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Commencement Address - Judge Joan Dempsey Klein

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"1776-1976: Slavery to Affirmative Action - A Perspective"

During America's 200th birthday celebrations, much high sounding rhetoric has been forthcoming, extolling the virtues of this great country, and properly so. It should be a time for rejoicing in our freedoms and abundancy.

It should also be a time for reflection, evaluation, and a time for rededication to our foundational ideals as we conceptualize them today.

In reflection, an historical perspective compels the conclusion that the authors of the Declaration of Independence contemplated their finely-honed phrases in an atmosphere far removed from interpretations that are reasonably made today. Surely it would be fascinating to be able to discuss with Thomas Jefferson and John Adams what they meant by:

> " . . . we hold these truths to be self evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; . . . "

Who were "all" the "men" referred to as being "created equal"?

We know that provision for slavery was part of the laws governing many of the colonies. As Jefferson pondered the contents of that hallowed document, he himself possessed some 30 blacks who thereby were property he owned.

Abigail Adams told her husband, John, "In the new code of laws . . . I desire you would remember the ladies, and be more generous and favourable to them than your ancestors . . . "

John Adams retorted with, "As to your extraordinary code of laws, I cannot but laugh," and that the delegates "know better than to repeal our masculine systems."

Since blacks and women were excluded from direct representation in government, it is obvious that over half of the colonies' population were not considered part of Jefferson's great plan for equality and inalienable rights.

Jefferson and Adams, and the other white, male, Anglo-Saxon founders of the new government, Benjamin Franklin, Roger Sherman, Robert R. Livingston, apparently never contemplated any other human beings than their own kind sharing equality and rights. That the fledgling government, including its original Constitution, acquiesced in, condoned, and

indeed, supported discrimination, as it is defined today, is now clear.

In the beginning, there were some who questioned the wisdom and morality of the custom of slavery, and the great debate continued over the years. As "consciousness-raising" occurred among large numbers, the volatile emotional issue exploded into an horrendous conflict.

America still suffers the scars of that soul rending in a hundred ways. The treatment of blacks, and women, continues to be a major flaw in our democracy.

Slavery was not formally abolished until the adoption of the 13th Amendment to the Constitution in 1865.

Three more years, and adroit political parliamentary maneuvers, were required to confer citizenship on blacks, with the ratification of the 14th Amendment.

Finally in 1870, the legislative process awarded blacks the precious illusive "right" of franchise.

Today as I speak with you, it is painfully recognized that blacks are continuing their mighty struggle to be treated as "created equal" and to attain those certain "inalienable rights."

Women, as a group, were also ignored with equanimity by the drafters of the original set of laws. The few courageous women who complained of their subservient role and demanded some legal recognition were ridiculed, summarily put down, and dismissed as rebels.

The common law system which regarded married women as legal nonentities with virtually no property rights was continued by those men entrusted to formulate the new government. John Adams justified the denial of the alleged "right" to vote to women by expressing the view that "Their delicacy renders them unfit for practice and experience in the great businesses of life."

That John Adams should have such an attitude is ironical, because history has shown his wife, Abigail, to have been a brilliant, self-educated and well informed, articulate person who spoke her mind.

An incredible 130 years were required to wrest from reluctant male legislators the right of franchise for women, accomplished with the ratification of the 19th Amendment in 1920.

To rectify their demeaning, second-class status, women clamored for another amendment to the Constitution guaranteeing them equal rights as a group in the early 1920s.

Some version thereof has been introduced every year since then. Finally, when the current proposed 27th Amendment to the Constitution was forced to the floor in 1971, it was passed overwhelmingly by both houses, and sent on its ratification route. To date, it has been ratified by 34 of the required 38 states, but is meeting resistance, mostly in conservative southern states, and by extreme right wing elements in qur society. Women, legal scholars, and astute political observers consider its ratification essential to women's struggle for equality of rights and opportunities. Its language is simple, and its meaning clear:

> "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

Times have changed, and American culture, circa 1976, is vastly different from that of 200 years ago.

Today, we live in an open, pluralistic society, greatly affected by the civil rights movements of the '50s, '60s and '70s. As one observer succinctly puts it:

> "It was a great awakening to individual rights, a grand consciousness raising in which everyone began to

> think about the justice of an open society, of a culture in which each person's individual worth and dignity is respected, of a government under which each person is free to develop his own potential without arbitrary limit."
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> ("The Equal Rights Amendment: Its Political and Practical Contexts," California State Bar Journal, Volume 50, No. 2, Page 82)

This is the atmosphere in California that has seen the election of a black man, who became a policeman and an attorney after meager beginnings, to the position of Mayor of Los Angeles, one of the world's greatest cities.

