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An Awakening: How the Civil Rights Movement Helped Shape My Life

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An Awakening: How the Civil Rights Movement Helped Shape My Life

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I. INTRODUCTION

The struggle of the civil rights movement for freedom and fairness is among the most important events in America's history, and it had a great impact on my life. There were many heroic figures in the Movement, including Thurgood Marshall at the National Association for the Advancement of Colored People Legal Defense Fund, with his painstaking and brilliant step-by-step legal strategy that led to *Brown v. Board of Education*; John Lewis and the Student Nonviolent Coordinating Committee, whose protests added attention to injustice; and thousands of less well-known Americans, who used their voices, or gave their lives, to fight for civil rights. But Dr. Martin Luther King, Jr. moved the country most. Why? First, his nonviolent demonstrations exposed the violent repression by racists in the South, and also in the North. Second, he tied freedom and justice for Negroes, as he would say, to the most fundamental and cherished American dream.

King, like Abraham Lincoln, linked his dream to the Declaration of Independence. He began the "dream" portion of his speech by expressing his "dream that one day this nation will rise up [and] live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'" It is no accident that the two greatest speeches in American history—King's "I Have a Dream" speech and Lincoln's Gettysburg Address—flow from the idealism of the Declaration, rather than the Constitution.¹ Because of King's tactics and speeches, public sentiment in America changed enough so that the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were possible. As Lincoln said: "With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions."²

The first two parts of this article are personal—describing a privileged child who, like far too many other whites, knew next to nothing about the oppression of American blacks. My eyes would later be opened by the civil rights movement, with King as its leading prophet. The third part of the article summarizes the campaign by J. Edgar Hoover and his FBI to destroy King. I know about this because in 1975 and 1976 I was chief counsel of the Senate Select Committee—known as the Church Committee for its chair, Senator Frank Church of Idaho—that investigated and revealed improper government intelligence activities, including the campaign against King. The fourth part is again more personal: How the civil rights movement and King's teachings influenced my public life after the Church Committee.

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1. Except for the Preamble, the U.S. Constitution does not have any memorable language. Except for the Bill of Rights, the Civil War Amendments, and the Nineteenth Amendment, the Constitution, while historic, is a map for government administration. It is not filled with ideals, but with compromises, including compromises with slavery.
 2. Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27 (Roy P. Basler ed., 1953).

II. EYES CLOSED AS A KID AND A TEENAGER

Born in 1935 as a child of privilege on Manhattan's Upper East Side, I grew up in a white world. My family had no black friends. My grade school—Collegiate School, the oldest independent school in America—had no non-white students. I did read *The New York Times* each morning at breakfast, starting at age seven, with the paper resting on the brown rug in my parents' dining room so I could turn the pages. But the news I remember from those years was all about World War II.

The only contact with blacks that I recall in grade school was a class visit to a New York City jail, either the Tombs or Rikers Island. An awfully high proportion of the prisoners were black. And I vaguely remember my father later saying that seemed unfair. In April 1947, my father took me to see Jackie Robinson play his first game for the Brooklyn Dodgers in New York City.³ That fall, my father took me to two World Series games at Yankee Stadium against the Dodgers. Robinson was already established as a star and a man of character. I went to the games because I was then—before George Steinbrenner soured me—a passionate Yankees fan. Nonetheless, Robinson's brilliance, and the fact that before him blacks had been excluded from established baseball leagues, made an impression on me.

In the fall of 1948, I went away to boarding school at Milton Academy, near Boston. At the time, this too was an entirely white school. The only comparable boarding school to begin admitting blacks before my graduation in 1953 was Groton School, which admitted one to the ninth grade when I was a Milton senior.⁴ Nonetheless, I did have one eye-opening experience related to race at Milton. Every Sunday evening, the Boys School and the Girls School would gather for a service in the school's gothic chapel. One preacher who spoke at Milton was Dr. Howard Thurman, a black pastor, dean at Boston University's Marsh Chapel, and faculty member at Boston University's School of Theology.⁵ Thurman was by far the most impressive of the many preachers who visited Milton. For me, this was another Jackie

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3. See Louis Effrat, *Brooks Win, 14-6, with 11-run Fifth*, N.Y. TIMES, Apr. 12, 1947, at 12. It was an exhibition game against the Yankees because in those years the two teams finished spring training by playing a series of games moving north from their camps in Florida. See *id.*
 4. The decision at Groton School, Franklin D. Roosevelt's and Dean Acheson's school, was controversial among some alumni. When asked if Groton was admitting "more Negroes," the headmaster, Dr. John Crocker, replied "Sir, it would be news if Groton did *not* admit more Negroes." ROBERT A. MOSS, A MEMOIR OF JACK CROCKER: HEADMASTER OF GROTON SCHOOL, 1940-1965, at 184 (2014) (emphasis added). It saddens me that Milton Academy, largely a school of Boston Brahmins, but also of Robert and Ted Kennedy, did not begin to wake up until a few years after Groton.
 5. King was then attending the School of Theology and Thurman, while not teaching him in class, became one of his most admired mentors. See, e.g., Clayborn Carson, *Martin Luther King, Jr., and the African-American Social Gospel*, reprinted in AFRICAN-AMERICAN RELIGION: INTERPRETIVE ESSAYS IN HISTORY AND CULTURE 341, 348 (Timothy E. Fulop & Albert J. Rabotheau eds., 1997) (stating Thurman was a family friend of the Kings and when he "became Boston University's dean of the chapel, he developed a personal acquaintance with King, Jr., who was then attending the university"); *The Legacy of Howard Thurman: Mystic and Theologian*, PBS (Jan. 18, 2002), <http://www.pbs.org/wnet/religionandethics/2002/01/18/january-18-2002-the-legacy-of-howard-thurman-mystic-and-theologian/7895/> (noting King carried Thurman's *Jesus and the Disinherited* during protests and was influenced by Thurman's teachings on nonviolence and the importance of maintaining a spiritual life); LERONE BENNETT, JR., WHAT MANNER

Robinson moment. But there was still a long way to go. Because I had been elected as the school's head monitor, I was expected to talk at one of the Sunday evening gatherings. My subject was "Tolerance." While not directly focused on race or equality, this topic suggests something was bubbling in my mind.

