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## When Civil Rights Go Wrong: Agenda and Process in Civil Rights Reform

Charles F. Abernathy

*Georgetown University Law Center*, [abernath@law.georgetown.edu](mailto:abernath@law.georgetown.edu)

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# When Civil Rights Go Wrong: Agenda and Process in Civil Rights Reform

by CHARLES F. ABERNATHY\*

A full generation has come of age in the twenty-five years since the assassination of the Rev. Dr. Martin Luther King, Jr., in the spring of 1968.<sup>1</sup> Dr. King's trusted lieutenants in the field,<sup>2</sup> contemporary giants who toiled in parallel rows,<sup>3</sup> and even his rivals of a similar age,<sup>4</sup> have virtually all passed from the civil rights scene. A set of leaders and advocates deemed young at Dr. King's death has itself grown older and wiser from twenty-five years astride the stage of the civil rights movement.<sup>5</sup> It

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\* Professor of Law, Georgetown University Law Center; A.B., J.D., LL.M., Harvard University. The author would like to express his deepest gratitude to Kathleen M. Bender and Kelly R. Rausch, who have provided valuable research assistance for this and other projects for the last two years and who have, in the process, become colleagues rather than assistants. As a professor, the author also thanks the members of the Civil Rights Policy Seminar (Fall Semester, 1992), whose openness and candor challenged him to write this article. Renee Alexander (discrimination in mortgage lending), Andrea Bernard (critical race theory), Raymond Di Camillo (homosexual marriages), Scott Hulsey (family issues), and Kelly Rausch (AIDS and the FDA), in particular, wrote papers that taxed the author's ideas and provided sources that fueled his work. Although these people aided him immeasurably, the author avows that any mistakes in this work are his alone, and the responsibility for ideas expressed here, which at times are diametrically opposed to those of his students, rests with him alone.

The author was a junior co-founder of the Southern Poverty Law Center in 1970, where (with Joseph Levin, Jr.) he wrote the briefs for civil rights plaintiffs in, among other cases, *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Gilmore v. City of Montgomery*, 417 U.S. 566 (1974); and *Frontiero v. Richardson*, 411 U.S. 677 (1973). He is also the author of *CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION* (1992), *THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY* (1990) (with Stephen N. Shulman), and *CIVIL RIGHTS* (1979). The author lectures widely for the Federal Judicial Center and has served as a consultant to Congress on civil rights and judicial appointments.

This article is an expanded version of the Dr. Martin Luther King, Jr. lecture delivered at Temple University School of Law on March 22, 1993.

1. Earl Caldwell, *Martin Luther King is Slain in Memphis; Guard is Called Out, Curfew is Ordered in Memphis but Fires and Looting Erupt*, N.Y. TIMES, Apr. 5, 1968, at 1; DAVID LEVERING LEWIS, *KING: A BIOGRAPHY* 389 (2d ed. 1978).

2. See RALPH DAVID ABERNATHY, *AND THE WALLS CAME TUMBLING DOWN* 253 (1989) (discussing King's confinement in Birmingham jail).

3. Linda Greenhouse, *Thurgood Marshall, Civil Rights Hero, Dies at 84*, N.Y. TIMES, Jan. 25, 1993, at A1; Juan Williams, *Puzzling Legacy of 1954; Historic Decision's Effect Debated*, WASH. POST, May 17, 1979, at A1.

4. Peter Kihss, *Malcolm X is Shot to Death at Rally Here; Three Other Negroes Wounded—One is Held in Killing*, N.Y. TIMES, Feb. 22, 1965, at 1; *Elijah Muhammad Dead; Black Muslim Leader*, 77, N.Y. TIMES, Feb. 26, 1975, at 1.

5. Lynne Duke, *Civil Rights Activist Ben Chavis Selected to Head NAACP: Cleveland Minister Wins Vote Over 2 Others*, WASH. POST, Apr. 10, 1993, at A1; Jean Merl and Stephanie

is time for change.

The aging of the persons leading the civil rights movement is only a metaphor for a more serious aging process that afflicts the movement. It is a sclerotic condition that has kept an old agenda and once-prodding—but now increasingly intolerant—ideas in place, a fixed way of thinking that has become more strident and resistant to change as it has become more complacent with itself. Once the opponent of conformity, some parts of the civil rights community now preach conformity within their communities.<sup>6</sup> I see these not as indices of the venality of the civil rights movement, but as human responses that can be reformed by the contributions of a new generation. This change has already begun to occur, and my goal is to have a new generation build an immunity to sclerosis into the movement, an immunity that avoids the hardening of its agenda by remembering that civil rights is a process, not simply an agenda.

In the first part of this article, I want to break with the tradition that requires that only good things be said about the civil rights movement. I seek to identify some serious shortcomings that have a consistent theme: the sclerotic tendency of some civil rights communities to see civil rights as a static agenda rather than as a process. More emphasis on process, as at least of equal value with the agenda itself, will open the civil rights movement to change and reinvigoration. In the second part of this article, I focus on some fundamental intellectual conceptions of the civil rights movement in order to suggest some possibilities for how a reinvigorated movement might reconceive “civil rights.” I suggest, in particular, that the very success of the original civil rights movement has led to too much imitation and insufficient conceptualization of alternative models for describing and solving social issues in the civil rights field. Creating new arguments and concepts, I suggest finally, is not enough, for they must be tested in a new way: not by asking only if they promote the civil rights agenda, but by asking if they constitute fair process.

## I. INTRODUCTION: PAST ACCOMPLISHMENTS AS A CONTEXT FOR REFORM

By virtually any measure, the original civil rights movement, the

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Chavez, *Jackson Calls for Unity after Trial*, L.A. TIMES, Apr. 17, 1993, at 3; *SCLC Takes Up Battle Against Guns*, ATLANTA J. & CONST., Apr. 6, 1993, at A18.

6. I do not attempt a comprehensive definition of the term “civil rights community” because none is necessary for the thesis of this article. Any minority community sufficiently cohesive to define its membership in part by reference to a trait or characteristic that also prompts others to deny dignity to that community, e.g. African-Americans or Mexican-Americans, is a civil rights community. This working definition poses some irony for my thesis, however, for part of my contention is that civil rights communities at times over-define themselves and their members, demanding too much conformity and assuming that members of the community define themselves only in terms of their community.

movement for liberation and equality for "colored people," "Negroes," "blacks," or "African-Americans" has been enormously successful. Measured by the goals set in 1947, virtually the entire legislative agenda of the post-World War II movement<sup>7</sup> has been enacted into federal law. We now have civil rights laws that prohibit racial discrimination in public accommodations;<sup>8</sup> that prohibit racial discrimination by programs receiving federal financial assistance;<sup>9</sup> that prohibit racial discrimination by all employers,<sup>10</sup> governmental as well as private;<sup>11</sup> that prohibit racial discrimination in both government-owned and privately owned housing;<sup>12</sup> and that prohibit governmental machinations having the purpose or effect of limiting the voting power of Americans because of their race.<sup>13</sup> Initially adopted in the remarkably short period between 1964 and 1968, and based in no small measure on the moral persuasiveness of Dr. King and his Southern Christian Leadership Conference,<sup>14</sup> these statutes revolutionized racial relations in the United States. Measured against its own legislative agenda, the African-American liberation movement has been perhaps the most successful social movement in American history.

The enactment of these statutes has not yielded a mere paper suc-

7. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 107-12, 151-73 (1947) (recommending federal protection of civil rights through article I powers over voting, defense, interstate commerce, taxing and spending, postal system, District of Columbia and territories). Congress has legislative power originating outside article I as well. See U.S. CONST. amend. XIII, § 2 (empowering Congress to abolish slavery by legislation); *id.* amend. XIV, § 5 (empowering Congress to enforce fourteenth amendment by legislation); *id.* amend. XV, § 2 (empowering Congress to enforce voting rights by legislation); *cf.* *Screws v. United States*, 325 U.S. 91, 100 (1945) (upholding constitutionality of criminal statute prohibiting wilful violation of fourteenth amendment). The Supreme Court, however, had viewed these powers as limited to enforcing the judicially defined terms of the Civil War amendments. See *Civil Rights Cases*, 109 U.S. 3, 20-22, 32 (1883) (fourteenth amendment does not authorize direct congressional regulation of private rights, but only correction of prohibited state action); *cf.* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 169, 173-74 (1970) (42 U.S.C. § 1983 (1964) requires same degree of state action as required for fourteenth amendment violation). Use of article I power to prohibit racial discrimination, therefore, would free Congress to develop its own definition of civil rights.

8. Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-6 (1988).

9. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2000d-7 (1988); *cf.* Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-86 (1988); The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988).

10. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

11. 42 U.S.C. § 2000e-16 (1972). To a certain extent Congress itself remains beyond the reach of the law. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, 1077 (1991); *but see* *Davis v. Passman*, 442 U.S. 228 (1979).

12. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1988).

13. Voting Rights Act of 1965, 42 U.S.C. § 1973c (1988); Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973(b) (1988).

14. TAYLOR BRANCH, PARTING THE WATERS 883-85 (1988). See also LEWIS, *supra* note 1, at 119, 230.

cess. Although the practical successes since 1968 have been less than what the legal successes of 1964-68 might have led us to expect,<sup>15</sup> they have nevertheless been almost everything that Alex Haley's grandmother Queen<sup>16</sup> might have wished for. There are now over 7,500 elected officials of African-American ancestry.<sup>17</sup> African-Americans now comprise approximately seven percent of all J.D. students in law schools, a rise from less than four percent in 1971.<sup>18</sup> Entry into other professions has also pressed ahead: when I recently needed surgery, for example, my surgeon, radiologist, and anesthesiologist were African-Americans, assisted by two white nurses. Some parallel civil rights movements, such as those seeking to aid women or disabled persons, for example, may claim parallel success.<sup>19</sup>

Among those of us who celebrate the life of Dr. Martin Luther King, Jr., I suspect that there is a consensus that more remains to be done. That leads me to my topic for today, for my view is that part of the more that needs to be done is to reform and reinvigorate the civil rights movement itself. Although I have spoken so far of the African-American civil rights movement, I now speak more broadly of the civil rights community in general.

I believe that the failings of the civil rights movement fall into three broad categories: prejudice that is deep-seated and irrational; intolerance that is perhaps rational and purposeful, but nevertheless deeply destructive of the open society that makes social remedies possible for current and future civil rights communities; and the intrusion of base politics and the dissembling of lobbyists that devalues the moral persuasiveness of the civil rights community. What all three failings have in common is a single-minded pursuit of the civil rights agenda, which ignores the more fundamentally, and more enduringly, valuable view of civil rights as a process. After making these criticisms, I want to suggest some causes for

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15. Recent studies have demonstrated that poverty rates differ among the races. See, e.g., Elizabeth Neuffer, *Racism Seen as Battle in Poverty War*, BOSTON GLOBE, May 19, 1992, at 1; Spencer Rich, *Poverty Found to Grow Fastest Among Whites; Population: They Make Up the Largest Bloc of Poor, Although Proportionately They Lag Behind Blacks and Latinos, Study Shows*, L.A. TIMES, Oct. 9, 1992, at A24; Frank Swoboda, *Forty-five Percent of Black Children In U.S. Poor, Study Says*, WASH. POST, Oct 2, 1989, at A4.

16. ALEX HALEY & DAVID STEVENS, QUEEN (1993).

17. Peter Applebome, *Enduring Symbols of the Confederacy Divide the South Anew*, N.Y. TIMES, Jan. 27, 1993, at A16 (discussing whether Georgia's state flag is racist symbol in current political climate).

18. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES: FALL 1992 (1992).

