EXPANDING THE CONCEPT OF AFFIRMATIVE ACTION TO ADDRESS CONTEMPORARY CONDITIONS

ALFRED W. BLUMROSEN*

INTRODUCTION

Today's civil rights program was shaped more than thirty-five years ago by a Presidential Committee report.[1] The social and economic conditions of minorities and women have so improved since then, that a fundamental reexamination of the civil rights program and its handmaiden, affirmative action, is now in order.

The Truman Committee Report of 1947 identified racial discrimination in employment by reference to three socio-economic indicators: relative occupational distribution, relative unemployment rate and relative income level.[2] These indicators changed little from the end of World War II to the passage of the Civil Rights Act of 1964.[3] Since 1964, one of these indicators — occupational distribution — has improved dramatically. Millions of minorities and women are now in better paying, higher status jobs than they would have held under the pattern of occupational distribution of 1965.[4] This improvement requires that we expand our basic thinking about civil rights and affirmative action and helps to explain the diminution in public, political, and official support for these programs.

The first twenty years under the Civil Rights Act were devoted to opening opportunities. The emphasis in the future may be on making those opportunities meaningful in human terms, assuring minorities and women that they can enjoy the newly won fruits of their labors. To achieve this objective, the civil rights movement will have to join — or rejoin — those who are concerned with the enhancement of individual freedom, dignity, and opportunity in fields which are "new" to the civil rights movement. It will no longer be sufficient to press the traditional concepts of affirmative action. The civil

* Professor of Law and Herbert J. Hanoch Scholar, Rutgers Law School, Newark, N.J.; A.B., J.D., University of Michigan. Professor Blumrosen has served as a consultant to the Departments of Justice and Labor, as Chief of Conciliations for EEOC, and as an advisor to employers, unions, employees, and state and local governments on equal employment matters.

1. President's Committee on Civil Rights, To Secure These Rights (1947).

2. Id. at 53-61.

3. A. Blumrosen, Black Employment and the Law, 271-92 (1971) [hereinafter Black Employment].

4. More detailed data appear in Blumrosen, Six Conditions for Meaningful Self Regulation, 69 A.B.A. J. 1264, 1267 (1983) [hereinafter Six Conditions]; Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Indus. Rel. L. J. 313, 333-40 (1984) [hereinafter Law Transmission].

rights movement must become concerned with tax, tariff, antitrust, educational policies and protection by the criminal law.

An expanded approach to civil rights issues is dictated by the extensive socio-economic changes since 1965. The extent of these changes is suggested by Table I.

TABLE I
RATIO OF MINORITY TO WHITE PARTICIPATION RATES IN STANDARD OCCUPATIONAL CATEGORIES, 1950-1980[5]

Job Category	1950	1965	1980
Officials/Mgrs.	21.5	23.4	43.3
Prof./Technical	37.5	52.3	77.0
Sales	17.3	26.7	42.6
Clerical	25.3	50.3	98.9
Crafts (skilled)	35.0	49.6	72.2
Operatives (semi-skilled)	90.2	117.0	143.7
Laborers (unskilled)	282.0	282.0	160.5
Service Wkrs.	233.3	218.3	176.1

Since 1965, the proportion of minorities in the "officials/managers," "professional/technical," "clerical," and "crafts" job categories has moved rapidly toward the proportion of whites in those categories. Simultaneously, the excessive concentration of minorities in "operatives," "laborers" and "service" categories has been reduced. Thus, the image of a minority worker as essentially performing hard labor in a white-dominated employment system has been blunted by the history of the last fifteen years.

In addition, the minority and female share of total employment has increased. In 1965, minorities constituted 10.7% of an employed labor force of 72 million; in 1980, they constituted 11.2% of an employed labor force of 97 million.[6] Thus, nearly half a million more minorities were at work in 1980 than would have been at work under the labor force participation rates of 1965. In 1965, females accounted for 34.8% of the labor force; in 1980, they accounted for 42%. Nearly four million more women were at work in 1980 than would have been at work under the 1965 participation rate.[7] Women achieved significant improvement in their occupational status as well.

5. Six Conditions, supra note 4, at 1267; Law Transmission, supra note 4, at 335; Data for 1950-1965, U.S. Bureau of the Census, Statistical Abstract of the United States: 1966, at 229 [hereinafter Statistical Abstract 1966]; Data for 1970-1980, U.S. Bureau of the Census, Statistical Abstract of the United States: 1981, at 400 [hereinafter Statistical Abstract 1981].

6. Statistical Abstract 1966, supra note 5, at 229; Statistical Abstract 1981, supra note 5, at 402.

7. See note 5 supra.

TABLE II
CHANGE IN OCCUPATIONAL DISTRIBUTION AND INCOME OF MINORITY AND FEMALE WORKERS IN 1980 COMPARED TO THAT WHICH WOULD HAVE EXISTED UNDER THE OCCUPATIONAL DISTRIBUTION OF 1965

Job Category	Change in Numbers of Employees[8]		Change in Gross Mean Earnings[9]	
	Minority	Female	Minority	Female
Officals/Mgrs.	283,140	1,016,135	4,352,145,000	12,588,896,515
Prof./Technical	642,510	1,371,608	9,351,090,500	16,056,043,248
Sales	108,900	−346,360	783,100,000	−1,999,241,868
Office/Clerical	1,110,780	1,445,960	9,424,968,300	11,761,438,640
Craft (skilled)	315,810	291,993	3,811,195,000	2,715,251,276
Operatives (semi-skilled)	−206,910	−1,942,332	−1,984,473,800	−13,883,789,136
Laborers	−631,620	352,812	−4,390,390,600	2,207,191,872
Service except household	−935,540	−1,711,483	−5,697,178,500	−8,242,502,128
Farm	−686,070		−3,850,224,800	

In 1980 alone, minorities received nearly nine billion dollars more in wages than would have been the case under the occupational distribution of 1965; women received nearly 22 billion dollars more. The increased wage incomes to minority and female workers totalled at least 25 billion dollars in 1980 alone. This pattern of improvement established between 1965 and 1980 continued through 1982 according to more recent statistics.[10]

The Equal Employment Opportunity (EEO) programs have improved access to and participation in higher level jobs for minorities and women. Yet there seems to have been a "conspiracy of silence" about this development. Opponents of affirmative action have no interest in acknowledging its success. And some supporters fear that recognition of success will justify reduction in support for such programs.

Nevertheless, it is important to recognize that the situation of minorities and women in the 1980's is substantially different—and better—than in 1965. This improved condition of minorities and women helps to explain the decline in public support for civil rights issues; it makes the rhetoric of the 1960's sound hollow. An understanding of the dimension of this change is necessary

8. See notes 4 and 5 supra.

9. See Current Population Reports, Series P-60, No. 129, U.S. Bureau of the Census, Money Income of Families and Persons in the United States: 1979 (1981).

