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## NOTE

# USING DISCOURSE ETHICS TO PROVIDE EQUALITY IN EDUCATION FOR AFRICAN-AMERICAN CHILDREN FORTY YEARS AFTER *BROWN v. BOARD OF EDUCATION*\*

### I. INTRODUCTION

Jurgen Habermas' theory of Discourse Ethics proposes a forum of political discussion that seeks to recreate community and national solidarity.<sup>1</sup> Habermas conceived of Discourse Ethics as applying to a world with diverse views of the *good* and the *just*.<sup>2</sup> The theory acknowledges the existence of diverse communities and traditions, and the ways in which this diversity forms people's opinions.<sup>3</sup> As a result of this diversity, no single tradition can serve as the foundation for a common sense of justice for society.<sup>4</sup>

Discourse Ethics is a model of normative justification that seeks to include the beliefs and opinions generated by social diversity. The interests and struggles of each interest group are reflected in the social norms offered by the discussion's participants.<sup>5</sup> Discourse Ethics involves a search for common ground so that people can establish political relations among themselves instead of relations of force. It addresses one of the central issues of modern politics: "the need to live together while preserving difference."<sup>6</sup>

In particular, Discourse Ethics is appropriate in a very specific but common conflict situation: when the laws or norms which have been guiding society have either become inequitable or have never included an equitable solution.<sup>7</sup> At this point, Discourse Ethics helps society face the question of how to continue.<sup>8</sup>

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<sup>1</sup> Brian Walker, *Habermas and Pluralist Political Theory*, 18 PHIL. AND SOC. CRITICISM 81, 86 (1992).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 103 (Christian Lenhardt et al. trans., MIT Press 1990).

<sup>6</sup> Walker, *supra* note 1, at 86.

<sup>7</sup> HABERMAS, *supra* note 5, at 103, 204.

<sup>8</sup> *Id.*

When the validity (normative rightness) of a social norm has been questioned, social actors have three alternatives, they can: switch to strategic action;<sup>9</sup> . . . break off all discussion and go their separate ways; or . . . continue to interact practically by entering into a critical discussion (practical discourse) about the validity of the norm in question.<sup>10</sup>

Discourse Ethics remedies situations where the norms of a particular community no longer serve to ground its institutions and practices.<sup>11</sup> Discourse Ethics includes institutional social relations, the legal and political system, and particular laws and rights in our maintenance of democracy. As a result, Discourse Ethics provides a way to adjudicate conflicts of morality and political justice.<sup>12</sup>

When the Warren Court deliberated the issue of racial segregation in *Brown v. Board of Education*,<sup>13</sup> it attempted to remedy two centuries of legalized racism.<sup>14</sup> *Brown* opened many doors, providing educational opportunities previously inaccessible to African-Americans, and advancing the integration of African-Americans into mainstream society through the classroom.<sup>15</sup> Unfortunately, "increasing racial polarization and residential segregation in America have put the integrative ideal to the test."<sup>16</sup>

<sup>9</sup> Habermas draws a distinction between strategic and communicative action. The principles of Discourse Ethics are communicative because its participants have decided to solve their problems through a consensual coordination of efforts. When an individual acts strategically, he/she "seeks to influence the behavior of another by means of the threat of sanctions or the prospect of gratification." HABERMAS, *supra* note 5, at 58.

<sup>10</sup> Jean Cohen, *Discourse Ethics and Civil Society*, 18 PHIL. AND SOC. CRITICISM 315, 316 (1992).

<sup>11</sup> HABERMAS, *supra* note 5, at 133-34.

<sup>12</sup> Cohen, *supra* note 10, at 318. One example of the conflict between morality and political justice can be seen in the debate concerning the legality of abortion.

<sup>13</sup> 347 U.S. 483 (1954).

<sup>14</sup> Richard Cummings, *All-Male Black Schools: Equal Protection, The New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725, 747 (1993).

<sup>15</sup> Drew Days III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 74 (1992).

<sup>16</sup> *Id.* From the moment *Brown* was handed down, whites committed to racial separation began their resistance. *Id.* at 53 (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)). Also, demographic changes since 1954 have produced a pattern of de facto segregation, which has made desegregation difficult in certain areas. *Id.* White flight from racially mixed residential neighborhoods created segregated school districts. White families moved away from urban areas and moved to neighboring white suburban areas. Miriam Paula Gladden, *The Constitutionality of African-American Male Schools and Programs*, 24 COLUM. HUM. RTS. L. REV. 239, 249 (1993) (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)).

Since the 1960s, the enrollment of African-Americans in predominantly white institutions of higher learning has increased. Although enrollment in white institutions has been a stepping stone for launching African-Americans into the professional world, while on these white campuses, African-Americans have to endure social isolation and a lack of faculty support. In addition, these same institutions have failed to graduate

From an early age, African-American students must endure psychological and emotional stress in order to enjoy the benefits of predominantly white educational institutions which are rich in resources, academic programs and important alumni networks.<sup>17</sup> In addition, African-Americans have discovered that integration into the white classroom requires assimilation and a rejection of African-American values and culture.<sup>18</sup> The gravity of these problems has led some African-American communities to criticize plans which require busing their children into white school districts. Some African-Americans suggest that the federal funds allocated for these busing programs would better serve the aim of educating African-American children if utilized within their local schools.<sup>19</sup>

After witnessing the effects that court-imposed desegregation has had on African-American children, many African-American parents and educators question the continued implementation of *Brown* and the desegregation precedents. Today, segments of the African-American community fight to maintain segregated schools, which support the "separate but equal"<sup>20</sup> doctrine that *Brown* sought to overturn. Some members of the African-American community view this new political stance as a blasphemous disregard for the Civil Rights Movement, while others see segregated schools as a necessary change.<sup>21</sup> The notion of self-imposed segregation caused one African-American activist to remark, "I can find no rationale for bringing any form of segregation back into schools."<sup>22</sup> In response, a Maryland educator replied, "Our children are dying and [middle-class black folks are] talking about gains. What gains have [we] made as far as inner-city children are concerned?"<sup>23</sup>

In 1990, the public school board of Detroit, Michigan converted three of its existing public elementary schools into all-male black academies.<sup>24</sup> This move

and retain African-Americans on a level comparable to white students. Days, *supra* note 15, at 71-72.

<sup>17</sup> Days, *supra* note 15, at 73.

<sup>18</sup> *Id.* at 74.

<sup>19</sup> Cummings, *supra* note 14, at 747.

<sup>20</sup> Plessy v. Ferguson, 163 U.S. 537 (1896).

<sup>21</sup> For example, Kenneth Clark, architect of the *Brown v. Board of Education* decision, said, "This separation . . . seems to me a flagrant and certainly not even subtle violation of *Brown* . . ." Janet Wilson, *Expert Dislikes All-Male Schools Consultant Say They Harm Black Students*, DET. FREE PRESS, Feb. 24, 1992, at 1B. An African-American resident of Detroit stated, "Segregation crippled black folks over the years and a lot of people gave their lives to get rid of it . . . I think it is a mistake for blacks to legitimize it." Brenda J. Gilchrist, *All-Male Schools Anguish Civil Rights Veterans*, Det. Free Press, Sept. 3, 1991, at 1A.

<sup>22</sup> Gilchrist, *supra* note 21, at 1A.

<sup>23</sup> *Id.*

<sup>24</sup> One response to the crisis facing African-American children has been the creation of the all-male black school ("AMBS"). AMBSs are based on two premises: that young black males need a special, exclusively black, educational environment to survive, and that the curriculum of such an institution should be afrocentric. Cummings,

created a huge emotional dispute within the African-American community of Detroit. Some members of the community, while in agreement regarding the need for segregated schools, objected the 'Academies' exclusion of female students.

The African-American community of Detroit reached a point where its internal disagreement temporarily hindered its progress. The communal consensus momentarily collapsed. Although the African-American community mutually agreed that the Detroit Public School System was not serving its best interests, its opinion as to how to achieve that goal led to a disagreement that resulted in litigation. The community's inability to reach a mutual agreement prompted one community member to place this decision in the hands of the legal system. This pursuit of a legal ruling limited the community's ability to make an autonomous decision.<sup>25</sup> In situations where traditionally disempowered communities encounter legal roadblocks, attorneys and public interest advocates need to help these communities settle conflicts through a cohesive effort. This Note proposes that Discourse Ethics serve as a form of alternative dispute resolution and political empowerment in situations where group solidarity is threatened.