19. See, e.g., Title VII, 42 U.S.C. §§ 2000e-2000e-17; Fair Housing Act, 42 U.S.C. §§ 3601-31; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; Americans with Disabilities Act, Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12,101-12,213 (1991). See also Tony Munroe, *Women Minorities Lead Growth in the Nation's Workforce in 1980s*, WASH. TIMES, Jan. 29, 1993, at C1.

these failings, and I want to challenge a new generation to break free of my generation's failures and chart a new course for civil rights.

## II. CIVIL RIGHTS AND CIVIL WRONGS: A CRITIQUE OF SOME PRACTICES IN THE CIVIL RIGHTS COMMUNITY

Let me begin with the most spirited statement of my criticism. Prejudice and intolerance infect not only foes of the civil rights community but members of the civil rights movement itself. We stereotype others; we are prejudiced against those deemed outsiders or foes; and, most of all, we have become intolerant of those who think differently from the prescribed "civil rights" viewpoint. In short, the norms we espouse seem often to be only for others—we exempt ourselves.

### A. Prejudice

EPITHETS. It has become increasingly socially unacceptable to issue racial or ethnic epithets or to make anti-gay remarks in public, and so such remarks usually occur at closed meetings,<sup>20</sup> in hushed conversations,<sup>21</sup> or only among those known to be receptive.<sup>22</sup> It is a dark secret of the civil rights movement that racial and ethnic epithets flow like water in discussions among members of traditional civil rights communities. Only occasionally does knowledge of these epithets become public, as when the press reported during the 1984 presidential primaries that the Reverend Jesse Jackson had referred to New York City as "Hymietown."<sup>23</sup> While the scope of the problem is difficult to document because of the privacy of the settings in which it occurs, anecdotal evidence abounds.<sup>24</sup> Given the intra-group friction that has sometimes

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20. Peter Baker and Kent Jenkins, Jr., *Fairfax GOP Dinner Featured Black, Gay Jokes*, WASH. POST, Mar. 18, 1993, at A1.

21. See *Georgetown University, Gay Student Groups Settle Bias Lawsuit Blocking Bond Issue*, THE BOND BUYER, Mar. 30, 1988, at 25. Negotiators for the university, in the author's experience, encountered council members of the District of Columbia who in public referred to "gays" but in private disparagingly called the same persons "queers." Cf. John F. Harris, *Wilder Says the Joke Wasn't His*, WASH. POST, May 11, 1993 at B1 ("Some gay rights activists said today that Virginia Governor L. Douglas Wilder's lisping, limp-wristed impersonation of a homosexual last week ['in a crowded convention hall in front of several reporters'] showed he is insensitive, while some Republicans said it showed he is a hypocrite."); Richard Harwood, *The Way They Lisp*, WASH. POST, May 18, 1993, at A21 (revealing that Wilder's impersonation of homosexual stereotype was done before small group of friendly reporters).

22. See, e.g., James Sterngold, *Navy Plans Murder Charge in Death of Gay Sailor*, N.Y. TIMES, Feb. 4, 1993, at A16; *3 Marines are Acquitted of Assault at Gay Bar*, N.Y. TIMES, Apr. 14, 1993, at B8; *2 Marines Disciplined in Fight with Gay Patrons of D.C. Bar*, WASH. POST, July 5, 1990, at C7.

23. Fay S. Joyce, *Jackson Denies Using Term Offensive to Jews*, N.Y. TIMES, Feb. 20, 1984, at A10.

24. Much of my anecdotal evidence comes from faculty members and students active in the civil rights field. They report to me such references as the following: African-American

arisen between some civil rights communities,<sup>25</sup> one does not need to strain to hear the epithets.

Such epithets flow in the civil rights community for the same reasons that they issue in other communities. First, civil rights speakers sometimes consider that they are in the presence of a cohort group who will understand and tolerate the remarks. Columnist Richard Cohen has revealed, for example, that Rev. Jackson's remarks were made in the presence of African-American reporters whom Rev. Jackson felt he could trust.<sup>26</sup> The epithet also works to control, belittle, or dehumanize an opponent. When a magazine that characterizes itself as a fighter for civil rights systematically publishes cartoons that picture Arabs as fanatics or Muslims as cruel enforcers of moral law,<sup>27</sup> it accentuates and perpetuates a regime that reduces Arabs and Muslims to mere caricatures.<sup>28</sup> These cartoons are as deeply offensive to Arab-Americans<sup>29</sup> as similar depictions are to African-Americans.<sup>30</sup>

That some civil rights communities can have members prejudiced against other traditionally disfavored groups is perhaps unremarkable. A more fashionable and insidious trend is toward creation and popularization of derisive ethnic or racial stereotyping of non-victim ethnic groups formerly considered to be in power. During the 1992 presidential primaries, for example, experts at the prestigious Urban Institute regularly referred in public to the "Bubba vote,"<sup>31</sup> that is, those white, largely rural,

civil rights activists on the District of Columbia Council who refer to homosexual rights advocates as "queers"; an activist professor who referred to his Arab taxi driver as a "camel driver"; a civil rights activist's sexual harassment of office workers that included regular references to women as "c—ts."

25. The conflict that has occasionally arisen between the male-dominated traditional black civil rights community and women's groups has often received public attention. Maureen Dowd, *The Thomas Nomination; Taboo Issues of Sex and Race Explode in Glare of Hearing*, N.Y. TIMES, Oct. 13, 1991, at 1; Ann O'Hanlon, *Grass Roots and Glass Ceilings: Women Carry Civil Rights Groups but Aren't Allowed to Lead*, WASH. POST, Apr. 18, 1993, at C5 (discussing the recent NAACP elections). Professor Derrick Bell has also written about these issues in a way that reveals the same struggle. Derrick Bell, *The Effects of Affirmative Action on Male-Female Relationships Among African-Americans*, 21 SEX ROLES 13 (1989).

26. Richard Cohen, *Deeds, Not Words*, WASH. POST MAG., Mar. 21, 1993, at W5.

27. See PLAYBOY MAGAZINE, Oct. 1992 at 99 (Arab sheik in cartoon, enjoying bedroom scene with four women, says "Can I call you back, Abdul? I'm on a roll."); *id.* at 169 (employee drying hands on a towel roll reads sign announcing that "In Saudi Arabia if you use more than four feet of towel, they cut your hand off!"). Compare *id.* at 40 (magazine's editorial support for purported women's equality).

28. See JACK SHAHEEN, *THE TV ARAB* 45 (1984) (describing television's caricature of Arab women as veiled or one of multiple wives).

29. ARAB-AMERICAN ANTI-DISCRIMINATION COMMITTEE, 1991 REPORT ON ANTI-ARAB HATE CRIMES: POLITICAL HATE AND VIOLENCE AGAINST ARAB-AMERICANS 9 (1992).

30. Debbi Wilgoren, *D.C. to Pay Fire Captain Over Cartoon; Officer Protested Ban on Drawing*, WASH. POST, Jan. 27, 1993, at B5.

31. One could, of course, make the argument that deriding "Bubba" was not a derision of

southern voters who were presumed to represent a fairly monolithic bloc of unsophisticated citizens.<sup>32</sup> Moreover, the civil rights movement has not merely used epithets created by others; it has also become adept at creating new epithets. "Male chauvinist" and "homophobe" come to mind as names that have the purpose and effect of dehumanizing opponents and excluding such persons from further discourse.<sup>33</sup>

**BLOC-VOTING.** Bloc-voting has long been a feature of American politics useful in suppressing black voting power.<sup>34</sup> More recently there has emerged a countervailing prejudice, as bloc-voting activity by members of civil rights communities has also emerged or has been encouraged. I do not include here such activity as voting in one's own self-interest; if one party or candidate opposes the interests of civil rights communities and the other does not, there is no prejudice, no irrational judgment, in the civil rights community's overwhelming or bloc vote in its own self-interest.

Yet we have begun to see in the last few years some consistent appeals for bloc-voting that are little more than outright appeals to voters in a civil rights community to vote for a particular candidate for no other reason than a shared race,<sup>35</sup> gender,<sup>36</sup> or other group identity.<sup>37</sup> Few in

all whites, but only an ignorant few; but it would be like arguing that making fun of pregnant women is not a classification of all women, but only a sub-group of women. The civil rights community has rejected that argument in the past. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

32. The speakers from the Urban Institute thus perpetuated a stereotype also pressed by others who can at least claim less knowledge of equal treatment. See Ron Sessions, *Toyota T100: Beefy Enough for Bubba?*, ROAD & TRACK, Mar. 16, 1993 (Special Series), at 106 ("As an office-bound city slicker, I must confess to a somewhat stereotypical mental image. . . . It involves cowboys wearing denim jeans, lots of beef on the menu, Hank Williams crooning over a scratchy A.M. radio, and . . . a long, bumpy ride in a pick-up truck.").

33. In books on child-raising, authors regularly remind parents to refer to specific behavior as good or bad, rather than to refer to the child as good or bad. Such mild epithets as "homophobe" not only play on the self-consciousness of the listener, they also play on the fear of other listeners who dread being called homophobes themselves.

34. See *Terry v. Adams*, 345 U.S. 461 (1953) (white voter's association implemented a three-step exclusion process to suppress black voting power); *Smith v. Allwright*, 321 U.S. 649 (1944) (election judges refused to give an African-American a ballot to vote); *Nixon v. Condon*, 286 U.S. 73 (1932) (Texas statute used to prevent an African-American from voting in a primary election); *White Primary Cases*, *Nixon v. Herndon*, 273 U.S. 536 (1927) (African-American prevented from voting in a primary). See also *White v. Regester*, 412 U.S. 755 (1973) (Texas legislature redistricting plan suppressed black voting power).

35. Dirk Johnson, *Challenge at Home for Adept Player of Racial Politics*, N.Y. TIMES, Mar. 11, 1990, at 22 (discussing then-Representative Gus Savage, an African-American elected from the second congressional district of Illinois, an African-American section of Chicago).

36. Joel M. Gora, *Emily's List Showed What Democracy Can Do*, N.Y. TIMES, Mar. 22, 1993, at A16 (Emily's List is a political action committee that raised money for several women candidates in the 1992 election).

37. Bettina Boxall, *L.A.'s New Gay Muscle; With Big Bucks and Connections, The Local Gay Community is Changing Politics Nationwide*, L.A. TIMES MAG., Mar. 28, 1993, at 27;



the civil rights community have stood up to these appeals.<sup>38</sup> I realize that one might argue that racial or gender identification is sufficiently important to constitute the sole determinant of voter choice, but in my view this argument either depends upon what is itself a stereotyped view of persons of one race or gender,<sup>39</sup> or achieves a result that few, if any, rational voters would in fact desire.<sup>40</sup> To virtually all Americans, a candidate is more than his or her race or gender. To paraphrase Dr. King, a candidate must be judged by the content of her character, not the color of her skin or her gender identity. Or if I may quote a former student: "I'm so disappointed," she told me a year after the jubilation of electing a person of her race governor of a southern state, "because he's against my position on virtually every issue except race."<sup>41</sup>

Bloc-voting is in essence the most curious form of stereotyping, one in which a group member stereotypes his or her own group. Mary McGrory, the liberal editorialist for the *Washington Post*, exemplified this self-destructive practice in a recent commentary on the unfortunate events surrounding the Branch Davidians in Waco, Texas. Following the fire that destroyed the group's compound, she wrote the following: "Janet Reno is getting kudos for taking it on the chin about her disastrous decision on Waco. . . . But she has let down people who thought that with a woman calling the shots, calamities like [this] would not happen."<sup>42</sup> Perhaps Ms. McGrory believes, along with the Justices who de-

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Charles W. Hall, *Gay Arlington Candidate Seeks to Set Mark in Area; National Group Backing Board Race by Fisette*, WASH. POST, Mar. 19, 1993, at A41.

