

KEYNOTE ADDRESS

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I am delighted to be here this afternoon and have the opportunity to introduce this very exciting topic to you. My function is to stimulate your thinking on the various issues we will be covering and to survey them for you in some way that will provoke conflict and interest. Let me begin by saying that in my view—and I hope this is not a controversial statement—the most important employment discrimination issue identified by the Kerner Commission in 1968 was the need to eliminate the existence in this country of two separate and unequal societies, one largely black and increasingly female and poor and the other white and substantially more affluent even in today's hard economic times.

The statistics on the continuing inequality between these two separate societies are depressing. There has been substantial progress over the past two decades in the political arena in the area of education, but there still remain two basic problems: social segregation and economic inequality. Black families currently earn 56% as much as white families. Women earn 59% as much as men. If you look at the poverty figures, over 50% of female heads of families exist in poverty. If those women are under the age of twenty-four, over 60% of them exist in poverty. The number of black families currently at the poverty level totals 35%, up from 31% only a few years ago. This is in sharp contrast to the number of white families at the poverty level: 11%.

Perhaps the statistics that concern us most are the employment figures for blacks, particularly for the black adult male and for the black teenager. The current participation rate of the black adult male in the economy is only 58%. Put differently, over 21% of adult black males are unemployed. This has tremendous adverse implications for the black family and has led to much of its structural breakdown. It of course means that large numbers of black women are working and sharing, or bearing exclusively, the responsibility for child care, and are therefore unable to support their families in a meaningful way. If you are a black child, you have a three times greater chance of being born into poverty. You have twice as much chance of dying in the first year of your life. If you are a black teenager, 50% of you are unemployed. This has led to a permanent underclass of people who have almost no income, few aspirations and little if any hope.

Now I reject any comment that what I have just outlined is a political or social problem and nothing more. The reason I felt it legitimate to raise these statistics is because they point to what is essentially or equally a legal problem. At root, these facts are the result of a continuing pattern of discrimination and

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of statutory and constitutional law violation, and in the case of women, not only a violation of existing law, but also a reflection of the unequal allocation of child care and household burdens, a problem currently being addressed by both federal and state legislatures.

In fact, I am very pleased to tell you that yesterday, Wisconsin became the first state since the forties to adopt a broad uniform marital property act. It will be signed by the Governor next Wednesday. It is the first state to adopt the uniform marital property act proposal which was completed only a couple of years ago, and I hope that it will gather the same momentum that we saw when Wisconsin adopted the Unemployment Insurance Law some fifty-one years ago.

This legal question of continuing discrimination is raised again at a time of severe economic distress, at a time when jobs could fairly be said to constitute a scarce resource. This has led to a new debate concerning the definition of non-discrimination, a debate which—without meaning to personalize it—has pitted the Department of Justice, under the leadership of William Bradford Reynolds, against the civil rights community and until its recent radical restructuring, the United States Civil Rights Commission. I feel free to say that because earlier this year I debated Mr. Reynolds on this issue and found it educational, if nothing else.

For those who would rather avoid the debate you might say, "Wouldn't it be simpler just to use the government fiscal and monetary policy to create more jobs? Let's just make a bigger pie so that everyone can have a share." Well, in fact, that is what was done to a large extent in the last administration through its twelve billion dollar highly targeted jobs program. I think that program demonstrates some difficulties. First, it isn't easy to increase the pie without experiencing inflationary difficulties. Second—and I think this is the real lesson of the CETA program—in an expansionary economy while minorities may be better off in the sense that they have a job, they still stand at the end of the line. They merely get a bigger share of bad jobs. And from the job corps CETA programs we learned that, although we generated temporary jobs, we failed to generate permanent private sector jobs that these people would continue to have.

The only other strategy, and the one most civil rights lawyers subscribe to, is to redistribute jobs and give a fairer share to those who historically have been exploited. Lester Thurow suggests that we should simply distribute jobs and earnings so that jobs and earnings for blacks and women are at least equal to what now exists for fully employed white males.