This is the atmosphere in which today's reformers live. They have been influenced by Jefferson's words. They interpret those words in the perspective of the '70s, not the 1770s, but the 1970s, taking into consideration what has occurred during the intervening 200 years.

Citizens of this state elected as Secretary of State an Asian-American woman who was born in a Chinese laundry. Our Lieutenant Governor climbed out of the poverty of a

West Indies fishing village, and battled racial prejudice to achieve his position. The state's Superintendent of Public Instruction is the grandson of a former slave, and orphaned at age 12.

Californians elected as their Governor a youthful 36 year old lawyer who studied for a time for the priesthood with the Jesuits. An iconoclast, an eclectic, an independent thinker, he now stands for a "new spirit," and aspires to the presidency.

It is an atmosphere that enables a peanut farmer and former governor of a southern state also to seek the White House.

It is a time when government is trying to be more responsive to great numbers of people who have been neglected and abused in our historical past. It is a time to redress past wrongs, and to make amends for grave injustices practiced by government and the people.

These efforts have taken different forms, including the celebrated presidential proclamation resulting in Executive Order No. 11246, in September, 1965. The purpose of this far reaching Order was twofold: to preclude the government from contracting with employers who engaged in

discriminatory employment practices; and, to cause contracting employers to take "affirmative action" to insure against employment discrimination on the basis of race, color, sex, etc.

Implementations of the Order constituted some of the first efforts on the part of the federal government to do something affirmative to right wrongs.

American businesses dealing with the federal government are now aware that they must have an affirmative action plan, which basically calls for hiring goals and time tables to bring their work forces within parity of the available work force of minorities, women and handicapped in their geographical areas.

Other governmental entities, state, county and city, also have affirmative action programs, requiring all employers who would sell their goods and services to government to enter into contracts that contain nondiscrimination clauses, affirmative action plan certifications, and equal employment practices certifications.

Unfortunately, cooperation has not been motivated by altruism but by money. However, considering the tremendous dollar volume of all government contract business and the

competition therefor, the pressure for compliance is thus substantial. No other technique could be as potent a force for change.

Legislation emanating from the Congress in 1964 in the form of the Federal Civil Rights Act also has been a strong force in the effort to diminish discrimination in America.

Title 7 thereof prevents employers, both private and public, from job discrimination on the basis of sex, race, color, religion and/or national origin. The enforcement arm, the Equal Employment Opportunities Commission, charged with the duty to investigate and prosecute if necessary, has settled multimillion dollar cases with some of the nation's major businesses, including Bell Telephone and the Georgia Power Company. Such cases are settled on the basis of "hard quotas" in hiring and/or promoting practices, as well as compensatory dollars.

Of particular interest to women workers is the development under Title 7 of a simple formula to be applied whenever an employer is contemplating sex as a criterion for a job, known as "BFOQ." The requirement is that there must be a bona fide occupational qualification, such as sperm donor or wet nurse, to justify hiring by sex only.

Many local government entities also have enforcement agencies comparable to the Equal Employment Opportunities Commission, such as California's Fair Employment Practices Commission.

When this nation was experiencing good economic times a few years back, and jobs were plentiful, little criticism was leveled at the government's efforts to eradicate discrimination.

However, during the recession and times of high unemployment, when jobs are scarce, implementation of the laudable ideals and goals of eliminating discrimination are met with resistance and resentment. When a man's means of earning a living are on the line, and his seniority rights in jeopardy, he doesn't look kindly upon efforts to provide positions for minorities and women. He can be heard to say that the situation is not his problem, nor of his making.

Such basic realities present dilemmas of grave proportions. Very few Americans will admit of individual responsibility for discriminatory practices in employment, education or housing, proclaiming that the cause lies elsewhere, as does the remedy.

But the question looms large in a democracy as to who is responsible, individuals and/or government, for cause

and remedy. Law abiding citizens of ostensible good will become incensed and moved to violence at the prospect of busing to achieve racial integration of a school system. A proposed plan to provide low cost housing in a suburb which might attract minority families is met with similar resistance.