Part II of this Note presents the difficulties that the African-American community faced while trying to establish the AMBS program in Detroit. Part III examines the basic principles of Discourse Ethics and analyzes its theoretical soundness. Part IV suggests how counsel for both parties could have used the principles of Discourse Ethics to build a consensus within the Detroit community and avoid litigation. Finally, this Note concludes that, if utilized correctly, Discourse Ethics can earn a place amongst the various forms of Alternative Dispute Resolution, thereby helping this country mitigate its litigious nature, conserve judicial resources, and legitimize its democratic principles.

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*supra* note 14, at 725.

In several American cities, African-Americans have attempted to institute AMBS programs. These cities include Detroit, Michigan; New York, New York; Prince George's County, Maryland; San Diego, California; Milwaukee, Wisconsin; and Minneapolis, Minnesota. *Id.* See also, *Gilchrist, supra* note 21, at 1A.

Although these programs have been presented as a way to alleviate the problems facing African-American males, "[l]egal issues halted an all-male class in Dade County, Florida . . . and canceled the all-male academy planned in Milwaukee." *Id.*

<sup>25</sup> In response to the District Court's ruling, Clifford Watson, the principal of one area elementary school stated, "Clearly this is an example of a white federal judge making a decision for the African-American community which he does not live in and which he does not understand." Brenda J. Gilchrist, *Single-Sex Schools Are Unconstitutional; Judge Stops All-Male Programs In Detroit*, DET. FREE PRESS, Aug. 16, 1991, at 1A. Clifford Watson's school was one of the schools earmarked to become an AMBS. *Id.*

## II. THE DETROIT DISPUTE

A. *Establishment of the AMBS Program*

In December 1990, the Detroit School Board conceived a plan to establish three all-male black academies (the "Academies"). The Board designed these racially segregated, single-sex schools to "respond to the special needs and problems of urban male students of African-American and Latino descent."<sup>26</sup> A local newspaper account of this movement read:

Civic and political leaders in Detroit, jarred by recent studies depicting black men as an at-risk population, are launching an unprecedented drive to save the black male . . . . The City Council, Board of Education, Detroit Youth Commission and Wayne County Commission, supported by several civic agencies, are waging a united front against a problem that many believe threatens the black family, black culture and black male-female relationships.<sup>27</sup>

Detroit already had an established system of alternative single-sex public schools, and the Academies fit within this existing group.<sup>28</sup>

The Academies' curriculum included academic programs superior to those in the coeducational public schools "in areas such as linguistics, social sciences, math and technology. Other planned programs would focus on career development, test-taking skills, and social responsibility. Students with academic problems could benefit from extended school days, remedial programs and personal mentors."<sup>29</sup> The Academies' planners hoped that the Academies would enable seventy-five percent of their students to score at or above grade level on national achievement tests, and in the highest category on Michigan standardized tests.<sup>30</sup>

The Academies would also institute mandatory training for parents, solicit parental input,<sup>31</sup> and require parents to attend school activities and sign a "covenant of participation" in their children's educations.<sup>32</sup> Teachers and staff

<sup>26</sup> Lisa K. Hsiao, *'Separate But Equal' Revisited: The Detroit Male Academies Case*, 1992/1993 ANN. SURV. AM. L. 85, 88 (1993) (quoting MALE ACADEMY GRADES K-8: A DEMONSTRATION PROGRAM FOR MALES AT-RISK. DETROIT PUBLIC SCHOOLS (Mar. 26, 1991) (unpublished study, on file with the Detroit Public Schools) [hereinafter "MALE ACADEMY"]).

<sup>27</sup> Gregory Huskisson, *Preserving Manhood Civic, Political Leaders Unite to Rescue Young Black Males at Risk*, DET. FREE PRESS, Jan. 29, 1991, at 1B.

<sup>28</sup> Hsiao, *supra* note 26, at 88.

<sup>29</sup> *Id.* (quoting MALE ACADEMY, *supra* note 26, at 13).

<sup>30</sup> *Id.* (quoting MALE ACADEMY, *supra* note 26, at 14).

<sup>31</sup> *Id.* (quoting MALE ACADEMY, *supra* note 26, at 46).

<sup>32</sup> *Id.* (quoting Provisional Charter for The Male Academy of the Detroit Public Schools at Woodward School, June 24, 1991, Detroit Public Schools, at 4; Provisional Charter for The Male Academy of the Detroit Public Schools at Marxhausen School, June 24, 1991, Detroit Public Schools, at 4; Provisional Charter for The Male Academy of the Detroit Public Schools at Cooper School, June 24, 1991, Detroit Public

would receive intensive training beyond that normally offered by the public school system. Both students and parents would participate during the day, in after school events, and in extracurricular activities.<sup>33</sup>

Finally, the Academies would offer innovative self-esteem programs.<sup>34</sup> Students would receive "Rites of Passage" training, which focuses on self-esteem, "male" societal and economic roles, personal growth and health.<sup>35</sup> These rites, labeled as personal, spiritual, economic, emotional, physical, mental, political, social, historical, and cultural, aim to produce boys who are socially conscious, responsible, employable, and mentally and emotionally stable.<sup>36</sup>

The Academies were scheduled to open in August of 1991. In March of that year, Shawn Garrett and Nancy Doe, mothers of two female students who would be denied admission to the academies, filed suit in the United States District Court for the Eastern District of Michigan.<sup>37</sup> The plaintiffs sought a temporary restraining order to enjoin the operation of the male academies; Judge Roth denied the motion.<sup>38</sup> The plaintiffs moved for a preliminary injunction, and the district court set an expedited hearing date to resolve the motion. On August 15, 1991, the district court heard oral arguments. Before the court heard oral arguments, however, Ms. Garrett withdrew her action in response to several harassing phone calls and intimidating comments from community members.<sup>39</sup> The district court granted the plaintiffs' motion, holding that "the purpose [of the AMBS] is insufficient to override the rights of females to equal opportunities."<sup>40</sup>

Ms. Garrett stated, "I am a citizen of this state who is willing to speak on the behalf of my daughter and other parents who feel the same, which is segregation is unlawful and unfit in today's society."<sup>41</sup> Ms. Garrett, reflecting on her experiences as a teenager, recalled that several of her female friends dropped out of high school because of "pregnancy, drugs, peer pressure and lack of family and school support."<sup>42</sup> Furthermore, "[i]f the school district is offering special programs that help avoid th[e]se and other obstacles, [Ms.

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Schools, at 4-5).

<sup>33</sup> *Id.* at 90 (quoting MALE ACADEMY, *supra* note 26, at 30, 36-37).

<sup>34</sup> *Id.* (quoting MALE ACADEMY, *supra* note 26, at 13).

<sup>35</sup> *Id.* (quoting MALE ACADEMY, *supra* note 26, at 32-33).

<sup>36</sup> *Id.* (quoting MALE ACADEMY, *supra* note 26, at 33-35).

<sup>37</sup> *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1005 (E.D. Mich. 1991). The American Civil Liberties Union and the National Organization of Women assisted the plaintiffs' preparation of the suit.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at n.1.

<sup>40</sup> *Id.* at 1014. Although an appeal was planned by the Defendants, the parties settled and agreed that both male and female students would attend the Academies. Daniel Gardenswartz, Comment, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?* 42 EMORY L.J. 591, 611 (1993).

<sup>41</sup> Brenda J. Gilchrist, *Lawsuit Challenges All Male Academies District Charged With Sex Discrimination*, DET. FREE PRESS, Aug. 6, 1991, at 3A.

<sup>42</sup> *Id.*

Garrett] wants her daughter . . . to have the opportunity to participate.”<sup>43</sup> Some members of the African-American community voiced strong opposition to Ms. Garrett’s sentiments. One mother of three boys argued, “We have zillions of schools that are mixed, so what’s wrong with one that is not. Try it out. These are changing times, our males are falling by the wayside . . . I feel badly that somebody is trying to interfere with this.”<sup>44</sup>

The plaintiffs’ pursuit of litigation and the district court’s ruling in *Garrett* spurred an outpouring of emotional reactions. One Detroit resident stated, “I’m a graduate of the male academy, the penitentiary . . . This is an emotional issue for me.”<sup>45</sup> The involvement of outside observers in this matter offended some community residents.

As this issue continues to be addressed, it might be wise to reflect on the relative ease with which self-appointed do-gooders such as the ACLU and NOW, supported by an oppressive federal judiciary are able to undermine, to the detriment of the children, the legal and prudent decisions of elected officials and parents.<sup>46</sup>

Another resident remarked,

[t]he fundamental question raised by this controversy is: Who shall be empowered to make decisions affecting the education of Detroit’s children? Will it be the leadership of the (ACLU) and (NOW), most of whom reside outside the city of Detroit? Or will Detroit’s parents and voters retain the right to expend their tax money as they see fit on behalf of their children’s education?<sup>47</sup>

Some members assumed that this ruling was simply another example of inequality. When one mother informed her sons that they would be unable to attend the Academies due to the ruling, her nine-year-old responded, “Why? Because we’re black?”<sup>48</sup> Others called upon the African-American community to empower itself and question precedent.