38. Michael Abramowitz, *Race Issue Moves Into Open as D.C. Campaign Heats Up*, WASH. POST, Aug. 21, 1990, at A1. In 1991 a white politician, long a leader in the civil rights community, ran for mayor of the District of Columbia, where the vast majority of registered voters are African-Americans. In response to a whispering campaign against this candidate in the black community, Roger Wilkens spoke forcefully to remind voters that to part with their vote in 1990 for skin color alone was a further postponement of Dr. King's 1963 dream that racism would die in America.

39. For example, one might vote only for women or African-Americans on the ground that only such a person—and each such person—would be sympathetic to women or African-Americans. Those are clear stereotypes.

40. One might argue that any female candidate is better than any male candidate because there need to be more women in Congress in order to raise public awareness of the importance of women's contributions to society. Few voters could actually believe this. It is very unlikely that the election of porno star La Cicciolina ("little corpulent one") to the Italian legislature contributed anything to the respect accorded women in Italian society.

41. See, e.g., Peter Baker and John F. Harris, *Va. School Cuts Hit Suburbs Hard: Aid to Many Districts Slashed 12%*, WASH. POST, Dec. 29, 1990, at A1 (In order to reduce the state deficit, Virginia's African-American governor, Douglas Wilder, slashed state spending on schools).

42. Mary McGrory, *Misjudgment and Tender Mercies*, WASH. POST, Apr. 22, 1993, at A2.

cided *Bradwell v. State*,<sup>43</sup> in the “natural and proper timidity and delicacy which belongs to the female sex.”<sup>44</sup>

**TRIALS AND PUBLIC PROCEEDINGS.** The civil rights community finally shows its prejudice in the way that it responds to “singular” public events such as the Clarence Thomas confirmation hearings in Washington in 1991,<sup>45</sup> the Rodney King trials in Los Angeles in 1992 and 1993,<sup>46</sup> or the Harold Ford trial in Tennessee in 1993.<sup>47</sup> I allude here not to the actual guilt or innocence of any party in these cases, but to a more fundamental issue—the instantaneously certain judgment reached within some civil rights communities about who was lying, who was guilty or innocent, in these singular confrontations. As I myself watched the Thomas hearings among colleagues deeply devoted to civil rights, I was surprised to hear derisive laughter in response to every statement by the nominee; he was known to be guilty before being heard.<sup>48</sup> In the Rodney King case, there was a widely shared feeling that abuse had occurred.<sup>49</sup> Yet even before a federal verdict was read,<sup>50</sup> trusted liberal columnist Lou Cannon ventured into print with the media’s “dirty little secret” that the famous videotape was not clearly favorable to Mr. King and that the oral testimony at trial presented an incident much more ambiguous than that widely credited in the civil rights community.<sup>51</sup> The jury’s split verdict appears to confirm Mr. Cannon’s view, although some civil rights leaders, as expected, denounced the jury’s split verdict as “half justice.”<sup>52</sup>

43. 83 U.S. (16 Wall.) 130 (1872) (upholding the Illinois State Bar’s refusal to admit women).

44. *Id.* at 141 (Bradley, J. concurring). I do not argue that sex is never relevant. See *infra* text accompanying notes 176-78. But in light of our experience with such leaders as Golda Meir and Margaret Thatcher, it seems a stereotype to argue that women leaders are opposed, as a group, to the use of force.

45. Juan Williams, *Open Season on Clarence Thomas*, WASH. POST, Oct. 10, 1991, at A27.

46. Jay Mathews, *L.A. Beating Case Creates Odd Alliances; Noted Feminist Backs Chief Gates; Gun Owners’ Group Supports Foes*, WASH. POST, Mar. 23, 1991, at A3.

47. Michael Isikoff, *Lobbying by Rep. Ford, Black Caucus Preceded U.S. Reversal on Trial Jury*, WASH. POST, Feb. 26, 1993, at A4 (in his trial for bank fraud, Ford, an African-American Congressman, argued for a new jury on the grounds that he would not receive a fair trial with an all-white jury).

48. Several members of Georgetown’s faculty represented Professor Anita Hill during her testimony before the Senate and declared their belief in her account based upon their personal knowledge of Professor Hill’s integrity. Such prompt support for one side of a public dispute lies outside the scope of my criticism because these persons had an independent, non-reflexive basis for making a prompt determination of whom to believe.

49. Geoffrey Taylor Gibbs, *L.A. Cops, Taped in the Act*, N.Y. TIMES, Mar. 12, 1991, at A23; Dorothy Gilliam, *Just Remember, Rodney King is Not on Trial*, WASH. POST, Mar. 17, 1993, at B1.

50. Lou Cannon, *Jury Convicts 2 Los Angeles Officers in King Beating; 2 Others Acquitted in Civil Rights Case*, WASH. POST, Apr. 18, 1993, at A1.

51. Lou Cannon, *Not an Open-and-Shut Case*, WASH. POST, Mar. 21, 1993, at C7.

52. Lynne Duke, *Jury Convicts 2 Los Angeles Police Officers in King Beating; At ‘Ground*

This prejudgment before the evidence is heard is prejudice by the most ancient of analyses. Those of us who work in the civil rights field are widely aware that police officers abuse African-American suspects, especially African-American males apprehended in automobiles.<sup>53</sup> Those of us involved in the civil rights movement are also aware that women often suffer the indignity of sexual harassment and remain not only quiet about the episode, but publicly respectful of their tormentor for years after the incident has occurred.<sup>54</sup> Since these incidents occur to many black men and to many women, we jump to the conclusion that every person charged with such conduct is guilty. In short, we reason from the general to the specific; we prejudge based on our stereotypes before we even hear the evidence.

Civil rights organizations are in an admittedly difficult situation in some of these cases, for no one can expect an advocacy group to sit on the sidelines during a hearing when advocacy is appropriate and necessary. Nevertheless, in my opinion, civil rights groups have shown little concern for two factors they should hold important. First, as is illustrated by the Harold Ford trial in Tennessee, civil rights leaders may perpetuate the very racist or sexist stereotypes that they fight against. Congressman Ford, an African-American, charged that he would be treated unfairly by the almost-all-white jury scheduled to try him. Two days later that jury acquitted him.<sup>55</sup> Who acted based on racial stereotypes, the jurors or Congressman Ford?<sup>56</sup> Second, the tendency to treat all such singular events as "show trials" demeans the individuality and personhood of each participant in the trial. Individual guilt or innocence is lost in the need to show that a larger public problem exists. This sacrifice of individual justice to the greater good is the very essence of the denial of human rights.

### *B. Intolerance*

**DEMONSTRATIONS, OLD AND NEW.** In the beginning, the civil

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*Zero, Signs of Peace, Relief*, WASH. POST, Apr. 18, 1993, at A1 (paraphrasing Benjamin F. Chavis, NAACP Executive Director).

53. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BEYOND THE RODNEY KING STORY: NAACP REPORT ON POLICE CONDUCT AND COMMUNITY RELATIONS (1993).

54. Catherine Corcoran, *Sexual Harassment Has Many Definitions*, IRISH TIMES, Mar. 18, 1993, at 12.

55. See Don Phillips, *Rep. Ford Acquitted of Fraud; Jury Verdict Ends Justice Dept. Case Against Tennessean*, WASH. POST, Apr. 10, 1993, at A1.

56. Although it was not widely reported, the Ford case broke other stereotypes: the judge who transferred Rep. Ford's prosecution to a division with a high concentration of whites was himself black. John Branston, *Jury in Rep. Ford's Retrial Must Define What Is a Loan or Bribe*, WASH. POST, Mar. 7, 1993, at A20.

rights movement took the position that demonstrations and other public pronouncements promoted the essential public good of forcing society to confront the results of its belief systems and its actions.<sup>57</sup> Whether it was African-American students marching on a courthouse demanding justice,<sup>58</sup> marching in the streets demanding equal accommodations,<sup>59</sup> "sitting in" at a library to portray by their actions that African-Americans could and would read,<sup>60</sup> or conducting boycotts and parades to break the economic power of white-owned stores,<sup>61</sup> the civil rights community forced opponents to see that there was a dissonance between the equality that those opponents preached and the inequality that they practiced. When such confrontational tactics were legal, civil rights demonstrators paid the price of confrontation by facing down angry counter-demonstrators.<sup>62</sup> When the confrontations were illegal, demonstrators paid the price by going to jail.<sup>63</sup>

This right to demonstrate has customarily been accorded across the board to all who would demonstrate non violently, for "the free speech principle is grounded as much in a desire to avoid being the slaves of our own intolerant impulses as it is in a desire to preserve an unshackled freedom to speak one's own mind as one wishes."<sup>64</sup> Yet self-interest always plays a role: the issue not decided by the Supreme Court in the Skokie Controversy case, whether a bond so high as to prevent demonstrations by Nazis could be demanded by local government, and not raised when black activists held the "largest civil rights demonstrations in the South since the 1960s" in Forsyth County, Georgia,<sup>65</sup> was later

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57. *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) (school regulation prohibiting the wearing of black armbands to protest the Vietnam War violates First Amendment right to free speech); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Alabama libel law declared unconstitutional on First Amendment grounds).

58. See *Edwards v. South Carolina*, 372 U.S. 229 (1963) (conviction reversed).

59. See *Cox v. Louisiana*, 379 U.S. 536 (1965) (peaceful expression of unpopular views may not be punished).

60. See *Brown v. Louisiana*, 383 U.S. 131 (1966). When refused service, the African-American patrons "sat and stood in the room, quietly, as monuments of protest against the segregation of the library." *Id.* at 139. In reversing the convictions, the Court noted that speech rights "are not confined to verbal expression." *Id.* at 142.

61. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 900 n.28 (1982) (speech by boycott leader threatening to "have their [African-American] necks broken" if African-Americans violated boycott is protected by First Amendment).

62. See *supra* notes 59-61.

63. See *Adderly v. Florida*, 385 U.S. 39 (1966) (convictions punishable by three months in jail and \$100 fine upheld because demonstrators who blocked passages at a jail were not acting in a public forum); *Cox v. Louisiana*, 379 U.S. 559 (1965) (*Cox II*) (conviction for marching on a courthouse, which carried sentence of one year in jail and \$5,000 fine, upheld on basis of narrowly drawn statute).

64. Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 629 (1982).

65. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2399 (1992) (large civil

decided when demonstrators opposing the recognition of Martin Luther King's birthday were silenced by a \$100 parade-bond requirement.<sup>66</sup> By overturning the bond law, the Court preserved the rights of the Nazis in Skokie, traditional black civil rights activists, and the Nationalists who opposed national recognition of Dr. Martin Luther King's birthday.

Yet today, it is quite fashionable among some civil rights groups to deny the speech interests of those who oppose them and their agenda. Pro-choice activists have litigated,<sup>67</sup> and now lobby,<sup>68</sup> to outlaw demonstrations at abortion clinics. Punishment of speech directed at persons from civil rights communities topped some university agendas in the 1980s,<sup>69</sup> and enhanced punishment for hate-motivated crimes remains an issue this year.<sup>70</sup> There may be lovely arguments to distinguish anti-abortion demonstrations, or even the other cited restrictions,<sup>71</sup> from traditional civil rights demonstrations of the 1960s, but they are not easy arguments.<sup>72</sup>

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rights demonstrations prompted county to enact bond ordinances later enforced against Nationalist Movement demonstrators).

66. *Compare Forsyth County*, 112 S. Ct. 2395 with *Smith v. Colin*, 436 U.S. 953 (1978), denying stay of 578 F.2d 1197 (7th Cir. 1978).

67. *See Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (abortion clinic protestors cannot be sued under 42 U.S.C. § 1985(3), former Klu Klux Klan Act).

