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COMING OUT FOR GAY RIGHTS

the Honorable Thelton E. Henderson†

Often at a gathering such as this one there is a natural tendency to focus on the issues facing our own communities. Speakers at a discussion on gay and lesbian issues might discuss topics such as AIDS, the rights of domestic partners, or ways to eliminate sexual orientation discrimination. Speakers at a discussion focusing on African-American issues might discuss affirmative action, black unemployment, or the problems of drugs in the black community. However, rarely does either community discuss issues of *common concern* such as the unique problems faced by Black gays and lesbians, or of the need to eliminate hate violence directed at both communities.

I do not presume to speak with authority on the issues facing the gay and lesbian communities. Rather, I intend to discuss what I perceive to be the need for the Black community and the gay and lesbian community to find common ground, to recognize the commonalities of our oppression, and the great need to do something about it, and *especially* in the face of a retreating judiciary and an advancing ultra-conservative movement that seriously threatens our well-being.

I want to quote this evening from the Reverend Martin Luther King Jr., who once wrote:

Injustice *anywhere* is a threat to justice *everywhere*. We are caught in an inescapable network of mutuality; in a single garment of destiny. What effects one directly effects all indirectly.

King's words continue to speak to the problems that we and our communities must still address; indeed, with some urgency. Dr. King speaks of the need to rise up against not only one's own oppression, but against oppression wherever it rears its hideous head. Dr. King *commands* us to recognize the unity of our experience.

Let me begin by briefly discussing why I believe that it is now more than ever *imperative* that our communities learn to work together. It has partially to do with my own perceptions of the changing role of the law in our society, but also with the changing face of politics.

When I graduated from law school *Brown v. Board of Education*¹ had been decided only eight years earlier, declaring separate schools for black and white students to be unconstitutional. A string of civil rights victories in the courts was soon to follow. Many minorities, myself included, saw the law as a powerful tool for progres-

sive social change — a governmental structure which would enforce the rights of minority communities. For communities which had for so long been locked out of the political arena, the importance of such an institution was obvious. The court took on a special mission in those days for which it was uniquely qualified — as a defender of the rights of those who were so outnumbered that they would inevitably be drowned out, pushed out, or simply left out of the political process. It was this vision of the law that drew many progressive people in my generation to careers as lawyers.

It goes without saying that the law today is quite a different creature. Affirmative action has been turned on its head and replaced by reverse discrimination. Elections are won and lost using code names such as quotas. A recent study shows that schools in our major cities are *more* segregated today than at the time of *Brown v. Board*. Not only are the courts no longer expanding our rights, but they are actually taking back many of the hard fought victories of my generation.

Where once we counted on the court to correct the social injustices inherent in the political system, it is now the *legislature* which we must call upon to reverse the Supreme Court in the area of civil rights. The Civil Rights Act now before the legislature² is just one example of a congressional attempt to counter the conservative turn evidenced in the Supreme Court's decisions in *Wards Cove*³, *Patterson v. McLean Credit Union*⁴, *Price Waterhouse v. Hopkins*⁵, and four other cases.

Today it is the judiciary which has become the most conservative branch. Rather than leading society along a path of ever-evolving social justice, the Court today finds itself trailing behind much of the rest of society, being dragged, kicking and screaming, as we approach the twenty-first century. In such a setting we must pause a moment and reanalyze the political landscape. We must realize that the tools and tactics of my generation may not be the most effective for yours.

When we turn an honest eye to this new political scene, the first thing we recognize is that we can no longer rely on the courts to safeguard the rights and freedoms most dear to us — and that is a difficult truth for me to recognize as a judicial officer. Today it seems a victory just to hold the line in federal court.

This is not to say that we should completely abandon the courts. There is still room in which a progres-

2. The Civil Rights Act of 1991 was signed into law on November 21, 1991, Pub. L. 102-166, 105 Stat. 1071.

3. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

5. 490 U.S. 228 (1989).

† Chief Judge, United States District Court, Northern District of California. Speech given at the Committee on Gay and Lesbian Issues Bar Association of San Francisco June 25, 1991.

1. 347 U.S. 483 (1954).

sive judge can be heard. Just three months ago a District Court Judge in Kansas found governmental classifications based upon sexual orientation to be inherently suspect under the Equal Protection Clause.⁶ Judge Kelly's opinion was eloquent, well-reasoned, and within the law, taking note of the fact that *Bowers v. Hardwick*⁷ did not explicitly foreclose the Equal Protection Clause to gays and lesbians.