Some people are afraid to re-examine some of the decisions made 40 years ago. But we need to look at those decisions and ask ourselves, ‘Are we really better off than we were 40 years ago?’. . . We need to be talking about making new laws, to go in there and change the Constitu-

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Brenda J. Gilchrist & Robert Musial, *Detroit Board Allows Girls Into Academies It Plans To Keep Fighting for All-Male Schools*, DET. FREE PRESS, Aug. 28, 1991, at 1A.

<sup>46</sup> Frank Hayden, *Rationale Behind Male Academies Dictates Legal Pursuit Of That Goal*, DET. FREE PRESS, Sept. 9, 1991, at 11A.

<sup>47</sup> Lawrence C. Patrick, Jr., *Detroit Parents Should Have Right To Choose*, DET. FREE PRESS, Oct. 29, 1991, at 9A.

<sup>48</sup> Linda Stewart, *Perfect Answer Erased By Ruling, Parents Say*, DET. FREE PRESS, Aug. 16 1991, at 8A.

tion so we can educate our children.<sup>49</sup>

This debate ensued for several months. It included several meetings within the local school board and a push for changes in legislation by community activists. The community eventually settled the debate and the Board agreed to integrate females into the Academies. This Note asserts that through the utilization of Discourse Ethics, the community could have avoided, or at least minimized, the damage to its morale and solidarity.

### B. *Garrett v. Board of Education*

The *Garrett* suit alleged that the Board of Education's plan violated the Fourteenth Amendment of the United States Constitution, the Michigan Constitution, Title IX, the Educational Opportunities Act, Michigan's Elliot-Larsen Act and Michigan's School Code.<sup>50</sup> Plaintiffs contended that the Academies had two major flaws: they did not require an exclusively male atmosphere in order to succeed, and the special programs addressed issues that also affected females.<sup>51</sup> In *Mississippi University for Women v. Hogan*,<sup>52</sup> the Supreme Court held that exclusion from a publicly-funded school based on sex is unconstitutional unless the exclusion served important governmental objectives, and the means employed substantially relate to the achievement of these objectives.<sup>53</sup>

The plaintiffs in *Garrett* asserted that:

[t]he academies were developed in response to the crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates. While these statistics underscore a compelling need, they fall short of demonstrating that excluding girls is substantially related to the achievement of the Board's objectives.<sup>54</sup>

Under *Hogan*, an "exceedingly persuasive justification." must support a policy that excludes on the basis of gender.<sup>55</sup> While testing the validity of gender-based exclusion, "fixed notions concerning the roles and abilities of males and females" must not be considered.<sup>56</sup> In addition, the objectives of the policy must not reflect "archaic and stereotypic notions."<sup>57</sup> Therefore, if the policy's objective is to "'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."<sup>58</sup> Therefore, under the *Hogan* standard, the Academies' exclu-

<sup>49</sup> Gilchrist & Musial, *supra* note 45, at 1A.

<sup>50</sup> *Garrett*, 775 F. Supp. at 1005.

<sup>51</sup> *Id.* at 1006.

<sup>52</sup> 458 U.S. 718 (1982).

<sup>53</sup> *Garrett*, 775 F. Supp. at 1006 (quoting *Hogan*, 458 U.S. at 724).

<sup>54</sup> *Id.* at 1007.

<sup>55</sup> *Hogan*, 458 U.S. at 724-25.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

sion of females would only be constitutional if based upon a legitimate and important objective and if there was a "substantial relationship between [the] objective and [the] means."<sup>59</sup>

While a large number of the objectives sought by the Academies may be achieved without excluding females, some objectives may be *better* achieved within a male-only environment. In addition, statistics show that there are real differences between African-American males and females that are not based on stereotypes and differences in social roles.<sup>60</sup> In particular, the situations of African-American males in Detroit may support the exclusion of females from the Academies.

### 1. Illustrating real differences and exceedingly persuasive justifications

Racism and poverty have a much harsher effect on African-American males than females. In fact, virtually all of the destructive forces that plague African-Americans have a more adverse effect on males than females.<sup>61</sup>

#### a. Quality of life and life expectancy

African-American males in the inner-city "are less likely to reach the age of sixty-five than men in Bangladesh, one of the poorest nations in the world."<sup>62</sup> In 1989, the life expectancy of African-American males was 65.2 years, compared to 74 years for African-American females, 79.1 for white women and 72.6 for white men.<sup>63</sup> "From the ages of fourteen to thirty-nine, African-American men are at least twice as likely as African-American women to die."<sup>64</sup> Compared to their female counterparts, African-American males are twice as likely to die from illnesses such as heart disease, malignant tumors, liver disease and pulmonary diseases.<sup>65</sup> "Of the African-American males who commit suicide, [fifty-two percent] of them do so between the ages of fifteen and thirty-four; only [nine percent] of African-American female suicides occur during this age bracket."<sup>66</sup> In Wayne County, Michigan, African-American males die at a rate of "nearly fifteen times the national average for all men in the United States."<sup>67</sup> Young African-American men in Michigan "have a

<sup>59</sup> Hogan, 458 U.S. at 725-26.

<sup>60</sup> See discussion below.

<sup>61</sup> Paula J. Smith, Comment, *All-Male Black Schools And The Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2037 (1992).

<sup>62</sup> *Id.* (citing Sharon Shahid, *We're Saying If We Don't Try Something New, We Are Doomed*, USA TODAY, Aug. 15, 1991 at 11A).

<sup>63</sup> Smith, *supra* note 61, at 2037 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, 73 (11th ed. 1991) [hereinafter "CENSUS 1991"]).

<sup>64</sup> *Id.* (citing CENSUS 1991, *supra* note 63, at 74).

<sup>65</sup> *Id.* (citing CENSUS 1991, *supra* note 63, at 81).

<sup>66</sup> *Id.* (citing CENSUS 1991, *supra* note 63, at 85-86).

<sup>67</sup> Huskisson, *supra* note 27, at 1B.

greater chance of becoming homicide victims than those in any other state."<sup>68</sup>

Another dismal reality facing African-American males is their level of incarceration. "[O]ne out of four African-American men in the United States is incarcerated," more than the proportion of African men incarcerated under South Africa's now abolished system of institutionalized apartheid.<sup>69</sup> In 1991, African-American males accounted for forty-five percent of the American prison population.<sup>70</sup> In 1990, 436,000 African-American males were incarcerated, compared to only 78,417 of African-American females.<sup>71</sup>

#### b. Differences in scholastic achievement

Forty percent of all African-Americans are placed in special education classes or schools; however, African-American males account for eighty percent of this group.<sup>72</sup> African-American males in Detroit comprise fifty-four percent of the school age population. Unfortunately, they account for sixty-six percent of those students suspended during their school careers, fifty-four percent of those who drop out of high school, and only thirty-nine percent of those who graduate.<sup>73</sup> In Detroit, the graduation rate of African-American males is forty-five percent compared to a rate of sixty percent for African-American females.<sup>74</sup> One Detroit school official pointed out, "the [school] system actually fails to work for close to seventy-five percent of the [African-American] male students."<sup>75</sup> One school board member noted that out of the three high school graduations she attended in 1991, African-American female graduates outnumbered their male counterparts two to one.<sup>76</sup>

### 2. Problems facing females

Although African-American males clearly face substantial challenges, the educational system is failing *all* African-American students. Research shows

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<sup>68</sup> *Id.*

<sup>69</sup> Smith, *supra* note 61, at 2037 (citing Sam V. Meddis, *Black Imprisonment Highest in U.S.A.; New Study: Rate Tops South Africa's*, USA TODAY, Jan. 7 1991, at 2A). See also Allan Ellis, *Of Race and Incarceration*, RECORDER, Dec. 5, 1991, at 6.

<sup>70</sup> *Id.* (citing Meddis, *supra* note 69, at 2A).

<sup>71</sup> *Id.* at 2038 (citing *Study on Black Convicts: Reform Sentencing*, CHI. TRIB., Feb. 27, 1990, at C6). In Detroit, African-American males make up eighty percent of those in the Wayne County criminal justice system. *Id.* (citing MALE ACADEMY, *supra* note 26).

<sup>72</sup> *Id.* at 2042 (citing 1 JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS 11 (1985)).

<sup>73</sup> Hsiao, *supra* note 26, at 88.

<sup>74</sup> *Male Academy: Despite Roadblocks, Innovative School is Worth a Try*, DET. FREE PRESS, Feb. 2, 1991, at 8A.

