

CIVIL RIGHTS AND SOCIAL COOPERATION

FATHER ROBERT A. SIRICO*

Few words inspire passions in the American political culture like “civil rights.” The word “right” itself suggests the tradition of St. Thomas Aquinas, John Locke, David Hume, Thomas Jefferson, James Madison, Jacques Maritain, and other great thinkers.¹ But add the word “civil” before “right,” and it conjures up images of political battles, regulations, lawsuits, legal briefs, courts, bureaucracies, and social discord.² Words that once suggested high aspirations and noble sentiments have come to be used as political weapons. Yesterday's natural rights and today's civil rights seem to have developed into different and often antagonistic concepts.

This is a strange and even tragic development of the last two decades. What began centuries ago as an intellectually and politically ecumenical movement to remove artificial barriers to economic and political progress³ has become a source of political heat and not of light. There exists a consensus that equality is a valuable political priority, yet there also seems to be very little agreement on what constitutes true equality, much less on how precisely to bring it about.⁴

* Co-founder and president of the Acton Institute For The Study of Religion & Liberty, a nonprofit, non partisan, free-market educational organization. Since its inception in 1990, the Acton Institute has been on the forefront of educating future religious leaders with the principles of free market economics. In addition to undergraduate study at the University of Southern California and the University of London, Rev. Sirico received his Master of Divinity degree from the Catholic University of America.

1. This perspective on the centrality of rights, as well as many of the ideas in this piece, are derived from the following core works: MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (Humanities Press 1982); JAN NARVESON, *THE LIBERTARIAN IDEA* 148-50 (1988); RALPH MCINERNEY, *A FIRST GLANCE AT ST. THOMAS AQUINAS* 164-80 (1990); MICHAEL NOVAK, *The Moral-Religious Basis of Democratic Capitalism in CHRISTIANITY AND POLITICS: CATHOLIC AND PROTESTANT PERSPECTIVES* 54-61 (1981); MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* 41-69 (1989).

2. See THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* (1984).

3. See CLINT BOLICK, *UNFINISHED BUSINESS* 47-86 (1990).

4. See AARON WILDAVSKY, *THE RISE OF RADICAL EGALITARIANISM* (1991). In light of the volatility and polarizing potential of the topic at hand, let me make clear at the outset that this examination is intended as a moral and philosophical probing of the matter; I do not intend my work to weigh in on behalf of any partisan political agenda.

What Harvard law professor Mary Ann Glendon calls “rights talk”⁵ has become a game not altogether different from the child's game of “King of the Mountain.” The goal of various political lobbies is to get their rights recognized by law through any means possible, convert those rights into special privileges via litigation, and hold on to those legal protections as long as possible. When whole societies play the game, the process is capricious and costly, and the end result is political, social, and cultural fragmentation and a zero-sum economic system in which battles over existing wealth take precedent to the creation of wealth.

It is time that this child's play comes to an end. Americans must discover ways to promote a higher degree of social peace than we have seen in recent years. We need to rediscover a common ground upon which all reasonable people can stand and whereupon the equal rights of all individuals can be safeguarded. This nation needs a new intellectual consensus on what constitutes civil rights so we can bring this zero-sum game to an end.

This essay is not intended to be a lengthy discussion of court cases and legislation. Nor does it present a complex legal argument or a controversial new political program. There is no shortage of that style of argumentation. It is difficult, if not impossible, to discuss any such matters so long as widespread disagreement exists even on the definition and meaning of such basic terms such as freedom and equality. What is missing is serious reflection on the more fundamental moral and cultural foundations of the civil order itself. As Arthur Schopenhauer reminded us, “[t]o preach morality is easy, to give it a foundation is hard.”⁶

It is necessary to begin again with first principles, and to think anew about ground rules for engagement on the civil rights issue. We need what a previous generation took for granted: a social logic to evaluate our current dilemmas and a common ground for understanding what constitutes fairness and justice in our civil and economic relations.

