Affirmative Action in the 1980s: Dismantling the Process of Discrimination

A Proposed Statement
of the United States Commission on Civil Rights

Clearinghouse Publication 65
January 1981

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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PREFACE

The U.S. Commission on Civil Rights in *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* analyzes affirmative action as a means for remedying discrimination based on race, sex, and national origin. Drawing extensively on past Commission publications and consolidating much existing law and policy, this document proposes a conceptual approach designed to facilitate answers to difficult questions raised by affirmative action plans. The Commission believes *Affirmative Action in the 1980s* provides a useful approach that can only be improved by testing it in the court of public opinion and real world activities.

In early 1981 the Commission will sponsor a consultation on affirmative action where participants will be invited to comment on this proposed statement and discuss specific applications of its concepts. A final statement will be issued later in 1981 with the concrete information produced by the consultation.

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INTRODUCTION

During the past decade, the concept of affirmative action has emerged as the focal point of public debate over civil rights. Controversy and confusion have surrounded certain elements of affirmative action and affirmative action plans. On the surface they seem paradoxical and at odds with the goal of a "color blind" America that makes its decisions without reference to race, sex, or national origin. How can means that consciously use race, sex, and national origin be reconciled with ends that preclude any consciousness of race, sex, and national origin?

Removing the arbitrary and historic limits that discrimination has imposed on individual opportunities is a widely shared objective. There is also support for the use of affirmative action plans designed to attain these ends. Agreement often disappears, however, when those plans call for measures designated as "goals," "quotas," or other types of "preferential treatment." Many people voice concern that such affirmative measures are or may become basically indistinguishable from "quotas" used in the past to stigmatize identifiable groups and may defeat the very objective—eliminating discrimination—that affirmative action programs are designed to achieve.

This Commission has stated in other documents,[1] and restates here, its vigorous opposition to invidious quotas whose purpose is to exclude identifiable groups from opportunities. On the other hand, we maintain our unwavering support for affirmative action plans and the full range of affirmative measures necessary to make equal opportunity a reality for historically excluded groups. The Federal courts, Congress, and the executive branch as well have decried quotas born of prejudice. But they have also repeatedly ordered and permitted numerically-based remedies that explicitly take race, sex, and national origin into account.[2]

Although there are still those who oppose any and all conscious actions based on race, sex, and national origin, established civil rights law and policy is rapidly making such a position untenable. The law of our Nation now requires and encourages affirmative action to redress the present effects of past discrimination. Despite such commitment to affirmative action by the Federal Government, there are those who still believe that some or all forms of affirmative action are at least counterproductive and at most inconsistent with basic notions of fairness and equality.

In addition, and perhaps more important, those in business, education, government, labor, and other areas who are charged with actually implementing national civil rights law and policy are often perplexed by a number of thorny issues. What is the difference between "goals" and "quotas"? Which kinds of affirmative measures should be used when and for what reasons? How long should affirmative action plans be continued? Which groups should be included in affirmative action plans and why?

Even among those who generally support affirmative action, there is significant difficulty in reaching a consensus on the answers to these important questions. As a result, there is increasing need for an overall perspective that counters public misconception of a supposed conflict between the means of affirmative action and the ends of a society in which opportunities are unaffected by considerations of

[1] U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978); *Statement on Affirmative Action* (1977); *Statement on Affirmative Action for Equal Employment Opportunities* (1973).

[2] The use of numbers and statistical methods to indicate both the existence and elimination of discrimination is discussed at length in Part B.

race, sex, and national origin and provides practical guidance to those who must create and administer affirmative action programs.

A unifying and problem-solving approach to affirmative action that addresses the hard questions is needed now. It is time to consolidate the lessons learned from past studies, the case-by-case pragmatism of litigation, and a decade of experimentation and trial and error and develop an approach that gives concrete direction and assistance to ongoing and future affirmative action efforts.

The Commission believes that this problem-solving approach can emerge from a deeper, more precisely articulated understanding of the nature and extent of discrimination based on race, sex, and national origin in our society. All too often, in discussions of affirmative action, this remedy is divorced from the historic and continuing discrimination it was created to eliminate. The merits of particular affirmative measures are then debated without consistent reference to or agreement upon the discriminatory conditions that make such remedies necessary. But just as medical treatment is conducted on the basis of a diagnosis of an illness, the remedy of affirmative action depends on the nature and extent of the problem of discrimination. This statement, therefore, will propose and explore a "problem-remedy" approach that continually unites the remedy of affirmative action with the problem of discrimination. This approach stresses clarity about the problem in order to promote productive analysis and implementation of the remedy. Consequently, our theory of affirmative action starts with our understanding of discrimination.

In the United States, individual bias or prejudice deriving from notions of white and male supremacy and other forms of overt bigotry are the most widely recognized forms of discrimination. Over the years the American public has made progress toward rejecting such outright acts of prejudice as governmentally required segregation, the mistreatment of American Indians, racially exclusionary immigration laws, and the sometimes unintended legal subordination of women under the guise of "protective" laws. Nonetheless, practical experience in enforcing civil rights laws has shown that prejudice is perpetuated by many institutional processes and that discrimination is more complicated than individual acts of prejudice based on irrational ideas of racial and gender superiority.[3]

Despite civil rights laws and a noticeable improvement in public attitudes towards civil rights,[4] continued inequalities compel the conclusion that our history of racism and sexism continues to affect the present. A steady flow of data shows unmistakably that most of the historic victims of discrimination are still being victimized and that more recently arrived groups have also become victims of ongoing discriminatory attitudes and processes. Social indicators reveal persistent and widespread gaps throughout our society between the status of white males and the rest of the population.[5]

[3] Prior to 1964, "employment discrimination tended to be viewed as a series of isolated and distinguishable events due, for the most part, to the ill-will on the part of some identifiable individual or organization. . . .Employment discrimination, as we know today, is a far more complex and pervasive phenomenon." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2143-44.

[4] Public opinion polls reveal that the expression of prejudiced attitudes towards blacks and women have continued to decline, particularly in the past decade, although such prejudice persists in a significant percentage of the public. A 1978 Gallup poll showed declining prejudice in issues related to housing, education, and politics. Between 1965 and 1978 the number of whites who said they would move out of their neighborhoods if blacks moved in declined from 35 percent to 16 percent. Between 1973 and 1978 the number of whites who said they would object to sending their children to schools having a majority of black students also declined from 69 percent to 49 percent of southern whites and from 63 percent to 38 percent of northern whites. Between 1969 and 1978 the number of whites who said they would vote for a qualified black Presidential candidate of their own party also increased (from 67 percent to 77 percent). *Gallup Poll,* Aug. 27-28, 1978. Between 1971 and 1978 a declining number of whites said they believed blacks to be inferior (from 22 to 15 percent) or of less native intelligence than whites (from 37 percent to 25 percent). Poll by Louis Harris and Associates for the National Conference on Christians and Jews, *Newsweek,* Feb. 26, 1979, p. 48. With regard to women, the findings are ambiguous. Attitudes toward passage of the Equal Rights Amendment, for example, have changed little. A recent Gallup Poll shows no change in the percentage of the public that supports the ERA (56 percent in both 1975 and 1980). *Gallup Poll,* July 31, 1980. Another poll, by the Roper Organization, showed a decline in support for the ERA (from 55 percent of women and 68 percent of men in 1975 to 51 percent of women and 52 percent of men in 1980). However, the same poll indicated that support for efforts to strengthen women's status had increased (from 40 percent of women and 44 percent of men in 1970 to 60 percent of women and 64 percent of men in 1980). *Virginia Slims American Women's Opinion Poll,* Roper Organization, 1980.

[5] The Commission has issued a report evaluating the Nation's progress toward equality by systematically comparing the social conditions of the minority and female population to those of the majority male population. U.S., Commission on Civil Rights, *Social Indicators of Equality For Minorities and Women* (1978). According to the report, minorities and women are less likely to have completed as many years of high school or have a high school or college education than white males. If not undereducated, they tend to be educationally overqualified for the work they do and earn less than comparably educated white males. As of 1976, among those persons 25-29 years of age, 34 of every 100 white males were college educated, while only 11 out of every 100 minorities were college educated. Ibid., p. 26.

Women and minorities are more likely to be unemployed, to have less prestigious occupations than white males, and to be concentrated in different occupations. From 1970 to 1976, when unemployment rates were rising for all groups, the disparity between minority and female rates and the majority male rate generally increased; blacks, Mexican Americans, and Puerto Ricans of both sexes moved from having approximately twice the unemployment of majority males in 1970 to nearly three times the majority

Because they occur so often and in so many places, these statistically observable, unequal results are strong evidence of a systematic denial of equal opportunities. We reject as an age-old canard of bigotry the view that the victims of discrimination have only themselves to blame for their victimization. As the Supreme Court of the United States has observed in the context of employment, statistics showing racial and ethnic imbalance are important:

> because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.[6]

Statistics showing inequalities, however, illuminate only the results of a discriminatory process. They do not explain the specific ways in which that process works to produce those results.

These observations suggest that discrimination against minorities and women cannot be equated solely with individual prejudice nor with the abundantly documented unequal conditions that minorities and women experience. Neither prejudice nor unequal results alone adequately explain the dynamics of today's discrimination. In this Commission's judgment, deliberate prejudice is but one of the obvious causes of the denial of equal opportunity; unequal results are but one of the obvious signs that equal opportunity may have been denied. Their conspicuousness tends to blind us to other, less obvious, ways in which discrimination works.

As the first part of this statement will discuss, discrimination has become a process that builds the discriminatory attitudes and actions of individuals into the operations of organizations and social structures (such as education, employment, housing, and government). Perpetuating past injustices into the present, and manifesting itself through statistically measurable inequalities that are longstanding and widespread, this discriminatory process produces unequal results along the lines of race, sex, and national origin, which in turn reinforce existing practices and breed damaging stereotypes which then promote the existing inequalities that set the process in motion in the first place. This combination of attitudes and actions forms patterns that maintain subordination, exclusion, and segregation and deny equal opportunity almost as effectively as overt racist, sexist, and bigoted behavior. The task before our Nation today is clearly to discern and then systematically dismantle this discriminatory process.

This understanding of the problem as a discriminatory process forms the basis for affirmative action plans and the particular affirmative measures commonly used by such plans. As this statement will demonstrate, when such a process is at work, antidiscrimination efforts to eliminate prejudice by insisting on "color-blindness" and "gender-neutrality" are insufficient remedies. Such efforts may control certain prejudicial conduct, but they often prove ineffective against a process that transforms "neutrality" into discrimination. In such circumstances, antidiscrimination efforts cannot be limited to measures that take no conscious account of race, sex, and national origin. Only those antidiscrimination actions that are developed out of an awareness of this process—affirmative actions—can successfully halt and dismantle it.

The problem-remedy approach advanced in this statement grounds affirmative action in the reality of discrimination as a process. To dismantle a process that turns "neutrality" into discrimination, affirmative measures may be necessary. This approach

male rate in 1976. Ibid., p. 29. In 1976, 47.8 percent of black male teenagers, 51.3 percent of black female teenagers, and 55.2 percent of Puerto Rican male teenagers were unemployed, compared to 15.0 percent unemployment among majority male teenagers. Ibid., p. 32. Occupational segregation is also intense: one-third of the jobs held by minority men and two-thirds to three-fourths of the jobs held by women in 1976 would have to be changed to match the occupational patterns of white males. Ibid., p. 45.

Minorities and women have less per capita household income and a greater likelihood of being in poverty. "The indicator values for median household per capita income for 1959, 1969, and 1975 show that most minority and female-headed households have only half the income that is available to majority households." Ibid., p. 65. The incomes available to Mexican Americans and Puerto Ricans in 1975 were the same or less, relative to the income of white males, than they were in 1965 and 1970. In addition, minority-headed families, regardless of the sex of the family head, are twice as likely to be in poverty as majority-headed families, and minority female-headed families are over five times as likely to be in poverty as majority-headed families. Ibid., pp. 65–66.

Finally, minority and female-headed households are more likely to live in central cities than in the suburbs where majority-headed households are located. Between 1960 and 1970 most minority households were only about one-half to two-thirds as likely as white households to be situated outside a central city. Minorities and females are less likely to be homeowners, more likely to live in overcrowded conditions, and more likely to spend more than a quarter of their family income on rent. American Indian, Alaskan Native, black, Chinese American, Filipino American, and Puerto Rican rental households were all more than two, with Mexican American households almost six, times as likely to be overcrowded as white households in 1970. In 1976 minority and female-headed households were, at best, two-thirds as likely to be owner occupied as majority-headed households. Ibid., pp. 75, 84–85.

[6] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340, n.20 (1977). The same principle has been applied in sex discrimination cases. Dothard v. Rawlinson, 433 U.S. 321 (1977).

distinguishes *affirmative action plans* from specific *affirmative measures* that commonly are a part of such plans. An affirmative action plan is a systematic organizational effort that comprehensively addresses the discriminatory process through antidiscrimination measures that may or may not take race, sex, and national origin into account. An affirmative measure is a specific technique within an affirmative action plan (and sometimes apart from it) that implicitly or explicitly uses race, sex, and national origin as criteria in decisionmaking. The problem-remedy approach recognizes that affirmative action plans and the particular affirmative measures used by such plans depend on the nature and extent of the discrimination to be remedied.

The Commission, in a previous statement on affirmative action, accurately described it as "a term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."[7] Building on our earlier statement, this new statement addresses the underlying rationale for and provides a process-oriented approach to affirmative action.

Because this approach makes an explanation of the discriminatory process essential, Part A will describe the various components of the process of discrimination and provide an overview of its workings. Part B will then explain how civil rights law already incorporates an understanding of this process and requires or permits affirmative action plans and the full range of affirmative measures as needed to eliminate all aspects of the process of discrimination. Finally, Part C will show how the problem-remedy approach to affirmative action helps answer the objections of critics of affirmative action and such questions as under which conditions, to what extent, in what ways, for how long, and for whom should affirmative action be undertaken.

Our Nation enters the 1980s amidst high unemployment, continuing inflation, cutbacks in public services, increasing housing shortages, and general anxiety over our economic well-being. In this charged atmosphere, there is a strong temptation to view affirmative action as pitting the rights of minorities and women against white males in a battle over diminishing resources. The challenge, however, is to maintain, indeed, to advance our commitment to equality without asserting one equity over another.

The problem-remedy approach proposed by this affirmative action statement does not place the rights of minorities and women over those of white males. It seeks equity for all. Its objective, like that of all antidiscrimination efforts, is to ensure that differences among people be simply differences and not indications of superiority or inferiority, domination or subordination. To attain a society in which achievements and aspirations are unaffected by race, sex, or national origin, however, it is necessary to identify as precisely as possible the ways in which discrimination works to prevent the just sharing of resources and opportunities. By focusing on the nature and extent of such discrimination, the Commission believes, decisionmakers will be better able to use the tools of administration, including affirmative action, to create organizational forms that, instead of supporting discrimination, function to remedy it.

[7] U.S., Commission on Civil Rights, *Statement on Affirmative Action* (1977), p. 2.