10. U.S. Bureau of Labor Statistics, Statistical Abstract of the United States: 1984, 417 [hereinafter Statistical Abstract 1984].

if we are to implement programs that will make as much sense for the next era as did the programs of the 1940's which were implemented in the 1960's.

Because of the success of affirmative action programs, it now becomes necessary to ensure that those minority and female workers with improved job situations enjoy the fruits of their labors. In pursuing this objective, the civil rights movement may find new common ground with other sectors of society such as whites/males who are in comparable situations, and thus generate anew more general public support for civil rights objectives.

This article will suggest a concept of affirmative action which relates the experiences of the past — both the successes and the failures — to the needs of the future. Part I addresses conventional affirmative action issues. Part II addresses "new" areas in which the civil rights movement should become involved, including taxation, tariff, antitrust, education and protection of persons and property through criminal law.

I
TRADITIONAL AFFIRMATIVE ACTION

A. Occupational Distribution — The "Goals and Timetables Issues" in Modern Perspective

The function of the "goals and timetables" program of the 1970's was to insure the inclusion of minorities and women in jobs from which they had traditionally been restricted or excluded. The success of the approach is manifest in the statistics in Table I, *supra*. It is obvious that goals and timetables are no longer needed as an overall macro-legal program for minority office and clerical workers; however, such a program may be necessary in the case of individual employers who engage in discriminatory recruitment and hiring.

The remaining job categories where a program of goals and timetables should generally be used, for a limited time, include officials and managers, professional and technical jobs, and sales and craft jobs. The length of time during which goals programs should remain in effect is uncertain. There is no general need for a goals program when the proportion of the minority work force in a given occupational category comes close to that of whites. A decade ago, I urged that a discussion of the issue as to when "quotas" should be discontinued from being used be undertaken.[11] Such a discussion never occurred because the opponents of goals did not want them used at all, and the supporters of the program did not want to discuss a stopping point when conditions were, in their view, so bad. The need to consider this question is sharpened by the Reagan administration's attack on goals and timetables. The goals programs should continue only until the proportion of the minority or female labor force in a job category approaches the proportion of whites/males. As an operational or practical application of this view, the adoption of

11. Blumrosen, Quotas, Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675, 678 (1974) [hereinafter Quotas].

the "80% rule" set forth in the Uniform Guidelines on Employee Selection Procedures would be appropriate.[12] If the "80% rule" determined when, in general, goals and timetables should be phased out, we would soon see the end of such programs in most job categories. Thus, goals programs would remain in place for officials, managers, professional and technical workers and craft jobs.

This approach may be criticized. How can we abandon the goals program while the minority unemployment rate remains double that of whites? The answer is that while the goals program seems to have had little impact on minority unemployment, in actuality the minority "share" of all jobs increased during the 1970's. It is because of increases in the minority population and labor force participation, that the minority unemployment rates have remained double that of whites.[13] Considering these circumstances, it is doubtful that the equal employment laws can significantly affect the relative unemployment rate. An alternative approach to the unemployment problem—reduction of the normal work week—will be discussed in the next section of this article.[14]

The officials, managers, professional, technical and craft jobs for which a goals program should be maintained involve a high degree of discretion in both performance and evaluation. They are not well suited to the one-on-one litigation under Title VII. The job specifications are vague and general; performance expectations are uncertain; therefore, performance evaluation is difficult and subjective.[15] Under these conditions, the outcome of one-on-one litigation is more apt to resemble Russian roulette than the reasoned application of social policy. Therefore, a general requirement that minorities and women be included in these categories, leaving the details to be worked out by those in control of the workplace, may be more appealing to unions, management and the civil rights movement than a search for identifiable victims of individual acts of discrimination.[16]

12. Uniform Guidelines on Employee Selection Procedures 1978, 29 C.F.R. §§ 1607.3-.4(D) (1978); See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The government uses the Guidelines to identify those employee selection procedures which have an adverse impact on minorities and women. If the proportion of minorities and women who pass the employee selection procedure is at least 80% of the proportion of white/males who pass, then the government will generally not find "adverse impact." If the procedure does not meet the "80% rule" it is considered to be discriminatory and in violation of Title VII unless the employer can establish business necessity or the test's validity. While the rule has its critics, it does provide a practical "on site" method of making an important assessment as to the possible illegality of a selection procedure.

13. Blumrosen & Culp, Reducing the Workweek to Expand Employment: A Survey of Industrial Response, 9 Empl. Rel. L.J. 393, 407-08 (1984) [hereinafter Survey].

14. See notes 31-36 and accompanying text infra.

15. See Valentino v. United States Postal Serv., 674 F.2d 56, 64-69 (D.C. Cir. 1982) (denying both individual and class claims, and noting the difficulty of an objective selection process for promotions to high-level management positions); Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 959-64 (1982) (explaining judicial reluctance to review high-level decision-making).

16. There may indeed be individual victims for whom Title VII will provide relief, but to

This approach assures that goals and timetables will not be continued so as to divide the work force along lines of race and sex on a mechanical basis. Proportional representation in the workplace is neither possible under the principle of the *Weber* case[17] nor under the EEOC Affirmative Action Guidelines.[18] It had been theoretically possible under the Labor Department Compliance Manual during the Carter administration.[19] However, this manual was directed primarily at the job categories of sales, professionals, and officials/managers, where, at the time, there was "far to go" before proportionality became a real possibility.

The cloudy legislative history of the "anti-preference" provision of Title VII[20] makes clear only that Congress did not want a mechanical allocation of jobs along race, ethnic and sex divisions.[21] Within that framework, it remains appropriate to utilize goals to correct traditions of restriction and exclusion of disadvantaged groups. Group claims are asserted to redress a history of exclusion of individuals because of their membership in the group. As the consequences of group exclusion decline, the need for recognition of group claims also declines.[22] But we must continue to recognize group claims where the group as a whole continues to suffer the consequences of repression. Otherwise, we accept the subordinate status of minorities and women that Congress has rejected.[23]

Employers generally adopt and implement goals programs when they are assured that they need not employ unqualified personnel. They prefer to use qualification standards of their own choosing rather than only those which pass muster under the Uniform Guidelines on Employee Selection Proce-

---

confine affirmative action to remedying such individual discrimination (the 1984 Justice Department policy) is either to restrict affirmative action unduly in situations of uncertainty, or to force extensive litigation over the discrimination issue, when settlement would otherwise be possible. Such results would appear to conflict not only with United Steelworkers v. Weber, 443 U.S. 193 (1979), reh'g denied, 444 U.S. 889 (1979) (holding a voluntary affirmative action plan to be within congressional intent), but also with the thrust of the decision in Ford Motor Co. v. EEOC, 458 U.S. 219, 228-30 (1982) (limiting back pay liability so that employer has incentive to hire Title VII claimants), as well as EEOC Affirmative Action Guidelines, 29 C.F.R. § 1608 (1979) (§ 1608.1 stresses the need for voluntary action without litigation). The decision in Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) is not to the contrary. *Stotts* holds only that bona fide seniority systems are not subject to revision under Title VII. See Justice O'Connor's concurring opinion at 2592.