Going from Milton to Harvard College brought me into contact with a few black classmates—but only a handful. One was a colleague who rowed on the Harvard Crew. Although I recall excitement about the *Brown* decision in the spring of my freshman year, I did not follow race issues closely then. Indeed, while I must have read about the Montgomery Bus Boycott led by King, I do not remember doing so.

My class at Harvard Law School was even less integrated than my college class. There was only one black student, who was expelled before graduation. We also had only eight women in a class of 525. Nevertheless, my experience at law school awakened my passion for civil rights.

III. MY EYES ARE OPENED

In February 1960, in my third year at law school, sit-ins had started in Greensboro, North Carolina at Woolworth's and other stores that barred blacks from eating at their lunch counters.⁶ Young blacks (along with a few white supporters) sat at the counters and were refused food, abused, and arrested. Even though a law student, it was the unfairness—really the inhumanity—more than any legal question, that motivated me to help organize sympathy picketing of the Woolworth's on Brattle Street in the heart of Cambridge, right next to Harvard Yard. On several cold February days, we attracted lots of supporters, including several fellow law review members. But not everyone agreed. Antonin "Nino" Scalia, a law review friend, who even then was noted for his conservatism, declined. His position was that since Woolworth's was run as a franchise, we would first be hurting the franchise holder. Yes, but we would second be hurting the company. And anyway, the issue was too important to ignore. But I also failed with Gail Jones, the daughter of famed black singer Lena Horne. Gail was another friend, who had been the Radcliffe roommate of my then-wife. In Gail's book about the Horne family written a quarter century later, she wrote, "Fritz . . . asked if I would join him in picketing the Cambridge Woolworth. . . . But I simply could not see the Cambridge connection [to the Southern Woolworth's]."⁷

The struggle of all Africans for independence from colonial rule was part of the same struggle for fairness and freedom being waged in America by the civil rights movement. And so it was that after clerking, I worked for the Northern Region of the newly independent West African nation of Nigeria, as part of a non-government

OF MAN: A BIOGRAPHY OF MARTIN LUTHER KING, JR. 74–75 (1976) (stating King read *Jesus and the Disinherited* during the Montgomery Bus Boycott).

6. For more information on the sit-ins, see Alan Gartner & Christopher Ferreira, *A State of Action*, 59 N.Y.L. SCH. L. REV. 95 (2014–2015).

7. GAIL LUMET BUCKLEY, *THE HORNES: AN AMERICAN FAMILY* 237 (1986). Born Gail Horne Jones, Gail Lumet Buckley is the daughter of Lena Horne and Louis Jones.

precursor to the Peace Corps: the MIT Fellows in Africa Program, funded by the Ford Foundation and run by Professor Carroll Wilson. Nigeria had great promise with many talented people and many natural resources. During the colonial era, as compared to East African countries, native Nigerians had filled more jobs because of the absence of both Indian immigrants—who had taken many mid-level jobs in East Africa—and white settlers (West Africa was known as the “white man’s grave”). Working in Nigeria increased my interest in racial issues and my interactions with black people, including young American friends also working in Nigeria. I had many Nigerian friends, the closest of whom was a Muslim journalist.

In January 1963, back in New York—after finishing most of my book on Nigeria⁸—I started working as a young litigation associate at Cravath, Swaine & Moore. That spring I closely followed King’s dramatic demonstrations in Birmingham, Alabama, where Police Chief Eugene “Bull” Connor used snarling, snapping dogs and cannons shooting water at a force of one hundred pounds per square inch against peaceful demonstrators protesting segregation, many of them children. The attention given to these protests helped build momentum for the famous March on Washington of August 1963.

My then-wife and I joined the March, riding to Washington from New York City on one of several special trains. Many things stick in my mind: the peaceful passion of the huge crowd; the bond among the black and white participants; the mix of the privileged and the poor; the singing before the speeches (for instance, Mahalia Jackson with “I’ve Been ’Buked and I’ve Been Scorned” and Joan Baez with “We Shall Overcome”); and the power and beauty of King’s oration that concluded the ceremonies. All of King’s Speech reached my heart. I felt a particular thrill at his saying “many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny.”⁹

Of course I did not know in August 1963 that within a few months I would be working with the architects of the March on Washington. Or that twelve years later, part of my job with the Church Committee would be to reveal that right after King’s Speech the Federal Bureau of Investigation (FBI) resolved to destroy him.

Two months after the March, the *Harvard Law Bulletin* published a speech I had made the previous spring to a gathering of young African graduate students at the law school.¹⁰ The thrust was the need for the new generation of African leaders to get rid of the “colonial mentality” so “the yoke of colonialism is thrown off and not merely disguised.”¹¹ But to do so without losing faith in bills of rights. “Why rid your

8. FREDERICK A.O. SCHWARZ, JR., *NIGERIA: THE TRIBES, THE NATION, OR THE RACE: THE POLITICS OF INDEPENDENCE* (MIT Press 1965).

9. Martin Luther King, Jr., “*I Have a Dream . . .*,” NAT’L ARCHIVES (1963), <http://www.archives.gov/press/exhibits/dream-speech.pdf>. I had remembered this as “brothers and sisters,” for there were many women in the crowd.

10. Frederick A.O. Schwarz, Jr., *African Revolution and Constitutional Restraints*, 15 HARV. L. SCH. BULL., no. 2, Oct. 1963, at 14–15.

