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# Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights

**Vol. I: Papers Presented**

February 10 and March 10-11, 1981  
Washington, D.C.

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## **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

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In January 1981 the Commission's proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, was released for public comment. On February 10, March 10 and 11, and April 7, 1981, the Commission held a series of consultations at which written and oral comments on the proposed statement were presented or submitted by lawyers, government officials, social scientists, academic administrators, management and labor representatives, and others. Experts also offered their views on the practical aspects of implementing affirmative action plans. Based on this information and a thorough review of the draft document, the Commission revised the proposed statement. We also added an appendix that offers specific guidelines for designing, implementing, and evaluating affirmative action plans in employment. The finished statement was published in November 1981.

This publication compiles all papers submitted by consultation participants, as well as all other comments received by the Commission, and the Commission's response to those who were unable to participate in the consultations and conveyed their comments through correspondence. The transcript of the consultation proceedings will be published as a second volume. It records the stimulating exchange of ideas that assisted us in improving the quality of our statement. The Commission would like to express its gratitude to all who participated in this project.



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**ASSESSMENTS OF *AFFIRMATIVE*  
*ACTION IN THE 1980s*  
FROM A LEGAL PERSPECTIVE**



# Statement

By Thomas I. Atkins\*

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I have read the proposed statement entitled *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* and offer the following comments and observations to the Commission for consideration in finalizing this very excellent document.

1. In the first instance, let me say that the statement will significantly contribute to and advance the cause of equal justice under the Constitution and laws of the United States. It addresses with skill and clarity a subject that has generated far more heat than light in recent years. I believe that this statement, with the minor modifications I will outline below, will serve to assist judges, employers, government administrators at all levels, the media, members of protected groups, and the general public more fully to understand and appreciate the need for and meaning of "affirmative action."

2. This statement, when completed and released, will come to play the same constructive role so many of the Commission's previous publications have. For instance, courts have been particularly eager to obtain and peruse the Commission's publications on school desegregation, both because these publications have contained factual information not compiled as coherently in any other form by any other entity and because they have helped to place individual cases in their proper contextual perspective. Even when the litigants have already said to the court that which is contained in (and frequently drawn from) the Commission's publications, the courts view with greater confidence and assurance the material that emanates from an official public

entity, particularly one with the historic prestige and special mission of the Commission. In this connection, I would hope that the Commission will send the completed statement to every Federal district and appellate court judge in the United States. It is my experience that they will benefit from, and appreciate receiving, this information. The publications of the Commission fall into the category of matters of which these judges may, upon proper notice, take judicial notice. Thus, a mailing of the type suggested, if not already contemplated, would serve to put before a very crucial set of actors in this whole arena of affirmative action material they are unlikely to get from any other source. The impact of such action by the Commission will be immense and virtually incalculable.

In light of the predictable efforts that will be made in the Congress either to strengthen or gut various civil rights guarantees, I also suggest that the Commission make certain that this statement is put in the hands of each of the Senators and Congressmen, and sent to the staff directors of the congressional committees that will be dealing with housing, education, employment, contracting, etc. I prefer to believe that the Congress will act better when informed than when swept along by the highly emotional winds of rhetoric that have surrounded this unfinished part of the Nation's agenda.

3. I would suggest that more attention needs to be given to the type and nature of the differences which characterize that discrimination visited upon women from that visited upon blacks and other minorities. While mention is made of this difference,

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\* Thomas I. Atkins is general counsel, NAACP.

I believe that the statement would benefit, as would the public dialogue, from an expansion of this treatment. Over the course of the past several years, women and minorities have increasingly found themselves pitted against each other for inadequate "set-asides" or other goals. The reality is that substantial differences exist in the type of disabilities faced by women and racial minorities, not the least of which is the pace at which opportunity may become available and the relative ability to exploit those opportunities that do appear. Women have not, to the same extent, been excluded from or underrepresented in colleges and other training programs on the same scale as racial minorities and are not equal competitors when barriers are finally reduced or eliminated.

The NAACP stands fully behind those efforts that are aimed at wiping away the cultural, structural, political, or legal barriers to full opportunity and fulfillment for and by women. We believe that more attention needs to be given to the differences between women and racial minorities when fashioning remedies, lest these two natural allies be set against each other in a scramble for calculatedly inadequate opportunities.

4. In a similar vein, the statement would be strengthened by focusing more attention on the frequently great differences in the nature of the discrimination suffered and remedies needed by blacks, as compared with Hispanics, for example. We are particularly aware that the additional barrier to opportunity posed by language deficiencies cries out for remedies that will take this need into account where Hispanics are involved.

By the same token, blacks have suffered a form and scope of discrimination which is both quantitatively and qualitatively different from that of Hispanics, in most instances. In many instances, the differences are keyed to regional nuances; in others, to the relative numbers of blacks or Hispanics present in a particular location. In any event, those fashioning plans and measures to address past exclusion need to be aware of the differences, lest the remedies themselves serve to validate the present effects of past discrimination and block the likelihood that these problems will ever be addressed in an effective manner.

Expanded attention to this area will also help to prevent the type of competition between fellow victims referred to above and will aid in the development of coalitions among the protected

classes. I am convinced that many of those who, in good faith, would seek to fashion sensitive remedies have simply not thought out the nuances nor have any idea of the type of sensitive remedies that will be most effective in addressing exclusion where both blacks and Hispanics have been victimized. The NAACP believes that the Nation must understand and address in an effective manner the needs of those who have been victimized because of both race and color, and who have language barriers to overcome at the same time. It is not enough to liken the Hispanic problem in this regard to the experience of the "Euro-ethnics," who did not face the pervasive and systemic exclusion based on color and race, even though religion may have been a barrier for many of these immigrants. The tendency to equate the scope of the problems faced by racial or racial-lingual minorities with those faced by the "Euro-ethnics" has been a continuing barrier to full understanding of the problems and to the necessary search for remedies.

5. The statement would be benefited by more greatly addressing the differing standards applied to and problems faced by the public and private employers/institutions. While some of the problems of exclusion faced in the private sector mirror those in the public sector, it is frequently the case that substantial differences exist and that different sets of laws will be applied. It is also the case that the nature of the remedies available may differ greatly because of the public sector's greater ability to command resources necessary for full remediation. A discussion in greater detail of these differences will assist those responsible for devising remedies, as well as those assessing the need for remedies, including courts and the Congress.

6. In recent years, much has been made of the need to show "intent to discriminate" as a predicate for relief from segregation or exclusion. The statement discusses the role of the EEOC in helping to insulate voluntary affirmative employment plans from collateral attack. It may be time to establish the principle that those challenging affirmative action measures or plans, where the object is to redress historic exclusion and deprivation, must themselves show that those developing the plans or measures "intended to discriminate" against the white males who usually launch the collateral attacks on such efforts. Why should there not be a presumption of good faith and regularity on the side of the governmental or private actor whose efforts are aimed at

fulfilling a frequently reiterated national goal of equalizing opportunity and reversing past discriminatory impacts? The NAACP believes that the proposition that white males are being discriminated against in this country is so absurd on its face that those who seek to proffer this proposition should have a tremendous burden to carry. Perhaps they, too, should have to shoulder the heavy burden of proving intent and not merely effects. The Commission might do much to educate the public on the general absurdity of the proposition that white males, notwithstanding their near-exclusive hold of the implements and tools of power in this country, are disadvantaged by race- or sex-conscious affirmative measures or plans.

7. Given the pivotal importance I believe this statement will achieve, it would be helpful if more attention were given to the efforts and results of affirmative action plans or measures that have already been put in place. The public needs to know that affirmative attention to previous exclusion is not mere theory and tinkering, but that it can have important and measurable results. It would be important to point out the number of minority teachers who owe their positions almost exclusively to court-ordered affirmative measures as a part of comprehensive desegregation remedies. Similarly, public sector employers have sometimes produced dramatic results after implementing affirmative action plans, whether voluntarily or with the aid of courts. Private employers, universities, etc., have also produced impressive results after enacting affirmative measures or plans. We hear too much of the downside and not enough of the success stories. The Commission is uniquely situated to gather and highlight this information.

By using the State Advisory Committees, the Commission would be able to gather and disseminate such information on State or regional bases, thereby painting the picture worth a thousand words to those facing the task of developing remedial measures. This information would also facilitate the sharing of success, and eliminate the need for each employer/organization to re-create the wheel.

I am aware that the Commission has published (in other documents) some of the information of which I speak. However, it would be significant to marry these data with this descriptive and prescriptive statement. It is the unfortunate truth that much of the excellent work which has been done by the Commission and its staff has simply not come to the

attention of those officials, public or private, who have the day-to-day responsibilities for running their organizations.

## Summary

The above comments should not be taken to obscure the profound importance we attach to this effort by the Commission. They are, rather, aimed at making even more powerful the impact of the message the statement will deliver.

At some points in the statement, there is almost too great a tendency to apologize for support of quotas, given the widespread public furor aroused by their use. I believe that it makes no sense to oppose air travel because of plane crashes, nor to ban anesthetics because of Hitler's ovens, nor electricity because of the barbarity represented by the electric chair, nor water because of floods and drowning, nor flames because of forest fires. Similarly, no apology should be given for the affirmative use of quotas simply because they were abused in the past. The doctrinaire opposition to quotas is not only misplaced, but has come to be a tactic in the hands of those whose real game is to oppose the elimination of discriminatory barriers. It is somewhat like being for children but against intercourse.

While it is certainly true that not all whites have been practitioners of discrimination or harborers of prejudice, it is true with equal certainty that almost all blacks and Hispanics (and other minorities on lesser scales) in this country have been victims of discrimination and objects of prejudice. These are realities that cannot be forgotten, for they stand at the heart of the systemic discrimination and the interlocking effects that the proposed statement eloquently details. The NAACP apologizes to no one for its belief that affirmative quotas are required to dismantle the pervasive system of exclusion created by the previous misuse and abuse of quotas and other techniques not even as benign as exclusionary quotas.

The members of the protected classes who are the intended beneficiaries of affirmative measures and plans are Uncle Sam's blood children. In this connection, they are no different than the children of university alumni/faculty/donors who are routinely preferred nor the sons of the business owner whose preferential treatment is not only not questioned by expected. They are like the members of the President's party who are routinely preferred for public service and the benefits and power that flow

from these appointments. Not until these historic examples of "quotas" and "preferential treatment" are questioned and eliminated will the NAACP take seriously the complaints of those who cry "reverse discrimination" in the face of an effective affirmative action plan or measure. The Federal Government's role in requiring and promoting affirmative action is important because of the previous role played by this very same Federal Government in requiring or sanctioning the exclusion of these protected class

members. We have not yet so dismantled the continuing effects of the prior, shameful, wrongful actions of the Federal Government, nor of the States and their localities, to be able to slacken the pace in pursuit of affirmative action.

The Commission's proposed statement will, strengthened as suggested, help to keep this country on course and on target. The NAACP stands ready to assist the Commission in whatever manner we can.

# Reflections on Affirmative Action

By Jack Greenberg\*

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I would like to address additional dimensions that may deserve some attention, including certain social, economic, political, and, if you will, philosophical factors that should be addressed in a total treatment of affirmative action.

To my thinking, affirmative action is the perhaps encouraging thing in the civil rights picture today. The historic economic indicators of racial pathology remain with us. I will refer to only two of them: First, median black income remains at approximately 60 percent that of white. It may go up or down a few points, but doesn't budge very far from that mark.

Second, the historic black unemployment rate remains double that of whites. For teenagers it is much more than that, frequently as high as four times. It has not moved, and that is not encouraging. Yet, at the same time we look at the world around us and know that changes are taking place. We go into universities and see many more black and minority faces than 10 or 15 years ago. We walk down the corridors of corporations and make the same observation.

It is in large part because of affirmative action. Looking at statistics, the number of minority managers has gone up from about 3 to 8 percent, almost a tripling, in the last decade or so. The number of members of minorities in law schools has gone from 1 to about 10 percent over approximately the same period of time, and medical students have increased in approximately the same proportion.

A startling figure is that the percentage of minorities graduating from high school who now attend colleges is approximately equal to the percentage of whites graduated from high school now attending college. People often refuse to believe that figure, and I have to go back and check. But it's true. The fact is, however, proportionately more blacks go to 2-year colleges; many more fail to graduate. Moreover, the large black dropout rate occurs before high school graduation, so that the percentage of blacks graduating from high school is disproportionately smaller than the percentage of whites. Nevertheless, there is the enormous improvement in college enrollment, and I would submit that it is to a considerable extent due to affirmative action.

If affirmative action programs were to be scrapped, then, to put it one way, the only game in town would be gone. We would be left with the 60 percent median income rate and the double or quadruple, depending on age, unemployment rate, and little or nothing encouraging going on in this country with regard to race that could hold out hope for a better and more equal future in years to come.

Turning to other considerations that deserve additional attention, instead of urging a single argument in favor of affirmative action or denying the validity of a single argument against it, we should draw up a balance sheet and acknowledge that there are many advantages—indeed, some disadvantages which we should total up before

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\* Jack Greenberg is director counsel, NAACP Legal Defense and Education Fund, Inc.

stating our conclusions. If we were to add up the merits and demerits and balance one against the other, the result would strongly be in favor of affirmative action.

For a comprehensive treatment, which I have not seen fully developed anywhere, I would like to suggest some factors that should be weighed. One is that affirmative action should be seen as a selection method and procedure which is one of many methods and procedures we have in this country. It is not terribly dissimilar from some that are in use generally. For example, children of alumni have preference in being admitted to many colleges. This, of course, favors whites who in years past were almost exclusively those whom many colleges admitted.

In the *Bakke* case (although it did not appear in the opinions), in fact, a university administrator had several picks of his own for admission that did not have to go through the admissions committee. He selected applicants who were no more qualified than many others, but who were children of influential people. This sort of thing goes on all the time. Anyone connected with university education or American corporate life knows that people in charge of things take into account friendships, influence, and personal or institutional gain. There is the so-called "old boy" network. I am constantly amazed at the list of well-known persons' children one sees attending some of our more prestigious universities. They don't seem much brighter than any of the others and often appear to be less qualified. One is forced to the conclusion that provenance has more to do with where they have risen than strict merit or test scores.

We ought also to marshal the arguments for affirmative action. One is compensation for past wrongs. American blacks have been the victims of a hundred years of racial segregation that, when ended nominally by *Brown v. Board of Education*, persisted because the right to a prompt remedy was not created at least until 1970 for schools. Other civil rights were not established until the Civil Rights Acts of 1964, 1965, and 1968. And enforcement has lagged behind legal declarations. School segregation still is not yet dismantled. Neither is discrimination at an end in other aspects of life.

Another argument in favor of affirmative action is that the testing and selection procedures which we use often do not adequately measure ability to do the job.

Yet another argument we ought to look at is the argument of Justice Powell in *Bakke*: When blacks and whites and members of various groups are together, they tend to learn some things from one another that otherwise would not be learned.

And one of the most important arguments, one that may be found in philosophical literature back to the times of the early Greeks, is that it is important that we do not have a society in which there are strong divisions among different groups generating hostilities that tend to tear the society apart.

We also have to look at some of the downside aspects. I don't think we can say there are not white males who are not equally qualified or better qualified for some positions who lose out in a quest for opportunities that have gone to beneficiaries of affirmative action. Sometimes that happens. But it has to be seen in the context of total selection procedures of all sorts. Moreover, it must be seen in the context of alternatives available to such white males.

If I may give a personal anecdote, I recall being berated by a relative because her son was rejected from Harvard. She said that undoubtedly he was rejected because a black applicant was admitted, and I had something to do with that. The fact is, her son was admitted to Haverford and later went to medical school. Her son is none the worse for it if, indeed, he was rejected from Harvard because a member of a minority got in. But if it were true, the black who did get into Harvard may have been someone who without that advantage might not have had an opportunity to enter into the higher echelons of society.

It is argued that the self-esteem of minorities and women who are selected because of affirmative action is impaired. Sometimes that may occur. But it has to be seen in total context. I would imagine that anybody whose self-esteem were insufficient wouldn't take the job or wouldn't stay there. But we should not pretend that kind of argument doesn't exist and that it doesn't have some sort of validity.

It is sometimes said that the esteem in which others hold people who achieve positions through affirmative action is impaired, that people will say, "Well, you see, she's just in that job because she's black or she's the woman in the job," and so forth. That may, indeed, be said of members of minorities or women who have been selected *without* regard to affirmative action. I have no doubt that occurs sometimes. We ought to address those concerns.

It is sometimes said that people are employed who cannot do the job. Of course, that has occurred. But how often and how often it occurs in the case of white males, for example, should be considered.

I think we have to address such issues. We have to evaluate them and add them up. I think that after we do, we will come out strongly on the side of

affirmative action. But too often people talk past one another. It would be much more effective if we would acknowledge existence of such issues, face them, and show that, all things considered, affirmative action is the best thing we have going for us today in the civil rights picture.

# Comments of Women's Legal Defense Fund

By Judith Lichtman\*

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## Introduction

I wish to congratulate the Commission on its very important and necessary statement on affirmative action. It goes a long way to dispel the myths that surround affirmative action programs. Further, I commend you for your approach to the entire question of how to fashion remedies for specifically defined problems. This statement contributes enormously to the clear articulation of the need for vigorous affirmative action programs to redress institutional discrimination. You are to be applauded.

My comments will deal generally with the tone, thrust, and emphasis of the statement and specifically with your description on page 13 of the different forms and manifestations of racism and sexism.

## General Comments on the Statement's Emphasis

While the statement includes strong support for affirmative action (see the concluding paragraphs on page 42), it lacks a clearly articulated position in favor of the use of goals and timetables as one device available for overcoming past discrimination. There should be no equivocation about the moral and legal efficacy of the use of goals and timetables.

In this context, part C should clearly state that there will be no effective means of dealing with the present effects of past discrimination without strong affirmative action plans, including goals and timetables. The use of goals and timetables should be

analyzed from the standpoint of their technical utility.

Further, part C should address the myths that surround affirmative action plans along with the shibboleths of reverse discrimination.

Goals and timetables do not endanger the merit system. The statement should forthrightly assert that the merit system in America is a myth. The question asked should not be whether or not preferential treatment is legal, ethical, or moral, but *who* should a particular preferential scheme benefit. The only difference between the preference in an affirmative action plan and the "old boy" (read white male) preferential scheme is that ours is more explicit than the latter system. The statement should acknowledge that there is no way to pursue affirmative action without unsettling the expectations of white males.

In addition, the statement should respond to the false arguments and the myths that surmount the evils of affirmative actions, i.e., that it stigmatizes the very people it is intending to help, the psychological damage to people as a result of their fear that their success is based solely on their race or sex as opposed to their merit.

It should address the increased economic opportunities for all as a result of well-developed affirmative action plans, dispelling the myth that affirmative action reduces the opportunities for white males (see *Weber v. Kaiser Aluminum*).

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\* Judith Lichtman is executive director, Women's Legal Defense Fund.

Finally, the statement should devote considerable attention to success stories of affirmative action. It should include a description of the changed picture of the American work force in specific industrial sectors where goals and timetables have succeeded; it should discuss the increased educational opportunities as a result of well-implemented affirmative action plans; and finally, it should discuss the positive stake white males have in this success story.

### **Specific Analysis of the Systemic Evils of Sexism and Racism**

As stated in my oral testimony before the Commission on February 10, 1981, I strongly object to the statement's articulation of the structural and generationally reinforcing cyclical problems endemic in sexism.

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.

To say that because some white women are related to white men they are "enjoying advantages" not available to others is to totally misunderstand sexism. Indeed, with the inclusion of this paragraph, the statement itself is sexist. There is a truism "that a woman is a man away from welfare." The statement must acknowledge that the dependence of women upon men is a symbol of their inferior status.

I do believe, however, that there is documentable cyclical, generational, and structural sexism in

America. It differs from your example about racism. That difference can and should be expressed. The statement must describe how sexism perpetuates itself generationally; for instance, the socialization of young girls toward educational opportunities that do not include technical and mechanical skills and their lowered expectations of themselves result in limited educational opportunities, which in turn circumscribe employment opportunities, resulting in job segregation where women are overwhelmingly clustered in low-paying, low-status female jobs. This results in marginally employed women with virtually no economic independence who are even more dependent on men for subsistence, who in turn have limited expectations about their ability to perform and the cycle repeats itself. For single women and single women who head households, the problems of limited housing opportunities enter the cyclical equation and are also brought to bear as a bar to adequate educational opportunities. Minority women's problems as a result of structural discrimination should be given special attention, since they suffer from the devastating effects of both endemic sexism and racism.

### **Conclusion**

Again, the Commission should be applauded for its statement on affirmative action in the 1980s. It goes a long way toward clearly articulating the necessary and beneficial aspects of a Nation committed to undoing the effects of past discrimination. I strongly urge, however, that the statement give its unqualified endorsement to the use of goals and timetables. Finally, I would expect that the discussion of structural systemic sexism will be amended along the lines I have suggested above.

# An Asian American Perspective

By Stan Mark\*

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## Introduction

The Asian American Legal Defense and Education Fund (AALDEF) supports the Commission's proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, as a constructive step toward defining the complex nature of discrimination and developing criteria for specific affirmative measures to eliminate racism and sexism in our country.

The Commission's statement comes at an important juncture in the oft-heated debate over the merits of affirmative action. The implementation of affirmative action programs, coupled with the enforcement of other civil rights laws, is just beginning to yield favorable, if long overdue, results for minorities who have historically faced discrimination. For Asian Americans, it has led to such gains as job opportunities and training programs in higher-paying skilled trades and crafts, such as the construction industry; higher law school enrollments, leading to legal careers traditionally shunned by Asian Americans; and promotions into policymaking roles and management positions in government and the private sector.

At the same time, increasing attacks have been mounted upon the basic concept of affirmative action and, in particular, the inclusion of Asian Americans in such affirmative action programs. This challenge has been grounded upon the erroneous premise that Asian Americans are a "model minori-

ty" that has attained success in our society, despite its long history of discrimination. However, as this Commission observed in its informative report entitled *Success of Asian Americans: Fact or Fiction*, this "positive" stereotype of Asian Americans is misleading and fails to recognize major differences among various Asian American groups. In short, "the stereotype of success focuses on those Asian Americans who are doing well, but it ignores the large number who are not."<sup>1</sup> Because of inaccurate myths surrounding the status of Asian Americans today, the Commission's proposed statement provides an opportunity to examine current forms of discrimination against Asian Americans and to determine how appropriate affirmative action plans that include Asian Americans can be developed.

## The Problem: Discrimination Against Asian Americans

We fully agree with the Commission's view that any affirmative action program must be predicated upon a careful analysis of the unique discriminatory processes affecting each minority group. Too often, the scope of affirmative action is couched in terms of which racial minorities have suffered the worst discrimination and are most "deserving" of remedial measures. This distorted characterization pits one minority against another and ultimately diverts attention from those institutions and individuals that have caused the discrimination at issue. The Commission thus provides a useful framework for focus-

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<sup>1</sup> U.S., Commission on Civil Rights, *Success of Asian Americans: Fact or Fiction?* (1980), p. 17 (hereafter cited as *Success*).

ing upon the particular forms of discrimination faced by each minority group and how best to overcome their present effects.

Although the Commission cites several examples of how racism and sexism have operated to disadvantage minorities and women, it overlooks two important factors in the discriminatory process affecting Asian Americans: English language proficiency and immigration status. These two aspects of national origin discrimination—an inevitable consequence of the century-long history of racist immigration and naturalization laws directed specifically at Asians<sup>2</sup>—assume special importance, since half of the total Asian population is currently composed of immigrants and refugees.<sup>3</sup>

It is evident that the inability to speak English deters Asian Americans from full participation in all aspects of our society. Limited English proficiency of foreign-born and some American-born Asians constitutes a major reason for their segregation into low-paying, low-skilled jobs, primarily in the garment and restaurant industries. In addition, foreign-born Asian immigrants who are well educated, nonetheless, are often prohibited from practicing their professions as doctors, nurses, accountants, and teachers in the United States, due to licensing examinations that test English language proficiency rather than practical work skills. Bilingual education programs in Asian American communities, which are effective in easing the transition of limited English-proficient students into the regular educational curriculum, are inadequate to meet existing needs. Moreover, Asians with little or no English proficiency are effectively denied a range of government entitlements by the failure of government agencies to provide adequate bilingual personnel and services to eligible applicants.

Citizenship requirements as a prerequisite to employment and educational opportunities likewise have a disproportionately harsh impact upon Asian Americans. Although racist national origin quotas were eliminated from U.S. immigration laws in 1965, prior laws barring Asian immigration and naturalization, together with current quotas severely limiting Chinese immigration from Hong Kong, continue to perpetuate discrimination patterns against Asian Americans. If nondiscriminatory immigration laws had been in effect during the last 100 years, many

Asian Americans would already have met the 5 year residency requirement for American citizenship and would now have equal access to those jobs, educational opportunities, and government entitlements currently available only to U.S. citizens. Like language discrimination, discrimination based on immigration status, such as prohibitions against the employment of aliens in certain Federal civil service jobs, erects discriminatory barriers against Asian Americans seeking employment, educational, and other government benefits.

Because discrimination against Asian Americans results from the unique interaction of race, English language proficiency, and immigration status, we urge the Commission to expand its final statement to include a thorough analysis of these important factors and a discussion of how they should be addressed in affirmative action programs.

### **The Remedy: Affirmative Action for Asian Americans**

AALDEF is in general agreement with the Commission's problem-remedy approach to discrimination, which addresses many of the objections raised in recent years by critics of affirmative action. However, the Commission seems unduly defensive in its discussion of numerical goals and quotas to implement affirmative action plans. We believe the Commission should explicitly state its strong and unequivocal support for goals and quotas, whether legally imposed or voluntarily implemented, in light of their past effectiveness as measures to dismantle the discriminatory process.

We would like to add our specific comments on the following two points.

#### **The Use of Statistics**

The use of statistics in identifying the existence of discrimination and appropriate remedial measures warrants special mention as it affects Asian Americans. AALDEF agrees with the Commission that statistical data may not always provide accurate indices of discrimination and should not be applied rigidly in formulating affirmative action programs.

For many years, statistics about Asian Americans have been buried in the "Other" category, thereby providing no precise data with which to document the extent of discrimination against Asian Ameri-

<sup>2</sup> See U.S., Commission on Civil Rights, *The Tarnished Golden Door—Civil Rights Issues in Immigration* (1980), p. 18.

<sup>3</sup> U.S., Commission on Civil Rights, *Civil Rights Issues of Asian and Pacific Americans: Myths and Realities* (1979), p. 11.

cans. While Asian Americans are now increasingly being identified in a separate category, it is important to recognize further that the Asian American population is extremely diverse, consisting of Chinese, Japanese, Filipino, Korean, Vietnamese, Asian Indian, Thai, Lao, Cambodian, Hawaiian, Guamanian, Samoan, and other subgroups, each with their own distinct language and culture.

As a result, generalizations about the status of all Asian Americans cannot be made from statistics for one particular Asian subgroup. Indeed, the Commission has already recognized that the stereotype of Asian Americans as a "successful" minority has derived largely from statistics, such as their average high level of education, their representation in professional and technical fields, and their average income levels. However, these statistics ignore the disproportionately large number of Asian Americans with almost no formal education,<sup>4</sup> the relatively small number of Asian Americans in high-paying managerial and administrative positions,<sup>5</sup> and their disproportionately low income despite high educational attainments when compared to majority Americans.<sup>6</sup>

For example, existing statistics suggest that Asian Americans are already well-represented in the medical profession. However, there are several factors that could be considered in determining whether Asian Americans should be included in a particular medical school's minority admissions programs:

1. Do foreign-trained doctors constitute a large proportion of Asians in the medical profession, necessitating further inquiry into whether American-born Asians have equal access to such educational opportunities?
2. Do statistics indicate that Asian Americans are underrepresented in the medical school's student population?
3. Even if sufficient numbers of one Asian subgroup, such as Chinese, are accepted through the school's regular admissions process, is there still a need for affirmative action with respect to other Asian subgroups, such as Koreans or Filipinos?
4. If the medical school is located in an area with medically underserved and non-English-speaking

Asian communities, such as New York City, should factors such as demonstrated commitment to serve Asian American communities and bilingual language skills be considered in devising an affirmative action program?

The very mixed statistical picture of Asian Americans emphasizes the importance of refining and expanding data collection concerning diverse Asian subgroups and carefully evaluating such data. With this as a starting point, institutions can better determine the nature and scope of their affirmative action programs with respect to Asian Americans.

### Monitoring the Gains of Affirmative Action

At the outset, we must reiterate that institutional and individual racism against Asian Americans continues to permeate our society—from overt attacks by the Ku Klux Klan against recently immigrated Vietnamese fishermen in Texas to more subtle forms of discrimination against Asian Americans seeking promotions and management-level positions. However, as Asian Americans and other minorities begin to gain access to better educational and employment opportunities, an inevitable question arises: At what point can institutions legitimately exclude Asian Americans from their affirmative action programs?

For example, Japanese Americans were included in the special admissions program at the University of California-Berkeley Law School (Boalt Hall) until 1976. However, in the period since their exclusion from this program in 1976, Japanese American student enrollment has declined sharply, so that the class entering in 1979 represented only 20 percent of the total enrollment for the group's entering class in 1975.<sup>7</sup>

This example points out the need to avoid the recurrence of underrepresentation of Asian Americans or a particular Asian subgroup in schools or occupations following a decision to exclude them from affirmative action programs. To ensure that such gains are not lost, the operation of affirmative action programs should be constantly monitored, through followup studies and statistical data, to ensure that Asian Americans are guaranteed equal

<sup>4</sup> *Success*, p. 4.

<sup>5</sup> *Success*, pp. 4, 9. See generally A. Cabezas & H. Yee, *Discriminatory Employment of Asian Americans* (ASIAN, Inc., 1977).

<sup>6</sup> *Success*, p. 9.

<sup>7</sup> See brief of the Boalt Hall Asian American Law Students Association in support of Asian American Legal Defense and Education Fund's Motion to Intervene in *DeRonde v. Regents of the University of California*, 3 Cir. 16461, 3 Cir. 16872.

opportunity, even in the absence of affirmative action measures.

### **Conclusion**

The success of affirmative action programs rests heavily upon the public's understanding and acknowledgment that race-conscious measures are essential tools in dismantling the continuing effects of discrimination against minorities. The Commission can play an important role in continuing to educate the public about the many successful affirmative action programs that have increased oppor-

tunities, not only for racial minorities but for all people in our society. Affirmative action not only safeguards the promise of equality for minorities; it brings the full benefit of diversity to our society by enriching our culture with a multiracial perspective.

Laws alone cannot guarantee equality or justice—people must work actively to fulfill these goals. A well-informed public that understands the success and societal benefits of affirmative action will preserve our society's hopes and aspirations of true equality and justice for all.

# Comments of the Puerto Rican Legal Defense & Education Fund, Inc.

By M.D. Taracido\*

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## Introduction

The Puerto Rican Legal Defense & Education Fund appreciates the opportunity to comment on the Commission's proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*. The statement is a worthy addition to the fine collection of documents concerning important civil rights issues that have been produced and made available to the public by the Commission. Moreover, the proposed statement is a positive contribution to the literature in the field.

The timeliness and necessity of the proposed statement cannot be questioned. As the document clearly states, "Despite civil rights laws and a noticeable improvement in public attitudes toward civil rights, continued inequalities compel the conclusion that our history of racism and sexism continues to affect the present." (page 4) Too, it is especially important at this juncture to issue this public declaration in support of affirmative action as a means of ending the historical cycle of discrimination. There appears to be a withdrawal from the gains made in the last two decades in the area of civil rights. Examples of this retrenchment abound: the demise of the amendments to the Fair Housing Act that were meant to strengthen the enforcement mechanisms, the withdrawal of the Department of Education's proposed bilingual education regulations, and the continuing threats to block reauthorization of the Voting Rights Act of 1965. The Commission is to be complimented for making this effort to grapple with the emotionally explosive

issue of affirmative action during this period of apparent retreat from the principle of equal access to opportunity.

For purposes of clarity, the discussion that follows is organized according to the sections of the proposed statement that are being scrutinized.

## Part A. The Problem: Discrimination

This first section makes several contributions. In readily understood terms and replete with examples, it rightly describes the process of discrimination as operating on at least three levels—individual, organizational, and structural. The discussion of structural discrimination is especially important, since the public, in large part, fails to see the self-perpetuating and cumulative nature of the discriminatory process, and it is crucial that this be highlighted.

