

# **New Paradigms for a New Century: Rethinking Civil Rights Enforcement**

**National Council on Disability**

**National Council on Disability**

1331 F Street, NW Suite 1050

*Washington, DC 20004*

202-272-2004 Voice

202-272-2074 TTY

202-272-2022 Fax

[www.ncd.gov](http://www.ncd.gov)

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## **I. Purpose of this Concept Paper**

Based on the findings of the National Council on Disability's (NCD) major studies of civil rights enforcement, and the results of the Think Tank 2000 initiative, this paper sets forth recommendations for developing a more effective and inclusive civil rights enforcement strategy for our nation over the next decade. It offers a framework for the discussion at the upcoming Civil Rights Retreat aimed at identifying a core set of strategic actions for effective enforcement that address the agendas and experiences of the diverse cultural groups which make up the civil rights constituency.

In NCD's *Unequal Protection Under Law* report series, a number of overarching barriers to effective enforcement of existing federal civil rights laws are identified. These barriers include:

- ❑ Disability civil rights laws with enforcement provisions that are often narrower or more cumbersome than those of other civil rights laws;
- ❑ Slow implementation of disability civil rights laws among covered entities and a low priority on enforcement by most federal agencies;
- ❑ Disability civil rights laws often lack attorney fees provisions, putting litigation as a means of enforcement beyond the reach of many people with disabilities;
- ❑ Public education efforts that frequently do not employ a culturally competent outreach strategy; and
- ❑ The absence of coherent, innovative strategic action plans guiding the enforcement efforts of federal agencies.

Developing a set of strategic actions for overcoming these barriers will be a key objective of the Civil Rights Retreat. Participants in NCD's Think Tank 2000 also identified additional objectives that an inclusive civil rights agenda should meet:

- ❑ Developing leadership at national, state and local levels for sharing and enhancing knowledge and skills among people from diverse cultures.

- ❑ Maximizing the participation of civil rights organizations and the understanding of what is involved in building effective coalitions.
- ❑ Developing a "report card" for assessing the responsiveness of service systems and enforcement agencies to the needs of or input from people of diverse cultural backgrounds or other underserved groups;
- ❑ Creating multicultural and cross-disability training and advocacy tools;
- ❑ Establishing a steering committee or other mechanism to begin identifying common threads across civil, human, and disability rights agendas;
- ❑ Articulating a strategy for outreach to federal agencies to engage their support for leadership training of persons from underserved groups and for development and dissemination of culturally competent training materials on various disability civil rights laws; and
- ❑ Building a web site, list serve, fax and mail trees for collecting and disseminating educational, training, leadership development and coalition-building resources.

The need for dialogue, mutual respect and common goals among civil rights constituencies is widely understood. Greater potential than ever exists for making these goals tangible in the context of Think Tank 2000, the Civil Rights Retreat, and follow-up grass-roots community briefings and dialogues. Think Tank 2000 was aimed at identifying federal level strategies for achieving full implementation of civil and human rights of people with disabilities from diverse cultures. The Civil Rights Retreat will provide a forum for thinking through a set of strategic actions to enhance or overhaul federal enforcement (as needed) for greater effectiveness and better results.

Unless these opportunities are understood in relation to the nature of civil rights legislation and in connection with existing or proposed enforcement strategies for implementing these laws, the application of our new consciousness may prove elusive. Unless we can develop practical strategies for building a shared consciousness, the danger is all too real that awareness of the need for common agendas will not translate into action.

This paper therefore discusses a variety of existing, proposed and potential civil rights enforcement strategies from the vantage point of how they meet the needs and advance the goals of all civil rights constituencies. It attempts to identify goals and strategies that lend themselves to multicultural coalition efforts, and just as importantly, to methods for reaching out to entrenched opponents of civil rights enforcement.

Too often, the continued resistance and hostility of certain interest groups is accepted as inevitable. For instance, avenues may be readily available for convincing key sectors of business that effective civil rights enforcement is responsible civil rights enforcement, and strongly in their interests to define and support.

## **II. Background**

In 1996, the National Council on Disability (NCD) convened a national summit on disability policy in Dallas, Texas. Out of this historic gathering of leaders came a number of recommendations documented in NCD's report, *Achieving Independence: The Challenge for the 21<sup>st</sup> Century*. A central theme and leading policy recommendation coming out of the summit was a call for heightened enforcement and stronger implementation of federal civil rights laws. In response, NCD commissioned a series of studies on the implementation and enforcement of major federal civil rights laws. To date, the *Unequal Protection Under Law* series includes studies on the Air Carrier Access Act (ACAA), the Individuals with Disabilities Education Act (IDEA), and the Americans with Disabilities Act (ADA). Two studies remain: one on the Fair Housing Act Amendments of 1988, the other on Section 504 of the Rehabilitation Act.

As discussed in the next section, the completed studies disclosed that while tremendous strides have been made in advancing the equality of Americans with disabilities, a number of critical and recurrent barriers to the success of these statutes could be discerned.

Over the past six years, NCD has sponsored studies, meetings and discussions that have raised again and again issues arising from the failure of existing laws or outreach strategies to reach or fully engage many persons with disabilities from diverse cultural backgrounds.