11. The colonial mentality was the feeling of many Africans that they did not have the capacity of their former colonial masters. This was coupled with lots of little things that suggested “British was better”:

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countries and your people of the colonial mentality? To be free. And ultimately that means to be free as individuals, which freedom can be both protected and inspired by a bill of rights.”

The speech was read by Peter Weiss, the chair of the American Committee on Africa (ACOA), who asked me to join its board. At the ACOA, I met and worked with three fellow board members closely tied to King: Bayard Rustin, Clarence Jones, and Stanley Levison.

The ACOA was the most important American organization fighting apartheid in South Africa, as well as Portugal’s suppression of independence in Mozambique and Angola. Its board was about half black and half white. Its executive director was George Houser (a white minister), who in the 1940s joined the Fellowship of Reconciliation and had also been one of the founders of the Congress of Racial Equality (CORE), then a respected part of the civil rights movement. Also in the 1940s, Houser joined Bayard Rustin on an integrated bus ride to the South, long before the celebrated Freedom Rides of the early 1960s. Rustin was, among other things, the prominent organizer of the March on Washington. Before that, he was an advisor to King, awakening him to nonviolence and the tactics of Gandhi. Clarence Jones had been a successful private lawyer who King pressured and persuaded to become his counsel and speechwriter. Indeed, before King abandoned his prepared speech at the March and responded to gospel singer Mahalia Jackson’s demands to “tell ’em about the ‘Dream,’ Martin,” King had been reading from a draft largely prepared by Jones.¹² The third fellow ACOA board member ensnared in J. Edgar Hoover’s efforts to destroy King was Stanley Levison—King’s closest white advisor. Hoover justified warrantless wiretaps of King and his colleagues by telling John and Robert Kennedy that Levison was a Communist, failing to tell them Levison had stopped supporting the Communists several years earlier. Although Hoover tried to tie the civil rights activism of Rustin, Jones, and Levison to Communism, my personal experience with them was that they were patriotic Americans deeply concerned about racial injustice. And it is revealing that from all the miles of recordings of their conversations swept up by the Bureau’s warrantless wiretaps, the FBI never came forward with anything to the contrary.

In addition to meeting Rustin, Jones, and Levison through the ACOA, Oliver Tambo, leader of Nelson Mandela’s African National Congress outside South Africa, visited our West End Avenue apartment. Eduardo Mondlane, head of Mozambique’s

for example, the use of wool wigs for lawyers in sweltering courtrooms, as well as street names and the names of institutions that needed to be changed, just as we changed Kings College to Columbia University. One personal experience is revealing: My then-wife and I were the only whites at a wedding of two Nigerian friends. After the ceremony, the twenty or so men settled into a circle and I was then asked to speak first, even though I knew the groom least well of any of the guests. Also, a person’s cultural background was often considered more important than race. For example, Harry Dodds, a black American of my age working in another pre-Peace Corps program, expected to be treated as a brother. He was shocked and maddened when Northern Nigerians called him “Baturi” (phonetic), the Hausa word for European.

12. See CLARENCE B. JONES & STUART CONNELLY, *BEHIND THE DREAM: THE MAKING OF THE SPEECH THAT TRANSFORMED A NATION* 112 (2011).

revolutionary FRELIMO party, who was later assassinated in Mozambique, also visited two or three times with his wife.

The most useful thing I did as an ACOA board member was to write, in 1966, an early magazine article describing apartheid's evils and urging American companies to leave South Africa.¹³ The article exposed apartheid's harmful impacts on South Africa's blacks and other non-whites, which were facilitated by American companies that had "a substantial stake in the status quo." The article also said that:

[T]he apparent hypocrisy of the [U.S.] Government and the increasing association of [U.S.] business with the symbol of world racism exacerbates race relations in this country. Present policy supports the charges of those who characterize this nation as racist when the chips are down, white power indifferent to black misery.¹⁴

While still an associate at Cravath, I also did some work for the Vera Institute of Justice ("Vera"), which had been co-founded and led by Herb Sturz¹⁵ with Burke Marshall as its chair. One job was to write guidelines for the New York City Police Department on reducing the "Use of Deadly Force by Police Officers." These guidelines were preceded by a series of speeches that Police Commissioner Howard Leary asked me to write for him. He wanted to reduce police killings, including getting rid of the "fleeing felon" rule—a rule that allowed a police officer to shoot and kill a suspected felon even if the person (if arrested and then convicted) might be sentenced to only a few years in prison. On behalf of Vera, I also wrote the Police Department's new "Guidelines for Demonstrations" for Police Commissioner Patrick V. Murphy.¹⁶

Neither guideline was directly focused on race issues. Indeed, the need for guidelines on demonstrations was triggered by police overreactions to mostly young anti-Vietnam War demonstrators. This raised First Amendment rather than civil rights concerns. But the deadly force guidelines, while general, were based in part on

13. For the full article, see Frederick A.O. Schwarz, Jr., *The United States and South Africa: American Investments Support and Profit from Human Degradation*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 9, at 265 (2006).

14. *Id.* at 269. Many American companies that did business in South Africa were Cravath clients. In addition, one of Cravath's biggest clients was one of six banks that the ACOA was urging religious organizations, unions, and students to boycott because of the bank's public gesture of financial support for the apartheid regime. That gesture was in response to concerns about the South African economy, stemming from the regime killing approximately one hundred peaceful African demonstrators at Sharpsville. Vindicating my belief that Cravath was the firm I should join, because I would be judged by the quality of my work and not by other factors, nobody at the firm questioned my anti-apartheid activities. And I was made a partner three years later, after six years at the firm.

15. See SAM ROBERTS, *A KIND OF GENIUS: HERB STURZ AND SOCIETY'S TOUGHEST PROBLEMS* (2009).

16. For copies of both sets of guidelines, which are in the possession of New York Law School's Center for New York City Law, see FREDERICK A.O. SCHWARZ, JR., 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tabs 13–14, 16 (2006); see also Frederick A.O. Schwarz, Jr., *When May Society Shoot to Kill?*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 15 (2006).

concern about white police officers shooting blacks—a concern that is very much alive today.