17. *Weber*, 443 U.S. at 208 (noting that voluntary affirmative action plan was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance").

18. 29 C.F.R. § 1608 (1984).

19. Federal Contract Compliance Manual, § 2.190.1(a) (1979).

20. 42 U.S.C. §2000e-2(h) (1982); § 703(h) of Title VII.

21. Blumrosen, The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of *Connecticut v. Teal*, 20 Harv. J. on Legis. 99, 114 (1983) [hereinafter Group Interest]; Quotas, supra note 11, at 692; see also note 16 supra.

22. See Law Transmission, supra note 4, at 337 (distinguishing second generation cases, in which discriminatory patterns are no longer clear, from first generation cases, in which the practices are easily identified).

23. See Group Interest, supra note 21, at 116.

dures.[24] The "bottom line" theory of Title VII would have permitted the employer to do this if they included adequate numbers of minorities and women.[25] But the Supreme Court may have, mistakenly, unduly limited this option.[26]

The Reagan administration's opposition to goals is both internally inconsistent and legally unsound. The use of goals and timetables has been opposed by the government in petitions for certiorari to the Supreme Court;[27] however the government has not rescinded the regulations under which they are required and protected. Department of Labor Regulations requiring goals and timetables are still in effect, as are EEOC Guidelines protecting employers who take affirmative action. These regulations have the force of law and the Justice Department should be bound by them unless, and until, they are changed pursuant to the Administrative Procedure Act.[28]

Why has the Reagan administration not rescinded these regulations if it is opposed to goals and timetables? The answer may lie in the interstices of administrative law and politics. To rescind these guidelines would require formal government action, including at least "notice and comment" procedures by the OFCCP and the EEOC. Since the guidelines and regulations involve both race and sex discrimination, their change would restrict women's rights. This would pour oil on a fire which the administration would rather dampen.

To avoid this problem, the "quota" issue has been argued in the only forum in the United States where different standards are applied to race and sex matters: the judiciary. The Supreme Court has labeled race a "suspect" classification, and government action based on racial classification must undergo "strict scrutiny." Sex is not a "suspect" classification and therefore government action based on gender is subject to a lesser degree of review.[29] Given this double standard, the gender aspects of affirmative action programs may survive while the race aspects may fail. At the least, there is a technical justifi-

24. 29 C.F.R. § 1607.14 (1978) sets out detailed standards for validation of tests and other selection procedures.

25. Blumrosen, The Bottom Line in Equal Employment Law: Administration of a Polycentric Problem, 33 Ad. L. Rev. 323 (1981).

26. See Connecticut v. Teal, 457 U.S. 440 (1982) (criticized in Group Interest, supra note 21).

27. See, e.g., Petitions in Support of Certiorari, Bratton v. City of Detroit, No. 83-551 (Oct. Term 1983); Boston Firefighters Local 718 v. Boston Chapter, NAACP, No. 82-185, 246, 259 (Oct. 1983); Firefighters Local No. 1784 v. Stotts, No. 82-206, 279 (Oct. 1983). See also Reynolds, Justice Department Policies on Equal Employment and Affirmative Action, in Proceedings of N.Y.U. 35th Annual National Conference on Labor 443 (R. Adelman ed. 1983).

28. 5 U.S.C. § 553. See Blumrosen, The Binding Effect of Affirmative Action Guidelines, paper presented at the Section on Labor Employment Law, A.B.A., May 4, 1984, New Orleans, La., reprinted in Daily Lab. Rep., May 8, 1984, at D1 (to be published in revised form in a forthcoming issue of The Labor Lawyer, a new publication of the Labor and Employment Law Section, A.B.A.) [hereinafter Binding Effect]. See also Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866-67 (1983).

29. See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272-74 (1979).

cation for the government to challenge only the race aspects of the affirmative action program.

I do not know if this is in fact the strategy of the Reagan administration. In any event, the Supreme Court should not become entangled in such political machinations. It should require the executive branch to get its own house in order, in a manner which complies with the Administrative Procedure Act.[30]

B. Unemployment and the Thirty-Two Hour Work Week

Minority unemployment rates remain about double of white unemployment rates; and minority teenage unemployment rates in urban areas reach levels above 50%.[31] This suggests that the overall share of jobs going to minorities has not improved during the past fifteen years. In fact the minority share of all jobs has increased during this time.[32] If the minority population had remained at about 11% of the total population, as in 1965, we would have seen a sharp drop in the relative unemployment rate. This did not happen. The minority baby boom of the fifties and sixties increased the minority proportion of the population to its present 17-18%, with large numbers concentrated in their teens and early twenties. The result is that the improved employment of minorities after the Civil Rights Act did "solve" the problem as it had existed in 1965, but the population mix has so changed that the relative unemployment rate is now as high as it had been in 1965.

We may consider three approaches to the minority unemployment problem for the coming period: hire according to affirmative action plans; reduce our social commitment to the "work ethic"; or create additional employment.

First, there is little reason to believe that continued affirmative action hiring will seriously affect the relative unemployment rate since it took from 1965 to 1980 to increase the minority share of the labor force by less than one percent. While this represented nearly half a million jobs, it did not absorb the excess of minority unemployment. Nevertheless, continued pressure for affirmative action may be useful to prevent backsliding and to insure that specific employers recognize their social responsibilities.

Second, we cannot reduce our emphasis on the work ethic despite government efforts supporting this approach.[33] The elimination in 1981 of the tax advantage that "earned income" had over "unearned income" suggests that an individual in the higher tax bracket might as well manipulate her financial affairs rather than perform what is traditionally considered "work." Similarly, the welfare system, as currently administered, may reduce work incentives. Deemphasizing the work ethic through such policies is inappropriate as a gen-

30. 5 U.S.C. § 553. See Binding Effect, supra note 28.

31. Blumrosen & Culp, supra note 13, at 401.

32. See note 5 supra.

33. See generally The Work Ethic — A Critical Analysis (J. Barbash, R.J. Lampman, S.A. Levitan & G. Tyler eds. 1983).

eral proposition. We operate in a world where there are millions, if not billions of people, who would find working at our most menial jobs a vast improvement in their condition of life. Further, our own economic needs require continued attention to productivity.

Therefore, job creation is the only alternative left to alleviate minority unemployment. Since our efforts to create jobs in the public sector have not been successful, we should seek to create new jobs in the private sector. Requiring employers to pay time and a half for hours worked after thirty-two hours would create millions of new jobs, a good many of which would be part-time.[34] These jobs would create new avenues of entry and experience for youth including minority youths, for those who wish to join the world of employment without relinquishing their roles as parents, and for older workers who wish to slow down but not be tossed onto the industrial scrap heap.