The issues posed in achieving greater inclusiveness are not primarily technical or legal barriers. Nor do they arise from structural or organizational weaknesses in the administration of civil rights laws or from deficiencies in the scope or coverage of these laws themselves. Instead, these barriers both reflect and stem from our failure to make these laws meaningful in the lives of the full range of Americans with disabilities.

While considerable sums have been spent in public education and technical assistance, involvement of persons from diverse cultural backgrounds in the benefits of disability rights legislation or in the day-to-day advocacy necessary to support disability civil rights statutes has fallen short of our aspirations. With civil rights, as with services programs, the benefits do not appear to have been enjoyed equally by all segments of the population with disabilities. Nor should we be surprised if knowledge of or enthusiasm for these laws is less pronounced in some parts of our community than others.

Yet another realization underlying our efforts provides an essential backdrop to our considerations here. Civil rights enforcement is an issue encompassing the interests of many population subgroups. To address the issue of civil rights enforcement from the standpoint of disability, gender, race or ethnicity alone is not only short-sighted, but far worse, it is likely to create conditions under which groups with strong and enduring common interests are forced into competition for scarce resources and available attention.

Most people don't fall neatly into any single civil rights constituency. The vast majority of us fall into more than one, whether as women of diverse cultural backgrounds, as men with disabilities from diverse cultural backgrounds, or simply as persons whose cultural backgrounds encompass more than one historically underrepresented group. Even if we are only majority males with disabilities but live in an inner city or rural area, our situation and status is complicated: complicated beyond the foresight of those who devised our most important civil rights laws a few short years ago.

The recognition that most of us fall into more than one civil rights constituency group is borne out by demographics data. That is, disability, race, gender and national origin interact in almost every conceivable setting. For example, when we note that African-American children

are disproportionately likely to be isolated from the mainstream school population as a result of a "special education" student designation, are we saying something about the way society treats disability, about the way it treats race or both? Statutes may create neat jurisdictional categories, but they are categories which life increasingly belies.

Recognition of the need for outreach to people with disabilities from diverse cultural backgrounds is therefore nothing more nor less than acknowledgment of the makeup of the population. But we do not recognize or value most people's dual or even multiple group status simply for its own sake. Behind these demographics lies a key political reality, one that bears decisively upon the fate of any reform agenda or new initiatives in the civil rights enforcement arena.

The approaches people take, and the resources society devotes to enforcement of civil rights statutes reflect larger and ongoing political struggles. Our attitudes toward enforcement of laws are in large measure shaped by our attitudes toward the enactment of those laws. Those favoring their enactment typically support vigorous enforcement while those opposed often regard weak enforcement as a way of minimizing their impact.

Many factors make the sustained effort and attention required for effective civil rights enforcement difficult to achieve. The tremendous energy and mobilization brought to bear to enact milestone civil rights legislation are difficult to sustain in the bureaucratic, decentralized, and largely invisible world of day-by-day enforcement.

Yet all our civil rights statutes rely to a greater or lesser degree upon enforcement by administrative and executive branch agencies. From the regulations that implement and apply them, to the oversight and monitoring that characterize agency attention in the years to follow, to the procedures adopted for dealing with complaints--to all of these--the civil rights community is held in thrall because of the way our current laws are structured.

In order to ensure consistent energetic and effective enforcement, concerted efforts are required to draw upon the technical knowledge, political will, and personal commitment of many people. Given the number of statutes at issue, the variety of agencies involved in their implementation, the range of entities subject to these laws, and the endless variety of new



situations and novel issues technology, economic and social change can thrust upon us, vigilance and involvement by all who care is ever-more indispensable if our laws are to require the hopes and efforts that led to their adoption. To achieve effective enforcement, we must build the bridges that bring together people from every background to share the resources needed to meet this challenge head on.

Yet our efforts to build bridges have fallen short. How many champions have been lost to the disability rights cause because their cultural traditions, modes of expression or accent somehow devalued them in the view of the dominant majority, or somehow led to the perception that they had other agendas? How many leaders have been lost to traditional civil rights causes because the accommodations they needed to participate gave rise to the perception that they too were dealing with different issues or that the accommodations were just too much trouble? How many times has the aspiration for justice gone unappreciated because it expressed itself differently with an accent or an augmentative communication device, in halting English or in synthesized speech?

Far from being different or in conflict, the interests of the diverse groups making up the civil rights constituency have never been more united. Anyone doubting this need only look at the increasingly standard arguments made by opponents against all civil rights initiatives and in connection with all covered groups. Aren't the bitter denunciations of web site accessibility currently being directed against Section 508 of the Workforce Investment Act predicated upon familiar anti-affirmative action and anti "special rights" diatribes so familiar in divisive political campaigns over the past decade? Blaming the dismal state of school discipline on the enforcement of protections for children with disabilities to be educated in the least restrictive setting is reminiscent of claims that workplace morale and productivity is somehow undercut by enforcing protections against sexual harassment.

If the tide is left unchecked, if those who would strive for equality and justice cannot unite in the recognition of shared goals and common perils, then no group will escape in the end. None will be able to gather up enough crumbs to make any sort of a meal.