I knew Burke Marshall, who had previously been the Kennedy administration’s assistant attorney general for civil rights, not only through Vera work but also because, starting in the late 1960s, my main Cravath case had been defending IBM in the government’s case claiming monopolization of the computer industry. Burke had been IBM’s general counsel. I believe Burke proposed me to be the Church Committee’s chief counsel. But he never told me, and I never asked him.

IV. THE CHURCH COMMITTEE’S REVELATIONS ABOUT THE FBI’S CAMPAIGN TO DESTROY KING

The Church Committee conducted the most extensive investigation of a government’s secret activities ever—in this country or elsewhere. Our discoveries included the FBI’s efforts to drive King to commit suicide; the CIA enlisting Mafia leaders in its plots to kill Cuba’s Fidel Castro; and a thirty-year NSA program to get copies of all telegrams leaving the United States. While both the FBI and the CIA engaged in behavior that harmed America, the FBI’s actions were to me the more dangerous. The CIA undermined our reputation overseas, while the FBI undermined democracy at home. The FBI used excessive surveillance on millions of Americans and harassed, and even attempted to destroy, many groups and individuals, including King, to suppress their appeals to America’s creed of democracy.

At the March on Washington, King ended his speech by telling the country of his dream that:

[A]ll of God’s children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing the words of the old Negro spiritual, “Free at last, Free at last, Great God a-mighty, We are free at last.”¹⁷

In the bowels of the FBI headquarters, the reaction to King’s Dream was to declare him the nation’s “most dangerous and effective Negro leader,” as shown by his powerful “demagogic speech.”¹⁸ King had to be destroyed because he was a potential “messiah” who could “unify and electrify” the “black nationalist movement.” The Bureau also secretly decided to anoint another Negro leader to “assume the role of the leadership of the Negro people.” King was dangerous because he might “abandon his supposed ‘obedience’ to white liberal doctrines (nonviolence).”¹⁹ So, in

17. King, *supra* note 9, at 6.

18. 2 SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 11 (2d Sess. 1976) [hereinafter 2 SENATE SELECT COMM.]; *see also id.* at 12, 219–23; *Dr. Martin Luther King, Jr., Case Study*, in 3 SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 79–184 (2d Sess. 1976) [hereinafter 3 SENATE SELECT COMM.].

19. Memorandum on Counterintelligence Program from FBI Dir. Hoover to Special Agent in Charge in Albany, N.Y., at 4 (Mar. 4, 1968). The FBI’s reference to “white liberal” doctrines reveals ignorance, as

J. Edgar Hoover's upside-down secret world, a fervent apostle of nonviolence had to be secretly attacked and destroyed as insurance against the supposed possibility he might abandon his core philosophy of nonviolence.

The FBI had a similarly topsy-turvy mindset when it labeled the Southern Christian Leadership Conference (SCLC) as a "black nationalist hate group." The SCLC, an association of black Baptist Church leaders led by King, in fact preached a gospel of love and called for nonviolence to bring justice to black Americans. But the consequence of labeling the SCLC a hate group was to give license to the FBI, under its secret Counterintelligence Program ("COINTELPRO"), to injure the SCLC by using covert dirty tricks to undermine its fundraising.²⁰

Hoover had three reasons for his obsession with, and his hostility toward, King. First, he yearned for an earlier time in our nation's history when blacks were suppressed and largely silent. Second, Hoover claimed American blacks were controlled by Communists. Even when his General Division ("the Division") concluded that Communist efforts to exploit black discontent had failed, Hoover insisted the Division change its findings. Believing they "would all be out on the street" if they failed to do so, they produced a new memo stating: "The Director is correct." King was the "most dangerous Negro" from the "standpoint of Communism . . . and national security." Third, King had criticized the FBI for its lax attention toward crimes committed against blacks fighting for civil rights.

In 1962, Hoover had added King to the Reserve Index, a highly secret list of people to be rounded up and detained in a "national emergency." Starting in 1963, the Bureau began its active efforts to undermine King, even attempting to block his publications. It attempted to discredit King with the White House, heads of government agencies, members of Congress, the Internal Revenue Service, the press, financial leaders, universities, churches, and even the Pope. Hoover was particularly outraged that King received the Nobel Peace Prize.

As part of its effort to destroy King, the Bureau mailed him a "sterilized" tape-recording from warrantless bugs it had placed in his hotel rooms. The tape contained intimate conversations and came with an anonymous letter stating:

You know you are a complete fraud . . . an evil, vicious one at that . . . your end is approaching.

King, there is only one thing left for you to do. You know what it is. . . . You are done. There is but one way out for you. You better take it before your filthy, abnormal fraudulent self is bared to the nation.

well as impropriety, because King was tutored in nonviolence by a black man (Rustin) who led him to the philosophy and tactics of an Indian (Gandhi).

20. See 2 SENATE SELECT COMM., *supra* note 18, at 222–23. Frustrated by the courts, Hoover created the highly secret COINTELPRO to harass and destroy law abiding citizens and groups he regarded as dangerous. See *id.* at 65–67, 86–93. COINTELPRO destroyed reputations, got teachers fired, broke up marriages, sabotaged political campaigns, falsely labeled intended victims as government informers, and provoked "numerous beatings and shootings." See 3 SENATE SELECT COMM., *supra* note 18, at 188; see also *id.* at 46, 50–55, 57–60; 2 SENATE SELECT COMM., *supra* note 18, at 215–19.