For example, the observation that discrimination against minorities and women is an interlocking process that started in the past and now routinely bestows privileges, favors, and advantages to white males while simultaneously imposing disadvantages on minorities and women is one that goes a long way towards placing the discriminatory process in proper perspective. In the same vein, emphasizing that seemingly neutral acts may also contribute to the discriminatory process and, indeed, may have an unequal result that fosters inequities in other areas that eventually confirm prejudices and engender new ones also contributes to a greater understanding of the self-perpetuating and interlocking nature of discrimination.

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Accordingly, we agree with your assertion that the most "productive and pragmatic approach towards eliminating discrimination starts with an informed awareness of the forms, dynamics, and subtleties of the process of discrimination." (page 15)

One unique type of discrimination not given sufficient emphasis in this section is that endured by persons of limited English proficiency. The statement's only reference to the discrimination faced by such persons is an example of "individual discrimination": "Teachers who interpret linguistic and cultural differences as indications of low potential or lack of academic interest on the part of minority students." (page 10) Language and culturally related discrimination occurring on the individual, institutional, and structural levels is one of primary concern to the Puerto Rican-Latino community and it should be addressed more fully in the proposed statement. (See discussion, part B, below.)

## Part B. Civil Rights Law and Affirmative Action

The legal analysis provided in part B of the statement also is a positive contribution. It provides a well-documented discussion of the state of the law with regard to breaking down the barriers to equal access to opportunity, including the legal bases for permitting and requiring affirmative action as a means of rectifying the present effects of past discrimination and for utilizing, if necessary, affirmative action measures, i.e., numerical ratios based on race, sex, or national origin. This discussion is quite comprehensive, and we are glad that it has been conducted in such a manner as to ensure that it will be comprehensible to the lay public. However, although part B's legal analysis is quite thorough, it fails, as does part A, to cover the issue of language and culturally related discrimination. More specifically, it fails to provide the legal bases for this type of discrimination and the affirmative action remedies that can be devised to address it. One example of a problem-remedy approach to a language-related issue is the provision of bilingual education to students with limited proficiency in English as a

means of opening up access to equal educational opportunity.

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court confirmed that school districts are compelled under Title VI of the Civil Rights Act of 1964 to address the special educational needs of children who have limited English proficiency. [Not to do so would be denying the children] their right to equal educational opportunity. Bilingual education for language minorities is the most effective means of providing equal access to education and for addressing the institutional and individual discrimination problems confronting these children. Accordingly, it is important that such programs be affirmatively established.

Like other affirmative action measures, bilingual education has been criticized as preferential treatment. It has also been charged with fostering ethnic separateness and even has been labeled as un-American. These misconceptions flow in part from the mistaken notion that the purpose of bilingual education is to preserve the native language of the student and not to teach them English. Adequate and effective bilingual educational programs provide children subject-matter instruction in their native language until they can function in an all-English classroom so as to ensure they do not lag behind their peers. It also provides instruction in English as a second language as an integral and important part of their instructional program, since a primary goal of such programs is to develop sufficient English language skills to integrate these students into the regular educational program. Anything less than this type of programming will, from the fund's perspective, deny these children their rights under Federal law. As the Supreme Court in *Lau*<sup>1</sup> stated:

[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find

<sup>1</sup> In addition to *Lau v. Nichols*, *supra*, the following cases should be discussed: *Guadalupe Organization, Inc. v. Tamale Elementary School, District No. 3*, 587 F.2d 1022 (9th Cir. 1978); *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (N. Mex. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974); *United States v. Texas, Civ. Petition No. 5281* (E.D. Tex., Jan. 7, 1981); *Rios v. Read*, 480 F.

Supp. 14 (E.D. N.Y. 1978); *Cintron v. Brentwood Union Free School District*, 455 F. Supp. 57 (E.D. N.Y. 1978); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 72 Civ. 4002 (S.D. N.Y. Aug. 29, 1974) (unreported consent decree). *But see*, *Otero v. Mesa County Valley School District No. 51*, 568 F.2d 1312 (10th Cir. 1977).

their classroom experiences wholly incomprehensible and in no way meaningful. (at 566)

The purpose, therefore, of bilingual education is to integrate students of limited English proficiency into the educational system and to provide them the same opportunity to learn, advance, and become functioning citizens of this Nation as is afforded those who have the advantage of having English proficiency. Not to address the linguistic/cultural needs of these students would be to put them at a social and legal disadvantage.

The fund urges the Commission to include a discussion of the unique discrimination confronting persons with limited English proficiency. Bilingual education as well as bilingual services and assistance are affirmative action remedies that are problem related, which fall within the legal parameters discussed in the Commission's policy statement. We have actively advocated on behalf of the Spanish-speaking community for such remedies and believe they merit specific attention and inclusion within the proposed statement's legal analysis.<sup>2</sup>

### Part C. The Remedy: Affirmative Action

The stated objective of this section is to explain the Commission's problem-remedy approach to ending discrimination. It seeks to show how, once the elements of the problem have been identified, one can devise an affirmative action remedy that will specifically address the identified problem and do so in conformance with society's legal and moral obligations. However, the Commission's posture with regard to affirmative action as a remedy is a markedly defensive one. We strongly feel this is inappropriate. Affirmative action, as was pointed out in the legal analysis section, is a legally mandated requirement in some instances and permissible in others. The Commission, therefore, need not shy away from strongly endorsing its use as an effective problem-remedy approach to discrimination.

The section also attempts to address the misconceptions, criticisms, and concerns surrounding affir-

mative action, subjects of great importance if we are to achieve clarity regarding the parameters within which one operates in using affirmative action as a remedy. Regretably, these two related, but separate, subjects have been explored in this section in a poorly organized and poorly focused manner.

Each independently is so important that you might well consider discussing them in separate sections. Minimally, however, the discussion regarding misconceptions, criticisms, and concerns should be better organized.

With regard to the discussion of the problem-remedy approach, the section should restate at the outset in clear and definitive terms the necessity, legality, and appropriateness of affirmative action remedies. On page 42 of the statement, there is eloquent and assertive language in the last two paragraphs that goes to the rationale and purpose of affirmative action. If modified and used as introductory rather than closing paragraphs, these few sentences would set both the proper tone and emphasis of the discussions to follow. Moreover, the historical, legal, and moral bases for affirmative action should be reiterated forcefully in summary form.

Having established the legality and appropriateness of affirmative remedies when there is a finding of past discrimination and having assumed a nondefensive posture, the presentation can be followed by a discussion of the kind of voluntary rectification demonstrated by *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The holding of *Weber* is of special importance, since the statement's purpose in large measure is to encourage the type of voluntary self-analysis and subsequent adoption of an affirmative remedy as was done by the Kaiser Aluminum Company.

Part C would benefit as well from the inclusion of various examples of creative and successful affirmative action plans. These successful plans and the discussion of the benefits that have accrued to both the implementing organizations and the target groups should be showcased within the section.

<sup>2</sup> See, e.g., *Asociacion Mixta Progresista v. U.S. Dept. of Health, Education, and Welfare*, Cir. No. C-72-882 SAW (N.D. Cal. 1976); *Mendoza v. Lavine*, 412 F. Supp. 1105 (S.D. N.Y. 1976); *Pabon v. Lavine*, 70 F.R.D. 674 (S.D.N.Y. 1976); *Sanchez v. Norton*, Civ. Action No. 15,732 (D. Conn. 1974); *Perdomo v. Trainor*, No. 74 C 2972 (N.D. Ill. 1976); and *Burgos v. Illinois Department of Children and Family Services*, No. 75 C 3974 (N.D. Ill. 1977). But see, *Keiri v. Edelman*, 491 F. 2d 684 (7th Cir. 1974) (bilingual assistance and materials in federally funded governmental agencies providing services in public assistance,

employment, and unemployment); *Puerto Rican Organization for Political Action v. Kasper*, 350 F. Supp. 606 (N.D. Ill. 1972), *aff'd*, 490 F. 2d 575 (7th Cir. 1973); *Lopez v. Dinkins*, No. 73 Civ. 695 (S.D. N.Y. 1973); 538 F.2d 10 (2d Cir. 1976); 69 F.R.D. 343 (S.D. N.Y. 1975); *Torres v. Sachs*, 381 F. Supp. 309 (S.D. N.Y. 1974); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974); *Ortiz v. New York State Board of Elections*, 74-455 (W.D. N.Y. 1974); *Marquez v. Falcey*, Civ. No. 1447-73 (D. N.J. 1973); (bilingual election materials and assistance).

Such examples would encourage voluntary participation while concurrently dispelling fear and removing doubt.

We agree with the Commission that the progress achieved as a result of past affirmative action efforts need not be lost nor new affirmative action efforts postponed during periods of economic crisis. Therefore, we are pleased that the Commission has included in the section C discussion creative alternatives that have been used to preserve past gains, foster new ones, and simultaneously minimize adverse impact on nonminorities, e.g., proportional layoff procedures, work sharing, inverse seniority, and public policy changes in unemployment compensation. Since, as the Commission paper states, it is important to break the historical cycle of discrimination, we would suggest that the discussion of alternative measures be expanded if that is possible. As part of this more fully developed discussion, it would be worthwhile to integrate into the main body of the text the information on work sharing and unemployment compensation contained in footnote 18 on page 39.

The section's discussion of the misconceptions, criticisms, and concerns surrounding affirmative action should be reorganized, preferably for discussion as a piece. As currently organized, this discussion is dispersed throughout the section. We believe that serves to confuse the reader and defeats what we assume is the Commission's objective, to dispel wrongly held notions.

For example, the discussion on page 36 regarding the tendency on the part of the lay public to confuse statistical underrepresentation of minorities and women with discrimination itself and the rigid demand for statistically equal representation without regard to the presence or absence of discrimination should probably be incorporated into the discussion regarding group rights that appears on page 41.

Moreover, there are instances in which wrongly held notions are not sufficiently addressed so that

the charges remain largely unanswered. As examples, the charges that affirmative action remedies substitute numerical equality for the traditional criterion of merit and that numerical quotas result in reverse discrimination (pages 40 and 42) are insufficiently addressed. They should be more fully dealt with and probably should be integrated into the discussion of quotas, goals, and preferential treatment. (pages 37-40)

With respect to the issue of preferential treatment, a major omission of the discussion on misconceptions is its failure to cite preferential selection procedures, which in the past have worked against the interests of minorities and which have had little, if anything, to do with merit. Examples of preferential treatment that have often favored nonminorities and males are political appointments, university alumni and regional preferences, veterans preferences, etc.

In sum, a balanced, well-organized, and comprehensive approach to presenting the case for affirmative action and for dispelling misconceptions must be utilized, if the Commission is to deliver a clear message to the public about the legal and moral parameters of its problem-remedy approach to ending discrimination.

## Conclusion

The sociopolitical consequences of failing to address the continuing effects of past and present discrimination affect the well-being of every person of this Nation. The responsibility to use affirmative action or other methods in order to achieve equality and dismantle the process of discrimination in the United States falls upon all of us. We agree with the Commission's assessment that "affirmative measures end when the discriminatory process ends, but without affirmative intervention, the discriminatory process may never end." (page 42)

# Statement on Behalf of the Mexican American Legal Defense and Educational Fund

By Carmen A. Estrada\*

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MALDEF applauds and strongly endorses the Commission's recent proposed publication, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*. Although I was unable to attend the consultation held in Washington, D.C. on February 10, 1981, I have had the benefit of reviewing the transcript of that consultation and base my following remarks on issues raised therein.

First of all, I found the Commission's statement on affirmative action to be not only timely but extremely useful in approaching the problem in a manner fit for the eighties. Those of us active in civil rights recognize that the mood of the Nation as well as the powers that be towards affirmative action may very well endanger future affirmative action efforts in the United States. The Commission's proposed paper addresses sensitive issues in a forthright manner, although the Commission's position on some issues might not be as strong as some of my colleagues might wish it to be. Nonetheless, the Commission has compiled and explored an extensive array of issues dealing with affirmative action as well as its legal basis and remedy resulting in the "problem-remedy" approach.

I agree with Thomas Atkins' statement that "more attention needs to be given to the nature and types of discrimination." This is important, since frequently employers make the mistake of lumping all "minori-

ties" into one category without making attempts to assess whether the needs or recruitment efforts aimed at certain minorities or women must be specialized. Further, the need for remedial action keyed to the problems of various groups is important. The Commission's input in this area would be of great assistance to persons interested in employment discrimination issues.

Although part B, which deals with civil rights and affirmative action, is primarily concerned with detailing the elements of class action discrimination, it might be helpful to include a short section on the "disparate treatment" or individual discrimination case.<sup>1</sup> This would be helpful to employers and laypersons who do not fully understand the distinction between individual vis-a-vis class action cases. Most important, the final document should stress that there is no need for affirmative action when employers have a "balanced" work force. Employers who complain about the added burdens of Federal Government intervention and affirmative action requirements need only balance their work force or make good-faith efforts to do so. I believe the Commission's proposed statement clarifies employers' duties in this regard and by making affirmative action more understandable will serve to encourage employer compliance in this important area.

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<sup>1</sup> For example, *McDonnell Douglas Corp. v. Green*, 441 U.S.

792; *Texas Dept. of Community Affairs v. Burdine*, 41 CCH. S.Ct. Bull. P.B. 1192 (1981).

Upon reviewing the transcript of the consultation held in February, I found that my colleagues adequately addressed many issues concerning affirmative action generally. The following comments address specific issues that pertain to Hispanics which were raised at the consultation:

### **Language Discrimination**

It is extremely important to note that language discrimination can be tantamount to national origin discrimination. The recent Fifth Circuit decision in *Garcia v. Gloor*<sup>2</sup> has confused the issue and left many employers uncertain as to their obligations regarding language minorities. I have received increasing numbers of complaints from individuals claiming that employers are announcing and enforcing "English-only" rules irrespective of the rule's job relatedness. The Equal Employment Opportunity Commission's recent revised guidelines on national origin<sup>3</sup> clarify this issue somewhat and provide guidelines for employers who seek to prohibit non-English speaking on the job.

### **Undocumented Alien Issue**

Commissioner Horn raised the question of job competition between "illegal aliens" and other minorities. This issue lends itself to rhetoric, and it is important to distinguish empirical data from rhetorical comments. First of all, "undocumented aliens" is far preferable to using the term "illegal aliens." Many aliens in the United States are documentable and others are not. On the whole, a very small percentage of aliens have been found by immigration courts to be here "illegally." Labeling all undocumented aliens as "illegals" does a grave injustice to them as a group.

Clearly, we encourage the Commission to gather more documentation to support the proposition that undocumented persons are "taking away" jobs from Americans before it takes a position on the issue. Most of the documentation goes contrary to this belief. As Douglas Massey of the office of population research at Princeton University says:

At this time, our best evidence suggests that the facts are these: the United States is not being inundated by an out-of-control "invasion" of illegal immigrants; nor is it likely that illegal aliens represent a burden to taxpayers; nor is there any clear evidence to indicate that on balance, illegal aliens displace American workers. Bearing these points in

mind will help put the issue of illegal immigration into a reasoned perspective.

### **Employer Sanctions**

MALDEF has protested the placing of legal sanctions against employers who hire undocumented aliens because we know that such sanctions would mean more employment discrimination against Mexican Americans. Further, we doubt that such sanctions would accomplish their stated purpose of "stemming the flow" of undocumented persons.

Well-meaning employers, fearful of government sanctions, might well shy away from hiring people who "appear foreign." Prejudiced employers will simply use the sanctions as an excuse to avoid hiring qualified minorities. At the very least, untrained and inexperienced employers are likely to err in their assessment of who is undocumented. In times of economic trouble, the Mexican American community does not need more employment discrimination.

### **National Identification Card**

MALDEF opposes any attempt to require national identification cards. As stated above, it is highly questionable whether, assuming a problem exists, this is an appropriate and effective way to address the issue. National I.D. cards will create more problems than they will solve.

The following comments, although not specific to Hispanics, may be of assistance to the Commission:

### **Bakke-Weber Decisions**

The paper's discussion of the *Bakke-Weber* line of cases was extremely useful. It sought to clarify an area of the law that has led to more confusion than direction. I agree with the Commission's analysis that both cases "leave ample room for effective affirmative action efforts." I recommend, however, that mention be made that the reluctance of the court to approve, without equivocation, the affirmative action programs and policies before it in these cases may have been the result of the absence of a real party in interest. In each of the suits, the party to the litigation was an aggrieved white male in a predominantly white institution that sponsored the challenged policy. The importance of this fact is that it excludes at the trial level the minority beneficiaries of the program or the policy being challenged from participation as a principal in the litigation. The minority beneficiaries had a tangible and significant

<sup>2</sup> 618 F.2d 264 (5th Cir., 1980).

<sup>3</sup> 29 C.F.R. §1606 (Dec. 29, 1980).

stake in the outcome that was different from the other litigants. Neither the plaintiff nor the defendants in these cases were interested in placing into the records all the facts showing discrimination and offering justification for the affirmative action effort. Thus, each of the cases reached the appellate stage with defective records, devoid of critical information tending to support the affirmative action effort that was being challenged. Therefore, it is not surprising that the final decisions lacked the clarity to put the use of quotas and affirmative action programs on a firm footing.

### **Issue of Meritocracy**

I agree with comments made that the Commission unnecessarily concedes that a meritocracy, in fact, exists. The reality is that meritocracy has been the exception rather than the rule. As stated by my colleagues at the consultation, colleges, universities,

and employers exercise their discretion to admit and employ persons for reasons other than grades, experience, and "merit." Athletes, musicians, and well-connected students have been admitted to schools under policies rarely challenged by the meritocratic purists. Further, in addition to preference issues, there is question whether seniority and tenure in the employment context run contrary to meritocracy or whether longevity really does add to "merit." Perhaps the Commission, in its report, could question the premise of merit as a valid principle before entering into its discussion of the issue in part C.

### **Conclusion**

Overall, the Commission's proposed document is an important addition to the national dialogue on affirmative action. MALDEF looks forward to its final publication and dissemination.

**ASSESSMENTS OF *AFFIRMATIVE*  
*ACTION IN THE 1980s*  
FROM A POLICY PERSPECTIVE**



# Comments

By Morris B. Abram\*

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This proposal, despite its laudable purpose, is a hazardous step for a Federal agency, the original purpose of which was to gain adherence to the rule of law in an area where progress has been made by appeal to reason and right. I say this for two reasons: First, the proposal implicitly rejects the principle of neutrality, the basis of the Constitution and the most cherished guideline of the liberal tradition since the Enlightenment. Second, the proposal rejects the principle of legality, asserting that "the legal issue" is no longer whether affirmative action "is lawful," but whether it is appropriate, regardless of statute and constitutional command.<sup>1</sup>

Moreover, despite its effort to define discrimination as a broad and pervasive problem, the proposal nevertheless adopts a singleminded and inflexible remedy for so complicated an issue. It targets white males as the sole source of remedy for the minorities of this Nation. By so doing, the proposal shows not the slightest recognition that amongst white males are some of the most disadvantaged groups and individuals in the society. Thus, while the proposal proceeds from the laudable purpose of curbing discrimination, it points in the direction of a new discrimination, of an inconceivable order and magnitude without any improvement of the old.

No one can doubt that every decent person wants a society in which each individual is judged without the incubus of distinctions based on race, color, creed, or sex; for what American, committed to the

Constitution, is not also committed to the equality of treatment of all persons, ignoring the odious distinctions that have plagued our society and positively seeking to uncover, encourage, train, admit, and employ those who have been overlooked while monitoring progress towards a fairer society. But history is replete with the examples of good men trying to do good and ending up doing evil.

I and the authors of the proposal share a common objective. It is on the question of method that our paths diverge. It is so easy, as this proposal does, to grasp at cosmetic and superficially attractive solutions to the endemic problem of discrimination, but these offer no cure and, indeed, may intensify the illness.

The "basic elements" of a group of vague affirmations, set out in the final paragraphs of the proposal, are as acceptable as the purpose of ending, or lessening, discrimination. In fact, these "basic elements" reflect the approaches and steps that I have always supported and that I understood to be the meaning of "affirmative action" when the phrase was first coined. The tone of the proposal, however, resonates with an implicit theme that the present test for nondiscrimination in all opportunities is to read out the numerical distribution of designated minorities in the totals of those selected to fill such opportunities.

Despite ambiguity in some critical passages, the paper enthusiastically supports "numerically-based

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<sup>1</sup> See proposal, p. 19.

remedies that explicitly take race, sex and national origin into account." The document endorses color-conscious actions based on those considerations and derides "neutrality" as the test for equal justice. Justice in the context of this paper has her blindfold removed.

The very arguments used by Justice Thurgood Marshall and the civil rights movement in the historic battle to invalidate invidious classification based on race and gender in a 50-year struggle are repudiated in the proposal, which stands in stark contradiction of the most sacred texts of the country, from Declaration to Constitution. Its stance flaunts the words of Mr. Justice Powell's significant opinion in *Bakke*: "Preferring members of one group for no reason other than race or ethnic origin is a discrimination for its own sake."

The proposal interchangeably uses the words "quotas," "targets," "goals," and "preferential treatment" elusively, as in a game of four-card monte, finally repeating the court description of this process as a "semantic dispute." This is true. The undeniable thrust of the proposal is for apportionment of opportunities by race and sex, call it what one will.

In truth, short of all the camouflage, this proposal is a call for quotas—for a numerically proportionate sharing of American opportunity by race and gender. If this paper became widely enforced national policy, it would set off similar demands for inclusion, in shares proportionate to their numbers, of ethnic minorities and subgroups thereof, of persons of various sexual persuasions, and, eventually, by necessity, of religious groupings. Such a policy will inevitably produce a "preferred" group total exceeding 100 percent of the whole.

The crux of the issue is whether the United States should witness, indeed encourage, a redistribution of opportunity by the numbers, using classifications that liberal elements heretofore considered not only invidious, but odious. The proposal is a call for a total inversion of the American political value system in which a Nation of religious and ethnic minorities implicitly agreed to neutrality of treatment as the only possible route to public peace and order.

There are many moral, political, and practical reasons to oppose the proposal. The overarching problem is that the proposal would reintroduce the hated element of racism into the social fabric, by rejecting the principle of neutrality. But classification by invidious distinctions is a two-edged sword,

as any American Japanese placed in a concentration camp in World War II can bear witness.

Next, the proposal rejects the principle of legality and carries the limited holdings of *Griggs* and *Albemarle*, involving coal handlers in one case and production workers in the other, to the full range of administrative and educational and presumably professional life of the country.

More generally, the philosophy of the paper was expressed in a letter to me dated February 13, 1981, from Richard Seymour of the staff of the Lawyer's Committee for Civil Rights Under Law as a representative of the plaintiffs in *Luevano v. Campbell*. Attacking PACE, the qualifying examination for 118 entry-level positions in the Federal civil service merit system, and defending an affirmative action consent decree that would have required racial-quota hiring, he wrote:

For example, suppose that 100 whites and 100 blacks applied for 50 jobs. If there were no adverse impact in the examining procedures used to select for these jobs, one would expect to see 25 blacks and 25 whites hired. Under the 80% test used by the Consent Decree, it would be a matter of indifference if 27 whites and only 23 blacks were hired.

We all know that those applicants who merit selection for any given administrative or professional job do not come proportionately divided as to race, gender, and ethnic origin in accordance with U.S. population statistics. Yet those who want to believe otherwise find it impossible to accept as valid any selection procedure that does not result in a one-to-one match between the race, gender, and ethnic composition of the applicant pool and the candidates selected. This, I fear, is the philosophy of the paper under discussion—a presumption that, for every opportunity in life, the meritorious candidates selected must necessarily include minority applicants in their proportionate numbers and that a test or admission practice based upon merit which does not confirm this presumption is hopelessly invalid and must be discarded.

The underlying principle of the proposal is that group rights (leaving aside the question of how the group should be defined) are more important than individual rights. That is, that everyone is to be treated as a group member, not as an individual with distinctive abilities, interests, and character, and that individual merit is to count for little or nothing as compared to one's gender or the color of one's skin.

Given that principle, preferential treatment for discriminated-against minorities seems appealing. Why should not those who have suffered long a pervasive discrimination, the effects of which still persist, be given some form of compensation? But the idea becomes less and less appealing under rigorous analysis, and eventually it is appalling.

First, America has had many different victims of discrimination, beginning with its native Indians. To the ranks of those who have suffered in varying degrees must be added blacks, Chicanos, Chinese, scores of ethnics, Catholics, Jews, and women. To measure discrimination by creating broad classifications of those who may ever have been affected by it is impossible, and to compensate for it by individual allocation of advantages and burdens becomes ridiculous. Those who suffered most from discrimination may have long departed and the most egregious oppressors with them. More important, within each of the protected minority groups that the EEOC classifies as "Black of non-Hispanic origin," "Hispanic," "Asian or Pacific Islanders," and "American Indian or Alaskan Native," are subgroups with different experiences of oppression. Do blacks of British West Indian origin suffer the same discrimination as American blacks? Are Japanese "Asians" in the sense of persons to be protected from present disadvantage and on what premise? Are Hispanics of Argentine origin to be given the same preferential treatment as Puerto Ricans? How much blood is required for admission to or exclusion from the preferred caste?

Second, the EEOC's broad categories of minorities to be afforded special protection, on which many of the premises of the paper rest, simply will not stand up under even the most gentle examination. The 1970 census figures demonstrate that the mean income of employed persons varied as much by subgroups within the "protected minority" classifications as the comparative figures for these classifications varied in comparison with the total U.S. population, whose median annual family income was \$10,678. West Indian black families here earned almost as much, \$9,821, though black American families earned a meager \$6,821. In the face of these facts, should we prefer all blacks equally? Are Puerto Ricans, whose average family income was \$6,728, to be preferred over American Indians whose family income was even lower? And if Hispanics in general are to be advantaged, should

we include those of Castilian origin who may have resided in Puerto Rico for two centuries?

Under the protection and advantages to be conferred on "Asians," do we include Chinese Americans whose family income of \$12,176 is well above the national average or Japanese here who enjoy, I believe, an extraordinarily high family income for any group in America? And where do the Italian Catholics fit, who may rightfully point to the massive discrimination against them enshrined for generations even in the immigration laws, or the Poles, who suffer even today from persistent ethnic slurs?

The approach of the paper, if enforced as national policy across the board, would thus recast the nature of American society. Groups would be assigned proportions of opportunities in the most bizarre manner. After allocating perhaps 20 percent of such opportunities to blacks and "Hispanics," 2 percent to American Indians, 5 percent to "Asians," 20-30 percent to those of various kinds of European ethnic origin, and varying percentages for others of differing religious or ethnic origin who have legitimate claims of unequal treatment, and making sure that assigned opportunities within these groups are divided equally between men and women, the whole may not be equal to the sum of the parts. The stage would be set for a vast resentful confrontation between people of differing race and ethnic origins.

Individuals excluded from such opportunities, even by a Title VII judgement or consent decree, would still have the right to challenge the discrimination against them as a deprivation of constitutional rights under the Civil Rights Act of 1875, 42 U.S. — 1981. In such case the claim of right originates not from an act of Congress, but from the Constitution itself and its majestic words "no state shall deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws."

It may be said that the compensatory preference will be short lived. I do not believe, however, that one should be denied a constitutional right or be the recipient of an unconstitutional advantage at any time and for any length of time. But, if anyone disagrees, then the question is, Who is to pay the compensation, to whom, in what amount, and for how long? Compensatory justice is as difficult to apply as it is impossible to calculate; in practice it will always be unfair; and as long as the Constitution

stands, it will be subject to attack. Let us take some examples:

As to fairness, consider the case of the Georgia black voter. Georgia, my native State, had denied black voters the precious civil right of franchise from the adoption of the 13th amendment until the middle 1960s. Of that there is no doubt. Nor is there any dispute as to the effects of this deprivation that linger on. Then why should Georgia not restrict white registration until blacks are proportionally enrolled? Or place whites on hold at the polling places at every election until blacks have turned out *pari passu* in relative proportions?

Consider the issue further: If disparate impact is presumptive evidence of discrimination, then voting patterns show almost without exception—North and South—that blacks are still discriminated against in respect of the ballot. If the end of voting is to elect, then the composition of the legislature of every State with a heavy black or Hispanic population will furnish ultimate proof of discrimination. If equality of result is the measure of equality of opportunity, black elected officials in Mississippi should comprise nearly 30 percent of all those elected and in New York State at least 20 percent. This is simply not the case, though blacks are free to vote in both States.

Third, the paper's constant reiteration that women are to be considered just as oppressed as blacks may have political force, but it is without factual support. At one point, the proposal makes reference to the unequal numbers of men and women at college, a point that is supposed to demonstrate the fact of discrimination. It would be less dramatic, but factual, to state that women were 47 percent of all white college students in 1978 and 56 percent of all black college students in the same year. While women have suffered gender discrimination, it is simply not true that they have suffered anything like the discrimination against blacks, Indians, Hispanics, and in some places and times Catholics and Jews. By seeing the problem of gender, racial, and ethnic discrimination in identical terms, the proposal offers an inadequate resolution of the problems.

The paper sets out what it calls a "problem-remedy" approach. This is a useful device if the problem is clearly defined and the remedy is fashioned to fit it. Unfortunately, the problem is superficially perceived, and it follows that the remedy is inappropriate. The proposal ignores that a significant proportion of American's black population is in

dire distress, at a time when the condition of other black Americans is dramatically improving.

The decline in the composite black-white median income ratio from 61 percent in 1969 to 59 percent in 1978 shows the stubborn persistence of income disparities. Within these undifferentiated figures, one can find reasons for great hope and dismal despair. But overall figures obscure rather than enlighten and make the search for remedy impossible. The figures tell us nothing of the astonishing increase in the number of blacks attending college, which quadrupled between 1965 and 1977 from a base of 274,000 to 1.1 million.

The gross income figures, when broken down, show that if discrimination is measured by income, it is not equally pervasive. For example, college-educated black women earn more than their white female counterparts, and the gap between all black and white family groupings is closing, *except* in "the exploding number of black female-headed families" over which poverty hovers, as the black chairman of the University of Chicago's Sociology Department, Professor William J. Wilson, has noted. In this category, family income is about one-third that of black households headed by a male. Thus, within the black community (leaving aside any comparison with the white), there is a vast disparity in the incomes of black families. Homes without an adult male head have grown from 23.2 percent of all black families in 1962 to 40.5 percent in 1979. It is the woefully meager incomes of these families that is skewing the median black family income average and preventing the closing of the 40 percent disparity between black and white families as a whole. Dr. Kenneth B. Clark's study, "Dark Ghetto," and Daniel Patrick Moynihan's report, "The Negro Family," agree that a grave problem has surfaced, namely, the existence of a growing black underclass in the urban ghetto.

The proposal addresses itself to discrimination in employment and other opportunities of life. But what does the Commission propose to do about the hopeless condition of the uneducated or unemployable underclass, about the frail family and the failed home? Surely these are problems, but nowhere are they mentioned in the proposal and, of course, no remedy is proposed. If poverty is the hard problem—and who can doubt it, regardless of where it originates and whatever causes it to persist—why do we not address it and seek remedies?

I have no pat solutions, but none will be found or adopted unless the problem of discrimination is seen as associated with poverty and thus placed on the national agenda for discussion. Poverty must be attacked across the board and not on purely racial lines. Need is need, ignorance is ignorance, in whatever identifiable groups they occur. Obviously, full employment, the control of inflation, better medical care, sensitive education in a noncombatant environment are all probable requirements to help people in their efforts to meet opportunity equally well prepared.

The proposal now before the Commission, however, would focus remedial action on the areas

where most progress has already been made in eliminating inequities and would leave those in direst need in the pit. The Commission's proposal is wrong in precisely the way that Justice Douglas, dissenting in *DeFunis*, referred to when he said: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

The proposal before the Commission is a piece of social engineering to move up those who are already on the upward-mobile escalator, leaving the most disadvantaged behind and dividing man against man and man against woman.

# Proposed Statement on Affirmative Action by the U.S. Commission on Civil Rights: A Critical Review

By John H. Bunzel\*

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I appreciate the invitation extended to me by the United States Commission on Civil Rights to participate in this discussion of its proposed statement on *Affirmative Action in the 1980s*. At a time when our national attention is turned to a bewildering array of economic difficulties at home and equally serious troubles abroad, I am delighted to have this opportunity to reaffirm my own strong support of a program of affirmative action that has as its major goal the elimination of all kinds of discrimination; that seeks to recruit, train, and hire qualified women and minorities; and that accepts the principle that in a democratic society an individual's worth has a higher moral claim than his or her color, sex, or origins.