Three principles are necessary for clarity in thinking about civil rights. First, civil rights should promote the common good. Second, civil rights should promote economic participation and the potential for sustainable prosperity. Third, civil rights should be a means of redres-

5. See MARY ANN GLENDON, *RIGHTS TALK* (1993).

6. HENRY HAZLITT, *THE FOUNDATIONS OF MORALITY* 2 (1964).

sing individual wrongs and not a means of creating social conflict. There is good reason to support any conception of civil rights that meets all three of these criteria. At the same time, it is reasonable that a more careful look should be taken at practices that are not in accord with these principles.

As these three principles are discussed, call to mind stories heard via the media or read in the newspapers on the subject of civil rights. Consider how the circumstances and outcomes might be different if these aforementioned three principles were brought to bear in our legislatures, courts, businesses, and our own lives.

I. CIVIL RIGHTS SHOULD PROMOTE THE COMMON GOOD

Many people say there is no such thing as the common good. The prevailing philosophy of public life is that we should look after ourselves and our group, take what we can get, and forget the rest. It is a fashionable attitude, but it is beneath a civilized people. Some have a notion of rising above selfishness to attain something good for people who constitute the commonwealth.⁷ The Founders spoke of the “general welfare” in the Preamble to the Constitution. They, and the traditions they drew from, were profoundly aware that individual rights cannot be secured apart from institutions like family, church, and community that foster social consensus on concepts like liberty and peace.⁸

In the United States, institutions like church, state and local government, and family are designed to protect the common good against arbitrary uses of government power and uncontrolled private passion. Our system of government features devices carefully designed to restrain both, including separation of powers, checks and balances, the notion of federalism, and demarcations of public and private spheres of life.⁹

Sometimes people speak of individual rights and the common good as an either/or proposition. But the whole point of the American exper-

7. See MICHAEL NOVAK, *FREE PERSON AND THE COMMON GOOD* 19-36 (1989).

8. *Id.* at 43-55.

9. See RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 415-40 (1978).

iment is to show that this is not so.¹⁰ The good of the many is bound up very closely with the good of the one. Even economists have discovered that it is inaccurate to speak of self interest in the literal sense. Our own good is so closely tied to the good of others—whether it be our families, communities, or the nation as a whole—that we frequently set aside short-term selfish considerations for long-term gains. As economists like to say, our “utility functions” are not hermetically sealed but intertwined with one another.¹¹

In his work *Free Persons and the Common Good*,¹² Michael Novak makes a powerful case that the notion of the common good is ultimately inseparable from the freedom of the individual to choose the good.¹³ He cites Catholic teaching from the Second Vatican Council: “The common good is the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment.”¹⁴ And Novak developed this axiom: “The free person is ordered to the building up of the common good; the common good is ordered to the fulfillment of free persons.”¹⁵

Despite claims to the contrary, the classical liberals, who defended the modern concepts of freedom of speech and freedom of economic enterprise, always held to a view of the common good. Adam Smith said that restraining selfishness and indulging benevolence constitutes the perfection of human nature.¹⁶ Friedrich A. Hayek said the primary worth of economic initiative is the development of the community.¹⁷ Ludwig von Mises believed that classical liberalism was the first political

10. *Id.* at 457-67.

11. The Austrian economists, always a breed apart, have long understood this essential point. See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 664-84 (3rd ed. 1966). Yet the Chicago and Public Choice schools are also coming to realize the limitations of the self interest axiom. See James Buchanan, *Methods and Morals in Economics, in WHAT SHOULD ECONOMISTS DO?* 202-17 (1979).

12. NOVAK, *supra* note 7.

13. *Id.* at 75-109.

14. VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS, *The Church in the Modern World*, art. 26, 927 (St. Paul 1988).

15. NOVAK, *supra* note 7 at 12.

16. See BENJAMIN A. ROGGE, *CAN CAPITALISM SURVIVE?* 85-105 (1979).

17. See FRIEDRICH A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 38-47 (1988).

movement aimed at promoting the welfare of all.¹⁸

As all these thinkers remind us, the free market economy is consonant with the general welfare. When the market is free, producers find profitable reward only in the service of others—the consuming public. The entrepreneur is rewarded by discovering and meeting the unmet needs of the community. The beauty and mystery of the market—which has long confused its opponents—is how it reconciles the good of the individual with the good of all.