### **III. Findings of NCD'S Research Studies**

As indicated above, in addition to such major cross-community initiatives as Think Tank 2000, NCD has sponsored a number of in-depth research studies into the operation of three of our most important and representative disability civil rights laws. Because these laws are representative of all disability rights laws, the emergence of recurrent patterns and findings is extremely important. Moreover, these statutes, though written with disability in mind, have many structural features in common with, and share many of the legal precedents with other traditional civil rights statutes. As such, the weaknesses found in these statutes are not confined to their impact on the civil rights of persons with disabilities, but shed considerable light on issues faced by all civil and human rights advocacy and constituency groups.

#### **Major Findings**

All three studies found that enforcement of the laws is highly uneven--varying enormously in focus, vigor, method and style among and even within enforcement agencies. Where the statutes vest jurisdiction for enforcement in more than one agency, there is an almost total lack of coordination or joint planning. Among agencies responsible for investigating complaints and monitoring compliance, resources have been inadequate, both in terms of internal agency priorities and overall annual budget allocations. Further, agencies generally have not been in a position to consult with the disability community regarding what the priorities should be, for instance between case finding and thorough investigation of complaints, or between vindication of individual rights and concentration on patterns and practices.

Where enforcement authority has been vested in agencies with line responsibility for regulating particular industries, still other problems have occurred. These agencies (which never sought civil rights enforcement responsibility) typically have little expertise or sense of mission in this connection. Established relationships between regulators and the regulated, or agency self-image, have all too often restricted the possibilities of vigorous enforcement. And even when agencies have been disposed to enforce the law energetically, their lack of knowledge or technical resources has seriously limited their ability to do so.

## **Other Implications**

Although harder to document, the studies also seem to suggest that many agencies are keenly aware of the political nature of the enforcement process. This is borne out by a number of findings and confirmed by a variety of external evidence. For instance, regulations, whether developed through the standard process or through regulatory negotiations (reg-neg efforts), have typically taken far longer to promulgate than specified in the authorizing statutes. Few need reminding that nearly 4 years, plus direct action protests and civil disobedience (modeled on the civil rights sit-ins of a decade before) were required in 1977 for promulgation of the first regulations implementing Section 504. Similar delays have been common in other settings, including with ACAA and IDEA.

Once regulations are adopted, their enforcement is rarely accepted quietly. Those charged with violation of any of the statutes have been quick to cry out against the heavy hand of an oppressive federal government, and have frequently sought congressional oversight hearings or used their access to media to launch attacks against the unreasonable and burdensome nature of the statutes themselves, or against the excessive zeal of regulators. Under such circumstances, it is hardly surprising that regulators are cautious in their enforcement activities.

Of course opposition to disability rights invariably includes the obligatory expression of sympathy for the acknowledged needs and plight of the population in question, and usually expresses the opponent's shared commitment to the goal that the disability rights measure is attempting to accomplish. But the opponent parts company with the civil rights advocate by arguing against the need for any legal mandate; and arguing for the narrowest possible interpretation of the law, the restriction of opportunities for private litigation, the costliness of enforcement, and the counter-productivity of intrusive government oversight. With the exception of their expression of sympathy, the opponents of civil rights increasingly make the same arguments in non-disability contexts.

If only in their need to respond to these allegations, all civil rights constituencies have much in common. Systematic, community-wide efforts to respond to these contentions could be organized and could go a long way toward blunting the anti-civil rights drift of many media, as

well as improving public opinion about civil rights. Since the research suggests that enforcement agencies are politically cautious, we should remember that every political sensitivity cuts two ways.

Members of civil rights constituent groups are voters and taxpayers too. To the degree they can unite to tell their elected officials (local state and national) they want effective civil rights enforcement, and to the degree that as business persons, customers of business, friends or family members of business owners or managers, they can argue that vigorous enforcement of the law only helps those who honor it, they can achieve far more than any smaller isolated subgroups can hope to accomplish alone.

### **Elements of Effective Enforcement**

The three studies published thus far in NCD's *Unequal Protection Under Law* series offer key considerations for designing an effective and culturally competent enforcement strategy. Such a strategy should be:

- ❑ based on an enforcement plan that takes into account available resources and competing priorities;
- ❑ developed with the maximum possible degree of coordination, information and resource sharing (including technical assistance) among all the agencies involved;
- ❑ developed and administered with input and feedback from the population groups meant to be protected; and
- ❑ organized to facilitate the data collection and other oversight necessary for regular monitoring of enforcement activities to determine their consistency with the underlying enforcement plan, their responsiveness to feedback, and their success in reaching diverse cultural groups.

#### **IV. The Meaning of Enforcement**

Broadly speaking, "enforcement" includes all the actions undertaken by government in connection with the administration of a law once it has been passed. We mean it here to include also the actions of nongovernmental individuals and groups. Traditional dimensions of civil rights enforcement would include:

- ❑ proposal and adoption after public comment of implementing regulations;
- ❑ designation of individuals and entities to take various enforcement responsibilities;
- ❑ public awareness and outreach efforts;
- ❑ technical assistance to covered entities;
- ❑ compliance monitoring;
- ❑ receipt, processing and disposition of complaints of violation;
- ❑ record-keeping, and regular agency reporting to Congress and the Administration.

Let us see what the possibilities for collective effort are in relation to each of these.