<sup>75</sup> *Id.*

<sup>76</sup> Nancy Ann Jeffrey, *N.O.W., A.C.L.U. May Sue Board To Let Girls Attend Male Schools*, DET. FREE PRESS, Aug. 5, 1991, at 1B.

that the public education system also fails African-American females.<sup>77</sup> For example, African-American females "are expected to reflect traditional sex-role expectations of passivity and obedience," this fact leads to a stunting of their intellectual development.<sup>78</sup> In the resolution that the Detroit School Board drafted to establish the Academies, the Board noted that "an equally urgent and unique crisis" faces African-American females.<sup>79</sup> African-American females in the inner-city "drop out of school, suffer a loss of self-esteem and become involved in criminal activity."<sup>80</sup>

An analysis of the advances made by African-American women in relation to their male counterparts illustrates the real differences between males and females and the more urgent need for programs focusing on the needs of males.

The obstacles faced by black men are made even clearer by the extent to which black women have been able to take advantage of the opportunities presented by the Civil Rights Movement. Black women have higher rates of completion at colleges and graduate schools. Their income is higher. On the average, black women who are college graduates have achieved income parity with their white counterparts. [However, it is true that] black women remain afflicted by high rates of teen-age pregnancy, AIDS and drug addiction. But, on the whole, they have made real strides. . . .<sup>81</sup>

Protecting the constitutional rights of females is paramount. A solution reached through communicative means, however, may have led to a quicker, cheaper and more beneficial solution for the African-American community of Detroit. Statistics illustrating the urgent crisis facing African-American males arguably gave the Detroit Public School Board an *exceedingly persuasive justification* to exclude females from admission to the Academies in order to concentrate on the future of African-American males.

The principles behind integration have not served to effectively educate African-American children in the eyes of all African-Americans. Unfortunately, when the African-American community in Detroit attempted to create a new solution, the diverse opinions within this community failed to garner equal respect among the parties involved, and a bitter and emotional debate ensued. This situation presents the precise type of conflict Discourse Ethics strives to resolve. The next part of this Note briefly discusses the main components of Discourse Ethics.

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<sup>77</sup> Karen E. Sundberg, *All-Male Academy is Built on Sexist Myths*, DET. FREE PRESS, June 9, 1991, at 2F.

<sup>78</sup> *Id.*

<sup>79</sup> *Garrett*, 775 F. Supp. at 1007.

<sup>80</sup> *Id.*

<sup>81</sup> *The Black Man is in Trouble. Whose Problem is That?*, N.Y. TIMES MAG., Dec. 4, 1994, at 74. See also, THE CHRONICLE OF HIGHER EDUCATION ALMANAC (Sept. 1 1994).

## III. THE THEORY OF DISCOURSE ETHICS

A. *The Application of Discourse Ethics to Formal Law*

Discourse Ethics recognizes that law should change as societies evolve and extralegal forces change. As law students and attorneys are often reminded, "Laws are not created in a vacuum."<sup>82</sup> By seeking to validate the beliefs and principles within society, Discourse Ethics offers a viable means of legal maintenance.

Legitimizing law through its established form and procedures or through its orderly and systematic nature is impossible.<sup>83</sup> Law is legitimized through

**DEGREES CONFERRED BY RACIAL AND ETHNIC GROUP, 1991-92**

DEGREE	AFRICAN-AMERICANS	WHITES
<b>ASSOCIATE</b>		
Men	14,294	164,799
Women	25,117	235,731
Total	39,411	400,530
<b>BACHELOR'S</b>		
Men	26,956	429,842
Women	45,370	506,929
Total	72,326	936,771
<b>MASTER'S</b>		
Men	6,054	116,096
Women	12,062	152,275
Total	18,116	268,371
<b>DOCTORATE</b>		
Men	576	14,674
Women	647	11,139
Total	1,223	25,813
<b>PROFESSIONAL</b>		
Men	1,603	36,939
Women	1,957	22,861
Total	3,560	59,800

For the 1991-92 academic year, African-American women earned Associate, Bachelor and Masters degrees at an average rate of 1.7 times more than African-American men. *Id.* at 31. However, for the same year, white women earned Associate, Bachelor and Masters degrees at an average rate of 11 times more than African-American women. *Id.*

From 1982-1992, the college enrollment of African-American women was at least 1.5 more than the college enrollment of African-American men. *Id.* at 15.

<sup>82</sup> See, e.g., *In re Wildman*, 30 B.R. 133, 156 (Bankr. N.D. Ill. 1983); *Robertson v. Dept. of Motor Vehicles* (Cal. Ct. App. 1992) 9 Cal. Rptr. 2d 319, 324.

<sup>83</sup> JURGEN HABERMAS, *LEGITIMATION CRISIS*, 95-117 (Thomas McCarthy trans. 1975). See also, JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, Vol.

extralegal sources, not positivist justifications. Constitutional justifications of law are equally inadequate because they merely imply that the legitimacy of law is derived from principles of democracy and the democratic process.<sup>84</sup> Although the principles of democratic procedure underlie the authority of law, "these principles can no longer be defended as sacred 'self-evident truths' as they were in theories of natural law and in republican theories of civic virtue."<sup>85</sup> Discourse Ethics provides a contemporary equivalent of these theories while avoiding their dogmatic assumptions.<sup>86</sup>

Discourse Ethics is a procedural and formalistic moral and ethical theory.<sup>87</sup> Law and morality are not the specific subjects of Discourse Ethics because they are substantive principles, whereas Discourse Ethics is mainly a procedural principle.<sup>88</sup> Therefore, the procedural aspects of Discourse Ethics can be utilized to test the soundness of norms and laws.<sup>89</sup> In other words, it is not the purpose of Discourse Ethics to generate new norms and laws; instead, Discourse Ethics is more aptly used as a tool to adjudicate real conflicts or reach a consensual means of regulating controversial social matters.<sup>90</sup> Discourse Ethics' ability to regulate controversial social matters makes it a particularly appealing means for settling matters of the public interest, and specifically, a desirable alternative to the means used to settle the Detroit Academy dispute.

Certain scholars have stated that the fruits of bourgeois democracy such as freedom, equality, and liberty for all within society, have not been realized.<sup>91</sup> In particular, the "principles of formal democracy (universal suffrage, majority rule, protection of minorities, representation, alternation, freedom of the press, assembly and opinion) that are 'freedom guaranteeing' " are limited by the selective organization or institutionalization of these rights, and are today increasingly bureaucratic.<sup>92</sup> Furthermore, participation in the political decisionmaking process has become very restrictive to the average citizen.<sup>93</sup> For example, factors such as the segmentation of the voter's role; competition of elites; vertical opinion formation in party apparatuses; and the manipulative

1, at 254-270. (Thomas McCarthy trans., 1984).

<sup>84</sup> Cohen, *supra* note 10, at 320.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> HABERMAS, *supra* note 5, at 103.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* See also William Rehg, *Discourse Ethics and the Communitarian Critique of Neo-Kantianism*, 22 THE PHIL. F. 120, 121 (1990) (quoting JURGEN HABERMAS, MORALITÄT UND SITTlichkeit: DAS PROBLEM HEGELS UND DIE DISKURSETHIK 25 (Frankfurt: Suhrkamp 1986); HABERMAS, *supra* note 5, at 43). Habermas adds, "To the extent to which a moral theory touches on substantive areas—as Rawls' Theory of Justice does, for example—it must be understood as a contribution to a discourse among citizens." HABERMAS, *supra* note 5, at 94.

<sup>91</sup> Cohen, *supra* note 10, at 324.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

techniques of the mass media have considerably restricted the community voice.<sup>94</sup> Today, identifying the base requirement of democratic legitimacy for our political institutions seems idealistic and impractical.<sup>95</sup> Instead of functioning as examples of true discourse, our political institutions reinforce the "counter-factual character of the principle of democratic legitimacy."<sup>96</sup> The principles of Discourse Ethics may offer an avenue into the restructuring and understanding of our political practices as opposed to merely giving them institutional supports and positivist justifications.<sup>97</sup> By utilizing the principles of Discourse Ethics, public interest advocates may help large interest groups create a sense of solidarity and gain needed social reforms and political change. Often, the aims of large interest groups fail to materialize because of the lack of cohesion among its members.<sup>98</sup> There may be times when certain intra-community battles hurt a community more than help. For example, if the district court in *Garrett* held that AMBSs were entirely unconstitutional, that community would have suffered a complete loss.