Rutgers Law Professor Jerome Culp and I recently surveyed industrial relations personnel as to their probable response to the "32 hour work week." The survey strongly suggests that the primary response of employers to the 32 hour work week would be to reduce the hours of presently employed personnel. These employers would make up for the lost hours by hiring part-time personnel, who would then provide the primary pool from which future full-time workers would be hired.[35] We estimated that this approach would create some five million full- and part-time jobs.[36] This would reduce unemployment to less than half of its current figure.[37]

Some supporters of affirmative action have responded cautiously to this proposal. Their concern is that minorities and women would be locked into "second class" part-time jobs, thereby perpetuating the division between the haves and have-nots in the labor force. While pre-Civil Rights Act history would justify this concern, it is not justified under current conditions. Virtually all of the employers surveyed indicated that they would draw full-time workers from their part-time employees. Their failure to do so would be discriminatory to the extent that they neglected a source of minority and female workers. Finally, common sense indicates that an employer would prefer to make a full-time worker of a part-time worker whose work was satisfactory rather than hire an unknown.

Objections from other quarters also exist. Some workers, whose employers reduced their hours to thirty-two, would take a cut in pay. This is true, but not as drastic as it first appears. The average work week now is approximately thirty-five to thirty-six hours, not forty hours. So the pay cut which would result is no more than 10%, reduced by a smaller tax bite, by fewer work preparation expenses, and by the value of the additional free time.

34. Blumrosen & Culp, supra note 13, at 394.

35. Other employers would remain at forty hours and absorb the increased cost. Still others would reduce to thirty-two hours and hire additional full time workers. And finally, some would simply reduce to thirty-two hours without hiring additional workers. Id. at 394-96.

36. Id. at 414.

37. Currently, about ten million Americans are unemployed. Id. at 397.

This proposal would allow the play of economic forces, including unionism, to determine how employers deal with the consequences of the new requirement, and would honor existing collective bargaining arrangements through their term. Our economy is so varied and complex that detailed regulation is difficult. Effective regulation should set forces in motion which operate without direct government supervision. Therefore, the response to the thirty-two hour work week should be worked out primarily by those involved.

C. Wage Disparities

The third indicator of discrimination has been the lower wage levels of minorities and women. Nevertheless, the first decade following the enactment of Title VII was largely devoted to opening job and promotional opportunities for minorities and women, rather than challenging wage rates in jobs to which they had been traditionally assigned. The lower pay rates for traditional minority and female jobs were not initially perceived as discriminatory.

Some work was done on the issue of wage discrimination in the sixties, notably in the Newport News agreement of 1966[38] and the settlement of the Planters Manufacturing case in 1967.[39] However, the unstated assumption during that period was that the opening of promotional opportunities to higher paying jobs was a sufficient prospective remedy for the concentration of minorities and women in low paying jobs. The Equal Pay Act did address the issue of wage equity,[40] but applied only where a job held by a female was similar in content to a higher paying job held by a male. As a result, the Equal Pay Act was of limited utility because most "women's jobs" were and are different from "men's jobs."[41] The strategy of opening promotion opportunities was of limited value because it did not provide relief for depressed wages earned by those at the bottom of the wage-job pyramid. In addition, many workers, particularly those in their middle years, hesitated to give up work that they were performing satisfactorily for a new, unknown, possibly risky, and possibly discriminatory job situation.

In the mid-seventies, these facts were recognized, and attention began to shift to pay equity for jobs of "comparable worth."[42] In 1979 an ovarian article analyzed the problem as "wage discrimination based on job segregation."[43] A challenge to wage structures, under the theory of wage discrimination, was

38. Black Employment, supra note 3, at 328-407.

39. International Chem. Workers Union v. Planters Mfg. Co., 54 Lab. Cas. (CCH) ¶ 9025 (N.D. Miss. 1966) (motion to dismiss denied), 55 Lab. Cas. (CCH) ¶ 9046 (N.D. Miss. 1967).

40. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

41. Blumrosen, Wage Discrimination, Job Segregation, and Title VII of The Civil Rights Act of 1964, 12 U. Mich. J.L. Ref. 397, 399-400 (1979) [hereinafter Wage Discrimination].

42. See, e.g., Quotas, supra note 11, at 696-98.

43. Wage Discrimination, supra note 41, at 416 n.84. This article notes that most of the research reported in M. Hughes, The Sexual Barrier: Legal, Medical, Economic and Social Aspects of Sex Discrimination (1977), dealing with sex roles and attitudinal data, was published after 1970.

permitted by the Supreme Court in the *Gunther* decision in 1981.[44] A vast expansion of this area of law will probably take place during the 1980's.[45] Thus, affirmative action in the next period of its development will include pressure to increase wages in jobs held predominantly by minorities or women. This approach may, at last, address the minority and female income disparities. Considerable litigation will inevitably be necessary before a new sense of equity or fairness in the wage structure emerges.

II
NEW AREAS OF AFFIRMATIVE ACTION

The success of affirmative action programs means that there are now significant numbers of minorities and women in middle income level positions. Therefore, problems of race and sex discrimination are no longer exclusively the problems of the poor. In order to ensure that these minorities and women enjoy the fruits of affirmative action in employment, civil rights supporters need to embrace a range of new issues, including tariffs, tax policy, and quality of life. In taking this approach, the civil rights movement can rebuild alliances with other interests, to the mutual benefit of all.

A. Affirmative Action and Taxation

Because minorities' and women's wages are generally lower than those of white males, specific aspects of tax policy are obvious candidates for examination. Such policies include taxation of low wage earners and the impact of the tax structure on the cost of borrowing money.

1. Taxation of the "Working Poor"

Taxing the lowest levels of income obviously has an adverse effect on minorities and women because a higher proportion of them are represented in these lower income levels. They are the working poor or low-middle class. Although an important social interest is furthered by encouraging persons in this category to improve their situations rather than depend on public support, the government taxes them when they begin to earn even very little. The "earned income credit"[46] is but a limited effort in recognition of this inequity. The taxation of the working poor, in effect, encourages welfarism and penalizes those who seek to make a better life for themselves. It is time the civil rights community sought tax relief for the working poor to enable them to save or spend more of what they earn.