Part A

THE PROBLEM: DISCRIMINATION

Making choices is an essential part of everyday life for individuals and organizations. These choices are shaped in part by social structures that set standards and influence conduct in such areas as education, employment, housing, and government. When these choices limit the opportunities available to people because of their race, sex, or national origin, the problem of discrimination arises.

Historically, discrimination against minorities and women was not only accepted but it was also governmentally required. The doctrine of white supremacy used to support the institution of slavery was so much a part of American custom and policy that the Supreme Court in 1857 approvingly concluded that both the North and the South regarded slaves "as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[1] White supremacy survived the passage of the Civil War amendments to the Constitution and continued to dominate legal and social institutions in the North as well as the South to disadvantage not only blacks,[2] but other racial and ethnic groups as well—American Indians, Alaskan Natives, Asian and Pacific Islanders, and Hispanics.[3]

While minorities were suffering from white supremacy, women were suffering from male supremacy. Mr. Justice Brennan has summed up the legal disabilities imposed on women this way:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[4]

In 1873 a member of the Supreme Court proclaimed, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[5] Such romantic paternalism has alternated with fixed notions of male superiority to deny women in law and in practice the most fundamental of rights, including the right to vote, which was not granted until 1920;[6] the Equal Rights Amendment has yet to be ratified.[7]

[1] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 408 (1857).

[2] For a concise summary of this history, see U.S., Commission on Civil Rights, *Twenty Years After Brown*, pp. 4–29 (1975); *Freedom to the Free : 1863 Century of Emancipation* (1963).

[3] The discriminatory conditions experienced by these minority groups have been documented in the following publications by the U.S. Commission on Civil Rights: *The Navajo Nation: An American Colony* (1975); *The Southwest Indian Report* (1973); *The Forgotten Minority: Asian Americans in New York City* (State Advisory Committee Report 1977); *Success of Asian Americans: Fact or Fiction?* (1980); *Stranger in One's Land* (1970); *Toward Quality Education for Mexican Americans* (1974); *Puerto Ricans in the Continental United States: An Uncertain Future* (1976).

[4] Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973), citing L. Kanowitz, *Women and the Law: The Unfinished Revolution*, pp. 5–6 (1970), and G. Myrdal, *An American Dilemma* 1073 (20th Anniversary Ed., 1962). Justice Brennan wrote the opinion of the Court, joined by Justices Douglas, White, and Marshall. Justice Stewart concurred in the judgment. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, wrote a separate concurring opinion. Justice Rehnquist dissented. See also H.M. Hacker, "Women as a Minority Group," *Social Forces*, vol. 30 (1951) pp. 60–69; W. Chafe, *Women and Equality: Changing Patterns in American Culture* (New York: Oxford University Press, 1977).

[5] Bradwell v. State, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring), quoted in *Frontiero, supra* note 4.

[6] U.S. Const. amend. XIX.

[7] See U.S., Commission on Civil Rights, *Statement on the Equal Rights Amendment* (December 1978).

White and male supremacy are no longer popularly accepted American values.[8] The blatant racial and sexual discrimination that originated in our our conveniently forgotten past, however, continues to manifest itself today in a complex interaction of attitudes and actions of individuals, organizations, and the network of social structures that make up our society.

Individual Discrimination

The most common understanding of discrimination rests at the level of prejudiced individual attitudes and behavior. Although open and intentional prejudice persists, individual discriminatory conduct is often hidden and sometimes unintentional.[9] Some of the following are examples of deliberately discriminatory actions by consciously prejudiced individuals. Some are examples of unintentionally discriminatory actions taken by persons who may not believe themselves to be prejudiced but whose decisions continue to be guided by deeply ingrained discriminatory customs.

- Personnel officers whose stereotyped beliefs about women and minorities justify hiring them for low level and low paying jobs exclusively, regardless of their potential experience or qualifications for higher level jobs.[10]
- Administrators, historically white males, who rely on "word-of-mouth" recruiting among their friends and colleagues, so that only their friends and proteges of the same race and sex learn of potential job openings.[11]
- Employers who hire women for their sexual attractiveness or potential sexual availability rather than their competence, and employers who engage in sexual harassment of their female employees.[12]
- Teachers who interpret linguistic and cultural differences as indications of low potential or lack of academic interest on the part of minority students.[13]
- Guidance counselors and teachers whose low expectations lead them to steer female and minority students away from "hard" subjects, such as mathematics and science, toward subjects that do not prepare them for higher paying jobs.[14]
- Real estate agents who show fewer homes to minority buyers and steer them to minority or mixed neighborhoods because they believe white residents would oppose the presence of black neighbors.[15]
- Families who assume that property values inevitably decrease when minorities move in and therefore move out of their neighborhoods if minorities do move in.[16]
- Parole boards that assume minority offenders to be more dangerous or more unreliable than white offenders and consequently more frequently deny parole to minorities than to whites convicted of equally serious crimes.[17]

[8] See note 4, Introduction.

[9] See, e.g., R.K. Merton, "Discrimination and the American Creed," in R.K. Merton, *Sociological Ambivalence and Other Essays* (New York: The Free Press, 1976), pp. 189-216. In this essay on racism, published for the first time more than 30 years ago, Merton presented a typology which introduced the notion that discriminatory actions are not always directly related to individual attitudes of prejudice. Merton's typology consisted of the following: Type I—the unprejudiced nondiscriminator; Type II—the unprejudiced discriminator; Type III—the prejudiced nondiscriminator; Type IV—the prejudiced discriminator. In the present context, Type II is crucial in its observation that discrimination is often practiced by persons who are not themselves prejudiced, but who respond to, or do not oppose, the actions of those who discriminate because of prejudiced attitudes (Type IV). See also D.C. Reitzes, "Prejudice and Discrimination: A Study in Contradictions," in *Racial and Ethnic Relations*, ed. H.M. Hughes (Boston: Allyn and Bacon, 1970), pp. 56-65.

[10] See R.M. Kanter and B.A. Stein, "Making a Life at the Bottom," in *Life in Organizations, Workplaces as People Experience Them*, ed. Kanter and Stein (New York: Basic Books, 1976), pp. 176-90; also L.K. Howe, "Retail Sales Worker," ibid., pp. 248-51; also R.M. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).

[11] See M.S. Granovetter, *Getting A Job: A Study of Contract and Careers* (Cambridge: Harvard University Press, 1974), pp. 6-11; also A.W. Blumrosen, *Black Employment and the Law* (New Brunswick, N.J.: Rutgers University Press, 1971), p. 232.

[12] See U.S., Equal Employment Opportunity Commission, "Guideliness on Discrimination Because of Sex," 29 C.F.R. §1604.4 (1979); L. Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (New York: McGraw Hill, 1978), pp. 92-96, 176-79; C.A. Mackinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), pp. 25-55.

[13] See R. Rosenthal and L.F. Jacobson, "Teacher Expectations for the Disadvantaged," *Scientific American*, 1968 (b) 218, 219-23; also, D. Bar Tal, "Interactions of Teachers and Pupils," in *New Approaches to Social Problems* ed. I. H. Frieze, D. Bar Tal, and J.S. Carrol (San Francisco: Jossey Bass, 1979), pp. 337-58; also, U.S., Commission on Civil Rights, *Teachers and Students, Report V: Mexican American Education Study, Differences in Teacher Interaction With Mexican American and Anglo Students* (1973), pp. 22-23.

[14] Ibid.

[15] U.S., Department of Housing and Urban Development, Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey (1979); D.M. Pearce, "Gatekeepers and Home Seekers: Institutional Patterns in Racial Steering," in *Social Problems*, vol. 26 (1979) pp. 325-42; "Benign Steering and Benign Quotas: The Validity of Race Conscious Government Policies to Promote Residential Integration," 93 *Harv. L. Rev.* 938, 944 (1980).

[16] See M.N. Danielson, *The Politics of Exclusion* (New York: Columbia University Press, 1976), pp. 11-12; U.S., Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974).

[17] See L.L. Knowles and K. Prewitt, eds., *Institutional Racism in America* (Englewood Cliffs, N.J.: Prentice Hall, 1969) pp. 58-77, and E.D. Wright, *The Politics of Punishment* (New York: Harper and Row, 1973). Also, S.V. Brown, "Race and Parole Hearing Outcomes," in *Discrimination in Organizations*, ed. R. Alvarez and K. G. Lutterman (San Francisco: Jossey Bass, 1979), pp. 355-74.

These contemporary examples of discrimination may not be motivated by conscious prejudice. The personnel manager is likely to deny believing that minorities and women can only perform satisfactorily in low level jobs and at the same time allege that other executives and decisionmakers would not consider them for higher level positions. In some cases, the minority or female applicants may not be aware that they have been discriminated against—the personnel manager may inform them that they are deficient in experience while rejecting their applications because of prejudice; the white male administrator who recruits by word-of-mouth from his friends or white male work force excludes minorities and women who never learn of the available positions. The discriminatory results these activities cause may not even be desired. The guidance counselor may honestly believe there are no other realistic alternatives for minority and female students.

Whether conscious or not, open or hidden, desired or undesired, these acts build on and support prejudicial stereotypes, deny their victims opportunities provided to others, and perpetuate discrimination, regardless of intent.

Organizational Discrimination

Discrimination, though practiced by individuals, is often reinforced by the well-established rules, policies, and practices of organizations. These actions are often regarded simply as part of the organization's way of doing business and are carried out by individuals as just part of their day's work.

Discrimination at the organizational level takes forms that are similar to those on the individual level. For example:

- Height and weight requirements that are unnecessarily geared to the physical proportions of white males and, therefore, exclude females and some minorities from certain jobs.[18]
- Seniority rules, when applied to jobs historically held only by white males, make more recently hired minorities and females more subject to layoff—the "last hired, first fired" employee—and less eligible for advancement.[19]
- Nepotistic membership policies of some referral unions that exclude those who are not relatives of members who, because of past employment practices, are usually white.[20]
- Restrictive employment leave policies, coupled with prohibitions on part-time work or denials of fringe benefits to part-time workers, that make it difficult for the heads of single parent families, most of whom are women, to get and keep jobs and meet the needs of their families.[21]
- The use of standardized academic tests or criteria, geared to the cultural and educational norms of the middle-class or white males, that are not relevant indicators of successful job performance.[22]
- Preferences shown by many law and medical schools in the admission of children of wealthy and influential alumni, nearly all of whom are white.[23]
- Credit policies of banks and lending institutions that prevent the granting of mortgage monies and loans in minority neighborhoods, or prevent the granting of credit to married women and others who have previously been denied the opportunity to build good credit histories in their own names.[24]

Superficially "color blind" or "gender neutral," these organizational practices have an adverse effect on minorities and women. As with individual actions, these organizational actions favor white males, even when taken with no conscious intent to affect minorities and women adversely, by protecting and promoting the status quo arising from the racism and sexism of the past. If, for example, the jobs now protected by "last hired, first fired" provisions had

[18] Height and weight minimums that disproportionately exclude women without a showing of legitimate job requirement constitute unlawful sex discrimination. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Minimum height requirements used in screening applicants for employment have also been held to be unlawful where such a requirement excludes a significantly higher percentage of Hispanics than other national origin groups in the labor market and no job relatedness is shown. See Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir. 1975).

[19] U.S., Commission on Civil Rights, *Last Hired, First Fired* (1976); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979).

[20] U.S., Commission on Civil Rights, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1977), pp. 84–89.

[21] A. Pifer, "Women Working: Toward a New Society," pp. 13–34, and D. Pearce, "Women, Work and Welfare: The Feminization of Poverty," pp. 103–24, both in K.A. Fernstein, ed., *Working Women and Families* (Beverly Hills: Sage Publications, 1979). Disproportionate numbers of single parent families are minorities.

[22] See Griggs v. Duke Power Company, 401 U.S. 424 (1971); U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978), pp. 10–12; I. Berg, *Education and Jobs: The Great Training Robbery* (Boston: Beacon Press, 1971), pp. 58–60.

[23] See U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978), pp. 14–15.

[24] See U.S., Commission on Civil Rights, *Mortgage Money : Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Conn.* (1974); J. Feagin and C.B. Feagin, *Discrimination American Style, Institutional Racism and Sexism* (Englewood Cliffs, N.J.: Prentice Hall, 1976), pp. 78–79.

always been integrated, seniority would not operate to disadvantage minorities and women. If educational systems from kindergarten through college had not historically favored white males, many more minorities and women would hold advanced degrees and thereby be included among those involved in deciding what academic tests should test for. If minorities had lived in the same neighborhoods as whites, there would be no minority neighborhoods to which mortgage money could be denied on the basis of their being minority neighborhoods.

In addition, these barriers to minorities and women too often do not fulfill legitimate needs of the organization, or these needs can be met through other means that adequately maintain the organization without discriminating. Instead of excluding all women on the assumption that they are too weak or should be protected from strenuous work, the organization can implement a reasonable test that measures the strength actually needed to perform the job or, where possible, develop ways of doing the work that require less physical effort. Admissions to academic and professional schools can be decided not only on the basis of grades, standardized test scores, and the prestige of the high school or college from which the applicant graduates, but also on the basis of community service, work experience, and letters of recommendation. Lending institutions can look at the individual and his or her financial ability rather than the neighborhood or marital status of the prospective borrower.

Some practices that disadvantage minorities and women are readily accepted aspects of everyday behavior. Consider the "old boy" network in business and education built on years of friendship and social contact among white males, or the exchanges of information and corporate strategies by business acquaintances in racially or sexually exclusive country clubs and locker rooms paid for by the employer.[25] These actions, all of which have a discriminatory impact on minorities and women, are not necessarily acts of conscious prejudice. Because such actions are so often considered part of the "normal" way of doing things, people have difficulty recognizing that they are discriminating and therefore resist abandoning these practices despite the clearly discriminatory results. Consequently, many decisionmakers have difficulty considering, much less accepting, nondiscriminatory alternatives that may work just as well or better to advance legitimate organizational interests but without systematically disadvantaging minorities and women.

This is not to suggest that all such discriminatory organizational actions are spurious or arbitrary. Many may serve the actual needs of the organization. Physical size or strength at times may be a legitimate job requirement; sick leave and insurance policies must be reasonably restricted; educational qualifications are needed for many jobs; lending institutions cannot lend to people who cannot reasonably demonstrate an ability to repay loans. Unless carefully examined and then modified or eliminated, however, these apparently neutral rules, policies, and practices will continue to perpetuate age-old discriminatory patterns into the structure of today's society.

Whatever the motivation behind such organizational acts, a process is occurring, the common denominator of which is unequal results on a very large scale.[26] When unequal outcomes are repeated over time and in numerous societal and geographical areas, it is a clear signal that a discriminatory process is at work.

Such discrimination is not a static, one-time phenomenon that has a clearly limited effect. Discrimination can feed on discrimination in self-perpetuating cycles:[27]

- The employer who recruits job applicants by word-of-mouth within a predominantly white male work force reduces the chances of receiving applications from minorities and females for open positions. Since they do not apply, they are not hired. Since they are not hired, they are not present when new jobs become available. Since they are not aware of new jobs, they cannot recruit other minority or female applicants. Because there are no minority or female employees to recruit others, the employer is left to recruit on his own from among his predominantly white and male work force.[28]

[25] See *Club Membership Practices by Financial Institutions: Hearing Before the Comm. on Banking, Housing and Urban Affairs, United States Senate,* 96th Cong., 1st Sess. (1979). The Office of Federal Contract Compliance Programs of the Department of Labor has proposed a rule that would make the payment or reimbursement of membership fees in a private club that accepts or rejects persons on the basis of race, color, sex, religion, or national origin a prohibited discriminatory practice. 45 Fed. Reg. 4954 (1980) (to be codified in 41 C.F.R. §60–1.11).