And while I continue to believe in the strongest way that my opinion in the *High Tech Gays*⁸ case states the law of the future on the issue of constitutional protection for gays and lesbians, my reversal by the Ninth Circuit⁹ indicates that there are limits to the role of the district judge. I wish Judge Kelly in Kansas better luck with the Tenth Circuit, but I think we must recognize the limits of the law today.

Given this state of affairs it appears to me that there is no alternative but for progressives to take to the legislative arena in a way that they have never done before — not to the exclusion of the judiciary, but at the very least in addition to it. We have already seen abortion rights advocates begin this transformation with a surprising degree of success.

While I don't want to sound like a Polyanna, I do believe that there is a positive side to these otherwise negative developments. First, I believe that the transformation I have just discussed will cause our diverse communities, at long last, truly to work together and to take Reverend King's words seriously. Second, I believe that if we do this, we can win this fight together.

When the courts were a more viable channel for our concerns, it was much easier to "go it alone," so to speak. The classic lawsuit involves a single plaintiff, Smith, who sues a single defendant, Jones. Of course the class action provides a vehicle to expand the scope of a lawsuit, but the law still prefers a narrow class of "similarly situated" individuals.

The political arena makes demands almost exactly opposite from the courtroom. Where the lawsuit prefers narrowly defined classes, politics demands broad-based coalitions. The lone plaintiff doesn't stand a chance on the senate floor, and even a relatively broad class would have a tough time. If we are to survive in the new political arena, we must learn to work together, and to build coalitions across our diverse communities.

If we are to take Reverend King's words seriously, it means nothing less than to make each others' issues our own. This project presents a simple yet enormously difficult challenge. First, to treat people as equals and to respect fully their capacities and their dignity. And if that were not enough, then to imagine *actively* how other people experience life, to be humble enough to learn from others, and to surround ourselves with other peo-

ple who can teach us — and finally, to advance the causes of other communities as vigorously as we advance our own.

The political right seems to have taken this project far more seriously than we have. We all know that it is quite often the very same groups which oppose the rights of Blacks to live and work where they choose, who also oppose the rights of gays and lesbians to love whom they choose. We all know that it is quite often the very same groups which oppose the rights of women to control their own bodies, who also oppose the rights of minorities to control our own businesses and communities. These coalitions have given birth to the likes of David Duke, William Dannemeyer, Lyndon LaRouche and Jesse Helms. Theirs is a coalition based on an intolerance of those who are different, of those whose existence is threatening, and of those who, with power, could undermine the hierarchy of society as they envision it.

In the face of such opposition we must recognize that *we can no longer afford the luxury of infighting*. Because as Blacks or as gays and lesbians we have each experienced the pain of discrimination, and the humiliation of exclusion, one might say we should speak up all the more for other victims of discrimination. However, even the most casual observer can see that oppressed people do not always work together in support of each other.

The Black church that has led much of the black civil rights movement has not actively purged *itself* of sexism and homophobia. Similarly, the gay movement has been plagued by its own racism and sexism. We must examine ourselves and ask honestly, do we speak up for others, for women, for the disabled, for other racial and ethnic minorities? Do we always seek to walk in the other person's shoes and seek to understand him or her?

It seems particularly appropriate tonight to quote from James Baldwin, who as well as being one of the most prominent African-American authors of our time, was also openly gay. Baldwin wrote:

It is an inexorable law that one cannot oppress another; for in thy victim's face you see a reflection of your own.

Baldwin's words speak to both the Black community and the gay community, and they, unfortunately, ring as true today as the day when they were written. Baldwin tells us that *we must* not oppress one another, for in that act we see our own oppression. It is a simple message, yet it is one which has all too often gone unheeded. Baldwin was, I believe, uniquely qualified to make such an observation — sitting at the nexus of the Black and the gay communities — at the intersection, as it were, of two particularly virulent strains of oppression.

We must remember Baldwin's words. And we must recall Doctor King's words, and move beyond mere tolerance to solidarity. We must find common ground, and recognize the commonalities of our experiences.

6. *Jantz v. Muci*, 759 F.Supp. 1543 (D.Kan. 1991, Kelly, D.J.).
7. 478 U.S. 186 (1986).

8. *High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F.Supp. 1361 (N.D.Cal. 1987) (Lesbians and gay people are a quasi-suspect class entitled to heightened scrutiny under the equal protection clause).