I regret to say, however, that I am in basic disagreement with the Commission's latest statement on affirmative action. The report reveals an allegiance to certain major assumptions I am unable to accept. It seeks to justify and expand the use of racially preferential treatment as a way of overcoming discrimination in our society. It promotes the idea that disproportionate or unequal results index race and sex discrimination. It legitimates private, so-called voluntary affirmative action plans tied to mathematical formulas and statistical yardsticks that, if adopted across the country, would lead to more preferences based on race—and in a more unchecked manner. The Commission's message is clear: The millions of Americans who have stead-

fastly opposed all practices that give persons an advantage, or impose upon them any disadvantage, because of anything extraneous to their ability, achievement, and promise are past their prime. They are out of step with the times and no longer useful in the struggle against discrimination. They could easily conclude from the Commission's report that they are the main enemy today. They will be saddened and discouraged to learn that in the Commission's view the true pathbreakers, those who *really* oppose discrimination, are those who fight for preferential policies and quota-ridden strategies based on race, sex, and national origin.

My own differences with the Commission are of several kinds. Some are matters of emphasis and degree; others are fundamental. The examples that follow, along with the accompanying comments, are offered in the spirit of constructive criticism.

1. By what has been said and left unsaid, the Commission has embedded in its report many of the confusions and ambiguities that have surrounded the issue of affirmative action from the very beginning. Thus it states quite correctly that the first class to operate under a policy of special admissions at the Medical School of the University of California at Davis "had three Asians but no blacks, Mexican Americans, or American Indians."<sup>1</sup> What it fails to point out is that there was a broader base in the prespecial admission period of 1968-70 when the school admitted 14 Asian Americans, 2 blacks, and 1

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<sup>1</sup> Report, p. 27. Incidentally, Allan Bakke's name (on the same page) might just as well be spelled correctly ("Allan," not "Alan").

Mexican American. A quibble? Perhaps. But inasmuch as numbers are so crucial to the Commission, why not, in fairness, present them all?

A more serious matter is the Commission's treatment of Justice Lewis Powell's opinion in the *Bakke* case. The report leaves the impression that Mr. Powell gave an affirmative action justification for special admissions. Yet the Commission knows that the only reason Mr. Powell gave for permitting race to be used was to bring about more diversity. Furthermore, Mr. Powell rested his decision not on affirmative action grounds, but on the first amendment. This was not a semantic evasion on his part. It represented the underpinning of his argument.

Consider also the discussion of intended versus unintended discrimination. The Commission is clear about its own feeling that the "disparate effect" of employment tests and other selection mechanisms, not discriminatory purpose, is the much more important standard. It draws attention to *Griggs v. Duke Power Company* (1971) to underscore its position. But the reader of the report is never told that in the case of *Washington v. Davis* (1976) the Supreme Court stated that a Federal civil service exam of "verbal ability, vocabulary, reading, and comprehension" was not unconstitutional "simply because a greater proportion of Negroes failed to qualify than members of other racial or ethnic groups." The fact that the test had a "disproportionate impact on blacks as a group," wrote Justice Byron White, does not warrant a conclusion of purposeful discrimination. The test was "neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue." In trying to persuade us that discrimination exists regardless of whether discriminatory intent exists, the Commission has failed to mention the Supreme Court's declaration that action which has a differential effect is still not unconstitutional. A more fair and complete discussion of this complex issue would have pointed out that in *Washington v. Davis* the Court left unimpaired the "basic equal-protection principle that the invidious quality of a law claimed to be racially discriminatory must

ultimately be traced to a racially discriminatory purpose."

2. The Commission uses public opinion polling data (p. 4) to show that "the expression of prejudiced attitudes towards blacks and women have [sic] continued to decline" and that there has been "a noticeable improvement in public attitudes towards civil rights." What it does not state is that many of its most important views on affirmative action are not supported by public opinion, as revealed in virtually every poll ever taken. This is never mentioned, which is another reason why the Commission can fairly be said to have authored a one-sided advocacy report.<sup>2</sup> A more balanced statement would have included the following information: (A) Large majorities of blacks and whites favor setting up special programs for women and minorities so they can be given "every chance to have equal opportunities in employment and education" and providing "special training and advice" so they can perform better on the job. Stated simply, Americans approve of *compensatory action* to help make up for past discrimination based on race, sex, poverty, or other grounds. (B) What Americans do *not* support is preferential treatment—*not* just quotas, which are opposed by most Americans, but any form of absolute preference. A Gallup poll in 1977 showed that an overwhelming proportion of the public—8 in 10—opposed preferential treatment. Eight in 10 college students took the same position, with non-whites rejecting preferential treatment by 49 percent. (C) In 1974 Gallup found that 96 percent favored promoting the "best qualified" regardless of race; over 80 percent of the blacks polled agreed. A New York Times-CBS News survey in 1977 confirmed that 60 percent of the whites and 42 percent of the blacks disapproved of a school's "reserving a certain number of places for qualified minority applicants even if it meant that some qualified white applicants wouldn't be admitted." As Daniel Yankelovich has observed, "There is no ambiguity about where the majority stands. More than 80 percent are against affirmative action when it is carried to the point of reverse discrimination."<sup>3</sup>

<sup>2</sup> Even the use of footnotes, while extensive, is very selective. There is no recognition of the large body of argument and literature on affirmative action that runs counter to the Commission's point of view.

<sup>3</sup> These are data that the Commission cannot afford to overlook or dismiss. I was reminded again of their importance when I read that Patricia Harris, former Secretary of Health and Human

Services, recently said, "I hear about so-called 'reverse discrimination' but I have never seen it." Perhaps, in the words of Equal Employment Opportunity Commission Head Eleanor Holmes Norton, she would simply have the term "banished from the language." One would like to know if the Commission also

3. I applaud the Commission for its strong opposition to discrimination. Furthermore, I support its wish to see a society "in which achievements and aspirations are unaffected by race, sex, or national origin." I also believe the Commission is right when it says it is necessary "to identify as precisely as possible the ways in which discrimination works to prevent the just sharing of resources and opportunities." However, I wish it had also said (and *will* say in its final report) that it is just as necessary to identify those circumstances where intergroup statistical variations do *not* automatically point to discriminatory behavior. The problem is with the Commission's understanding of what constitutes discrimination. It is insufficiently broad and flexible to deal with many complicating factors. Moreover, the Commission's report is critically flawed by a disregard of evidence and experience that disconfirm its contention that only discrimination can explain differences in salary levels, promotion rates, or representation. It is as if the age, education, income, and cultural values (as well as other social and economic differences) of American women and ethnic groups were not decisive considerations.

I want to illustrate the point by discussing a specific case that challenges the Commission's view of organizational discrimination. In August 1978 the XYZ Corporation, a Fortune 500 company, was charged with sex discrimination in one of its divisions.<sup>4</sup> The suit was filed by several female clerks who pointed to the fact that, while 82 percent of the entry-level jobs were filled by women between 1971 and 1978, female clerks were only 74 percent of those promoted in 1978 and only 61 percent of those promoted in earlier years. XYZ did not dispute these figures, but its management could not explain them. Discrimination was forbidden; an entire district supervisory staff had once been dismissed for such practices; XYZ's management was sure employees were treated fairly. There were no differences in education, training, or experience that could explain the differences, and seniority was not a factor. Management insisted that only knowledge of the job, performance, and leadership played a part in promotion, but never asserted that there were differences between men and women in these respects. The president of the company had started in

an entry-level job in this particular division. The management of XYZ was genuinely puzzled. Furthermore, the corporation stood to lose a lot of money.

XYZ decided to ask Hoffman Research Associates (HRA), a North Carolina consulting firm, to conduct a study of its personnel practices. The research task was to determine the reasons for the lower rate of promotion for female than for male clerks and to study another pattern that management had noticed, that of women being less likely than men to apply for lateral transfer within the company. Trained interviewers conducted private, personal interviews, on company time, with independent samples of 363 female clerks, 283 male clerks, and 204 supervisors (102 male and 102 female). The samples were drawn randomly and proportionately from some 20 offices in all parts of the continental United States. The questions of particular interest to HRA were embedded in a lengthy "job satisfaction" questionnaire.

The members of the Commission should be interested in the findings of this comprehensive study:

A. Analysis of the data made it clear that male and female clerks at XYZ were promoted in almost exactly the same proportions as they expressed interest in promotion. On the face of it, the difference in promotion rates for men and for women did not result from practices and policies that discriminated against women, but from a pattern of behaviors and attitudes that led male clerks more often than female clerks to seek and to accept promotion. Those who reported that they had sought promotion were twice as likely as the others to report that they had actually been offered promotion at some point.

B. Although a good many respondents of both sexes were dissatisfied with various aspects of their jobs, only a negligible proportion complained about discrimination of any sort—sex, race, religious, or age—and males were more likely than females to complain. When female clerks were asked why they had not, in fact, been offered promotion, they were much more likely than males to indicate they were known to be uninterested or that they were not qualified. HRA was able to demonstrate from its data that the difference in promotion rates between

language of the summary report by Carl Hoffman and John Shelton Reed as it appeared in *The Public Interest*, no. 62, Winter 1981, pp. 21–39.

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believes that "reverse discrimination" is a nonproblem that should be put to rest.

<sup>4</sup> The factual account present here is, for the most part, in the

male and female clerks was not due to company policy or practice.

C. The differences in behavior that did produce the difference in promotion rates appear to lie in the fact that female clerks were likely to have lower aspirations than male clerks, less likely to have had the time or to have felt they had the ability for higher level positions, more likely to have seen their employment as a “job” rather than as a stage in a career, and more likely to have sought better working conditions rather than advancement. In short, the women’s ambitions, both for immediate advancement and long-term success, were more limited than the men’s. This difference was present when they were hired. It was not something the XYZ corporation created.

D. For many more female than male clerks, the question of promotion was of little importance, because they did not intend to remain employed. Female clerks were significantly more likely than male clerks to plan to drop out of the labor force, at least for a while, and more likely actually to have done so in the past. Women, more than men, were unwilling or unable to make a number of sacrifices that, they recognized, career advancement requires. Moreover, a pattern of discontinuous employment, reflecting commitments other than to one’s career, was more common among women than among men. Finally, women were substantially more likely than men to believe they lacked the ability to fill higher level positions. While the perceptions of female clerks—or, for that matter, those of male clerks—may be inaccurate, they can have the same effects as a real difference in abilities.

E. There was no difference between men and women with low motivation: Neither group was likely to have sought promotion. Those with high motivation were much more likely to have done so—twice as likely if they were women, three times as likely if they were men. But HRA wanted to know why women who were apparently motivated to seek promotion were less likely than men actually to have done so. The data show that the differences between unmotivated men and women were relatively small, as were those between highly motivated, *unmarried* men and women. The largest difference between men and women was that between highly motivated married men and highly motivated married women. Marriage appears to increase promotion seeking among highly motivated men and to decrease it among highly motivated women. For

nearly all HRA’s measures of motivation, commitment, promotion seeking, and perceived ability to meet the demands of a new position, the effect of marriage—marriage per se, without the added complications of childrearing—was to reduce the likelihood of promotion for women, on the average, and to increase that for men.

There is an important postscript to this true story. If this survey had not been conducted, XYZ would probably have lost the lawsuit, paid million-dollar damages, and been subjected to injunctive procedures setting up goals and timetables for the elimination of discrimination. But HRA was able to show that the relatively low proportion of women among those promoted did not reflect discrimination. It reflected differences in the behaviors and attitudes of male and female clerks—differences the company and its policies had no part in producing.

Some may say (and perhaps members of the Commission will choose to believe) that the XYZ Corporation is atypical, an exception in the business community. That would be a conclusion based not on a careful canvassing of actual business practices and the data they often produce, but, again, on the Commission’s view that discrimination is borne out by “the numbers.” I believe the Commission has an obligation to let us know how it would apply its own view, namely, that a systematic web of discrimination exists in all our institutions, to the specifics of the XYZ experience. I am asking the Commission to state whether what happened at XYZ is discrimination in the meaning of its report. If it is, is it the kind of discrimination that the Commission feels should be remedied by government action? Inasmuch as the XYZ explanation of differential rates of promotion is anchored in differential roles of men and women, does this set an agenda for investigatory action by a Federal agency? If the answer is yes, does the Commission understand what is truly involved—in a word, that it would require a quantum leap in government intrusion culminating in a bureaucratic nightmare? Finally, does the Commission recommend that all companies do what XYZ did to show the inappropriateness of transforming by reflex action the meaning of discrimination into a numerical concept?

If the Commission believes that the situation at XYZ does not constitute discrimination, I urge it to state that it is not an example of what it calls “a self-perpetuating discriminatory process” that is a “barrier to equal opportunity” and that it lies outside of

the government's realm. My interest is not in further exoneration of XYZ. It needs none. It does not meet a fair and reasonable test of discrimination. My challenge to the Commission is that, against the backdrop of this case, it recognize that the criteria for discrimination it has adopted and that are applied by such agencies as the Equal Employment Opportunity Commission too often reinforce the ideology of quotas now prevailing in many quarters and undermine important values of the democratic ethic of this country, including individual rights and initiative in the competition for social benefits and opportunities. I would hope that the Commission, drawing on lessons of the XYZ experience, would declare that "a criterion of party, the insistence that a category of individuals is entitled to rewards proportionate to its numbers and not to its members' performance, does not serve the common good."<sup>5</sup>

4. As a university administrator, I regularly encountered the seemingly powerful argument that statistical underrepresentation of women and minorities provides irrefutable proof of discrimination and unequal treatment. Today it has become virtually a conclusion, to the point that the burden to prove good behavior has shifted to the campus to show that it is *not guilty* of discriminating on grounds of race, reversing the ordinary requirements of legal procedure. It is as if our colleges have lost the right to be considered innocent until proven guilty because the gross use of numbers and percentages is presumed to yield *prima facie* evidence of their guilt. It would be foolish to claim that underrepresentation never provides evidence relevant to the discovery of discrimination. Of course it might. But the Commission has made no attempt to unravel the multiple confusions having to do with careless attempts to make words like "discrimination" and "unequal" synonymous with terms like "disproportionate" and "underutilized."

It could begin by pointing out that the most general difficulty with the argument that underutilization/disproportionality equals discrimination is that it conveniently overlooks the fact that there have always been differences of values, orientation, taste, expectation, and the like among the varied groups that compose this or any other country. Many cruel perversions of our political life as a Nation have exacerbated these differences, sometimes making them into heavy burdens or vicious

stereotypes that have barred the way of some minorities to advancement. We need to continue and indeed to deepen our moral resistance and our legal opposition to such betrayals of the principle that all men are created equal. But, to do this effectively, we must have a clear mind about what is to be concluded from our observations of the real world.

The fact is that many of the differences of group outlook—differences that have influenced a disproportionate number of Italians to become opera singers, a disproportionate number of Armenians to become truck farmers, and a disproportionate number of Jews to become doctors, college professors, and novelists (and, if C.P. Snow is correct, to constitute almost half of those ever awarded the Nobel prize for excellence in science)—these differences express *prima facie* evidence *not* of discrimination, but rather of the vitality of democracy. These specialized choices are derived from deep allegiances to group loyalties, to religious ties, to sentimental attachments, to cherished traditions and ethnic identification. It is not necessary to believe that every aspect of these choices has been free of constraint in every respect in order to defend them as expressions of democracy. Such a view would be perfectionistic and unrealistic. It is only important to understand that the alternative to such choices—quota arrangements that would assure proportionality—is an infinitely greater source of constraints on our freedom and provides absolutely no assurance—either with reference to logic or the record of social practice—of possible success. It is also important to understand that many of these choices that have resulted in disproportionality were made in an environment that offered alternative possibilities.

I invite the Commission to consider the example of Asian Americans. They are overrepresented in the aggregate in high-status income and occupational levels in our society. Simply stated, they are not evenly distributed. Thus there are great disproportions of Japanese and Chinese Americans in such fields as mathematics, engineering, and premedical training. On the other hand, they are severely underrepresented in the social sciences, humanities, law, and in business schools. Does the Commission propose that something should be done about it? Is there a problem of discrimination here? If so, what is its character? The fact is that this kind of ethnic pattern is very much the norm—and for other

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<sup>5</sup> Ibid., p. 39.

American ethnic groups too. If this is so, why should some approximation of proportional representation of various groups be set up as the government's preferred remedy and result? If disproportionality denotes discrimination, then practically every ethnic group in the country can show that it is underrepresented in some occupation.

5. One reason I do not think quotas (by any name) can be invoked in a "good cause" is because I do not believe bad means can assure us of good ends. In the hiring of faculty, the use of quotas or fixed ratios will result in harmful incremental additions to the life and values of our universities. This does not mean that I am insensitive to legitimate concerns. For example, blacks, Mexican Americans, and other groups are not heavily represented on college faculties. Some say that our colleges and universities should, therefore, move at once to bring about a statistically acceptable representation of women and minorities on their faculties. Others go so far as to say there should be a formula for some form of proportional representation of races and sexes. But this is what I wish the Commission would state clearly some place in its report: that a university does not and should not make faculty appointments the way the Democratic Party chooses convention delegates; that if a college or university gives preference in its faculty hiring to certain groups on racial grounds, it undermines the fundamental ideal and precept of individual performance and merit; that the proper goal is to hire the best qualified person, and that the paramount criteria should be accomplishment and capacity in teaching and research; that it misses the point to say that quotas are "flexible," not "inflexible," or that they are only "numerical goals," because the real objection to quotas is that they shift the emphasis from considerations of quality to quantity. The Commission should also point out that while we frequently construct public policies that provide social justice to a class, race, or ethnic group, we do not *hire* a class, race, or ethnic group. We hire a *person*.

The Commission decries only "invidious quotas." It presumably approves of the rest—what I suppose can be called congenial quotas—but chooses to call them "numerically-based remedies that explicitly take race, sex, and national origin into account." What the Commission wants us to believe is that a quota is all right if it can be invoked in a good cause which (surprise) is a cause that it supports. However, it knows that most people do not like the smell

of quotas and thus prefers an inoffensive and much milder term such as "numerical goals." Perhaps, following Alfred Kahn, the Commission would have us call a quota a banana.

This is not a trivial matter. My experience in the academic world has confirmed what administrators and faculty members across the country have discovered, that fixed ratios, percentages, or "numerical goals and timetables" in university faculty hiring, when put into actual practice, are almost invariably thinly disguised functional equivalents of quotas. The truth is that the Commission has been less than candid about quotas because of what it has failed to emphasize. A balanced report would declare openly: (a) that the quota mentality makes a selfish appeal to group or individual advantage that is fundamentally destructive of the common set of rules that alone bind us together as a people and as a nation, (b) that quotas can reduce the incentive for genuine reform by encouraging many people to believe that discrimination can be and is being dealt with by relatively mechanical means, and (c) that even a person who stands to gain an advantage from a quota is being treated unequally because he or she is given that advantage by restricting someone else's access to equal opportunity. One would like to know if the Commission really believes that such a quota advantage, especially when it is purposely imposed to produce certain outcomes, serves our commonsense notion of justice.

6. As an educator I am concerned that the number of minority students enrolled in the Nation's graduate and professional schools has dropped. For example, there are no blacks in this year's first-year class at the UC-Davis medical school, although it offered enrollment to five blacks. The decline is especially severe in graduate schools, which are the "training ground" for our future college teachers. At Stanford, new minority student enrollment in master's and doctoral programs dropped more than 50 percent this year, from 78 in the fall of 1979 to 37 in the fall of 1980. (The total number of graduate students enrolled in these programs this year is 3,700.) At Harvard, the number of minority students who applied for graduate programs declined to 67 this year, down from 141 in 1977.

There is no evidence to suggest that minority students are turning away from the major private universities to the less expensive public ones. At both the University of California at Berkeley and the University of Michigan, the number of minority

graduate students has also declined. As education correspondent for the *San Francisco Chronicle* William Grant has remarked, "What may be a significant opportunity to improve the proportion of minorities on the faculty at many universities could be lost because of the small number of blacks, Latinos and other minorities now working toward Ph.Ds."

The trend is clear. What is not clear is why it exists. I recommend that the Commission undertake a national study based on extensive interviews that would provide the necessary data to explain what is happening to minority enrollments at all levels of postsecondary education. The Commission would be expected to let us know whether it believes (as some are now quick to charge—without any data) that the decline in graduate minority applications and admissions results from the fact that the *Bakke* decision rejected the idea that schools could use strict numerical quotas to set aside specific places for blacks and other minorities. After such a study, one would want to know if the Commission felt that the only way to stop the trend is for colleges to have to admit specific numbers of minorities. (Does the Commission take that position now?)

For many years I have believed that many affirmative actionists who attack our colleges and universities today are really attacking the wrong problem. The kind of affirmative action program I have long supported stresses the importance of increased opportunities for academic training for women and minorities by (among other things) rescuing good minds at the high school level before they become dulled and ill-equipped to go to college. I am talking about an educational program that would benefit the handicapped, by which I mean giving people, on a nondiscriminatory basis, a chance to overcome poverty, a bad family situation, and the like. It seems to me that much of the Commission's emphasis that is put into affirmative action enforcement could wisely and profitably be put into discovery and assistance.

There are early educational problems to which the report is conspicuously inattentive, even though these bear directly on affirmative action. For example, researchers point out that educators must intervene early to improve the basic skills of high school black students if they are to "catch up" to their white peers. Psychology professor Lloyd

Humphreys of the University of Illinois states that without early intervention, affirmative action programs to increase minorities in the professions will lower the standards of professional schools. His point is that affirmative action programs after age 18 are not the real answer to minority underrepresentation. Humphreys' studies show that black and white differences on achievement test scores span a wide range of skills, including oral and visual reading comprehension, English composition, and math reasoning. A question for the Commission is this: In the light of these differences, does it believe that some form of proportional representation in engineering, law, and medical schools is justified?

7. A major deficiency of the report is that the Commission has stayed above the political clashes of interests and values that are always implicit in affirmative action. In an almost philosophical manner, it calls for an incredibly fine-tuned set of preferential policies that tend to be irrelevant to the middle-level managers who must deal with the everyday problems and pressures in the real world of affirmative action. Moralism, it has been said, is not a substitute for practicality, which perhaps is why I found so much of the analysis in the report that is left at the legal level to be light years away from affirmative action in operation.

Leonard Reed, a contributing editor of *The Washington Monthly*, has written an article chronicling some of the ways affirmative action works in the Federal Government. He cites, for example, the head of one subdivision of a government agency involved in radio broadcasting who was told by a recent director of the organization that he expected him "to hire a 'disproportionate' number of blacks for all subsequent vacancies." By disproportionate, he explained, he meant about 70 percent. The manager protested that of 190 applicants for the 2 available announcer jobs, he could identify only 2 as blacks, and their auditions had not been even close to the passing range. "Yes," said the broadcaster, "there are applicants that nobody wants. I resent being told that for them we should lower the standards. Well, it didn't do any good to explain—he told me that I fill the vacancies with blacks or not at all."<sup>6</sup>

Or the executive in another government department whose job was "to put together a staff of 18,

<sup>6</sup> Leonard Reed, "What's Wrong With Affirmative Action," *The Washington Monthly*, January 1981, pp. 24–31.

comprised of the best professional talent available.” After having hired four people, he was:

told flatly that although there wasn't exactly a quota, if I didn't get more women and minorities immediately I wouldn't be permitted to complete the staffing. . . . I was in a very awkward situation. . . . Women, and particularly minorities, are scarce. And, finally, what you do, facing reality, you accept people who are the best of a very uncertain lot. I believe in upgrading people, not downgrading standards, but that's not where it is today. People get sent around from the Director's office with a "Must Hire" tag on them. I have so far filled eleven of the jobs—seven of them with "targeted" people. In the affirmative action element of my performance rating I was graded "outstanding." But whether the people I've put on staff are adequate is another story. The point is that the emphasis isn't on qualifications, it's on the quota.<sup>7</sup>

What kind of penalties would the Commission recommend for those who push affirmative action into such unwarranted forms of racial preference? Would it even blow the whistle?

What is missing in the Commission's report (as it has been in its other reports over the years) is a fact-anchored scrutiny of the way affirmative action too often works. The Commission seems unaware of what actually happens when those in the government agencies, business firms, or our universities who want to open up jobs for truly qualified minorities become frustrated and demoralized when they are pressured to choose people not because they are the best, but because they will contribute to the percentile figures already set. The credibility of the Commission will remain an issue unless it faces up to some of the affirmative action practices that, having gone beyond its own guidelines, have taken on a life and momentum of their own.

I recommend to the Commission that it spend some of its money on interviewing the practitioners of affirmative action to see what they have to go through in directly administering the program on the job. It would come up with a much better understanding of what really takes place if it were to conduct a totally independent survey of those who live with affirmative action. As it now stands, the report lacks an empirical base. I would suggest that only with this kind of data can a serious and reasonable policy be derived.

The Executive order that established the policy of affirmative action was clear in its original purpose:

The contractor *will not discriminate* against any employee or applicant for employment *because of* race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, *without regard to* their race, color, religion, sex or national origin. . . . The contractor agrees to post . . . notices . . . setting forth the provisions of *this nondiscrimination clause*.

Through a variety of regulations and court rulings, the original purpose of affirmative action has been transformed from a *nondiscrimination* policy that mandated the treatment of all persons *without regard to* their race, gender, or background into a preferential policy of *affirmative discrimination* that identifies persons *solely on the basis of* their race, sex, or national origin. The distinguished attorney Joseph L. Rauh put it succinctly when he said that much of the talk "about affirmative action among qualified people is not affirmative action. You have to have preference for blacks if you really want affirmative action."<sup>8</sup>

This change of purpose is not supported by the great majority of the American people. I would propose two courses of action to help restore what affirmative action was originally intended to accomplish:

*First*, that President Reagan issue a new Executive order or clarifying declaration to all departments (and, in particular, the Department of Labor) stating that no Federal agency shall adopt any policy, regulation, or practice requiring or encouraging either the consideration of persons *with regard to* their race, color, religion, sex, or national origin, or the recruitment, employment, or promotion of persons of any group in numbers proportional to their representation in the employer's labor market or in the population. I further suggest that language also be included saying that no employment practice shall be considered discriminatory merely because it may happen to affect persons of a particular race, sex, or national origin differently from the way it affects persons of another race, sex, or national origin. By narrowing the definition of discrimination in this way, the compliance agency would have to show that a "differential impact" on women or minority persons was the *intended* effect of an employment or promotion practice.

<sup>7</sup> Loc. cit.

<sup>8</sup> Quoted in the *National Journal*, Nov. 3, 1979, p. 1852.

*Second*, that Congress assert its legislative responsibilities by providing conclusive evidence on how it views the redefinition of equality currently taking place—whether, for example, an explicit (or even implicit) policy of racial preferences in hiring (or school admissions) is the will of the popularly elected branch of our government. It could begin by restating the purposes of the Civil Rights Act, including one pertinent section:

*Nothing* contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group...on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer. . .in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community. . .or in the available work force in any community, state, section or other area.

A fundamental policy question for Congress is this: If race or ethnicity, once abolished by the Supreme Court as a permissible basis for governmental classification (the *Brown* case of 1954), is to be reinstated as a legitimate and desirable ground for awarding jobs, social benefits, or opportunities, and if rights and special preferences are to be given to certain groups (but not to others), should the courts or the rulemakers in EEOC, OFCC, or elsewhere make political decisions about how to institutionalize the “new legitimacy” without the legislative process being engaged?

Congress is as much a guardian of the people’s liberties and welfare as are the courts. In addition to reaffirming the principle of nondiscrimination against anyone on the grounds of race or sex, it should address itself to the unresolved and critical issue of how equality in the United States derives its meaning as well as its limits from the larger system of democratic values to which it belongs. An inquiry of this sort could be the opportunity for an airing in the appropriate national forum of whether (or when) overt race-based and group-oriented preferential policies are justified in order to create equal opportunity.

## Summary

I wish to reaffirm my own strong support of a program of affirmative action that has as its major goal the elimination of all kinds of discrimination; that seeks to recruit, train, and hire qualified women and minorities; and that accepts the principle that in

a democratic society an individual’s worth has a higher moral claim than his or her color, sex, or origins.

However, the Commission’s report reveals an allegiance to certain major assumptions I am unable to accept. It seeks to justify and expand the use of racially preferential treatment as a way of overcoming discrimination in our society. It also promotes the idea that disproportionate or unequal results index race and sex discrimination. It legitimates private, so-called voluntary affirmative action plans tied to mathematical formulas and statistical yardsticks that, if adopted across the country, would lead to more preferences based on race.

I am in disagreement with the Commission on other points, some of which are matters of emphasis, others more fundamental:

- The Commission’s reference to public opinion polling data does not indicate that while most Americans approve of *compensatory action* to help make up for past discrimination, they do *not* support preferential treatment—not just quotas, but any form of absolute preference.
- The Commission’s “numbers definition” of discrimination no longer turns on whether an employer purposely took race into account when making hiring decisions. The new test is whether an employer’s hiring procedures have a “differential impact” on certain (but not all) minority groups. I do not believe this approach will promote the genuine equality of opportunity that the American people want.
- The Commission’s discussion of “invidious quotas” would be more complete if it declared openly that the quota mentality makes a selfish appeal to group or individual advantage that is fundamentally destructive of the common set of rules that alone bind us together as a people.
- A major deficiency of the report is that the Commission has stayed above the political clashes of interests and values that are always implicit in affirmative action. What is missing is a fact-anchored scrutiny of the way affirmative action too often works—where the pressures on middle managers, for example, are to choose new employees not because they are the best, but because they will contribute to the percentile figures already set.

Affirmative action has been transformed from a *nondiscrimination* policy that mandated the treatment of all persons “*without regard to* their race, color, religion, sex or national origin” into a prefer-

ential policy of *affirmative discrimination* that identifies persons *solely on the basis of* their race, sex, or background. I would urge President Reagan to help restore affirmative action to its original purpose through an Executive order or clarifying declaration.

Congress is as much a guardian of the people's liberties and welfare as are the courts. In addition to

reaffirming the principle of nondiscrimination against anyone on the grounds of race or sex, it should assert its policymaking responsibilities by addressing itself to the unresolved and critical issue of how equality in the United States derives its meaning as well as its limits from the larger system of democratic values to which it belongs.

# Affirmative Action: Problems, Remedies, and Prognosis in the 1980s

By Kenneth B. Clark\*

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I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

Justice Blackmun

*University of California Regents v. Bakke*

June 28, 1978

The 1964 Civil Rights Act, and particularly Title VII of the act, may be viewed as one of the major successess of the civil rights movement of the 1950s and 1960s. Prior to the enactment of this statute, white males were generally accepted as the preferred group in employment for managerial, supervisory, and executive positions. It was generally accepted that this group would have a higher income than other groups in the economy. For the most part, females were found concentrated in secretarial and clerical positions, while the disproportionate bulk of minorities were restricted to menial and maintenance roles in the society. Almost nobody questioned the pervasive evidence of differential economic and occupational status based upon sex and race. Whether such discrimination was intentional or nonintentional is not only debatable, but also not particularly relevant to the face of its existence. And while one could argue with some justification that the lower occupational status of

minorities was a reflection of the existing pattern of inferior education inflicted upon blacks in segregated schools, this assumption did not hold for the employment discrimination of females. Upon these facts were based the laws prohibiting discrimination in employment and the Executive orders requiring affirmative action for those corporations doing business with the Federal Government. Title VII of the 1964 Civil Rights Act as amended in 1972 thereby prohibited discrimination on the basis of race, color, religion, sex, and national origin. The Equal Employment Opportunity Commission (EEOC) was set up under this law with the authority of seeking conciliation among the aggrieved parties and the corporations, and with the power to provide remedies through consent decrees.

Executive Order 11246 and Executive Order 11141 went beyond the requirement of prohibiting discrimination against any of the protected groups. They required employers with Federal contracts in excess of \$10,000 to develop and implement an affirmative action plan that would seek to remedy the effects of past discrimination. The Office of Federal Contract Compliance Programs of the Department of Labor (OFCCP) was charged with the responsibility of reviewing such plans and of determining that the employers were complying with them. The affirmative action programs stated in the plans were to demonstrate results in the recruitment and hiring of minorities and females, as well as good faith in seeking to achieve these goals within a reasonable period of time.

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In 1977 then-President Carter appointed a task force to examine the problem of the large number of Federal agencies that were involved in enforcement of civil rights and affirmative action laws, rules, and regulations. The task force recommended the consolidation of the monitoring and enforcement powers of equal employment and affirmative action into two agencies, namely, the EEOC and the OFCCP. All other departmental agencies involved were either to be eliminated or to be transferred to these two agencies. The monitoring of equal opportunities in employment was specifically transferred from the Civil Service Commission to the EEOC. The EEOC Coordinating Council was abolished. At the time of the acceptance of these recommendations by President Carter, it was understood that the results of this reorganization would be reexamined after a 2-year period. It is not clear to this observer whether such reexamination occurred and, if so, what decisions have or have not been made on the basis of the available evidence.