68. Freedom of Access to Clinic Entrances Act of 1993, S. 636, 103d Cong., 1st Sess. (1993).

69. *See R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992) (ordinance targeted at hate speech is unconstitutional under First Amendment).

70. *Wisconsin v. Mitchell*, 169 Wis. 2d 153 (1992) (statute providing heightened punishment for hate crime is unconstitutional), cert. granted, 113 S. Ct. 810 (1992).

71. The issue of enhanced punishment was anticipated by Justice Holmes over seventy years ago in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 629 (1919), a case involving a 20-year sentence for obstructing war efforts: "the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed they avow . . . ."

72. Perhaps one could argue that the abortion clinics are different because they are private, but the target of many civil rights demonstrations was also private facilities or homes. *See, e.g., Gregory v. Chicago*, 394 U.S. 111 (1969) (demonstration at mayor's private residence lawful). Perhaps one could argue that the abortion demonstrations are violent or obstructive, but the civil rights demonstrations of the 1960s through 1990s were also sometimes obstructive and violent—and effective because of it. *See Cox v. Louisiana*, 379 U.S. 536, 553-57 (1965) ("There is no doubt from the record in this case that this far sidewalk was obstructed," but free speech may not be curtailed by a statute that allows possible punishment because of an administrator's disagreement with views expressed by demonstrators); Felicity Barringer, *Hire City Poor in the Suburbs, Report Urges*, N.Y. TIMES, Dec. 4, 1992, at D18; Patrick Lee, *Banks Band Together to Aid Riot Zone; Financing: Consortium Creates a Community Development Corporation to Lend and Invest in Areas Where Others Fear to Tread*, L.A. TIMES, Oct. 31, 1992, at D1; R.W. Dick, *Bush May Finally Achieve Enterprise Zone Legislation*, ATLANTA J. & CONST., June 5, 1992, at A10. Perhaps one could argue that the anti-abortion activists are interfering with a constitutionally protected privacy interest, choosing an abortion, but civil rights demonstrators who lay down in front of homes, *see Gregory*, 394 U.S. 111, or churches, *see Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (narrowing a district court injunction to

I fear that it is more likely that some civil rights groups react so vociferously against abortion activists for the same reason that some persons opposed civil rights demonstrators in the 1960s—that is, opposition to the demonstrators' views and to their effectiveness. I do not say that vociferousness and even zealotry in response to anti-abortion activists are violative of speech rights; they are indeed exercises of speech rights. But seeking to have the demonstrators silenced by law is intolerant of speech interests. Only recently have some district courts moved to modify their injunctions against anti-abortion demonstrators in order to respect their speech rights.<sup>73</sup>

Although I am loath to cite a cliché, I rely here on one that has passed into the philosophical mainstream: "Do unto others as you would have them do unto you." An anti-demonstration penalty that disables only one's opponents and not oneself is intolerant.

**SPEECH THAT EXCITES AND OFFENDS.** It was once a mainstay of the civil rights movement that words that excite and offend, even racist or physically challenging words, are precisely the kinds of words to be protected by the First Amendment. Even though they were directed at specific listeners, the Supreme Court has protected such language as "white son of a bitch, I'll kill you"<sup>74</sup> and "g-d d—n mother f—ker police."<sup>75</sup> Symbolic speech such as burning the American flag has also been protected in cases that began as protests against assaults on civil rights leaders.<sup>76</sup> Many cases that students read today as civil liberties cases involving free speech were in fact originally civil rights cases involving demands for African-American equality. In *New York Times v. Sullivan*,<sup>77</sup> when Justice Brennan wrote that speech should be "uninhibited, robust, and wide-open," he was protecting the provocative words of civil rights groups. And when Justice Holmes proposed the theory that every idea is an incitement, he was protecting civil rights demonstrators of his

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preserve civil rights group's demonstration calling on church to pay reparations), were in that sense also violating fundamental rights to privacy, association or religion.

73. See Marianne Lavelle et al., *Abortion Clinics*, NAT'L L.J., May 10, 1993, at 23 (stating that Judge Oberdorfer has appointed an amicus curiae to consider this issue in *National Organization for Women v. Operation Rescue*, CA89-2968-LFO).

74. See *Gooding v. Wilson*, 405 U.S. 518 (1972) (speech protected, at least in the absence of a narrowly drawn statute); cf. *Brown v. Oklahoma*, 408 U.S. 914 (1972) (conviction for Black Panther member's reference to African-American police officer as "black mother-f—king pig" reversed and remanded in light of *Gooding*).

75. See *Lewis v. New Orleans*, 408 U.S. 913 (1972) (mother's reference to police arresting her son), *vacated*, *Gooding v. Wilson*, 405 U.S. 518, 520 n.1 (1972) (holding "son of a bitch" protected in the absence of a narrowly drawn statute).

76. See *Street v. New York*, 394 U.S. 576 (1969) (reversal of conviction for burning flag in protest over shooting of civil rights leader James Meredith).

77. 376 U.S. 254, 270 (1964).

day.<sup>78</sup>

Contrast that protection for aggressive dissenting speech to the punishment that some modern civil rights activists propose for "hate speech," speech that, as in the recently invalidated St. Paul ordinance, is usually defined in terms of speech hated by civil rights activists and hurtful to civil rights communities.<sup>79</sup> At my own law school two years ago, the leader of the Black Law Students' Association ("BLSA") filed a disciplinary complaint against a student who wrote a student newspaper article deploring the use of what the writer saw as racial quotas. The BLSA leader did not object because the article was maliciously or recklessly false—or even because it was extremely poorly drafted and artlessly argued—but because she thought that its arguments hurt the feelings and standing of African-American members of the community.<sup>80</sup> Meanwhile, a group of other students and minority staff members devoted their energies to a principle more consistent with the history of the civil rights movement—that the cure for uninformative and hate speech is counterspeech, that sunlight is the best disinfectant.<sup>81</sup>

It was once true that one could always rely on the American Civil Liberties Union ("ACLU") to defend freedom of speech for even the most heinous and hateful of speech. Even into the last decade, the ACLU defended demonstrations planned by the Nazis in Skokie, Illinois, a town purposely targeted because the demonstrations would hurt and offend the large number of Holocaust survivors who had emigrated there.<sup>82</sup> Now, as Nat Hentoff has so effectively revealed, the ACLU is riven by a deep split in its ranks about speech that is harmful and offen-

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78. *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (arguing for the protection of socialist demonstrators protesting Western intervention in Russia).

79. *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

80. See complaint filed in response to Timothy Macguire, *Admissions Apartheid*, LAW WEEKLY, Apr. 8, 1991, at 5, with Professor Peter P. Weidenbruch, Chair of the Committee on Professional Responsibility, on file with Special Collection, Georgetown University Law Center Library.

81. Saundra Torry, *Affirmative Action a Flash Point at GU; Law Students Jam Meeting to Decry Articles as Racist*, WASH. POST, Apr. 17, 1991, at D1; *New York Times v. Sullivan*, 376 U.S. 254, 305 (1964) (quoting Justice Brandeis as saying "sunlight is the most powerful of all disinfectants"). It is sometimes argued that hate speech is different because its hurtfulness is directed at particular individuals, thus distinguishing it from the generalized protests against social conditions in such cases as *Spence v. Washington*, 418 U.S. 405 (1974) (peace symbol attached to flag to protest Cambodian invasion and killings at Kent State). But constitutional law, encouraged by the arguments of civil rights groups, is precisely to the contrary. The Nazi marches in the *Skokie* case targeted particular individuals for offensive remarks because of their ethnicity. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978). And in *Hustler Mag. v. Falwell*, 485 U.S. 46 (1988), involving a cartoonist's depiction of the Rev. Jerry Falwell having sex with his mother, the Court protected vituperative remarks directed at a single individual because of his religious convictions.

82. Myra MacPherson, *The Nazis and Skokie; Notes From the Real Life Drama*, WASH. POST, Nov. 17, 1981, at B1.

sive to African-Americans and women.<sup>83</sup> It has created a position that it calls a compromise,<sup>84</sup> but the ACLU's position is one that is so result-oriented that even non-lawyers see through its transparency.<sup>85</sup> Should compromise ultimately be necessary, that does not lessen the loss occasioned when the ACLU itself does the compromising. A group that has always been a process-oriented civil rights organization, one in which the only agenda was the openness of the speech process, has now become just another agenda-driven organization.

### C. Political Norms and the Civil Rights Community

Having spoken about prejudice and intolerance in the civil rights community, I now turn to the third of my criticisms—that the civil rights community has begun to play politics by the rules of those it formerly opposed, that it exempts itself from the high standards for which it once fought. Let me focus briefly on two sub-areas.

LEGISLATIVE INTERVENTION IN THE JUDICIAL PROCESS. In February of 1993, African-American representatives in Congress arranged a meeting with the Acting Attorney General to lobby for the disempaneling of a predominantly white jury chosen to hear criminal charges against one of their colleagues, Representative Harold Ford of Memphis, Tennessee.<sup>86</sup> I realize that elected African-Americans serve in many capacities other than their elective ones because of the vast disempowerment of African-American communities. Yet, opposition to intervention by politicians in the justice system is a longstanding and necessary part of the civil rights community's ethic.<sup>87</sup> The actions of the Mississippi Sovereignty Commission showed how politicians can use their power to subvert individual justice, even as they argue that they are promoting a broader social good.<sup>88</sup> This ethic has been so strong that as recently as the 1960s, a violation of the ethic cost a sitting Supreme Court Justice the opportunity for elevation to the position of Chief Justice.<sup>89</sup>

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83. Nat Hentoff, 'Susceptible to Abuse': *The ACLU's Civil War about 'Hate Speech' Crimes*, WASH. POST, Feb. 6, 1993, at A23.

84. Nadine Strossen, 'Hate Crimes': *The ACLU's Position*, WASH. POST, Mar. 6, 1993, at A19. "The position the ACLU's national board recently adopted instead said that society has a right to treat discriminatory criminal acts more severely than other criminal exploits." *Id.* (emphasis added).

85. Samuel Intrater, *The ACLU and Bias Crimes, Letters to the Editor*, WASH. POST, Mar. 18, 1993, at A26.

86. Kenneth J. Cooper, *GOP Alleges Impropriety in Ford Case; House Leaders Cite Lobbying Over Jury*, WASH. POST, Feb. 27, 1993, at A13.

87. R. ABERNATHY, *supra* note 2, at 163-68.

88. Jack Nelson, *White Knights, Dark Hearts: The Hateful Summer When the Klan Loosed Its Terrorists on Mississippi's Jews*, L.A. TIMES MAG., Jan. 10, 1993, at 28.

89. John P. MacKenzie, *Fortas 'Proud' of Role as a Johnson Adviser: Senate Told of Aid on Top Issues*, WASH. POST, July 17, 1968, at A1. Although an association with a felon's



It is perhaps lightly remembered today,<sup>90</sup> but the very beginnings of federal judicial reform of the criminal justice system can be found in the African-American civil rights movement. The Court's landmark decision on the right to counsel, *Powell v. Alabama*,<sup>91</sup> begins with these chilling words: "The . . . defendants are negroes charged with the crime of rape, committed on the persons of two white girls."<sup>92</sup> No lawyer would defend the "Scottsboro boys,"<sup>93</sup> and they were each sentenced to death following one-day trials.<sup>94</sup> But one need not have a long memory or a historian's understanding of the civil rights movement<sup>95</sup> to know that the protections of an independent judiciary and a certain law of criminal procedure—and indeed the very conception of procedural "rights"—inure to the benefit of civil rights communities.<sup>96</sup> As Judge Harry T. Edwards noted in his dissent in *United States v. Prandy-Binett*,<sup>97</sup> the evolving lax standards for police searches, permitted in "the so-called 'War on Drugs,' has produced a gross distortion of the case law in our criminal jurisprudence" which will hurt primarily the "poor or people of color."<sup>98</sup> Political intervention into the judicial process in individual cases violates a cardinal rule of the civil rights movement.