2. Taxation and the Cost of Borrowing Money

Low- and middle-income persons who seek to borrow in order to improve

44. County of Washington v. Gunther, 452 U.S. 161 (1981).

45. See, e.g., AFSCME v. State of Wash., 32 Fair Empl. Prac. Cas. (BNA) 1577 (W.D. Wash. 1983).

46. 26 U.S.C. § 43 (1982).

their condition in life are disadvantaged by tax policies which enable higher-income earners to borrow money more cheaply than lower-income earners. For example, consider the annual cost of borrowing $10,000 at 10% interest, which is $1,000. A taxpayer in the highest tax bracket (50%) would ordinarily pay $500 in tax on that $1,000. If the taxpayer borrows $10,000 and uses that $1,000 to pay interest, the expense is deductible from taxable income. The taxpayer "saves" the $500 she would otherwise pay in taxes on the $1,000. Therefore, the actual cost of borrowing the $10,000 to this taxpayer is not $1,000, but only $500. Someone in the 25% tax bracket has an actual cost of $750 per year for borrowing that same $10,000 because the interest deduction saves only $250. Thus the actual interest cost of borrowing for housing, automobiles, home appliances, not to mention the cost of opening a small business, is higher for low-income persons than for higher-income persons. This makes it more difficult for lower-income persons to take advantage of opportunities to invest. Affirmative action should seek to afford low income persons the same borrowing opportunities that the wealthy receive: low-income persons should also be allowed to deduct 50% of their interest payments. This is a more sensible approach than that of further reducing the taxes of the rich by a "flat rate" tax which unrealistically assumes that "tax loopholes" can be closed.

The flat rate tax idea will, in fact, penalize the lower-middle class which must use its entire income for either personal consumption or debt charges; thus, such a tax furthers the monopoly of the rich over capital acquisition and accumulation. In addition, if the tax exemption for municipal bonds is eliminated, the cost of borrowing for cities, where minorities are concentrated, would increase. Civil rights interests should vigorously oppose such an approach to taxation.

B. Tariff Policies and Affirmative Action

The downward pressure on wages in the United States resulting from competition of low-wage countries should also become a civil rights issue, requiring a new form of affirmative action. Many of the jobs which are leaving the United States are low- and middle-skill jobs which would otherwise be accessible to minority and female workers who have had limited training opportunities. Using the language of EEO law, the flight of these jobs overseas has an "adverse impact" on minority and women workers.

One of the major achievements of EEO law and affirmative action of the 1970's was the Steel Industry Consent Decree of 1974.[47] The decree gave minority and female workers the benefit of their total length of service in competing for improved jobs, and in being protected against layoffs. This was a vast improvement over the "departmental" seniority systems which had locked minority workers into the departments and jobs to which they had been assigned

47. See U.S. v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975).

because of their race.[48] By the 1980's, this Consent Decree meant that minority workers would be the last laid off as the steel industry closed plant after plant under pressures from foreign competition. To preserve the gains of affirmative action, therefore, the civil rights movement should insist on a tariff policy which demands that low wage countries measurably improve the real wages of their own workers, as a condition of free access to American markets.

In response to this analysis, some argue that under free competition consumer prices will be lower, and therefore the economic position of minorities and women is advanced by a "free market" approach to tariffs. This response fails to address a crucial aspect of the EEO law. The law is intended to enhance dignitary as well as economic interests.[49] It is part of a broad civil rights program involving access to public accommodations and the political process, as well as economic concerns such as employment.

Viewing minority and female workers purely as "consumers" disregards the social importance of work as an indicator of individual dignity. The nature of an individual's job influences individual dignity because work defines one's role in society.[50] The value of that role is related to the wages which the work commands. Discrimination which circumscribes opportunity and confines minorities and women to low-paying jobs harms both dignitary and economic interests. The flight of "blue collar" jobs overseas has special impact on minorities who might otherwise hold them. It is unrealistic to expect the very groups who have been discriminated against in the past to bear, in silence, the heavier brunt of the flight of jobs out of the country, and the restrictions of our access to foreign markets under the banner of free competition. To these groups, this result may appear to be a continuation of discrimination against them in yet another form. Therefore, affirmative action for the 1980's should include a tariff policy which encourages low-wage countries to raise the real wages of their workers.

It would be wrong to adopt a merely protectionist attitude toward low-wage countries. Free access to our markets should be conditioned on continuing improvement in the conditions of workers in these low wage countries. The problem is that low wages in these countries leverage *down* the wages of American workers. The advanced position of the American workers should be used to leverage *up* the wages of workers in foreign countries. The harm is magnified in dealing with countries such as Japan, where American-made goods, produced under affirmative action conditions, are denied free access to its markets.

Tariff policy should, therefore, protect both our affirmative action gains against the ravages of low-wage countries and establish a position of leader-

48. Black Employment, supra note 3, at 169-217.
49. Group Interest, supra note 21, at 117-32.
50. See generally K. Auletta, The Underclass (1982) ("view from the bottom").

ship for the United States in improving the lot of workers in the rest of the world.

C. *Quality of Life: Recognizing the Social Interests of Minorities*

Minorities are heavily concentrated in our major metropolitan cities, where the quality of many services is lower than in the largely white suburban areas. The cities are increasingly dominated by minority political figures, but the economic basis for municipal services has eroded. For black working families, which face crime in the streets and inadequate public school systems for their children, affirmative action and improved job opportunities have not brought corresponding improvement in their life situations. This is because traditional concepts of civil rights and affirmative action have not adequately addressed some fundamental expectations of our society: adequate protection for persons and property, and adequate educational opportunities for children.

1. *Education*

The quality of inner city public schools is notoriously lower than that of suburban schools. The burden of this disparity falls most heavily on inner city children, including the most talented among them. Their potentials may never be recognized. Correcting this requires a program aimed at early identification of the talented members of the minority school population.

Social conditions and family situations may suggest longer school days and a higher degree of security for teachers and students. The demand for such services should become part of the concept of affirmative action. Teachers should not be required to spend the bulk of their time as caretakers of unruly children.

It may be unpleasant to address these realities, in part because many teachers and administrators in inner city public schools are now, by virtue of affirmative action, themselves minorities. Therefore criticism of education programs may sound like a "blame the victim" argument. But that is not the case. The race or sex of a teacher or administrator placed in a difficult or impossible situation by massive currents of social change is not germane to the question of how well we face these challenges. The more serious default would be to fail to address them because of the race or sex of those involved. We do not want observers in 1990 to conclude that we perpetuated the inferior education of minority children by placing in charge of that education persons whose presence made it impolitic to raise questions about its quality.

2. *Security of Persons and Property*

The post-World War II civil rights program did address one facet of the question of personal security; it demanded a strong federal anti-lynching law to protect blacks from white lawlessness.[51] Lynching has ceased, but this as-

51. See President's Committee, supra note 1, at 20-25, 157-58.

pect of the civil rights program has not been pressed to its logical conclusion: protecting minorities against lawless invasion of their persons and property. The burden of discrimination has made it difficult for minorities to develop personal skills and to acquire and accumulate property. Additionally, minorities suffer disproportionately from criminal injury to person and property, thus compounding difficulties created by discriminatory conditions of life.[52] For a black worker whose home is ransacked, or whose family is mugged or whose children are seduced into drugs, the color of the skin of the criminal must matter little.