[26] See discussion of the courts' use of numerical evidence of unequal results in the text accompanying notes 4–21 in Part B of this statement.

[27] See U.S., Commission on Civil Rights, *For All the People. . .By All the People* (1969), pp. 122–23.

[28] See note 11.

- The teacher who expects poor academic performance from minority and female students may not become greatly concerned when their grades are low. The acceptance of their low grades removes incentives to improve. Without incentives to improve, their grades remain low. Their low grades reduce their expectations, and the teacher has no basis for expecting more of them.[29]
- The realtor who assumes that white homeowners do not want minority neighbors "steers" minorities to minority neighborhoods. Those steered to minority neighborhoods tend to live in minority neighborhoods. White neighborhoods then remain white, and realtors tend to assume that whites do not want minority neighbors.[30]
- Elected officials appoint voting registrars who impose linguistic, geographic, and other barriers to minority voter registration. Lack of minority registration leads to low voting rates. Lower minority voting rates lead to the election of fewer minorities. Fewer elected minorities leads to the appointment of voting registrars who maintain the same barriers.[31]

Structural Discrimination

Such self-sustaining discriminatory processes occur not only within the fields of employment, education, housing, and government but also between these structural areas. There is a classic cycle of structural discrimination that reproduces itself. Discrimination in education denies the credentials to get good jobs. Discrimination in employment denies the economic resources to buy good housing. Discrimination in housing confines minorities to school districts providing inferior education, closing the cycle in a classic form.[32]

With regard to white women, the cycle is not as tightly closed. To the extent they are raised in families headed by white males, and are married to or live with white males, white women will enjoy the advantages in housing and other areas that such relationships to white men can confer. White women lacking the sponsorship of white men, however, will be unable to avoid gender-based discrimination in housing, education, and employment. White women can thus be the victims of discrimination produced by social structures that is comparable in form to that experienced by minorities.

This perspective is not intended to imply that either the dynamics of discrimination or its nature and degree are identical for women and minorities. But when a woman of any background seeks to compete with men of any group, she finds herself the victim of a discriminatory process. Regarding the similarities and differences between the discrimination experienced by women and minorities, one author has aptly stated:

> [W]hen two groups exist in a situation of inequality, it may be self-defeating to become embroiled in a quarrel over which is more unequal or the victim of greater oppression. The more salient question is how a condition of inequality for both is maintained and perpetuated—through what means is it reinforced?[33]

The following are additional examples of the interaction between social structures that affect minorities and women:

- The absence of minorities and women from executive, writing, directing, news reporting, and acting positions in television contributes to unfavorable stereotyping on the screen, which in turn reinforces existing sterotypes among the public and creates psychological roadblocks to progress in employment, education, and housing.[34]
- Living in inner-city high crime areas in disproportionate numbers, minorities, particularly minority youth, are more likely to be arrested and are more likely to go to jail than whites accused of similar offenses, and their arrest and conviction records are then often used as bars to employment.[35]
- Because of past discrimination against minorities and women, female and minority-headed businesses are often small and relatively new. Further disadvantaged by contemporary credit and lending practices, they are more likely than white male-owned businesses to remain small and be less able to employ full-time specialists in applying for government contracts. Because they cannot monitor the availability of government

[29] See note 13.

[30] See notes 15 and 16.

[31] See Statement of Arthur S. Flemming, Chairman, U.S., Commission on Civil Rights, before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the U.S. Senate on S.407, S.903, and S.1279, Apr. 9, 1975, pp. 15–18, based on U.S., Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (January 1975).

[32] See, e.g., U.S., Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974).

[33] Chafe, *Women and Equality*, p. 78.

[34] U.S., Commission on Civil Rights, *Window Dressing on the Set* (1977).

[35] See note 17; Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); Green v. Mo.-Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

contracts, they do not receive such contracts. Because they cannot demonstrate success with government contracts, contracting officers tend to favor other firms that have more experience with government contracts.[36]

Discriminatory actions by individuals and organizations are not only pervasive, occurring in every sector of society, but also cumulative with effects limited neither to the time nor the particular structural area in which they occur. This process of discrimination, therefore, extends across generations, across organizations, and across social structures in self-reinforcing cycles, passing the disadvantages incurred by one generation in one area to future generations in many related areas.[37]

These interrelated components of the discriminatory process share one basic result: the persistent gaps seen in the status of women and minorities relative to that of white males. These unequal results themselves have real consequences. The employer who wishes to hire more minorities and women may be bewildered by charges of racism and sexism when confronted by what appears to be a genuine shortage of qualified minority and female applicants. The guidance counselor who sees one promising minority student after another drop out of school or give up in despair may be resentful of allegations of racism when there is little he or she alone can do for the student. The banker who denies a loan to a female single parent may wish to do differently, but believes that prudent fiscal judgment requires taking into account her lack of financial history and inability to prove that she is a good credit risk. These and other decisionmakers see the results of a discriminatory process repeated over and over again, and those results provide a basis for rationalizing their own actions, which then feed into that same process.

When seen outside the context of the interlocking and intertwined effects of discrimination, complaints that many women and minorities are absent from the ranks of qualified job applicants, academically inferior and unmotivated, poor credit risks, and so forth, may appear to be justified. Decisionmakers like those described above are reacting to real social problems stemming from the process of discrimination. But many too easily fall prey to stereotyping and consequently disregard those minorities and women who have the necessary skills or qualifications. And they erroneously "blame the victims" of discrimination,[38] instead of examining the past and present context in which their own actions are taken and the multiple consequences of these actions on the lives of minorities and women.

The Process of Discrimination

Although discrimination is maintained through individual actions, neither individual prejudices nor random chance can fully explain the persistent national patterns of inequality and underrepresentation. Nor can these patterns be blamed on the persons who are at the bottom of our economic, political, and social order. Overt racism and sexism as embodied in popular notions of white and male supremacy have been widely repudiated, but our history of discrimination based on race, sex, and national origin has not been readily put aside. Past discrimination continues to have present effects. The task today is to identify those effects and the forms and dynamics of the discrimination that produced them.

Discrimination against minorities and women must now be viewed as an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior. That process, started by past events, now routinely bestows privileges, favors, and advantages on white males and imposes disadvantages and penalties on minorities and women. This process is also self-perpetuating. Many normal, seemingly neutral, operations of our society create stereotyped expectations that justify unequal results; unequal results in one area foster inequalities in opportunity and accomplishment in others; the lack of opportunity and accomplishment confirm the

[36] See U.S., Commission on Civil Rights, *Minorities and Women as Government Contractors*, pp. 20, 27, 125 (1975).

[37] See, e.g., A. Downs, *Racism in America and How to Combat It* (U.S., Commission on Civil Rights, 1970); "The Web of Urban Racism," in *Institutional Racism in America*, ed. Knowles and Prewitt, (Englewood Cliffs, N.J.: Prentice Hall, 1969) pp. 134–76. Other factors in addition to race, sex, and national origin may contribute to these interlocking institutional patterns. In *Equal Opportunity in Suburbia* (1974), this Commission documented what it termed "the cycle of urban poverty" that confines minorities in central cities with declining tax bases, soaring educational and other public needs, and dwindling employment opportunities, surrounded by largely white, affluent suburbs. This cycle of poverty, however, started with and is fueled by discrimination against minorities. *See also* W. Taylor, *Hanging Together, Equality in an Urban Nation* (New York: Simon & Schuster, 1971).

[38] The "self-fulfilling prophecy" is a well known phenomenon. "Blaming the victim" occurs when responses to discrimination are treated as though they were the causes rather than the results of discrimination. *See* Chafe, *Women and Equality* (New York: Oxford University Press, 1977) pp. 76–78; W. Ryan, *Blaming the Victim* (New York: Pantheon Books, 1971).

original prejudices or engender new ones that fuel the normal operations generating unequal results.

As we have shown, the process of discrimination involves many aspects of our society. No single factor sufficiently explains it, and no single means will suffice to eliminate it. Such elements of our society as our history of *de jure* discrimination, deeply ingrained prejudices,[39] inequities based on economic and social class,[40] and the structure and function of all our economic, social, and political institutions[41] must be continually examined in order to understand their part in shaping today's decisions that will either maintain or counter the current process of discrimination.

It may be difficult to identify precisely all aspects of the discriminatory process and assign those parts their appropriate importance. But understanding discrimination starts with an awareness that such a process exists and that to avoid perpetuating it, we must carefully assess the context and consequences of our everyday actions.

The Commission believes that a more productive and pragmatic approach toward eliminating discrimination starts with an informed awareness of the forms, dynamics, and subtleties of the process of discrimination. Decisionmakers are then better able to develop programs utilizing the tools of administration to create an organizational climate that successfully promotes equality instead of supporting continued inequality. The problem-remedy approach advanced in this statement is intended as an aid toward moving in that direction.

[39] See e.g., J.E. Simpson and J.M. Yinger, *Racial and Cultural Minorities* (New York: Harper and Row, 1965), pp. 49–79; J.M. Jones, *Prejudice and Racism* (Reading, Mass.: Addison Wesley, 1972) pp. 60–111; M.M. Tumin, "Who Is Against Desegregation?" in *Racial and Ethnic Relations,* ed. H. Hughes (Boston: Allyn & Bacon, 1970) pp. 76–85; D.M. Wellman, *Portraits of White Racism* (Cambridge: Cambridge University Press, 1977).

[40] See, e.g., D.C. Cox, *Caste, Class and Race : A Study In Social Dynamics* (Garden City, N.Y.: Doubleday, 1948); W.J. Wilson, *Power, Racism and Privilege* (New York: MacMillan, 1973).

[41] H. Hacker, "Women as a Minority Group," *Social Forces,* vol. 30 (1951) pp. 60–69; J. Feagin and C.B. Feagin, *Discrimination American Style* ; Chafe, *Women and Equality;* J. Feagin, "Indirect Institutionalized Discrimination," *American Politics Quarterly,* vol. 5 (1977) pp. 177–200; M.A. Chesler, "Contemporary Sociological Theories of Racism," in *Towards the Elimination of Racism,* ed. P. Katz (New York: Pergamion Press 1976); P. Van den Berghe, *Race and Racism: A Comparative Perspective* (New York: Wiley, 1967); S. Carmichael and C. Hamilton, *Black Power* (New York: Random House 1967); Knowles and Prewitt, *Institutional Racism in America* ; Downs, *Racism in America and How to Combat It* (1970).

Part B

CIVIL RIGHTS LAW AND AFFIRMATIVE ACTION

This statement started from the premise that the remedy of affirmative action can be most productively discussed by reference to the problem of discrimination it was created to address. The legal community often equates "discrimination" with activities prohibited by law. Remedies to combat such discrimination more often than not are limited to attempts to correct illegal acts that have been committed.

In this statement, however, the Commission defines "discrimination" to include all expressions of discrimination related to race, sex, and national origin, as explained in the preceding section of this statement, whether legal or illegal. Accordingly, "remedy" as used here includes all measures designed to eliminate such discrimination.

This broader definition has been used because civil rights laws do not prohibit all the forms of discrimination experienced by minorities and women, particularly the more complex processes of discrimination. Such discrimination may continue because there may be practical difficulties in establishing that a legal violation has, in fact, occurred,[1] or the discrimination, despite consistently unequal results, is entirely lawful.[2] If civil rights laws are interpreted to restrict affirmative action only to those acts that are or may be illegal, they can put beyond remedial reach essential aspects of the process of discrimination described in Part A.

Civil rights laws already require even the most controversial affirmative measures—"goals" and "quotas" or other types of "preferential treatment"—when necessary to remedy illegal discrimination. These laws also encourage the voluntary implementation of affirmative action plans to eliminate all other forms of discrimination. Depending on the circumstances, these voluntary corrective efforts may include the use of "goals" and "quotas" or other types of "preferential treatment."[3] The legal issue has recently changed from the general question of whether affirmative action is lawful to the more particular question of what specific affirmative measures within affirmative action plans are appropriate in which circumstances to remedy what forms of discrimination.

This section will examine civil rights law as it both supports and is supported by the problem-remedy approach to the issue of affirmative action. It will first show how civil rights law acknowledges the numerous forms of discrimination, including the overall process of discrimination affecting minorities and women. Next, it will discuss how these laws combat discrimination through a variety of required remedies, including affirmative action plans containing numerically-based remedies that explicitly take race, sex, and national origin into account. Finally, this section will address the issue of voluntary affirmative action and explain under what conditions

[1] Civil rights plaintiffs, for example, often have the difficult, and sometimes impossible, burden of proving discriminatory intent. See 12 Harv. C.R.-C.L. L. Rev. 725 (1977). In Title VII cases, class action litigation and use of statistical data to show discrimination has become increasingly expensive, complex, and time-consuming. *See, e.g.,* B. Schlei and P. Grossman, *Employment Discrimination Law* 1161-93 (1976); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 Harv. L. Rev. 387 (1975).

[2] The Supreme Court and others have referred to discrimination for which no one in particular can legally be held accountable as "societal" discrimination. See text accompanying note 79 and note 84, below. Examples of such discrimination appear in the text accompanying notes 71-72.

[3] Goals, quotas, and preferential treatment as legal issues are addressed in the text accompanying notes 43-67, below; they are addressed as policy issues in Part C, "Goals," "Quotas," and Other Types of "Preferential Treatment."

the same remedies ordered by the courts and Federal civil rights agencies for illegal discrimination may be taken voluntarily without incurring legal liability.

Civil Rights Law and the Problem

As Part A has shown, discrimination is manifested by the unequal outcomes it generates. Accordingly, courts and enforcement agencies rely on statistics showing disparate results among race, sex, and national origin groups as indicators of the likely presence or absence of illegal discrimination.

For example, the Supreme Court has said that numerical evidence showing a marked exclusion or underrepresentation of minorities or women in jobs, classrooms, geographic areas, or juries:

> raises a strong inference that. . .discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would. . .so consistently reduc[e] the number. . . .[4]

That "strong inference" can be rebutted, however, by demonstrating in a particular circumstance that other factors unrelated to race, sex, or national origin have produced the unequal result.[5] Unequal results as a matter of law, therefore, are only suggestive of discriminatory conduct; they do not conclusively establish the presence of illegal discrimination, nor do they always identify the specific actions, much less the motivation, that caused the discrimination.

Because discrimination can be either intended or unintended, civil rights law has two markedly different legal standards for determining when illegal discrimination has occurred.[6] The 5th and 14th amendments' guarantees of equal protection of the law are violated only by intentional, purposeful, or deliberate actions[7] that harm persons because of their race, national origin, or sex.[8] Other laws, however, such as Title VII of the Civil Rights Act of 1964,[9] Executive Order No. 11246,[10] and the Emergency School Aid Act,[11] also forbid actions, regardless of their intent, that have a disproportionate effect on the basis of race, national origin, and sex and that cannot be justified by any legitimate reason. Although both the "intent" and the "effects" standards use statistical data in determining whether illegal discrimination has occurred, they use such data for distinctly different purposes.