King and his associates interpreted the letter as an attempt to induce him to commit suicide.²¹

The Bureau's campaign against King continued even after his death as Atlanta agents proposed harassing his widow and Hoover authorized efforts to defeat the designation of his birthday as a national holiday, instructing agents to act "very cautiously." Overall, however, the FBI acted brazenly to try to undermine King. As the chief of the Division admitted to Senator Walter ("Fritz") Mondale, "no holds were barred," when the Bureau brought home "rough, tough, dirty" tactics used overseas against Soviet agents and applied them to American citizens whose views offended Hoover and his colleagues. Moreover, "never once did I hear anybody . . . raise the question is this course of action . . . lawful, is it legal, is it ethical or moral?"

The Bureau's tactics used against King and many others were deeply disturbing, even revolting. They violated American laws. They undermined America's moral principles. They were more fitting for a tawdry police state than for the United States of America.

V. IMPACT OF THE CIVIL RIGHTS MOVEMENT AND KING UPON MY GOVERNMENT AND NON-PROFIT POSITIONS

From 1982 through 1986, during all of Mayor Edward Koch's second term and the first year of his third, I served as the New York City Corporation Counsel. Previously, while at Cravath, the Mayor—along with David Jones, an African American assistant who had worked for me at Cravath—asked me to represent the City in two cases relating to the census. The first was to resist efforts by the Federation for American Immigration Reform (FAIR) to force the Census Bureau not to count undocumented aliens. We won. The second was to challenge the census undercount, which missed more than ten percent of the City's population, harming both the City's representation and funding. The undercount primarily affected minorities, non-English speakers, high-crime areas, and urban populations. Of the City's black males between eighteen and thirty, about forty percent were missed. As I put it in court, this echoed the Constitution's infamous clause which, for apportionment purposes, counted slaves as three-fifths of a person. We won at trial and then lost the appeal because the trial judge had imposed an overly severe sanction on the government for refusing to supply information. The Second Circuit did not reach the merits and the issue remains alive today.

Before asking me to be Corporation Counsel, in lieu of a formal interview, the Mayor and I had a chat over breakfast at Gracie Mansion. During that conversation, I told him I disagreed with his death penalty position, and also that I thought the City's leadership should be healing on race questions, and that these issues were

21. The sources for this section are collected in FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 221–22, n.6. (2007); see also *Like All Frauds Your End is Approaching*, LETTERS NOTE (Jan. 5, 2012), <http://www.lettersofnote.com/2012/01/king-like-all-frauds-your-end-is.html> (containing a redacted image of the original letter as well as a full transcript).

important to me.²² Koch asked me to take the job and I soon became an advisor on many policy issues ranging beyond the law.²³

The Corporation Counsel's office—or the Law Department—is huge. With over 500 lawyers, it is one of the nation's largest public law offices. Its work is varied. Most matters it handles have nothing to do with race, but some do. One example is *Wilder v. Bernstein*, a case involving the City's foster care system.²⁴ For more than a century, the City had relied on religious organizations to provide foster care for children. The American Civil Liberties Union (ACLU) sued to dismantle the system, claiming that reliance on religious organizations to perform a governmental function violated the establishment clause of the First Amendment. The case also included claims of racial disparity, which reflected the City's huge demographic changes. Most foster care children were now black. But since most blacks were Protestant, and many of the best agencies were sponsored by the Catholic Church or by Jewish groups—both to varying degrees favoring admission of their own—black children had less opportunity to get into desirable group homes.

The case was about to go to trial when the three excellent young lawyers covering the case came to me saying they believed the City would lose, primarily because of very bad evidence on the racial issues from the agencies and the City. After considering the facts and the legal issues, I became convinced of two things. First, it was important for the City to keep using religious organizations for foster care because losing them would severely harm children and thus the City. Second, it was unacceptable for the City's system to treat black children less well than other children.

At a family dinner at my apartment, Burt Neuborne, then the ACLU's legal director, and I worked out the essence of a settlement: The ACLU would drop almost all its establishment clause claims,²⁵ and the City would devise a system that would give black children a fair chance of getting into the best foster care group homes. For us to enter into such a broad settlement, the Mayor obviously had to approve. But, as the settlement approval went through an extremely long and slow

22. The Koch administration incidents are discussed in Frederick A.O. Schwarz, Jr., *Edward I. Koch Administration Oral History Project: The Reminiscences of Frederick A.O. Schwarz, Jr.*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 28 (2006). For the oral history, the Mayor urged his key aides to hold nothing back. I told him he was like Oliver Cromwell, who told the portrait painter to “paint me ‘warts and all.’” Of course, the Mayor would have, deservedly in my view, expected more “all” than “warts.”

23. See, e.g., Frederick A.O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y.L. SCH. L. REV. 375 (2008–2009).

24. 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). For a book with an extensive treatment of foster care and a detailed discussion of *Wilder*, see NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (First Vintage Books ed. 2002) (2001); see also Richard A. Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U. CHI. LEGAL F. 209 (1987); Burt Neuborne & Frederick A.O. Schwarz, Jr., *A Prelude to the Settlement of Wilder*, 1987 U. CHI. LEGAL F. 177 (1987); Schwarz, *supra* note 22, at 137–50.

25. We agreed that the religiously sponsored organizations would not have to provide birth control information to the young people in their group homes, but they had to make available the opportunity for the young people to visit family planning clinics.

process involving the foster care agencies and the Southern District judge responsible for the case, the Mayor changed his mind many times, reacting to pressure against the settlement from close allies such as Cardinal John O'Connor. But the Mayor ultimately stuck with the settlement and it was approved by the courts.²⁶

Among my many exchanges with Mayor Koch that had nothing to do with litigation, some related to race. One such exchange concerned how the City should approach South African apartheid. After David Dunlap, a *New York Times* reporter covering City Hall, told me the Mayor had emphatically derided taking action against South Africa by saying there were many other bad countries, I went to see the Mayor and persuaded him to appoint a panel to report on "City Policy With Respect to South Africa." Getting the Mayor to do this took some work. But he was persuaded, as indicated by his announcement of the panel's creation with me as chair. The Mayor asked us to "make recommendations about how to fulfill the City's 'moral responsibility'" to lead the fight against discrimination, both here and abroad, by assessing the City's policy with respect to South Africa, "whose apartheid policies make it a 'pariah nation.'" Our report made many recommendations to combat apartheid, which the City accepted.²⁷