### B. *The Philosophical and Theoretical Foundations*

The principles of Discourse Ethics outline the procedures of the practical discourse and aid social actors in their quest to distinguish legitimate norms from illegitimate norms.<sup>99</sup> The discourse is designed to encourage its participants to reach a mutual understanding from within each other's perspective.<sup>100</sup> By listening to opposing views, discourse participants realize that norms which may seem to represent universal interests, only favor a view of the good that applies to them.<sup>101</sup> Discourse allows people to draw a distinction between what is particular to their sub-culture and what is generalizable to other lifestyles. Conflicts of interest are resolved through an oral discourse whereby the participants arrive at norms that express interests which any moral agent would affirm.<sup>102</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 325.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., JANE J. MANSBRIDGE, *WHY WE LOST THE E.R.A.* (Chicago: Univ. of Chicago Press 1986).

<sup>99</sup> Cohen, *supra* note 10, at 316.

<sup>100</sup> Rehg, *supra* note 90, at 130.

<sup>101</sup> Walker, *supra* note 1, at 85.

<sup>102</sup> For this to occur, the discourse must be motivated by:

. . . the force of the better argument in an impartial search for fairness—the interest of a single party cannot be allowed to determine the outcome, but can count only as one of the elements that has to be taken into account in any fair resolution. Thus each participant must be accorded the freedom and respect to state her position; at the same time, each must submit his or her arguments for consideration by the group. This requires each participant to consider impartially the position, interests, and arguments of the other. If necessary, the argument must be able to

### 1. The power of discussion

Through discussion, participants can agree on common norms, create a sense of solidarity, recreate community, and uncover suppressed interests.<sup>103</sup> Practical discourse allows competing interest groups to come together and realize norms that will be true to who they are and what they need. In other words, they can *mutually discover good law*.<sup>104</sup> In order for a proposed norm to maintain its validity, those affected must accept the consequences and side effects which result from its general observance. Therefore, an actual dialogue — in which the needs and interests of everyone are equally explored — must exist. Such dialogue allows discourse participants to discern whether there is a common interest that can become the basis of a new norm.<sup>105</sup>

### 2. The objective moral theory

Discourse Ethics assumes that social actors are intuitively aware of their moral obligations. Therefore, social actors do not need external references to conceptions of the good (deontological). It further assumes that ethical judgments can be reduced to empirical, factual knowledge (cognitivist), and does not define morality in terms of individual good will. In other words, Discourse Ethics presents an objective approach to explaining what we do when we make ethical determinations. The principles of Discourse Ethics offer an explanation of the normative force expressed in moral injunctions such as, “one ought to help those in need,” unlike subjective ethical approaches where normative statements force compliance by their mere utterance or where legislative mandates form morality.<sup>106</sup>

Discourse Ethics also maintains that “ought” statements are validated objectively. It asserts that “ought” statements are different from descriptive statements (i.e., “the sun is hot”) because they can have a truth value. The truth of an “ought” statement is proven by the good results that its compliance will bring. For example, the statement “you ought not leave the faucet running” is true because its compliance lessens the amount of water waste in society, assuming that water waste is bad.<sup>107</sup>

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move to the level of interests and need interpretations, for it could be that the initial language in which needs and interests are expressed systematically distorts the perception of general interest.

Rehg, *supra* note 90, at 122.

<sup>103</sup> Walker, *supra* note 1, at 84-85.

<sup>104</sup> *Id.* at 86.

<sup>105</sup> Cohen, *supra* note 10, at 318.

<sup>106</sup> Two examples of subjective ethical theories are emotivism and decisionism. In emotivism, value judgments or normative ethical statements are meant to incite or encourage rather than be cognitive. WEBSTER'S THIRD NEW INT'L DICTIONARY 742 (3d. ed. 1976). In decisionism what is right is what the legislature has determined it to be. *Id.* at 585.

<sup>107</sup> Furthermore, the descriptive statement “that car is red” is true because people

If normative speech acts (ought statements) have no inherent truth value, Habermas must show how we can establish truth or legitimize norms.<sup>108</sup> In order to ground this objective morality, Habermas suggests that society create social morals through argumentation.<sup>109</sup> Habermas asserts that people have the ability to make judgements about morality and norms in an objective framework.<sup>110</sup> Therefore, through argumentation and debate, communities can

will look at the car and see the color red, provided that they are not colorblind. On the other hand, the normative statement "abortion is wrong" arguably has no inherent truth value because the truth of this statement may vary from individual to individual. There is no way of proving the absolute truth or falsity of this statement because the morality of abortion changes from culture to culture, epoch to epoch. The evolution of the Anti-abortion platform to Pro-life and the Pro-abortion platform to Pro-choice illustrates the lack of inherent truth in normative speech acts. The color red is constant and absolute, its linguistic identification may change but the quality of "redness" does not.

<sup>108</sup> HABERMAS, *supra* note 5, at 58-61.

<sup>109</sup> *Id.* at 57. In the past, moral theories have focused on subjective criteria such as a person's perception of the "good" or the strength of their religious beliefs. In contrast, ethical theories are philosophical attempts to codify the effect that language has on how people communicate morality. Here, Habermas collapses the disciplines of moral and ethical theory.

<sup>110</sup> The imprecise nature of human language may make objectivity in judgement problematic because the ability of people to express their needs or thoughts is often difficult. In addition, the careful and accurate interpretation of the spoken thoughts of another is equally difficult. This problem has been articulated by philosophers such as Ludwig Wittgenstein and ethical theorists such as Ronald Dworkin and Mary Daly.

In the *Tractatus-Logico-Philosophicus*, Ludwig Wittgenstein states:

Language disguises thought. So much so that from the outward form of the clothing it is impossible to infer the form of thought beneath it, because the outward form of the clothing is not designed to reveal the form of the body, but for entirely different purposes.

LUDWIG WITTGENSTEIN, *TRACTATUS-LOGICO-PHILOSOPHICUS* 19 (D.F. Pears et al. trans. 1988). Wittgenstein offers examples of our inability to clearly articulate our thoughts or accurately interpret the comments of another. *Id.* These examples are all intended to show how the breakdown of language leads to human misunderstanding. As a result, it is very hard for people to communicate their true internal notions through language. This would make the creation of an objective political discourse difficult.

Also, certain cultural facts in society heavily influence human language. Can these cultural facts be constrained and not corrupt the discourse?

But does [Discourse Ethics] stand on neutral ground? It is important that it do so.

Groups or individuals who are strongly attached to particular sets of values must be able to enter discussion without giving up these values. This will not be the case if the speech practices which Habermas sees as so central are coded to reproduce results which give artificial primacy to a sub-set of European values.

Walker, *supra* note 1, at 86. For example, there is no guarantee that the Eurocentric history which permeates American culture will not permeate the discourse. In addition, there are other biases that tend to influence human thought or debate such as economic class affiliation, religious beliefs or gender biases.

construct or discover the truth of a newly proposed norm and assert its valid-

Gender biases present an interesting problem. Some feminist scholars criticize the idea that concepts and ideas can be made and remade through such a practical discourse. Robin West, *Feminism, Critical Social Theory and Law*, U. CHI. LEGAL F. 59, 65 (1989). In this article, West defends the criticisms that some feminist legal theorists have articulated concerning the ideas of Michael Foucault, Roberto Unger and other critical social theorists. Her critique centers on the four basic components of critical social theory: the nature of power; the nature of knowledge; the nature of morality; and the nature of self. Her analysis of the Foucaultian nature of knowledge offers an insight into the linguistic limitations of Discourse Ethics. *See id.* This criticism stems from the silencing effect that patriarchy has had on the voices of women. Robin West asserts that social theory's focus on discourse is not an appropriate focus for feminism because of women's constant exclusion from the discourse. *Id.* at 66.

Overall, "[s]ilence . . . has been to modern women's lives what Foucault has argued that knowledge and discourse have been to modern men's." *Id.* *See also*, MICHAEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans. 1979); MICHAEL FOUCAULT, THE ORDER OF THINGS (1970); MICHAEL FOUCAULT, 1 THE HISTORY OF SEXUALITY (Robert Hurley trans. 1980). (For examples of other feminist scholars that have studied the silence of women see, ELLEN BASS & LOUISE THORTON, eds., I NEVER TOLD ANYONE (1983); ANDREA DWORKIN, INTERCOURSE (1987); TILLIE OLSEN, SILENCES (1978); ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1978); ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE (1979); FLORENCE RUSH, BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1981); LINDA TSCHIRHART SANFORD & MARY ELLEN DONOVAN, WOMEN AND SELF ESTEEM (1984)). Because women's viewpoints are continually . . . silenced by the existing social order, feminist authors see this "forced silence" as the proper starting point for conducting any socio-historical analysis of women in modern society. Thus the question is, how can society overcome this silence and let the voices of women be heard? Even if a seat is extended to the feminist voice will it contribute to the discourse with the same amount of power that the voices of men will command? Or, some may argue, can the principles and rules of the practical discourse overcome these potential setbacks?