In "intent" cases, the courts have had to develop a variety of ways to determine whether intentional discrimination exists, because few decisionmakers publicize or otherwise expose their discriminatory intent.[12] Primary among these is numerical evidence of unequal results because "[i]n many cases the only available avenue of proof is the use of. . .statistics to uncover clandestine and covert discrimination."[13]

In "effects" cases, however, numerical evidence is not used to assess the likelihood that the accused discriminator has intentionally caused harm to the victim on the basis of race, national origin, or sex because the intent of the discriminator is not determinative. As used in these cases, numerical evidence emphasizes the existing unequal conditions in our society, whether they are caused by one discriminator or many, intentionally or not.

Perhaps the single most important decision in the evolution of equal employment opportunity law, *Griggs v. Duke Power Co.*, [14] best explains this significant difference between an "intent" and an "effects" standard. In *Griggs* the Supreme Court interpreted Title VII of the 1964 Civil Rights Act to invalidate general intelligence tests and other criteria for employment that disproportionately excluded

[4] Alexander v. Louisiana, 405 U.S. 625, 630 (1972) (*prima facie* case of racial discrimination established by the disproportionate exclusion of blacks from grand juries).

[5] *Id.* at 632. *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed in the text accompanying notes 14–20, below.

[6] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977), in which the Supreme Court distinguished between "disparate treatment" cases, where proof of discriminatory intent is critical, and "disparate impact" cases, where proof of discriminatory intent is not required. "Either theory, of course, may be applied to a particular set of facts." *Id.*

[7] Intentional discrimination on the basis of race, color, religion, sex, or national origin can also violate Title VII of the Civil Rights Act of 1964, as well as other statutes. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[8] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238–39 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

[9] 42 U.S.C. §§2000e–2000e-17 (1976).

[10] 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §2000e, at 1232 (1976).

[11] 20 U.S.C. §§3191–3207 (Supp. II 1978); *see* Board of Educ. v. Harris, 444 U.S. 130, 140-152 (1979).

[12] Some factors, in addition to statistical evidence of discriminatory impact, that may indicate such discriminatory intent include the sequence of events leading to the decision, abnormal procedures, the historical background of the decision, and contemporary statements by decisionmakers. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579–80 (1978); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266–68 (1977); Washington v. Davis, 426 U.S. 229, 238-39 (1976).

[13] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977), quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971).

[14] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

minorities, because these selection devices were not shown to be dictated by "business necessity."[15] Although the lower courts had found that Duke Power's tests were not deliberately discriminatory, the Supreme Court concluded:

> [G]ood intent or [the] absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[16]

All employment selection mechanisms that have a "disparate effect," that is, screen out a percentage of minorities and women that is disproportionate to whites or males when compared to their presence in the relevant labor market, are not unlawful. *Griggs* establishes, however, that the employer must demonstrate that practices with an adverse impact on the opportunities of minorities and women do, in fact, fairly measure or predict actual performance on the job.[17]

Griggs interpreted Title VII to require that "the posture and condition of the jobseeker be taken into account."[18] The Court recognized that the disproportionate failure rate of minorities on tests of the kind used by the Duke Power Company was caused by the inferior education they had received in the area's segregated schools. As the Supreme Court said in a later decision:

> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.[19]

By presuming on the basis of statistical data showing unequal results that illegal discrimination has occurred, *Griggs* recognizes the existence of a pervasive and interlocking process of discrimination in education, employment, and other areas. "Neutrality"—the presence of good intent or the absence of bad—in such a context will only support existing unequal conditions. To prevent the perpetuation of discrimination, the *Griggs* principle imposes a legal duty on employers and unions not to compound the discriminatory acts of others through their own arbitrary acts (i.e., using selection devices that have no direct relationship to the jobs to be performed).[20]

Numerical evidence of unequal results, however, is not conclusive proof that illegal discrimination has been committed. Under the "effects" test, the actions that produced such results may be lawful if the challenged decisionmaker can show that there was no reasonable alternative other than to perpetuate the unequal results. Nor is evidence of unequal results likely to be scrutinized by Federal enforcement agencies if the outcome of the total selection procedure—its "bottom line" statistical profile—is acceptable, even though individual components of that selection procedure may be illegal.[21]

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[15] *Id.* at 431.

[16] *Id.* at 432.

[17] *Id.* at 436. Pursuant to *Griggs* and other cases, the four Federal agencies having primary responsibility for the enforcement of Federal equal employment opportunity laws (the Equal Employment Opportunity Commission, the Civil Service Commission (now the Office of Personnel Management), the Department of Labor, and the Department of Justice) adopted guidelines in 1978 establishing a uniform Federal Government position with respect to selection procedures having an adverse impact. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607 (1979). The fundamental principle underlying the guidelines is that employment policies or practices that have an adverse impact on the employment opportunities of members of any race, sex, or ethnic group are illegal under Title VII and Executive Order No. 11246, unless justified by business necessity. An employer may usually avoid the application of the guidelines by using procedures that have no adverse impact, or by choosing alternatives that further legitimate business needs with lesser adverse impact. 29 C.F.R. §§1607.3B, 1607.4C, 1607.6. For example, if an employer ranks all applicants, and this ranking system does not cause minorities and women to be underrepresented in the employer's work force, the procedure is lawful under the guidelines. However, if the ranking system causes underrepresentation, the guidelines advise the use of alternate procedures, such as a pass/fail method, to assure the legality of the selection procedure. 29 C.F.R. §1607.5G.

Seniority systems are a partial exemption to the adverse impact rule. 29 C.F.R. §1607.3C. The Supreme Court has held that under §703(h) of Title VII, a *bona fide* seniority system (one that does not have its genesis in intentional discrimination) is lawful even where the employer is shown to have engaged in past discriminatory hiring and promotion practices and the effects of those practices are perpetuated by the seniority system. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[18] 401 U.S. at 431.

[19] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

[20] Founded as it is on the historical and current process of discrimination against minorities and women, the *Griggs* principle cannot sensibly be applied to white males. There is no history of discrimination against white males because of the color of their skin or their gender, no interacting individual, organizational, and structural attitudes and actions denying white males opportunities that disadvantage them in the job market on account of their race and/or sex. Title VII does ban deliberate discrimination against white males because of their race and/or sex and such arbitrary action has been found to have occurred. *See, e.g.,* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white male employees, who misappropriated cargo and were discharged while a black male employee, also involved in such theft, was retained, have a cause of action under Title VII); Calcote v. Texas Educational Foundation, Inc., 458 F. Supp. 231 (W.D. Texas 1976), *aff'd,* 578 F.2d 95 (5th Cir. 1978) (white male was paid a lower salary, received smaller salary increases than an equally qualified black male, and was harassed because of his race); Sawyer v. Russo, 19 Empl. Prac. Dec. @8996 (D.D.C. 1979) (qualified white male was passed over for promotion by black supervisors in favor of lesser qualified black applicants and in violation of regulations). Such discrimination, however, is isolated and not part of a self-perpetuating process of discrimination such as that experienced by minorities and women.

[21] Under the Uniform Guidelines on Employee Selection Procedures, *supra* note 17, numerical evidence is used to determine how Federal enforcement

Civil Rights Law and The Remedy

Because Federal civil rights agencies and courts view unequal results as a strong indication that discrimination may have occurred, they also view the reduction of unequal results as a strong indication that such discrimination is being remedied. As a result, some civil rights laws require affirmative action plans that include numerically-based remedies that affirmatively take account of race, sex, and national origin. Other laws mandate such affirmative measures as needed to remedy identified illegal acts.

In order to remedy constitutional violations in school desegregation cases, for example, courts normally set mathematical ratios of majority to minority students in the school system as a "starting point in the process of shaping a remedy."[22] These mathematical ratios, the Supreme Court has ruled, are not "inflexible requirement[s]."[23] Indeed, courts permit significant deviation from these ratios when "one race" schools are not the products of earlier segregative acts by school officials. But the burden is on the school authorities to overcome the presumption that the racial composition of such schools is the result of present or past discriminatory acts on their part.[24]

This legal presumption is based on the recognition that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people."[25] This "profound reciprocal effect" between the decisions of school authorities and the housing decisions of parents, the Supreme Court has stated, dictates the "common sense" conclusion that the actions of school authorities "have an impact beyond the particular schools that are the subjects of those actions."[26]

Once again, the law is acknowledging the interlocking nature of the discriminatory process. Racial neutrality in school assignments is bound to perpetuate segregation when applied to the "loaded game board"[27] of a community with segregated schools and segregated housing.

Such segregation, the courts have found, can best be addressed through the use of numerically-based remedies. This statement has noted that statistics showing unequal outcomes may indicate the presence of discrimination but are not conclusive proof of it. Similarly, numerical targets are "starting points" for the remedy, not the remedy itself.

In addition to school desegregation cases, numerically-based remedies are also used in the Federal contract compliance program under Executive Order No. 11246, as amended,[28] which requires businesses that contract with the Federal Government to agree as a condition of their contract not to discriminate and to take affirmative action. This general affirmative action requirement, when first added to the contract compliance program in 1961, resulted in little progress. By the end of the 1960s, it became clear that more vigorous enforcement was needed to cause Federal contractors, particularly construction contractors and building trades unions, to make significant changes in their employment practices. At the same time, there was growing recognition that even if personal and overt discrimination were ended, equal employment opportunity could still be denied; a "color-conscious" approach was needed to overcome the present effects of past discrimination.[29] In order to determine progress, or the lack of progress, in implementing affirmative action programs, therefore, the concept of "goals and timetables" was adopted as the cornerstone of the Federal contract compliance program under Executive Order No. 11246.[30]

The contract compliance program now[31] requires businesses and institutions that choose to contract with the Federal Government to have an "affirma-

agencies will allocate their scarce enforcement resources. Under the "bottom line" formulation of the guidelines, Federal enforcement agencies look at the numerical data of the business' total selection process. If such "bottom line" statistics as a whole reveal no adverse impact, the Federal enforcement agencies in the exercise of their administrative and prosecutorial discretion generally will not take enforcement action, even where adverse impact may be caused by a component of the process. 29 C.F.R. §1607.4C (1979).

[22] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[23] *Id.*

[24] *Id.* at 26.

[25] *Id.* at 20.

[26] Keyes v. School Dist. No. 1, 413 U.S. 189, 202-203 (1973).

[27] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 28.

[28] 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §2000e, at 1232 (1976). Executive Order No. 11246 was amended by Executive Order No. 11375 in 1967 to prohibit discrimination on the basis of sex. *See* 3 C.F.R. 684 (1967).

[29] See R. Nathan, *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights by the Brookings Institution) (Washington, D.C.: Government Printing Office, 1969), pp. 92-100; U.S., Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971), pp. 42, 50-55, 60.

[30] For a full discussion of the history of the Executive Order program and its strengths and weaknesses, see U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. 5, To Eliminate Employment Discrimination* (1975), pp. 230-70.

[31] In the early 1970s detailed regulations were issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, the agency that enforces Executive Order No. 11246, giving more specific content to the general affirmative action requirement. 41 C.F.R. Part 60-2, known as Revised Order No. 4, was issued in 1970 and revised in 1971, and is applicable only to *nonconstruction* contractors. 41 C.F.R. Part 60-4 closely conforms the affirmative action requirements for *construction* contractors to those of Revised Order No. 4. See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort-1974,* Vol. 5, *To Eliminate Employment Discrimination* (1975), pp. 230-70.

tive action program," defined as "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort."[32] Contractors must undertake an "analysis" of their patterns of employment of minorities and women in all job categories,[33] comparing their patterns of "utilization"[34] of minorities and women with the proportion of minorities and women in the available and relevant labor pool, a determination that may vary with the kind of industry and the location of the facility or institution involved. The contractor is then required to develop "goals and timetables" to measure success and failure in overcoming the underutilization of minorities and women.[35] The goals are generally expressed in a flexible range (e.g., 12 to 16 percent) rather than in a fixed number.[36] They reflect assessments of the percentage of minorities and women in the work force, the availability for employment of minorities and women with the requisite skills, and the existence of current or potential training programs that are available to prepare minorities and women for employment.[37]

Goals, timetables to meet them, and "utilization analyses" are the distinctive features of the Federal contract compliance program. Basic is its requirement that contractors conduct a self-analysis[38] to identify obstacles to the full utilization of minorities and women that may account for their representation in small numbers in particular categories. Based on this self-analysis, contractors must then develop an affirmative action plan with specific methods to overcome those obstacles.[39] The affirmative action plan spells out the "results-oriented procedures" through which the goals will be met.

This problem-remedy approach works by requiring contractors to identify aspects of the employment process that produce "underutilization" and to take actions, including those that take account of race, sex, and national origin, to solve those problems. One court has listed some of the many causes of underutilization and the kinds of affirmative steps that can be taken, and it is worth quoting at length:

> Underutilization may be traced to failure of available women and minority workers to apply, for a variety of reasons, in the expected numbers. They may not be aware of job openings. If this is the problem, contacts may be established with local organizations, institutions, or individuals who are in a position to refer women and minority applicants; advantage may be taken of media and events through which potential women and minority applicants can be reached; and word-of-mouth recruiting by women and minority employees and applicants may be encouraged. Perhaps the contractor will discover that potential applicants are discouraged by the contractor's negative image among women workers or in the minority community. If so, the problem may be solved by designating minority liaison officers, or by widening dissemination of the contractor's fair employment policy and practices. Or deficiency in the flow of applications from women and minority workers may be attributable to persons other than the contractor—to labor unions or subcontractors, for example—whom the contractor can persuade to abandon exclusionary practices.
>
> If the contractor is attracting a balanced flow of applicants, underutilization may be the product of improper screening or selection processes. Facially objective job criteria that screen out women and minority workers disproportionately may prove to be irrelevant or only marginally related to job performance, and new and validated criteria can be substituted. Or the contractor may discover that hiring personnel entertain subjective biases (conscious or not) that can be corrected by instruction or training, or by removing biased officials from the hiring process.[40]

Under the regulations, contractors can ensure that their affirmative action plans are implemented by holding individual managers and employees responsible for carrying out company policy, by assigning specific responsibilities and duties under the plans, and by evaluating their employees' performance.[41]

Determinations of compliance with the Executive Order are not based solely on the question of whether the goals are actually reached, but on the contractor's "good faith efforts" to fulfill the "result-oriented procedures" the contractor has developed.[42] The contractor is not required to hire unqualified persons or to compromise demonstrably valid standards to meet the established goals. Indeed,

[32] 41 C.F.R. §60-2.10 (1979).
[33] *Id.* §60-2.11(a).
[34] *Id.* §§60-2.11(b)(1) and (2).
[35] *Id.* §60-2.12(a).
[36] *Id.* §60-2.12(e).
[37] *Id.* §60-2.11(b).
[38] *Id.* §60-2.10.
[39] *Id.* §§60-2.11(b) and 60-2.13(d),(g).
[40] Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979) (citations omitted).
[41] 41 C.F.R. §§60-2.13, 2.21, 2.22 (1979).
[42] *Id.* §§60-2.10 and 60-2.14.