In 1983, John Conyers, Jr., then a congressman from Detroit, announced he would hold hearings in Harlem on police brutality in the City. The Mayor's initial instinct was to be combative and hostile. I suggested we convene a meeting of several black commissioners, deputy commissioners, and other high-ranking officials in the Koch administration. At the meeting, the attendees recounted occasions when they, or their children, or both, had been mistreated by the police either physically or verbally. After further discussion, Koch decided upon a more balanced and empathetic response which, while defending the Law Department against having a systemic policy of abuse, conceded that charges of illegal force represented a problem that "cannot be dismissed merely as one of perception," highlighting that he understood that "words do sting and words of prejudice sting worst of all." He went on to add that he was "'truly sorry' if he had offended anyone by not sufficiently emphasizing the need to recognize and respect the city's diverse racial and ethnic groups."²⁸

Another episode relating to the police and race took place at dinner at an Upper East Side Italian restaurant where Koch, Herb Sturz, and I shared at least two bottles of wine before getting down to business. After arranging for the dinner, I heard the Mayor was nervously asking aides, "Why are Fritz and Herb taking me to dinner? Do they plan to resign?" But by the evening of the dinner, the Mayor had figured it out. For, after dessert, he asked, "What black man do you want me to

26. See *Wilder*, 645 F. Supp. 1292.

27. See Frederick A.O. Schwarz, Jr., *Report of the Mayor's Panel on City Policy With Respect to South Africa*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 10 (2006).

28. See Sam Roberts, *Hearing on Police Cut Off in Harlem*, N.Y. TIMES, July 19, 1983, at A1; Sam Roberts, *Koch Defends Police at Hearing on Brutality*, N.Y. TIMES, Nov. 29, 1983, at A1.

appoint as police commissioner?”²⁹ The Mayor’s deduction was correct. We urged him to appoint Benjamin Ward, recounting the string of other government jobs Ben had done well, and our high personal regard for him. After a process that was unique in my experience—instead of holding a group discussion on the issue, Koch met with key advisors individually—Koch appointed Ben as the City’s police commissioner. This was a breakthrough appointment nationally as well.

People are often surprised when I describe Koch. Unlike the sharp, sometimes caustic public persona who was always quick with a quip, in his office he was a careful listener who could be persuaded after dialogue to change his mind. People find it particularly surprising that he even accepted pointed criticism—so long as it came from someone he regarded as basically loyal and motivated by the best interests of the City. Several times I spoke to Koch alone, saying that I thought his rhetoric on race was too often harmful. While a foe of discrimination and unprejudiced toward individuals, the Mayor generally failed to be a uniter or a healer. Twice, I communicated my thoughts on this to the Mayor in writing.

On January 3, 1985, I gave the Mayor a four-page note that we then discussed in his office.³⁰ I offered a number of reasons why his rhetoric on race was not “necessary, wise, good for the City or good for your historical reputation,” and said that “[y]ou will ultimately be judged by how much you did to bring the City together, not by whether one or the other remark can be defended.” The note concluded by saying:

So often weaknesses are the flip side of strength. Your enduring optimism and your determination to fight back are wonderful personal assets. They have been vital ingredients in your powerful and effective leadership of the City A[t] the same time, those characteristics make it very hard for you to admit to yourself—much less to others—that you bear some of the responsibility for a problem.

The Mayor called in Dan Wolf, the founder and former editor of *The Village Voice* and Koch’s long-time supporter, and asked him to read the memo. He did, and said he agreed with me. The note and similar conversations with the Mayor, including those leading up to the police brutality hearing discussed above, had some short-term impact. But Koch’s rhetoric on race too often continued to be divisive. As an advocate, advisor, and friend, my job was not just to write a good analysis and try to push the right intellectual and psychological buttons for persuasion, but to persuade with long-term results. Being right is fine. Being right and effective is happiness.

On April 25, 1988, more than a year after finishing as Corporation Counsel and when I was back at Cravath, I wrote the Mayor another critique of his rhetoric on

29. The new police commissioner would replace Robert McGuire who was leaving after five years. See *A Look Back; Commissioners Past and Present*, N.Y. TIMES, Mar. 31, 1996, available at <http://www.nytimes.com/1996/03/31/nyregion/a-look-back-commissioners-past-and-present.html>.

30. The note is discussed in Frederick A.O. Schwarz, Jr., *Edward I. Koch Administration Oral History Project: The Reminiscences of Frederick A.O. Schwarz, Jr.*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 28, at 178–87 (2006). A copy of the note can be found in Frederick A.O. Schwarz, Jr., *Memos to Mayor Koch on the Subject of Race*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 29 (2006).

race.³¹ This concerned his attacks on Jesse Jackson during the recent New York presidential primaries, including his statement that “any Jew” would be “crazy” to vote for Jackson. Recognizing that Koch’s remarks were not racist and that he had the right to critique Jackson, I contended that the way he voiced his points had been inconsistent “with two of [his] own best insights”: his general denunciation of single-issue politics, and “for one who often makes the case that people should be judged, promoted, elected or whatever as individuals—and not by their color (or religion or ethnicity), you seemed to base the campaign on the assertion that people do (and should) vote and think as group members, not as individuals.” I concluded with three points:

I do not mean to suggest a new Ed Koch, all sweetness and light, insipid, restrained, dull But without abandoning your style or your integrity you could have come out against Jackson without heightening tensions.

Sometimes, it helps in analyzing an issue to change the facts and then test the original assumptions. Suppose an opponent said “any black would be crazy to vote for Ed Koch.” Wouldn’t you not only question the merits, but also say that group stereotyping would not be acceptable?