Mr. Reynolds attacks the Thurow definition of non-discrimination as meaning preferential treatment, and as based on some outlandish notion that jobs and income have to be distributed among the races and sexes in accordance with some nice but non-legal mathematical formula. I submit that the Reynolds charge rests on an assumption that blacks and women are unequal, because if after two decades of non-discrimination policy black men and wo-

men are still at the bottom, then the only explanation can be that they have lesser skills and talents than white men.

Now since I do not subscribe to that notion but believe, just intuitively and to some extent based on my personal experience, that talents and capabilities have been distributed equally among the races and sexes, I assume that there is another explanation for the fact that after two decades of civil rights enforcement, women and blacks are still at the bottom. I think that simple explanation, is continuing discrimination. One of the reasons that this discrimination has been so difficult to get at is that it is subtle, it is deep, it is pervasive. And it is often extremely difficult to point, as Mr. Reynolds would have us do, to identifiable individuals who have experienced this discrimination. But when you look at the management structure of A.T.&T. and see that it is two percent female and seven percent craft female, then you know that there must be discrimination being practiced. And when you tell the company that you strongly suspect them of discrimination and want them to engage in a program of goals and time tables, and you find that in one decade they can increase craft jobs from seven percent to thirty-seven percent, and management jobs from two percent to seventeen percent, then I think your original assumption of discrimination was accurate.

Unfortunately, the current administration does not accept this thesis and says instead that this notion of affirmative action, these goals and time tables, these quotas when they are imposed by a court in response either to a consent decree or to evidence of discrimination victimize white males who had nothing to do with these decades of past discrimination.

That kind of approach has had some very unfortunate results. First, it has polarized our society. For the first time in two decades we have a government telling the people that women and minorities have gotten all they are entitled to, and any further claims they make are being made unfairly at the expense of white males. Therefore, says the Justice Department, we now must enter the fray on the side of the white male to protect him from the greedy and unwarranted outreach for white jobs.

Second, this approach mistakenly identifies these white males as innocent victims, if you accept my premise that discrimination is continuing. Now I will grant you, that if discrimination ended in 1964 with the enactment of the Civil Rights Act, then these whites who obtained their jobs in the non-discriminatory system and now stand to lose them or to lose some aspects of them twenty years later, then in fact you might have bystander victims. But that is not what happened. We have had continuing discrimination. We're not talking about discrimination that took place prior to 1964.

In the two cases in which the Justice Department has reversed its position and sided with the white males, the Memphis fire department and the New Orleans police department cases, we're not talking about people hired in the forties and fifties, but about people hired since 1960. How do you explain a community of 50% blacks in New Orleans, where 60% of the applicants for

the police jobs are black, and 40% of the qualified pool are black, and only 2% of any of the officers are black—unless you assume discrimination?

Chief Justice Burger describes these white males as being something like the holder in due course of negotiable paper—a bona fide purchaser of property without notice of any defect in the seller's title. Herbert Hill, my colleague from Wisconsin, responds by saying that black workers have not been denied jobs as individuals, but as a class, regardless of their personal merits and qualifications. Correspondingly, white males as a class have benefited from this systemic discrimination, and the notion that they are blameless should thus be rejected.

I subscribe to Professor Hill's views. Having said this, I certainly concede the necessity of redistributing scarce jobs in a manner which does not lead to armed conflict or open revolution. I realize that if you take something from the majority to give to the minority, you must do so in a way that is acceptable to all. It was less of a problem for us in prior administrations because we were dealing essentially with hiring and promotion goals. Although hiring and promotion goals do interrupt the expectation of a white male worker that he will get this job if he applies for it or that he will get a promotion, nonetheless he isn't losing something that he already has.

The issue of course becomes much stickier when you have a declining economy, reduced municipal budgets, and the need to lay off workers. If you adopt layoff systems which are designed to maintain the gains of the last two decades in placing minorities and women into these positions, then you will be taking from the white male an expectation based on his seniority. Now one reason I suggest it should be done anyway is because one reason the Memphis fire fighter has twenty years of seniority is that Memphis didn't start hiring blacks in 1964. It took two court decrees and lots of lawsuits to get that process started, and indeed it had only just begun going nicely when Memphis suddenly had to cut back on its budget and lay people off. Nonetheless, I do recognize the problem, and I suppose Professor Blumrosen will talk about it.