the regulations repeatedly underline the importance of merit principles by instructing employers to recruit women and minorities "having requisite skills" and to make promotion decisions based only on "valid requirements" for the job.[43] If goals are not met within the time allotted, no sanctions are applied, as long as the contractor can demonstrate it has made "good faith efforts" to reach them.[44]

Critics of the Federal contract compliance program contend that the numerically-based remedies it mandates amount to "preferential treatment" and "quota" systems for minorities and women. Defenders of the Executive Order stress the flexible nature of the goals and the fact that they need not be met if "good faith efforts" pursuant to the contractor's self-developed affirmative action plan are unavailing. Controversy centers around selection systems that require that a numerical proportion of qualified minorities and women to white males be chosen. These specific mechanisms virtually guarantee that among substantially equally qualified applicants, a designated ratio or percentage of qualified minorities or women will be selected until a set number or percentage of people in the job categories are minorities or women. While neither the Executive Order nor its implementing regulations explicitly approve or disapprove such selection systems for the purpose of meeting specified goals, OFCCP has routinely negotiated and approved ratio and percentage selection systems where contractors may not have made "good faith efforts" or are charged with illegal discrimination.[45] Despite numerous challenges to its constitutionality, the courts have consistently upheld the legality of Executive Order No. 11246.[46]

In addition to approving affirmative action plans containing numerically-based remedies pursuant to the Federal contract compliance program, the courts in Title VII cases have repeatedly ordered and approved similar selection systems that regularly and predictably work to overcome the marked nonparticipation by minorities and women. Typical of this type of affirmative remedy is the plan in *Carter v. Gallagher,* [47] where a Federal court found that the Minneapolis Fire Department had illegally discriminated against minorities. The court ordered that one of every three employees hired by the department be a qualified minority person until at least 20 minority workers were employed. To overcome the discriminatory effects of tests that violate the *Griggs* principle,[48] courts have also ordered the establishment of separate lists for minority and women eligibles and their selection from the top of each list in a proportion established by the court.[49]

Some courts that have upheld these and similar measures have not hesitated to call them "preferential" treatment or "quotas."[50] Other courts have termed them "goals,"[51] used the words "goals" and

[43] *Id.* §§60-2.13(j) and 60-2.20(3).

[44] A contractor's "good faith efforts" would be measured by the extent to which attempts were made to carry out procedures, as detailed in its affirmative action plan, such as recruiting through advertisements in minority and women's magazines, publicizing EEO plans in company literature and on bulletin boards, notifying minority and women's organizations of EEO policy, obtaining union cooperation in carrying out affirmative procedures, analyzing position descriptions for accuracy, establishing formal career counseling programs, and using appropriate employee selection procedures. *Id.* §§60-2.20–2.26.

[45] *See* EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105, 1115–16 (E.D. Pa. 1973); Dep't of Labor v. Uniroyal, Inc., No. OFCCP 1977–1 (BNA/DLR Apr. 16, 1980) (consent decree); Weber v. Kaiser Alumimum and Chem. Corp., 416 F. Supp 761, 766 (D. La. 1976), *aff'd,* 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[46] *See, e.g.,* Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16–17 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684–85 (7th Cir. 1972); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159, 171–73 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971); Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1341–43 (9th Cir. 1979) (*dictum*) *cert. denied,* 100 S. Ct. 3010 (1980).

[47] 452 F.2d 315 (8th Cir.), *modified en banc,* 452 F.2d 327 (1971), *cert. denied,* 406 U.S. 950 (1972).

[48] See text accompanying notes 14–20, *supra,* for a discussion of *Griggs.*

[49] *E.g.,* United States v. City of Chicago, 549 F.2d 415, 436–37 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). While some courts have limited the use of such measures to hiring lists, *e.g., Bridgeport Guardians, supra,* others have applied them to remedy discriminatory practices involving promotion lists. *See* Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 774–75 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976); Crockett v. Green, 534 F.2d 715, 719 (7th Cir. 1976).

[50] "[T]his court has held that such *preferential* relief violates neither the equal protection clause nor any provision of Title VII." United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir. 1977) (emphasis added) (citations omitted). "This court. . .has. . .sanctioned hiring *quotas* to cure past discrimination. . . ." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973)(emphasis added) (citations omitted). "The use of *quota* relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices." NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974)(emphasis added). *See also* United States v. City of Chicago, 549 F.2d 415, 436 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974).

[51] "We use 'goal' rather than 'quota' throughout this opinion for the reason that. . .the term 'quota' implies a permanence not associated with 'goal'." Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974).

"quotas" interchangeably without apparent distinction,[52] or dismissed the debate that "goals" are legal and "quotas" are illegal as a "semantic dispute."[53]

Whatever they may be called, judicial experience has shown that such procedural devices to attain numerical targets are appropriate in a variety of circumstances. Particularly when there is evidence that less clear-cut steps are ineffective, such measures have been ordered to assure compliance with legal requirements.[54] In addition, when there is no real basis for choosing among a large number of equally qualified people, ratio procedures may be simpler, less costly, and more efficient in increasing participation by minority and women workers than other less specific methods. As a result, they are frequently used in "consent decrees," judicially approved settlements of cases where illegal discrimination has not been proven but only alleged by one party and denied by the other.[55] Finally, the same rationale for choosing these practical methods to settle cases supports their implementation before a case is even filed.[56]

It is these and other such explicit and straightforward affirmative uses of race, sex, and national origin to attain numerical objectives that have drawn the most criticism.[57] The Supreme Court has consistently declined to hear cases challenging the Executive Order and court-ordered or approved "quotas" or "preferential treatment." But all nine of the Federal courts of appeals that have considered the legality of fixed requirements in hiring and promotion have found them lawful when necessary to remedy both proven and alleged discrimination.[58]

In formulating and permitting these remedies, the courts have considered the interests of those individual white male workers who may be adversely affected by an affirmative action plan.[59] Most of these cases have involved seniority and promotion issues in which individuals or classes of minority and female victims of discrimination are seeking their "rightful place,"[60] that is, the positions they would have held but for the past discrimination, and assurances that such discrimination will not recur in the future. Restoring these workers to their rightful place and eliminating the offending practices may cause some white male workers to lose expected opportunities for promotion or other anticipated benefits and advantages. In these situations, courts must balance the interests of such white male workers against the need to make whole the victims of discrimination and prevent future acts from producing new victims. The Supreme Court has ruled that in general "a sharing of the burden of the past discrimination is presumptively necessary"[61] and the "expectations" of "arguably innocent" white male employees cannot act as a bar to measures

[52] *E.g.*, Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767, 772–74 (2d Cir. 1975); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177–80 (3d Cir. 1977).

[53] "We refuse to engage in any semantic dispute over the difference in meaning between 'goals' and 'targets' on the one hand and 'quotas' on the other." United States v. City of Miami, 614 F.2d 1322, 1335 n.26 (5th Cir. 1980). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288–89 n.26 (1978) (opinion of Powell, J.): "Petitioner [the Regents of the University of California] prefers to view [the special admissions program] as establishing a 'goal' of minority representation in the Medical School. Respondent [Bakke], echoing the courts below, labels it a 'racial quota.' This semantic distinction is beside the point. . . ."

[54] "[W]e. . .approve this course only because no other method was available for affording appropriate relief. . . ." Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398 (2d Cir. 1973); "quota relief was essential to make meaningful progress" as "no Negroes were hired in DPS support positions until the *Allen* court ordered affirmative relief. . . ." NAACP v. Allen, 493 F.2d 614, 620–21 (5th Cir. 1974). "[A]ffirmative hiring relief. . .is necessary. . .: a mere injunction against continued. . .discrimination was not effective." Morrow v. Dillard, 580 F.2d 1284, 1296 (5th Cir. 1978).

[55] *See e.g.*, United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

[56] *See United Steelworkers of America v. Weber*, discussed in the text accompanying notes 95–106, below.

[57] See Part C, "Goals," "Quotas," or Other Types of "Preferential Treatment."

[58] FIRST CIRCUIT: Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); SECOND CIRCUIT: Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc., v. Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); THIRD CIRCUIT: Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); FOURTH CIRCUIT: Sherrill v. J.P. Stevens & Co., 410 F. Supp. 770 (W.D.N.C. 1975), *aff'd*, 551 F.2d 308 (4th Cir. 1977); FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 895 (1974); Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); SIXTH CIRCUIT: United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); SEVENTH CIRCUIT: United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); EIGHTH CIRCUIT: Firefighters Institute for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

[59] White males as a class, as distinguished from individual members of that class, are often aided by affirmative action plans. See text accompanying note 108, below.

[60] Franks v. Bowman Trans. Co., Inc., 424 U.S. 747, 768 (1976).

[61] *Id.* at 777.

eliminating the present effects of past discrimination.[62] Although not uniform in their standards for sanctioning relief in the form of quotas in promotion and seniority cases, the Federal courts of appeals on numerous occasions have granted such relief.[63]

In the relatively few hiring cases[64] that have raised the interests of white males, the lower courts have not hestitated to deny such challenges where affirmative relief was necessary to overcome past discrimination against minorities and women.[65] Affirmative relief, therefore, including quotas and preferential treatment, cannot be denied simply because it may be detrimental to particular white males.[66]

Voluntary Affirmative Action

Title VII of the Civil Rights Act has been interpreted to have two purposes: "to make persons whole for injuries suffered on account of unlawful employment discrimination"[67] and to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[68] The latter purpose is the "primary" one,[69] for the obvious reason that voluntary (in the sense of not governmentally compelled) action to eliminate discriminatory conditions will result in fewer people who need to be "made whole." Equal employment law, in particular, and civil rights law, in general, impose legal obligations and liabilities while encouraging voluntary actions beyond those minimal legal requirements to accomplish so far as possible the policy objectives of the law.[70]

This distinction between compliance with minimum legal requirements and voluntary actions to accomplish maximum policy objectives is important because civil rights law does not make illegal all aspects of the discriminatory process. In employment, for example, where other institutions have deprived minorities and women from getting the skills, experience, or credentials actually needed to perform particular jobs, employers and unions are under no legal duty to undertake special recruiting, training, or other programs designed to overcome their lack of minorities and women with such backgrounds.[71] A collective bargaining agreement may lawfully perpetuate the employer's past discrimination by requiring that recently hired employees, who were the only minorities and women hired by the employer, be the first to be laid off, as long as such "last hired, first fired" provisions were negotiated without any intent to discriminate against minorities and women.[72]

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[62] *Id.* at 774.

> [O]ur holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 779 n.41.

[63] EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The Second Circuit, however, upholds the use of quotas "only if necessary to 'redress a clear-cut pattern of *long-continued* and *egregious* racial discrimination.'" Ass'n Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 310 (2d Cir. 1979), quoting Kirkland v. N.Y. State Dept. of Correctional Servs., 520 F.2d 420, 427 (2d Cir. 1975) (emphasis added).

[64] The interests of white males have generally been considered in cases involving issues of promotion and seniority rather than hiring because

> [a] hiring quota deals with the public at large, *none* of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for *promotion* is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white. EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976), quoting Kirkland v. N.Y. State Dept. of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975) (emphasis added).

Thus, in *hiring* cases the courts are not generally confronted with individuals who have a present interest in employment that will be adversely affected by racial preferences.

[65] "This court. . .has. . .sanctioned *hiring* quotas to cure past discrimination." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973)(emphasis added); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976). *See also* United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Ass'n of Heat and Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[66] Lower Federal court and previous Supreme Court decisions, therefore, are consistent with the Supreme Court's holding in United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979), that affirmative relief for minorities and women is permissible provided such relief does not "unnecessarily trammel the interests" of white workers. *Weber* is discussed in the text accompanying notes 96–107.

[67] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[68] *Id.* at 417–18, quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

[69] *Id.* at 417.

[70] *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part): "[O]ur society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action."

[71] The Uniform Guidelines on Employee Selection Procedures, *supra* note 17, encourage but do not require such voluntary actions. 29 C.F.R. §1607 (1979).

[72] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *But see* Oliver v. Kalamazoo Board of Education, 23 FEP Cases 1677 (W.D. Mich. Sept. 30, 1980).

The distinction between *de jure* (intentional) and *de facto* (unintentional) school segregation[73] is another example of the limits on the law's effort to impose legal obligations to eliminate all manifestations of discriminatory processes. The 14th amendment prohibits only school segregation arising from purposeful or intentional acts by governmental authorities.[74] If segregated schools cannot be traced to such deliberate acts, they are considered "racially imbalanced," but constitutional.[75] The Supreme Court has stated that school authorities may choose as a matter of policy to eliminate such racial imbalance, even though they may not be required to do so, by prescribing a ratio of minority to majority students reflecting the overall makeup of the school system.[76]

Such voluntary affirmative efforts, over and above those that are legally required, to further the national policy to eliminate *all* vestiges of discrimination have themselves been alleged to violate civil rights law. Nowhere was this controversy more apparent, nor given more public attention, than in the area of academic admissions policy.[77]

It came before the Supreme Court in the case of *Regents of the University of California v. Bakke.* [78] The Medical School of the University of California at Davis was confronted, as were other institutions of higher education, with extraordinarily low rates of minority admissions. The school's first class had three Asians but no blacks, Mexican Americans, or American Indians. To overcome this virtual exclusion of minorities, the school in 1970 implemented a special admissions program that in effect reserved 16 of 100 available openings for qualified minorities. A separate admissions committee reviewed applications for admission to these openings. Alan Bakke, a white male, alleged that his exclusion from consideration for any of these 16 places and the admission of minority applicants with lower academic credentials, as measured by standardized tests and undergraduate grade point average, discriminated against him on the basis of race in violation of the 14th amendment and Title VI of the Civil Rights Act of 1964.

Because neither Bakke nor the university introduced any evidence of constitutional or statutory violations, the courts all agreed that the medical school had violated no law that would obligate it to develop a special admissions program. The exclusion of minorities was not the result of illegal discrimination but of "societal discrimination," which the university described as "the effects of persistent and pervasive discrimination against racial minorities."[79] The issue was profound: absent evidence of illegal discrimination against minorities by the party taking affirmative action, are race-conscious remedial programs constitutional?