## **I. Problems**

On the basis of my experience as a student of the complex problem of American racism and my 6-year experience as the head of an equal employment/affirmative action consulting firm, I am prepared to share the following observations, which I believe to be relevant to the statement of the United States Commission on Civil Rights currently under discussion.

Enforcement of equal employment and affirmative action rules and regulations at best has been inadequate and spasmodic. Up until the present, the EEOC and the OFCCP did not seem to have the staff adequate to deal with the large number of complaints. Unlike the IRS, EEOC seemed unable to initiate inquiries in a systematic fashion. The problem of an unrealistically long waiting list was one of the major difficulties facing the EEOC as it sought to discharge its enforcement responsibilities. It appears clear that both the EEOC and the OFCCP were required to fulfill their functions by dealing with selected, high-visibility corporations such as AT&T. One could argue that this selective, if not discriminatory, approach to the problems of seeking compliance is based upon the belief that the publicity generated by such cases would have a filtered-down effect and would result in compliance on the part of other corporations not being audited.

The success of this assumption is not clear from the available evidence.

Certain companies and institutions seemed to have been immune to the scrutiny and compliance audits in spite of complaints on the part of employees from the protected groups. Employees of such companies were required to seek remedies through the Federal courts. Among the corporations that seemed to have been immune to enforcement pressure from the Federal regulatory agencies were smaller and middle-sized corporations, foreign corporations, and, with a few exceptions, educational institutions. One could speculate with some degree of justification that this differential approach of seeking compliance was, in a rather curious way, discriminatory. Ironically, laws that were designed to protect individuals in protected groups from discrimination were enforced in a discriminatory manner.

Another problem which cannot be ignored is that, prior to the 1977 consolidation of enforcement powers, those corporations seeking to comply with the Civil Rights Act and Executive orders were themselves faced with conflicting standards and judgments from the personnel of the variety of governmental agencies with whom they were required to deal. The same pattern of results accepted by one agency could be, and often was, rejected by the agents of another agency. This problem was further aggravated by differences in approach and in requirements among State and local civil rights enforcement bureaucracies. State and local agencies seemed to have been more lenient in their compliance demands.

Many of the corporate clients of my firm, and particularly those that seemed most desirous of compliance, complained that they were diverted from serious attempts at compliance through an excessive demand for paperwork, reports, and statistics. These excessive demands eventually subordinated the realities of affirmative action programs. Corporations and institutions that were not subjected to major enforcement audits seemed able to meet the letter rather than the spirit of the laws by the manipulation of data, changing of job titles, and other token devices.

There is little question that the most complex problems related to enforcement of the affirmative action and equal opportunities laws are those that reflect the present manifestations of flagrant and subtle racist backlash. The resistances to equal employment opportunity and affirmative action

should be expected, given the fact that the laws were required. Obviously, if equal opportunities were practiced, there would be no need for corrective legislation. While it is true that the more flagrant forms of white backlash rarely expressed themselves in terms of racial epithets and overt racial stereotyping, it is also true that reacting against effective compliance with affirmative action would result in the reduction of standards and efficiency, and would interfere with the primary priorities and objectives of the corporation and institutions. In the attempt to remedy the effects of past racism in the area of employment, a new semantics of racism has developed. It has become fashionable to state that increasing the number and percentage of minorities and females in positions from which they had previously been excluded was a form of "reverse discrimination," and "preferential treatment." This process should be rejected as a form of negative "quotas." The common denominator of these code terms was that all effective attempts at remedying past discrimination are inherently racist and violative of antidiscrimination laws. The most publicized examples of this approach are to be found in the rationale of the *Bakke* and *Weber* cases. The backlash movement and its relevant semantics must be understood as part of a total pattern of racial regression, if not the functional repeal of the *Brown* decision. These problems were further complicated by the onset of the doldrums of the civil rights movement, which reached its zenith in the 1960s. For some not clearly understood reasons, in the 1970s the civil rights agencies seemed unable to cope with the complicated, confusing, and diversionary forms of resistance to the gains of the 1960s. The frustrations of blacks were manifested not only in relative passivity, but also in the fortunately short-lived rise of black separatism that was publicized under the guise of black militancy.

There was another diversion that contributed to the general pattern of problems which interfered with the effective implementation of the civil rights laws and Executive orders. This diversion was the rise of the discussion about race and class: the assertions on the part of some white and black intellectuals that, with the success of equal employment and affirmative action programs, class was now the significant determinant of economic mobility of American citizens; race was no longer a related

factor. This controversy revealed the neoconservative movement among white intellectuals, formerly liberal, and among blacks was spreading to a small number of well-publicized blacks. Within recent months, these conservative blacks have publicly asserted their rejection of affirmative action programs, of busing, and of other specifically designed attempts to remedy the effects of past racism. These black conservatives have been well-publicized, and there is increasing evidence that their point of view will be given more attention by the present administration than the traditional position of black civil rights leadership.

At present the effective implementation of the objectives of the 1964 Civil Rights Act appears to be obstructed by the administration in Washington. The new administration will not be particularly diligent in enforcing AA and EEO rules and regulations. During his campaign, President Reagan stated that, if elected, one of the most important objectives of his Presidency would be to get the Federal Government off the backs of the people. There is reason to believe that this campaign promise had some appeal. What is not clear is the extent to which this promise was interpreted by the large percentage of whites who voted for Mr. Reagan as a means of reducing the role of the Federal Government in the enforcement of equal employment and affirmative action statutes. It remains a fact, however, that, whatever gains blacks and other minorities and females have made toward the goals of economic justice, it has been through the intervention of the Federal Government. The Federal courts, the Congress, and the executive branch have each used their power to encourage and facilitate such gains. If these three branches of the Federal Government are permitted to pull back from this responsibility, then it follows that not only would these gains be halted, but they may also be lost.

The majority of blacks today report that they have personally experienced discrimination in seeking employment. The Data Black survey<sup>1</sup> revealed that job discrimination is still perceived by blacks as widespread. It is not merely an historical phenomenon; it is a major obstacle facing blacks today. In response to those who claim that class rather than race is the determinant of discrimination, it should be noted that the better educated blacks in the sample are more convinced than the less educated

<sup>1</sup> "Summary of Major Findings: Data Black Study No. 1." Data Black Public Opinion Polls, Inc., January 1980.

blacks that they themselves have been the target of job discrimination. These findings support the results presented by Dr. Joe R. Feagin, who found that two-thirds of the sample of 3,000 black heads of households still feel that black males are discriminated against "a great deal" in this country. Blacks with incomes above \$20,000 were somewhat more likely to report a great deal of discrimination (70 percent) than those with incomes under \$6,000 (60 percent).

### **Imperatives for an Affirmative Action Program in the 1980s**

Given that the present administration is responding to the generally conservative mood of the country and will not give priority to effective enforcement of EEO and AA requirements, the private sector, educational institutions, and church organizations must compensate for the withdrawal of the Federal Government if the present gains in equal employment opportunities for minorities and females are to be maintained. The importance of including more than one-tenth of the American population into a constructive role in the economy goes beyond the matter of racial or sex attitudes. Those concerned with economic and social stability of the society must understand that the American economy cannot function effectively with a large percentage of its population being economically underdeveloped; they become a drain as tax consumers rather than as taxpayers. It is obvious that the stability and growth of the American economy is tied to effective affirmative action and equal employment opportunities: the inclusion of previously excluded groups as positive and contributing members of the economy.

In order for the private sector, educational institutions, and the church organizations to discharge this function of compensating for the passive role of the Federal Government, the following imperatives must be fulfilled:

1. There must be willingness to face the fact that racial and sex discrimination in the economy exists now. All attempts to obscure this fact, all attempts to claim it as a past relic, must be rejected in the face of the present realities.

2. There must be a commitment to remedy the past and present manifestations of these forms of discrimination. This commitment must be based upon the understanding that these remedies are essential for the stability and the growth of the economy as a whole.

3. There must be a firm and clear statement of this commitment from top executives and the social, political, educational, and religious leaders of the society. Their statement must include without equivocation the legal, the moral, and the practical implications of effective affirmative action programs.

4. There must be a direct communication by these executives and leaders to their subordinates who are responsible for the day-to-day operations of their agencies that rational methods for remedying existing areas of noncompliance must be designed and implemented within a reasonable period of time. Middle management must understand that their performance will be evaluated in terms of their degree of compliance or noncompliance.

5. There must be ongoing training sessions dealing with the variety of related problems that arise in seeking compliance and inclusion of previously excluded groups into the operation. These training sessions should be designed and held for executives, middle managers, and supervisors, white and minority, male and female workers. The purpose of these workshops is to eliminate myths, superstitions, and stereotypes. It must be made clear that the advantages of affirmative action and equal employment are not restricted to the protected groups, but that they provide benefits for all workers. Affirmative action and equal employment must be removed from the area of the sentimental. It must be based within the perspective of enlightened self-interest wherein the previously preferred white male group can be made to understand that they, too, will benefit through more systematic and equitable personnel procedures, recruitment, training, evaluation, promotion, and termination personnel practices.

If affirmative action and equal employment programs are to continue in the 1980s, a formula must be found for educating the majority of white Americans that this course is absolutely essential for the future of society.

# Affirmative Action in an Era of Reaction

By Joe R. Feagin\*

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## Introduction

Affirmative action is in serious trouble in the 1980s. The white male backlash against the social progress of minorities and women began in earnest in the early 1970s, less than a decade after the 1964 Civil Rights Act. Since then the backlash has grown in significance to the point that today it has articulate and powerful spokesmen at the highest levels of American business and government. A recent report of a Reagan administration transition team calls for the gutting of the Equal Employment Opportunity Commission, including a 1-year freeze on new court suits challenging discrimination and a thorough "reconsideration" of the philosophy of affirmative action. The transition report accuses the EEOC of creating "a new racism in America." In his new book, *Wealth and Poverty*, the influential George Gilder argues that there is no need for affirmative action because:

- (1) it is now virtually impossible to find in a position of power a serious racist;
- (2) it would seem genuinely difficult to sustain the idea that America is still oppressive and discriminatory;
- (3) discrimination has already been effectively abolished in this country.

Race and sex discrimination are explicitly described as "myths." Affirmative action is seen as unneces-

sary. Gilder further suggests that affirmative action for women is a "growing mockery" that victimizes black men, the "true" victims of discrimination. Even though this argument about black men contradicts Gilder's argument that discrimination has been effectively abolished, and in spite of the undocumented and loose character of many of Gilder's arguments, this book is, according to *Time* magazine, the "bible" of many in the Reagan administration and in conservative business circles.<sup>1</sup>

In addition, the influential report of the Heritage Foundation, titled *Mandate for Leadership*, argues vigorously for sharply reducing or dismantling many Federal EEO and affirmative action efforts for both minorities and women: "Affirmative Action does not run counter to American practice; it runs counter to American ideals. It should be jettisoned as soon as it is politically possible to do so." Equal opportunity and affirmative action regulations are seen as destroying both government agencies and private enterprise. The mass media have given considerable favorable attention to these reports. A year ago most serious analysts of civil rights would not have predicted such a rapid acceptance of these reactionary views at the highest levels of business, government, and academia.<sup>2</sup>

A decade and a half of major civil rights gains may be coming to a close. The Ku Klux Klan

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<sup>1</sup> Final report on EEOC prepared by transition team of Reagan administration, excerpted in Bureau of National Affairs, *Daily Labor Report*, Jan. 23, 1981, pp. E1-E5; George Gilder, "The Myths of Racial and Sexual Discrimination," *National Review*, 3,

Nov. 14, 1980, pp. 1381-90; George Gilder, *Wealth and Poverty* (New York: Basic Books, 1981).

<sup>2</sup> Charles L. Heatherly (ed.), *Mandate for Leadership: Policy Management in a Conservative Administration* (Washington, D.C.: Heritage Foundation, 1980), p. 205.

(KKK) and similar groups are on the rise again and have already been involved in the deaths of black Americans. According to a recent report of the Anti-Defamation League, the KKK and other blatantly racist groups have a number of secret training camps around the country where members are put through paramilitary training programs for "defense" and "survival." Violence has been directed at blacks in Atlanta, Cincinnati, Buffalo, Oklahoma City, and Salt Lake City. Crosses have been burned at northern colleges. Coupled with this has been a continuing problem with injustice in the court system. In Florida an all-white jury acquitted white police officers of killing a black insurance executive in spite of substantial evidence of guilt. Other cities have seen similar miscarriages of justice. And the mass media no longer spend much time reviewing inequality of conditions in black America. In some areas KKK-type groups have received favorable attention from the mass media for the first time in several decades. KKK-type groups tend to rise and fall depending on the support or indifference they receive from the rest of the white community. Today their extreme racism is being given legitimacy by those powerful whites who talk about the need to dismantle equal opportunity and affirmative action programs, talk often reflecting a modern prejudice that sees blacks as today getting massive privileges and advantages that whites do not receive.<sup>3</sup>

It is in this societal context of reaction that the Civil Rights Commission's *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* appears, and it is in this context that the major policy significance of this report becomes clear. I will divide my assessment of this policy significance into two sections, the first focusing on discrimination and the second centering on affirmative action.

## The Structure and Processes of Discrimination

This is the first major report by a Federal Government agency that (1) gives extended and systematic attention to basic types of race and sex discrimination and (2) provides a clear discussion of the linkage between that discrimination and remedies such as affirmative action. These are *major*

contributions to today's policy debates on discrimination and expanding opportunities for minorities and women.

Most government reports and court cases on equal opportunity and affirmative action use the word discrimination, but few have given the definition and dimensions of discrimination much attention. And, apart from a few words about sharp declines in discrimination, most critics also focus on the operation and effects of affirmative action and ignore the background and context of race and sex discrimination. Moreover, an adequate defense of affirmative action requires a thoroughgoing problem-remedy approach, since it is the discriminatory problem that requires the remedy. Compare the situation to that of cancer and its remedies. Frequently, policymakers and other analysts have not distinguished the different types of race and sex cancers and the different types of remedies that they may require. Talking about affirmative action without talking about discrimination is like assessing chemotherapy without examining the cancers involved. Discrimination is the *problem* for which affirmative action is the *remedy*. Discussions of affirmative action apart from the problems for which they are designed as solutions have an airy, abstract quality. Equal opportunity and affirmative action efforts make sense only if we understand the problems of individual and institutionalized discrimination.

Most conservative and many moderate critics of affirmative action seem to believe the cancers of race and sex discrimination have largely been eradicated. Few (no?) people who attack affirmative action believe that massive discrimination still exists. So we have prominent white males such as Nathan Glazer and George Gilder who not only reject most affirmative action, but also argue that "discrimination has already been effectively abolished in this country."<sup>4</sup> There is no consensus on affirmative action as a remedy because there is no consensus on the character and persistence of discrimination in the United States. The decline in overt, blatant prejudice and the decline in many blatant forms of race and sex discrimination are taken by conservative critics as signs that discrimination is dead or so near death as to require little or no further societal intervention.

<sup>3</sup> James D. Williams (ed.), *The State of Black America, 1981* (New York: National Urban League, Inc., 1981), pp. 6-7, 307-21.

<sup>4</sup> Nathan Glazer, *Affirmative Discrimination* (New York: Basic Books, 1975); Gilder, "Myths of Racial and Sexual Discrimina-

tion"; for the views of a black conservative, see Thomas Sowell, *Affirmative Action Reconsidered* (Washington, D.C.: American Enterprise Institute, 1975).

Race and sex inequalities are still conspicuously obvious in Census Bureau and other statistics on this society. But there is a growing chorus of critics in government, industry, and academia who challenge the use of these inequality statistics as *prima facie* evidence of discrimination. To explain such inequalities, these critics prefer to fall back on "natural" causes beyond the reach of civil rights laws and litigation. Timing and subcultural factors are often cited for minorities. These factors include the late entry of black Americans into cities, high minority birth rates, subcultural differences between young blacks and young whites, and something called "class" (subcultural differences). In the case of women, sex inequalities are said to persist because of biological (e.g., reproductive) differences; differences in aggressiveness in pursuing better paying, full-time jobs; and higher job turnover rates. Whatever the explanation, the intent is clear: to throw out the idea that white America still significantly discriminates against nonwhite America and that male America still significantly discriminates against female America.<sup>5</sup>

The Civil Rights Commission report helps to counter these policy-oriented arguments about the declining significance of race and sex discrimination. However, it is only a start. What is needed in the 1980s is a major effort by the Commission and others to demonstrate, conclusively and in detail, the extent, character, and rootedness of discrimination in this society. I will now try to provide some suggestions for this effort.

### Public Opinion on Discrimination

Important signs of the continuing importance of race and sex discrimination can be seen in recent polls of blacks and women. A fall 1979 survey by the Mathematica survey research firm interviewed 3,000 black households nationwide, probably the largest such survey ever made. Two-thirds of these 3,000 black heads of household felt black Americans are discriminated against "a great deal" in this country. Blacks with incomes above \$20,000 were somewhat more likely to report a great deal of discrimination (70 percent) than those with incomes under \$6,000 (61 percent).<sup>6</sup> Moreover, a 1980 survey by the

magazine *Black Enterprise* found most of their middle- and upper-income black readers to be critical of the current racial situation. Most felt a majority of black Americans had not yet become members of the "middle class." In response to the one question on a specific type of discrimination, 85 percent of the *Black Enterprise* readers agreed that "most lending institutions still discriminate against potential black borrowers."<sup>7</sup>

Black opinion is greatly different from that of rank-and-file whites. In reply to a June 1980 Gallup question, "Looking back over the last ten years, do you think the quality of life of blacks in the U.S. has gotten better, stayed the same, or gotten worse?" over half of the nonwhites in the sample (mostly blacks) said "gotten worse" or "stayed the same," compared with only a fifth of the white respondents. Three-quarters of the whites said "gotten better."<sup>8</sup> Thus a majority of rank-and-file white Americans seem to agree with the conservative reaction of many white leaders in academia, government, and business. Black problems and disadvantages tend to be blamed on blacks themselves. Two-thirds of whites in a recent NORC survey blamed black disadvantages on blacks' lack of "motivation or will power to pull themselves up out of poverty."<sup>9</sup> And the June 1980 Gallup opinion survey asked this question: "In your opinion, how well do you think blacks are treated in this community—the same as whites are, not very well, or badly?" Sixty-eight percent of the whites in this nationwide sample said blacks were treated the same as whites; only 20 percent felt they were not well-treated or were badly treated. The public opinion data suggest a clear polarization of the views of blacks and whites on issues of discrimination and inequality. The policy implications of these polarized attitudes are quite serious. Among other signals, the summer 1980 riot in Miami makes it clear that the price of racial injustice can be very high. In the 1980 Gallup poll (after the Miami riot), when asked about the likelihood of serious racial conflict in their local community in the future, 37 percent of nonwhites surveyed

<sup>5</sup> See Glazer, *Affirmative Discrimination*; Gilder, "The Myths of Racial and Sexual Discrimination."

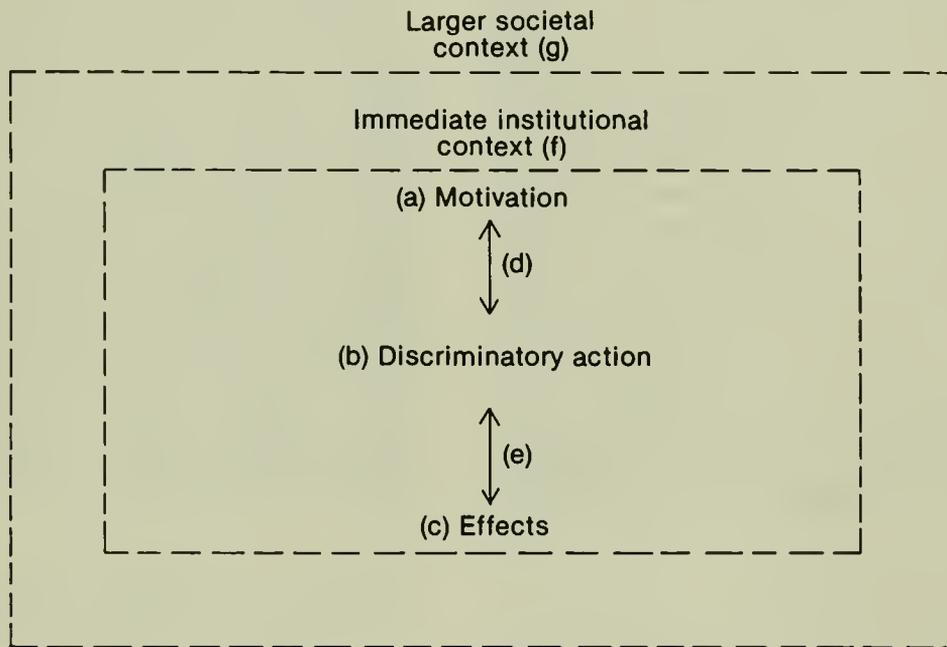
<sup>6</sup> "Initial Black Pulse Findings," bull. no. 1, Research Department, National Urban League, August 1980.

<sup>7</sup> "Economics," *Black Enterprise*, August 1980, p. 70.

<sup>8</sup> "Whites, Blacks Hold Different Views on Status of Blacks in U.S.," *The Gallup Opinion Index*, report no. 178, June 1980, p. 10.

<sup>9</sup> Cited in John C. Livingston, *Fair Game?* (San Francisco: W.H. Freeman, 1979), p. 78.

**FIGURE 1**  
**The Dimensions of Discrimination**



said racial conflict was likely or expressed uncertainty about the possibility.<sup>10</sup>

Few public opinion surveys have asked women about discrimination, but a 1980 Roper poll did ask a sample of 3,000 women some relevant questions. Six women in 10 in the survey said there was discrimination against women in jobs, including three-quarters of women in cities. Majorities saw discrimination in business, government, and the professions.<sup>11</sup> These surveys of minorities and women show clearly that substantial majorities still perceive race and sex discrimination as serious problems in this society.

### Dimensions of Discrimination

The Public policy debates over prejudice, discrimination, and the use of statistics are often confusing, in part because the various dimensions of discrimination are not carefully distinguished. As a first step in sorting out and advancing our thinking about discrimination, I would suggest the analytical diagram in figure 1. The dimensions of discrimination include (a) motivation, (b) discriminatory action, (c) effects,

<sup>10</sup> Nineteen percent replied "likely." "Whites, Blacks Hold Different Views on the Status of Blacks in U.S.," *The Gallup Opinion Index*, p. 12.

(d) the relation between motivation and action, (e) the relation between action and effects, (f) the immediate institutional context, and (g) the larger societal context.

In the social science and policy literatures, a few of these components have been given the greatest attention: motivation (a), effects (c), and the relation of motivation to action (d). The discriminatory practices or mechanisms themselves (b) and the larger institutional and societal contexts (f,g) have received less theoretical and empirical attention.

### Motivation

Much research and discussion on discrimination has focused on one type of motivation (a in figure 1)—prejudice—to the virtual exclusion of other types of motivation. Much traditional analysis also seems to emphasize the relation between prejudice and discrimination (d in figure 1), with prejudice seen as the critical causal factor underlying discriminatory treatment of a singled-out subordinate group.<sup>12</sup>

<sup>11</sup> 1980 Virginia Slims' American Women's Opinion Poll, The Roper Center, Storrs, Connecticut.

<sup>12</sup> The next few paragraphs draw on Joe R. Feagin and Clairece

Most of the social science and policy literatures have adopted some variation of a prejudice-causes-discrimination theory. Gunnar Myrdal, in his famous study *An American Dilemma*, viewed racial prejudice as a complex of beliefs "which are behind discriminatory behavior on the part of the majority group."<sup>13</sup> But, in fact, discrimination involves far more than the actions of bigoted individuals. Several authors have recently pointed out that the intent to harm lying behind much discrimination may not reflect prejudice or antipathy, but simply a desire to protect one's own privileges. Some discriminate because they gain economically or politically from racial and sexual restrictions on the competition. In the historical struggle over resources, systems of race and sex stratification were established in which the dominant groups benefit economically, politically, and psychologically. They strive to maintain their privileges, whether or not they rationalize the striving in terms of prejudice and stereotyping.<sup>14</sup>

### The Effects of Discrimination

A significant proportion of the discrimination literature concentrates on the psychological and statistical effects of discrimination (c in figure 1). There are a number of social-psychological studies of the effects of discrimination on the personalities of black Americans, such as the famous Clark studies of identity problems.<sup>15</sup> And there are numerous studies, often utilizing government demographic data, that analyze such statistical effects of discrimination as income inequality or residential segregation. From his important demographic analysis, after assessing the impact on income of regional, educational, and occupational differences between blacks and whites, Farley concludes that the large dollar differential in black-white income levels left even after all these other variables are considered probably shows the cost of discrimination.<sup>16</sup> There are many research papers in the social science literature, legal briefs, court cases, and affirmative action plans that similarly examine differentials in income, occu-

pation, education, and residence by race and sex. Most look at the effects of discrimination, with only brief attention to the concrete discriminatory mechanisms that may lie behind those effects.

Sharp statistical imbalances have often been considered to be *prima facie* evidence of discrimination. Statistical imbalance, such as 1 percent of a particular category of managers being composed of minorities and women in a community where blacks and women make up half of the white-collar employees, is usually considered a clear sign that discrimination is present. But critics of affirmative action have raised questions about the use of statistics to probe discrimination. They have argued, often vigorously, that sharp racial and sexual inequalities are due to other factors. This is one reason why the Civil Rights Commission could contribute very significantly to public policy by undertaking several in-depth studies of the actual mechanics of discrimination.

### The Mechanisms of Race and Sex Discrimination

Discriminatory actions<sup>17</sup> take different forms in this society, both individual and institutional (organizational) forms. Considerable individual discrimination remains in this society, as can be seen in the violent acts directed at black Americans. My own observations in college settings, and a recent study of southwestern medical schools by one of my graduate students, suggests that "old-fashioned" prejudice-motivated discrimination, practiced by whites and males, is much more widespread than we usually admit.<sup>18</sup> Some of this discrimination is camouflaged by a thin veil of equal opportunity rhetoric. There is a great need for more research on barely disguised prejudice and individual and small-group discrimination.

Institutional discrimination deserves intensive study as well. As the Civil Rights Commission report notes, "discrimination, though practiced by individuals, is often reinforced by the well-established rules, policies, and practices of organizations."

Booher Feagin, *Discrimination American Style* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1978), pp. 20-35; and Joe R. Feagin and Douglas Lee Eckberg, "Discrimination: Motivation, Action, Effects, and Context," *Annual Review of Sociology*, edited by Alex Inkeles (Palo Alto: Annual Reviews Incorporated, 1980), pp. 2-3.

<sup>13</sup> Gunnar Myrdal, *An American Dilemma* (New York: McGraw-Hill, 1964), vol. 1, p. 52n.

<sup>14</sup> Cf. David M. Wellman, *Portraits of White Racism* (Cambridge: Cambridge University Press, 1977).

<sup>15</sup> Kenneth B. Clark, *Prejudice and Your Child* (Boston: Beacon Press, 1955).

<sup>16</sup> Reynolds Farley, "Trends in Racial Inequalities," *American Sociological Review*, 42 (April 1977), pp. 189-207.

<sup>17</sup> Discrimination involves actions, as well as one or more discriminators and one or more victims on the receiving end. Discrimination has a negative and differential impact on the victims. Overt or hidden, discriminatory actions vary in the degree to which they are imbedded in large-scale organizations.

<sup>18</sup> Diana E. Kendall, "Square Pegs in Round Holes: Nontraditional Students in Medical Schools," Ph.D. dissertation, University of Texas (Austin), December 1980.

There seem to be two broad types of institutionalized discrimination. Type I, *direct institutionalized discrimination*, refers to organization-prescribed or community-prescribed actions that by intention have a differential and negative impact on members of subordinate race and gender groups. Typically, these actions are not sporadic, but are routinely carried out by a large number of individuals guided by the norms of a large-scale organization or community. They can be institutionalized in the guise of segregation laws or informal discriminatory practices. Examples include the informal steering practices of real estate agents and the informal harassment of women at work, examples examined in detail below. Type II, *indirect institutionalized discrimination*, refers to practices having a negative and differential impact on members of subordinate race and gender groups even though the organizationally prescribed norms or regulations guiding those actions were established, and carried out, with no intent to harm the members of those groups. For example, intentional discrimination in the education and training of members of subordinate groups has had the important side effect of handicapping them later in their attempts to compete with dominant-group members in the employment sphere, where hiring and promotion standards often incorporate educational credentials or requirements.<sup>19</sup>

### Steering Practices in Housing

International institutionalized discrimination is still a regular feature of American life. Nowhere is this more obvious than in the informal discriminatory practices in the real estate industry, an industry almost completely ignored in recent arguments about the decline in discrimination in this society. (See, for example, Gilder and Glazer.) Equal opportunity and affirmative action plans in the area of housing seem to have had little effect in reducing segregation. Numerous statistical studies of housing segregation have demonstrated that segregation remains massive today and cannot be explained in terms of the preferences or incomes of minority Americans. A recent study by Diana Pearce in the Detroit metropolitan area demonstrates some of the actual discriminatory mechanisms that maintain ra-

cial segregation in housing.<sup>20</sup> This study also suggests that housing discrimination is both intentional and well-institutionalized in informal practices of many real estate organizations. And the study suggests a research methodology for further research on discrimination not only in housing, but in employment and education as well.

Pearce found considerable persistence and increased subtlety in the character of housing discrimination directed against blacks. As part of a systematic field study, one black and one white couple with similar economic (income, credit, etc.) backgrounds were sent to the same 97 real estate brokers. Consistent differences along racial lines were found in financial advice, personal treatment, houses shown, and time devoted to the couples. Even though roughly the same as the whites, the economic resources of the black couples were evaluated as "lower" in terms of the house prices and financing white real estate agents suggested they could consider. Discrimination in personal treatment was also found, but the racial differences in such matters as courtesy were small. Nevertheless, black couples were much *less* likely to be shown houses than white couples on the first visit. And those black couples who were shown houses were more likely than whites to be shown (steered to) houses in or near already-black areas. Interestingly, brokers often suggested that black couples look in some other area than where the real estate firm was located. On the whole, brokers spent much more time with white couples than with blacks. Pearce illustrates the subtle nature of current discrimination with this example: Although treated courteously, one black homeseeker (with spouse) who went to a suburban real estate firm was told that his income and savings were insufficient to buy housing in that suburb. The man came back and asked if the researcher had made a mistake, not recognizing that a discriminatory act had occurred. "The white couple, however, was sent out with the same income and savings: in their interview, in contrast, no mention was made to them of inadequate resources for the community, and they were both urged to buy and were shown houses in

<sup>19</sup> For a thorough discussion of indirect discrimination, see Feagin and Feagin, *Discrimination American Style*.

<sup>20</sup> Diana May Pearce, "Black, White, and Many Shades of Gray: Real Estate Brokers and their Racial Practices," Ph.D. dissertation, University of Michigan, 1976; see also Ronald E. Wienk, *et*

*alia*, *Measuring Racial Discrimination in American Housing Markets* (Washington, D.C.: U.S. Department of Housing and Urban Development, 1979); and Feagin and Feagin, *Discrimination American Style*, pp. 92-94.

the same community as the firm in question was located in.”<sup>21</sup>

Pearce found a tendency for the more discriminatory real estate brokers to be in larger and more profitable firms. Once race-related discriminatory practices are built into regulations, routines of behavior, and training programs, they are not likely to be altered by weak outside pressures for change or even by a few court suits. Analysis of broker attitudes and prejudices led Pearce to the conclusion that “the organizational situation that salespersons find themselves in overwhelms whatever personal predilections they may have had to either discriminate or not.”<sup>22</sup>

Pearce’s study shows that intentionally discriminatory actions are well-institutionalized in this society. Often subtle and sophisticated, steering practices help maintain mostly segregated housing. This “tester” type of methodology could be adapted for use in the study of discrimination in other areas such as employment hiring patterns.