9. 895 F.2d 563 (9th Cir. 1990).

Coming Out for Gay Rights

Although the problems which the Black community and the gay community face certainly differ, both Blacks and lesbians and gays know the pain of living in America as people who are "different" and who often are "despised" because of that difference. For centuries, we've been taught that "black is bad, black is lazy, black is genetically inferior." And also that "gay is perverted, gay is sick, gay is mentally ill." We both know the fear of walking down the street not knowing the safety of our next step — whether it be on the streets of Howard Beach, the streets of Selma, Alabama, or the streets of San Francisco.

We each know exclusion — be it from clubs, jobs, or organizations because of our race; or from our own families because of our sexual orientation. We each know the feeling of other people not treating us as full human beings and judging us not by the "content of our character" but by the color of our skin or by the gender of our partners. We both experience disillusionment with a legal system which systematically devalues our beings. And we know the callousness of the American political system which does not devote sufficient resources or leadership to fight AIDS, which is ravaging *both* of our communities.

If our diverse communities truly take this challenge seriously, if we identify and build upon our common ground, then we will be not only a strong political force — I think we will be unstoppable. Racial *minorities* will soon be a *majority* in California. Add to this gays, lesbians, women and the disabled, and we will have a coalition of unprecedented proportions.

For the far right the prospect of minorities as a *majority* presents more than a mere semantic problem, it presents a threat to the very racial, sexual and cultural hegemony which has dominated this country for the last two hundred years — but *only* if we learn to bring our communities together.

I believe that in the face of a united and advancing right and a divided and retreating judiciary, we have no alternative but to bring ourselves together. When elected officials advocate the quarantine of entire sectors of our population, when Ku Klux Klan members attain high elected office, we must realize that it is the very existence of our communities which is at stake.

But to take this one step further — it is not just a matter of survival, it is a *moral imperative* that we learn to live, work and struggle together. I have explained that the challenge we face is more than just a matter of self-interest, but a matter of self-preservation. But it must be even more than that. We must heed Dr. King's words and support the struggles of others even when we do not see our own interests directly at stake.

I am reminded of my very first job out of law school. After I finished at Boalt, I went down to Mississippi, Alabama and Louisiana to work on voting rights cases for the Civil Rights Division of the Justice Department. It was not only Blacks who came to work for civil rights — it was whites as well. Though they had not experienced discrimination in the way that we had, the

white workers approached their task with true commitment and dedication.

I learned many things from that experience and one of them was that the struggle in which we were involved was not really Black against white — but rather, wrong against right. It was a fight against bigotry, prejudice and discrimination, a struggle of the oppressed against the oppressor.

Reverend King's words remind us that we should not fight for the rights of others just because it will benefit us some day, but simply because it is moral to do so. The obligation to fight discrimination belongs to every person and derives from a greater principle than mere self interest.

Dr. King's statement that "injustice anywhere is a threat to justice everywhere" directs the straight community to make a commitment to lesbian and gay rights.

Harvey Milk urged the gay community:

You must come out. Come out to your parents . . . come out to your relatives . . . come out to your friends . . . come out to your neighbors . . . to your fellow workers . . . to the people who work where you eat and shop . . .

I would like to see every gay doctor come out, every gay lawyer, every gay architect come out, stand up and let that world know. That would do more to end prejudice overnight than anybody would imagine. I urge them to do that, urge them to come out. Only that way will we start to achieve our rights.

Harvey Milk aimed his directive at the gay community. I would not presume to make such a command. My appeal is for *straight* people to come out. And by coming out I mean actively and openly supporting the rights of lesbian and gay people as the white civil rights workers "came out" for Blacks in the south.

Today many straight people perpetuate "the silence" because they are afraid to come out, or don't really want to come out. Perhaps they are afraid that they will be identified as gay or lesbian. But we must realize that this type of silence truly *does* equal death.

I would like to close this evening by sharing the memory of a dream that I will always carry with me. It was almost 30 years ago when I, along with 250,000 others walked along the banks of the reflecting pool, from the Washington Monument to the Lincoln Memorial.