What are the solutions, and where are they to come from? Compromises and hard decisions are required. The courts will be called upon to interpret legislation upon constitutional grounds. The United States Supreme Court recently decided the Franks, et al. v. Bowman Transportation Co., Inc., et al. (Decided March 24, 1976) case, holding that the only way to "make whole" black victims of illegal job discrimination was to grant them special seniority rights and move them ahead of white workers hired in place of them.

In authoring the Court's majority opinion, and in explanation of the ruling, Justice Brennan issued a profound statement: "A sharing of the burden of past discrimination . . . is necessary."

The full impact and import of governmental efforts to diminish discrimination in our society is beginning to be realized. Some persons foresee a collision course developing

between the cherished ideals of guarantees of equality of rights and opportunities for all on one hand, and the respected concept of individual merit on the other.

Indeed, the conflict is upon us, and the phrase "reverse discrimination" is reflective of the backlash. The March 29, 1976, issue of U.S. News & World Report had an article about the "Growing Debate" 'Reverse Discrimination' "Has It Gone Too Far?," which asks the question, "Are the courts and governmental agencies pushing too hard to prevent and correct bias, at the expense of whites and males?" The article considers the issues but does not provide answers.

However, a labor law scholar and the Dean of the University of Michigan Law School defends current "quota hiring" and "reverse discrimination," claiming the measures are both legal and necessary to resolve today's social ills. Dean Theodore J. St. Antoine recently argued that considering the social implications of continued widespread employment discrimination, such techniques are called for.

He acknowledges that "Deliberate race or sex-based preferences are dangerous medicine, justified only by the gravest circumstances, and they must not be allowed to become habit forming." But at the present time, he says, they "remain our one best hope."

It would seem that the main thrust of government efforts to eliminate discrimination is in the area of employment. Selecting this priority would seem appropriate, although efforts have been directed in other areas as well, such as education, housing, etc.

It is a truism that the opportunity to earn a decent living is a condition precedent to providing a decent life for a worker and his or her family. Money can buy nutritional food, appropriate housing, and an education for self and dependents. Economics is the bottom line. Until minorities and women have the power that comes with money, they will continue to be the second class citizens that they have been since the inception of our nation.

For the more impatient among us, it would seem that 200 years should have been enough time for Americans to understand and to empathize with the misery suffered by those among us who bear the brunt of discrimination and to eliminate it. 200 years should have been enough time for us to resolve this costly and debilitative problem. But strong emotional biases and prejudices die hard. Human evolution toward an ideal civilized society is a slow process in the scheme of things.

It is interesting to dwell for a moment on the role that lawyers have played in this nation's beginnings, and

their continuing role toward the development of such an ideal civilized society.

Theirs has been a positive, leadership role in the main. They started this country off on the right track. The "Committee of Five" appointed by the Congress in June, 1776, to prepare the Declaration of Independence, Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston, were all lawyers, except Franklin. Lawyer Jefferson actually authored the document.

Over the years, and up to the present time, lawyers and politicians have been in a very special relationship. Lawyers are by interest, inclination and education America's primary source of talent to serve the executive, legislative and judicial branches of government. Twenty-three of our 37 presidents have been lawyers, including the incumbent.

In California, 4 of the past 5 governors have been lawyers, including the incumbent.

The mayors of the 3 largest cities in California are lawyers.

In the California Legislature, about 60% of the Senate and 40% of Assembly legislators are lawyers.

Not only are lawyers serving as direct, elected politicians, but the supporting membership of national and local

political parties, the central committees thereof, and other such groups, are guided by legally trained minds.

Lawyer politicians determine the direction our daily lives take in immeasurable ways by their actions in government, for better or for worse. "Watergate" disclosed some lawyers at their worst, but lawyers also were responsible for cleaning up the Watergate mess.

Lawyers are taught professional responsibility, and certainly should be impressed with the enormous trust they bear. Whether as politicians with their sensitive burdens, or as practicing attorneys representing vulnerable and trusting clients, they owe a duty to the cause of justice. They should feel challenged by that duty. They have borne, and will continue to bear, heavy responsibility for the quality of life experienced by American citizens. They will have to resolve some of the critical issues that have been raised by the perspective I have presented today.

We all share the hope that lawyers do their job well, and meet the challenge of working for the cause of justice, lest the phrase,

" . . . that all men are created equal;
that they are endowed by their creator
with certain inalienable rights . . . "

ring emptily in the ears of over half of our population for another 200 years.