### Sex Discrimination at Work

Another major example of direct institutionalized discrimination can be seen in two major recent studies of sexual harassment on the job by Catherine MacKinnon and Lin Farley. These harassment practices are intentional, widespread, and informal. A key aspect of sexual harassment on the job is that it reinforces other types of employment discrimination directed at women. Work becomes a prize men give to women if women permit sexual harassment. Like wife battering and rape, sexual harassment and extortion at work are just now coming out of the closet. And like rape this harassment is pervaded with stereotypes of working women as sex objects, including the notion that most women intentionally invite the harassment. Sexual harassment has been portrayed by Farley as “unsolicited nonreciprocal

male behavior that asserts a woman’s sex role over her function as a worker.”<sup>23</sup> The actual mechanisms and practices of harassment include “staring at, commenting upon, or touching a woman’s body; requests for acquiescing in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape.”<sup>24</sup> Verbal abuse is common. An 18-year-old file clerk reported that her boss regularly asked her to come into his office “to tell me the intimate details of his marriage and to ask what I thought about different sexual positions.” Physical contact ranges from repeated “accidental” contacts to actual rape. One woman worker noted that, “My boss. . . runs his hand up my leg or blouse. He hugs me to him and then tells me that he is ‘just naturally affectionate’.”<sup>25</sup>

Sexual harassment is commonplace in the workplaces of America. A 1975 Cornell study of 155 women employees found that 92 percent of them felt sexual harassment was a serious problem for women. Half reported they themselves had been the victims of physical harassment, while 70 percent said they had been the victims of repeated and unwanted sexual comments, suggestions, or physical contact. And a 1976 *Redbook* survey of 9,000 women found that 90 percent had themselves encountered unwanted sexual harassment in their jobs. More than half the sample felt this sexual discrimination was a serious problem. In this survey a typical harassment pattern was that of an older man attacking a woman in her twenties or thirties. And a survey of women at the United Nations Secretariat found that half of the 600 women respondents reported sexual pressures on the job, particularly in promotions. Most said they had not reported the sexual harassment either because there were no channels to use or because it would have hurt their careers.<sup>26</sup>

MacKinnon suggests there are two types of sex discrimination. In some cases it is a question of *quid*

than men; their incomes are thought to be unstable, and there is a pervasive fear that they will become pregnant and lose their jobs. Feagin and Feagin, *Discrimination American Style*, pp. 94–95.

<sup>21</sup> Lin Farley, *Sexual Shakedown* (New York: McGraw-Hill, 1978), p. 14.

<sup>22</sup> *Ibid.*, p. 15.

<sup>23</sup> Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), p. 29.

<sup>24</sup> Farley, *Sexual Shakedown*, pp. 20–21; MacKinnon, *Sexual Harassment of Working Women*, p. 26–27; Claire Safran, *Redbook Magazine*, November 1976, pp. 149–219; United Nations Ad Hoc Group on Equal Rights for Women, report on file at the New York University Law Library, cited in MacKinnon, *Sexual Harassment of Working Women*, p. 26.

*pro quo*, of sexual favors for an employment benefit: "If I wasn't going to sleep with him, I wasn't going to get my promotion."<sup>27</sup> Retaliation for rejecting male advances can take the form of demotions, salary cuts, unfavorable notes in one's personnel file, poor working conditions, ridicule, and pressure to resign. In addition to the *quid pro quo* mechanism of discrimination, there is the type of discrimination that is a routine feature of a job. As MacKinnon notes from her research: "She may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally taken advantage of at work."<sup>28</sup> Many women workers have to tolerate some type of sexual harassment in order to work. This harassment is an integral part of the general subordination of women as workers and the exclusion of women from opportunities and job advancement.

In the Cornell survey 78 percent of the harassed women said they felt "angry," 48 percent "upset," and 23 percent "frightened." And the Cornell study found that among those who had experienced harassment a large proportion reported suffering on-the-job penalties for not responding and/or eventually quitting the job because of the discriminatory treatment. This "quit" reaction to harassment often results in hardships for women, since unemployment benefits are usually not available for this "cause," and women who protest by quitting may have difficulty in getting a comparable job in the future.<sup>29</sup> This quit rate also increases the turnover and unemployment rates for women, rates which male writers such as Gilder cite as evidence that women are not as serious about work as men.

This sexual harassment is part of a large structure of employment discrimination in this society. It does not exist in isolation as the peccadilloes of scattered males. A recent study of secretaries and managers demonstrates that many secretarial situations in business are patrimonial; that is, the status and income of a female secretary are tied to that of her male boss. Kanter concludes from her study of a major industrial supply corporation that secretaries got many of their rewards not from skills they used, but rather from the rank and promotions of their bosses. Promotions for secretaries were often tied to

promotions of their male bosses. Secretaries may even move with their bosses from one geographical area to another. Sexuality was found to be important in the promotability of a secretary. Kanter notes that secretaries were sent to secretarial schools as much for posture, how to dress, and use of deodorants, as for typing and filing skills. Since secretaries are status symbols for their bosses, personal appearance and attractiveness are critical for secretarial success. Kanter quotes one corporate official: "We have two good secretaries with first-rate skills who can't move up because they dress like grandmothers or housewives." Another was frank about the "selling" of secretaries: "Even those executive secretaries who are hitting sixty don't look like mothers. Maybe one or two dowdy types slipped in at that level, but if the guy they work for moves, they couldn't be sold elsewhere at the same grade."<sup>30</sup>

Even women in nontraditional roles often find themselves to be sexually defined and manipulated. Kanter's study of the few women on the sales force of this industrial corporation found that these token women were frequently singled out as much for their physical characteristics as for their skills. One male sales representative noted this: "Some of our competition, like ourselves, have women sales people in the field. It's interesting that when you go in to see a purchasing agent, what he has to say about the woman sales person. It is always what kind of body she had or how good-looking she is or 'Boy, are you in trouble on this account now?'"<sup>31</sup>

It seems clear from Kanter's analysis that sexual harassment is but one part of a larger scale system of sex discrimination. The pieces fall into place as one digs deeper into this system. Male stereotypes translated into discriminatory actions plague women workers in many ways that male workers do not have to face.

## Affirmative Action and Discrimination

I have chosen to go into detail on these two types of discriminatory mechanisms in order to demonstrate that race and sex discrimination is a long way from being abolished in the United States. The practices of steering and of sexual harassment are institutionalized in widespread informal practices in many organizations. Those whites and males who

<sup>27</sup> MacKinnon, *Sexual Harassment of Working Women*, p. 32.

<sup>28</sup> *Ibid.*, p. 40.

<sup>29</sup> *Ibid.*, p. 47; Farley, *Sexual Shakedown*, pp. 21-22.

<sup>30</sup> Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977), pp. 74-76.

<sup>31</sup> *Ibid.*, p. 217.

engage in the practices for the most part know what they are doing. These practices are intentional and seem motivated by a desire to protect privileges and by prejudices and stereotypes. Both types of practices have a serious impact on the lives of members of subordinate groups. And both illustrate that existing legal neutrality and affirmative action approaches in housing and employment have not eradicated major types of institutionalized discrimination.

Approaching affirmative action from the context of institutionalized discrimination is a key policy contribution of the *Affirmative Action in the 1980s* report. The last section of the report lists four manifestations of discrimination that, when taken together, signal a self-perpetuating process necessitating affirmative action:

- (1) a lengthy history of discrimination against the subordinate group in question;
- (2) widespread actions that disadvantage subordinate-group members;
- (3) clear data indicating inequality across several institutional areas;
- (4) evidence that color-blind, neutrality approaches are ineffective.

A critical point here is that institutionalized race and sex discrimination must be constantly kept in mind if affirmative action issues are to be satisfactorily dealt with. Let us now examine some of the misconceptions about affirmative action.

**Misconception Number One: Affirmative action is reverse discrimination.** In the 1970s the opponents of affirmative action scored a brilliant coup by getting the mass media to discuss affirmative action in terms of the simplistic galvanizing phrase "reverse discrimination." For example, in March 1976 *U.S. News and World Report* ran a feature story titled: "Growing Debate—Reverse Discrimination—Has It Gone Too Far?" and in September 1977 *Newsweek* ran a cover story under a front page headline of "reverse discrimination." The cover showed a white student and a black student in a tug of war over a college diploma. Many academic critics have also made use of this phrase.

Yet the term reverse discrimination is a grossly inaccurate label for the events and actions the critics deplore. This can be seen clearly if we follow the principle of keeping traditional patterns of institutionalized discrimination in mind in assessing arguments about affirmative action. Think for a moment about patterns of discrimination against black Amer-

icans in the United States. Traditional discrimination has meant, and still means, widespread, blatant, and subtle discrimination by whites against blacks in most organizations in all major institutional areas of this society—in housing, employment, education, health services, the legal system, and so on. For three centuries now, millions of whites have participated directly in discrimination against millions of blacks, including routinized discrimination in the large-scale bureaucracies that now dominate this society. Traditional discrimination has meant heavy economic and social losses for blacks in all institutional sectors for hundreds of years. One result is that most black Americans today have little in the way of banked resources (economic and educational) that have been handed down to them by their parents and grandparents.

What would the *reverse* of this traditional race discrimination look like? The reverse of the traditional discrimination by whites against blacks would mean the following: For several hundred years, massive institutionalized discrimination would be directed by dominant blacks against most whites. Most organizations in areas such as housing, education, and employment would be run at the top by a disproportionate number of blacks; and middle- and lower-level decisionmakers would be disproportionately black. These decisionmaking blacks would have aimed much discrimination at whites. As a result, millions of whites would have suffered trillions of dollars in economic losses, lower wages, unemployment, political weakness, widespread housing segregation, inferior school facilities, and lynchings. That societal condition would be something one could reasonably call a condition of "reverse discrimination." It does not exist, nor is it likely ever to exist.

Reverse discrimination is a mythological notion designed primarily to confuse and discredit, not to enlighten. Whatever cost affirmative action has meant for whites (or white males), those costs do not total anything close to the total cost of true reverse discrimination. To my knowledge, no affirmative action plan in industry, housing, higher education, or government has had the purpose or effect of establishing a system of black supremacy over whites or of female supremacy over men. Affirmative action plans as currently set up do not make concrete a widespread antiwhite prejudice on the part of blacks nor a widespread antimale prejudice on the part of women.

For the most part affirmative action plans have not been established and have not been set into operation—especially in terms of line decisionmakers—by minorities or by women. Major affirmative action plans in the areas of education, housing, and employment were originally set up and are still largely implemented by white males who dominate the line decisionmaking positions in all major organizations in the society. Moreover, it is relatively rare in organizations for a white person to be discriminated against by a black person, or for a man to be discriminated against by a woman, simply because the members of subordinate groups have generally been relegated to relatively powerless positions. Certainly, there are a few organizations, or departments in organizations, where minorities and women occupy decisionmaking positions and could thus discriminate against white males, but such situations are atypical. This can be seen in the fact that most of the evidence presented by critics to illustrate “reverse discrimination” does not involve black-against-white or women-against-men examples.<sup>32</sup> Perhaps most important, large-scale race and sex discrimination, in most organizations, in most institutional areas, directed against whites and males does not exist in this society.

If reverse discrimination in a widespread institutionalized form does not exist, and if reverse discrimination in individual forms is relatively rare, why is it such a widely accepted notion? The answer seems clear. “Reverse discrimination” is often used as part of a reactionary counterattack aimed at discrediting remedial programs with upward mobility benefits for minorities and women.

It is true that to this point in time a modest number of white males have paid a price for some affirmative action programs. If affirmative action is successful, particularly in a society with little economic growth, it will entail some cost. White male suffering does indeed exist. But to compare the scale of that suffering to the scale of the suffering of minorities and women seems rather absurd. A white male who suffers as an individual from remedial programs such as affirmative action in employment or education suffers because he is an exception to his privileged racial group. A black person who suffers from racial discrimination suffers because the whole

group has been subordinated, not because he or she is an exception. MacKinnon suggests this contrast:

When a white charges race discrimination (for example, due to preferential admissions for blacks) he is protesting the cost on one sphere of his life of a rectification process of an entire system that has tried to destroy all blacks in every sphere of their lives for generations, and could afford to ignore their protests.<sup>33</sup>

**Misconception Number Two: Affirmative action efforts have been so effective that white male resistance has been inconsequential.** Much opposition to affirmative action seems to suggest the misconception that there has been little effective resistance, that white males have watched helplessly as affirmative action has sharply eroded their control of organizations and institutions. Given the fact that white males have usually been in substantial control of those affirmative action plans that exist in areas such as business and higher education, this view would seem to be problematical on its face.

Containment seems to be one major strategy implemented by white males (or whites) in the face of equal opportunity and affirmative action pressures. *Containment* means *intentionally attempting to slow down or end the process of dismantling institutionalized race and sex discrimination*. Diana Kendall recently completed a study of a half-dozen medical schools in the Southwest. She found a variety of discriminatory patterns harming minority and female students and concluded that when organizations such as medical schools are forced by law “to abandon categoric exclusion of subordinate group members as a first line of defense in preserving dominant group status and privileges, dominant group members may move to second and third lines of defense.”<sup>34</sup> The second and third lines of defense can include more informal or subtle forms of discrimination to ensure continuing domination and slow down the progress of women and minorities. From her recent study of sexual harassment on the job, Farley has come to a similar conclusion: The “naive believe that male opposition will eventually disappear from a sexual intermingling of occupations, as is now required by law, is best replaced by a more realistic assessment of the ways men, despite this forced entry, will attempt to insure their

<sup>32</sup> Cf. Glazer, *Affirmative Discrimination*.

<sup>33</sup> MacKinnon, *Sexual Harassment of Working Women*, p. 132.

<sup>34</sup> Kendall, “Square Pegs in Round Holes: Nontraditional Students in Medical Schools,” p. 194.

domination and the continuation of job segregation.”<sup>35</sup> Public policy toward discrimination has yet to come to terms with this second line of defense.

Containment strategies can be seen in higher education employment, where a variety of “dodges” have developed aimed at reducing the effectiveness of equal opportunity and affirmative action programs. There are reports of college and university officials telling white male candidates for employment that they were rejected because the positions had to be offered to minorities and women, when they were really turned down because of their credentials or their personalities. And the rejected white males often become aggressive opponents of affirmative action. Goodwin lists a number of ways in which administrators and faculty “play games” to avoid affirmative action prescriptions in higher education.<sup>36</sup> For example, some departmental chairmen knowingly offer positions to women and minorities at salaries the candidates have previously indicated are unacceptable. When the position is turned down, a chairman then hires a white male candidate at a higher salary. The chairman can then claim he did offer a position to a woman or minority person. Or well-qualified minorities and women can be discouraged from accepting an offer because the chairman (or other male faculty member) emphasizes in an insulting fashion that the offer is not “a real one based on merit but only an offer to meet statistical requirements.” Even after a female or minority candidate is offered a position, some department chairmen have intentionally procrastinated in signing a contract until the candidate accepts an offer from another college. Goodwin points out that in all these cases affirmative action is effectively sabotaged by the white males in control, while the colleges and universities maintain an image of “good-faith” recruitment efforts for the benefit of the relevant government officials.

Winning the statistical battle is a major focus in many organizations. In such organizations workers have been reclassified in order to make it look like the employer has a good affirmative action record in reports filed with the government. For example, senior clerical workers have been reclassified to

“managers,” although the job remains the same, and suddenly there are many more women in “management.” Two management experts have noted these effective resistance activities by corporations:

Instead of improving organizational climate and revamping human resource planning, legal staffs have been beefed up to fight discrimination cases. Instead of validating selection processes, more emphasis is placed on winning the statistical battle.<sup>37</sup>

Tokenism has been one of the most successful devices in slowing down the process of dismantling institutionalized discrimination. Reluctantly tearing down the traditional exclusion barriers over the last two decades, many organizations have retreated to this second line of defense. Part of the tokenism strategy is to hire minorities and women for nontraditional jobs and put them in conspicuous and/or powerless positions. Following this strategy, officials must be careful not to place too many minorities and women in one particular unit of their organization.

Drawing on his work as a management consultant, Kenneth Clark has noted that blacks moving into nontraditional jobs in corporate America have frequently found themselves tracked into ghettos within the organization, such as a department of “community affairs” or of “special markets.” Many professional and managerial blacks (and women) end up in selected staff jobs such as equal opportunity officer rather than in line managerial jobs. Clark notes that “they are rarely found in line positions concerned with developing or controlling production, supervising the work of large numbers of whites or competing with their white ‘peers’ for significant positions.”<sup>38</sup> Minority and female “tokens” in managerial and professional jobs are frequently put into staff jobs with little power. They must rely on line managers (usually white males) to implement their suggestions. Moreover, decisions by those in staff positions dealing with affirmative action and equal opportunity may be seen as an irritant to line managers, who ignore such decisions because they see the programs as interfering with their more important production goals. Kanter found that staff people who tried to implement more

<sup>35</sup> Farley, *Sexual Shakedown*, p. 53.

<sup>36</sup> James C. Goodwin, “Playing Games with Affirmative Action,” *Chronicle of Higher Education* (Apr. 28, 1975), p. 24, discussed in Nijole V. Benokraitis and Joe R. Feagin, *Affirmative Action and Equal Opportunity: Action, Inaction, Reaction* (Boulder, Colo.: Western Press, 1978). I am indebted to Nijole Benokraitis for helpful comments on an earlier draft of this paper.

<sup>37</sup> Gopal C. Pati and Charles W. Reilly, “Reversing Discrimination: A Perspective,” *Labor Law Journal* (January 1978), p. 23.

<sup>38</sup> Kenneth B. Clark, “The Role of Race,” *New York Times Magazine*, Oct. 5, 1980, p. 30.

equitable systems for job placement in an industrial supply corporation had difficulty in selling these programs to line managers.<sup>39</sup>

A common problem for minority and women tokens in nontraditional jobs is isolation from important organizational networks. They are more often than others without sponsors and peer connections and excluded from those informal gatherings that provide important information for performing a given job. In her study Kanter found that the professional and managerial categories in a large industrial corporation were virtually all single sex, with very few women in them. Important training programs, task forces, lunches with colleagues, review meetings—these were composed of males, with at most one token female per gathering. Women at these levels found themselves alone most of the time. She notes that the 20 token women in a sales force of 300 employees were scattered over 14 offices. These women were “symbols of how-women-can-do, stand-ins for all women,” and they consequently “faced the loneliness of the outsider.” Statistical rarity of women in a particular organizational unit can be an alienating force for such women employees. Their numbers are so small that they have difficulty creating “survival” alliances or coalitions that might support them as they face new problems and conflict in the organization.<sup>40</sup>

Tokenism can become a self-perpetuating cycle. Isolated and alone, unable to draw on old-boy networks for routine assistance, many minority or female employees have difficulty in coping with the tensions of these higher level jobs. As a result, turnover may increase. White male managers, then, may cite the difficulties of these tokens in arguing against affirmative action and equal opportunity programs. Kanter makes the key point that in the long run increasing the proportion of minorities and women in an organizational unit beyond token numbers is critical for equal opportunity to work. Going beyond tokenism is necessary from the point of view of social justice for minorities and women. But going beyond tokenism is also critical from a practical point of view, as perhaps the only way of actually dismantling the age-old structure of institutionalized discrimination. “A mere shift in *absolute*

numbers, then, as from one to two tokens, could potentially reduce stresses in a token’s situation even while *relative* numbers of women remained low.”<sup>41</sup> Supportive coalitions can then form. Much opposition to significant increases in the numbers of qualified minorities and women in the name of “benign neglect” and “letting the market provide its own answers” ignores the social system aspects of desegregating this society. Kanter concludes that there is an important case to be made for increasing numbers beyond tokenism “as a worthwhile goal in itself, because, inside the organization, relative numbers can play a large part in further outcomes—from work effectiveness and promotion prospects to psychic distress.”<sup>42</sup>

**Misconception Number Three: Affirmative action efforts are destroying the normally meritocratic procedures in organizations.** The issue of merit is often a focus of critics of affirmative action. Maintaining that “there is no principle of selection other than merit which does not perpetuate an injustice,” a publication of the Anti-Defamation League argues that affirmative action violates fairness by pushing nonmerit characteristics.<sup>43</sup> The merit idea is linked to the idea of “qualified” persons, whether the persons concerned are students applying for college or job applicants. One argument is that affirmative action programs setting goals and timetables for the employment of minorities and women usually lead to the hiring of “unqualified” persons.

The issue of merit is a complex one not easily discussed in the space available here. But I do think it is important to keep a number of points in mind when this issue is raised. The first is that in many complex bureaucratic organizations there has long been—and prior to affirmative action programs—a meritocratic system on paper and a nonmeritocratic system in practice. There are routine particularistic features in the operation of bureaucracies, including those in industry and higher education. One expert, William Chambliss, has aptly characterized real life organizations: “Contrary to the prevailing myth that universal rules govern bureaucracies, the fact is that in day-to-day operations rules can and must be selectively applied.”<sup>44</sup> One reason for this is that the rules are stated in the abstract and daily reality is

<sup>39</sup> Kanter, *Men and Women of the Corporation*, pp. 186–87.

<sup>40</sup> *Ibid.*, pp. 188, 206–07.

<sup>41</sup> *Ibid.*, p. 238.

<sup>42</sup> *Ibid.*, p. 242.

<sup>43</sup> B.R. Epstein and A. Forster, *Preferential Treatment and Quotas* (New York: Anti-Defamation League, 1974).

<sup>44</sup> William J. Chambliss, “Vice, Corruption, Bureaucracy, and Power,” in J.F. Galliher and J.L. McCartney (eds.), *Criminology* (Homewood, Ill.: Dorsey, 1977), p. 410.

concrete and specific. And the reality is that virtually all large bureaucracies are controlled, particularly at top- and middle-level decisionmaking levels, by white males. White males apply the general rules using their own discretion and often can use the vagueness of the rules to justify hiring or promoting whomever they wish among possible candidates. "And if ambiguity and vagueness are not sufficient to justify particularistic criteria being applied, contradictory rules or implications of rules can be readily located which have the same effect of justifying the decisions, which, for whatever reason the officeholder wishes, can be used to enforce his position."<sup>45</sup> As most of us situated in bureaucracies know, they are not in actual practice the merit-oriented, universalistic organizations that critics of affirmative action seem to suggest. Internal politics, family ties, and personalities routinely affect decisionmaking in organizations. Until relatively recently, many such organizations had intentional exclusion barriers directed against women and minorities. Making all such organizations into the meritocratic ideal type suggested in much criticism of affirmative action will be very difficult and will require far more adjustments and internal democracy than the critics of affirmative action have yet considered.

Higher education is often cited as a major example of a meritocratic system of faculty hiring and promotion. However, what is merit in practice is always subject to interpretation by those with the greater power. According to the American Association of University Professors, what is merit for college professors still rests on intuition, custom, and presupposition. Thus, "it's not surprising that the person chosen tends to look like the people who are doing the choosing."<sup>46</sup> Many analysts of higher education note that the present system, while described as a meritocracy, is frequently in reality a nonrational, subjective, and elitist system controlled by white males, which still allocates rewards heavily to persons considered acceptable to those in power.<sup>47</sup>

Given the weakness in many areas of governmental compliance efforts and the declining civil rights pressures over the last decade, it is unlikely that the

majority of corporations, agencies, and colleges have gone any farther than tokenism as a strategy for coping with affirmative action pressures. In such a situation most organizations should be able, with modest effort, to find well-qualified minorities and women for the small number of nontraditional positions they intend to fill. According to one survey, 70 percent of corporate executives report they cannot find qualified women and minorities. Yet a top executive at Sears, Roebuck, and Co. has suggested that these executives are not being candid:

We don't believe the 70 percent response to the Yankelovich survey that said that the biggest problem with affirmative action is the availability of qualified minorities and women. That's not the biggest problem. The biggest problem is in acceptance—in getting management, which still happens to be white males, to accept the fact that if we start with the concept of individual differences and individual worth there are a lot of minorities and women out there who can do anything.<sup>48</sup>

The suggestion that there are a lot of qualified minorities and women who are not being tapped is here corroborated by an unlikely source, a top executive who himself is a white male. He further implies that for every corporation under close government scrutiny there are 200 employers who are ignoring affirmative action and "are laughing at the whole process." While corporations such as Sears and AT&T get a lot of scrutiny from the government and the media, a majority of corporations move along, at best, at a snail's pace of tokenism. As the Sears executive put it, "Many companies—they go and buy one black, one woman and say, 'Hey, we've got them'."<sup>49</sup>

In considering what is or is not "merit," there is also the difficult question: Are credentials and paper-and-pencil test scores good measures of actual ability to carry out jobs satisfactorily? In many cases, ever-rising educational credentials have been used to screen out minorities and women unnecessarily. Many jobs have an educational credential as a requirement. Yet one recent study has estimated that less than one-third of the labor force really needs a

<sup>45</sup> *Ibid.*, p. 411.

<sup>46</sup> M.W. Wartofsky *et alia*, "Affirmative Action in Higher Education," *AAUP Bulletin*, 59 (Summer 1973), p. 178.

<sup>47</sup> Feagin and Benokraitis, *Affirmative Action*, p. 181; cf. Herbert Hill, "Preferential Hiring: Correcting the Demerit System," *Social Policy*, 4 (July–August 1973), pp. 96–102; and Troy Duster,

"The Structure of Privilege and Its Universe of Discourse," *American Sociologist* (May 1976), pp. 73–78.

<sup>48</sup> Max Benavidez, "The Sears Interview: Ray Graham," *Forum*, October 1980, p. 16.

<sup>49</sup> *Ibid.*, p. 17.

**TABLE 1**  
**Proportion Completing Secondary School or Above, by Job Category**

Job Categories	United States		France	Sweden	Britain
	Whites	Blacks			
Professional	91%	89%	39%	35%	53%
Administrative	65	43	36	35	30
Clerical	72	69	7	8	16
Sales	56	44	5	5	9
All blue-collar jobs	30	20	1	0.5	2

Source: Dorothy K. Newman *et al.*, *Protest, Politics, and Prosperity* (New York: Pantheon Books, 1978), p. 95.

high school diploma or college degree to perform satisfactorily on the job.<sup>50</sup> This is true for white-collar jobs such as most clerical and sales positions, as well as for most blue-collar jobs. The U.S. Employment Service's job analysis manual and the Bureau of Labor Statistics *Occupational Outlook Handbook* make it quite clear that most blue-collar and white-collar jobs in this society can be learned on the job, in a few weeks or less, and without a real need for a high school diploma. "Bookkeepers have been converted into machine operators. Bank tellers have become, in part, keypunch operators."<sup>51</sup> Yet this computerized automation of offices and factories has sometimes been used as a rationale for excluding minorities who are told they do not have the specialized skills necessary.

The inflation in credentials in the United States is suggested in statistical comparisons with other major industrialized nations. For example, the West European labor force—rather productive in the last decade—has much less schooling on the average than black Americans. One study by Newman and her associates has revealed the proportions of work-

ers in key job categories who had completed secondary school or above, as shown in table 1.<sup>52</sup> Notice the much higher proportions of black Americans who have high school (or higher) degrees compared to French, Swedish, and British workers. As a group, black clerical workers have had much more schooling than European professional and administrative workers. Black manual workers, as a group, have had much more schooling than European clerical and sales workers. Even allowing for the different types of school systems involved, one can estimate that many U.S. jobs that now have screening requirements such as high school diplomas and college degrees do not in fact need to require such credentials for job performance. And if these higher level credentials requirements themselves are used as the major determinants for who is "qualified" or "best qualified" for a job, they often screen out disproportionate numbers of otherwise qualified minority applicants in areas such as employment. "Qualified" or "best qualified" have come to be defined less in terms of a person's true abilities than in terms of the degrees and other credentials one

<sup>50</sup> Dorothy K. Newman *et alia*, *Protest, Politics, and Prosperity* (New York: Pantheon Books, 1978), pp. 74-75.

<sup>51</sup> *Ibid.*, p. 75.

<sup>52</sup> These are 1960s data. *Ibid.*, p. 95.

possesses. Another problem here is that neither credentials nor standardized testing can reliably measure motivation and initiative or, for that matter, abilities such as artistic skill, mechanical dexterity, and reliability.

The *Affirmative Action in the 1980s* report emphasizes the important point that the "starting point for affirmative action plans with the problem-remedy approach is a detailed examination of the ways in which an organization presently operates to perpetuate the process of discrimination." This is an important policy suggestion, since it underscores the need to examine the specific discriminatory mechanisms and barriers in a specific organization. It is probable that many organizations undertaking this self-analysis will find unnecessary barriers such as excessively high credentials requirements for many types of clerical, sales, technician, and skilled blue-collar jobs. Expanded affirmative action efforts might well be directed toward correcting the credentials inflation that limits the opportunities of otherwise qualified minorities.

In his book *Education and Jobs*, Ivar Berg notes that most jobs in [our] society have a significant on-the-job training component.<sup>53</sup> Indeed, for many workers the on-the-job training is what teaches them most of what they need to do to carry out the job. Some of this on-the-job education is informal, learned from existing employees, while some takes the form of organized training. Even the occupants of high-level jobs routinely require on-the-job training of a rather basic sort. Thus a prominent management consultant recently commented:

One very large company needed to give some basic financial training to some of their executives, but before they started the program, they had to figure out what they would call it without insulting these men who supposedly knew basic finance, because, after all they were running the company!<sup>54</sup>

Given the crucial role of formal and informal on-the-job training for carrying out many levels of jobs, it would seem that the issue of "qualified" and "unqualified" minorities and women needs to be looked at in a new light. In addition to the large number of minorities and women who are well-qualified for nontraditional jobs, but are not now

sought out, there are probably many others who could be trained in a reasonable length of time to carry out a given job. Developing training programs for these minorities and women would not be a radical departure for most organizations, since most are already engaged in on-the-job training. It might mean the expansion or reorganization of training programs to meet the societal goals of upgrading minorities and women. The president of AT&T recently noted that "extensive efforts" to train people were important in meeting most requirements under their consent decree. As a result, he noted, "the impact on the company [e.g., efficiency] was not significant."<sup>55</sup> Since most people hired for jobs require some on-the-job training, in a sense most are "unqualified" until they receive that training. Training programs aimed at including previously excluded groups are in this context an extension of what already is part of organizational life.

**Misconception Number Four: Affirmative action plans for minorities are no longer necessary because the real problems facing minorities are problems of "class," not race.** One commonly hears this argument today in regard to black Americans. Many critics suggest that affirmative action and equal opportunity programs have primarily benefited middle-class black Americans. They argue that as a result there is a growing polarization in the black community between a growing, affluent middle class and a poverty underclass. Since in their view racial discrimination is rapidly being eradicated for middle-class blacks, and since the problems of the underclass have to do with "class," not racial discrimination, then there is less need for affirmative action. Indeed, middle-class blacks are sometimes seen as contributing to the persisting problem for underclass blacks.<sup>56</sup>

One problem with this polarization argument is that the statistical evidence on family income does not lend it much support. The Bureau of Labor Statistics publishes data on three family budget levels, low, intermediate, and high. The level of income for an intermediate-level family in 1979 was \$20,500. This level has frequently been used as the minimum income required to be a modestly affluent "middle-class American family." The proportion of white families with incomes at or above the interme-

<sup>53</sup> Ivar Berg, *Education and Jobs* (Boston: Beacon Press, 1971).

<sup>54</sup> "A Conversation with Rosabeth Moss Kanter," *MS*, October 1979, p. 64.

<sup>55</sup> Carol J. Loomis, "AT&T in the Throes of 'Equal Employer,'" *Fortune*, Jan. 15, 1979, p. 57.

<sup>56</sup> See Carl Gershman, "A Matter of Class," *New York Times Magazine*, Oct. 5, 1980, p. 24ff.

diate budget level increased a little from 47 percent in 1970 to 50 percent in 1979. The proportion of black families falling into this middle-income range or above increased slightly from 24 to 26 percent. As Robert B. Hill puts it: "In short, the proportion of economically 'middle-class' families is not significantly different among blacks (one-fourth) or whites (one-half) today than it was a decade ago—due to the unrelenting effects of recession and inflation."<sup>57</sup> (The gap between blacks and whites is even greater than these statistics suggest because wealth such as stocks, bonds, and real estate is omitted and because there are more extremely high-income families in the white group.) By this measure there has been little growth in the black middle class over the last decade. Looking at the very poor, we find that between 1969 and 1979 the proportion of black families below the poverty line stayed near 28 percent. Using these two proportions, we see *no* widening economic cleavage in black communities. The proportion of middle class hovered around one-quarter in the 1970s, while the proportion of poor remained close to 28 percent for the same period.