**DISSEMBLING IN THE LOBBYING PROCESS.** It is not only politicians from the civil rights community who sometimes lapse into the practice of playing politics like civil rights' opponents. It is not widely known outside Washington, but one of the most effective and widely feared lob-

foundation was the immediate precipitating factor for Justice Fortas' resignation, LAURA KALMAN, ABE FORTAS: A BIOGRAPHY, 370-78 (1990), the Justice's earlier, extremely close advisory role to President Johnson had already sensitized the nation and the press to problems of extra-judicial conduct. *Id.* at 357.

90. Modern criminal law casebooks in use for over the last decade do not even cite *Powell v. Alabama*, 287 U.S. 45 (1932). See, e.g., H. UVILLER, THE PROCESSES OF CRIMINAL JUSTICE: INVESTIGATION AND ADJUDICATION xxxviii (1979) (table of cases).

91. 287 U.S. 45 (1932).

92. *Id.* at 49.

93. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 17-18 (1969).

94. *Powell*, 287 U.S. at 50.

95. For a sampling of other cases in which civil rights communities played a role in developing procedural rights beneficial to all Americans, see *NAACP v. Button*, 371 U.S. 415 (1963) (recognizing group's ability to sponsor litigation by group members); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (limiting legislative investigations); *NAACP v. Alabama*, 357 U.S. 449 (1958) (limiting official inquiry into group's membership); *Herndon v. Lowery*, 301 U.S. 242 (1937) (allowing federal court to independently review state court record for evidence in First Amendment case).

96. See, e.g., Kimberly Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364 (1988); Patricia J. Williams, *Minority Critique of CLS: Alchemical Notes*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987).

97. 995 F.2d 1069 (D.C. Cir. 1993) (view of a taped rectangular box carried by a minority individual held to provide justification for police search of the box).

98. *Id.* at 1074-75 n.2.

bying groups on Capitol Hill is the loosely affiliated civil rights lobby.<sup>99</sup> With the adoption of the Family and Medical Leave Act,<sup>100</sup> the Americans With Disabilities Act,<sup>101</sup> and the Civil Rights Act of 1991,<sup>102</sup> it has been remarkably effective. Indeed, the civil rights lobby has been more effective at enacting legislation, which requires the extra energy of moving a body at rest into motion, than the number two lobbying organization, the National Rifle Association, has been at defeating legislation.

Yet the tactics of the civil rights community in pressing for this legislation have not been as noble as the legislation itself. When lobbying for the Civil Rights Act of 1991, for example, civil rights lobbyists painted a picture of a pressing need to overturn rapidly accumulating conservative Court opinions.<sup>103</sup> Yet these lobbyists failed to reveal that among those decisions slated for legislative reversal was one by Justice Brennan that substantially advanced the cause of civil rights, though not substantially enough to satisfy the lobbyists.<sup>104</sup> Another provision, touted as codifying the existing law, would have permitted judicial review of all factory closings or transfers,<sup>105</sup> a practice having no precedent<sup>106</sup> in pre-existing Title VII jurisprudence.<sup>107</sup>

Neither of these cases of lobbying involved lying, but they do raise

99. Steven A. Holmes, *Washington at Work; Lobbyist on Civil Rights Wins Despite Hostility*, N.Y. TIMES, Dec. 2, 1991, at A14 (describing Ralph Neas and the Leadership Conference on Civil Rights).

100. Pub. L. No. 103-03, 107 Stat. 6 (1993).

101. Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12,101-12,213 (1990).

102. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

103. Linda Greenhouse, *Morality Play's Twist*, N.Y. TIMES, Nov. 3, 1991, at 26; Ari L. Goldman, *Urban League Leader Calls Equality Essential to U.S.*, N.Y. TIMES, July 30, 1991, at A10.

104. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (holding the "mixed-motive" defense to be a complete defense to liability, not merely a limitation on permissible relief). Section 107(b) of the Civil Rights Act of 1991 overrode Justice Brennan's interpretation and mandated that the defense apply only to limit certain relief, leaving in place the possibility of a declaratory judgment and attorneys' fees. See 42 U.S.C. § 2000e-5(g)(B).

105. 137 Cong. Rec. H9,545 (1990) (discussing § 2104(o)(1)(b)).

106. Of course, any adverse employment action may be subject to scrutiny if it has an adverse impact on employees' Title VII-protected class. See, e.g., STEPHEN SHULMAN & CHARLES ABERNATHY, *THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY* ¶¶2.01-.03 (1990). Under Title VI, and related "spending power" statutes, there had been some disparate-impact litigation by 1989 concerning activities that looked analytically like plant closings, e.g., *Alexander v. Choate*, 469 U.S. 287 (1985) (cancellation of hospitalization program), but in general suits against closing of facilities on the grounds that minorities were adversely affected had by 1989 ended in massive failure. See Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination — It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939 (1990). There had been no substantial parallel litigation under Title VII challenging plant closings, and thus the proposed civil rights amendments could not have codified any results. Indeed, the most similar line of litigation had occurred under the Age Discrimination in Employment Act, 29 U.S.C. § 629(a) (1982), and involved so-called reductions-in-force, or mass discharges. Those cases showed no pattern of judicial interest in reviewing operational closings, and many expressed explicit reluctance to do so. See *Branson v. Price River Coal Co.*, 853 F.2d 768, 772

the troubling question of whether civil rights lobbyists should employ the tactics of dissembling and misrepresentation that we have for so long decried in opponents. This is an especially serious ethical issue for civil rights lobbyists because a great deal of their work involves education and consensus building. As necessary as it is to do the dirty work of getting laws passed, it is equally necessary to ensure that a reliable, standard-setting consensus was actually reached.<sup>108</sup> The process of legislative enactment is not unimportant.

### III. CIVIL RIGHTS AS PROCESS AS WELL AS AGENDA

#### A. *Dignity and Process*

I have come to the conclusion that the various problems I have identified share a common underpinning. Each betrays a single-minded pursuit of the civil rights agenda while ignoring the truth that civil rights is also a process. The agenda of the civil rights movement reflects a value strongly promoted by Rev. Dr. King: each person is worthy of dignity and respect because they are human beings. The fight for human dignity for African-Americans, women, or other ostracized or disadvantaged members of our society is not conducted because only these persons deserve dignity and respect, but because every person deserves dignity and respect as a human being—and those denied such dignity need to be accorded equality of dignity. The pursuit of that remedial agenda should not take place through a process inconsistent with Dr. King's injunction to respect the dignity of each person.

To the extent that the modern civil rights movement has strayed from Dr. King's teachings and has laid aside civil rights process for the single-minded achievement of the civil rights agenda, it has been influenced by certain regrettable tendencies in American society generally.<sup>109</sup>

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(10th Cir. 1988) (ADEA "not intended as a vehicle for judicial review of business decisions"); SHULMAN & ABERNATHY, *supra*, at ¶14.08.

107. At the Conference on Equal Employment Opportunity Law sponsored by Georgetown University Law Center in 1991, I raised this issue with a lobbyist for the Lawyer's Committee for Civil Rights Under Law, and noted that this provision does not in fact codify precedent. "Well, you've got us there," replied the lobbyist.

108. The Civil Rights Act of 1991 unfortunately seems to contain an overabundance of false compromises. Is the Act retroactive? See *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir. 1992) (per Posner, J.: Congress "dumped the question [of retroactivity] into the judiciary's lap without guidance."). Does the Act change the business necessity defense to make it more difficult to justify neutral rules having an adverse impact? Does the Act overturn precedent and make "subjective" or "bottom-line" hiring subject to disparate impact analysis? See 137 CONG. REC. § 15473 (daily ed. Oct. 30, 1991) (remarks of Sen. Dole, explaining his version of the compromise): "The burden-of-proof issue that *Wards Cove* resolved in favor of defendants is resolved by this Act in favor of plaintiffs. *Wards Cove* is thereby overruled. [O]n all other issues this Act leaves existing law undisturbed."

109. I lay aside the observation that must certainly also be true, that as mere mortals, the

I would like to identify two such tendencies because I think that they go directly to my goal in this article, that of inviting a new generation to reform and reinvigorate the civil rights movement.

### *B. Inhibitors to Change and Reform: Mimicry of Success*

Paradoxically, the single greatest inhibitor of change within the civil rights movement has been its initial success. This success has spawned ceaseless imitation, as the original movement and more recent offshoots mimic prior successful strategies or actions. In Hollywood, a successful film spawns a sequel, and a successful sequel spawns further sequels. Unfortunately, the same has happened with the civil rights movement.

This imitation probably explains some of the prejudice and intolerance within the civil rights movement. Early successes for civil rights were possible in large measure because the opponents of civil rights were so clearly wrong as measured by the value system of the vast majority of Americans. Demonstrations and confrontation worked precisely because they induced Americans to confront their own contradictory feelings and led them to see opponents of civil rights as fundamentally heinous perpetrators of social injustice.<sup>110</sup> Building on this element of success, civil rights communities have come to a position where demonizing of opponents is a subconsciously necessary element of the push for change. Just as demonizing the Japanese in World War II gave permission to prejudice,<sup>111</sup> this demonizing ritual in the civil rights movement also exacts a toll.<sup>112</sup>

Yet, while the mimicry that afflicts the movement may explain some of the prejudicial dehumanizing that goes on, it also operates as an inhibitor to creative change within the movement.

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members of civil rights communities are as capable as anyone of venal fears, prejudices, and intolerances. I see no need to dwell on this issue because I hope that the civil rights community is more disposed to checking these feelings when they have been brought to its attention.

110. See, e.g., Bill Richards, *Gun-Toting Klansman Denies Bombing Black Birmingham Church in 1958*, WASH. POST, Sept. 29, 1977, at A5; see BRANCH, *supra* note 14, at 144 (in response to bus boycott, white women write letters to the editor supporting "decent treatment" for their African-American maids), 893-98 (public response to Birmingham church bombings).

111. *Korematsu v. United States*, 323 U.S. 214 (1944) (holding the detention of Japanese-Americans in California during World War II was constitutional).

112. I have spoken earlier of the prejudice we see in the modern movement; now let me ask you to consider other examples. The various branches of the civil rights movement build their constituency in part by such demonizing of the opposition: to some gay rights activists, for example, it is useful to picture opponents, who may act for religious or other traditional reasons, not as persons to be persuaded but as "homophobes" to be vilified. See Richard Harwood, *Thought Police in America*, WASH. POST, May 11, 1993, at A19 (dean at Washington College accused of being a "Nazi" because he objected, on financial grounds, to extension of university employee benefits to all "domestic partners"). Such demonizing, perhaps effective, reduces the essential humanity of the opponents, and thus undermines the human-dignity goal of the civil rights movement.

THE EXCLUSIVENESS OF THE INTEGRATION MODEL. Dr. King's Negro civil rights movement, as Professor Cook has demonstrated, was built on a model of Christian love and sameness of all persons, beneath the skin, that made it a compellingly persuasive case for equal treatment and integration in a reconstructed community.<sup>113</sup> Whether from reaction to the holocaust or from their own ethnic experience, many non-African-Americans saw skin color as the only permanent difference between blacks and whites.<sup>114</sup> Once skin color was overcome as a barrier, not only acceptance, but a genuine bonding and love could follow because "you are me, I am you" in all life's institutions and feelings.<sup>115</sup> In short, while there might be cultural differences between African-Americans and non-African-Americans, this view saw *no difference* in terms of biology or individual dignity.<sup>116</sup> This "full equality," or mutuality model of equality, found strong resonance in the American civil rights movement of the 1960s.<sup>117</sup>

This model serves as an important ultimate goal for all equality movements, but it also impedes practical thinking about other models. The movement for women's equality has been stymied at certain stages in part because it did not appear to be true to all concerned that "you are me, I am you": women, after all, could bear children,<sup>118</sup> and even after

113. See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1023-30, 1033-41 (1990).

114. The operative word here is "permanent," for there were in fact differences in socioeconomic terms, KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 123-31 (1968), and in African-Americans' perceptions of daily life among theoretically enlightened whites, see Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1869 (1990); Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 436, 437 (1987).