**Regulations:** Even when we have no new statutes that need to be interpreted and applied, occasions are never far away to amend existing regulations, either in response to court decisions, statutory amendments, or evolving experience. The civil rights constituent groups should systematically review the implementing regulations for all key statutes to identify whether:

- ❑ they are clear as to obligations of covered entities, procedures and lines of authority;
- ❑ they allow for all the range of outcomes that the authorizing statutes permit;
- ❑ they include adequate provisions for notice to and involvement of the parties to a dispute in whatever adjudication or referral process occurs after the filing of a complaint;
- ❑ all dealings with the public, including with complainants and respondents, are fully accessible to persons with disabilities and culturally sensitive to people of varying backgrounds and experience (including alternative formats and native languages).

These factors are relevant across all constituent groups and can be addressed on an inclusive basis, as suggested in NCD's recent enforcement reports.

**Public Education and Culturally Competent Outreach:** The agenda for public education is a broad and inclusive one. The details of technical assistance do differ by population. (Assistive technology, for example, has no parallel in non-disability settings). For technical assistance, public education and outreach to be effective, they must reach and engage all the diverse cultural groups the law protects. It is all too easy to forget that some people communicate in different media or formats, in different languages or in different styles. No single approach can reach, let alone engage everyone. Leaving aside content issues for the present, it is enough to note that the various constituencies can work together to insist upon and ensure that the responsible government agencies and their nonprofit or private sector contractors have access to adequate informational resources to fulfill the clear requirements of the statutes.

Here the usual budgetary arguments against committing resources to technical assistance (TA) can be countered by presenting data showing the impact of effective TA on reducing compliance costs or preventing litigation. The civil rights community should undertake research designed to document the cost reduction and other benefits of technical assistance. Satisfied users can attest anecdotally but persuasively to the intangible benefits of technical assistance. Models can be developed to calculate the hidden costs of resistance incurred in attorney fees, litigation costs, and responding to complaints and claims that drain both material and human resources.

**Compliance Monitoring:** Because administrative agencies only know of the cases and issues brought to their attention, and because any sort of monitoring has acquired the unfortunate image of intrusiveness and governmental meddling, cross-community strategies must be developed that will allow systematic monitoring to be done either by nongovernmental partners or directly by the respective enforcement agencies. Subject to the establishment of the proper linkages, numerous models can be identified in the nonprofit sector. But even within government itself, examples of effective monitoring exist. These range from the various studies undertaken by the US Commission on Civil Rights, to the telecommunications industry accessibility monitoring

project (Market Monitor) established by the Federal Communications Commission under Section 255 of the Communications Act of 1996, to the federal agency information technology accessibility monitoring reports required from the Department of Justice under Section 508 of the Rehabilitation Act. These models should be studied for their applicability to the civil rights enforcement context.

One example of such compliance monitoring is the Department of Justice's assessment and reporting to the President and Congress on the accessibility of "electronic and information technology" used by federal agencies. This issue of the accessibility and usability of information technology by people with disabilities has acquired a civil rights dimension because Section 508 of the Workforce Investment Act requires such technology to be accessible to federal employees and members of the public with disabilities. Beginning later this year, violation of this accessibility requirement by a federal agency will be grounds for a complaint under Section 504.

Pursuant to Section 508, and independent of its role in civil rights enforcement or in defending federal agencies alleged to have violated the law, the DOJ monitors and reports on government-wide accessibility by surveying all federal agencies on a regular basis. These surveys provide a source of aggregate data about this important emerging civil rights concern, and over time, they will provide a means for comparisons.

**Case Finding:** Such ongoing compliance monitoring is particularly useful in identifying pattern-and-practices problems requiring attention, investigation or action. Again, in some cases the problems disclosed may relate to an industry practice that tends to exclude people with one disability from coverage, in another to the recognition of a governmental practice that restricts opportunities for advancement of women, in still another a rule that adversely impedes the opportunities of one or another nationality or ethnic group.

Even short of legislative change, collective efforts to negotiate with enforcement agencies can go a long way to ensuring the establishment and effective follow-up of monitoring efforts. These efforts can be designed readily in a way that is fully voluntary, respectful of privacy, and non-burdensome within the meaning of current legal provisions bearing upon the impact of data-collection activities on small entities. One of the chief obstacles to such an effort is the absence

of data needed to identify adverse practices or emerging enforcement needs. One major element of the web site proposed by Think Tank 2000 could be the development of uniform reporting tools to assist the broad civil rights community in helping the government to better address these problems. A civil rights data clearinghouse might represent the fullest expression of this idea.

**Case Adjudication:** The problems documented in NCD's studies are assuredly not limited to complainants with disabilities. In addition to the due process review of regulations already recommended, the communities must unite in insisting that agencies have the resources to evaluate and adjudicate complaints and perform all related activities within the time frames specified by the applicable statutes. This demand can be supported through litigation if necessary, particularly in light of the irreversible harm occurring to persons whose right to sue may be lost due to statutes of limitation even while administrative agencies are still reviewing their claims. Moreover, a prompt claims adjudication process is manifestly in the interests of respondents and defendants as well, who want nothing so much as an end to the uncertainty and doubt that unresolved complaints create.

It should not be difficult to galvanize significant local governmental and private sector support for appropriations that do no more or less than make the already specified statutory time frames meaningful. The effort is made even more promising by the fact that many of our key civil rights statutes are enforced by the same agencies irrespective of constituency. The EEOC's role in respect to employment discrimination, and the Justice Department's in connection with public accommodations illustrate such multi-constituency jurisdiction. Surely therefore, resources invested in their complaint processing capabilities should help all involved populations.