The Supreme Court could not reach agreement, and six separate opinions were published. Two opinions were supported by four Justices each, but they reached opposing conclusions. The ninth and deciding vote was cast by Justice Powell, who used reasoning entirely different from that of the other Justices. The result was two different five-Justice majorities. One ruled the Davis plan illegal and ordered Bakke admitted to the school; the other set out standards and rationales for lawful affirmative admissions plans.[80]

The opinion authored by Justice Stevens, and joined by Chief Justice Burger and Justices Stewart and Rehnquist,[81] narrowed its focus to Bakke's statutory claim. Title VI prohibits the exclusion of persons on the basis of race, color, or national origin from programs that receive Federal funds, including that of the Davis Medical School. Because the medical school conceded that Bakke's denial of admission resulted from the affirmative admissions plan, these Justices concluded that the university had violated the plain language of Title VI of the Civil Rights Act of 1964. Their opinion, however, specifically declined to address both the constitutionality of the Davis program and "whether race can ever be used as a factor in an admissions decision."[82]

Four other members of the Court (Justices Brennan, White, Marshall, and Blackmun) issued a joint

[73] See Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).
[74] *Id.* at 208.
[75] *Id.* ; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971).
[76] 402 U.S. at 16; McDaniel v. Barresi, 402 U.S. 39 (1971).
[77] The Commission has examined affirmative admissions in higher education in *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978).
[78] 438 U.S. 265 (1978).
[79] Reply Brief For Petitioner at 2, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[80] Owing to the 4–1–4 division in the Court, the legal principles governing affirmative admissions cannot be decided in reference to any one opinion. Only those reasons or conclusions Justice Powell shares with four of the other Justices can be considered legally authoritative.
[81] 438 U.S. at 408 (Stevens, J., concurring in part, dissenting in part).
[82] *Id.* at 411.

opinion finding the Davis program lawful under both Title VI and the Constitution.[83] Governmental bodies may adopt race-conscious programs for the purpose of overcoming the present effects of their own past discrimination or of "societal discrimination,"[84] if the program is reasonable in light of this objective and does not stigmatize any group or disadvantage groups relatively unrepresented in the political process.[85]

Justice Powell's opinion, joined fully by no other Justice,[86] held that eliminating the effects of identified illegal or unconstitutional discrimination is a compelling justification for affirmative action. But unless governmental bodies have the authority to make findings of past unlawful discrimination, identify its effects, and then develop affirmative measures responsive to those findings, they may not make racial classifications favoring relatively victimized groups at the expense of innocent individuals.[87] Because the university did not have the requisite authority and could offer no other valid justification for its preferential treatment of minorities,[88] the affirmative admissions program could not be upheld.

Conceding the "regrettable fact. . .[of] societal discrimination in this country against various racial and ethnic groups,"[89] Justice Powell considered such discrimination "an amorphous concept of injury that may be ageless in its reach into the past,"[90] but distinguished it from "identifiable instances of past discrimination."[91] Apparently for Justice Powell, once discrimination is identified by a duly authorized governmental body, it is no longer "societal" and "amorphous" and may then be the basis for fashioning affirmative remedial measures.[92]

Although Davis was unable to justify its admissions program on this basis, Justice Powell did find the desire to obtain a "diverse" student body a permissible goal. Such a program, however, must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[93] The Davis program favored racial and ethnic diversity over all other forms of diversity by means of an inflexible system that reserved a specific number of seats for minorities. Race, he ruled, can be one factor but not the sole factor in creating a diverse student body.[94]

Despite its ambiguities and its focus on illegal discrimination, Justice Powell's opinion leaves intact most graduate affirmative admissions programs. The result arrived at by the nine Justices permits professional schools to take those steps necessary to identify and dismantle the process of discrimination as it affects professional education.

While the constitutionality of voluntary affirmative action in academic admissions was drawing massive public attention, the alleged conflict between minimal legal requirements and maximum policy objectives in employment was also readily apparent.

As judicial decisions after *Griggs* increasingly clarified equal employment opportunity duties and responsibilities, those covered by Title VII began to find themselves in a difficult position. Whenever the numbers of minorities or women in various jobs on an employer's payroll were substantially lower than their numbers in the area's labor force, the employer and sometimes the union were subject under Title VII and other laws to lawsuits by minorities, women, or the Government, with the possibility of paying multimillion-dollar backpay judgments. To avoid such lawsuits and to eliminate the discrimination suggested by the statistics, many employers and unions chose to implement affirmative action plans. Such plans, however, were subject to challenges by white males claiming they were disadvantaged by the plans on account of their race and sex, in violation of Title VII. While conceding that an employer or union could lawfully remedy its own illegal acts against identified victims,[95] these white male litigants argued that, absent such illegal con-

[83] *Id.* at 324 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[84] "[A] state government may adopt race-conscious programs if the purpose. . .is to remove the disparate impact its actions might otherwise have and if. . . .the disparate impact is itself the product of past discrimination, whether its own or that of society at large." *Id.* at 369.

[85] *Id.* at 369–74.

[86] *Id.* at 269.

[87] *Id.* at 307–10.

[88] Justice Powell noted possible justifications for Davis' program other than curing past statutory or constitutional violations. He indicated that a professional school might be able to justify race-conscious measures when its admissions process was based on standardized tests that were racially or culturally biased or if it could prove that the delivery of professional services to currently underserved minority communities required race-conscious responses. Davis, however, did not present sufficient evidence defending its special admissions procedures to justify its program on either of these bases. *Id.* at 306 n.43, 310–11.

[89] *Id* at 296 n.36.

[90] *Id.* at 307.

[91] *Id.* at 308 n.44.

[92] *Id.* at 309 n.44. Justice Powell applied this analysis in Fullilove v. Klutznick, discussed in the text accompanying notes 109–13, below, and found Constitutional a congressionally mandated 10 percent set aside of funds for minority contractors.

[93] *Id.* at 317.

[94] *Id.* at 307.

[95] *See, eg.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

duct, affirmative remedies were inconsistent with Title VII's antidiscrimination prohibitions.

In *United Steelworkers of America v. Weber,* [96] the Supreme Court grappled with this issue. In 1974 a private employer (Kaiser Aluminum & Chemical Corporation) and a union (United Steelworkers of America) negotiated an affirmative action plan designed to increase black participation in Kaiser's craft jobs from the preplan level of 2 percent to the level of black participation in the area's work force, which was approximately 39 percent. To accomplish this goal, the plan created an on-the-job training program that reserved 50 percent of the openings for black employees. This reservation of slots resulted in the selection of some black employees who had less seniority than some white employees who applied and were rejected for the training program. One white production employee, Brian Weber, challenged the plan.

By a 5 to 2 margin,[97] the Supreme Court ruled that the "racial preferences"[98] in the affirmative action plan were a lawful means for eliminating "old patterns of racial segregation and hierarchy."[99] As in *Bakke,* the Court in *Weber* was not confronted by allegations that the underrepresentation of minorities in craft jobs was caused by illegal actions attributable to either Kaiser or the Steelworkers union.[100] The Court cited numerous judicial and study findings of general exclusion of minorities from craft jobs by craft unions as the explanation for the "manifest racial imbalance" in Kaiser's craft operations.[101]

The Court conceded that a literal interpretation of Title VII's prohibition against discrimination in employment based on race supports the argument that the challenged race-conscious plan illegally discriminated against white employees. But the Court decided that the purpose of the act and not its literal language determines the lawfulness of affirmative action plans. The legislative history of the act and the historical context from which the act arose compelled the conclusion, the Court held, that the primary purpose of Title VII was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[102] The Court explained:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[103]

Minimal legal requirements—the need to identify some specific person or entity who could legally be faulted for causing discrimination—were not set up as a bar to the policy objective of dismantling the discriminatory process.[104]

Having decided that Title VII encourages voluntary affirmative action by all private employers and unions, not only those legally responsible for discrimination, the Court in *Weber* then turned to the issue of the particular remedy that was used: a requirement that at least half of all employees admitted to the specially created craft training program be black until a specified percentage of all craft workers was black.[105] Its discussion of the plan in question, although brief, is instructive.

Declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," the Court found the plan lawful because "the plan does not *unnecessarily* trammel the interests of white employees."[106] This general characterization was then broken into three parts:

> [1]The plan does not require the discharge of white workers and their replacement with new black hires. [2]Nor does the plan create an

[96] 443 U.S. 193 (1979).

[97] Justice Brennan wrote the majority opinion, joined by the same three Justices who co-authored the joint opinion in *Bakke* (White, Marshall, and Blackmun) and by Justice Stewart. Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens did not particpate for unexplained reasons.

[98] 443 U.S. at 200.

[99] *Id.* at 204.

[100] *Id.* at 200.

[101] *Id.* at 198 n.1. Among them was a U.S. Commission on Civil Rights report, *The Challenge Ahead: Equal Opportunity in Referral Unions* (1976).

[102] 443 U.S. at 203 (quoting remarks by Senator Humphrey).

[103] *Id.* at 204.

[104] The Equal Employment Opportunity Commission has issued comprehensive guidelines on voluntary affirmative action that embody the principles articulated in the *Weber* decision. Affirmative Action Guidelines, 29 C.F.R. §1608 (1979). These guidelines encourage those covered by Title VII (public and private employers, unions, and employment agencies) to engage in a three-step process (§1608.4) in implementing an affirmative action plan: (1) to undertake a "reasonable self-analysis" (§1608.4(a)) to identify discriminatory practices; (2) to determine if a "reasonable basis for concluding action is appropriate" exists (§§1608.3 and 1608.4(a)); and, if such a basis is found, then (3) to take "reasonable action," including the adoption of practices that recognize the race, sex, or national origin of applicants or employees (§1608.4(c)). If such procedures are followed and the plan is challenged as violating Title VII, the EEOC pursuant to special statutory powers (§1608.10) can certify the lawfulness of the plan. Such certification effectively insulates the plan from "reverse discrimination" claims.

[105] 443 U.S. at 208.

[106] *Id.* (emphasis added).

> absolute bar to the advancement of white employees; half of those trained in the program will be white. [3] Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the. . . plant will end as soon as the percentage of black skilled craft workers in the. . .plant approximates the percentage of blacks in the local labor force.[107]

Weber, therefore, permits affirmative classifications which may adversely affect the interests of white workers when such measures are necessary to secure opportunities for those locked out of traditionally segregated job categories.

Affirmative Action Law

The decision in *Weber* was explicitly limited to private sector employers and unions covered by Title VII. Its rulings on the kinds of discrimination that they may voluntarily address ("manifest racial imbalance in traditionally segregated job categories") and the forms the remedies may take (plans may not "unnecessarily trammel" the interests of white employees) were deliberately restricted to statutory law. As a result, the Court avoided the constitutional question it had struggled with one year earlier in *Regents of the University of California v. Bakke:* are governmental actions that affirmatively use race, national origin, and sex[108] classifications constitutional under the equal protection clause of the 14th amendment?

That question was partially answered by the Court's most recent ruling supporting affirmative action. In *Fullilove v. Klutznick,* [109] the Court ruled constitutional a provision in the Public Works Employment Act of 1977 that required State or local governments, absent administrative waiver by the Department of Commerce, to use 10 percent of Federal funds granted for public works contracts to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups.[110] The 6 to 3 decision removes any doubts regarding the power of Congress to mandate similar affirmative action programs where evidence supports the need for such measures.[111]

As in *Bakke,* however, the Court was unable to agree upon constitutional standards governing affirmative action. There were three opinions forming the six-Justice majority. Chief Justice Burger's opinion, sharply limited to the distinct issue of congressional authority to pass legislation containing racial and ethnic classifications, held that congressional legislation may employ racial or ethnic criteria if it is "narrowly tailored" to remedy the present effects of past discrimination that impair or foreclose access by minorities to opportunities enjoyed by whites.[112] The opinions of Justice Powell and Justice Marshall simply applied the formulations they had previously set forth in *Bakke* and found the minority business enterprise program constitutional.[113]

The trilogy of Supreme Court affirmative action cases (*Bakke, Weber,* and *Fullilove*), despite their limits as legal precedent, shows a strong commitment to affirmative action measures designed to eliminate all forms of discrimination, *de jure* or *de facto,* illegal or legal. Only *Bakke* lacked an unequivocal outcome encouraging affirmative action plans that include "preferential" treatment and "quotas." *Bakke,* however, leaves ample room for effective affirmative admissions efforts.

Because there is no single standard governing affirmative action to which a majority of the Justices

[107] *Id.* at 208–9 (citations omitted). The affirmative action plan in *Weber,* while negatively affecting some white workers, provided new opportunities for others. According to the Supreme Court, until the initiation of the plan in question, the employer hired only outside workers with several years of craft experience for its craftwork. *Id.* at 199. But for the training program created by the affirmative action plan, white workers who lacked such craft experience—including Brian Weber—would have had no opportunity to bid for craftwork.

[108] Classifications based on sex have never been subject to "strict" judicial scrutiny, because sex, unlike race, has not been held to be a "suspect" classification. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Consequently, explicitly sex-based classifications identified as "compensatory" (that is, designed to achieve the important governmental interest of rectifying past discrimination against women) have not been strictly scrutinized and have withstood constitutional challenge. *See, e.g.,* Califano v. Webster, 430 U.S. 313 (1977); Kahn v. Shevin, 416 U.S. 351 (1974). However, where classifications based on sex have ostensibly been "compensatory," but in fact operated to disadvantage women, the classifications have been invalidated because they do not serve an important governmental interest. *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S.636 (1975).

[109] 100 S. Ct. 2758 (1980).

[110] The minority groups named in the statute are: "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.* at 2762.

[111] Chief Justice Burger's opinion was joined by Justices White and Powell; Justice Powell wrote a separate concurring opinion; Justice Marshall's concurring opinion was joined by Justices Brennan and Blackmun. Justice Stewart dissented, joined by Justice Rehnquist. Justice Stevens dissented separately.

[112] *Id.* at 2772, 2776.

[113] Justice Powell ruled that Congress had the authority to remedy "identified discrimination," had "reasonably concluded" that statutory and constitutional violations had been committed, and had chosen means that were equitable and reasonably necessary to redress the identified discrimination. 100 S. Ct. at 2783. Justice Marshall, stating that the constitutional question "is not even a close one," found the program constitutional because it was designed to further the important governmental interest of remedying the present effects of past discrimination and used means substantially related to the achievement of this objective. 100 S. Ct. at 2795.

on the U.S. Supreme Court subscribe, some legal questions remain.[114] Nonetheless, seven of the nine Justices have now approved the most vigorous sorts of affirmative action, although in different contexts, for different reasons, and with different standards.[115] In addition, a very strong pattern of judicial support for affirmative action is emerging in lower court opinions, particularly since *Weber*. [116]

Civil rights laws have not been set up as obstacles to tearing down the very process of discrimination they were enacted to dismantle. They have excluded only a narrow range of action (excessively rigid programs taken without adequate justification) from the scope of permissible affirmative activities. The current state of the law provides policymakers, both public and private, the flexibility needed to reach sensible solutions.

[114] The Court is expected to address some of these issues in Minnick v. California Dep't of Corrections, 157 Cal. Rptr. 260 (1979), *cert. granted*, No. 79-1213 (June 24, 1980), which involves an unsuccessful challenge by white employees and their union to the affirmative action plan of the California Department of Corrections that assigned a "plus" to female and minority employees competing for promotion or transfer in order to overcome a history of discrimination within the department.

[115] Four Supreme Court Justices in *Bakke* (Brennan, White, Marshall, and Blackmun) have found constitutional nonstigmatic quotas, ratios, set-asides, and preferential treatment based on race that remedy the present effects of past discrimination. *See* text accompanying notes 83-85, *supra*. Justice Stewart joined these same four Justices in *Weber* to hold voluntary affimative action plans lawful in private sector employment. *See* text accompanying notes 96-107, *supra*. A sixth Justice, Powell, approves of explicit racial classifications that are responsive to duly authorized governmental findings of statutory or constitutional civil rights violations. *See* text accompanying notes 86-92, *supra*. Finally, Chief Justice Burger ruled in *Fullilove* that Congress has the latitude to enact "narrowly tailored" racial classifications to eliminate the present effects of past discrimination. *See* text accompanying note 112, *supra*.