115. In King's view different groups might bring distinctive experiences to life's table. See Lewis V. Baldwin, *Martin Luther King, Jr., the Black Church, and the Black Messianic Vision*, in MARTIN LUTHER KING, JR.: CIVIL RIGHTS LEADER, THEOLOGIAN, ORATOR 15 (D. Garrow ed. 1989) (distinctive black suffering); cf. Charles F. Abernathy, *Affirmative Action and the Rule of Bakke*, 64 A.B.A.J. 1233, 1236 (1978) (expressing the hope that the *Bakke* case would create a regime under which "race will be seen as a differentiating factor . . . but one which divides us no more than any other day-to-day distinction"). But these were only different experiences, not differences in human potential or dignity.

116. This view may be best understood as the antithesis of a competing model, that of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 357 (1896). The former case saw all African-Americans, slave and non-slave, as an inferior race, and the latter, masquerading as a case about mere social differences, reaffirmed that view.

117. See BRANCH, *supra* note 14, at 44-46.

118. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 146 (1976) (Brennan, J., dissenting). This citation may seem reversed between majority and dissent, but it is not. It was Brennan who argued that "pregnant persons" were inherently "women," and not just another undifferentiated subset of all persons.

that issue was finessed,<sup>119</sup> there followed an unsettling amount of other research that showed that women are different from men in such fundamental ways, from how their muscles behave to whether both genders respond in the same way to medical treatment.<sup>120</sup> As a practical matter, this leaves the current women's rights movement with some degree of division, as the question arises whether pregnant women should be treated exactly the same as similarly temporarily disabled men, or whether it is acceptable to accord special benefits to pregnant women.<sup>121</sup> Some might see a similar situation arising with the gay rights movement, where such trusted leaders as General Colin Powell have argued that homosexuals are essentially different. Unlike Negroes in the 1940s, General Powell has argued, homosexuals cannot be integrated into the military because, though blacks and whites are the same, homosexuals are different because of their chosen course of conduct and lifestyle.<sup>122</sup>

Might a new generation develop a different model for explaining equality—one that recognizes the sometimes socially constructed, but sometimes inherent differences between different groups of persons in society? Recognition of these differences need not debase the human dignity of and respect due any person; the fallacy that there is no difference would yield to a new argument that there are no meaningful differences in terms of human dignity for each individual.<sup>123</sup>

So far only advocates in the disability branch of the civil rights movement have made overt and consistent use of this alternative model for civil rights. While discussion in other equality movements continues to focus on the old vocabulary about intentional and effects-style "discrimination," the new Americans With Disabilities Act of 1990 (ADA)<sup>124</sup> and its forbearer, § 504 of the Rehabilitation Act of 1973,<sup>125</sup> frankly admit that disabled persons are different from the norm<sup>126</sup> and

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119. See The Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (defining "sex" in Title VII to include pregnancy-based discrimination).

120. *Study Indicates Angioplasty Riskier for Woman*, DALLAS MORNING NEWS, Mar. 9, 1993, at 4A; *What Doctors Don't Know about Women; NIH Tries to Close the Gender Gap in Research*, WASH. POST, Dec. 8, 1992, at Z10.

121. The intra-family debate came to a head in the litigation over the legality under Title VII of special pregnancy benefits for women, an issue settled in *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272 (1987) (the plurality opinion holding that Title VII extension to pregnant women promotes equal employment opportunity).

122. A.M. Rosenthal, *On My Mind: General Powell and the Gays*, N.Y. TIMES, Jan. 27, 1993, at A23.

123. See *supra* note 115.

124. 42 U.S.C. § 12,101-12,213 (1990).

125. 29 U.S.C. § 794.

126. The EEOC Guidelines for the ADA specifically refer to the concept of the "normal" in defining who is disabled. See 29 CFR § 1630.2(h): "[H]eight, weight or muscle tone that are within 'normal' and are not the result of a physiological disorder" are not disabilities. See

deserve "reasonable accommodation."<sup>127</sup> This could provoke a quarrel among some about the socially constructed nature of what is "normal," but the ADA outflanks the argument: "Yes, disabled persons may be different," it posits, "but that difference can at times be easily accommodated so that the difference makes no difference."<sup>128</sup> In other words, the public world should be reconstructed, with balanced consideration for the cost to all,<sup>129</sup> so that differences do not detract from the material and spiritual worth, the human dignity, of each person. This model of "assisted equality" also has strong roots in American charitable traditions.<sup>130</sup>

Liberation from the single traditional notion of equality might also be helpful to a broad range of groups seeking less regulation from society or more independence in pursuing interests previously declared socially unacceptable, especially in areas involving privacy. The gay rights movement has proceeded substantially on the argument that homosexual relationships are as "normal" as heterosexual ones, that is, they are "natural" and thus equal to heterosexuality.<sup>131</sup> A different approach

generally Chai R. Feldblum, *The Americans With Disabilities Act Definition of Disability*, THE LABOR LAWYER 11 (1991).

127. 42 U.S.C. § 12111(8) (1990) (ADA provision); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (interpreting § 504 regulations to adopt "reasonable accommodation" test).

128. 136 CONG. REC. H4,583, 101st Cong., 2d. Sess. (1990).

129. This concept is not an insignificant one, but neither is it an inconsistent one. Indeed, any scheme that required others to pay for changes regardless of cost would place others at a relative disadvantage, as well as draw away resources that might be legitimately claimed for the satisfaction of other societal needs. Thus, the concept of reasonable accommodation takes into account not only the dignity and need of the disabled person, but also the dignity and fair interest of others. See, e.g., *United States v. Board of Trustees*, 908 F.2d 740, 750-51 (11th Cir. 1990) (lift-equipped bus service \$15,000 cost to provide service deemed not an undue burden given university's \$1.2 million budget); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152-55 (4th Cir. 1991) (provision of "cued speech" program for deaf students at all local schools rather than at chosen central site would be "substantial modification" in program that § 504 does not require; no dollar-figure discussed).

130. I suspect that this model is not very popular because of the currently fashionable view that charity is patronizing, and so it may be if that is how the giver and recipient feel about the sharing of community largess. But that view says more about the shortcomings of the giver and recipient than about the model; certainly there is no reason why social sharing must be an inherently disempowering relationship for the recipient. See Karl E. Meyer, *Editorial Notebook: 'Cults,' Deconstructed*, N.Y. TIMES, Mar. 7, 1993, at D:16; Kristin Eddy, *Mormonism's Sisters Lean on Each Other; Relief Society Was Begun 150 Years Ago*, WASH. POST, Mar. 21, 1992, at G11.

131. See Lawrence A. Kurdek, *Correlates of Relationship Satisfaction in Cohabiting Gay and Lesbian Couples: Integration of Contextual, Investment, and Problem-Solving Models*, 61 J. PERSONALITY & SOC. PSYCHOL. 910, 920 (1991) (such relationships founded on same interactions as heterosexual relationships); Margaret S. Schneider, *The Relationships of Cohabiting Lesbian and Heterosexual Couples: A Comparison*, 10 PSYCHOL. WOMENS Q. 234 (1986) (finding differences but attributing problems of homosexual relationships to "external" factors such as social pressure).

could view homosexuals as different, in the sense that homosexual unions produce no natural-born children, but take the position that this "difference" is one totally within the realm of private choice and thus constitutes a difference that makes no difference. This could lead to a third model for attaining equal rights, a "tolerance model" that asks neither for love nor even acceptance, but just equal respect in being left alone.<sup>132</sup> I note that this model also has deep roots in American society, especially in two areas deemed private throughout most of our history—religious beliefs and political views.<sup>133</sup>

I suggest these alternative models for equality with some trepidation, primarily because the possibility of choice raises the possibility of bad choices. Professor Lani Guinier, righteously irritated with lax enforcement of traditional "mutual equality" notions in voting,<sup>134</sup> has taken the position that it may be time to recognize an independent "right to representation" for minority groups that would guarantee not only equal access to the vote but a guarantee of representation.<sup>135</sup> This would extend not only to election of African-American candidates but also to at least some enactment of the African-American legislators' agenda.<sup>136</sup> This approach, which Professor Guinier calls an "access-based model"

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132. For an opposing viewpoint, see Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 46 (1991): "To settle for mere tolerance of sexual difference as opposed to social affirmation of self-definition is not only degrading, but ultimately self-defeating." In my view, Copelon misses the entire point of sexual privacy—that "social affirmation" is irrelevant, unwanted, and itself a sign of a submissive relation with others who should have no control of private choices. Copelon also shows no stopping point for her equality, thus missing all of the substantial occasions for line-drawing that Prof. Chamallas has recognized. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988) (discussing marriage-based, consent-based, and egalitarian-based models, the last of which would justify state regulation of exploitative relationships even when they are "consensual"). Just as one need only tolerate my religious or political choices to avoid offending me, one need only tolerate my non-exploitative sexual choices.

133. See *Lee v. Weisman*, 112 S. Ct. 2649, 2656-58 (1992) (affirming ban on sectarian prayer in schools, noting that the "design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which is itself promised freedom to pursue that mission"; good-faith attempt to make prayer acceptable to all is a "contradiction" of the principle of religious "tolerance"); *Young v. American Mini Theatres*, 427 U.S. 50, 63 (1976) (quoting Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it.").

134. Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 399-414 (1989).

135. *Id.* at 426.

136. *Id.* at 427 (the right means "creating districts . . . in which such a [black] representative can be elected"); "Second, equal status as participants within the political sphere is possible only if members of the group are allowed to participate at all stages of the process [and thus] contemplates minority participation in post-election . . . coalition-building and deliberation." *Id.* at 428. Guinier is not altogether clear on the issue of whether the election of blacks would naturally lead to part of the "black agenda" being adopted or whether a mechanism would be necessary to achieve such a result. See *id.* at 424-25 & n.138. See also Lani Guinier,



for legitimacy or equality,<sup>137</sup> puts to the test one's conception of African-Americans. Are such persons as a group fundamentally different,<sup>138</sup> or are African-Americans and non-African-Americans the same underneath the skin, as the "mutuality" model posits?

Professor Guinier's approach suffers from three major problems. First, she assumes that the only possible social context that can explain African-American candidates' losses is one of racially polarized voting,<sup>139</sup> hardly a credible assumption in light of our knowledge that African-Americans are elected even in majority non-African-American jurisdictions<sup>140</sup> and Guinier's own evidence showing that "black incumbents are in fact re-elected with more white support."<sup>141</sup> Admitting that the issue is contextual, her problem here is that her assumed context may be either incorrect<sup>142</sup> or too broad.<sup>143</sup> A more fundamental second problem is whether the proposed cure reinforces the disease. If actual African-American representation is necessary for African-Americans as a group, and presumably necessary for others having a history of voting victimization,<sup>144</sup> it will become also appropriate for Guinier's "whites" to consider themselves a cohesive group—and the problem of polarized vot-

*Triumph of Tokenism: The Voting Rights Act and Theory of Block Electoral Services*, 89 Mich. L. Rev. 1077, 1133-34, nn.275-83.

137. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1415 (1991).