**State Agencies:** Working in partnership with the Federal government (or on their own in the enforcement of state statutes) many state agencies play a role in securing the civil rights of members of the constituent groups. Comparatively little is known about either the effectiveness of state laws or about anomalies in their makeup, such as provisions allowing the award of damages or attorney fees to one constituency group while forbidding them to another. By pooling resources, such data can be collected systematically, and where administrative



weaknesses or statutory anomalies are revealed, coalition efforts aimed at either legislatures, governors or responsible state agencies can go much further than isolated efforts by any single subgroup. Clearly, in cases where a state law extends protection to the civil rights of some key constituencies but not others, coalition efforts can be useful in broadening the scope of the law.

A state civil rights database or clearinghouse like the one suggested above for tracking federal enforcement, could prove valuable in illuminating the strengths and weaknesses, the opportunities, pitfalls and needs for reform existing under various state laws. Many other opportunities for collective action could be cited, including those in some unlikely areas. The banking and financial services industries are good examples. People with disabilities have the right to expect that banks make their facilities and services (including ATM machines) fully accessible and usable. Members of racial and nationality groups have the right to expect that credit and retail banking services will be made fully accessible to them. How much more effective an alliance of all these groups might be, pursuing the common goal of equal access to equipment and services, as opposed to each group separately?

## **V. The Mobilization Process**

The opportunities for sharing goals and resources as discussed in the previous section are contingent upon a number of things. Success in bringing about change depends on people's availability and commitment. When considering the resources of those who oppose civil rights and those who simply resent being told what to do (whether or not it is right), and the impact of the vast residue of indifference and superficial information that exists in the culture at large, it becomes clear that the struggle for civil rights, in addition to being a never-ending one, is highly labor intensive. The struggle requires the sustained commitment of many, many people. Yet all too many indications exist that even among core members of the civil rights constituencies, awareness of the opportunities, commitment to the effort, and belief in the results may be far less than we might hope. And ironically, the more one knows about the current enforcement process, the less likely one is to have faith in it. In a society whose rank and file members seem less and less interested in anything resembling politics (that is participation in the electoral process and in

organized efforts to influence the activities and decisions of government officials and agencies), what can be done to energize the grass-roots members of civil rights constituencies to actively and jointly pursue the systems-change, reform and oversight needed to secure the hard-won rights granted by law?

This question has no easy answers but is a vital consideration, if only because new enforcement strategies will require new and sustained energies. Galvanizing and mobilizing all affected constituencies for action is crucial to fulfilling the promises of the law. This reality strongly suggests that the work of the upcoming Civil Rights Retreat must attend to both the substance and process of creating public awareness leading to informed action. People will need to be educated about what these laws mean and what they can do; about the intricacies of how they do and don't work; about the strategies available for making them effective; and, about the need for documentation to create a powerful and irrefutable record.

But without motivation, even such education may count for little. Unless outreach is done in a way that unites new activism with reciprocal understanding and mutual commitment among constituent groups, the results will be disappointing. Accordingly, outreach must include not only efforts to reach rank and file members of all groups, but also measures designed to bring together people who may have little or no previous knowledge or even sympathy with one another's aspirations and frustrations. Only structured contact and discussion can lead to the personal awareness and experience of others that is the basis of human fellow feeling.

How can this be done? Facilitated discussion including members of all covered constituencies should be organized in communities around the nation. These should focus on descriptions by members of each population to the others of the barriers they face and of the aspirations for civil rights they hold. These discussions should involve efforts to address any underlying resentments that may be all too common in our culture where competition for victimization sometimes seems the best access route to resources and attention. Furthermore, they should be designed to develop agendas, strategies and emphases that combine the various civil rights objectives into workable programs all can support. Also required from time to time will be the selection of agenda items for short-term focus that are more central to the needs of one constituency than another. If the proper baseline of interaction and cooperation has been

established, and if initial results pursuing joint objectives have been sufficient to generate optimism and confidence, then some alternation of focus should in due course be possible so that the particular needs of each constituency receives special attention in turn. Ideally, leaders and potential leaders who come from more than one civil rights constituency can be identified and encouraged to play key roles in bridging cultural and informational gaps.

## **VI. Models of Coalition Building**

Shared agendas have brought together diverse groups of people on many occasions. The disability community comes to coalition-building with considerable experience, both in terms of its own internal diversity and in terms of linkages to "outside" interests and communities. Achievements such as enactment of the ADA came about through an unprecedented collaboration among groups from across the disability spectrum. At the same time, the ADA would not have been possible without the support of major non-disability constituencies, including the traditional civil rights community and major sectors of the business community.

Likewise, the traditional civil rights community has vast experience in building alliances to achieve broad and important goals. Today in public policy we can point by way of example to a number of initiatives that demonstrate the potential for the melding of civil rights agendas into common purposes.

**The Digital Divide:** By "the digital divide" we refer to the disparity between technological haves and have-nots. What makes this a powerful cross-cutting issue is that denial of opportunity affects so many different kinds of people, and recognition is rapidly growing of the common barriers they face. Among those most affected are people with economic disadvantage including persons from diverse cultural communities; underserved inner city and rural populations (that is people living in areas which no one much wants to "wire up"); and, people with disabilities whose opportunity to participate in the information society is limited by different, but by no means less serious, factors.