Every person who participates in this market does so without coercion or compulsion, but as an act of free will. To the extent our actions serve the good of others, we benefit individually. A fine definition of market competition is striving for excellence in the service of others.¹⁹ On the other hand, if the market is cruel to anyone, it is to those who disregard the needs and values of his community and pursues a path of blind self interest.

Anything we can do to protect the institution of the market is also an advance in protecting the common good. Those who want to circumscribe the market process, injure the right of free contract, freeze labor markets, cartelize the system of competition, or place heavy and artificial burdens on entrepreneurship, have forgotten this point. All these actions limit everyone's freedom to choose and hinder the development of the community of persons.

Yet it is not only enterprise that grows out of voluntary action. Our nation also has a long tradition of private associations that protect the common good. Alexis de Tocqueville said that “if men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spread.”²⁰ In his view, Americans were distinguished by not setting too high a value on their own interests. If an American “were condemned to confine his activity to his own affairs,” he wrote, “he would feel an immense void in the life which he is accustomed to lead, and his

18. See LUDWIG VON MISES, *LIBERALISM IN THE CLASSICAL TRADITION* 7-8 (1985).

19. See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 274-75 (3rd ed. 1966).

20. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 517 (J.P. Mayer ed. & George Lawrence trans., Doubleday 1969).

wretchedness would be unbearable."²¹

It is this spirit which animated the movement for civil rights in this country. It was a desire to widen the definition of the common good to include not only the privileged or the majority, but also the underprivileged and minorities. It was a fulfillment of the common good through a social and legal acknowledgment of the rights to freedom all people had, but which some people had been denied. Martin Luther King, Jr. correctly identified the contradiction present from the beginning of the American experiment when he observed that from the beginning America has been divided against itself.²² It has been a great beacon of democracy and liberty the world over, while at the same time it has proudly professed the principles of democracy, and on the other hand it has practiced the very antithesis of those principles.²³

And who had denied these principles and rights? The primary violator, and the biggest impediment to gaining rights, was government; its laws discriminated against persons on arbitrary grounds. Government had excluded people from full participation in the voluntary development of enterprise and community. Its laws were a consequence of the tragedy and immorality of slavery.

But the institutions that were born at the founding of the country proved capable of self-correction, even if it took time and involved the self-sacrificial commitment of millions. The Civil Rights Act of 1866 provided that all citizens of the United States

shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property²⁴

21. *Id.* at 512.

22. See MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 135-45 (1986).

23. See *id.*

24. Act of April 9, 1866, ch. 31, 14 stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)).

This passage is entirely in keeping with the American conception of law and equality. It guaranteed the opportunity of fulfilling the promise of American life. It did so by securing equal rights, not by sustaining old privileges or creating new ones. It did away with classification by race or social status. It codified the natural order of liberty by securing person and property. It did not create the power of government to deny rights to people, or decide who should and should not benefit from the right to own property and make contracts. In sum, it was the fulfillment of the Declaration's promise of equality.

Unfortunately—and this is the great tragedy—the Act went unenforced at the local, state, and federal level. Nearly one hundred years later, equal rights in the form of the original Civil Rights Act were not secure for people on the arbitrary grounds of race.

Whenever a law denies fundamental rights to some that it grants to others, it is an unjust law. The civil rights movement was correct in speaking for the interests of the lesser community which was harmed by its exclusion from the definition of the general welfare by the larger community. Such an exclusion could only result in a violation of the common good. During this time, it was possible and proper to speak on behalf of group rights and group claims. The people who were doing so were objecting to laws that took explicit account of these very groups and communities. The laws themselves imposed disabilities for certain groups.

Today, our political landscape is dominated by people who claim to speak on behalf of groups, but their justification in doing so is much less plausible. The days of unanimity of group interest are gone. To be sure, discrimination against whole groups exists. But it is not legal discrimination, and therefore it is an error to speak on behalf of any group's legal rights. When we do, we run the risk of misrepresenting the values and interests of those on whose behalf we are purporting to speak.

