courts that have failed in the exercise of their constitutional duty to protect minorities. It is the legislative and executive branches that have failed. Despite the enumerated power to legislate for the general welfare and the specifically stated power to enforce the thirteenth, fourteenth, and fifteenth amendments by appropriate legislation, the other two branches of government have been reluctant to incur the even temporary wrath of the majority by enacting protective legislation for minorities. The executive, which has the power of the "bully pulpit", has in my lifetime given too little leadership to the efforts to serve the rights of minorities. The national legislature has given even less.

Both have left responsibility for leadership to the weakest and most vulnerable branch of the government—the courts. And having done so, neither has been too avid in protecting that weakest branch from attacks of those who resent the court's protection of the minorities. This failure by those elected by the majority to either act affirmatively to protect the rights of minorities or to defend the protecting court is in itself an affirmation of the wisdom of the drafters of the Constitution in restricting the ability of the majority to destroy the freedom of the minority. The same pressures that make elected officials loath to protect those who cannot return them to office (the minorities) would also be likely to lead them to succumb to the majority demands to restrict the

rights of minorities, and there is sufficient legislative history of such efforts to confirm the point.

But as persons concerned with community, we should not accept the total abdication of responsibility by legislators or executives, national or local. The majority leader of the national Senate in discussing his responsibility in deciding how to vote on the Panama Canal Treaty said that if legislators were only to count the ayes and nays of constituents and weigh the mail for or against an issue, the legislator could be replaced by a computer and a scale. He appropriately saw his role as one requiring application of judgment and leadership.

We must require as public persons our executives and our legislatures to exercise leadership on the issue of bringing minorities of this nation into the mainstream of American economic, social, and political life. The experience of the sixties in which such leadership was exercised shows how effective such leadership can be. Today there is an incredible negativism and a sense of national powerlessness to effect change. You and I very well know that it is not lack of power; it is only lack of will.

It is my hope that now at last with the meaning of due process and equal protection rooted in the legal system we are ready to move on and put our constitutional law of protection into practice at every level of our legal system. Legislators must have ingrained in their conscience the need to consider the effects of their statutes on the procedural and substantive rights of all executive agencies and the operation of all of their programs. The agencies which are responsible for the administration of programs must allow those affected by their work to be fairly heard, must reach their decisions openly, and must act affirmatively to protect the rights of those who have been cast aside in the implementation of social policy.

A movement to ensure fairness both in the enabling legislation and in the administration of that legislation will do much to remove from the judicial system the requirement that the judicial system protect the minorities who today find this their only resort to justice. The role of law is more central than ever in this society, for it is the means by which all the diffuse groupings of the nation will seek to reason out the problems of social cohesion. This means that we lawyers must face up to consequent problems such as congested courts, over-worked legislators, and an overwhelmed bureaucracy. But it is surely easier to face up to these problems than it was to resolve the substantive problems of racial segrega-

tion and denial of the vote a generation ago.

And indeed there are solutions on the way that you are considering today that the Foundation and the ABA itself are looking at in detail: extended use of arbitration, the ombudsmen, the achievement of more open government, the movement to systems of dispute settlement outside of our courts. It would also help to write laws, rules, regulations, and opinions in language that non-lawyers can understand. One of the problems is that those of us doing the writing are so often lawyers that what is very understandable to us does not always meet the test of understanding in nonlawyers.

As one who was very proud of her classroom admonition to students to talk like people and not to assume a special mystical language, I took a little newspaper test on writing more clearly that had two legal opinions, brief legal opinions. One was the characteristic judicial finding after a hearing and the other was a suggestion of the way it ought to be written for nonlawyers. I must tell you that even with this concern to write more clearly, I preferred the one that was not approved by the writer. It seemed much clearer to me than the four line opinion that replaced the twenty lines that had originally been there.

Nonetheless, we must do as much as we can as lawyers to deemphasize the assertion of a legal mystique and accentuate the law's understandability and the rule of reason. Because the kind of results reported in the poll about people's attitudes toward lawyers is that we have not done an adequate job of explaining to people what it is we do. When people go to a doctor, no matter what they pay him, he can give them a pill that makes them feel a little better so they forget basically that they paid him more than perhaps they wanted to. But when they finish with us lawyers, they are not sure they could not have done it themselves. We have got to do a better job of explaining and making clear to them that we are helping them achieve justice. And that should be a goal because unless people feel they have justice, they do not have justice.

But these efforts to make the law work more efficiently must in no way adversely affect the hard-won rights to due process for all. There can be no shortcuts to procedures designed to preserve the right to a full and fair hearing. This is the core of the constitutional right to hold out against intolerable majority pressures. We cannot see the vindication of this right—the major constitutional victory of our time—set back in the name of efficiency. The right



of a black child in Kansas or whoever her successor may be in seeking a right to a full hearing on whether the majority can separate her and others of her race or of any race from full participation in the society must never be abridged, and the power of the courts to look at the reality of her situation must never be abandoned. Concern for congested court dockets must always give way to the protection of the rights of individuals and minorities to full inclusion in the society and the protection of its laws.

The key to making the law work for everyone will be to ensure a legal system that values the rights of minorities and protects them. The fact that major social conflicts can be resolved by the legal process is a crucial accomplishment for this nation. This is no time for lawyers to call a retreat. And I am happy to see that the legal profession is not willing to disown its achievement. It is heartening for the cabinet officer with concern for housing and urban development to receive the responsible recommendation for legal activism such as those contained in the report last month of the American Bar Association's Advisory Commission on Housing and Urban Growth. The report calls not for a limitation but for an expansion of judicial concern for equal protection in local housing and land use laws. It further recommends that all branches of government actively seek to ensure the opportunity for decent living accommodations. Those are precisely the terms on which the law must move forward. It is good to know that some of my colleagues are prepared to go on with the task of applying established law in order to ensure that the rights of still disadvantaged minorities are extended and protected.

Your participation, the members of this bar, in this effort are for me a source of professional pride, and I assure you will be a source of professional pride, and I assure you will be a source of great aid to us as we move in the Department of Housing and Urban Development to secure greater opportunity in housing and residential choice for minorities in this country. More importantly, that report on housing is consistent with the concerns of the founding fathers that the power of the majority not be misused, that the power of the majority not be used to declare some people psoriatic who must be outside the community and not be used to provide privileged sanctuaries against the poor.

We will know that we have reached full maturity as a nation when our minorities have the full protection that the founding fathers sought for themselves as a mistreated minority. Their needs led to a rebellion. To prevent a recurrence of that need for

others, they devised a document that would not visit shame and degradation on future minorities of this nation. We have come a long way to the achievement of their goals. But as urban unemployment statistics and black, Chicano and native American poverty data show, we still have a long way to go. The courts have in the past met their responsibility in achieving the constitutional goals, and I am confident that they will continue to do so.

As an administrator, I am committed to adding the leadership of the executive to the achievement of the goal. It remains for all of us to remind the majority of our citizens that the responsibility is also theirs. When we accept this responsibility for our disadvantaged minorities, our legislators will act.

Surely it can be said that in protecting minorities who will never become a majority that we who find ourselves for whatever reason part of the political majority are indeed our brother's keepers. And indeed it was as such that the founding fathers devised the means to keep the minorities safe from the majority.