In the past we have hesitated to demand affirmative action to protect the rights of persons and property in minority communities. Rather, the emphasis has been on another aspect of the post-World War II program, protection of minorities against police brutality.[53] Without diminishing efforts to prevent police brutality, the focus for affirmative action should be on protecting minority citizens against all unlawful acts. This will require enhanced police protection in minority communities. A fear of police brutality may have deterred the demand for this protection. If so, this is simply another case of one form of discrimination immobilizing the fight against another. The fear of police brutality should not result in open season for criminal assaults on minority persons and property.

3. *Drug Abuse*

The problems resulting from drug abuse have not been vigorously addressed by the nation, or by the civil rights community. Because of the heavy incidence of drug abuse in the minority community, the drug problem has a disproportionately adverse impact on minorities, and should be addressed as part of an affirmative action program.[54] For example, the civil rights community should demand the use of the military to curtail illegal importation of drugs. The current resources available to civil authorities to curtail this problem are technologically and quantitatively inadequate.

D. Antitrust Policy

Those interests in affirmative action should concern themselves with our antitrust policy. Government policy has allowed large corporations to swallow up smaller companies at an alarming rate as long as they were not in the same industry. It has also allowed the use of capital for acquisition rather than reinvestment in plant and equipment, which in the future may weaken our national competitive position. The probable decline in independently

52. Black males had a homicide victim rate of 66.6 per 1,000,000 compared to a rate of 10.9 for white males in 1980. Black females had a rate of 13.5 compared to 3.2 for white females in that year. Statistical Abstract 1984, supra note 10, at 180. See id. at 179 for other comparative victim statistics.

53. President's Committee, supra note 1, at 25-27, 157.

54. See statistics cited in N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 584-86 (1979).

owned and operated business institutions will inevitably have a restrictive effect on opportunities for minorities and women. Minorities and women will find it more difficult to establish or maintain their own businesses in the face of such conglomeration, and may find large corporations less responsive to their individual talents and capacities and less receptive to diversity. Affirmative action works most effectively in an economy which provides maximum diversity among business units.

E. Bankruptcy

Professor Shuchman has established that nearly 50% of those who invoked the Bankruptcy Act in northern New Jersey in 1980-81 were minorities or women.[55] Yet the civil rights movement did not oppose proposals to make it more difficult for small debtors to secure a bankruptcy discharge. This may not have been perceived as a civil rights issue, but it surely is under the assumptions of this article, and deserves more attention.

CONCLUSION

The discussion presented in this article has taken us far afield of the traditional concerns of the civil rights community. Raising these questions leaves a feeling of discomfort from working in unfamiliar terrain. The professional tendency to specialize makes it more comfortable to follow lines of thinking developed many years ago. We all are familiar with the traditional debate about affirmative action in employment, regardless of which side one advocates.

But we may debate ourselves into irrelevance if we do not recognize that the changes brought about by affirmative action necessitate a broadening of our concerns.[56] We must modify affirmative action to address these new realities while preserving the principle that we must consciously assert our power, influence and ability to build a more just society.

The majority community may support a civil rights approach in the unconventional areas of affirmative action outlined in the article. The values to be advanced are traditional values, and the beneficiaries will include those members of the white society whose life situations are similar to those of many minorities. There may lie, in this expanded view of affirmative action, the seeds of a new coalition of the type which forged the Civil Rights Act of 1964. The concept of affirmative action in civil rights is barely 20 years old. It has the potential to render further service in our continuing quest for a more just society.

---

55. Author's files (available upon request).

56. Prof. Nathan Glazer has identified the need for a new liberal synthesis. See Glazer, New York Intellectuals — Up From Revolution, N.Y. Times Book Review, Feb. 26, 1984.

RESPONSE

NATHAN GLAZER*: I'm very glad Professor Blumrosen took the line he did; otherwise our discussion would have been less interesting. I have been a critic of affirmative action, at least of some of its forms. I've even collected my criticisms in a book entitled *Ethnic Dilemmas* which came out a few months ago. I am glad I added after *Ethnic Dilemmas*, "1964-1982," because we are now getting beyond some of these issues, as Professor Blumrosen's article indicates. He divided affirmative action into two parts. One part is "classic" affirmative action, i.e., the traditional issues surrounding discrimination; the other part involves issues of redistribution and the economic condition of minorities. While these issues are not civil rights issues, civil rights organizations will have to address them because it is clear that attacks on discrimination are increasingly less productive at a time when discrimination explains less and less the conditions of disadvantaged minorities. So there are a number of areas where Professor Blumrosen, who has defended and explicated the necessity of affirmative action, and I, as a critic of the more statistically based approach, are in really close agreement or at least partial agreement.

I will make three points briefly which suggest a narrowing between us on the classic affirmative action issue. The first is the remarkable change pointed to by Professor Blumrosen in employment of minorities by occupational categories. The situation that existed as recently as the 1960's, with a radical concentration of blacks in occupations of low income and low status and prestige, and a radical absence of them in occupations of higher income and status, has since changed. The occupational distribution has changed significantly; this has been in large measure obscured in discussion because it is in the interest of a lot of people to say that nothing has changed.

The second point: I think it is valuable to raise the question of when goals and timetables should end. The advocates of goals and timetables have tried to avoid that issue even though the critics consider it a crucial issue. Is ours to be a society in which race and sex are permanently accepted as criteria for employment and promotion? I think not. It is very helpful for Professor Blumrosen to suggest a standard, a point at which goals are not necessary. However, he indicates that the area in which goals are still necessary are those where a high degree of discretion is involved in both job appointments and evaluation of performance. This presents some problems. For example, consider academic jobs in colleges and universities. The notion that goals and timetables are needed for jobs of that sort implies a belief that discriminatory attitudes simply have not changed for twenty years. That is not so. To act on such a belief is to focus on the wrong issue. The issue in this and other areas of

* Professor of Education and Sociology, Harvard University Graduate School of Education.

high discretion is not one of prejudice and discrimination that has to be dealt with by goals and timetables. The issue in these areas is an absence of sufficient numbers of people who fulfill qualifications.

A third point on which we have at least a partial agreement, and I think this may be important, is the Reagan administration. This is an administration which, if it had wished to, could have implemented much of its stated intentions by a "stroke of the pen." These are historic words in the history of civil rights, because, if you recall, the civil rights community waited for President Kennedy to eliminate housing discrimination in many government programs by an executive order, that is, by a stroke of the pen. The fact that the pen has not been stroked by the Reagan administration does not suggest to me that it is using the ingenious strategy that Professor Blumrosen suggested—one of dividing women and minorities. In its ineptness, this administration has been willing to outrage women as much as minorities; for women there is *Grove City College*,[1] and for minorities *Bob Jones University*.[2] Rather, I think it reflects that the American people are willing to live with the present situation, regardless of polls which show they are against it. The political opposition to an effort to change the present executive orders and regulations would simply be too great to deal with.