Too often, the attempt of modern day activists to speak on behalf of groups collapses into demagoguery, a term which applies to any who dogmatically insist they represent the group. That goes for those who claim to represent the young, the old, the abled, disabled, whites or blacks, the majority or the minority. Everyone is entitled to his opinion. But everyone is not entitled to pretend as if his opinion is unanimously

agreed to by any one group, no matter how we define it.²⁵

Ending this practice would take us a long way towards reclaiming civil rights on behalf of individual freedom and the common good, and away from group rights over and above the community at large. James Madison personally observed how factions had normally injured the common good. Factions, he said in the *Federalist Papers*, have “divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.”²⁶ To avoid factions, he recommended a republican form of government, which gave every individual equality under the law and equality of rights. This form of equality makes it unnecessary to form into factions to secure rights.

Ideally, the common good is best met in a society that minimizes the intrusions of politics into society. So secure are people in their essential rights and liberties, which do not come at the expense of others, that they are free to concentrate time and energy on the pursuit of virtue and enterprise, of family and community, and of conscience and faith. We are a long way from these ideals. This is because we have disregarded Madison's advice to avoid factions. Those who champion the cause of civil rights and the common good generally would do well to revisit his warnings.

II. CIVIL RIGHTS SHOULD PROMOTE ECONOMIC PARTICIPATION AND THE POTENTIAL FOR A SUSTAINABLE PROSPERITY

As the wording of the Civil Rights Act of 1866 suggests, the foundation of civil rights should be liberty and property, which includes the right of contract, the right of redressing wrongs against person and property, the right of inheritance, the right of exchange, and the right of economic initiative.

In an eloquent dissent in the *Slaughter-House Cases* of 1873,²⁷ Justice Joseph P. Bradley wrote:

25. See generally WALTER WILLIAMS, *AMERICA: A MINORITY VIEWPOINT* 3-28 (1982) (illustrating the variance of opinion on matters of racial diversity).

26. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

27. 83 U.S. (16 Wall.) 36 (1873).

For the preservation, exercise, and enjoyment of [his] rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.²⁸

This is, however, not the case today. Myriad laws exist which circumscribe these rights, making economic participation too expensive for those who are most in need of opportunity.²⁹ It is more costly today to begin a self-employed business than ever before in American history.³⁰ The hundreds of volumes of federal regulations, taxes, and mandates make the task difficult for those who cannot afford to waste a dime of capital or pay expensive fees to accountants and lawyers.³¹ Ironically, the more successful a business is, the more difficult it becomes for the business to adhere to the law. That is because the U.S. Congress has mandated more regulations and taxes for larger businesses than smaller ones.³² Consequently, this has the perverse effect of actually discouraging expansion, growth, and job creation.

Friedrich A. Hayek said liberty "describes the absence of a particular obstacle—coercion by other men. It becomes positive only through what we make of it."³³ By Hayek's definition, liberty is on the decline today, and has been for some time. Our society has become increasingly ruled by coercion, and our economy hampered by artificial barriers to economic progress. In the final analysis, this is the effect of

28. *Id.* at 116 (Bradley, J., dissenting).

29. See JAMES BOVARD, *LOST RIGHTS* (1995).

30. See *id.* at 259-65.

31. See WALTER OLSEN, *THE LITIGATION EXPLOSION* (1992); WALTER OLSEN, *THE EXCUSE FACTORY* (1997).

32. See generally *Regulation Home Page: a comprehensive source of regulatory studies, statistics, & information* (visited February 26, 1998) <<http://www.regulation.org>>.

33. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 19 (1960).

legislation that shifts the costs of the welfare state through public sector fiscal policy over to the private sector. Benefits that are mandated have high costs, even if they are less visible than the costs associated with taxing and spending.

Consider the example of rigorous licensing laws that exist in most service-sector industries. They are usually justified on the grounds of keeping quality high. But often these laws, strongly enforced, merely provide a pretext for keeping the market from becoming too competitive.

The taxicab monopoly is a classic example. Many large cities suffer a transportation shortage while those who have legal rights to drive others around cling to their privileges at others' expense.³⁴

This issue is raised not to advocate that any particular licensing laws be done away with. Regardless of how policy makers respond to the effects of licensing, it is difficult to deny that it creates legal barriers that can have serious consequences for keeping away potential rivals in the market and for preventing the economic advancement of whole communities of people. They circumscribe the right to economic initiative.