138. Guinier appears to believe this, see Guinier, *supra* note 134, at 422 (multiple references to blacks as "they" and group-wide attribution of what "they want"); "Black representative" is important to "black empowerment", and she offers statistical data to show that this group conception may be held by Ninety-one percent of blacks. See *id.* at 422 nn.128-29 (91% of voters would prefer to be able to elect a black person rather than merely influence outcome of election as swing voters).

139. *Id.* at 424 n.138 ("Because of extreme racial polarization within the electorate, the pluralist model does not work for blacks.").

140. See, e.g., *For the Record*, WASH. POST, June 20, 1990, at A20 (discussing the elections of L. Douglas Wilder as governor of Virginia, David Dinkins as mayor of New York, Norman Rice as mayor of Seattle, John Daniels, Jr. as mayor of New Haven, Connecticut, and Cynthia Moore Chestnut as mayor of Gainesville, Florida); Paul Ruffins, *California: Where Black Politics Began*, L.A. TIMES, Oct. 29, 1989, at M3 (discussing the elections of Tom Bradley as mayor of Los Angeles and Mervyn M. Dymally as lieutenant governor of California).

141. Guinier, *supra* note 134, at 422 n.138.

142. See *supra* notes 140-41.

143. Assuming proof of prior discrimination, some affirmative response would be justified under the "mutual equality" model, as explained in such voting rights cases as *City of Rome v. United States*, 446 U.S. 156 (1980) (interpreting section 5 of the Voting Rights Act of 1965's "effects test" as a remedy), and in school desegregation cases such as *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968) (integration, not required by the Constitution, is appropriate measure of whether segregation has ended in formerly segregated schools). Where there has been no such showing, the remedial assumption would be too broad. Certainly we have no reason to believe that racially polarized voting, sufficient to dilute minority voting strength, exists nationwide. See, e.g., *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158 (1993) (unanimous decision relying on finding of no such voting pattern in Ohio).

144. See, e.g., *Salas v. Southwest Texas Jr. College Dist.*, 964 F.2d 1542 (5th Cir. 1992)

ing will have become ingrained rather than eradicated. Every resort to the "assisted equality" model runs some risk of reinforcing *Dred-Scott*-like notions of inequality.<sup>145</sup> At times Guinier appears to espouse a model of separation without inequality, but if that model is on her mind, it is a model with a very poor modern track-record for peaceful accommodation of self-defined factions that live in a single jurisdiction.<sup>146</sup>

The search for alternative models that I propose, therefore, carries with it a sobering obligation to make some very fundamental choices. On racial matters, the most difficult and intractable in American life, Dr. King's mutuality model for equality carries lasting appeal because it expresses our most fundamental aspirations. While it is a formality with a cost,<sup>147</sup> form may matter over function.<sup>148</sup>

**OVER-RELIANCE ON THE LITIGATION AND GOVERNMENT-RESPONSIBILITY MODELS.** The success of Dr. King's civil rights movement has also focused civil rights activists on mimicking two other features of that civil rights movement, the reliance on litigation as an enforcement mechanism<sup>149</sup> and the related reliance on government efforts as the general vehicle for ameliorating the ills affecting civil rights communities.<sup>150</sup> Yet the success of both models might be as much the result of the acci-

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("Hispanics" in southern Texas are such a group; because Hispanics are in majority, lack of success for group not attributable to violation of Voting Rights Act).

145. Cf. *supra* note 116.

146. John Pomfret, *Croat-Muslim Battle Rages On in Bosnia; Serb-Battered Town Found Nearly Abandoned*, WASH. POST, May 11, 1993, at A12; David Hoffman, *Many Israelis Say Time Has Come to Cast Off Gaza*, WASH. POST, Mar. 3, 1993, at A21.

147. The loss of remedial action need not be a cost, as activists and centrists alike permit remedial affirmative action to overcome the effects of prior discrimination. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (narrow affirmative action options; must be remedial); *Steelworkers v. Weber*, 443 U.S. 193 (1979) (broad options because remedial).

148. Title VII of the Civil Rights Act of 1964, for example, contains a so-called BFOQ defense for such matters as sex or national-origin discrimination, but none for race. 42 U.S.C. § 2000e-2(e). Title VII also shows a similar concern for possible backsliding in Congress' decision to cover discrimination based on "color" as well as "race." See SHULMAN AND ABERNATHY, *supra* note 106, at §4.02[1][c]; cf. *United States v. Flagler County Sch. Dist.*, 457 F.2d 1402, 1403 (5th Cir. 1972) (faced with a claim that board did not know who was black, court notes that same factors that made blacks identifiable for accomplishing segregation makes such persons identifiable for accomplishing desegregation).

149. Every major "rights-creating" civil rights statute either has an explicit authorization for suits, see, e.g., *Yellow Freight System v. Donnelly*, 494 U.S. 820 (1990) (both federal and state jurisdiction over suits under Title VII), an "implied right of action," see, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (Title IX and, by implication, other Title-VI-based analogues), or an action under the "and laws" language of 42 U.S.C. § 1983, see, e.g. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (if other federal law creates "rights" against state officer, it may be enforced through § 1983 unless other statutory remedy is exclusive).

150. See, e.g., Guinier, *supra* note 134, at 423-24 & n.138 (describing "Blacks' view of political participation as a means of transforming and redistributing political and economic goods").

dents of history as their inherent preferability or workability. The litigation model grew up in large part because of the felicitous gift of a white entrepreneur and the existence of a dedicated group of African-American (and white) lawyers led by the late Justice Thurgood Marshall.<sup>151</sup> And the government-responsibility model may have been only a by-product of the success of the litigation model that relied on government: Dr. King's social action model, from the days in Montgomery when Rosa Parks refused to change her bus seat,<sup>152</sup> relied upon African-American self-help,<sup>153</sup> African-American churches,<sup>154</sup> and the astute wielding of African-American economic power.<sup>155</sup>

This recognition suggests not that the government role in promoting civil rights be abandoned, but that a new generation might well focus on new models or the reinvigoration of models. In my view, many of the ills affecting civil rights communities are peculiarly susceptible to amelioration through these alternative approaches. One might focus, for example, on twin scourges currently affecting some African-American communities: children bearing children and especially, murderous violence.

Major contributors to poverty in African-American communities today are the continuing and accelerating phenomena of teenage pregnancy and childbirth outside marriage.<sup>156</sup> In same-race "ghettos" (mostly African-American), "single parent families account for sixty-five percent of all families with children,"<sup>157</sup> and from among all families, single-parent families are six times more likely to live in low-income ghettos.<sup>158</sup> Civil rights communities should be most interested in the fact that almost half of white children, if current rates continue, will live part of their life in a single-mother home, while eighty-six percent of African-American chil-

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151. See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50*, at 1-20 (1987) (describing monetary grant that enabled legislative attack on segregated schools).

152. MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM; THE MONTGOMERY STORY* (Harper 1958).

153. *Id.* (describing support network in African-American community).

154. COOK, *supra* note 113, at 1021, 1043.

155. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1986) (boycott in Mississippi and its practical ramifications in the community); William Booth, *Miami Agreement Ends a Costly Black Boycott*, WASH. POST, May 13, 1993, at A3.

156. See William Julius Wilson, *Public Policy Research and the Truly Disadvantaged*, in *THE URBAN UNDERCLASS* 461 (Christopher Jencks & Paul E. Peterson eds., Brookings Inst. 1991) (underclass characterized often by joblessness among "poor single-parent families").

157. Paul A. Jargowsky and Mary Jo Bane, *Ghetto Poverty in the United States, 1970-80*, in *THE URBAN UNDERCLASS* 247 (Christopher Jencks & Paul E. Peterson eds., Brookings Inst. 1991).

158. Sara McLanahan et al., *The Role of Mother-Only Families in Reproducing Poverty*, in *CHILDREN IN POVERTY* 64 (Aletha C. Huston ed., Cambridge Univ. Press 1991).

dren will live with their single mothers<sup>159</sup>—and probably in poverty.<sup>160</sup> The phenomenon of single-mother familyhood not only correlates very highly with poverty,<sup>161</sup> it reproduces poverty at an alarming rate.<sup>162</sup> One need not disparage the effort that single mothers are making to conclude that it takes a superhuman effort for them to succeed alone as parents.<sup>163</sup> To the extent that the problem is greater in civil rights communities, or has different causes or cures, it is a civil rights problem.<sup>164</sup>

Because of the recognition of a right to privacy in procreational matters,<sup>165</sup> the government has a much lesser role to play here, and other consensual social institutions, such as the church or even extended family, have a correspondingly greater sphere of influence. They may also be the more appropriate social organs because of their nurturing influence: one study of teenage pregnancy among African-American girls showed that parental control and supervision, more than poverty itself, correlated with significantly lower rates of pregnancy.<sup>166</sup> Why does the civil rights community not revive an earlier model of social activism that emphasized social work<sup>167</sup> rather than litigation or governmental supervi-

159. IRWIN GARFINKEL & SARA MCLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN 2* (Urban Inst. Press 1986).

160. The poverty rate for African-American single mothers is almost 30% higher than for white single mothers. Sanford L. Dornbusch et al., *Single Parents, Extended Households, and the Control of Adolescents*, 56 *CHILD DEVELOPMENT* 326 (1985) (70% versus 54%). Comparative data suggest that living in a mother-only household correlates with a 5% decrease in the chances of a white child completing high school, but a 13% decrease for African-American children, GARFINKEL & MCLANAHAN, *supra* note 159, at 28-29. Failure to finish high school is a "major predictor" of future poverty and reliance on public assistance. McLanahan, *Family Structure and the Reproduction of Poverty*, 90 *AM. J. OF SOCIOLOGY* 873, 875 (1985).

161. Approximately half of all single-mother families live in poverty. GARFINKEL & MCLANAHAN, *supra* note 159, at 1.

162. Daughters growing up in single-mother families are more than twice as likely as their peers in nuclear families to raise single-mother families themselves. Sara McLanahan, *Family Structure and Dependency: Early Transitions to Female Household Headship*, *DEMOGRAPHY*, Feb. 1988, at 1, 9.

163. For possible theories about what it is in single-mothering that causes the problems described, *see id.* at 2-3.

164. *See* McLanahan, *Family Structure and the Reproduction of Poverty*, *supra* note 160, at 888 (economic status correlates with drop-out rate for young whites, but not for young blacks). The same study shows that welfare tends to have negative consequences for whites wishing to escape poverty permanently, but it may have a positive influence on the long-term attainment of blacks. *Id.* at 897.

165. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

166. Dennis P. Hogan & Evelyn M. Kitigawa, *The Impact of Social Status, Family Structure, and Neighborhood on the Fertility of Black Adolescents*, 90 *AM. J. OF SOCIOLOGY* 825, 846-47 (1985) (adolescents in families with lax parental control of dating showed pregnancy rates 64% higher than those in families with strict controls).

167. *See* WALTER I. TRATTNER, *POOR LAW TO WELFARE STATE* ch. 8 (The Free Press 1974) (discussing settlement house movement at turn of the century).

sion as the method for social change?<sup>168</sup>

The point I have made about problems of single-motherhood in the black community may also be applied to a range of similar situations where social mores and community pressure may be even more effective forms of help—self-help—than civil rights statutes could be. The problem of drug-related killings in some African-American communities<sup>169</sup> has begun to draw serious attention from civil rights leaders. Whoever may ultimately be at fault for introducing drugs and guns into these communities, it is nevertheless visibly true that when African-Americans are killing African-Americans, a cure is within the hands of African-Americans. The old model of relying almost exclusively on government to incarcerate offenders, relieve poverty, or catch non-African-American drug lords, omits a wide range of additional, perhaps more effective, remedies that are within the community's, rather than the government's, control.<sup>170</sup>

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168. I realize that for the older reader this is not a rhetorical question. Indeed, there may be many psychological and social reasons to explain the reluctance of civil rights groups to focus their resources in this direction. "Social uplift" does not carry such a clarion ring in these days when we are more disposed to believe that black communities are "just fine, thank you, the way we are." Older black civil rights organizations, already marginalized among youngsters, might fear even greater rejection should they take on a message that discourages sex and child-bearing.