I reject the idea put forward by some cynics that you welcome exacerbation of racial and religious tensions. But if your comments in fact had such an unintended effect, and you don’t act to address that, the cynics will only be strengthened.

Within six months of this letter, Koch asked me to chair what became the 1989 Charter Revision Commission (“Commission”).

The Commission was needed because the City’s government had been declared unconstitutional. The Board of Estimate—which had power over land use and contracts, and (along with the City Council) over the budget—violated one-person-one-vote by giving, at the most extreme example, an equal vote to the borough presidents of Staten Island and Brooklyn even though Brooklyn had seven times as many people. But our recommendations went far beyond abolishing the Board.³²

To get to a new charter, we had three hurdles to jump. First, we had to achieve the approval of the fifteen-member Commission. This we did by an eleven to four vote after an intense, grueling, and open process lasting eight months. Second, because parts of the City were covered by the Voting Rights Act, we had to, and did, obtain approval from the Justice Department’s Civil Rights Division. Third, we needed the approval of City voters. At the general election in 1989, the voters—by a

31. Frederick A.O. Schwarz, Jr., *Memos to Mayor Koch on the Subject of Race*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 29 (2006). The note is discussed in Frederick A.O. Schwarz, Jr., *Edward I. Koch Administration Oral History Project: The Reminiscences of Frederick A.O. Schwarz, Jr.*, in 1 SELECTED WRITINGS AND SPEECHES OF FREDERICK A.O. SCHWARZ, JR., tab 28, at 187–88, 313–19 (2006).

32. For a full recounting of the City Charter story and the details and sources for all items addressed below, see Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 723–1015 (1998). Eric Lane was the Commission’s executive director and counsel.

fifty-five to forty-five percent vote—approved what were the most radical changes to the City Charter since 1901. While the Commission addressed many charter topics, race was extremely important both to the substance we proposed and to the electoral strategy we pursued.

Shortly after accepting Mayor Koch’s invitation to chair the Commission, I urged him to fill vacancies to increase our minority membership from four (out of fifteen) to six.³³ He agreed. I believed a Commission with only four minority members could not appropriately explore the City’s government problems or acquire sufficient legitimacy to address them. This reasoning (which Eric Lane shared) was based on the City’s pluralistic population, the different life experiences reflected in the pluralism, the City’s historical discrimination in voting matters, the need to obtain approval under the Voting Rights Act, and the need to foster trust and acceptance among all groups in the City for moral, policy, and political reasons.

As we approached our job, we focused on centrifugal forces that threatened to unravel the fabric that held the City together. Among them, race was foremost. A dominant theme in the Commission’s work was enhancing minority political opportunities and increasing the likelihood of minority political participation. As we explained in our subsequent article, in 1989 we believed “[s]omething was seriously wrong with race relations in the City. A charter that failed to address race relations—but only to the extent charters can—would leave behind a ticking time bomb for the City, [for] racial tensions were high in 1989 and the years leading up to it.” This concern affected our work on government structure. In addition, the attitude the Commission expressed, including our language, goals, opinions (and even where we met), as well as the expression of our ideals, aspirations, and ability to listen, had worth of its own.

On the day we released the “Chair’s Initial Proposals” for reform, I also set forth what I saw as the Commission’s goals, leading with:

First and foremost, there is the goal of fair representation. The one-person-one-vote idea . . . is not just a formula; it is the heart of democracy. And fair representation also means the legal, but more importantly, the moral imperative that underlies the Voting Rights Act

The timing of the charter changes and their substance were influenced by, among other things, our concerns about race. As to timing, right after the U.S. Supreme Court’s March 1989 decision affirming the unconstitutionality of the City government,³⁴ the Mayor invited Lane and me to dinner at Gracie Mansion. There,

33. Frederick A.O. Schwarz, Jr., *Twenty-Five Years Later: Reflections on New York City’s 1989 Charter Revision Commission and on Charter Commissions in General*, 58 N.Y.L. SCH. L. REV. 95, 109 (2013–2014). In late 1986, even though the matter was still in the courts, at my suggestion, Koch had appointed a prior Commission (chaired by Richard Ravitch). By late 1988, that Commission’s two-year term had expired, Ravitch resigned to run for mayor, and three other members said they could not serve on a second commission. Once appointed, charter commissioners are independent. Absent “cause” for removal, they serve until the earlier of two years or reforms being placed on the ballot.

34. *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989), *aff’g* 831 F.2d 384 (2d Cir. 1987), *aff’g* 647 F. Supp. 1463 (E.D.N.Y. 1986).

the Mayor, accompanied by the new Corporation Counsel and the first deputy mayor, asked us not to place our recommendations before the voters at the 1989 election, when he hoped to be running for reelection. The Mayor added that the charter debate would be racially divisive and indicated he did not want or need that. I responded that we could not agree to delay because the votes of millions of New Yorkers were being diluted and this constitutional wrong should not be allowed to fester. I added that I would not lead a group that had a racially divisive impact.³⁵ Months later, at the end of the charter process, we also accelerated the election of the new City Council by shortening the terms of council members elected in 1989 from the usual four years to two. Dr. Roscoe Brown, Jr., a friend who was president of One Hundred Black Men, Inc.—and a Tuskegee Airman during World War II—drove home the importance of an accelerated election in an exchange with me at a public hearing: “This is the greatest change that has been made in New York City government in decades” and “more empowerment to minorities, the sooner . . . the better.”

Our changes to the City Council were indeed our most important reform. While we retained a strong Mayor, the City Council inherited many of the powers of the Board of Estimate in addition to its traditional legislative powers. In addition, we increased the size of the council from thirty-five to fifty-one members after extensive research showed that with smaller districts the council would better represent the diversity of the City. This proved to be correct as minority representation on the council dramatically increased.