Both this paper and *Affirmative Action in the 1980s* have spelled out many types of organizational and interlocking discrimination that face all black Americans, including the neoracism of containment strategies. There is still much intentional race discrimination, however sophisticated and subtle, that sets barriers in the way of upward mobility for nonwhite minorities. Frequently, the plight of the black underclass is discussed as though their high unemployment, underemployment, low incomes, and poor housing conditions had little to do with racial discrimination. Indeed, in a recent *New York Times Magazine* article, Carl Gershman argues that it is the worsening condition of the black underclass, not racial discrimination, which requires the greatest policy attention today. Critical to his argument is the idea that the conditions of poorer black Americans are somehow due to the "tangle of pathology" in which they find themselves.<sup>58</sup> The suggestion is that poor black Americans have gotten locked into a lower-class subculture, a culture of poverty, with its deviant value system of immorality, broken families, juvenile delinquency, and lack of emphasis on achievement and the work ethic. These arguments are not new, but are a resurrection of culture-of-

poverty arguments made in the 1960s (for example, in Daniel Patrick Moynihan's *The Negro Family*). Now as then the victims are blamed for their own problems. It is admitted that this "tangle of pathology" ultimately stems in part from slavery and legalized discrimination in the "ancient past," but in the present the "tangle" has taken on a life of its own, a life that is not affected much by racial discrimination. If this misconception were true, poor blacks should face the same conditions as poor whites. But this is not the case. Poor blacks do not live in integrated "slums" with poor whites. Poor and near-poor blacks are less likely than comparable whites to get unemployment compensation when they are unemployed. They tend to hold even lower paying and less secure jobs than poor whites. To the extent that the working poor are unionized, whites benefit from informal discrimination in unions.

In addition, the role of past discrimination in current "tangles of poverty" needs to be reassessed. Much "past" discrimination is not something in the distant past, but rather is recent. Blatant discrimination against blacks occurred in massive doses until a decade or so ago, particularly in the South. Most blacks (and whites) over the age of 16 years (more than half the population) were born when the Nation still had massive color bars North and South. Most blacks over 30 years of age were educated in segregated schools of lower quality than those of whites, and many have felt the weight of blatant racial discrimination in at least the early part of their employment careers. And the majority of those black Americans under the age of 20 have parents who have suffered from blatant racial discrimination. Moreover, most white Americans over the age of 20 have benefited, if only indirectly, from blatant racial discrimination in several institutional areas. Put this recent past discrimination together with today's blatant and covert types of racial discrimination and you have a better conception of the causes of much black poverty, unemployment, and underemployment than resurrected poverty-subculture theories provide. The real dilemma is the persisting tangle of interlocking and institutionalized discrimination in this society.

I noted in the first section of this paper that a substantial majority of black Americans surveyed in a 1979 Mathematica survey feel that there is a great

<sup>57</sup> Robert B. Hill, "The Economic Status of Black America," in *The State of Black America*, p. 34. The BLS data are also cited on p. 34.

<sup>58</sup> Gershman, "A Matter of Class," pp. 92-95.

deal of racial discrimination in this country. And the supposed beneficiaries of affirmative action (those with incomes over \$20,000) were somewhat more likely than the poor to report a great deal of discrimination. There is a consensus among large majorities of the poor and of the middle class that racial discrimination remains a serious problem. In the same 1979 survey a majority of the black respondents saw a declining national commitment to equal rights. The survey asked: "Is the push for equal rights for black people in this country moving too fast, at about the right pace, or too slow?" Fully three-quarters said, "too slow."<sup>59</sup> This compares dramatically with the results of a similar question asked in a Harris survey in 1970; in that survey only 47 percent said, "too slow," with 41 percent saying, "about right."<sup>60</sup> The overwhelming majority of black Americans believe that the U.S. commitment to racial equality is eroding. Moreover, middle-class blacks are somewhat more likely than poorer whites to feel that the movement to racial equality is going too slowly. While 72 percent of those with incomes under \$6,000 said the push for equal rights was "too slow," 83 percent of those with incomes over \$20,000 said, "too slow." Those who are supposed to have made the greatest progress in the last decade, middle-income blacks, are a bit more likely than the rest to see equal rights as moving too slowly, as well as to report a great deal of discrimination in the country.

How do black Americans see affirmative action? According to a 1980 *Black Enterprise* survey of its middle-income and upper-income black readers, 78 percent saw affirmative action as "somewhat effective." Virtually all (94 percent) thought affirmative action would still be needed in the 1990s.<sup>61</sup>

### **Conclusion: Public Policy in Retrogression**

The momentum toward expanding employment, educational, and housing opportunity for minorities and women has slowed significantly over the last few years. Governmental policymakers and private sector officials are now preoccupied with matters other than race and sex discrimination, as the fall 1980 congressional rejection of a much-needed fair housing bill and recent developments in the Reagan administration clearly indicate. Books by men such

as Glazer and Gilder are widely heralded as demonstrating the need for government to pull back further from its already weakening commitment to equal rights. It was only a century ago that a decade or two of great progress in expanding opportunities for black Americans (1865-1885), called the Reconstruction period, was followed all too soon by a dramatic resurgence of conservatism and reaction, called the Redemption period. While there are certainly major differences between then and now, today, only 16 years after public policy shifted significantly in favor of expanded opportunities for minorities and women, we again seem to be moving in a conservative and reactionary direction. Many powerful leaders are now calling for the ending or reduction of affirmative action and equal opportunity programs. The bottom line on evaluating affirmative action is that more than a decade into affirmative action no systematic or fundamental changes can be seen in any major institutional sector in the United States. White males overwhelmingly dominate, often alone, upper-level and middle-level positions in virtually every major bureaucratic organization in the U.S., from the Department of Defense, to General Motors, to State legislatures, local banks, and supermarkets. The dominant concern has shifted away from patterns of institutionalized race and sex discrimination. Sadly, those hurt most by the shift have been those people who have long suffered from traditional institutionalized discrimination—minorities and women.

Much debate and action on affirmative action seems misplaced. An organization's lawyers and accountants may negotiate with the government's lawyers over a long period. And the result may be an affirmative action plan that is not grounded in a careful study of discrimination within the organization, particularly of the covert, subtle, and sophisticated forms of discrimination. This, in turn, may lead to a poorly constructed affirmative action plan issued with fanfare, but one that is to be weakly enforced and token. A top Sears executive recently complained about negotiations with the government: "We are forced to create mounds of paper to prove that people aren't available instead of creatively and innovatively developing techniques to make sure people are available."<sup>62</sup> Whether he would aggressively pursue the development of new techniques to

<sup>59</sup> "Initial Black Pulse Findings."

<sup>60</sup> Cited in *ibid.*

<sup>61</sup> "Economics," *Black Enterprise*, p. 64.

<sup>62</sup> Benavidez, "The Sears Interview," p. 16.

find qualified women and minorities if he did not face the paperwork is open to question. But a number of observers of organizations assessing organizational reactions to affirmative action have noted that too much of the effort often goes into paperwork, both statistical and legal, and too little into aggressively finding minorities and women for nontraditional positions. In a recent article two veteran management consultants have concluded from their experience not only that too much corporate effort is aimed at winning the statistical battle, but also that hostile overreactions, little budget money, and poor management have created "mongrel" affirmative action plans that are weak. The weak efforts may bring in or upgrade a few minorities and women, but alienate many white males, who can now blame their own problems on affirmative action.<sup>63</sup>

In this climate of reaction and containment, the report *Affirmative Action in the 1980s* appears as a beacon beckoning us back to the core issues of individual, institutional, and societal discrimination. This report is a major policy contribution both because it highlights the continuing importance of complex patterns of race and sex discrimination and because it grounds remedial actions such as affirmative action in detailed research by organizations on their operations that perpetuate the burdens of discrimination.

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<sup>63</sup> Pati and Reilly, "Reversing Discrimination," p. 9-10.

## Future Action

The *Affirmative Action in the 1980s* report should, in my judgment, become a springboard for expanded Civil Rights Commission efforts to educate policy-makers and the American people on the problem-remedy approach to discrimination. Since the Civil Rights Commission has for more than two decades been a major source of policy research and analysis on discrimination and segregation, the three possible avenues of future policy analysis I suggest below fall logically within that tradition:

- (1) Expanded policy-oriented research on informal and sophisticated patterns of institutionalized discrimination, such as real estate steering and sexual harassment. A vigorous investigation of the ways in which different types of informal discrimination interlock could be part of this effort.
- (2) Expanded policy-oriented research on the extent of, and the success or failure of, specific affirmative action programs. There is no systematic study yet available on this topic.
- (3) New policy-oriented research on the containment strategies of artful "dodges" and tokenism within organizations. Examination of patterns of intentional resistance to equal opportunity and affirmative action in organizations would be a valuable contribution to civil rights progress in the 1980s.

# Comments

By Isabel Sawhill and Sandra Tangri\*

The Civil Rights Commission's report, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, appears at a time when much of the earlier consensus about the need to improve the distribution of opportunities in our society appears to have come unstuck. While it would be a mistake to overdramatize the significance of the recent election, it is certainly one indicator of some broader social trends that have been apparent for some time. As the rate of economic growth has slowed, the Nation's ability to redistribute resources to the disadvantaged without imposing losses on the more fortunate has eroded. As a result, the "haves" are acting with less generosity toward the "have nots," and even among those who remain committed to the goal of social justice, there has been a loss of confidence in the ability of government to resolve various kinds of inequities. In light of these trends, it is not surprising that the current administration's top priorities are a renewal of economic growth and a commitment to dismantle big government—and especially its regulatory functions.

Since laws reflect as much as they shape public attitudes, and since no law can be very effective in an environment of widespread skepticism about its value, we ought to begin by examining the possible reasons for this new conservative mood and its implication for equal opportunity laws.

As the Commission states:

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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. (p. 3)

In a recent issue of *Fortune* (March 9, 1981), Walter Guzzardi, Jr., eloquently articulates the neoconservative position:

For the Federal Government to continue to dole out prizes and penalties on the basis of racial and sexual categories, which are the old enemies that inflicted the stigmata on the unfortunate in the first place, is to apply the disease as cure. . . . To favor some groups is not a free-floating act: it means less justice and freedom for others. . . . Who should pay that price? On which sons should the sins of the fathers be visited? And for how many generations? (p. 100-01)

He goes on to spell out some of the alleged counterproductive consequences: "white flight" to the suburbs in response to busing as a vehicle for achieving school integration; a deterioration of competence in our universities, offices, and factories as less qualified women and minorities are afforded preferential treatment; the stigma and lowered self-esteem that such treatment confers on the beneficiaries themselves, and growing class divisions within the black community as employers compete to hire better educated blacks and national attention and

views expressed here are those of the authors and do not represent the position of the Urban Institute or any of its sponsors.

resources are diverted from assisting the less fortunate still trapped in the ghetto.

There can be plenty of disagreement about the merit and importance of each of these arguments, but there is little doubt that a great many people *perceive* that society has paid substantial costs in the pursuit of greater social justice. There are few, on the other hand, who do not give at least lip service to the goal itself. Moreover, a panoply of statistical indicators and a whole body of social science research clearly demonstrate that women and minorities continue to lag behind their white male counterparts in economic and social status. *The question that must be addressed is: If the goal of a more equal distribution of rewards is worthy and affirmative action is not the solution, what are the alternatives* While we would probably all agree that affirmative action laws need to be refined and better implemented, the neoconservative critics of such measures are not interested in incremental reform, but in abolishing the concept. What would they put in its place? Evidently, they believe that justice would be better served by a policy of strict neutrality with respect to race, gender, and national origin.

The Commission's report explains in a careful and constructive way why such a policy would fail. Efforts to eliminate prejudice by insisting on "color blindness" and "gender neutrality" are insufficient remedies, because they do not break the cycle of cumulative handicaps or the pervasive institutional practices that perpetuate inequities. For blacks and other disadvantaged minorities, the well-known cycle of poverty and deprivation must be broken. While women are no more economically disadvantaged by birth than men, social expectations about appropriate roles lead to labor market behavior and occupational choices that produce low earnings and further entrapment in a dependent role. Moreover, such dependency—or male sponsorship to use the Commission's phrase—may not always protect them from poverty and other deprivations. Protection and support is a prerogative of the sponsoring male and is often a temporary status. Gender is a permanent attribute. Without repeating all the many examples of the ways in which neutral behavior leads to unequal results that are cited in the Commission's report, we conclude that their diagnosis is the correct one: The problem is not so much individual prejudice as it is institutionalized discrimination.

The strongest criticisms of affirmative action are that the use of race- and sex-conscious goals and

timetables are antithetical to the goal of eliminating these characteristics as bases for institutional decisions regarding individuals' entry and progress, and that their use penalizes white males who themselves did not discriminate and should not, therefore, be made to pay the price of restitution for past discrimination.

The fact is that goals and timetables are merely *indicators* of the degree to which affirmative action plans are working. The heart of the affirmative action approach is to develop internal mechanisms for selection, evaluation, promotion, and salary determination that are alternatives to those which have served to perpetuate past patterns of occupational segregation and unequal pay. Some of these patterns have been in place so long, and with such obvious advantages for white males, that the practices which perpetuate them (such as informal recruiting networks, sex-segregated want ads, or informal support groups within the workplace) appear to be synonymous with the definition of a meritocracy.

The issue of "who is to pay the costs of restitution" is also more complicated than the critics admit. As the Commission's statement makes clear, court decisions have been careful not to penalize white males by, for example, reducing their pay to the level of women's and minorities' pay or forcing them out of jobs they occupy to make room for other kinds of workers. As *individuals*, white males are *not* losing jobs, pay, or admission slots that they already occupy, and instances in which they are the victims of "reverse discrimination" are few and far between. As a *group*, what they *are* losing are privileges and advantages they have to come to expect: What they experience is the thwarting of actuarial expectations based on a historically limited competition. Other things being equal, young white males cannot expect to do as well as their fathers because their fathers had a near monopoly on certain kinds of jobs. Those women and minorities who might once have worked as maids, janitors, secretaries, and nurses are now preparing and competing for a wider array of occupational opportunities. The tensions that this kind of social change engenders are understandable, but inevitable.

At the same time, there is no denying that, in the attempt to bring about a fairer distribution of rewards, some costs have been paid. The paperwork requirements of affirmative action plans, alone, are a burden on the productive efficiency of the economy.

And there have been cases where, in the name of affirmative action, women and minorities have been put in academic programs or jobs they could not handle. The real issue, then, is whether society judges the benefits to have been commensurate with the costs and whether today's investment will produce a better society in the future. It is not surprising that where one comes out on this issue depends on the importance one attaches to social justice versus other goals.

How effective is affirmative action as a means of achieving greater equality? Any Rip Van Winkle who woke up in 1981 after a 20-year sleep would immediately be struck with the changes that have occurred. The Commission's report *Social Indicators of Equality for Minorities and Women* documents the areas and degrees of progress achieved by minorities and women between 1960 and 1976. It also documents the fact that most minority groups and women have *not* caught up with white males in educational attainment, occupational prestige, earnings, and quality of housing.

Of course, affirmative action programs cannot automatically be credited with all the progress that has occurred. In fact, the technical evaluations that have been done to date give them very little of the credit. While there appears to be a direct linkage between affirmative action programs and the employment of blacks, the programs have had no significant impact on the employment of women. With respect to occupational upgrading, the evidence is so mixed that it is difficult to say whether EEO efforts have played a role. One must immediately add that the research on which these findings are based has been flawed in a number of ways, of which two in particular should be mentioned. First, the programs are so recent that they were only just getting up to speed at the time the evaluations were performed. Second, estimates of effectiveness tend to be biased downwards, because they do not measure the *indirect* effects of EEO requirements on organizational behavior. That is, the mere existence of the law and the risk of being found in noncompliance at some point in the future may be sufficient to induce a change in hiring or utilization patterns, even when no specific governmental action is involved. Antitrust and many other laws work in much the same way. One does not need a policeman on every corner to deter crime, and one should not measure the effectiveness of legal sanctions by

comparing the crime rates on street corners with and without policemen.

But, beyond this, there is still a subtler point to be made which is that external sanctions are only part of the story. Laws can also induce a change in behavior *because they redefine what is considered socially acceptable behavior*. What may start as an externally imposed set of requirements may eventually become internalized in the form of a new set of values. Laws are society's conscience, and no one wants to deviate too far from the social norm.

Thus, in spite of the well-worn canard that "you can't legislate attitudes," both history and behavioral theory suggest that under certain circumstances there is a cause and effect relationship. Widespread acceptance of segregated public facilities has virtually disappeared since passage of the 1957 Civil Rights Act. The same is true for the other grosser manifestations of racism that kept blacks from the voting booth, from attending "white" neighborhood schools, and from applying for jobs where "whites only need apply." The polls suggest that prejudice has decreased, and where private prejudice still exists, it is less likely to be translated into discriminatory behavior.

What the above also suggests is that individual prejudice is most likely to be reduced if: (1) the amount of pressure for compliance is just sufficient to induce the desired behavior without provoking backlash or inhibiting the internalization of new values; (2) the positive benefits of compliance are emphasized ("carrots" are better than "sticks"); (3) affirmative action is continued long enough to produce the kind of cumulative experience with women and minorities in nontraditional positions that will wear down stereotypes.

This last point is extremely important. Stereotypes operate in subtle but powerful ways to make life difficult for women and minorities, particularly those who find themselves in pioneer roles. Stereotypic notions of what women are or should be like, for example, are incompatible with stereotypic notions about what healthy adults should be like, what constitutes "competence," and, in particular, what attributes should characterize a good supervi-

sor, manager, or other person having authority over others.<sup>1</sup> Images of figures in authority have everything in common with our images of what men are like and little or nothing in common with our images of what women are (or should be) like. In fact, actual research has revealed little or no difference between men and women in how they carry out managerial (or other occupational) roles. Yet, as Judith Long Laws has said, sex-role scripts "form and deform interactions between individual women and men in the work place." Subordinates have been found to behave in ways that undermine the authority of women and blacks in leadership positions. Studies also indicate that token women and minorities are often pushed to the periphery of group interaction and are excluded from the normal give and take of peers.<sup>2</sup>

In relationship to superiors, women and blacks are less likely to receive the sponsorship and mentoring commonly acknowledged to be extremely helpful in climbing the ladder of success. In addition, the effect of stereotypes on evaluations of performance is strong and well-documented. Considerable research using double blind tests has demonstrated consistent patterns in how men's and women's performances are interpreted in ways damaging to the latter's career opportunities. When would-be managers are

asked in an experiment to evaluate the candidacy or performance of individuals described to them on paper and the descriptions provided are identical except for the sex of the candidates, results show a consistent pattern of less favorable evaluations of female "candidates" than of male "candidates."<sup>3</sup> Accompanying these evaluations are fewer decisions to hire, promote, and give pay raises or bonuses to females than to males—in spite of identical descriptions of the candidates. We have highlighted this particular set of research findings for the Commission because we believe it helps to demonstrate the powerful effect of unconscious stereotypes on the treatment of different groups and one of the reasons why equal objective characteristics often produce unequal rewards, even in the absence of overt prejudice.

In conclusion, we are in basic agreement with the Commission's report on the continuing need for affirmative action. Like any tool of social change, it will create tensions and it will occasionally be misused. There is no easy or costless way to dismantle the process of discrimination. The challenge for the 1980s will be to rebuild the consensus that the benefits of living in a caste-free society far outweigh the transitional costs of getting there.

<sup>1</sup> Inge K. Broverman, S.R. Vogel, D.M. Broverman, F.E. Clarkson, and P.S. Rosenkrantz, "Sex Role Stereotypes: A Current Appraisal," *Journal of Social Issues*, 1972, 28(2), 59-78.

<sup>2</sup> C. Wolman and H. Frank, "The Solo Woman in a Professional Peer Group." *American Journal of Orthopsychiatry*, 1975, 45, 164-71.

<sup>3</sup> Benson Rosen and Thomas Jerdee, "The Influence of Sex-Role Stereotypes on Evaluations of Male and Female Supervisory Behavior." *Journal of Applied Psychology*, 1973, 57, 44-48.



**ASSESSMENTS OF *AFFIRMATIVE*  
*ACTION IN THE 1980s*  
FROM AN ENFORCEMENT PERSPECTIVE**



# Comments

By Lawrence Z. Lorber\*

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The question of the continued viability of affirmative action as an appropriate goal of government enforcement action has been addressed by the Commission on Civil Rights in its proposed statement. While the statement apparently was drafted to reflect the current state of the law of affirmative action, it can only be considered as a retort to a perceived retrenchment of public concern about the continuing problems of discrimination and a diminution of the proactive Federal response that has evolved over the past 15 years. Because of this fear, based not on any official or announced policy change, but upon a misconception of the actual impact of the government's efforts, the Commission has adopted as its analytical model a thesis that will not only diminish support for affirmative action, but will hinder the increasing voluntary response to the problem of job creation and integration of the work force. While the draft statement represents an extensive discussion of the historical societal problem of inhibitions to full and equal opportunities for women and minorities in this country, it avoids discussing the implications of its conclusions in the United States job market of the 1980s and ignores the bureaucratic and judicial realities in the adaptation of the public policy known as affirmative action.

As we enter the third decade of official Federal involvement in the process of employment as it relates to equal opportunity, what is perhaps most

striking is the adoption of code words or phrases that any dialogue on equal opportunity now seems to require. Thus, we are reminded by this Commission that it vigorously opposes "invidious quotas whose purpose is to exclude identifiable groups from opportunities," while at the same time assured that the Commission maintains its "unwavering support for affirmative action plans." And those who might hold a viewpoint incompatible with the Commission's make the particular effort to reaffirm their own commitment to equal opportunity, but abhor quotas and the other manifestations of government policy generally considered under the present-day perception of affirmative action.

I believe it might assist the public debate to push this decorous dialogue forward and even eliminate the need for each side to couch its points in the rhetoric of each other. Does this Commission actually believe that the reality of affirmative action as mandated by regulation and agency edict does not result, on occasion at least, in the invidious quotas it proclaims as unwarranted? Do those who would acknowledge a government policy on equal opportunity deny the use of remedial actions, including preferential assistance for individuals or groups who have actually suffered discrimination? The answer to both questions must be no.

Rather than create a strained justification for the simple continuance of present policy, the Commission might assist in the development of government

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enforcement policy by attempting to redefine for the new decade a rational definition of affirmative action so that the debate could focus on substance and not revolve endlessly within a morass of meaningless nomenclature. Unfortunately, the draft statement does not define with any specificity or analysis the term or concept "affirmative action." And in the context of the analytical framework underlying the draft statement, such a definition would be difficult to fashion.

The predicate for this draft statement is that the unquestionable statistical reality of underrepresentation in the work force is derived from a past history of pervasive societal, structural, or individual employer discrimination so that affirmative action and the current bureaucratic and regulatory superstructure built around the term is a necessary response. In this context, and under the analytic model set forth in the draft statement, remedial affirmative action is probably an appropriate response. Whether or not the remedial effort would include preferences for individuals who might share common membership with the defined group of discriminatees but not common identity as an individual who personally suffered discrimination is a continuing question. But I do not believe this to be the main question of public concern today, nor would I accept the proposition that all statistical underrepresentation is derived from past or present employer discrimination.

It would seem incumbent, therefore, to address not only the definition of affirmative action, but also that of employment discrimination. I believe it important to note that at various stages of societal activity, there are key points at which intentional exclusionary practices will have ramifications beyond the immediate effects. Thus, denial of equal opportunity in education, either directly by segregated school admission policies or otherwise, for example, by unbalanced funding of school systems, might result in a group of persons sharing common racial or gender characteristics less able to participate productively in our economic system. Assuming that their relative abilities are fairly measured, how should the "recompense" for their "harm" be determined, and who should be made to bear that cost? Is it an appropriate governmental response to require employers, who use the end product of the educational system, to compensate for its deficiencies? So, too, restrictive housing policies or inadequate community facilities that hinder the ability of

certain racial, ethnic, or physically handicapped individuals to commute to employment opportunities or live within areas of natural recruitment ought not to be used to compel employers to stretch their own recruitment beyond reason in order to counteract these non-employment-related conditions. However, where it can be shown that employment policies create inequities, where standards are set at an arbitrary level not to reflect appropriate employment needs, but to exclude individuals from consideration, or where an employer arbitrarily excludes geographic areas from recruitment activity because they contain certain minority or ethnic groups, such policies must be considered discrimination and remedied accordingly—a remedy for the group members discriminated against and required of the employer who discriminated, an appropriate "problem-remedy" approach.

But the Commission statement and the pattern of government activity have gone beyond these exclusionary policies to encompass a host of activities under the heading of discrimination. We now find an unbelievably complex series of regulations and guidelines, purporting to define protected or prohibited activities, compliance with which determines the equal employment status of an employer. For example, the government has promulgated a document known as the Uniform Guidelines on Employee Selection, which one circuit court has stated is impossible to comply with and which could prevent any employer from using objective selection procedures. Is this the discrimination Congress intended to prevent?

The courts and the agencies have expanded their analyses of employment practices to the point where complex statistical inquiry must be made, utilizing computer-assisted regression analyses, standard deviation determinations, or econometric models, to determine whether an employer unfairly denied employment opportunities. Is this labyrinth of expert opinion a true reflection of congressional intent to assure equal employment opportunity?

Yet, it is against this background of administrative action, judicial reaction, and general bureaucratic expansion that an affirmative action policy is suggested. I would submit that such an analysis includes intellectual bootstrapping and bureaucratic creativity that are unsupported by statutory history. However, even should such an analysis continue, is it necessary or even appropriate to base an affirmative

action policy on such a foundation? The answer must be negative.

In couching the discussion in terms of discrimination, the Commission risks a reaction against affirmative action that should raise alarm. In one respect, positing a situation whereby every employer is deemed to bear individual liability for societal or structural problems for which the employer has only the most nebulous responsibility or is merely in a reactive mode because of its size or local employment impact forces the employer into a defensive posture. Under this analysis, any employer that opts to take affirmative action is placed in the untenable position of admitting to a liability for prior or present discrimination whether or not the employer had any responsibility for the problem. Does the Commission anticipate that such an analysis will encourage affirmative action? It is my belief that the analysis would discourage affirmative action.

Basing so much of its position on the proposition that affirmative action is merely a remedy for past discrimination, the Commission also risks the viability of the concept as the very definition of discrimination is redefined. The hallmark of the Commission's analyses is that presumptions of individual employer wrongdoing, discrimination, can be gleaned from sophisticated statistical imbalances. Yet, the development of the law seems to be backing away from this type of analysis. It is now possible to defend against a charge of discrimination by showing a rational reason for the employment decision, without the almost impossible task of proving that discrimination did not enter the decisionmaking process. With this rationalization of the burden of proof in discrimination, cannot employers absolve themselves from any affirmative action efforts by examining their own employment process and documenting rational reasons for the current employment picture? At this point, and under the Commission's thesis, their obligations would end.

The other critical flaw in the Commission's analysis is the lack of definitions of affirmative action. Aside from the nebulous code that the term has become, what does the Commission intend when it requires employers to take affirmative action!

In this regard, the Commission seems to adopt as its definition the regulatory scheme that has evolved over the past decade. In particular, the Commission seems to have opted for the methodology developed by the Office of Federal Contract Compliance in its enforcement of the Executive order requiring affir-

mative action of government contractors. Thus, it is appropriate that some attention be given to the experience of that agency as a model for the application of affirmative action as an enforcement model.

The evolution of the OFCCP into a major government enforcement agency has occurred with a minimum of review either by the Congress or, indeed, by the program administrators. Whether by design or otherwise, the OFCCP has largely exerted a great deal of effort in obliterating the distinction between affirmative action and nondiscrimination, choosing to focus all its efforts on finding employers "guilty" of discrimination and attempting to levy substantial backpay judgments. In my view, such a single-minded focus significantly distorts the agency's mission and tends to transform the affirmative action obligation into the very "invidious quota" this Commission opposes so directly.

In focusing on discrimination, the OFCCP ignores the expressed intent of Congress that decided to keep the Executive order authority away from the EEOC. In particular, Senator Saxbe, the chief proponent of separate authority noted:

The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfurl on a limited and expensive case by case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

The rationale for the Senator's distinction becomes apparent on closer analysis. Affirmative action as a prospective activity of employers was conceived of as a means of focusing attention on the need to bring into the work force persons who previously were left out, for whatever reason. Too, the concept evolved at a time when the economy was experiencing an increase in jobs and when the jobs being filled did not initially require a great deal of skill or knowledge on the part of the new employees. The pie to be divided was an expanding one. Very much like the type of plan approved by the Supreme Court in the *Weber* decision, the initial affirmative action efforts or plans were individually designed to the specific employment situation of employers. The government viewed its function as assisting in the process of job creation. However, that effort was quickly transformed into a complex regulatory scheme whereby voluntary, ad hoc sys-

tems were converted into inexorable regulations, the adherence to which determined not only whether an employer violated its affirmative action obligation, but also whether the same employer was guilty of discrimination. At a time when the nature of employment in this country was dramatically changing, from a large number of semiskilled jobs to a smaller number of technically complex functions, the government adopted methodologies of measuring availability, unreflective of necessary skills requirements. Is it affirmative action to require employers to hire the unskilled or lesser skilled? Is it "invidious" discrimination to deny employment to the better skilled because of their race or sex? These are questions that must be addressed.

Also, the dramatic increase in the size of the regulatory work force caused some of these developments. When 1,400 compliance officers are charged with measuring "affirmative action" and told to find guilty employers, it quickly becomes the norm to measure the employers' progress against a fixed target. The goal becomes a quota.

Perhaps a rethinking of the administrative framework of affirmative action will address some of these problems. Results-oriented programs should be encouraged. Incentives for employers who create new opportunities should be explored. Prospective actions are a fair subject for government action, particularly when government funds are involved. But the measures themselves must be realistic and attainable. A goal for an individual employer based upon availability data that accurately reflects the job needs and skill requirements of employees and the work force pool can be a positive tool; a goal based upon unrepresentative data or based upon a denial of legitimate employment needs becomes a devisive and potentially discriminatory quota. A continuance of an adversary relationship between the government and employers, where progress is measured in backpay rather than new jobs, cannot serve the purpose of affirmative action. Therefore, a formal reordering of priorities might be quite helpful; rather than tying affirmative action to determinations of discrimination, as the Commission does in its report

and the agencies do in their activities and regulations, a separation of the two concepts might be in order, allowing one arm of government the flexibility to work with employers in innovational job creation, while the other focuses on the discrete, narrow question of whether an individual or an identifiable group suffered a harm from an individual employer that must be remedied. Whether that remedy would include a preference for employment would be left to individual case-by-case determinations. I believe in this way the ideal of employment opportunities would be furthered.

Affirmative action is an expression of the highest ideals of our society. It bespeaks a commitment to open up opportunities for persons who, for whatever reason, do not participate in every aspect of our work force. But it must recognize the heterogeneous nature of our society and the increasingly complex nature of our work requirements. Ignoring these factors does not assist the process of equality. So, too, we must avoid labeling individuals or organizations with the appellation of discriminator. The need to find blame does not comport with the need to find jobs. I simply do not believe that the vast majority of employers in 1981 will choose to disregard qualified individuals because of their sex or race. It makes not business sense and will result in significant liability. For those that do, a fair and vigorous application of the law will remedy those actions. But for the majority of employers who attempt to increase participation, who indeed accept in principle the use of numerical measures as one means of judging progress, the government can be a partner in progress, not an adversary.

The draft statement of the Commission will not assist this effort. It is grounded in a time when there were no government efforts, when the laws we accept so readily now were first being drafted, and it ignores the developments of the past 15 years. Perhaps most directly, it ignores the actual realities of regulation and enforcement and, in so doing, provides little assistance for those who believe affirmative action is an appropriate subject of public activity.

# Summary of Views

By Weldon J. Rougeau\*

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The United States Commission on Civil Rights is to be commended for its excellent proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*.

The statement provides useful definitions of discrimination, reviews the state of affirmative action law, and provides what I believe is a constructive approach to the uses of affirmative action measures to undo the process of discrimination in a more lasting way than has previously been attempted.

The Commission's statement comes at a time when the concept of affirmative action is staggering from public denunciation of its usefulness in redressing the rights of those who have suffered from the ill effects of systematic, enduring doses of discrimination. These premeditated criticisms of affirmative action have caused the public to misunderstand the concept and, if we are to believe the public opinion polls, to fear its use in the Nation's attempts to expiate the sins of the Founding Fathers and their progeny.

As a result of the calculated attacks on affirmative action, the public has come to perceive the concept as something synonymous with unwarranted "preferential treatment," "reverse discrimination," and "quotas." These code words, with their inherently threatening connotations, have not allowed for a favorable climate within which to consider affirmative action, to nurture it, and to provide for its use as a creative means of eliminating the debilitating

effects of discrimination against blacks, in particular, against women, Hispanics, and other nonwhite minorities.

One should not be surprised. The furor over a misperceived notion of affirmative action has put the victims of discrimination on the defensive, to justify, as it were, why affirmative measures are needed to stop the bleeding, now that the stabbing has ceased. Perhaps the Commission's statement, if adopted as proposed, will help to further the public's understanding of affirmative action and guide American society towards a meaningful dismantling of the process of discrimination. Perhaps.