Some of Professor Blumrosen's proposals to deal with the economic problems of minorities, should certainly be considered by civil rights activists. We will need economists as well as lawyers or sociologists to consider these problems. Each of Professor Blumrosen's proposals raises issues that are very substantial and that at least require economic analysis. There is a great deal of initial attractiveness in some of the ideas Professor Blumrosen has raised, and I can't see any argument against some of them. About others, I am more doubtful. Consider the 32-hour work week. Does the 32-hour week mean—and once again I speak of the differing perspectives of men and women—that many men, limited to a 32-hours-a-week job, will rush out and get another job for 32 hours? I suspect more men work at two jobs than women do and there is a reason for that which has nothing to do with discrimination. A 32-hour week requirement, if it is enforced through law rather than through the market, which has its own wisdom, introduces a situation that may favor women who want to work fewer hours over men who want to work more. It may favor the two- or three-earner family over the one-earner family. I question whether we want to do that particularly if our concern is minorities.

The tariff issue is very complex. While we want to save good jobs for Americans, I question if we can really save them through these tariff mechanisms. Can we, as Professor Blumrosen suggests, use our tariffs to force low-wage countries to pay higher wages thereby losing their advantage over us in

1. Grover City College v. Bell, 687 F.2d 684 (3d Cir. 1982), rev'd in part, 52 U.S.L.W. 4283 (U.S. Feb. 28, 1984) (No. 82-792).

2. Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), aff'd, 461 U.S. 574 (1982).

international trade? That seems very unlikely. It would seem very difficult to convince Korea, which is building itself up on the basis of low wages and is now competing in steel production against Japan and other countries, that it should raise its wages and lose this advantage. I don't see how we can exercise such power over such countries.

I agree with Professor Blumrosen's point about taxes and the treatment of interest on loans. I think there is an inequality there that really can be dealt with constructively.

I think Professor Blumrosen and I agree about several issues. We agree that the traditional legal attack on discrimination now gets fewer and fewer returns in advancing the conditions of those for whom it is undertaken. There has been much change in this country, and in order to improve the position of minorities, one has to look at issues other than discrimination. There are politically strategic questions about whether one continues to call these new issues civil rights issues or affirmative action issues. We have to deal with improving education, with crime and safety, and with the drug plague. If our effectiveness in dealing with those issues is improved by calling them civil rights and affirmative action issues, I would certainly go along.

But I think they are issues of a different kind. They are issues on which lawyers will have to get a lot of help from economists; lawyers will at least have to argue a lot with economists, educators and even policemen as to whether their proposals will be helpful. Lawyers, because they are so clever, sometimes think that these problems are easier to solve than they are. If lawyers are going to become involved in these areas, which involve less the question of law and rights than the quesiton of effectiveness, I think they are going to need a lot of allies.

RESPONSE

HOWARD GLICKSTEIN*: Professor Blumrosen, as always, was provocative. I am disinclined to disagree with him because he has often been ahead of his time and eventually proven to be right.

His basic thesis is that the great improvement in the relative occupational distribution of minorities and women is a result of affirmative action. To the extent that is true, it is certainly a great tribute to affirmative action—one of the few programs in recent years that has actually worked. But, pursuing traditional affirmative action is not likely to seriously address relative unemployment and relative wage rates, Professor Blumrosen says. The other programs which Professor Blumrosen advocates certainly would have some impact on relative unemployment and relative wage rates, and they are certainly worth considering and pursuing. I have to believe, however, that traditional affirmative action programs are likely to have an even greater impact.

Professor Blumrosen mentioned the President's Commission of 1947[1] which emphasized employment, housing and education. It also emphasized voting and political participation. And, in fact, the first civil rights act passed since reconstruction, the Civil Rights Act of 1957, dealt only with voting.[2] The theory in those days was that if people could vote, if they had political power, all these other issues would be solved. That was not true, as Jeffries and McGahey pointed out earlier. It was not enough to have some rights; economic means were needed as well and consequently we got the Civil Rights Act of 1964 with Title VII.[3] Further efforts to strengthen political participation came through the Voting Rights Act of 1965[4] which probably has been the most effective piece of legislation ever passed in this country. I think that the combination of voting rights and traditional affirmative action is likely to produce the political empowerment that can bring about the fundamental economic and social changes necessary to improve schools, reduce crime, and reform the tax structure.

We talk about the fact that minorities and women have moved up in the occupational structure. I think what is overlooked is what the people who have achieved those positions are able to do once they have achieved those positions. Traditional affirmative action programs provide people with the economic security, dignity and sensitivity to political issues that has spurred political participation.[5] Greater political efforts could advance these and even

---

* Dean, University of Bridgeport School of Law.

1. See President's Committee on Civil Rights, To Secure These Rights (1947).
2. Pub. L. No. 85-315, 71 Stat. 634 (1957).
3. Pub. L. No. 88-352, § 101, 78 Stat. 241 (codified at 42 U.S.C. § 1971).
4. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).
5. See Bell, Race, Racism and American Law 155 (2d ed. 1980).

more effective programs.

While it might be worth trying to convince U.S.-controlled corporations operating in foreign countries to raise their wage rates there, the very reason they are operating overseas is to take advantage of lower economic wage rates.[6] I think that the significant number of women now in the legal profession—largely the result of traditional affirmative action—will, through the courts and through politics, have a more profound impact on wage rate issues such as comparable worth, than any of the programs suggested by Professor Blumrosen. I know of one major corporation where the Vice President for corporate responsibility is a black man; in that position he is going to have an enormous influence on corporate policy. To the extent that our keynote speaker Carin Clauss might in some small part have achieved her position as Solicitor of Labor, and some of her other positions, as a result of traditional affirmative action, the impact she has had on the law of this country has been absolutely enormous; and it is people in such jobs who can do so much more.

One of the fears that I have about Professor Blumrosen's proposal is that it will dissipate energies. During the late 1960's, when it became difficult to deal with some apparently simple civil rights problems, people drifted away from civil rights in many directions: going off to try to remedy the environment, going off to try to stop the war in Vietnam. People are not always able to remain with issues that need a great deal of concentration. I think one reason that traditional affirmative action programs are under attack today is that almost from the beginning there have been some individuals and groups which have single-mindedly devoted all of their attention and energies to attacking, discrediting and otherwise seeking to undermine such programs, while the advocates of affirmative action often have gone off in other directions. I think that falling into the morass of trade policy, tax reform, and drug enforcement, while worthwhile, seems like a detour that will allow little time for anything else. Of course, the issues that Professor Blumrosen touched upon have not really been ignored: as Professor Clauss mentioned earlier, the Kerner Commission talked about two societies and about the suburban noose around the cities. The Civil Rights Commission from the mid-1960's has been looking at inequities in urban education, the urban/suburban dichotomy, and the inadequate police protection in minority communities; and we even had a statute that was part of the Johnson administration called the Safe Streets Act[7] that was supposed to make the streets safe for everybody. Today of course the new Civil Rights Commission is saying that these are social and economic questions and of no concern to a civil rights agency.[8] Improving schools, in-

6. See Affirmative Action To Open the Doors of Job Opportunity, Citizens' Commission on Civil Rights (1984) [hereinafter Affirmative Action] (discussion of the impact of affirmative action on corporate activities).

7. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968).

8. Morris A. Abram, the current Vice Chairman of the U.S. Commission on Civil Rights, appointed by President Reagan, sets out the current philosophy of the Commission in What Constitutes a Civil Right? N.Y. Times Mag., June 10, 1984, at 52.

creasing housing availability in the suburbs, and dealing with drugs all involve an enormous investment of funds. It is highly unlikely that sufficient resources are going to be made available to do that. Furthermore, Professor Blumrosen mentions that if we have a 32-hour week it might well be that some people will have to take a 10% reduction in salary. With all the commotion we hear today about the problems of innocent white males, it is easy to imagine the outcry that would follow if we suggested that people take a 10% reduction in salary. It is worth emphasizing that traditional affirmative action programs have placed more minorities and women in teaching, in police departments and in other places where they have had some impact on dealing with the urban problems that Professor Blumrosen referred to.[9]

One area in which I think it essential that traditional affirmative action continue to be pursued is in our defense program. The defense department is responsible for such a vast number of jobs that it is absolutely essential that the government continue its efforts to insure the pursuit of equal employment in that area.

We cannot turn our backs on the importance of race in America. Professor Glazer said he would prefer not to live in a world where sex and race were always factors in determining job positions. At the beginning of this century, the black sociologist W.E.B. Dubois said that the issue of the twentieth century was going to be race; it certainly has been. My hope is that race will not be the issue of the twenty-first century. But it will be the issue of the twenty-first century unless we, as a nation, do what is necessary to meet these problems. I think the problem of race still needs to be dealt with directly and explicitly through traditional affirmative action, and I do not think it can be avoided by talking about trade barriers, immigration policy or reforming the tax laws. Thank you.

9. See Affirmative Action, supra note 6, at ch. 4.

RESPONSE

RICK SEYMOUR* : Civil rights advocates have made great progress over the last couple of decades, but we must not exaggerate the degree of that progress. First, the broad categories used in reporting forms, i.e., officials and managers, clerical, professional, technical and so on, may misrepresent actual progress. The categories contain a broad range of both high- and low-paid positions. Census Bureau statistics indicate that minorities and women have gained toe holds only at the bottom rungs of these categories. For example, the official and manager category includes the General Motors plant manager as well as traditionally low-paid managers of very small enterprises such as a Mom and Pop's grocery store or a shoe repair business. In the clerical category there is a world of difference in compensation and rewards between someone who works as a filing clerk and someone who works as an executive secretary. There is still much room for progress.

Second, the Census Bureau indications of progress are not uniform geographically. What takes place in large urban centers may be quite different from what takes place in smaller cities. Many business enterprises in the South, in areas with a very substantial number of black people, have clerical pools of thirty or forty workers yet not one is black. And this situation is not infrequent.

Third, the gains by minorities and women shown in the statistics are not uniform by type of industry. Many of the industries in which minorities and women have made the highest gains—and here I think it is a bit more true for racial minorities than for women—are industries whose long term prospects are stable or declining. The automobile industry, for example, is likely never to have the number of employees it had ten years ago. In the Silicon Valley, however, where industry grows rapidly, few minorities are employed in the high status jobs.

Fourth, I find an enormous difference in the treatment of women and minorities between the private sector and the public sector. As a litigator who has spent almost 100% of his time over the last fifteen years, handling race and sex discrimination cases, I contend that discrimination problems are worse in the public sector than in the private sector. And in the public sector they are worst within the federal government. We do not often find with major national companies that managers deliberately change promotional paths or career ladders in order to avoid the promotion of black women to a given job category. We do find that in the federal sector. Further, federal judges have occasionally found that federal government employers engaged in wholesale perjury to defend their actions. The problem is the lack of accountability in the public sector.

---

* Lawyers' Committee on Civil Rights, Washington, D.C.

Private companies on the other hand, expect that Department of Labor officials may come and look over their shoulders to see whether or not they have complied with affirmative action guidelines. The use of goals and timetables has not been able to guarantee results. Most of the companies that we have had in litigation have not met their goals and timetables and many have never bothered to inform the government that they were not meeting their goals and timetables. The goals are useful, however, when somebody audits the company's practices. It gives the auditor an opportunity to ask a question: Why? Goals and timetables force people to think about what they might not otherwise think about. The practice of using goals, timetables, and affirmative action plans has spawned in most large corporations a bureaucracy of its own that educates local plant managers about the dangers in simply "conducting business as usual;" it cautions them to take a closer look at the unintended effects of their practices. For example, if you give great discretion to line supervisors to determine who gets hired and which among the available jobs a new employee is placed in, discrimination unsurprisingly does occur. Such supervisors need to have a sense that there is somebody inside the company looking over their shoulders in order for decisions to be made on the basis of something other than race or sex.

A case I once had illustrates the potential for discrimination when employer supervisors have unchecked hiring discretion. A drug manufacturing plant in Mississippi, we alleged, was not hiring the mothers of illegitimate children. This practice had an enormous racial impact because at that time half of all the births to black women were illegitimate. The sexual impact was also enormous because this illegitimacy policy was enforced only against women because this was easier than enforcement against men. The company officials who were responsible for industrial relations denied under oath in discovery responses that there was any such practice; in perfect good faith they never knew that such a practice existed. However, an employment interviewer who was a witness at the trial of the case readily admitted that the policy existed. I stole a look over at the defense table to see the corporate executive's jaw hanging open. What was the reason for the practice? The personnel manager thought that if it got around that the company was hiring persons who had been involved in non-marital relationships, the switchboard would get tied up with people making calls to arrange romantic liasons. That quality of decision-making is bizarre, but people act on such bizarre decisions without paying any attention to the effect of those decisions.

The progress that has been made in the last couple of decades does not necessarily continue by some inexorable law of nature; it continues because it was in part the result of a process. If that process is interfered with—and it is being interfered with right now—then that progress will not continue. One of the things that has set this country apart from all other countries in the world, and one in which we can take great pride, is that this country did make a change in racial relations over the last two decades and did so with virtually

no violence. It did so because the government promised to protect racial minorities against unjust treatment. The definition of unjust treatment has evolved over time but the reality of that promise and its steady enforcement in the courts has been very real and very tangible. Clients of the Lawyers' Committee and other civil rights organizations believe very strongly in this promise, and that their interests are being protected by the national government.

In many parts of the world we see a different process. For example, in Northern Ireland, where although the British government in the 1970's first enacted legislation establishing a body to enforce laws against religious and political discrimination in employment, the government never effectively enforced this legislation. When the social contract breaks down, everyone suffers. If the promise is perceived to be broken, much of the progress that we have made and much of the relative ease with which we have made that progress might not be maintained. All parts of society have a responsibility to keep that promise and keep that perception alive. Thank you.