There have been various alternatives to what Mr. Reynolds calls "preferential layoffs"—programs like job sharing, particularly following the California experiment in which unemployment insurance laws were modified to provide some state compensation for the hours of work you were giving up in order to share your job with someone else; volunteer rotational layoffs; reduced hours; and of course, wage concessions, which as we've just seen in the airline industry have the impact of opening up numerous new jobs. The difficulty with these alternatives is that you have to convince the majority to accept them, and I think you can convince the majority to accept them only if they feel that they have no legal entitlement to keep all of the jobs. One problem when the government tells these people that they are in fact entitled to the jobs and any attempt to take them is unlawful and unconstitutional is that it makes it very difficult for the union to come in and say, you have a constitutional right to the job, we'd like you to share it with these women and blacks.

The second issue on which we'll be spending quite a bit of time in this colloquium is the problem of discrimination against women. That is of particular interest because it is separate from the occupational distribution problem which exists for women as it does for blacks. We will also focus on the issue of undervalued wage rates for women as a significant cause of their disproportionately low income.

You probably have seen—if not in the recent *Washington Monthly*, then certainly on your public television—Phyllis Schlafly, who has labeled this notion of pay equity or comparable worth as another one of those “lousy Washington ideas.” Because, she argues, these female rates have been fixed by the market place and are determined by those neutral factors of supply and demand. Women, because of their occupational segregation, are simply applying for the same jobs in too great a number. And because there are too many of them applying for the same jobs, the wage rates have gone down.

This reminds me of what I'm sure you were told about the three professors stranded on the desert island, if you ever took economics in college. They have one can of beans, and they're starving, and the problem is how to open up that can of beans. I won't tell you about the chemist's idea, but the physicist comes up with a complicated theory about throwing a rock up so high, with such force that it will hit the can at exactly this point with just enough force to open it, without splattering it all over the place. The economist, after listening to these complicated theories, says “Can't we just assume a can opener?” I love the way that Phyllis Schlafly and her colleagues assume the neutral operation of supply and demand.

You probably remember the nursing shortage when we didn't have enough women applying for nursing jobs. Did we raise the wages? No, we didn't. We recruited temporary aliens from Ireland and England to come in and do the work, and because they weren't qualified to do the work, we obtained from the government special exemptions so that they would not have to take qualification exams.

So certainly the facts do not demonstrate that the reason for these low rates is supply and demand. In fact, if people will look at history they will see that these wage rates are simply a continuation of something which was very conscious, very deliberate, and which goes back to the early 1930's. Indeed no one concealed it, because it was accepted that women would be paid less than men for doing work of equal value.

In fact, while I don't want to embarrass any law school, I will tell you an anecdote about Columbia in 1963, when I graduated. There were three women in the class—we were the largest class of women yet. The dean called us in one day and said he just had a little conversation with the deans from Brooklyn and Fordham law schools, and they were quite perplexed about what starting salary to advise their women law students to ask for. He said, “now of course the men are getting \$7,200, but you couldn't ask for that”. And we said no, of course not, we couldn't ask for that. He said, “we've talked it over

and we think you should all ask for \$6,800.” We said, thank you very much, and never questioned it, because that was in fact the standard practice in this country.

Every union negotiated female rates and male rates. The standard job evaluation plans first point-rated the men and women, then multiplied their points by different factors to get wage rates. The men’s point were multiplied by one, and the women’s by .77. So naturally we have unequal rights which have simply been built into the system, and unless we step in and change that system, we simply perpetuate that prior discrimination. It’s sort of like the boating race at Oxford in which each year you start again where you finished the year before. So if you’re last, no matter how good a race you run, you always are last. That’s the way it is with women’s wages.