The modern regulatory state has also circumscribed the crucial right to bargain over terms and conditions of employment. Without this right, which is essential to the fulfillment of human dignity itself, we make a mockery of the ideal of equal opportunity. Yet the high costs of labor, forever on the rise, and the legal inflexibility of negotiating lower ones, have kept people from becoming vital parts of society's division of labor.

If Congress raised the minimum wage to \$1,000 an hour tomorrow, it could create an unprecedented amount of unemployment with the stroke of a pen. Yet those who realize that this is the case have difficulty understanding that even marginally higher wage floors have the same effect of generated unemployment on the margin, even if the effects of such interventions in the market appear in subtle ways.

The Department of Labor has become fond of conducting sting operations against businesses to discover whether they engage in child labor. But what constitutes child labor turns out to be a very complex matter. Teenagers are prevented from working more hours per day and per week than some bureaucrats in Washington, D.C. think they should.

34. See S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* (1987), (author provides an exposition of this subject).

As a result, young people are denied essential opportunities for economic advancement and mentorship and business is denied the chance to provide these. It is time we revisit these laws and ask whether it is really true that a single agency in Washington is capable of knowing exactly how much young people should work, or whether we ought to adopt a less paternalistic attitude toward the right of people to make contracts for themselves.

Again, this issue is raised not to propose a legislative agenda, but to illustrate the way in which economic opportunity is so crucial to a serious concern for securing essential rights. A freer economy would take us closer to the ideals of the pioneers in this country's civil rights movement. Martin Luther King, Jr. recognized this when he wrote: "With the growth of industry the folkways of white supremacy will gradually pass away,"³⁵ and he predicted that such growth would "increase the purchasing power of the Negro [which in turn] will result in improved medical care, greater educational opportunities, and more adequate housing. Each of these developments will result in a further weakening of segregation."³⁶

But rather than freedom, those who claim to desire the economic advancement of everyone have turned to coercion and compulsion. Quotas, rigid forms of affirmative action, and high levels of welfare provision are obvious examples of legislation which might have been well-intentioned in their inception, but which have proved to be sources of social division.³⁷ Moreover, the prosperity that these laws have created is not secure because it has not been brought about by the conditions of free enterprise.

Civil rights must create the potential for a sustainable prosperity of the kind that comes through work, enterprise, and saving. The law has done few favors for people by creating and attempting to sustain what is essentially the illusion of prosperity through wealth transfers, whether those transfers are made to corporate executives or to the middle-class through generous entitlements. Pseudo-prosperity fosters not inde-

35. MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE* 100 (1986).

36. *Id.*

37. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 145-267 (1992).

pendence but dependency, and it creates a constituency that becomes one of Madison's factions. Modern politics is nearly defined by this sort of activity. From the perspective of the common good, struggling for wealth through lobbying is wasteful and inefficient.³⁸

Civil rights advocates have always known in their heart of hearts that the long-term advancement of any group must ultimately rest on a solid economic foundation.³⁹ The history of the last thirty years shows just how true this is. But somehow this goal has been lost in the fray.

In some sectors, particularly those involving racial minorities, political action has replaced individual entrepreneurial action as a means to social advancement.

Let it be known that the achievement of political power is the most ephemeral of all victories, despite what our political culture wants us to believe. But to have skills, to have ethics, and to develop the virtues of honesty and persistence, and to use those virtues in practical ways in the marketplace—that is a lasting source of dignity and self-respect. We need to work for conditions that minimize the occasions for the corrupting tendency of political power and maximize the opportunities for economic success. This approach, as Dr. King saw early on, is one of the surest ways to advance the well-being of members of minority groups.

III. CIVIL RIGHTS SHOULD BE A MEANS OF REDRESSING WRONGS, AND NOT OF CREATING SOCIAL CONFLICT

Conflict is a word often associated with the words “civil rights” today. That is not as it should be. If the rights to person and property were strictly guaranteed, we would have a clearer understanding of what is mine and what is thine, and how that property can be peacefully traded in the marketplace. This minimizes the potential for conflict. But the inability to accurately define terms, a tendency that pervades the practice of modern civil rights, has become a source of social division.