I am reminded of a personal experience from Romania, which I visited in 1991 in order to promote the development of non-governmental civil rights organizations. I met the leader of the Ethnic Rominy Foundation, an organization of Gypsies, who suffer widespread discrimination in Romania and elsewhere, and I asked his group's agenda. First on his list, he said, we want to educate Gypsies to stop stealing and doing other inappropriate things. Personal Journal for International Human Rights Law Group, Thursday, October 31, 1991 (on file with the author). My first reaction was that he had himself bought in to the stereotype of Gypsies. Perhaps I should have thought, is he on to something here?

169. More African-American males have been killed by other African-American males in the last decade than were lynched by whites since the end of the Civil War. See Marian Wright Edelman, *National Press Club Luncheon Speaker*; Marian Wright Edelman, *President, Children's Defense Fund*, FEDERAL NEWS SERV., Apr. 14, 1992, available in LEXIS, Nexis library (speaker was discussing increase in deaths of African-Americans by firearms).

170. Hamil R. Harris & Evelyn Hsu, *Fear of Stalker Became Force for Neighborhood Unity*, WASH. POST, Apr. 22, 1993, at J1.

A rare example of self-help in the contemporary civil rights movement has been the remarkable efforts undertaken in male homosexual communities to control the spread of AIDS through unprotected sex. Victor F. Zonana, *Data Shows Relapse into Unsafe Sexual Activity by Gay Men; AIDS: Levels are Far Lower than in Early 1980s. But Failure to Maintain Preventions Worries Officials at Conference*, L.A. TIMES, June 22, 1990, at A3. A similar effort has been made to provide gray-market medicines to those infected with the HIV virus. See Paula Span, *Buyers' Clubs: Fast Answer to FDA's Slow Approval*, HEALTH LINE, Apr. 8, 1992, available in LEXIS, Nexis Library, Current File; Mireya Navarro, *Into the Unknown: AIDS Patients Test Drugs*, N.Y. TIMES, Feb. 29, 1992, § 1, at 1; *Patients Going Underground to Buy Experimental Drugs*, AIDS L. & LITIG. REP. MONTHLY REV. (Univ. Pub. Group), Dec. 1991, 81. Some care is necessary in thinking through what non-governmental initiatives may be appropriate: what some call "self-empowerment" may have caused more rapid death in others.

Thinking creatively of alternatives to the traditional government-initiative models would have another benefit. The looming lack of government resources would not inhibit action under these models as it does under government-responsibility models. Just as our evidence shows that the most successful schools are not those that have the most money, but those that have the most community involvement,<sup>171</sup> models based on private initiative would allow the substitution of abundant resources—community members and their energy—for scarce resources—money and other government aid.

**INHIBITORS TO CHANGE AND REFORM: OBFUSCATION IN THE USE OF "DISCRIMINATION."** Using its narrow-based historical formula for success, the civil rights movement has for almost forty years pushed ahead by seemingly purposeful obfuscation in its use of the word "discrimination." This occurred as early as in the drafting of the Civil Rights Act of 1964, when Congress chose not to specify concretely whether it aimed its remedies at only intentional discrimination or also at the disparate, unintended effects flowing from the enforcement of neutral standards.<sup>172</sup> This practice continued in later years, as Congress side-stepped the issue with a contrived "results test" in the 1982 Voting Rights Act.<sup>173</sup> It continued the practice in the Civil Rights Act of 1991 by failing to describe unambiguously the circumstances under which so-

Richard Grant, *Staying Alive with the Aids Guerrillas*, S. CHINA MORNING POST, Aug. 2, 1992, at 4.

171. Douglas P. Munro, *How to Find Out Where the Money Goes in the Public Schools*, 955 THE HERITAGE FOUNDATION STATE BACKGROUNDER 1 (1993). See also Ron Stodghill II, *A Tale of Two School Districts*, BUS. WK., Aug. 2, 1993, at 63-65; Mary Jordan, *Group Challenges Increase in Public School Spending*, WASH. POST, Sept. 10, 1993, at A4. Cf. Stephanie Anderson Forest, *True or False: More Money Buys Better Schools*, BUS. WK., Aug. 2, 1993, at 62-63 (discussing question of whether school financing is more crucial than other factors to the improvement of academic performance).

172. See Charles F. Abernathy, *Title VI and the Constitution: Toward a Regulatory Model for Defining Discrimination*, 70 GEO. L.J. 1 (1981); cf. *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582 (1983) (Congress permitted regulatory adoption of regulations prohibiting "effects-style" discrimination).

173. The "results" test of § 2 of the Voting Rights Act of 1972, 42 U.S.C. § 1973(b) (1972), was a political safe haven half-way between the intent-only position of *Mobile v. Bolden*, 446 U.S. 55 (1980), and the full "effects" test that was applied under § 5 of the original Act to jurisdictions having a history of intentional discrimination, see *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). S. Rep. No. 97-417, 97th Cong., 2nd Sess. 28 [PL 97-205] (1982), U.S. Code Cong. & Admin. News 1982, pp. 177, 205 [96 Stat 131]. In *Thornburgh v. Gingles*, 478 U.S. 30, 35 (1986) (involving use of single-member districts to dilute minority voting power), Justice Brennan blurred the effects and results tests, [citing above S. Rep.], but ultimately recognized that single-member districts are not per se illegal under § 2 and that a "totality of the circumstances" test applies. *Id.* at 45. Justice O'Connor's concurring opinion, *id.* at 83, probably more closely captures the view of the present Court, see *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993) (per O'Connor, J., for a unanimous Court) (minority "packing" of voters also subject to § 2 analysis), and in both *Gingles* and *Voinovich* she uses a test, though labeled "effects," that has no tendency to outlaw

called "subjective hiring" would be deemed unlawful.<sup>174</sup>

As with Congress, it has sometimes been beneficial for leaders of civil rights communities to lump together the social impact of intentionally discriminatory action and unintentional conduct. This is not surprising because, given the consensus against intentional discrimination that refuses to treat all as mutual equals,<sup>175</sup> the more persuasive social argument is always one that makes it appear that intentional discrimination is the single cause of a minority's social plight. But this obfuscation denies civil rights advocates the ability to see for themselves and to educate others about the quite different remedies that may be necessary for different versions of "discrimination."

Two examples adequately illustrate my point. First, if lower average wages for women are only the product of intentional discrimination, an aggressively pursued war on intentional sex discrimination, coupled with a very narrow BFOQ defense,<sup>176</sup> could be an adequate remedy. But if the wage differential is due to other neutral social barriers that separate women from high-paying jobs, a different set of measures is necessary and it will be necessary to acknowledge that men and women may be situated differently.<sup>177</sup> If the differences resulted from non-coercive private choices, the differential might even go unremedied.<sup>178</sup> A second example is "discrimination" in bank lending.<sup>179</sup> To the extent that what is at issue is intentional discrimination that does not treat African-Americans as whites would be treated,<sup>180</sup> the cure would involve no costs, and

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all practices having any adverse effect on African-American voting power. See *Voinovich*, 113 S. Ct. at 1156.

174. See *supra* note 108.

175. See *supra* note 143.

176. See *International Union, UAAAIW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) ("protection" of pregnant women from dangers to fetuses is intentional sex discrimination unavoids by a bona fide occupational qualification analysis [BFOQ] defense).

177. Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986) (article on causes of unequal wages). A similar phenomenon may be at work in what might be called the return of the "potty issue": if women require more bathroom facilities to meet women's need, is it "discrimination" to provide only "equal" facilities? Cf. Paul Weingarten, *Men's Room Trip Opens Door to Women's Rights*, CHICAGO TRIBUNE, July 29, 1990, at 5 (long lines necessitate woman's recourse to men's room). Since each individual has human dignity in these matters, each need should be met, regardless of whether failure had been previously occasioned by men's intent to harm women.

178. Those who speak of hegemony would probably disagree, seeing coercion in the system and a false consciousness as factors in private choice. See, e.g., Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990). But if each person has two consciousnesses, W. DUBOIS, *THE SOULS OF BLACK FOLK* 17 (1961) ("American" and "Negro" or ethnic identification), and probably multiple consciousnesses depending on how each self-identifies, no consciousness is false other than the one denied.

179. See George C. Galster, *Research on Discrimination in Housing Mortgage Markets: Assessment and Future Directions*, 3 HOUSING POLICY DEBATE 641 (1992).

180. See Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*,

might even add to the cost-efficiency of financing mechanisms. But if the differences are based on credit-worthiness, an end to the "discrimination" would require a subsidy of African-American debtors.<sup>181</sup>

Whether from obfuscation or sloppy thinking, the failure to identify cause and effect in discrimination can have undesired consequences. First, it limits the civil rights advocate's range of remedial choices. Rhetoric in this sense is a false consciousness that can prevent us from seeing the world as it actually is, with dangerous results: different maladies have different cures. Second, the rhetoric is becoming increasingly unpersuasive to a new generation that feels less personally guilty of the sins of the past and perceives itself as consistently (if not absolutely) free of intentional bias.<sup>182</sup> The diversifying of American life through the expansion of new immigrant groups, or newly liberated groups, also means that more people will see themselves as faultless for unintended harms affecting traditional civil rights groups. Rhetoric will not persuade these groups.

#### IV. CONCLUSION

I have suggested that there are some shortcomings in the current civil rights movement that your generation should want to repair. Prejudice, intolerance and dissembling degrade the human dignity of perpetrator and victim alike, and having civil rights communities participate in the degradation of others is something that we can well do without. We have, I have argued, lost sight of Dr. King's most enduring message, that there is no legitimacy to the agenda of equality and dignity without obedience to the process of equality and dignity.

I have also suggested that now is a good time to move on to a newly reinvigorated civil rights movement that will not be the captive of a previous generation's methods and models. There is an essential message here of continuity in the change, however. As a new generation begins to explore new solutions for newly perceived problems, such as poverty

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92-7 Working Paper Series 1 (Federal Res. Bank of Boston, 1992); Allen J. Fishbein, *The Ongoing Experiment with "Regulation from Below": Expanded Reporting Requirements for HMDA and CRA*, 3 HOUSING POLICY DEBATE 601, 618-19 (1992) (even controlled for factors signifying credit-worthiness, blacks denied loans at significantly higher rate than whites).

181. See Penny Lunt, *How Seven Banks Serve Low Income Markets*, Am. Bankers A. Banking J., Sept. 1992, at 58 (counselling and special loan solicitation by specially hired teams of roving loan officers); Phil Hall, *Mission Difficult, Not Impossible*, Am. Bankers A. Banking J., Aug. 1990, at 71, 73 (commercial bank makes such loans and accepts lower profit rate). Even if the current results were caused by accumulation of intentional discrimination elsewhere, one might rationally decide to choose some other mechanism than banks' subsidization of loans in order to allocate costs more equitably ("internalize" them), or to preserve the soundness of the banking system.

182. Edward Kenney, *Race Affects Teen's Outlook on Prejudice*, USA TODAY, Jan. 14, 1993 at 1D (citing survey done by Who's Who Among American High School Students).



among children, violence in African-American communities, disease in the gay community, we should be true to Dr. King's underlying values for the civil rights movement: it is a movement not about black and white, women and men, homosexuals and heterosexuals, the abidingly healthy and the disabled, but a movement about human dignity for all people.