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Civil Rights Litigation: The Current Paradox

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CIVIL RIGHTS LITIGATION: THE CURRENT PARADOX

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Thanks a lot and good morning. I'd like to welcome you as well to the Edward Sparer Conference.

The issues we are going to be discussing over the next day and a half involve some of the most critical questions regarding access to the courts and the right of individuals to vindicate their constitutional and statutory rights. We have some of the most knowledgeable lawyers, academics, and practitioners in the field. We have invited an extraordinary group of people to share their thoughts with us over the next couple of days. And the issues we're going to be discussing—the entire question of access to justice, resources for justice, access to the courts and the question of remedies—couldn't be more timely or more critical.

They relate very well to what Michael [Dean Michael Fitts] said about the legacy that Edward Sparer left us with. Ed, as Mike said, was a person who was really one of a kind; a lawyer, a social and political activist, community organizer, a labor organizer, and at one point in his life, a professor of law. His work from the 1950s through his untimely death at a very early age in 1983 was a model of advocacy, scholarship, institution building, and personal commitment to legal and economic justice. He founded Mobilization for Youth [MFY], one of the first poverty law offices in the country, in the late 1960s on the Lower East Side of Manhattan. MFY became a model for the legal services movement of the last 40 years. Edward Sparer was *the* principal intellectual and organizing force in the struggle for welfare rights, for economic justice, and for healthcare in the 1960s and 1970s. In his spirit, we have organized this conference today to discuss the issues he was most concerned with: access to justice, access to healthcare, and access to courts as a means of vindicating constitutional and other rights.

Let me try to put in focus some of the things we're going to be talking about over the next couple of days. It is somewhat paradoxical when you think about where we are and where we've been, because all of this is both historical and comparative in nature. A para-

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[*] Senior Fellow, University of Pennsylvania Law School. David Rudovsky's introduction was presented as the opening remarks for the 2002 Sparer Symposium.

dox because, when you think about the last forty years, we have seen what some people have accurately described as an explosion of civil rights and public interest litigation. Forty years ago, if you just take yourself back to 1961, the landscape was barren. In 1961, according to statistics from the administrative office of the federal courts, there were 260 civil rights actions filed in the federal courts. In the year 2000, the numbers were in the tens of thousands. In 1961, there were none, *none*, of the major federal civil rights acts that form the basis for much of our litigation. The Civil Rights Acts of 1964, the Voting Rights Act, the acts protecting those with disabilities, and acts passed to protect the rights of women were not yet a reality.

In terms of constitutional law development, the Supreme Court was first becoming active in putting some flesh on the bones of the Constitution in terms of substantive constitutional rights. Prior to *Monroe v. Pape*,[1] there were almost no means of vindicating federal constitutional or statutory rights in federal court. *Monroe v. Pape*, a watershed case of that era, resurrected Section 1983, permitted litigants to file claims in federal court and to sue state and local officials.[2] Later, in the *Bivens*[3] case, federal officials became subject to suit for civil rights violations.

Consider as well the resources that were available to people who sought legal redress. There were virtually no public defender offices (this was two years before *Gideon*[4]). There were some legal aid offices around the country, but "legal services" was still a dream of Ed Sparer's. The numerous organizations that we now see involved in civil rights and public interest advocacy did not exist. I recall when I was in law school in the 1960s and volunteered for the ACLU. The national office at that point had one full-time lawyer; that was it. He handled all the ACLU litigation around the country. The NAACP Legal Defense Fund was active in some civil rights work mainly around racial justice. But when you think of the numerous organizations that exist just in Philadelphia today—the Women's Law Project, Juvenile Law Project, the Law Project of Philadelphia, ACLU, AIDS Law Project, Educational Law Project, Community Legal Services, and Disabilities Law Project—none of those existed at that time. For potential clients, for organizations, for persons who could even be thinking about bringing legal actions, there were simply no resources. Of course, there were situations where lawyers would take these cases *pro bono*, but there was certainly no system established to provide these kinds of services. The landscape was barren, in terms

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[1] Monroe v. Pape, 365 U.S. 167 (1961).

[2] *Id.*

[3] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[4] Gideon v. Wainwright, 372 U.S. 335 (1963).

of developed constitutional principles, in terms of statutory rights, and in terms of resources that might be available to persons whose rights had been violated.

Today we have a fairly fragile landscape. This is the paradox: despite the explosion of litigation, with thousands of cases filed each year, an enormous increase in the number of lawyers, organizations, and services that are available to people who want to litigate these issues in court, we see a marked retrenchment in legal doctrine and access to the courts. We will look at what Congress and the Supreme Court have done in this area.

But just to put that in focus, I always like to go back to *Marbury v. Madison*,[5] where the Court said, and this really becomes a test I think for where we are today, "The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws whenever he," (and the court really meant "he" at that time), "receives an injury."[6] "*The very essence of civil liberty certainly consists of the right of every individual to claim protection of the laws whenever he receives an injury.*"[7] If that's the standard, the question is, how well are we doing? And I just point to a few things on the landscape that we ought to be considering as to whether or not that promise, that standard, has been fulfilled now close to 200 years later. First, think of what Congress has done just in the last decade, including prison litigation "reform," which literally closes the door to many prisoner claims, federal habeas corpus restrictions, and limits on the kinds of cases and issues that legal service lawyers can present.

Recall as well that court stripping measures were rejected in the 1960s and 1970s, but passed in the 1990s. There are now substantial limits on prisoners and immigrants using the courts, and something we won't be talking about today, but will certainly see in the future, some of the limitations, both substantive and procedural, that have been imposed by the USA PATRIOT Act.[8] That's just one branch of government. Second, think about what the Supreme Court has done by way of procedural doctrine in limiting remedies, and in limiting access to the courts. The Court's jurisprudence on immunities, Eleventh Amendment immunity, absolute immunity for certain governmental officers, qualified immunity for virtually every governmental official, has had an enormous impact on remedies. Think as well what the Court has said about standing, who can actually bring law-

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[5] Marbury v. Madison, 5 U.S. 137 (1803).

[6] *Id.* at 163.

[7] *Id.* (emphasis added).

[8] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT Act") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

suits and under what conditions they can bring lawsuits. And finally, what the Supreme Court has said about Congressional power to enforce the Fourteenth Amendment. As we all know, there have been serious restrictions imposed by the Court on congressional power in these areas.

Between what the Court and Congress have done, you see substantial limitations, and yet the paradox remains: who would have thought forty years ago that we would have this broad scope of civil liberties laws, we would have thousands of lawyers around the country advocating the rights of minorities, of poor people, of prisoners, of immigrants? Many, many more than we've ever seen in the history of this country. And so there is this kind of ebb and flow; on the one hand the expansion of rights, the expansion of access to the courts, the expansion of resources, and then, not unpredictably, the counter reaction—closing the court house doors and making it more difficult for people to actually remedy their rights. Those are the issues we are going to talk about in the next day and a half. I'm glad you are here; I'm looking forward to this conference. As I said, we have some of the best people in the country to talk about these issues. So why don't we get going?