38. *See id.* at 393-438.

39. *See* HENRY HAMPTON & STEVE FAYER., VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950'S TO 1980'S (1990).

The Americans with Disabilities Act,⁴⁰ passed in 1990, has proven to be a real watershed in the understanding of the phenomenon. Disabilities lawsuits are now the fastest growing area of civil rights law.⁴¹ The overwhelming majority of cases is not brought by people with obvious physical impairments who have been denied rights. Most of the cases involve people who did not receive an expected promotion and then suddenly discover a new weapon with which to bludgeon their benefactors. A full ten percent of disabilities cases before the Equal Employment Opportunity Commission of the United States are classified under the category of mental disabilities, evidence of which can include not showing up for work on time.⁴²

Very few of these cases have gone to court. Why? Because businesses have calculators. They calculate the costs of litigating for 18 months against the federal government's lawyers versus the costs of settling with a one-time payment to the plaintiff. Often, this practice is not the practice of rights enforcement; it is rightly regarded as economic extortion. It is bad enough that people's rights to property are being subtly undermined. But the highest cost is social and cultural. It has fostered an atmosphere of fear and mutual suspicion in the workplace instead of the social cooperation that is supposed to characterize economic exchange.

The word "discrimination" has come to be seen as grounds for arbitrating virtually every political and economic complaint that one person has against another, whether in employment or public accommodations. But remember this: when we call on the government to judge the correctness or incorrectness of people's motivations, as opposed to simply establishing the rules of conduct, we give up some of our freedoms.⁴³

This enforcement has become so politicized, especially within the workplace and in the context of disabilities enforcement, that the rights of drug users are held up as higher by the law than those of non-users.

40. Pub. L. No. 101-336, 104 Stat. 327.

41. See Edward L. Hudgins, *Handicapping Freedom: The Americans with Disabilities Act*, 18 REG. 2 (1996).

42. See WALTER OLSEN, *THE EXCUSE FACTORY* (1997).

43. See RICHARD EPSTEIN, *FORBIDDEN GROUNDS* 28-49 (1992), for a complete analysis of this conclusion.

There are countless examples of such unfairness. Yet today's problem is not that one group has more rights than another group. It is that all groups are struggling for a piece of the public pie. As the spoils are passed around, the pie gets smaller and smaller every day. The struggle has gotten ungenerous, messy, and even gruesome at times. The tragedy is that people feel they need to form themselves into politically active groups, not to achieve the fulfillment of their natural liberties, but primarily to claim their entitlements against others. This is not the vision that inspired the original civil rights movement, and it is a trend that deserves critical reappraisal.

The most important case for reappraisal is that we may never recover from the social division created by contemporary civil rights struggles, including the most tragic of all, racial conflict. The rise of black and white separatism and antagonisms—political and civic—is not to be taken lightly, as so many do. It represents a fundamental rift in the social fabric. But how can we set ourselves back on the track of using the appropriate means? How can we make civil rights a source of social cooperation instead of a source of conflict?

It is crucial that society begin to think of civil rights as something that is essentially the same as individual rights. If a person has been wronged, that wrong must be rectified. Justice, in the ancient formulation, is giving to each his due. But the term justice begins to lose its clarity when we speak too loosely of social justice or economic justice.⁴⁴ Those formulations are more likely to inspire litigation, public brow-beating, and the formation of pressure groups for the purposes of intimidation and political power; this is precisely the wrong direction that our country needs to take.

The purpose of law is to enlarge the freedom of citizens.⁴⁵ So it should be with civil rights. The aim of the civil rights project is not to make it more difficult to live under conditions of social peace; the purpose must be to expand opportunity and enlarge our sense of community to take full account of all members of society.

What is the first step in making this a reality and not pure theory? It is not to appeal to our political representatives. Nor is it to join a

44. See HAYEK, *supra* note 17, at 106-13.

45. See FREDERIC BASTIAT, *THE LAW* (1950).

pressure group for the purpose of exercising power in numbers. It must begin in our own lives, families, and communities. We must also become tolerant of diversity, but not uniformity imposed by government decree. True diversity must flow out of a social system in which forgiveness takes priority to litigation, and when things don't go our way, we choose to let it pass. The political and judicial culture of slight and retribution must be replaced by one of cooperation and understanding.