We will also be looking at some of the cutting edge issues affecting women, including genetic screening and the freedom of women to make choices which may adversely affect either their fetus or their child bearing capacity. Such issues go well beyond the abortion controversy. For example, there are now some scholars operating out of law schools who feel that a woman should be required to submit to surgical procedures which, although invading her body and imposing surgical risks, could potentially save the fetus she is carrying. You have probably all seen the poster—I think that New York has one, and Wisconsin has one—cautioning women about the hazards of drinking while pregnant. I wonder if we’re reaching a point where these women who nonetheless drink while pregnant can be prosecuted for child abuse or neglect. If you read Theodore White’s fascinating piece on black and women voters, in the February 5, 1984 *New York Times*, you will see why women wouldn’t vote for Theodore White. He says that laws must discriminate against women in order to protect their child bearing capacity.

Beyond what we’re going to discuss during the next two days, I personally would like you all to look at the Family Protection Act, introduced by Senator Helms and supported by the Administration. I always like to tell people Adlai Stevenson was one of my heroes, but even heroes have clay feet, and he never understood the proper role of women in modern society. In his commencement speech to graduates of Smith College, of which his daughter-in-law was one, he told them that the role of women had been established since tribal times and had continued basically unchanged to modern times: to restore valid, meaningful purpose to life in your home, and to watch for and avert the constant gravitational pulls to which your work-a-day husband and children are exposed. If you think that view of the male/female relationship is archaic, you might be interested in the provision of the Family Protection Act that withdraws any federal funding for “studies of educational materials that don’t reflect a balance between the status roles of men and women and don’t contribute to the American way of life as it has been historically understood.” And we might well ask, understood by whom?

Another issue we will consider, another phenomenon of the eighties which has an impact on job equality, is the increasing number of companies that have transferred jobs to other localities or indeed to other countries. Now, while at first blush this might appear to be a labor issue, it is in fact a race and sex issue, because blacks are disproportionately represented in auto and steel plants, which are two industries relocating or plain disappearing, and women are disproportionately represented in industries like the textile industry.

This is a very serious problem because blacks make up about four times the percentage you would expect of the work force in auto and steel, and they also make up a large percentage of the black middle class, which is already suffering. In the last three years, the black middle class has diminished from about 13% of black families to 9%. A dramatic change in the auto and steel industries will produce a dramatic change in the average income level of black families. These people have devoted their lives to learning skills for those industries. They have community ties to those locations. To suggest, as people do, that we will simply pick up and move to the Southwest or the West or Haiti or The Dominican Republic or to Hong Kong, as the California Atari plant is doing—just moving to Hong Kong and Taiwan—is to indicate that we have a serious problem. It is a problem that must be addressed by our laws, which provide some worker protection from this kind of unannounced unilateral move.

This points the direction that industrial revitalization must take. We must preserve some industrial base for these workers—so many of them black—in the Northeast and Midwest.

A related consequence of these hard economic times is what has happened to our immigration policy. I don't have to recall for you the pictures of Haitians in the detention camps in Florida or the administration's decision in September of 1981 to board Haitian refugee boats at sea and grant immediate asylum or exclusionary hearings without counsel. Fortunately that policy has been stopped, but it demonstrates the kind of disregard for civil rights that often occurs in hard economic times, removing any illusions we may have about our country or ourselves.

Another major consequence of the declining economy, has been the disproportionate impact of the federal budget cuts on blacks, women, and the poor. For example, although income assistance for blacks and women constitutes only 18% of the total expenditures for income security, it has sustained nearly 60% of the budget cuts to date. If you look at the cumulative effect of the tax increases and program cuts, the disparity between rich and poor has been increased. The total income decline due to budget policies for households with incomes under \$10,000 will be 16.8 dollars, and the total income increase for households with incomes over \$80,000 will be 55 billion dollars. So the gap between our two societies, one primarily black and female and the other primarily white, continues to widen.

Finally, ask yourselves as you listen to this colloquium, how can we rebuild a federal enforcement program to ensure non-discrimination and civil rights? And how can we provide the moral leadership necessary to eradicate the existence of these two societies and to attract the support of the American people? Thank you, and enjoy the colloquium.