In the digital divide initiative, these diverse groups are coming together in order to secure the benefits of computer access and the Internet to all. The model bears study for the techniques

that show promise in helping people work together to formulate both a common frame of reference and a shared vision of action. Other like initiatives can also be found, many of them also spurred by the new realities created by technology. For instance, the principle of universal service, once understood as our nation's commitment to making basic telephone service available to every community in the country, regardless of income, now includes access to the telephone system for people with disabilities as well.

These and comparably inclusive initiatives need not be further detailed here. It is enough to urge that the Civil Rights Retreat participants use their experience to identify other examples of cross-platform work and to extract the organizing principles, educational and outreach techniques, goal-setting strategies and motivational tools contributing to the viability of these efforts.

As important as such examples may be, we must be careful about the lessons we draw from them. The strategies and techniques of effective action vary with the nature and context of the problem, and the results sought. That is why, for the retreat to achieve its goals, the strategies identified must be measured against the particular barriers to be overcome and the specific issues faced today. To facilitate this process, let us now examine some cutting-edge civil rights enforcement techniques, with a view to describing how each lends itself to united efforts. Let us also consider how the embrace of each would influence the kind of organizing and communication that needs to take place.

## **VII. New Civil Rights Enforcement Strategies**

As NCD's three research studies strongly suggest, traditional enforcement models, encompassing federal regulation, agency oversight and claims processing, have not worked. The reasons why are amply documented in the reports. What cannot be documented is whether the methods, the money, the people or a combination of all three are responsible for the deficiencies. In other words, if the agencies were staffed by people who believed passionately in civil rights as the primary mission of their work, and if appropriations of funds were adequate for what they regarded as full staffing and prompt action, would this traditional model, which we shall call the

executive branch/administrative law model, work? Is it working in other civil rights venues? Is it better for enforcement of some kinds of rights, say to accessible public buildings, than for other kinds, say freedom from subtle but pervasive discrimination in employment?

These questions go beyond the scope of this paper. While it is important to strengthen enforcement along all the traditional lines the law allows and history endorses, it is equally imperative to look to new and innovative enforcement strategies. In particular, we need to look for enforcement strategies that maximize stakeholder involvement and the role of the community in the enforcement process.

**Alternative Dispute Resolution:** In all areas of civil rights, and indeed in almost all areas of potential conflict between the federal government and private entities in non-criminal, legal contexts, federal law and policy reflect an increasing preference for alternative dispute resolution (i.e., mediation and negotiated settlement) over litigation. In civil rights, this preference has resulted in enforcement agencies such as the Department of Justice relying increasingly on mediation in the civil rights context. It has also led to changes and new patterns under a number of other statutes.

But as the NCD studies make clear, the way alternative dispute resolution is being implemented is not necessarily consistent with the spirit of the underlying laws. In the civil rights enforcement process, mediation may be used as an alternative to formal investigation and adjudication of individual complaints of discrimination. When determinations of discrimination have been made, out of court negotiated settlements are sought wherever possible as an alternative to litigation. As used in the enforcement process, the main goal of both mediation and out of court negotiations, is to terminate complaints or lawsuits on terms voluntarily agreed to by both parties.

As implemented in the civil rights enforcement context, mechanisms for ensuring that mediation agreements meet the minimum requirements of the law generally are not in place. Nor are mechanisms for ensuring that mediation does not serve to disguise pattern and practice discrimination by a covered entity that requires aggressive enforcement action. The adoption of guidelines for mediating civil rights claims, such as the ADA Mediation Standards, would be an

important step toward a mediation process fully compatible with the objectives of civil rights enforcement.

By the same token, out of court settlement agreements negotiated between a federal agency and a covered entity may not produce the rigorous protections against future acts of discrimination that are the goal of litigation. These concerns must be addressed to ensure that alternative dispute resolution does not inadvertently result in obstructing the law's intent.

Another option to be considered to ensure fair outcomes from mediation is to mediate claims through panels consisting of representatives from the consumer and the respondent communities --in other words by peers of those whose rights, and in many cases whose futures, are being decided. Some may suggest that people from the stakeholder communities are unsuitable as mediators, but the experience with school-based conflict resolution programs around the country suggests that just the opposite may be the case. Complaints filed under IDEA are being successfully mediated in communities around the country by parents and attorneys trained as mediators. The possibilities should in any event be explored, for if community involvement proves as viable in the civil rights setting as it appears, mediation could be a tool for generating new interest and commitment at the grass-roots level to a dynamic civil and human rights agenda under law.

For example, potential of alternative dispute resolution as a tool for public participation in policy-making around enforcement has not been fully explored. There needs to be a mechanism for ongoing public participation in formulating, implementing and evaluating enforcement strategies that goes beyond regulatory negotiations. Such a mechanism might involve panels consisting of stakeholders from the federal enforcement agencies, civil rights groups, businesses, and community-based organizations, trained in accordance with the governing law, the principles of negotiation, and knowledgeable about the issues and concerns of their communities around enforcement. Facilitators well-versed in the issues and trained in the relevant law would guide the panels in framing the issues, policy options and recommendations for enforcement. A vibrant civil rights coalition reflecting the interests of all those affected, would be in a far stronger position than any one subgroup alone to negotiate with the Department of Justice, the Department of Education, the Equal Employment Opportunity Commission

(EEOC), the Department of Transportation, etc. and opposing stakeholder groups for systemic reforms in the enforcement process overall.