From a policy perspective, legislation must be evaluated in terms of whether it encourages people to view every personal slight as a social catastrophe in need of government intervention. Ultimately, the shift from a culture of conflict to one of cooperation requires changes at the most basic level. If a male is passed over for a promotion, he should not blame and sue his supervisor. It is all too easy to say, I would be more successful but so-and-so is keeping me down. To be sure, some people face special challenges, and unfair discrimination is among them. But rather than turn to the courts, political arrangements should encourage people to use their own will and sense of determination rather than the courts. Avoiding the temptation of accusing others helps the cause of social cooperation.

I am not suggesting that specific wrongs should not be righted; I am suggesting that we have become too anxious to make others scapegoats when something does not go our way, thereby making ourselves victims. In our diversity, we not only have incapacities, but we also have unique strengths. The market has a special way of punishing irrational discrimination. Through the profit and loss test, and the pressures of competition, the market denies profits and long-run success to businesses that irrationally discriminate.⁴⁶ This is only one way the market economy helps shape the moral fabric of society.⁴⁷ However imperfect the competitive process may be, it provides liberty, wider opportunities, and diversity within which each person can play a vital role.

But under this system, will people have unequal incomes and unequal amounts of social status? Absolutely. That is also part of

46. See Nicholas Capaldi, *Affirmative Action*, reprinted in *COMMERCE AND MORALITY* 197-212 (Tibor Machan ed., Rowman & Littlefield 1988).

47. For other ways, see WILHELM RÖPKE, *A HUMANE ECONOMY: THE SOCIAL FRAMEWORK OF THE FREE MARKET* 104-07 (1960).

diversity. We cannot have both equality of result and the freedom of economic enterprise and opportunity. We must avoid the politics of envy, which means using the government to bring down those who are successful solely because others are not as successful.⁴⁸ Neither should we fall prey to the wish for an egalitarian society, which is always and everywhere the coercive society. Tolerating the rich, even the “filthy rich,” is a part of the process of becoming mature, even as we do not confuse economic status with moral status.

Stephan and Abigail Thernstrom have done a remarkable job in showing how, in people’s daily lives, race is less of a consuming issue now than since the inception of the nation’s experiment with civil rights legislation.⁴⁹ This is due, not to government legislation, which has only exacerbation tensions, but to the ability of the American people to work out their problems with each other in the course of daily affairs. The evidence of improvement is overwhelming; yet so is the reality that certain interest groups continue to fan the flames of division.⁵⁰

What both sides of the debate—the Egalitarians and the Cognitive Elitists—overlook is the crucial role of the division of labor in a free society. A genius who is a master of a thousand skills is no more or less valuable to the social order than a lowly person with one small skill. The scarcity of this world imposes constraints on everyone. A great violinist may also be a great brain surgeon, but scarcity and the need for personal fulfillment requires that this person must choose between the two tasks and leave the unchosen to another.

The secret to social harmony is to establish a free system of exchange that allows every person to develop to his or her full potential, using individual talents. This division of labor creates an intricate web of labor upon which no government or cabal of geniuses can improve.

Let us make it a challenge over the next few years to rethink civil

48. See HELMUT SCHOECK, *ENVY: A THEORY OF SOCIAL BEHAVIOUR* (1966).

49. See STEPHAN THERNSTROM AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

50. Particularly notable is the temporary over the supposed conspiracy to burn black churches in the South, which the Thernstroms show was not a conspiracy at all, but a consequence of isolated arson attacks, not centrally directed. These were exploited to political advantage by groups anxious to sustain racial division according their own institutional self interest. *Id.* at 505.

rights. Let us learn from the past, but keep our minds primarily focused on the future, with all recriminations left out. But let us begin by agreeing on this proposition: Civil rights should promote the common good, cultivate economic participation, and create cooperation not conflict between people. As stated at the outset, there is good reason to support any conception of civil rights that meets these criteria. As for those that do not, it is time that we shift the burden of proof.