Martin Luther King, Jr. was introduced, and he commenced to give one of the great speeches of our time. He told us of his great dream for his children: "That they might one day live in a nation where they will not be judged by the color of their skin, but the content of their character." His great dream for our people: "That one day on the red hills of Georgia, sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood." And his great dream for his country: "A dream rooted in the American meaning of its creed, 'we hold

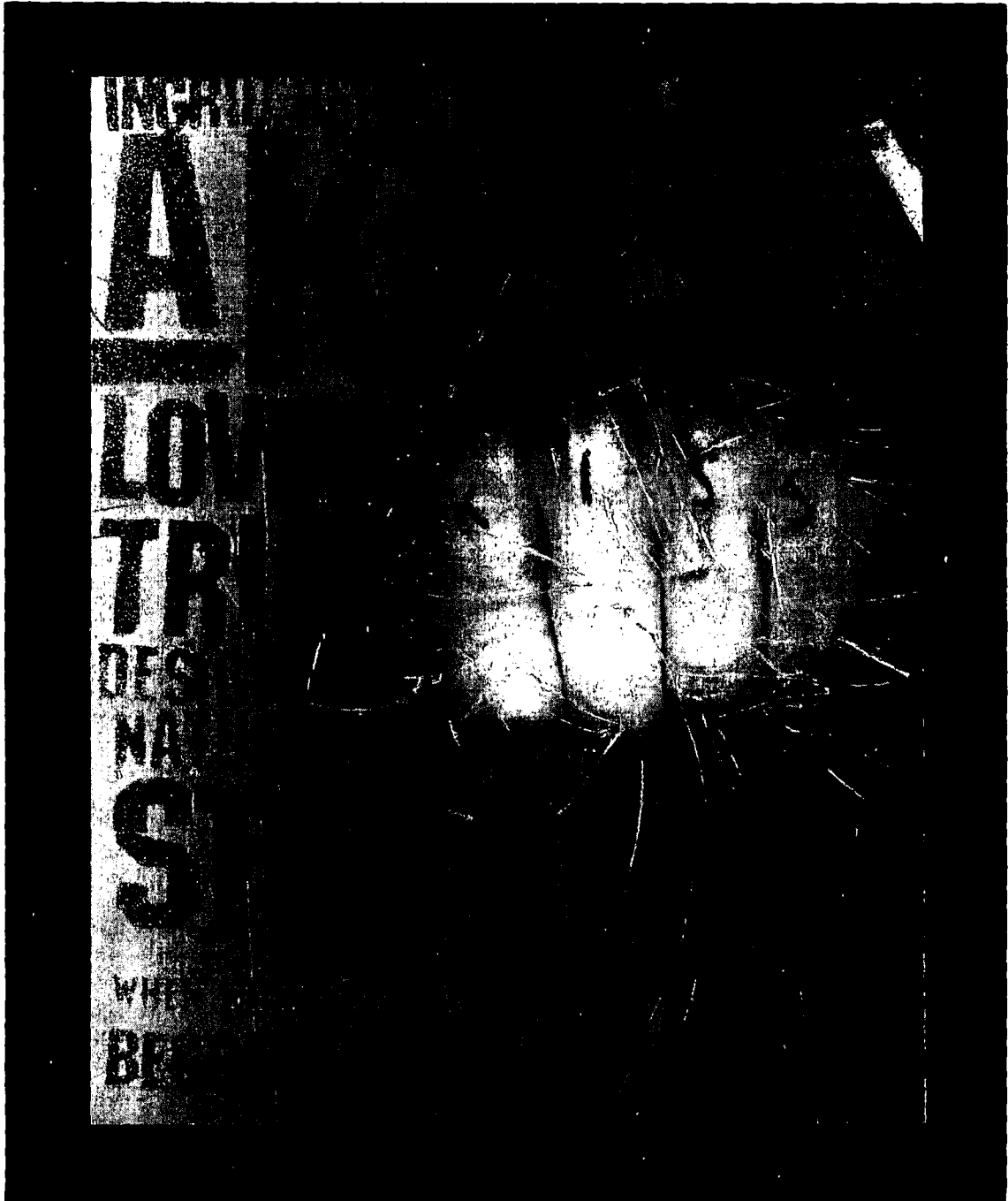
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these truths to be self-evident, that all people are created equal.' ”

My challenge to you is nothing less than to make Dr. King's dream a reality. To “come out” for each other. And to recognize that we are caught in a “single garment of destiny.” When we do this there will be no

stopping us. No David Duke, no William Dannemeyer, and no Supreme Court will be able to stop us. And we will all sit down together at the table of brotherhood and sisterhood.

Thank you and good luck.



artist: Ned Campbell