The Commission has defined individual, organizational, and structural discrimination in ways that should facilitate a better understanding of how affirmative measures can help produce equal opportunity in the light of previous conditions of inequality. If these definitions of discrimination are embraced by American decisionmakers, then perhaps the ensuing awareness of discrimination's many forms and effects can be used to tailor specific measures to overcome the residual inequality that still plagues minorities and women.

The "problem-remedy" approach to the application of affirmative action can be a good one if adopted by employers, college and university officials, and others. Using the four categories of evidence of discrimination, it should be possible to define one's problems with particularity and tailor a

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corrective program accordingly. Self-analysis should spur creative solutions to problems that may exist in a work force, a professional school, or some other area where the process of discrimination has limited the opportunities of minorities and women.

From an enforcement perspective, the "problem-remedy" approach advanced by the Commission would require monitoring by the government to determine whether "good-faith" efforts were being made to identify problems of discrimination and to provide appropriate affirmative measures to eliminate those problems. The Commission's statement appears to suggest a process of self-identification of problems necessitating affirmative action without active participation by the government. If this were the case, then an enforcement policy would have to be developed to determine whether remedies have been tailored to address appropriately the problems

uncovered. Periodic monitoring of affirmative action plans would provide opportunities to determine how well affirmative efforts were being implemented.

Enforcement, however, will not be an easy task. Affirmative action suffers from gross distortions of its uses and effects. Rescuing that concept from the jaws of the opposition and making it palatable to the public at large will be a difficult undertaking. The Commission will need to mount an aggressive public information campaign to dispel erroneous notions about affirmative action. If this is done, then perhaps people will begin to accept efforts to dismantle fully the process of discrimination in the 1980s and beyond. I believe the Commission is to be commended for its most recent efforts to save affirmative action. Let us hope it is not too late.

# An Assessment from an Enforcement Perspective

By Eleanor Holmes Norton\*

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I want to begin by commending this Commission for its leadership in addressing affirmative action, a corrective for discrimination that enjoys only primitive public understanding. Despite its widespread use for over a decade in the American workplace in its present form, affirmative action is discussed with not much greater understanding and sophistication than it was when it was first introduced. Moreover, the confusion in public understanding cuts across racial and philosophical lines and reaches from the highest leadership levels to the man and woman on the street.

Motivated by concern for the level and quality of the public debate, I am currently writing a book about the development and impact of discrimination remedies under a grant from the Rockefeller Foundation. My purpose is not to produce yet another polemic on a subject that has attracted more than its fair share, but to attempt a rigorous and readable treatment that seeks to contribute information and analysis where dogma and divisiveness have often dominated.

Thus, I have read with great interest your draft document, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, A Proposed Statement of the United States Commission on Civil Rights, January 1981 (*Proposed Statement*.) It is a careful exposition of a difficult subject and an important and helpful contribution to public understanding.

You have asked me to assess affirmative action from an enforcement perspective. It has been my good fortune to have led agencies charged with enforcing discrimination remedies for the past 10 years. When I began as chair of the New York Commission on Human Rights in 1970, the field was in its infancy. It was not until the next year that the Supreme Court announced *Griggs v. Duke Power*,<sup>1</sup> the decision that opened up Title VII to the broad reaches that were to follow beginning in 1971. By the time I resigned from the Equal Employment Opportunity Commission (EEOC), with the coming of a new administration, Title VII of the 1964 Civil Rights Act, as amended, was a fully mature statute. Few Federal statutes have developed so fully so quickly.

During these very years, the decade of the 1970s, Executive Order 11246 was undergoing rapid development. It began to become an effective tool in breaking down discriminatory patterns in 1969, when goals and timetables were first applied. Its development culminated with the consolidation of the compliance functions into the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) in 1978.

This rapid development in law and regulations outpaced the mechanisms that enforced them. Only in the past few years have the primary instruments of enforcement, the Equal Employment Opportunity Commission and the Office of Federal Contract

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<sup>1</sup> 401 U.S. 424(1971).

Compliance, undergone significant change. Each received important new functions and funds that substantially enhanced their power and potential to conquer discrimination. EEOC received jurisdiction over two additional statutes, the Age Discrimination in Employment Act and the Equal Pay Act, making it a multijurisdictional commission, typical among State commissions, but a development that took 15 years to achieve at the Federal level. Internally, the EEOC underwent large changes in all its operations, including the introduction of entirely new case-processing and management systems and the establishment of the first formal systematic program designed to make class action work the equivalent in importance of individual case processing.

I believe I can be most useful if I try to draw upon the history and operation of government enforcement to indicate future directions that seem to me to be most likely or rational. My references will be for the most part to EEOC, the agency I know best, but I should say at the outset that there is no credible way to look at government antidiscrimination enforcement in the 1980s piecemeal. Nor will public understanding and acceptance of affirmative action be aided by enforcement that proceeds from several sources where one would be most rational. President Carter's civil rights reorganization did not complete the consolidation of the equal employment functions of the Federal Government, but the consolidation and coordination that have occurred have led the public to expect rationally structured enforcement without duplication and inconsistency.

The underlying thesis of my remarks proceeds from the view that government enforcement by EEOC is changing markedly, with the government dominating and in some instances preempting the field, a sharp turn from the private party law enforcement that often dominated in litigation during the past decade. This will put unprecedented pressure on government to operate with strong, streamlined, and fair procedures for enforcement. In turn, the professionalism of government enforcement, including its perceived fairness, will be a critical factor in molding—and hopefully remolding—public attitudes toward affirmative action, the central concern of this Commission in its *Proposed Statement*.

I want to begin by distinguishing affirmative action from the statutory discrimination remedies

EEOC enforces. The distinction has been all but lost in public discussion and even in much of the professional dialogue. In its *Proposed Statement*, this Commission has defined affirmative action broadly 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 occurring in the future."<sup>2</sup> This definition is appropriate in light of the broad policy concerns of the Commission in the *Proposed Statement*, but the Commission might consider a brief explanation of the difference between the approaches of EEOC and the OFCCP because the distinction indicates much about what is required to capture pervasive discriminatory patterns.

Affirmative action as carried out under Title VII takes place in the context of law enforcement in private actions brought by individuals and in actions initiated by the EEOC, both pursuant to a statutory scheme that presupposes a violation as defined in Title VII of the 1964 Civil Rights Act, as amended. This is a different basis for affirmative action than that of Executive Order 11246, which relies on a contract rather than a law enforcement theory. Thus, under Title VII the nexus to affirmative action is a violation of the statute. Under Executive Order 11246, the nexus is the government contract, which the Executive order makes contingent upon action to eliminate discriminatory practices. The Executive order was meant to address the situation whereby the massive procurement power of the Federal Government was reinforcing and encouraging discrimination through its outlays of billions of dollars to companies that maintained discriminatory job patterns. Title VII was meant to reach employers whenever a violation of statutory provisions was shown.

Contrary to common impression, the body of practices that the public understands as affirmative action was not created principally by government agencies. Indeed, neither the EEOC nor the OFCCP has always played the principal role in antidiscrimination enforcement. Suits by private parties under section 706(f)(1) of Title VII have predominated in the development of the law in this field by the courts. Private party law enforcement resulted from a compromise reached at the time of enactment of the statute. Proponents of the legislation wanted

<sup>2</sup> *Proposed Statement*, p. 6.

cease and desist authority of the kind possessed by many State and local civil rights commissions, the National Labor Relations Board, and other Federal agencies. This authority allows an agency not only to conciliate, but also to adjudicate and decide claims of discrimination (through hearing officers functioning in a discretely separate relationship from other staff within the agency) and to issue final orders, which may then be appealed to the courts. In effect, the civil rights agency in its adjudicatory function acts like a lower court, but within an administrative process context designed to build in the special expertise necessary to adjudicate cases in the subject-matter area and, presumably, to process cases faster than courts, which are nonspecialized. However, there was opposition to placing this power in the EEOC, and the compromise reached allowed only private parties to enforce the statute in court while EEOC could go no further than to conciliate matters within the administrative process. Not until the 1972 amendments did EEOC get the power to sue in court, but this fell short of cease and desist power; EEOC still cannot issue final orders in the administrative process but must proceed to prove a case *de novo* in court as if administrative processing had not occurred.

Still, the compromise that withheld cease and desist power from EEOC in return for private party enforcement may be one of those compromises business has come to regret. A single agency, no matter how efficient, could never have brought more than a few hundred cases a year. Instead, thousands were brought in every Federal jurisdiction in the United States. A veritable garden of lawsuits flowered, though employers who had to defend them may have fancied them weeds. The fact remains that the private party law enforcement encouraged by the statute greatly accelerated the broadly liberal and, above all, rapid development of the statute over what would have been the case if EEOC alone had been given enforcement power, as, for example, was the case with the National Labor Relations Board. Without the lawsuits brought by the private bar in every district court and court of appeals in the United States, Title VII would never have developed so fully in so short a time. Between 1971, when the *Griggs* case was unanimously decided by the Supreme Court, and 1979, when the Court

decided *United Steel Workers of America v. Weber*,<sup>3</sup> Title VII became a fully mature statute and a powerful instrument against discrimination, a development that occurred in less than a decade. This short period of statutory development served the purposes of enforcement well, but it also collapsed what might have been a longer period for the public to absorb the full meaning of these unprecedented remedies in American law.

Thus, the strong remedies the public associates with affirmative action were not creations of the government enforcement agencies, but of the courts. The cases that shaped and expanded the statute were decided by the Federal courts in suits brought initially by private parties. To be sure, the EEOC often played a critical and powerful role as *amicus* or intervener once a suit was started, supplying vital expertise, manpower, and funds. But affirmative action was developed in a series of important cases brought by private parties. These included *McDonnell Douglas v. Green*,<sup>4</sup> which established the principle that a *prima facie* case of disparate treatment may be made using statistical disparities, which the employer may then rebut; *Moody v. Albermarle*,<sup>5</sup> which established a virtual mandatory requirement for backpay, perhaps the most powerful deterrent under the statute; and *Griggs v. Duke Power Co.*,<sup>6</sup> the leading case in the field, which established the theory of disparate impact, that an employer is responsible for a discriminatory effect even if there was no specific discriminatory intent.

Thus it was the Federal courts in every Federal jurisdiction of the Nation and the U.S. Supreme Court acting at the behest of private individuals who developed affirmative action. The private individuals involved prevailed by carrying the significant burden of proving discrimination by a preponderance of the evidence in thousands of cases. The development of the practices and doctrines associated with affirmative action, including quotas, that resulted was the product of courts acting under circumstances of rigorous due process, a fact often lost sight of amidst complaints about the fairness of affirmative action.

It now seems clear that the era of law enforcement under Title VII by private lawsuit has mostly run its course. To be sure, there will always be private actions, some of them significant, initiated by

<sup>3</sup> 443 U.S. 193 (1979).

<sup>4</sup> 411 U.S. 792 (1973).

<sup>5</sup> 422 U.S. 405 (1975).

<sup>6</sup> 401 U.S. 424 (1971).

private lawyers, and if enforcement of Title VII is reduced by this or any other administration, the private bar and public interest lawyers can be expected to fill the void. But the cost and complexity of Title VII litigation today severely limits the capacity of the private bar to bring significant litigation of the kind brought by private litigants in the 1970s. The single private practitioner bringing an action for a client or class has already disappeared in many jurisdictions, with a somewhat larger firm being necessary to develop the expertise and carry the cost associated with Title VII litigation today. During my tenure, EEOC set up a structured referral panel system in its field offices for cases where EEOC could not be the attorney for the party, but the Commission has encountered increasing difficulty getting private attorneys to take such referrals, despite the fact the court costs and fees are awarded to attorneys who prevail.

This difficulty is seen in the declining number of Title VII actions filed in court, a reversal of an upward pattern for years. In the year ending June 30, 1979, 4,804 private actions were brought by private parties, a figure that dropped to 4,394 during the following year ending June 30, 1980. This reduction of 410 private cases constituted a drop of over 8 percent in a single year.

This decline was perhaps inevitable as the statute matured. First, refinements in interpretation made cases more difficult to prove. Second, and perhaps most important, the obvious cases of discrimination have been brought, leaving largely the more difficult cases of deeply institutionalized discrimination, which require greater effort and cost.

In any case, the reasons for the decline converge around the critical element of mounting cost in Title VII litigation today that often takes on aspects of antitrust litigation in its complexity. Even for a small class action case, the statistical work alone often will not be less than \$15,000 to cover the costs of computer, key punching and coding, and computer time along with the cost of the programmer and systems analyst. In a case of any size, this work will run to \$25,000 and above. Moreover, virtually all class cases depend upon the use of costly experts, such as an industrial psychologist or, in an age case, a medical doctor. A labor economist, who is often used in cases to help in the development of ap-

proaches to identifying the available pool, might easily cost \$10,000. In a current action that relies on such experts, EEOC is about to bring in a \$2 million dollar settlement, but the case has cost \$350,000 in expenses. This would be prohibitive today for most attorneys in private Title VII work even though they may recover courts costs and fees. But such a recovery usually comes only after the attorney has advanced costs for many months and is possible only in case of a victory, and court victories are more difficult under the more developed case law and requirements of proof today than was the case when private attorneys won many of the early cases.

This leaves primarily the government in the 1980s as the major agent with the capacity to mount the kind of effort that remains. As it assumes a larger role, government will have to pursue enforcement not only vigorously, but also carefully, and in the process should seek to help reeducate the public concerning affirmative action and how it operates.

EEOC has spent the last 4 years trying to prepare for a new and enlarged role. It is generally agreed that changes in operations and case processing have not only strengthened enforcement, but have improved the fairness of the process, an important step in the context of this Commission's concern in the *Proposed Statement* with "[c]ontroversy and confusion [about]. . . certain elements of affirmative action."<sup>7</sup> This Commission is aware of many of these changes, so I will not reiterate them here. However, the results thus far should be noted because they have gone far toward changing the EEOC, a development inevitably related to perceptions of affirmative action. The 100,000-case backlog has been reduced by two-thirds, with total backlog elimination to occur by the end of FY 82.<sup>8</sup> The new case-processing systems have reduced the time to process an individual case from 2 years to 4 months while raising the amount recovered by individuals from \$1,400 per case to \$3,200 per case. The reforms that brought these results about were met with strong approval from the charging party and business public alike. Thus EEOC has worked to make its internal reorganization and reforms contribute to more positive attitudes toward government enforcement and affirmative action itself.

The structural changes brought about by President Carter's civil rights reorganization in the entire

<sup>7</sup> *Proposed Statement*, p. 3.

<sup>8</sup> Recent budget cuts announced by the new administration may delay backlog elimination until at least FY 83.

government EEO apparatus should also contribute positively to public attitudes toward affirmative action in time. The placement of similar equal employment functions in the same agencies has reduced the sense among many individuals that enforcement of their rights is tedious at best and among many businesses that enforcement procedures border on harassment.

This achievement of the civil rights reorganization should not be viewed as a structural reform unrelated to the substance of affirmative action, how it works, and how it is viewed by the public. The uncoordinated network of equal employment functions dispersed here and there across the entire government reinforced the public perception that at least some of the chaos attending enforcement by the agencies had infected the remedies.

The disarray in compliance was most ostensible in the many faces and voices of government enforcement. For example, two of the most important guidelines in the field had been issued in conflicting versions by the EEOC and the OFCCP. This hardly inspired confidence in affirmative action or its implementation. In 1978, EEOC brought the appropriate agencies together to produce one set of Uniform Guidelines on Employee Selection, the most basic guiding principles in the field. The 1978 Supreme Court decision in *Los Angeles Department of Water & Power v. Manhart*,<sup>9</sup> which upheld the EEOC pension guidelines requiring that women receive equal outlays with men, has now resulted in one set of principles on pensions in this area.

President Carter's implementing Executive Order 12067 has already vigorously attacked many of the problems that produced this wasteful duplication and inconsistency. With the transfer to the EEOC of the authority to coordinate and produce uniform policies, data collection, and other practices, duplicative, overlapping, and conflicting actions that are unnecessarily costly and paper intensive without gain to enforcement are being eliminated. Perhaps most significant has been the production of a new EEOC-OFCCP memorandum of understanding to synchronize all the major operations of the two agencies through a joint task force. But even before formal development and implementation of the memorandum of understanding, the EEOC and the

OFCCP, beginning in 1977, eliminated the major conflicting activity in this jurisdiction by setting up a system to avoid duplication between class cases by EEOC and reviews by OFCCP. Where there has been recent activity by one agency, the other will not proceed. This has eliminated the waste to the government of duplicative actions, assured coverage of a greater number of businesses by avoiding redundant activities, and eliminated the unfairness to respondents who had to answer to more than one agency for the same violations.

In these and many other ways, the civil rights reorganization has already responded significantly to the exasperation that had accumulated at the dispersed and uncoordinated antidiscrimination apparatus.<sup>10</sup> But the larger question in antidiscrimination enforcement remains open. Will the two major pieces of enforcement machinery, the EEOC and the OFCCP, remain separate? If they do, many of the problems in affirmative action and enforcement cannot be forthrightly resolved. For all its efficacy in addressing many of the problems of duplication and conflict, the civil rights reorganization and the new EEOC-OFCCP memorandum of understanding cannot reach some of the most pressing problems. Many of the remaining problems require decisions and action that can be satisfactorily addressed only if the functions are in the same agency. For example, some of the major questions that vex employers simply would not arise if there were a single, coherent, equal employment agency. The controversy over whether backpay is appropriately awarded under Executive Order 11246 is a case in point. If the OFCCP were located in the same agency with the EEOC, the Title VII enforcement tool, where backpay is routine, would undoubtedly be used in such cases, thus removing this bone of contention. Moreover, the fairest and most rational targeting of employers requires a single-agency focus. For even with joint targeting under the EEOC-OFCCP memorandum of understanding and the excellent cooperation that has developed between the two agencies during the last administration, the institutional concerns of two separate agencies cannot help but be a consideration in targeting respondents and in other areas of enforcement. For example, the recently signed consent

<sup>9</sup> 435 U.S. 702 (1978).

<sup>10</sup> *Coordination of Equal Employment Opportunity Programs: The First Year 1978-79*, August 1979, Equal Employment Opportunity

Commission, U.S. Government Printing Office, No. 052-015-0052-9.

agreement with the Ford Motor Company was delayed for several months while the OFCCP reviewed it for signoff. Because the OFCCP had been involved years ago at an early point in the negotiations and because this was a nationwide complaint, Ford wanted OFCCP as well as EEOC agreement on the consent decree. Otherwise, of course, there was no guarantee that the OFCCP would not look at violations from the same period. OFCCP understandably felt it had to review its files on Ford and the entire agreement. This kind of bureaucratic activity is necessary when functions are separately placed, causing delays and inefficient use of staff.

Employers ought to be targeted by EEOC or OFCCP based not only on their record, but on which remedy is most appropriate to deal with the alleged violation. The Title VII and contract compliance remedies need to be tailored to specific fact and violation situations to get the greatest mileage for the public and to assure the fairest approach to enforcement for business.

But as compelling as the logic of consolidation is, it must be done only under the best planned and most expert management. Both the EEOC and the OFCCP are more difficult to run than most agencies because of the volume of contact with business and the public and the inherently controversial nature of their mandates. Consolidation will not simply be a matter of moving OFCCP staff and functions to EEOC. It will involve complicated conceptual and functional planning and a redesign of many aspects so that merger avoids both competition and redundancy within the new agency. But consolidation is imperative if fully rational and efficient enforcement is to be achieved.

Is consolidation desirable or inappropriate in terms of the Commission's *Proposed Statement*? This is a fair question in light of the Commission's search for "a unifying and problem-solving approach."<sup>11</sup> The Commission's "approach stresses clarity about the problem in order to promote productive analysis and implementation of the remedy."<sup>12</sup>

I agree that if affirmative action is to succeed the relationship between problem and remedy must be better understood and must be fair and precise. Otherwise, "the merits of particular affirmative action measures" will continue to be "debated

without consistent reference to or agreement upon the discriminatory conditions that make such remedies necessary."<sup>13</sup> It seems clear that consolidation would allow more precise tailoring of discriminatory practice to antidiscriminatory remedy and thus would promote not only better understanding by the public, but more efficient and effective implementation of the remedy. This would occur because, unified in the same agency, the Title VII remedy can be applied to situations suited to law enforcement while contract compliance reviews and remedies can be tailored on a flexible scale that takes into account the pertinent factors such as record of performance, seriousness of suspected violations, and prospective or retrospective relief. And unified in the same agency, some of the questions raised in the Commission's document can be addressed in practice. Not the least of these is "which kinds of affirmative action measures should be used, when and for what reasons."<sup>14</sup> Thus, the problem-remedy approach the Commission advocates has much to say to improved enforcement that hones the remedy to the problem, even as a doctor searches for the most specific drug he can find for a particular disease. Without consolidation, the kind of remedy-specific enforcement necessary for the most professional execution of the law and regulations and for improving the fairness of the process will fall short.

Ironically, consolidation of EEOC functions into a single agency is a ripe issue in this decade because voluntary enforcement is improving and because many of the worst patterns have been eliminated in the past 15 years of enforcement. Thus fairness and efficiency to employers and effective enforcement for minorities and women will require both the EEOC and the OFCCP to exercise greater care in selecting targets than was necessary in the past when violations were more pervasive. When we introduced a system of rational targeting in systemic work at the EEOC, targeting employers with the worst performance record, we found it necessary to pass over many companies or many units and departments in companies. After more than a decade of modern affirmative action enforcement, many companies have corrected many violations or are making such strides toward compliance that targeting under Title VII is not indicated. If government resources are to be concentrated where the most

<sup>11</sup> *Proposed Statement*, p. 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, p. 3.

serious violations persist, it will not do to depend on coordination between separate agencies engaged essentially in the same task. To meet the new challenges presented in administering remedies where precise targeting will be necessary, the consolidation issue must be faced.

Thus our emphasis at the EEOC on modernizing enforcement remedies to streamline them and make them efficient was intimately related to our view that this would make enforcement not only more effective, but fairer and more understandable. Naturally, as these remedies have become more effective and potent, affirmative action inevitably has become more controversial. Inefficient or unnecessarily burdensome enforcement procedures can only contribute to public concern about and misunderstanding of these remedies.

However pejorative the term "affirmative action" has become for some, it is a tool created and buttressed by years of statutory and judicial sanction. If more vigorous and responsible leadership is exercised and greater care is taken to encourage better understanding of the remedies, there will be greater public acceptance. After almost a generation of enforcement, the public is still unaware of some of the most basic facts concerning affirmative action, facts that would dispel much public concern: for example, that affirmative action remedies are not permanent fixtures in the workplace, but are automatically no longer applicable once an employer corrects his violations or underrepresentation as indicated by his own analysis of his work force; that in the past decade strong enforcement has brought large areas of compliance, an indication that if such

enforcement persists many companies will not be subject to affirmative action remedies in the future; and that these are last resort remedies developed and approved by the courts only after lesser remedies were tried for many years and found to be ineffective. When the sad history of remedy failure is laid out, most Americans will see why the Congress, the State legislatures, the courts, and government agencies came uniformly to develop and embrace affirmative action remedies. The alternative was simply unthinkable—permanent second-class status or unconscionably slow progress for minorities and women in the American workplace.

The most important irony that attends these remedies is itself elucidating: that the strong and sure application of these remedies in the short run can alone guarantee their disappearance in the long run. For under the law the remedies contain the seeds of their own destruction once utilization of minorities and women according to their availability is achieved. It will not be a destruction to be mourned, for it will mean that equality has come.

But there is no easy or totally painless way to achieve this goal, because the patterns involved have been built upon rigid practices centuries in the making. They must be carefully taken apart piece by piece and replaced with fair personnel practices and systems. It is a labor for the entire society. It need not take nearly as long to undo discrimination as it did to structure it into the workplace. Much of the work of affirmative action can be completed before the end of this century if strong enforcement continues to end the past and begin the future.



# **DESIGNING AND IMPLEMENTING AFFIRMATIVE ACTION PLANS**



# Enlightened Managerial Self-Interest: Affirmative Action in the 1980s

By Rodolfo Alvarez\*

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I am grateful to the United States Civil Rights Commission for the invitation to participate in this consultation.

The task before this consultation, as I see it, is to assess the adequacy of the proposed Commission statement (*Affirmative Action in the 1980s: Dismantling the Process of Discrimination*) as a set of guiding principles by which to conduct relevant public policies in the decade we have just begun. I want to state at the very start that I view this proposed statement as the most tightly reasoned, most professionally sound, and most well-balanced document on the practice of affirmative action and of the guiding principles under which it might ideally be conducted that I have seen in recent years. The Commission and its staff have no doubt worked heroically to understand (and to discount carefully) the known ways in which the perspectives and motivations of consciously self-interested groups with varying degrees of power produce particular actions in the political arena. The focus of the proposed statement is clearly and appropriately not to placate any given special interest, but rather to enumerate and explicate the several legally sanctioned ways in which affirmative action can operate to achieve a "practical level" of fairness in several areas of public life in our society. The statement addresses specific problems and does not attempt to provide all things to all people.

Those problems constitute some, but by no means all, of the elements of which the processes of personal and institutional discrimination are com-

posed. I will later suggest a strong working definition of institutional discrimination. The Commission has wisely noted that the practices legally defined as discriminatory do not include "all forms of discrimination experienced by minorities and women, particularly the more complex processes of discrimination." Indeed, social scientists do not yet fully understand nor have we fully charted the joint processes of personal and institutional (organizational) discrimination. Even so, we do know much about the very gross elements and how they interrelate to create processes that of themselves are discriminatory.

As I see it, in the past affirmative action as a set of very specific, legally sanctioned remedies has been aimed at these very gross aspects of the process of discrimination. I will later suggest how I believe affirmative action should evolve in the 1980s. For the moment it is important to say that it is as yet unclear in any demonstrable evidentiary sense what it is that affirmative action programs as they have been practiced in the past have accomplished. This is so as much because government appears to have been slow and uncertain in the pursuit of affirmative action as because resistance to its effective implementation has been so widespread, subtle, and increasingly well organized throughout our society. While progress toward equality of opportunity that has been made by women and by particular racial and national origin groups has been substantial in some, few, organizations and while moderate progress has been made in some regions of the country,

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overall statistical evidence for the country as a whole suggests that we have a long way to go before we obtain convincing results that affirmative action has produced significant social change. Indeed, the evidence suggests that the gap between the white (especially the white male) population and the presumably "protected" groups in question has probably increased rather than decreased in almost every major institutional sector such as education or employment or housing during the decade of the 1960s. Preliminary evidence just now becoming available suggests that the overall gap will have again increased in the decade of the 1970s. Thus, it is fair to ask what it is that affirmative action as practiced in the past has accomplished.

My answer to that is that affirmative action has accomplished a great deal in some peculiar ways. Perhaps the gaps of which I speak would have been much larger had affirmative action programs not existed. Perhaps a much higher proportion of minorities and women would not have even made an effort to fight injustice and improve their lot out of sheer hopelessness had affirmative action programs not offered at least the hope of opportunity during this era. It can certainly be said that no other governmental action has done more than affirmative action to sensitize virtually the entire population to the continued pervasive inequities that exist in our society. Affirmative action has served to provide abundant documentation of the existence of these inequities. Affirmative action has provided a vehicle for the ageless debate between those who believe that all differences in group accomplishment can be eliminated and those who believe that these differences will remain regardless of how much help any given group will get.

In an era of apparent economic abundance (1960s), mass media announcements of educational and occupational opportunities for previously excluded populations were only mildly objectionable to previously favored constituencies, since they perceived no substantial threat to their own interests. In the ensuing era of increasing economic stringency (1970s), such announcements in the mass media were like matches on kindling because favored constituencies perceived threats to their interests. The fact that perceived as compared to actual opportunity was grossly exaggerated was irrelevant. The fact that, even if actual opportunity increased somewhat, a comparatively small proportion of those to whom opportunity was made available

were, in fact, able to benefit from it was irrelevant. What was relevant was that in a contracting economic situation favored constituencies were able to blame their actual or perceived failures on highly visible scapegoats: affirmative action programs and the "protected" groups they were intended to help. Because that scapegoating has become so effective, we can predict that the 1980s will be an era of reactionary counterattack during which virtually all programmatic efforts to increase opportunities for populations officially designated as needful of governmental protections will be either completely undone or severely curtailed. This reactionary trend is born out of fear and narrowly conceived, short-term self-interest. It is based on popular misconceptions, rather than empirically demonstrable evidence. It fails to understand that the political instability that might result from increased inequalities between self-conscious constituencies is an infinitely greater threat to everyone's fundamental, long-term self-interest. One can only speculate at this point as to whether the dismantling of affirmative action programs will reverse whatever real progress our society has made toward equality of opportunity by women and minorities. To the extent that we understand elements in and the operation of processes of institutional discrimination, we can predict that, left unattended, such processes will produce greater rather than less differences between groups. Regardless of the rhetoric of extreme proponents and opponents of affirmative action during the 1970s, it seems clear that affirmative action *has never* and probably *will never* substantially intrude upon the well-established and well-protected advantages of the white male sector of the population. What little, if any, impact affirmative action has had makes charges of reverse discrimination ludicrous. If extreme proponents and opponents had their say in the 1960s and 1970s, what shall the moderates of the 1980s stake out as their ground?

The arena that I see emerging for public debate in the 1980s is that of enlightened managerial self-interest. I stated earlier that affirmative action has left virtually no sector of our society unsensitized to the pervasive inequalities that persist and that affect our capacity to live self-consciously at peace with our constitutional ideals. The vast majority of people who are neither extreme proponents nor opponents of affirmative action have, nevertheless, been touched by the greater public awareness that has resulted. A major leadership element among that

vast majority of our population are middle and higher level managers who hold stewardship responsibility for the day-to-day operation of hundreds of thousands of public and private organizations through which life in our pluralistic society is conducted. The remainder of my remarks are designed to suggest to the Commission that, among all the many things it must do to pursue its own mandate, it must surely focus sharply upon ways to enlighten middle and upper levels of management in all kinds of public and private organizations to the fundamental, long-term self-interest of the Nation as a whole. Managerial activities that help to perpetuate group inequalities are a threat to the social stability required for the continued well-being of organizations through which all aspects of life in our society are played out. The enlightened manager knows that the well-being of the organization for which he or she holds stewardship is more important than persisting in discriminatory practices.

I am delighted that the Commission has now begun to focus its attention on organizational (that is, institutional) discrimination per se. When major organizations set their policies, they influence the pattern of activity and the standards for judgment of managerial excellence in smaller organizations by several orders of magnitude. But it is not enough merely to influence the setting of policies by organizations. Policies, after all, have to be implemented by individual decisionmakers in day-to-day operations. Thus, ways must be found to reach organizational stewards and to raise their consciousness of affirmative action practices as being in their own self-interest.

My own particular bias, as a professor and researcher, is that *research* (or more specifically the systematic evidence resulting from research) is a very important and effective tool by which to reach managers. To do so it has to be research the results of which allow managers to see realistically that change toward elimination of discriminatory practices in their own organizations will *increase* rather than lessen their control over the success and economic well-being of their organization. The message, the appeal, must not be characterized by lumping managers as part of a much larger category of "white males." Managers who have reached the middle or upper levels of even moderate-sized organizations are only a small fraction of the entire white male population, even though white males are a statistically significant proportion of the manageri-

al population. To raise the collective consciousness of *all* white males about their favored status in society is an error. The vast majority of white males in our society perceive themselves to be ill rewarded for their hard work. The fact that the vast majority of the movers and shakers in our society are white males does not and should not blind us to the fact that the vast majority of white males are not themselves movers and shakers. In short, the movers and shakers are few. When we raise the consciousness of the general public to the fact that the movers and shakers are predominantly white males, we say little that women and minorities did not already know through the experience of discrimination. By so doing, we may not generate any greater motivation to achieve than already existed among women and minorities. But we do awaken the vast majority of white males to their own achievement shortfall by comparison to the few who are movers and shakers. Mass media propaganda broadsides merely serve to generate anxiety at the "perception" that vast numbers of women and minorities are moving into the higher reaches of society when, in fact, nothing of the sort is happening. Anxiety and frustration lead to displaced aggression resulting in both a political backlash against affirmative action programs as well as increased activities reflecting personal prejudice and intolerance. Thus, I recommend that the Commission give considerable thought to ways of pinpointing its own efforts at public awareness. I suggest that specific efforts to enlighten middle and upper level managers to their public responsibilities should be developed.