Ronald Dworkin touches upon the meta-language problem that was discussed by Wittgenstein. *See Ronald Dworkin, Law's Empire* 1-113 (1986). The interpretation of statutes and the drafting of legislation are problems that are not only attributable to moral differences and linguistic shortcomings. One that is distinct from the diversity of group attitudes and social beliefs. Constructing the "real statute" or deciphering the legislative "intent" or "spirit" of the writing becomes extremely problematic once you acknowledge the shortcomings of written language. At this point the sting of semantic disagreement becomes even more of a problematic. Legal disagreement as to the truth or falsity of a legal proposition can be caused by more than semantic disagreement. *Id.*

Mary Daly shows that certain aspects of sexism have deeply permeated our usage of language. She illustrates how casual references in human conversation are laden with sexism. MARY DALY, GYN/ECOLOGY, THE META-ETHICS OF RADICAL FEMINISM 1-20 (1978). For example, linguistically, the words "female" and "woman" can be fairly interpreted as mere variations of "male" or "man." The linguistic identifications of women in the English language are not entities within themselves. Consequently, if the English language identifies women as variations of men (as opposed to "womyn" for example), how could a linguistic discourse guarantee equality amongst the sexes.

ity. In order to accept morality as a function of argument and not as a subjective espousal of "rightness," "good" or "virtue," a community must have some means by which it can validate and universally accept newly proposed norms.<sup>111</sup> Only the universal acceptance of norms makes agreement in moral argumentation possible.<sup>112</sup> Habermas offers the Principle of Universalization as a solution.

The Principle of Universalization<sup>113</sup> seeks to justify norms and moral com-

Unfortunately, the medium through which Discourse Ethics operates may be its greatest limitation.

<sup>111</sup> One scholar argues, if no values may be taken for granted, and all beliefs must be questioned and justified, then there seems to be no possible standard by which to criticize practices and institutions. Without a base standard of morality, no normative claim will escape some level of scrutiny. This fact would appear to leave each participant within the discourse with no place to stand. Each standard that is raised to justify a claim can itself be brought into question, *ad infinitum*. This inability to start from a basic pool of values would leave the practical discourse with no basis of common understanding.

Although several factors may limit the effectiveness of practical discourse and communicative action, the aims of Discourse Ethics may still be realized. If practical discourse is guided and objectively moderated with full awareness of its limitations, then the theoretical shortcomings of Discourse Ethics may be surmounted. No form of discussion or social problem solving can completely eliminate the different dynamics that led to the formation of the problem in question; however, the initiation of discussion that is sensitive to the various strengths and weaknesses of its participants is possibly the most viable means of building a sense of community and understanding amongst conflicting interest groups. HABERMAS, *supra* note 5, at 58-61.

<sup>112</sup> *Id.*

<sup>113</sup> The universal acceptance of norms is based on the Principle of Universalization (U):

(U) All affected can accept the consequences and side effects [that a norm's] general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those of known alternative possibilities for regulation).

HABERMAS, *supra* note 5, at 65. Habermas notes that this principle has been criticized due to its inability to distinguish between norms that are constant throughout history, such as the moral wrongness of murder, as opposed to norms that change from epoch to epoch such as the morality of abortion in American society. Habermas further asserts that this principle only applies to those norms that are strictly universalizable, i.e. norms that are accepted throughout historical periods and amongst all social groups. When thinking of moral rules one should not look at each problem in a "culture" or "epoch specific" framework like a sociologist or historian. A rule is not universalizable merely because it is widely accepted among a particular culture or group that is being studied. *Id.* at 111 n.41.

The soundness of the Principle of Universalization may weaken the plausibility of Discourse Ethics. "That such a discourse can arrive at norms that have a universal, rather than merely ethnocentric validity," is a difficult point to establish. Rehg, *supra* note 90, at 121. Even if we assume there is no problem assuring equal representation, there is no guarantee that the voices of all will be given equal weight during the dis-

mands.<sup>114</sup> After all, if one can not validate the existence of moral commands and norms, Habermas can not assert his theory.

### 3. The importance of community participation

The problems which Discourse Ethics sets out to solve must be handled cooperatively. Through a communicative effort, moral argumentation can successfully and consensually settle social conflicts.<sup>115</sup> Communicative action is crucial because conflicts related to norm-guided interactions are the result of a disruption or disagreement of the normative consensus.<sup>116</sup> Repairing the disrupted consensus entails restoring the social recognition of the threatened validity claim or replacing the controversial validity claim with a new one.<sup>117</sup> Consensus that is the result of this procedure will then express the *common will*. Therefore, it is not enough for the individual or sub-group to assent to a norm. A communicative process of understanding must occur in order to convince the collective of the rightness of a proposed norm, regulation or law.<sup>118</sup>

Analogous to a system of checks and balances, moral argumentation and universal acceptance prevents participants within the discourse from distorting their own interests. For this to work, each participant must leave his or her interests open to criticism from others.<sup>119</sup> The needs and wants of each group must be interpreted in light of their respective cultural values.<sup>120</sup>

In Detroit, the African-American community needed to repair its broken consensus through argumentation. The interests of the supporters and opponents of the Academies should have been addressed through political discus-

course. Members within the community or communities which have been previously excluded from the political process will undoubtedly have difficulty participating in the discourse. There is also no guarantee that certain groups will not band together against others. Although Discourse Ethics ensures that the voices of all are included in this process of normative validation, it does not completely eliminate the force of the majority, the educated, or more importantly, the most persuasive rhetorician. How can we be sure that the participants will create one truth that comes from a universe of thoughts as opposed to universalizing one group's opinion?

<sup>114</sup> HABERMAS, *supra* note 5, at 57.

<sup>115</sup> *Id.* at 67. In addition to the limitations of language and the silencing of voices, the motivation to join the discourse must be proven. Today, political discussions often address the fact that interests of race, class, gender and sexual preference have long gone without hearing or response. According to Habermas, since Discourse Ethics allows participants to question norms and issues which were once taken for granted, individuals are motivated to join the discourse so they can respond to "previously silenced interests, and standards of normality" which were never questioned. Walker, *supra* note 1, at 85. This may not be enough to motivate all the members within a community to participate politically.

<sup>116</sup> HABERMAS, *supra* note 5, at 67.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

sion. The needs of both African-American females and males had to be fairly interpreted and assessed in light of their respective gender values. If the social conflict that resulted from the exclusion of females from the new and hopeful Academies was settled consensually, as opposed to judicially, the resulting Afrocentric Academies would have represented the common will of the community.

#### IV. APPLICATION OF DISCOURSE ETHICS TO THE DETROIT DISPUTE

##### A. *Communicative Principles In American Society*

Theoretical applications to real-life problems are often not enough to illustrate the plausibility of a new idea or mode of problem solving. An actual application of a theory's principles in a real situation may offer a stronger justification for its adoption. Fortunately, some of the principles of Discourse Ethics have been previously utilized in American society. In particular, the Civil Rights Movement provides an illustration of how political discourse can affect positive change and legitimize democratic principles.

The Civil Rights Movement "altered and expanded American politics by providing other oppressed groups with organizational and tactical models, allowing them to enter into the political arena through the politics of protest."<sup>121</sup> Through protest, African-Americans clarified their interests and needs. By utilizing the politics of protest, "the legitimate needs and interests [of African-Americans] were no longer locked away in silence within the normal game of power and prestige."<sup>122</sup>

Although the Civil Rights Movement allowed African-Americans to make great social gains, it was neither a perfect form of social change nor an example of practical discourse. Ultimately, the Civil Rights movement was driven by protest, not communicative action. A political discourse built upon communicative action may have allowed African-Americans to better dismantle the foundations of American racism. If there had been an exchange of ideas and viewpoints between African and Anglo-Americans during this period, integration might not have led to assimilation and the reversal of gains for African-Americans in education. Merely integrating into racist institutions will not eliminate social problems. Without the mutual exchange of ideas that is commanded by communicative action, we may unfortunately repeat some of history's best lessons.

##### B. *Understanding The Issues*

###### 1. How the principles of Discourse Ethics apply

As stated above, Discourse Ethics intends to remedy situations where the

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<sup>121</sup> ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 286-87 (1984).

<sup>122</sup> Walker, *supra* note 1, at 85.

norms of a particular community no longer serve as a firm foundation for its institutions. In the African-American community of Detroit, Michigan, the principles of desegregation advanced by *Brown* failed to serve the educational needs of its children. In response to this problem the school board drafted a plan that reflected the norms of its community— Afrocentric education. Unfortunately, this solution was not equitable. The aims sought by the institution of the Academies excluded the needs of another important and disadvantaged segment of the community: African-American females.