[116] *E.g.*, Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3466 (U.S. Jan. 22, 1980) (No. 79-1080); Price v. Civil Serv. Comm'n, 161 Cal. Rptr. 475, 604 P.2d 1365 (1980); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979); Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979); Maehren v. City of Seattle, 92 Wash.2d 480, 599 P.2d 1255 (1979), *petition for cert. filed*, 48 U.S.L.W. 3453 (U.S. Jan. 15, 1980) (No. 79-1061); Chmill v. City of Pittsburg, Pa., 412 A.2d 860 (1980); McDonald v. Hogness, 92 Wash. 431, 598 P.2d 707 (1979), *cert. denied*, 100 S. Ct. 1605 (1980).

Part C

THE REMEDY: AFFIRMATIVE ACTION

This statement has identified "affirmative action" as those measures that consciously use race, sex, and national origin as criteria to dismantle the process of discrimination experienced by minorities and women. It has distinguished between affirmative action plans, which use a wide range of antidiscrimination measures that may or may not take race, sex, and national origin into account, and specific affirmative measures commonly occurring within such plans. The first part of this statement described the process of discrimination as one that perpetuates itself through the interaction of attitudes and actions of individuals, organizations, and general social structures, such as those in education, employment, housing, and government. This process produces marked economic, political, and social inequalities between white males and the rest of the population. These inequalities in turn feed into the process that produced them by reinforcing discriminatory attitudes and actions.

The existence of this process makes truly neutral decisionmaking virtually impossible. The conduct of employers, guidance counselors, bankers, and others discussed previously [1] are but a few examples of how decisions that seem to be neutral, and may even be motivated by good intentions, may nonetheless result in unequal opportunities for minorities and women. These "neutral" acts become part of a cyclical process that starts from, is evidenced by, and ends in continuing unequal results based on race, sex, and national origin.

The second part of this statement then explained that civil rights law in some cases requires and in other cases permits a full range of affirmative measures, including numerically-based remedies such as goals, ratios, quotas, or other forms of "preferential treatment," as necessary to dismantle this process. Instead of being useful ways of addressing complex issues, however, these terms have become emotion-laden, inconsistent labels of right and wrong, even within the courts.[2]

The problem-remedy approach presents a format for a more productive discussion of these issues. Its aim is to help distinguish the proper uses of affirmative action plans and affirmative measures from their abuse. Keeping this approach in mind, this section will address some of the major concerns voiced by opponents and proponents of affirmative action.

Self-Analysis, Statistics, and Affirmative Action Plans

The starting point for affirmative action plans within the problem-remedy approach is a detailed examination of the ways in which the organization presently operates to perpetuate the process of discrimination. Such a self-analysis identifies, as precisely as possible, the personnel, policies, practices, and procedures that work to support discrimination. Without such a thorough investigation, an affirmative action plan risks bearing no relationship to the causes of discrimination and can become merely a rhetorical statement that endorses equal opportunity, compiles aimless statistics, and patronizes minorities and women. Affirmative action plans that are not preceded by a critical assessment of the patterns and causes of discrimination within the organization frequently prove counterproductive by arousing hostility in those otherwise sympathetic to

[1] See text accompanying notes 10–24 in Part A.

[2] See text accompanying notes 50–53 in Part B.

corrective efforts to remedy discrimination. When based on a rigorous analysis that identifies the activities that promote discrimination, however, affirmative action plans are comprehensive and systematic programs that use the tools of administration to dismantle the process of discrimination.

In recent years, statistical procedures interpreting data based on race, sex, and national origin have been the dominant means for detecting the existence of discrimination.[3] Their use is premised on the idea that in the absence of discrimination, minorities and women would be likely to participate in the economic, political, and social institutions of this county in rough proportion to their presence in the population. A useful and increasingly refined method for self-analysis, such procedures have also been subject to misunderstanding.

One such misunderstanding has been to confuse statistical underrepresentation of minorities and women with discrimination itself, rather than seeing such data as the best available warning signal that the process of discrimination may be operating. Statistics showing a disproportionately small number of minorities and women in given positions or areas strongly suggests that the discriminatory process is at work, but such statistics raise questions rather than settle them.[4] They call for further investigation into the factors that produce the statistical profile.

Another misunderstanding of statistics has led to the rigid demand for statistically equal representation of all groups without regard to the presence or possible absence of the discriminatory process. Many people frequently leap from the misconception that unequal representation always means that discrimination has occurred to the correspondingly overstated position that equal representation is always required so that discrimination may be eliminated. This position reduces the use of statistics in affirmative action plans (in the form of numerical targets, goals, or quotas) into a "numbers game" that makes manipulation of data the primary element of the plan. It changes the objectives of affirmative action plans from dismantling the process of discrimination to assuring that various groups receive specified percentages of resources and opportunities. Such misunderstandings of statistics not only short circuit the critical task of self-analysis, but also imply the need for a remedy without identifying the discriminatory problem.

Once the activities that promote discrimination are identified, the task is then to put into effect measures that work against the process of discrimination. As the first part of this statement has shown, discriminatory attitudes and actions commonly form patterns that reinforce discrimination. In such a situation, sporadic or isolated affirmative measures may make for some change, but are unlikely to be successful in the long run. An affirmative action *plan* is required—a systematic organizational effort that comprehensively responds to the discriminatory problems identified by the analysis of the organization's operations. That plan will set realistic objectives for dismantling the process of discrimination as it occurs within the organization. It will include, as methods for achieving these objectives, antidiscrimination measures, some of which will take no account of race, sex, and national origin and others that will.

The basic elements of an affirmative action plan are simply explained. They include:

- the organization's written commitment to affirmative action stating the objectives of the affirmative action plan;
- dissemination of this policy statement within the organization and to the surrounding community;
- the assignment to senior officials of adequate authority and resources to implement the affirmative action plan;
- identification of areas of underutilization of minorities and women and analysis of the discriminatory barriers embedded in organizational decisionmaking;
- specific measures addressing the causes of underutilization and removing discriminatory barriers;
- monitoring systems to evaluate progress and to hold officials accountable for progress or the lack thereof; and
- the promotion of organizational and community support furthering the objectives of the plan and consolidating advances as they are achieved.[5]

[3] Gathering statistical data by race, sex, and national origin, which is almost universally practiced and well-established in the law, is a critical element in compliance efforts and program planning. For a full discussion on the collection and use of racial and ethnic data in Federal assistance programs and their legality, see U.S., Commission on Civil Rights, *To Know or Not to Know,* (1973).

[4] The use of numerical evidence as a sign of discrimination and not discrimination itself is well established. See text accompanying notes 4–21 in Part B.

[5] Both the Equal Employment Opportunity Commission and the Office of

A far more complex and controversial matter, however, concerns the ways in which affirmative action plans use race, sex, and national origin.

"Goals," "Quotas," and Other Types of "Preferential Treatment"

As a nation, we are committed to making our differences in skin color, gender, and ancestry sources of strength and beneficial diversity, and not grounds for oppression or mindless uniformity. Consequently, agreement on the need to identify discrimination based on race, sex, and national origin and to eliminate it through an affirmative action plan is frequently, and often easily, reached. Few fair-minded persons argue with the objective of increasing the participation of minorities and women in those areas from which they have been historically excluded. Heated controversy occurs, however, over particular methods affirmative action plans employ to achieve this common objective. The focal point of this controversy is usually not the entire affirmative action plan, nor its objective of eliminating discrimination, but those particular affirmative measures within the plan that explicitly take race, sex, and national origin into account in numerical terms. Those measures are popularly referred to as "goals," "quotas," and other types of "preferential treatment."

These terms have dominated the debate over affirmative action, often obscuring issues rather than clarifying them. The problem-remedy approach, the Commission believes, can help reorient this debate. It makes clear that the discrimination that exists within an organization forms the basis for the affirmative measures that are chosen—whether characterized as "goals," "quotas," or other types of "preferential treatment." The problem-remedy approach stresses the nature and extent of discrimination and what measures will work best to eliminate such discrimination, not what word to use to describe those measures.

The civil rights community has labored hard to define the point at which affirmative uses of race, sex, and national origin within affirmative action plans become objectionable. For many, the issue is how to distinguish a "goal," or the pursuit of a "goal," from a "quota." There is widespread acceptance of such affirmative measures as undertaking recruiting efforts, establishing special training programs, and reviewing selection procedures. On the other hand, firing whites or men to hire minorities or women, and choosing unqualified people simply to increase participation by minorities and women, are universally condemned practices. With respect to those affirmative measures that do not fall neatly on either end of this spectrum, however, distinctions are far harder to draw. These distinctions are not made easier by calling acceptable measures "goals" and objectionable ones "quotas."

For example, as part of an affirmative action plan, an employer could use any one or all of the following affirmative techniques: extensive recruiting of minorities and women; revising selection procedures so as not to exclude qualified minorities and women; assigning a "plus" over and above other factors to qualified minorities and women; specifying that among qualified applicants a certain ratio or percentage of minorities and women to white males will be selected. Similar measures could be undertaken by colleges and universities in their admissions programs.

These actions could all be taken to reach designated numerical objectives, or "goals." While the establishment of goals, and timetables to meet them, provides for accountability by setting benchmarks for success, their presence or absence does not aid in choosing which measures to use to achieve the "goals," nor make those measures any more or less affirmative in nature. The critical question is, Which affirmative measures should be used in which situations to reach the designated "goals?" The answer to this question, the Commission believes, is best found by analyzing the nature and extent of the discrimination confronting the organization.

Obviously, the last example given above of an affirmative method for reaching an objective—a percentage selection procedure—has characteristics of a "quota." But attaching this label to certain affirmative measures does not render them illegal. The preceding section of this statement explained that the lower courts have repeatedly ordered percentage and ratio selection techniques to remedy proven discrimination.[6] In *Weber* and *Fullilove* the Supreme Court of the United States approved of

Federal Contract Compliance Programs of the Department of Labor have issued sound guidance materials to employers on how to conduct a self analysis and develop affirmative action plans. Equal Employment Opportunity Commission, *Affirmative Action and Equal Employment: A Guidebook for Employers,* 1974; U.S. Department of Labor, Office of Federal Contract Compliance, *Federal Contract Compliance Manual* (1979). *See also* discussion of the Federal contract compliance program in text accompanying notes 28–46 in Part B.

[6] See text accompanying notes 47–54, 57–58 in Part B.

measures that cannot easily evade the description of "quotas."[7] In *Bakke* four of nine Justices approved a medical school's "set aside" program, arguing that any system that uses race, sex, or national origin as a factor in selection procedures is constitutionally no different from such a "quota" system.[8] A fifth Justice indicated such a program would be legal under circumstances not present in that case.[9] Rigorous opposition to all "quotas," therefore, does not aid in distinguishing when to use, or not to use, these kinds of legally acceptable, and sometimes required, affirmative remedies.

A debate that hinges on whether a particular measure is a "goal" or a "quota" is unproductive both legally and as a matter of policy, in choosing which kinds of affirmative measures to use in given situations. It loses sight of the problem of discrimination by arguing over what to label remedial measures. Whichever affirmative measure may be chosen—from recruiting to openly stated percentage selection procedures, with or without specific numerical targets—depends as a matter of law and policy on the factual circumstances confronting the organization undertaking the affirmative action plan. The problem-remedy approach urges using the nature and extent of discrimination as the primary basis for deciding among possible remedies. The affirmative measure that most effectively remedies the identified discriminatory problem should be chosen.

Regardless of the particular affirmative technique that is selected, any affirmative measure will be conscious of race, sex, and national origin in order to bring minorities and women into areas from which they were formerly excluded. Experience has shown, however, that in many circumstances, without such conscious efforts related to race, sex, and national origin, opportunities for minorities and women will not be opened.

By broadening the present field of competition for opportunities, affirmative action plans function to decrease the privileges and prospects for success some white males previously, and almost automatically, enjoyed. For example, a graduate school with a virtually all-white student body that extensively recruits minorities or women is likely to fill some available positions with minorities or women, not white males. A bank with its base in the white community that invests new energies and funds in minority housing and business markets has less available capital to channel to whites. A police force that has excluded minorities or women in the past and substitutes new promotion criteria for seniority will promote some recently hired minorities or women over more senior white male police officers.

Such affirmative efforts are easier to implement when new resources are available.[10] Additional openings, increased investment funds, and more jobs add to everyone's opportunities, and no one—neither white males nor minorities and women—has any better claim to these resources than anyone else. But whether new resources become available, remain constant, or even diminish, decisions must be made. Frequently the basic choice is between present activities that, through the process of discrimination, favor white males, or affirmative action plans that consciously work to eliminate such discrimination.

The problem-remedy framework does *not* suggest that the purpose of affirmative action plans is to "prefer" certain groups over others. To criticize affirmative measures on the ground that they constitute "preferential treatment" inaccurately implies unfairness by ignoring their purpose as a means to dismantle a process that presently allocates opportunities discriminatorily.

Affirmative measures intervene in a status quo that systematically disfavors minorities and women in order to provide them with increased opportunites. While it is appropriate to debate which kinds of "preferential treatment" to use under what circumstances, the touchstone of the decision should be how the process of discrimination manifests itself and which affirmative measure promises to be the most effective in dismantling it.

What distinguishes such "preferential treatment" attributable to affirmative action plans from "quotas" used in the past[11] is the fact that the lessened opportunities for white males are incidental and not generated by prejudice or bigotry. The purpose of

[7] See text accompanying notes 96–107, 109–13 in Part B.

[8] Regents of the University of California v. Bakke, 438 U.S. 265, 378 (1978) (joint opinon of Brennan, Marshall, White, and Blackmun, JJ.)

[9] *Id.* at 272 (opinion of Powell, J.) discussed in text accompanying notes 86–94 in Part B.

[10] For example, in United Steelworkers of America v. Weber, discussed in text accompanying notes 96–107 in Part B, the employer had hired, for its craft jobs, only workers with several years experience doing such work, thereby precluding its present employees who lacked these skills, which were nearly all of them, from obtaining these higher paying positions. 443 U.S. at 198. As part of an affirmative action plan, the employer agreed to pay the cost of an on-the-job training program open to whites as well as minorities and women. See note 107 in Part B.

[11] *See, e.g.,* N. Belth, *A Promise To Keep* 96–110, (1979); B. Epstein and A. Forster, "*Some of My Best Friends. ..*" 143–58, 169–83, 220–22 (1962).

affirmative action plans is to eliminate notions of racial, gender, and ethnic inferiority or superiority, not perpetuate them. Moreover, affirmative action plans occur in situations in which white males as a group already hold powerful positions. Neither Federal law, Federal policy, nor this Commission endorse affirmative measures when used, as were "quotas" in the past, to stigmatize and set a ceiling on the aspirations of entire groups of people.