Recognizing that poor areas of the City—which substantially correlated with its minority areas—had far more than their proportionate share of undesirable City facilities, and also got a lesser share of desirable facilities, we devised the “fair share” plan which required the City to disclose relative burdens and benefits before proposing land use changes. Another change based on the power of information required mayors to submit an annual report to the council analyzing the City’s “social, economic and environmental health” and proposing strategies to address problems revealed. The report had to include “generally accepted indices of unemployment, poverty, child welfare, housing quality, homelessness, health, physical environment, crime” and other similar matters. We sought to provide information to help reduce the likelihood of the City being divided into “two cities.”

In building our core coalition for the ultimate referendum, our political strategy began by building support among minorities and good government groups. We knew that unless our work was sensible and supported by a fair process, it would not prevail at the polls. Beyond this connection between good policy and good politics, we believed we could not win without substantial minority support. Without it, we would have lost support from others—particularly if the charter issues became racially divisive. Having support from minorities and good government groups also helped with our next

35. Moreover, from a purely political point of view, our chances of prevailing would be greater at a regular election than at a special election when turnout is lower and special interests have more sway.

priority: obtaining the endorsement of the *The New York Times* editorial board.³⁶ After these building blocks, we sought support from elected officials, including Koch, whose support would be helpful, and from whom a negative comment on fiscal responsibility or excessive bureaucracy would have hurt badly. We also sought support from mayoral candidates—David Dinkins (who became the City’s first black mayor) and Rudy Giuliani—and from other candidates including Claire Shulman, the Queens Borough President, and Ruth Messinger, then-candidate for Manhattan Borough President. We also wanted support from the *New York Daily News* and *New York Newsday* editorial boards. We succeeded in obtaining support from them all.

The value of listening to the voices and learning from the experiences of different races and ethnicities also affected my experience as chair of four different non-profit boards. Boards devoted to public policy issues should reflect America’s diversity. To do so is morally and politically right, and makes board service more fruitful and enjoyable. It is also the case that no matter how well a white person, for example, thinks he understands racial or ethnic issues, that understanding cannot be as nuanced or as rich as the understanding of someone from a minority group.

One board I chaired was that of the Fund for the City of New York, which had been established by the Ford Foundation to suggest creative proposals for the City government. By the end of my tenure as chair, half the board members were minorities. At Vera, we also succeeded in having a substantially integrated board. The one board where I failed on this part of leadership was at the Natural Resources Defense Council (NRDC). While the board vastly increased its female members, the needle barely moved on minorities, as has been true for environmental groups generally. In part, this was due to the pressure to raise money and in part because the environmental movement had not made sufficiently clear the importance of its substantive work to a large enough circle of Americans. The NRDC has done brilliant work winning battle after battle. But the environmental community is still losing the war because its national support is not as wide or deep as needed. In September 2014, the NRDC announced the appointment of Rhea Suh as our new president. Suh, a Korean American, who had a brilliant record on environmental issues as a foundation executive and in President Barack Obama’s Interior Department, was also the NRDC’s first president from outside its founders, and the first non-white to head a major environmental organization. The appointment and her talents and interests should be an important step toward widening our reach. Finally, as chair for a few years of Atlantic Philanthropies, a huge foundation that has given away billions of dollars, I supported Gara LaMarche’s program of “social justice” philanthropy, which focuses on those who are disadvantaged and vulnerable for various reasons including poverty and race.

At the Brennan Center for Justice at NYU School of Law, which I joined in 2002, we work on democracy, criminal justice, and liberty and national security. In this capacity, I have been fortunate enough to try three cases, argue in the Supreme

36. Lane persuaded me that this was essential because charter issues are complex, many voters need help in making up their minds, the voter participation rate on referenda is lower than at the top of the ticket, and referenda voters tend to include a high proportion of relatively careful newspaper readers.

Court, write two books, and work on many reports. All our work concerns justice, some of which is particularly focused on justice for racial, ethnic minorities, and other disadvantaged and vulnerable people. Such work includes challenges to laws that bar felons from voting after they have served their time, or that make it harder to vote by requiring identification that many poor people do not have. We have also challenged the mass incarceration system that results in America having only five percent of the world's population but twenty-five percent of its prisoners (who are disproportionately black and Hispanic). And we helped those groups plus American Muslim Arabs and South Asians by successfully pressing for an inspector general for the New York City Police Department.

VI. CONCLUSION

The civil rights movement was focused on blacks. But its teachings and its tactics have inspired movements of women and other “discrete and insular minorities,”³⁷ including Hispanics, Asians, Muslims, and gays and lesbians. It was a triumph and an inspiration for all Americans when we elected a black man as our president.

On November 4, 2008, after CNN announced that Obama had been elected as president, I sat sobbing on my living room sofa. Leaving aside occasional flashes of choking up, this was the first time I had really cried since my father died thirty-four years earlier. Two very different causes for tears spilling out. This time it was emotions ignited by King and the other heroes of the civil rights movement, all the hurts and harms that blacks had suffered, and my own caring about the issue. All this reached very deep within me.

By no means all who oppose Obama do so for racial reasons. But the ugly truth is that racism does underlie much of the hatred expressed toward him. America's racial challenges have not wafted away. Much has been done. There has been meaningful improvement. Nonetheless, much more must be done to reach the day when “all of God's children” can sing “Free at Last.” While not exclusively tied to race, it is also disturbing that, for the first time in American history, the gap between the advancement of children of the bottom fifth by income of American families and the children of the top fifth is increasing.³⁸

Throughout my life, I have been lucky to work at many wonderful places on many important issues. I am very grateful for all those opportunities. But no other issue has reached my emotions, my mind, or my faith in America's creed more than the need to address the harms that King exposed, and to achieve the freedom and fairness for all about which he dreamed.

37. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

38. *See generally* ERIC SCHWARZ, THE OPPORTUNITY EQUATION (2014).