Although the plight of the African-American male served as the driving force behind the Academies, the community needed to reach a solution that provided for the needs of both its male and female children. As the value consensus which led to the creation of the Academies began to break down (in particular, the decision to deny admission to females), the African-American community, faced with the question of how to continue, turned to litigation. Had the decision to admit females been reached through communicative action, the community might have preserved a sense of solidarity and achieved a re-creation of community. Communicative action may have prevented the alienation and fear that subsequently led to Ms. Garrett's voluntary withdrawal of her action. In addition, the sense of autonomy and empowerment that would have accrued to the community had it made its own determinations would have served as an invaluable benefit.

## 2. The issues in need of resolution

The central issue that divided the African-American community of Detroit was whether the special circumstances facing African-American males justified giving them a specialized education to the exclusion of females. There is no doubt that African-American female students, like their male counterparts, critically need the majority of the special programs offered at the Academies. Programs offering superior academic training as well as those focusing on career development, test-taking skills, and civic and social responsibility are needed in order to help African-American females close the gap between them and their white counterparts. In addition, the rite of passage programs are also important. The rite of passage program would help the community to produce women who are also socially conscious, responsible, employable, and mentally and emotionally stable.

The heart of a practical discourse would focus on more than the main issue in this debate. The exchange of ideas and viewpoints would hinge on the various reasons people had for siding with one position over another. The discussion would show the community how the rights and needs of its males and females are interdependent. After all, “[w]hen the African-American male suffers, so too does the African-American woman. When huge numbers of young black men are undereducated, unemployed, addicted to drugs or incarcerated, there remain only a relative few young black men with whom young

black women can build a future."<sup>123</sup>

a. The proponents' arguments

Some may favor excluding females from the Academies for several different reasons. Some feel that the preparation of young males is more important than the preparation of young females because of the fact that we live in a patriarchal society. As one Detroit woman noted:

As a woman who is first and foremost an African-American, I also believe that in this particular case, I cannot afford the luxury of waging a battle against sex-based discrimination when the future of black men—a group that even the federal judge called an endangered species—is at stake.<sup>124</sup>

Others feel that the gains African-American women have made compared to those of African-American men illustrate a more urgent need for male-only programs. One college professor stated, "I am not anti-integration, and I am definitely not anti-female. But I have to be pro-black boy because he's the one that this educational system in America has failed the most."<sup>125</sup> While agreeing that both males and females need special treatment, some feel that males should be given priority simply because they are worse off. One single mother of two boys, hoping that the Academies would be able to remain all-male, believed "the district should also open special school for females, they have problems too. But, who are you afraid of when you are walking down the street—the young men or young women?"<sup>126</sup> Another commentator, realizing that the exclusion of females from the Academies was possibly illegal, stated:

The need to do something about the system's special and well-documented failure to educate [African-American] males is so urgent . . . that the [Detroit school] board cannot simply sit on its hands awaiting a perfect solution . . . . We have to start somewhere to tackle this problem.<sup>127</sup>

Possibly, it is easier to launch a pilot school when it is a single sex program; therefore, starting with male academies would insure the success and acceptance of the program. Others favor single-sex schools over coeducational schools irrespective of race. For example, one University of Michigan professor claims that "[t]here is too much macho competition in school between boys when girls are the prize."<sup>128</sup> One Detroit mother, speaking in support of all-female programs stated, "[s]ince my daughter was separated, her study is more intense and more stable . . . . She doesn't spend an hour in front of the

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<sup>123</sup> Susan Watson, *Academy Concept Deserves A Chance*, DET. FREE PRESS, Aug. 21, 1991, at 1B.

<sup>124</sup> *Id.*

<sup>125</sup> Brenda J. Gilchrist, *All-Male Schools Anguish Civil Rights Veterans*, DET. FREE PRESS, Sept. 3, 1991, at 1A.

<sup>126</sup> *Id.*

<sup>127</sup> *School For Boys*, DET. FREE PRESS, Feb. 28, 1991, at 14A.

<sup>128</sup> Gilchrist, *supra* note 125, at 1A.

mirror in the morning anymore."<sup>129</sup> She further stated, with single-sex classrooms, "the social pressure is off."<sup>130</sup>

Moreover, "[s]ome research suggests that girls may make greater academic and social gains in single-sex schools."<sup>131</sup> In 1986, a University of Michigan professor conducted a study of students in 75 Catholic high schools and found that both "boys and girls in single-sex settings generally outperformed their counterparts."<sup>132</sup>

b. The opponents view

i. *Gender bias*

Opponents of the Academies believe males would benefit far more from a coeducational Afrocentric environment than a single-sex Afrocentric environment. They claim that the single-sex environment carries the danger of perpetuating or nurturing sexist attitudes. One commentator noted:

A clear anti-female ideology is implied and expressed by many proponents of same-sex schools and classrooms. They imply it is the presence of females, rather than poor economic and social conditions founded on race and sex discrimination, that has led to the failure to educate the majority of children in this nation's urban schools. Females are viewed as a distraction, causing boys to misbehave and making females responsible for bad conduct by males, an idea that was discredited years ago.<sup>133</sup>

Or it could be that the development of important gender relations skills may be sacrificed in the single-sex environment.

Kids of both genders have a profound need to learn together, to compete with one another, to change and grow in one another's presence. Much of their future happiness after all, is going to turn on how well they get along with members of the other sex. Going to the same school is perhaps the most important opportunity boys and girls have to learn to respect and value each other.<sup>134</sup>

Another Detroit resident added, "the best place to teach that men shouldn't abandon their babies and women shouldn't accept abandonment may be in the context of mutual respect in a gender-mixed classroom."<sup>135</sup> One member of the African-American community feared that establishing the Academies

<sup>129</sup> Ellen Creager, *The Priest and the Principal: Two Strong Men Build a School*, DET. FREE PRESS, June 4, 1992, at 1D.

<sup>130</sup> *Id.*

<sup>131</sup> Gilchrist, *supra* note 125, at 1A.

<sup>132</sup> *Id.*

<sup>133</sup> Sundberg, *supra* note 77, at 2F.

<sup>134</sup> James Ricci, *All-Male Schools Would Omit Some Important Lessons in Life*, DET. FREE PRESS, Aug. 18, 1991, at 1H.

<sup>135</sup> *All-Male Academies: The Case for Separate-But-Equal is Still Unproven*, DET. FREE PRESS, Sept. 11, 1991, at 6A.

might take many of the relatively few African-American male teachers, thus depriving the non-Academy children of these very important role models.<sup>136</sup>

ii. *Anti-segregation*

Opposition to the Academies also arose from reasons unrelated to gender. For example, a member of the local school board feared that the Academies may become a dumping ground for problem children.<sup>137</sup> She stated, "I am not in favor of again resegregating our kids. . . . I don't see this as an answer."<sup>138</sup> The Metropolitan Branch of the American Civil Liberties Union, echoing language from *Brown*, stated, "[t]he ACLU believes that separate schools are inherently unequal."<sup>139</sup> Howard Simon, the Executive Director of the Detroit branch, said that although the ACLU recognizes the crisis facing African-American males, its severity does not warrant the creation of forced or self-imposed segregation.<sup>140</sup> He further stated, "We're going to stand on principal. Segregation is bad. If you allow some segregation now, then you open the door to legitimized segregation. . . . The goal should be quality education for all students."<sup>141</sup> Karen Sundberg of the National Organization for Women stated, "Some have suggested a parallel female academy. Do we really want to revert to a time of strict separation of the sexes? Have we not learned anything from the civil rights movement and the women's movement? Segregation on any basis breeds mistrust, fear and animosity, and has no place in public institutions supported by tax money."<sup>142</sup> Another community member remarked, "Special attention to the problems that young black males and their families face is one thing. That problem will not be solved by creating a new class of victims who are told, in the age-old fashion of bigots everywhere, that no girls need apply, despite what the law says."<sup>143</sup> One young African-American and avid Republican remarked, "It is not an all-male academy that Detroit students need, but blue blazers and math . . . and exposure to white people."<sup>144</sup>

The reasons members of this community had for opposing or supporting the exclusion of females from the Academies are surely more numerous than those

<sup>136</sup> *All Male Schools; McGriff's Inflammatory Remarks Don't Aid Her Cause*, DET. FREE PRESS, Aug. 15, 1991, at 12A.

<sup>137</sup> Michele Vernon-Chesley, *Board Clears the Way for All-Male Academy*, DET. FREE PRESS, Feb. 27 1991, at 8B.