Support for affirmative action to dismantle the process of discrimination, however, does not mean insensitivity to the interests of white males. To the greatest extent possible, the costs of affirmative action should be borne by the decisionmakers who are responsible for discrimination, and not by white males who played no role in that process. In fashioning remedial relief for minorities and women, the courts have tried to avoid penalizing white male workers who were not responsible for the challenged discrimination. For example, rather than displacing white male employees who were hired or promoted through discriminatory personnel actions, courts in such cases have directed that the victims of the discrimination be compensated at the rate they would have earned had they been selected, until such time as they can move into the position in question without displacing the incumbent.[12] The Supreme Court has noted the availability of this "front pay" remedy as one way of "shifting to the employer the burden of the past discrimination."[13]

In addition, the law prohibits " *unnecessarily* trammeling" the interests of white males,[14] thereby protecting the existing status of white males (as distinguished from their expectations) from arbitrary affirmative action plans. Thus, there may be situations where minorities and women do not obtain the positions they might otherwise hold, because doing so would require displacing whites from their present jobs.[15] On the other hand, situations may occur in redressing discrimination that require disappointing the expectations of some individual white males.[16]

One of the most difficult areas in which to balance the national interest in eliminating discrimination against minorities and women and the interests of individual white men who may have to share with minorities and women the burden of past discrimination occurs when a downturn in business requires an employer to lay off workers. Historically, the groups hit first and hardest by recessions and depressions have been minorities and women. In the past, they were the last hired and the first fired. Today, employment provisions that call for layoffs on the basis of seniority can have the same result. In companies that used to exclude minorities and women, they will tend to have the lowest seniority and be layed off first and recalled last. To break this historical cycle and prevent recently integrated work forces from returning to their prior segregated status, this Commission has recommended, and at least one court has approved, a proportional layoff procedure.[17] Under this system, separate seniority lists for minorities, women, and white males are drawn up solely for layoff purposes, and employees are laid off from each list according to their percentages in the employer's work force.[18] There also are other methods that would preserve the opportunities created by affirmative action plans with less impact on senior white male workers, such as work sharing, inverse seniority, and various public policy changes in unemployment compensation.[19] If none of these or similar alternatives are pursued, however, the use of standard "last hired, first fired" procedures means that opportunities

[12] Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 538 (N.D. Tex. 1974); United States v. U.S. Steel Corp., 371 F. Supp 1045, 1060 n.38 (N.D. Ala. 1973), *modified on other grounds,* 520 F.2d 1043 (5th Cir. 1976).

[13] Franks v. Bowman Transportation Co., 424 U.S. 747, 777 n.38 (1976). *See also* McAleer v. American Tel. & Tel. Co., 416 F. Supp. 437 (D.D.C. 1976); German v. Kipp, 427 F. Supp. 1323 (W.D. Mo. 1977), *vacated as moot,* 572 F. 2d 1258 (8th Cir. 1978). *But see,* Telephone Workers Union v. N.J. Bell Telephone Co., 450 F. Supp. 284 (D.N.J. 1977). This future-oriented form of compensation is supplemantary to "backpay," which compensates victims of unlawful discrimination in an effort to restore the victim to the position he or she would have been in were it not for the unlawful discrimination. When a court awards backpay, the employer pays the victim for wages wrongfully denied in the past.

[14] United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (emphasis added).

[15] "Bumping" relief (the replacing of white male workers with minority or women workers) may not be used to remedy past discrimination. *See, e.g.,* Patterson v. American Tobacco Co., 537 F.2d 257 (4th Cir. 1976) *cert. denied,* 429 U.S. 920 (1976).

[16] *See* Franks v. Bowman Transportation, 424 U.S. 747, 774–77 (1976) and text accompanying notes 59–66 in Part B.

[17] U.S., Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977); Tangren v. Wackenhut Services, Inc., 480 F. Supp. 539 (D. Nev. 1979).

[18] Because "last hired, first fired" provisions generally are legal (see text accompanying note 72 in Part B), proportional layoffs are not required by law.

[19] Under worksharing agreements, employees agree to divide work and receive a reduced salary, in an effort to avoid or minimize layoffs. Inverse seniority permits the senior person, rather than the junior person, on the job to accept a temporary layoff with compensation and the right to return to his job at a later date. Changes in unemployment compensation include supplementing the wages of employees who work less than the normal 5-day work week with tax-exempt unemployment insurance benefits for the fifth day. For a discussion of these methods of minimizing or avoiding layoffs, see *Last Hired, First Fired,* pp. 49–71.

laboriously created in the 1970s may be destroyed during hard times in the 1980s.

In the short run, some white males will undoubtedly feel, and some may in fact be, deprived of certain opportunities as a result of affirmative action plans. Our civil rights laws, however, are a statement that such imagined or real deprivations cannot be allowed to block efforts to dismantle the process of discrimination.

Although affirmative action plans may adversely affect *individual* white males, they do not unfairly burden white males *as a class.* Their share as a class is reduced only to what it would be without discrimination against minorities and women. Emphasis on the expectations of the individual white male downplays the overall fairness of the plan, the discrimination experienced by minorities and women, and the fact that affirmative action has often produced and should continue to produce changes in our institutions that are beneficial to everyone, including white males. In eliminating the arbitrariness of some qualification standards, affirmative action can permit previously excluded white males to compete with minorities and females for jobs once closed to all of them.[20] Court-ordered desegregation of many school systems—which can be considered affirmative action plans for school systems—has revealed shortcomings in the education of all students and has led to improvements.[21] Employers have used the self analysis required by affirmative action plans as a management tool for uncovering and changing general organizational deficiencies.[22]

Other Concerns

Perhaps the most serious charge against affirmative action is that affirmative remedies substitute numerical equality for traditional criteria of merit in both employment and university admissions. Neither the Nation's laws nor this Commission calls for the arbitrary lowering of valid standards. Affirmative action plans often require, however, the examination and sometimes the discarding of standards that, although traditionally believed to measure qualifications, in fact are not demonstrably related to successful performance as an employee or a student.[23] Whether conscious or unconscious, overt or subtle, intentional or unintentional, the use of such standards may deny opportunities to minorities or women, as well as others, for reasons unrelated to real merit.

Some invalid standards used in one institution may build on discrimination that exists or has existed in other institutions. In the *Griggs* case, for example,[24] the tests and high school diploma required as conditions of employment as a "coal handler," though invalidated because they did not measure ability to perform the job, were called into question because they operated disproportionately to exclude minorities as a result of past discrimination in education. Valid standards, however, may also exacerbate such discrimination. Because of the pervasive and cumulative effects of the process of discrimination, some minorities and women may lack the necessary skills, experience, or credentials that are valid qualifications for the positions they seek. In such situations, there are no legal obligations that would require their selection.

Instead of reinforcing such economic, social, and political disadvantages, however, civil rights law encourages organizations and institutions to develop new standards that are equally related to successful performance and do not discriminate against minorities and women,[25] or to develop training programs that give minorities and women opportunities denied them by other sectors of our society.[26] Affirmative action, therefore, while leading to the dismantling of the process of discrimination, need not and should not endanger valid standards of merit.

Another major distortion of affirmative action occurs from faulty implementation.[27] University officials, for example, have inaccurately informed white male candidates, rejected for academic positions on the basis of their own qualifications, that their rejection was due to affirmative action requirements that had forced the university to select less qualified minorities or women.[28] Minorities have

[20] *See, e.g.,* note 107 in Part B; and Griggs v. Duke Power Company, *supra.*

[21] *See* U.S., Commission on Civil Rights, *Fulfilling the Letter and Spirit of the Law,* 152–53 (1976).

[22] *See, e.g.,* G.C. Pati and C.W. Reilly, "Reversing Discrimination: A Perspective," *Labor Law Journal* (January 1978), p. 20.

[23] *See* text accompanying notes 14–20 in Part B.

[24] Ibid.

[25] *See* text accompanying note 71 in Part B.

[26] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[27] Two experts on affirmative action plans have written: "We are concerned that incredible ignorance of the laws and regulations, overreactions, limited budget commitment, and poor management are creating 'mongrel' affirmative action and EEO programs and causing more harm than anticipated. We are appalled at what is going on in institution after institution, time and time again in the name of EEO and AAP." Pati and Reilly "Reversing Discrimination", *supra,* 29 Lab L.J. at 9, 10.

[28] J.S. Pottinger, "The Drive Toward Equality" in *Reverse Discrimination,* ed. B.R. Gross (Buffalo: Prometheus Books 1977), pp. 41–49.

been urged to accept promotions to positions for which they lack the necessary skills, in which they then fail, and are then blamed for their failure.[29] Minority or female "tokens" have been placed in situations where they face open hostility or lack of basic support and the resulting isolation causes them to quit, which the employer then uses as a basis for not hiring more minorities and women.[30]

Affirmative action plans have been subject to abuse. If undertaken with little or no understanding of the nature of the problem that affirmative steps are designed to remedy, such plans at best lead to mechanical compliance in a continuing climate of animosity among racial and ethnic groups and between men and women, and at worst to subversion of the plan itself.

"Group Rights"

The use of statistical data as an indicator of discrimination has given rise to the idea that affirmative action is a method for securing "group rights." This perspective misinterprets the use of statistical data in affirmative action plans as meaning that every racial and ethnic group has a right to have its members present in every area of society in a ratio reflecting their presence in the population. Those who stress this view[31] range from the most vocal opponents of some or all aspects of affirmative action to those who claim that they, too, should be covered.

Seen in this light, affirmative action becomes a numbers game and a system of group entitlement, instead of a set of special antidiscrimination measures that are necessary to counter the process of discrimination. The determination that an affirmative action plan should include members of a particular group, however, is a factual one. It depends on whether those members, because of their group membership, are encountering discriminatory practices and barriers to equal opportunity that have evolved into a self-perpetuating discriminatory process. It is not based on the premise that there should be perfectly proportional representation of racial and ethnic groups in every organization and institution. The Commission recognizes that in a diverse society overrepresentation in a particular occupational group may occur without discrimination based on race, sex, or national origin. However, to assure that such discrimination has not occurred, as suggested in this statement, an analysis needs to be conducted at an institutional level to determine that such overrepresentation has not been based on discriminatory factors.

The question facing our society is, When is heightened sensitivity to the possible existence of the process of discrimination required? Based primarily on the experience of blacks and women, the following four manifestations of discrimination taken together suggest when a self-perpetuating process of discrimination necessitating affirmative action is present:

1. when there is a history of discrimination against persons because of their membership in a group at the location and institution in question;
2. when there is evidence of widespread prejudicial attitudes and actions that presently disadvantage persons because of their membership in the group;
3. where there are statistical data indicating conditions of inequality in numerous areas of society for persons in the group when compared to white males; and
4. when antidiscrimination measures designed to secure neutrality have proven ineffectual in eliminating discrimination against persons in the group.

These four categories of evidence focus on the time, depth, breadth, and/or intransigence of discrimination. Their purpose is to help make the judgment whether our concern about discrimination should extend beyond the more palpable forms of personal prejudice to those individual, organizational, and structural practices and policies that, even though neutral, will perpetuate the process of discrimination. The first step, therefore, is to look for evidence that falls within the four relevant areas of inquiry whenever there is a reasonable belief that such a process of discrimination may exist. This investigation lays the factual basis for determining whether the discrimination experienced by members of the group in question is of such a nature and

[29] See Pati and Reilly, "Reversing Discrimination,"

[30] "Tokenism" as a way of avoiding changing formal and informal discriminatory organizational rules (see text accompanying notes 18–31 in Part A) rather than creating a climate encouraging the involvement of minorities and women in the life of the organization, is discussed in detail in: R.M. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977), pp. 206–44; R.M. Kanter, "Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women," in *American Journal of Sociology*, 82, 965–90 (1970).

[31] *See, e.g.*, Brief of American Jewish Committee, American Jewish Congress, Hellenic Bar Association of Illinois, Italian American Foundation, Polish American Affairs Council, Polish American Educators Association, Ukranian Congress Committee of America (Chicago Division), and Unico National, *Amici Curiae* at 32–33, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

extent as to require decisionmakers to act with an awareness of the context and consequences of their actions as they affect such individuals.[32]

The Federal Government, based on its experience in enforcing civil rights laws and administering Federal programs, collects and requires that others collect data on the following groups: American Indians, Alaskan Natives, Asian or Pacific Islanders, blacks, and Hispanics.[33] Because such data collection is needed when the process of discrimination is occurring, such data collection represents a decision that these groups are facing such forms of discrimination. It is the Commission's belief that a systematic review of the individual, organizational, and institutional attitudes and actions that members of these groups encounter would show that they generally experience discrimination as manifested in the four categories set forth above. Special attention to the possibility of such a process, and the subsequent need for affirmative action, therefore, is warranted.

The conclusion that affirmative action is required to overcome the discrimination experienced by persons in certain groups does not in any way suggest that the kinds of discrimination suffered by others—particularly members of "Euro-ethnic" groups[34]—is more tolerable than that suffered by the groups noted above. The Commission firmly believes that active antidiscrimination efforts are needed to eliminate all forms of discrimination. The problem-remedy approach insists only that the remedy be tailored to the problem, not that the only remedy for discrimination is affirmative action to benefit certain groups.

Arguments against affirmative action have been raised under the banner of "reverse discrimination." To be sure, there have been incidents of arbitrary action against white males because of their race or sex.[35] But the charge of "reverse discrimination," in essence, equates efforts to dismantle the process of discrimination with that process itself. Such an equation is profoundly and fundamentally incorrect.

Affirmative measures are not an attempt to establish a system of superiority for minorities and women, as our historic and ongoing discriminatory processes too often have done for white males. Nor are affirmative measures designed to stigmatize white males, as do the abusive stereotypes of minorities and women that stem from past discrimination and are perpetuated in the present. Affirmative measures end when the discriminatory process ends, but without affirmative intervention, the discriminatory process may never end.

Properly designed and administered affirmative action plans can create a climate of equality that supports all efforts to break down the structural, organizational, and personal barriers that perpetuate injustice. They can be comprehensive plans that combat all manifestations of the complex process of discrimination. In such a climate, differences among racial and ethnic groups and between men and women become simply differences, not badges that connote domination or subordination, superiority or inferiority.

[32] The Small Business Administration, pursuant to congressional directive (15 U.S.C. §637(d)(3)(c) (1978)), has developed similar guidelines to determine whether members of a minority group have suffered sufficient racial or ethnic prejudice to receive small minority business development assistance. The SBA uses the following criteria: "(1) if the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control; (2) if the group has generally suffered from prejudice or bias; (3) if such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507 (Blacks, Hispanics and Native Americans); and (4) if such conditions have produced impediments in the business world for members of the group over which they have no control which are not common to all small business people." 13 C.F.R. §124.1-1(c)(3) (1979).

[33] Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, Statistical Policy Handbook, *reprinted in* 43 Fed. Reg. 19,269 (1978). The data collection, of course, also includes whites and women within each category. The directive is careful to note the following: "These classifications should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program."

[34] In December 1979 the Commission held a consultation entitled "Civil Rights Issues of Euro-Ethnic Americans in the United States: Opportunities and Challenges," and is doing further research on the nature and extent of discrimination confronting "Euro-ethnic" groups.

[35] See note 20 in Part B.

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