**Advanced Certification:** The ADA contains a provision allowing Justice Department certification of state building codes as complying with the requirements of the Act. Such certification creates a presumption, a rebuttable presumption to be sure, in favor of the legality of the state's action when following that building code.

The ADA also contains a provision that has immeasurably contributed to understanding and awareness when taken seriously and used for its intended purpose though it has vexed many public sector entities covered by Title II of the law. This provision is the requirement for ADA self-studies or self-assessment of an entity's level of compliance. What if provisions like advanced certification and self-assessment could be combined to create some sort of certification regarding commitment to civil rights and certifying that the practices reviewed are consistent with the goals of equal opportunity and full inclusion for all. Ideally this would include a community-based, ongoing audit process.

Such a procedure could create new incentives for business and government to extend themselves in new and better ways to work with civil rights constituencies and to ensure their compliance with the law. Close and ongoing contact between organizations that agreed to participate in the process and the civil rights community would be required, and some tangible incentives for participation would need to be provided. No blanket immunity from legal process should ever be offered, but much confidence and mutual goodwill could be generated without conferring absolute immunity from suit. For example, entities that implement agreed-upon self assessment (civil rights auditing) tools on a regular basis could be offered time-limited but renewable certificates of good practice which, much like the state building code certification process under the ADA, would give rise to an initial presumption in favor of the legality and propriety of their actions.

Again, such an approach taking root and form at the community level could have many subsidiary benefits as well. It could bring members of otherwise marginalized or overlooked groups into contact with employers and with public accommodations in positive ways that have

not typically occurred before. It could create meaningful new roles for activism and involvement, while giving well-intentioned companies and government agencies an opportunity to learn more and to act responsibly without fear or the need to adopt a bunker mentality. Such a structure could also get to the root of many disputes, especially those involving patterns and practices, by identifying and addressing the problems long in advance of the time they would otherwise be noticed, and under circumstances where resolution is possible without recourse to an adversarial posture.

Many variants exist for such relationships and arrangements, and there are many names to describe them. One interesting variation, particularly useful for entities that in the past have been found guilty of discrimination, is the inclusion of a civil rights representative or advocate as a regular participant in the organization's internal policymaking or grievance procedure.

**Enforcement Targeting:** To the extent that enforcement resources are likely to remain somewhat limited for the foreseeable future, a question naturally arises concerning how these resources can be targeted for most effective and instrumental use. In an era when mandated record-keeping of any kind is more and more under pressure, when statistical evidence plays less and less of a role in establishing prima facie evidence of discrimination, when changing judicial interpretations (even of seemingly settled principles of law) create a host of new issues and significant uncertainties, when new technological frontiers place the question of what constitutes equal access into the domains of cyberspace--at a time when all these developments are occurring, the question of how monitoring and enforcement resources are to be prioritized becomes both more pressing and more complex than ever before.

Once again, nothing lends itself to the efforts of a civil rights coalition more than a systematic effort to engage the major enforcement agencies over these very questions. Only through such efforts will answers emerge to questions such as what is the right balance between technical assistance and monitoring, or the correct allocation of resources between adjudication of filed complaints and aggressive case finding, or the proper balance between the vindication of individual rights through case-by-case adjudication and the attempt to identify practices and trends that will warrant attention because of their implications for entire groups.



What can be said with certainty is that the grass-roots civil rights communities have had little or no input into the enforcement policies and practices of the federal oversight and implementing agencies. This must and can change. The variety of enforcement strategies disclosed in different agencies under the same laws reflects the enormous discretion agencies have in this area. Key resource allocation decisions are being made every day. While they are impacted by the total amount of available resources, they are in many significant respects independent of budgets. Rather they reflect turf issues, philosophies, established relationships, and many other factors as well.

Coming together as a community, the civil rights constituencies must identify the major goals that enforcement should pursue. Perhaps these will differ according to the issues. For instance, vigorous enforcement, including the levying of fines in all instances where possible, might be considered appropriate in cases involving employment discrimination, whereas training and technical assistance might be more effective strategies for eliminating barriers to public accommodations or public services. The community needs to work together to thrash these out, then undertake negotiations and discussions with the responsible agencies in a cooperative spirit, but with the quiet strength that comes from unity and commitment.

### **VIII. Legislative and Judicial Strategies**

Although much can be accomplished by direct negotiation with the executive branch of government and with a number of independent agencies, there are points beyond which the role of Congress and of the courts cannot be ignored. If the Supreme Court eventually holds that Title II of the ADA is invalid, as it has already held that subjecting state government to the requirements of the Age Discrimination in Employment Act (ADEA) is invalid, there would be no way for the Department of Justice to modify its enforcement practices in relation to Title II. There would be nothing there to enforce. Depending upon the grounds of such a decision, it might or might not even be possible for Congress, without a constitutional amendment and by statute, to revive the law.

**The Congress:** Congress is heavily implicated in all our day-to-day dealings around civil rights. If Congress chooses to tie various Federal expenditure programs to compliance with civil rights norms, the results are potentially very different from situations in which moneys are provided to states with few or no strings attached. And if appropriations for agency enforcement staff are too small, then even the options for independent enforcement-policy formulation are severely inhibited.