<sup>138</sup> *Id.*

<sup>139</sup> Brenda J. Gilchrist, *ACLU Opposes Plan for All-Male Academies 'Separate Schools Are Inherently Unequal'*, DET. FREE PRESS, May 31, 1991, at 4B.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Sundberg, *supra* note 77, at 2F.

<sup>143</sup> *All-Male Schools aren't Above the Law*, DET. FREE PRESS, Sept. 1, 1991, at 2E.

<sup>144</sup> Marian Dozier, *Voices of Discontent Americans Make One Thing Perfectly Clear: They are Sick and Tired of Politics as Usual Young Black Conservatives Say Democrats and Racial Politics Have Failed to be the Solution*, DET. FREE PRESS, Sept. 8, 1991, at 1F.

discussed above. The bases for the support of or opposition to the exclusion of females may not be solely rooted in social or political reasons. Some may voice opinions arising from economic, moral or religious beliefs as well. However diverse the disagreement and reasoning may have been, there is one common belief that everyone shared: African-American children needed an alternative to the current public school system. This shared belief is the foundation upon which a practical discourse could lead to a community consensus. Although there was strong disagreement between the opposing camps in this Detroit community, the common interest of providing a more effective education for its children should have motivated the community to initiate a more constructive debate. Also, the reasons why the African-American community was for or against the Academies are not necessarily related to the factors that would enable the proposed Academies to pass constitutional muster and the standards set forth in *Hogan*.

### C. *Building and Reconstructing the Consensus*

#### 1. The role of attorneys in the practical discourse

Attorneys and public interest advocates can play a crucial role in the practical discourse. This Note asserts that conducting the practical discourse under the supervision of attorneys and public interest advocates will help ensure its success. Although the principles of Discourse Ethics are not based on legal principles, this communicative method of problem solving may lead to results which have strong legal implications.<sup>145</sup> Therefore, the ability of lawyers to "see the big picture"<sup>146</sup> and limit the possibility of harmful legal consequences

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<sup>145</sup> See Gary Charles Leedes, *The Discourse Ethics Alternative to Rust v. Sullivan*, 26 U. RICH. L. REV. 87 (1991) (Professor of Law at T.C. Williams School of Law at University of Richmond offers another example of Discourse Ethics in a legal framework).

<sup>146</sup> Susan Watson, a writer for the *Detroit Free Press*, offered an interesting perspective on the need for attorneys to see the big picture. In her article, she reflects upon the political climate in Detroit during the litigation of Michigan's landmark school desegregation case, *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972), *cert. granted*, 414 U.S. 1038 (1973). See Susan Watson, *Wrong Fight Waged on School System*, DET. FREE PRESS, Aug. 30, 1991, at 1B.

Stephen J. Roth was the U.S. District Court judge who authored the *Bradley* opinion. According to Watson, "[w]hen the case began, Roth wasn't sympathetic to the NAACP's claim [of segregation in the Detroit public school system]." *Id.* In fact, he called the NAACP lawyers "'outsiders' and suggested that they leave Detroit alone to solve its own problems." *Id.* However, as the case progressed, evidence revealed that there was an intentional system of segregation fostered by federal, state, and local school district officials and local real estate agents. *Id.*

In *Bradley*, Roth held:

The consistent application of constitutional principles requires that this court take all steps necessary and essential to require them to desegregate the Detroit public schools effectively and maintain, now and hereafter, a racially unified, non-dis-

may provide an invaluable tool to guiding communities through effective political discussion. For example, members of the community need to be informed of the effect legal precedent could have on their community and other African-Americans' abilities to educate their children. Perhaps, the community needed to be convinced of the practical need to give one group more help and attention than its similarly disadvantaged counterpart. One statement that clearly reflects the situation's need for informed attorneys came from one of the Wayne County commissioners. In a newspaper interview he stated, "At some point in time, you have to understand that if your children are dying in the streets, you have to overturn the law."<sup>147</sup>

## 2. Constructing the discourse

The first step in initiating the discourse would entail holding a community meeting. Although it is often difficult to motivate citizens and parents to attend events such as P.T.A., planning board and town meetings, the passion surrounding this case should have encouraged the entire community. The mutual exchange of ideas would ensue. The moderators of the discussion would have to carefully monitor the discussion so that the ideas of the least persuasive would be expressed and heard as strongly as those of the most persuasive. In addition, the moderators would have to listen with a sensitive ear to ensure that no viewpoints are unfairly silenced, and to aid those who may have trouble expressing their ideas or understanding the expressions of others. The careful monitoring of the debate should minimize the distortion of interests or overpowering effect by one or two particular viewpoints.

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criminary system.

*Bradley*, 345 F. Supp. at 940. This ruling said to the suburbs that "you can ride, but you can't hide from fairness and equality;" however, the Supreme Court essentially let the suburbs off the hook by limiting this ruling to the Detroit city limits. *Watson, supra*. See also *Milliken v. Bradley*, 418 U.S. 717 (1974). Instead of confronting de jure segregation in Detroit, the Supreme Court abandoned redistricting and chose not to "allow cross-district restructuring in order to promote desegregation." *Id.* Any white parent in Detroit who did not want his or her child exposed to minority children could simply move into the suburbs. *Id.* In fact, "in 1990, the Detroit school district was close to 90 percent black and most suburban districts remained overwhelmingly white." *Id.*

*Watson* concludes by remarking:

Separate and unequal is alive and well. . . . And unless I'm mistaken, no one has filed an emergency lawsuit lately to tackle the problem that [the *Bradley* court] identified 20 years ago. If it was filed, it must have been overshadowed by the team of lawyers win to defend to help black males beat the often deadly odds against them.

*Id.*

<sup>147</sup> Brenda J. Gilchrist, *Leaders Start Organizing Protest for Male Schools*, DET. FREE PRESS, Aug. 19, 1991, at 1B.

### 3. Establishing a universal belief

Once the ideas, beliefs, opinions and fears of the community have all been heard, the members of the community would come together and form a universal belief or policy that reflects the general will. Through discussion, the community would be convinced of the practical and beneficial reasons for justifying their new policy in the eyes of all affected by its practice. As stated in the principle of universalization, the community would not only have to agree on a solution; it would also have to agree to accept and bear the negative consequences their solution might have on the community.

If the opposing views of the Detroit community's members had been voiced under the strict moderation that Discourse Ethics requires, then the community most likely would have been able to create a way to better educate their children. Through mutual understanding the African-American community may have decided that the needs of males are more urgent than those of females, or that the final result of admitting females could have been done through a quicker and less adversarial means, thus minimizing the hassle and win-lose situations posed by the judicial system.

## V. CONCLUSION

Ultimately, the push for Afrocentric curriculum and African-centered academies is nothing but an attempt to make people feel good. If children don't understand who they are or what they are, teaching the three Rs can be difficult, if not impossible."<sup>148</sup>

The following comments represent a sampling of remarks made about the results of the Academies: "Despite the rough start, the [A]cademies [were very] successful [after] their first year."<sup>149</sup> "[S]tudent attitudes, behavior and attendance [rates for these children] improved."<sup>150</sup> Overall, many students have enhanced their academic performances, and know more about the contributions of African-Americans than they did before they attended the Academies.<sup>151</sup>

Discourse Ethics offers an avenue to conducting a critical reflection upon problem-solving in our communities and society at large. If the principles of Discourse Ethics are utilized in every aspect of the American political process, then reforms such as political inclusion, integration and affirmative-action programs may be more effective. Through a practical discourse, communities can learn to help themselves and move forward as a cohesive unit. Different groups in society may finally enjoy the ability to exercise a sense of autonomy in shaping their social worlds.

The usage of practical discourse may also help society to lessen excessive

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<sup>148</sup> Debra Adams, *Detroit Schools Stand Tall After First Year*, DET. FREE PRESS, June 7, 1992, at 1F.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

and needless litigation. If community disputes can be resolved within its confines, the expense and time that accompany litigation will be avoided. In addition, litigation often creates negative feelings between litigants because of its inherently adversarial nature. If opposing parties reach an understanding through a mutual respect for the various perspectives involved, then the players in the game will be better able to accept the end result. Mutual acceptance of a final solution is particularly important when parties in a conflict must continue to interact with each other after a dispute is resolved.

Hopefully, as alternative forms of dispute resolution become more popular in American society, theories such as Discourse Ethics will gain more acceptance. And as other African-American communities strive to gain equality in the academic training of their children, they will be guided by one principle: "African-American children need *education*, not segregated education or desegregated education."<sup>153</sup>

*Norman Williams, Jr.*

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<sup>153</sup> Derrick A. Bell, Jr., *The Legacy of W.E.B. Du Bois: A Rational Model for Achieving Public School Equity for America's Black Children*, 11 CREIGHTON L. REV. 409, 415 (1978).