This being so, how can the civil rights community of persons with disabilities, of women, of people from diverse cultural and racial backgrounds influence federal bureaucracies toward greater recognition and support of their aspirations? To this question the answer that must be given is: a lot and not very much.

Congress offers important opportunities for advocacy and progress. Efforts must focus on making clear that broad constituencies are pressing for reform, on making the case that sensible enforcement policies are a separate issue from one's original support for or opposition to federal civil rights laws, and on enlisting the support of those who might normally be considered opposed to enforcement reforms, such as representatives of business and local government, who can testify from their own experience how civil rights has been good for them, maybe even benefitted their bottom lines. Surely, many such cases touching upon all disability and traditional civil rights subgroups, can be identified and brought forward.

All the civil rights constituencies are fortunate in having experience and skill in negotiating with Congress. None are neophytes in this regard. Provided each can effectively mobilize its constituents and supporters by describing the realities of working with Congress as it is today and not 50 years ago, it should be possible to bring to bear a more focused and instrumental activism than ever before.

**The Courts:** With regard to the courts, the careful selection and skilled prosecution of appropriate test cases represents, today as it has for the past 65 years, the best strategy for engaging the judicial branch on the side of equity and justice. Today's litigation must be undertaken with full regard to the new legal, political and economic realities. It may need to concentrate more on state law and state courts; it may need to educate judges about technology,

develop new analogies to better describe the benefits and harm to individuals and society resulting from certain practices, and accomplish a host of new objectives.

Follow-up will also be an increasingly important matter. For as successful litigation under Medicaid in the area of health care rights for the poor has demonstrated, follow-up by implementing and administrative agencies is often the missing link in the translation of individual victory into communal gain.

The civil rights community must assess the legal resources available to it, including opportunities for involvement of the private bar and of the public interest legal sector. Questions regarding the emphasis to be placed on specialized versus general expertise, on the development of technical assistance and training resources for the bar, on the identification of case-finding and case-funding mechanisms will also all be crucial to the outcome in the courts.

## **IX. The Building Blocks of a New Community**

Throughout this paper we have taken the potential for a new civil rights community as the starting point for our discussion. A number of suggestions have also been made for how such a community can be created and sustained. Short of an architectural blueprint (which if offered here would in any event disenfranchise those who will be the eventual builders), a few observations may nevertheless be in order.

First, a shared consciousness is the indispensable baseline and key first step for concerted, coordinated action. It is important to foster the consciousness among advocates that they are working on behalf of, not merely their group, not so much even on behalf of any particular issue of immediate concern, but for the sake of a vision of what an open, just and inclusive society can be. In this 21st century, as the population ages, as people of diverse ethnic and cultural backgrounds become themselves a majority, as the number of people with disabilities rises in proportion to demographic change and technological and medical advances-- in such an era, the agenda of inclusiveness is the only agenda that makes any possible sense for this country. As such, those who proudly and insistently assert this agenda, far from being put

on the defensive or marginalized, should know that they speak not only for themselves, but surely for a vast and growing number of relatively silent but thoughtful and well-intentioned citizens. The task of their new consciousness therefore must be to communicate with the public, and to negate the attempts of others to marginalize and trivialize them.

But such consciousness and any associated optimism and goodwill are by no means enough. Pain and anger are not always easy things to share, and to the extent that the new consciousness requires the submersion of one's own frustrations, it is not always an easy thing to do. It is aided by nothing so much as by contact, shared experience and reciprocal knowledge. As indicated earlier, every effort to bring together people from all the involved groups, formally and informally, will be rewarded in shared and mutual understanding and in heightened respect.

Consonant with the building of community must be the fashioning of specific objectives, the development of organizational structures for decision-making and coordination, and the development of methods for bringing the new unified consciousness into the service of agreed-upon goals. These steps must be accomplished from the ground up, through the involvement and input of those who do the work and make the commitments. Moreover, an emphasis on communities, with much opportunity for local decision-making, is critical to maintaining enthusiasm and effort.

In the matter of coalition building, the civil rights community may well draw some lessons from the business sector, particularly as to what happens when short-term agendas come into conflict, or when the question of whose agenda should be pushed first becomes an issue. It is worth noting in this regard how, politically, even in the face of issues that ought to pit one sector of business against another, such as whether to allow taxation of the Internet, business groups maintain a relatively high degree of unity. While there are certainly groups who regard the tax-free status of e-commerce as a form of unfair competition with brick-and-mortar trade, there seems little major controversy over this point. To the degree that there is controversy over whether to extend Internet exemption from taxes, it appears to derive from the fear of state governments that they are losing significant revenues from commerce taking place within their borders. One might suppose the established store-based retailing sector would more strongly

support taxation of e-commerce, or in the alternative seek comparable abatements. Why do they not? Is every Mom and Pop corner store planning to start selling on the Web?

We do not propose to solve the mystery here, except to say that they have good, practical, long-term reasons for their positions. Our community has come a long way in the era of what may be called identity politics. It is time now to don a larger mantle, the broader identity of those who seek and can lead a meaningful new vision for America at the dawn of a new millennium. Nothing less will inspire enough people to do enough hard work; nothing less will carry us through to success.