The task of managers is to discharge stewardship of their organization in such a way that resources are conserved or increased, that inputs to the organization exceed outputs. An organization that wastes its resources by not having peacefully cooperative relations with government agencies or with the increasingly well-organized community groups that seek to improve the well-being of women and minorities is an organization that can not be said to be well managed. On the other hand, excessive external demands for paperwork and statistical reporting are detrimental to efficient management also. Some protests against excessive reporting are certainly legitimate. Government must guard against make-work reporting requirements that lower productivity in other areas. However, enlightened management quickly concludes that compliance is less costly of organizational resources (of which

community good will is one) than a protracted fight over regulatory oversight procedures, especially so when the statistical monitoring devices used can be demonstrated to help managers achieve greater analytic understanding and thus control over processes of production in their organization. Elsewhere (*Discrimination in Organizations: Using Social Indicators to Manage Social Change*, Jossey-Bass, 1979) I have argued that the use of social indicator models can provide managerial payoffs far beyond the mere monitoring of affirmative action progress in the form of highly specific analysis of operating costs and productivity in relation to specific worker, supplier, or consumer constituencies. Viewed in this manner, compliance with nondiscriminatory requirements and the implementation of affirmative action programs to ensure opportunities for all people becomes a managerial option selected on rational grounds as most beneficial to the organization, regardless of the personal values of any given manager as regards either race or sex. It is simply good business, unless the requirements of compliance are so costly that it becomes more cost effective to fight. Note here that nonsexist, nonracist managers could be led to resist and even overtly fight against compliance if the procedures become too costly to their organizations without any offsetting benefits. My argument is twofold: First, the monitoring tools have to be upgraded; mere counting and percentaging rightfully enrages people professionally dedicated to the concept of cost effectiveness. The use of modern social indicator models for thorough internal analysis of organizational processes not only produces the needed monitoring of affirmative action and nondiscrimination, but has the additional benefit of greater understanding of all organizational operations. Second, not only the Commission but all government agencies charged with various oversight and regulatory responsibilities for civil rights should take it upon themselves to focus some effort on education of middle and upper level managers as to the considerable managerial advantages to be derived from use of these new tools.

As we enter the decade of the 1980s, the Commission must now focus the attention of government on how to encourage public and private managers to innovate creatively equalitarian practices that provide opportunities for talented people of all races to

make their contribution to society. In short, I am suggesting to the Commission that it must now begin to shoot with a rifle, not a shotgun; to cut with a surgeon's scalpel, not with an axe. The current proposed statement is an excellent milestone in the right direction. The tools for this effort are concepts that will target particular types of organizations; within those organizations, particular types of managers; and among them, particular types of actions and policies. The definition of discrimination that is employed in the proposed statement is useful; however, I urge the Commission to utilize a definition that is at once as equally useful for legal purposes as the one employed in the document, but that in practice gives greater possibilities for the use of sophisticated statistical tools such as social indicator models by virtue of permitting a more precise measurement of a greater number of the known elements in the process of discrimination.

The definition that I have designed and that has been used effectively in various organizational analyses is as follows:

Institutional discrimination is a set of social processes through which organizational decisionmaking, either implicitly or explicitly, results in a clearly identifiable population receiving fewer psychic, social, or material rewards per quantitative and/or qualitative unit of performance than a clearly identifiable comparison population within the same organizational constraints.<sup>1</sup>

The stronger and the more subtle the measurements of each of the known elements composing the process of institutional discrimination, the more feasible it will be to design specific affirmative action remedies. Affirmative action is the remedy for the problem of illegitimate discrimination. Therefore, we must be very precise in the identification of specific types of actions under specific organizational circumstances that can be defined as illegitimate discrimination. In my recent work *Discrimination in Organizations*, I provide an analytic framework for such an effort.

The definition that I propose has an added advantage over other definitions in that, while it does not preclude the pursuit of discrimination based on psychological or social-psychological factors, it does permit the analysis of discrimination engaged in strictly for material gain. The older social-psychological tradition that seeks to identify the personal

<sup>1</sup> Rodolfo Alvarez and Kenneth Lutterman (eds.), *Discrimination in Organizations: Using Social Indicators to Manage Social Change*. San Francisco: Jossey-Bass, 1979, p. 2.

pathology that leads members of one group to hate or personally to discriminate against members of another group is a good one. That research tradition had its uses and perhaps still does. But we are faced today with the widespread phenomenon of discrimination based not on personal prejudice, but on the rationally calculated material gain that can be obtained by placing a category of people in a subordinate and, therefore, noncompetitive position. Thus, my approach is to focus emphasis not only on psychic factors, but on all the factors by which one class of people takes advantage of another class of people.

Much of the opposition to affirmative action that I have heard during the last decade, indeed much of the opposition that was expressed to the Commission at its hearings on the proposed statement, is focused on the comparability of hurts. There is the question of whose hurt is greater, the Appalachian poor white or the New York middle-class black? The definition that I propose gets immediately at the question of comparability: comparability of organizational constraints, comparability of performance by the subjects in question, comparability of rewards—whether these be psychic, social, or material. It is logically dishonest to ask who has more right to entry into a given medical school, the son of an Appalachian poor white or the daughter of a middle-class New York black. Only when we begin to take into account all the comparable systemic factors can we begin to make the hard choices required of managers in an imperfect world with limited resources. It may be that discrimination cannot be said to be present when the analysis of the social system in question takes into account all the relevant factors and constraints. On the other hand, if after taking all these elements into account, it can still be demonstrated that one population gets rewarded more (in particular ways) than another population, then we have gained tremendous analytic strength for understanding precisely what processes are at work in what ways in which situations among which people in the social system with what consequences. Thus, we have identified a very specific discriminatory situation that needs a very specifically designed affirmative action remedy. Furthermore, this procedure allows the managers in charge to deal with the situation in a focused manner and with a high degree of knowledge about cause and effect at a practical level. Further still, this approach explodes the bogus reaction that *merit* is

being overlooked or undervalued because it can be demonstrated with precision that particular types of people make particular contributions to the organizational system and that their contributions have particular worth to the continued success of the system.

Now a word about organizational constraints: What constraints should be taken into account in the analysis of discrimination in organizations? Those that are task relevant. That is, those elements in the situation that are known to have an impact on the legitimate outcomes sought from organizational activity, or, additionally, those elements that are believed to potentially have an impact on results. Thus, some forms of institutional discrimination are justifiable because the decision to discriminate is based on knowledge that a set of constraints is necessary to obtain certain legitimate outcomes from organizational activity. It may be justifiable to discriminate against people who lack certain qualifications for a position even if the majority of black applicants lacks the necessary task-relevant qualifications. But it is not justifiable to impose such qualification requirements if these are not demonstrably related to the task. Nor for that matter is it justifiable to discriminate in the processes by which those required qualifications can be acquired in the first place. When the analysis reveals that the decision to discriminate is based on a set of constraints that are not related to performance toward legitimate outcomes, then it is unjustifiable and requires specific affirmative action remedies to correct the situation. Notice, however, that in this conception, affirmative action is not something special being imposed on management from the outside; rather, it becomes a normal integral aspect of the managerial process internal to the organization and pursued because it increases the efficiency and effectiveness of management in the pursuit of organizational goals.

Returning now to the proposed definition of institutional discrimination, notice that the definition calls for a distributional analysis: who gets what from whom under what circumstances. The definition calls attention to two types of distribution within social systems—only one of which has been dealt with in the classic, first-generation type of affirmative action cases. During the last decade the affirmative action battles have been over the question of *representativeness* of a given population at various levels and sectors of an organization. The

question, for example, has been what proportion of women or minorities are distributed in the engineering sector as compared to the sales sector or what proportion at the clerical as opposed to the executive levels. These have been analyses (most often gross and unsophisticated analyses) of representativeness. Now, in the second generation of affirmative action in the 1980s, we must not only do more subtle and more sophisticated analyses of representativeness, but we must also begin to focus increasing resources and sophistication on analysis of the issue of *representation*. Representation refers to advocacy for the interests of a particular population or constituency. Too often in the past we have assumed that, just because a category of people had achieved representativeness throughout an organization, that meant the organization did not discriminate against the category of people. We now are entering an era (1980s) when we have to be more knowledgeable and sophisticated. A bank that has achieved representativeness of women or of blacks even at the highest levels may still have policies that (with or without the knowledge of those representative people) still have a severe negative impact on women and/or blacks in the population of the society at large. So we have to get into an analysis of policies, to see whether representation of the interests of particular categories of people has been

achieved in those particular policies that affect them. It is important to note that some members of a particular category of people may be deliberately brought into the organization precisely because they do not themselves advocate on behalf of that population's self-interests. Such a situation may be the source of high rewards from the organization for the individual, providing as it does "cover" for organizational policies and practices that may be highly exploitive of that category of people as a whole. Thus, *representativeness* and *representation* are clearly distinct phenomena. These are phenomena that the aroused awareness created by a decade of affirmative action has now made imperative that we address. If we fail to address these phenomena, then affirmative action will be discredited in the eyes of a public that wants to believe in the basic fairness of our society and its institutions.

At this point I want to conclude by returning to a general observation about the Commission's proposed statement on affirmative action in the 1980s. I thank the Commission for what is nothing short of a heroic struggle over a period of years to bring to fruition a document that in a balanced, intelligent, and thorough manner sets the stage for a renewed attempt to secure our national ideals of fairness and justice for all.

# Affirmative Action Programs: Key Factors in One Company's Success Story

By Martha Glenn Cox\*

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Successful affirmative action programs are rather like tadpoles in a pond—even if you can see what you want, it is hard to grab them. On occasion, however, success is achieved, and it seems reasonable to expect that examination of the successes can yield insights to guide future endeavors. On that assumption, this paper reports on an affirmative action program within the sales division of a major U.S. manufacturer of medical equipment. The program has scored notable success and gives every sign of continuing to do so. This report on the program is in two parts. The first summarizes key events in the project's history. The second analyzes the importance of these events and attempts to delineate what made them effective and allowed the affirmative action program to become an integral part of the management structure of the firm.

## Part 1. Outline of the "Women in Sales" Affirmative Action Project

In the fall of 1979 a major manufacturer of high-technology medical equipment approached a Cambridge-based consulting firm<sup>1</sup> for help in meeting a severe affirmative action problem. The medical firm, which will be called MediCorp, had been trying for several years to increase the number of women in its sales force. A similar effort to integrate minorities had been successful, and indeed they had recently appointed a minority district manager. But they had

no success with women. The failure had long-range affirmative action implications because the company typically derived its upper-level managers from its sales force. Consequently, if there were no female sales representatives, there would be no female managers in the near future either.

The company had hired women for the sales representative position—14 women in the past 5 years into a total sales force of 120. Some of the women decided not to enter sales after completing the 1-year traineeship, generally moving into other functions within MediCorp instead. Others went into sales, but had difficulty meeting their sales quotas. They generally quit within 12 months. Even the two women who did rather well left within 2 years for sales positions in another company.

MediCorp's management was frustrated, but felt the client environment was largely to blame for their difficulties. They felt the radiologists who were their major clients simply were not ready to accept women in a high-technology sales role and that these attitudes caused the lower success rate of female representatives. Therefore, management felt there was little they could do to alter the situation. Still, they wanted to be sure where the difficulty rested and to be sure they were doing all that could reasonably be expected to meet affirmative action goals. They decided to hire a consulting firm to explore the reasons for women's difficulties in sales.

cal and practical expertise of Dr. Stein who, along with the author, designed and implemented the project. This report of the project and conclusions drawn are, however, the work of the author and any flaws in them remain solely her responsibility.

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<sup>1</sup> The firm is Goodmeasure, Inc. Dr. Barry Stein is the cofounder and chairman of the board of Goodmeasure. To a great extent, the project reported here reflects the tremendous theoretic

The consulting firm recommended formulation of a task force comprised of MediCorp personnel as well as members of the consulting firm. The purpose of the task force was to guide and monitor the project. Representation on it was cross level, cross function, and had both men and women. In this way differing views on the issue, if indeed there were any, would be represented on the task force.

At the first meeting, it was clear that there were differing views on how much of the female representatives' difficulties had been caused by the client environment and how much was contributed by internal issues. The first step proposed, then, was for the consulting firm to gather information about the sales roles and factors affecting women's performance in it.

A sample of sales representatives was randomly selected from regions across the country. Each representative was interviewed as well as the former female sales representatives who had transferred to new jobs within the company. Applications specialists, who are technical assistants to sales representatives, were also interviewed. Applications specialists are almost exclusively female and work both with MediCorp sales representatives and with the clients. The task force thought this exposure might give them valuable insights into factors affecting women in the sales representative role. The interviews were designed to elucidate:

(1) What factors help or hinder *anyone* in becoming a successful representative?

(2) What specific factors operate differently when the representative is female?

A group of eight district managers who were about to receive new sales trainees (over half of whom were female) was also interviewed by phone. Additionally, personnel arranged a 2-day training program for these district managers. The program was designed to present preliminary findings and to explore the district manager's role in the women in sales effort. Also included in this district manager meeting were several women who had sales experience with MediCorp or who were managers in other functions such as manager of applications specialists.

The interviews with sales representatives and district managers gathered a tremendous amount of information about features of the formal and informal systems within sales offices that facilitate or block representatives' effective performance. The features ranged from how territories were assigned to informal ways a boss could facilitate a representa-

tive's advancement. The most dramatic finding was how very differently women moving into a sales representative job were regarded and treated by bosses, peers, and subordinates. A brief look at three of the findings regarding women in the sales representative job will illustrate the kind of information gathered.

### **Territory Assignment**

Because women were an "untested product," district managers often overprotected them. They held women back from the big jobs and often gave them competitive accounts, that is, clients who generally purchased from MediCorp's competitors. Given the managers' assumptions about the women, this was a fairly reasonable strategy. It allowed managers to place the "untried recruits" where they could do the least damage. The manager did not expect much from the clients anyway, so if the woman were not a skilled representative, it would not hurt the bottom line. And if she were terrific and won away a competitive account, it would be a big bonus. Unfortunately, the managers were also sending a "lack of confidence" message to the women so placed. Additionally, it was much more difficult for women with this kind of account to make a big sale. Making sales was the key both to self-confidence and to credibility with boss and peers. Being given the toughest nut to crack made it harder for women to have sales successes. Newcomer males were not regarded as "high risk" as the women were and were given more balanced territory assignments.

### **Informal Relations With Boss and Peers**

There was usually one female representative in a district sales office. Peers and boss were male; the only other females were support staff. Typically, at lunchtime the male representative would go out with the boss, while the female representative would go out with the secretaries. This was a fairly comfortable solution socially. The woman did not have to worry about intruding on "the boys" nor did the males have to deal with having a new kind of person in their midst. Yet this pattern can have a staggering effect on long-term performance of the female because these informal contacts with experienced people are a critical source of training, information, and moral support. According to all interviewees, a great deal of learning in a sales representative position comes from on-the-job experience, an important component of which is learning

how other representatives manage both their accounts and the internal workings of the parent company. These informal interchanges were also often where representatives would learn of impending product or policy changes—changes that could greatly affect their credibility in clients' eyes, but news of which might take months to reach them through official communication channels. Consequently, anyone who misses out on these informal information conduits will be at a selective disadvantage.

### Credibility

As mentioned in the section on territory assignment, women were regarded as “high risk” or “untried.” Running along with this perception was a sense that women “don’t have what it takes” to be successful representatives. This created a self-fulfilling prophecy. All representatives interviewed stressed how much selling was a team effort—technical specialists, service representatives, and office staff each play a key role in building the strong client relationship central to success over time. Representatives with high credibility have an easier time getting these people to work with them. They are more likely to get their requests dealt with promptly and correctly, and to get “special help” when they need it. The “conventional wisdom” in the field about women was that they had been hired by headquarters to meet affirmative action quotas and that no one really expected them to make it. Their positions were seen as window dressing and their role was not taken seriously. Their requests and needs simply were not dealt with as quickly or efficiently as male representatives' requests were. Clearly, if women were to become more successful in the representative role, the message concerning women's “inability” was going to have to be corrected, as well as the idea that women were affirmative action lame ducks who lacked management's backing.

Interview findings were summarized, and a meeting of top management at headquarters was held to present the findings to them. Management was impressed by the information because it:

1. contained a great deal of information about the normal operation of their sales representative function and identified areas where change was needed;
2. gave them new insight into how their internal operations might have been handicapping women.

The CEO commended the project and pledged his personal support to the project on women in sales. Further, it was recommended that the report be presented to the regional managers. The regional managers are the primary link between headquarters and the field (see figure 1). They were, consequently, the key to getting the message out to the district managers that this was a serious commitment and one in which results were expected. Finally, headquarters recommended continuation and expansion of the membership of the task force. It was to be headed by the vice president in charge of sales. A regional manager and two district managers highly respected in the company at large were added, as well as a member of headquarters' personnel staff with special expertise in communications.

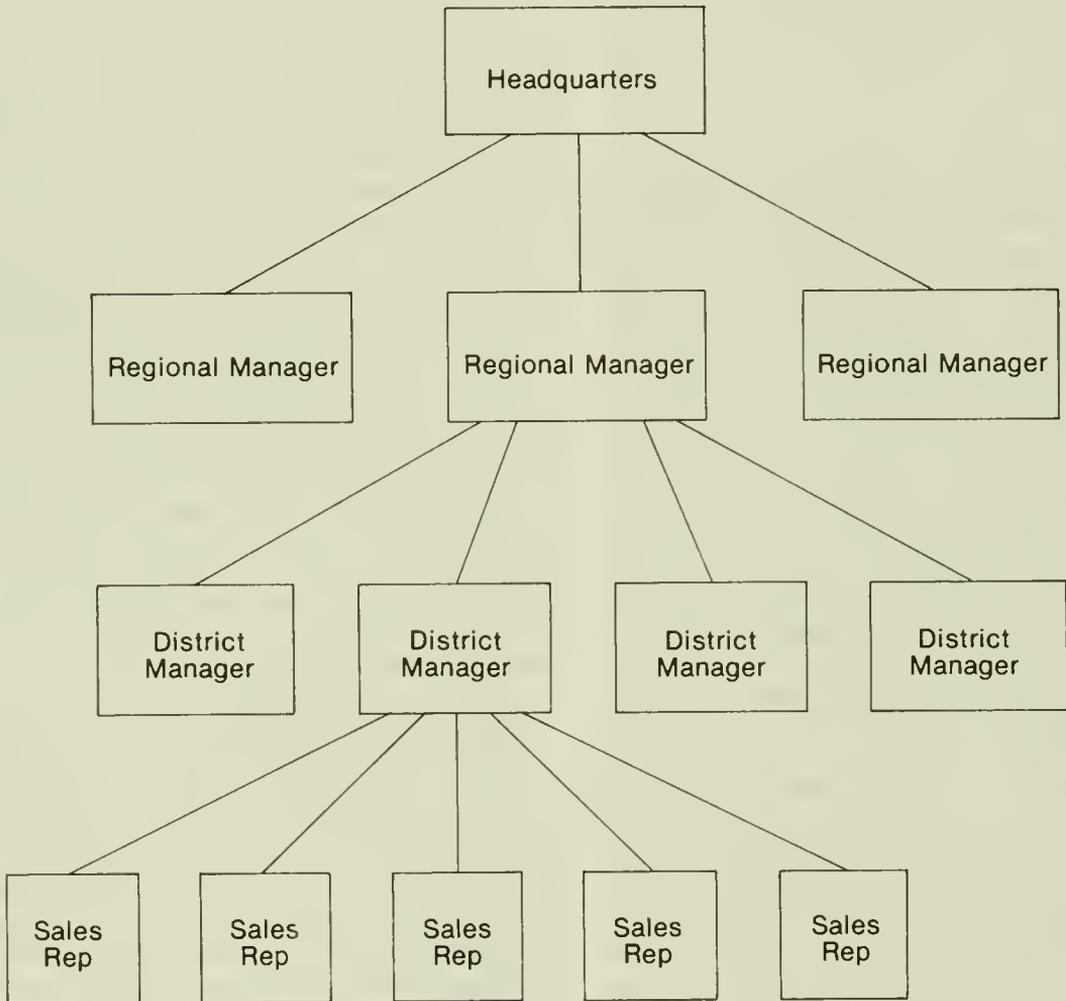
A meeting of the regional managers was held several weeks later. The striking aspect of the meeting was that, just as with the headquarters executives, the RMs' initial conception placed the blame for women's failure on the hostile client environment or on the women themselves, citing a lack of experience with technical equipment or a lack of self-confidence. By the end of the day's meeting, however, the RMs had a different view. They were genuinely amazed at the subtle patterns of discrimination in motion within the sales office. They agreed that if they themselves had faced the kind of obstacles women were facing, they would have had a hard time too.

In essence, at the outset of the project, top management viewed the failure of women in sales as a function of client attitudes, and the regional managers thought women might have lower technical aptitude due to their childhood socialization as well. Management felt they had no control over these factors, and as a consequence there was really nothing they could do to aid affirmative action goals. By the end of the project, the same men had a strikingly different conception. They believed that there were (sometimes quite unintentional) internal ways of treating women that limited their effectiveness. They expressed their commitment and, indeed, enthusiasm for the effort.

Of the six women who entered sales trainee positions since the beginning of the project, five have now made the transition to having their own sales territories. Three are performing very well indeed. One left for family reasons, but hopes to return to the company in a few years. The task force continues to meet. By some measures, success will

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**FIGURE 1**  
**Organization Chart for MediCorp Sales Division**



not be complete until the appearance of women in sales roles is no longer a matter of special note. In that sense the effort has just begun. Yet, certainly the strides already made have given this affirmative action effort a vitality and level of commitment that are not typical. A closer analysis of the structure of the program can yield insights into its success by illuminating the political and practical dimensions that shaped it. It is hoped that this analysis can provide guidelines for the successful implementation of affirmative action programs in other companies as well.

## **Part 2. Key Features Facilitating Success**

The program just reviewed was designed in accord with a structural approach to management and to affirmative action. The structural approach argues that the greatest insight into individuals' behavior in organizations comes not from knowledge of their personalities or even their attitudes, but rather from knowledge of their location in the larger organization. The kinds of opportunity and power available to them in their job determine how they will respond to proposed changes and how they will perform on the job.<sup>2</sup> The analysis of the long-term effects of any program, then, must take into account their net effect on managers' jobs. Do they increase management's options and opportunities or decrease them? Do they facilitate or punish? Do they build on and integrate with existing structures, or do they require totally new structures to be put in place? These effects on managers' positions, credibility, and day-to-day functioning on the job will have a strong impact on any program's viability. The 10 features analyzed here in detail explore how this particular affirmative action program affected management structures.

### **Communication Between Headquarters and the Field**

During the initial meeting of the district managers who were receiving new trainees, the DMs made it clear that they had not received definitive word from HQ about how serious this women in sales effort was. They wanted to know what the level of commitment was, whether funds had been set aside for recruitment and training, and so on. Headquarters was surprised by this questioning. They assumed

the field knew where they stood. Consequently, the women in sales effort identified a more general need for better communication between HQ and field. It also brought HQ management and the DMs face-to-face to discuss these issues. This allowed interchange of information about the affirmative action program and several other key problems on the DMs' minds. Everyone agreed it was a most useful interchange and that neither identification of the communication difficulty nor action to remedy it would have occurred without the women in sales program. This indicated to all involved that the AA effort created an opportunity for fuller and freer communication between HQ and the field that could benefit other aspects of the business as well.

The personal contact between the DMs and the vice president of sales got the message through to them that the women in sales effort was genuine and sustained. These DMs, in turn, carried the word to other DMs.

The meeting of regional managers provided another communication mechanism. The RMs had a chance to discuss the program with top management. It was made clear that it was the RMs' responsibility to see that the field understood the program and supported it in the spirit as well as the letter of the law.

Finally, HQ executives realized that messages regarding the program needed to go directly from them to the district managers. Consequently, several memos and reports have gone out from the president regarding the program. Summaries of the report with action recommendations were also sent to them. Thus, sustained interest on the part of the president was made visible in the field. In sum, the program made use of all the existing communications links with the field and created a few new ones as well, such as the face-to-face meeting of DMs and HQ management. Getting the word "out to the troops" is a key element of any organizational change effort. Clearly, part of the program's success was tied to getting the message out to the relevant managers. Additionally, the program received positive ratings from the men in the field for providing the impetus for increased communication in general and increased two-way communication between headquarters and the field in particular. Analysis of

<sup>2</sup> One example of this structural approach to management is presented by Rosabeth Kanter in her book *Men and Women of the Corporation*, New York: Basic Books, 1978. For an application of this approach specifically to affirmative action efforts see: "A

Structural Approach to Affirmative Action" by Rosabeth Kanter. Available from Goodmeasure, Inc., 6 Channing Place, Cambridge, MA 02138.

why two-way communication was deemed so important brings us to consideration of the next factor, autonomy.

### **Autonomy**

A critical dimension that surfaced in the district manager meeting was anger over the way past attempts to integrate women in the sales force had been handled. Historically, DMs were responsible for hiring and training their own sales representatives. In this way they had control over who entered the office and could take pride in the successful development of a new hire. In the case of women, however, headquarters' personnel department did the hiring and sent the women out to the DMs. The DMs resented what they regarded as a usurpation of their prerogatives.

The meeting, then, served several purposes. First, it allowed DMs to let off steam. Second, it clearly identified the control issue. Third, it allowed formulation of an alternative plan. Headquarters was not willing to turn hiring over entirely to the districts because HQ was responsible to corporate for affirmative action, and hence they wanted to ensure sufficiently high hiring rates. But HQ did say the task force (which had DM representation on it) would consider a multitrack recruitment and hiring process in which HQ might recruit some of the women and DMs could recruit others.

The earlier affirmative action efforts, then, had run afoul of a centralized versus regional manager conflict common in many industries. Government legislation usually requires standardization, a function most easily handled by central administration. Yet, if the effort has the net effect of removing control from the regions, it will be overtly or covertly resisted by regional managers. An effective program, then, must find ways of balancing standardization with local autonomy, perhaps by having a several-tiered system as suggested here.

### **Signs of Commitment**

Everyone interviewed, from regional managers down to sales representatives, stressed the importance to them of knowing whether the women in sales effort was "just talk" or whether it was a serious commitment on the part of top management.

People were looking for signals to ascertain the real significance of the effort. In this regard, the time invested by the president and vice president of sales was crucial to the credibility of the program. The

VP of sales took the time to spend half a day with the DMs answering their questions about the program and making clear his and the company's commitment to it. He also spent a full day at the regional managers' meeting and 4 full days with the task force. This kind of time commitment from a top executive is a clear message to all in the organization that the program should be taken seriously.

Second, in a time of tight money, management was committing funds to the project. The consultants, the DM and RM meetings, offsite task force meetings, recruitment, and training budgets all represented significant financial investments. As the vice president said, "You can be sure we wouldn't be laying out this money if we didn't want and expect to see results." These bottom-line items were one way, and probably the crucial way, of communicating commitment. Commitment was also communicated in the face-to-face interaction between the president, vice president, and the RMs and DMs. By their manner and tone, both top executives conveyed the message that this was not a joking matter and that a cavalier or hostile treatment of it simply would not be tolerated. This dimension of communication is noted here because it makes clear why face-to-face contact, particularly in the beginning, can aid a program's effectiveness in a way in which written documents or directives cannot. In addition, this aspect of "setting the tone" is a key source of managerial power and is especially important in affirmative action efforts. As noted in the interview data, an obstacle for women was getting members of the office to take them seriously. A few words and actions on the part of the top manager in such a situation can go a long way toward establishing the nuance and substance of future interactions.

### **Relevance**

A structural element greatly affecting the success of a new program is its relevance to central business agendas. Affirmative action efforts can be constructed as a feature of human resource development. Whether the company, in turn, defines this as central or peripheral determines how much time and energy managers at all levels will put into it. The mechanism is a pragmatic and not an unrealistic one. Given finite resources and potentially infinite demands, managers will apply resources where they can do the most good. Deciding where the greatest good is depends upon the objectives the larger organization is striving to meet. In a sense, when managers were

asking, "What is top management's commitment to this?" They were also asking, "How much energy should I invest here? If I do well in the affirmative action area, will my effort be rewarded? Or will I simply be chastized for not devoting more attention to other areas?" For some time effectiveness in affirmative action areas had been a measure on yearly performance evaluations. Without making an official statement, management made it clear that this section of the evaluation would be taken more seriously than it had been in the past. At the same time, it was clear that a DM who succeeded in developing female talent or an RM who groomed a female district manager would have acquired a significant feather for his cap. There were, then, incentives for effective performance on affirmative action within the manager's own career path. The message was out that increased long-term success of women in the sales force was a fundamental objective of the business. As with other core business objectives, a manager's future would be determined by his ability to perform in meeting the objective.

### **Validity**

A major impetus to the change in management's conception of the locus and nature of women's problems in sales was the interview data. There is no doubt that gathering firsthand information from within the company was critical to establishing its credibility with these men. In the interview data, they could see a great deal of information about a sales representative's job that they knew was accurate. The information about informal aspects of the job (such as the role of service representatives as a sales representative's "ears" within the hospitals) was particularly striking to them because everyone "knew" in some sense that this was truly an important key to success, but no one ever really talked about it in those terms. The information presented in the report, then, had a reality and immediacy that it could not have had if it were a report or a theory about some other kind of job or some other company. Because the analysis of factors in a representative's success was believable, people were more inclined to trust the analysis of what was causing women's problems as well. The views presented differed greatly from their own preconceptions, yet the data presented them were gathered from people like themselves, often in the original language, and they were talking about concrete realities of the job. The accuracy of the report in

describing the sales representative job in general (which the men did know a great deal about) consequently gave it greater validity when it turned to describing an area which they knew less about, internal processes that were operating to lessen women's chance for success.

### **Blame**

A feature of the report which became obvious in the first moments of its presentation was that it was not trying to blame anyone for women's past failures. The focus of the report was detailing elements of organizational structure that were, often in quite unintentional ways, creating a selective disadvantage for women. The project thus avoided the trap many affirmative action efforts fall into of implying either that white males are evil people, bad managers, or both. It seems predictable that managers would react defensively to either characterization. A primary value of a structural approach to affirmative action, then, is that it shifts away from placing blame. The focus was to inform and to plan concrete action in the future that would promote success.

### **New Understanding of the Problem**

At the program's outset, line managers understood women's failure in sales to be a function of the external, client environment, an environment over which they felt little control, or of women's lesser native ability with technical equipment. By the end of the data-gathering and analysis phase, a new view of women's difficulties had been engendered. Managers gained insight into the formal and informal systems influencing success of their sales representatives and of women representatives in particular. They realized that the cause of difficulties was not located entirely in the client environment, but rather in internal systems over which they did have a large element of control. Similarly, understanding structural effects on performance provided an alternative to blaming the women for their own failure. The managers could see that in many ways women were in fact being handicapped in terms of the resources, support, information, and contacts they were receiving. They agreed that anyone placed in that position would become less motivated and would have a more difficult time succeeding. Past difficulties no longer were assumed to indicate that women would necessarily have trouble in the future.

## Backlash

The project made no effort to “disguise” the fact that its primary goal was to improve the success of women in the sales force. The changes recommended, however, were changes that could benefit everyone in sales. There was no special favoritism being shown to women. This was an important aspect to both men and women in the system. Neither group wanted a program that used more lenient standards to gauge women’s performance. Men didn’t want it because it would lessen their own chances for promotion. Women didn’t want it because they wanted to prove they could make it without special help. Their credibility in the long run would only be damaged by any implication that they were promoted on the basis of gender rather than competence. It was agreed by all, however, that women had been unfairly disadvantaged in the past and that such inequity must end. The emphasis was on creating more equal access to both formal and informal rewards and connections in the system. People in the system soon recognized that the project was stressing basic principles of human resource development. Males and females alike stood to benefit from the changes recommended. Consequently, backlash was not a difficulty.

## Exposure to Competent Women

In each of the settings where data were presented and discussed (task force, district manager, and regional manager meetings), women were active members. Ideally, the women present would have been of the same level and in the same function as the men. However, there were no women in those positions as yet, and so female membership was comprised of the highest level managers possible, drawn from different but related functions such as application specialists. These women played a crucial role in the meetings.

First, the women were instrumental in validating the material presented. They had the confidence of the men, and the women had been with the company for many years and really knew how things worked. On occasion, the male managers would say, “Oh, that can’t happen here,” for example, when subtle ways in which women’s credibility was undermined were being discussed. At those junctures a quiet statement from one of the women to the effect that, “Oh, yes it does, fellows, for example. . .” was sufficient to end the debate. The male managers were often genuinely unaware of the kind and

frequency of such messages directed to women. The reports of these women, who were by all measures highly successful and respected, made the issue visible and believable to the men.

And second, the meetings became a forum in which the women could demonstrate skills the men didn’t know they had, in areas of policy formulation or the politics of program implementation, for example. So in addition to being able to validate the kinds of limitations women were experiencing within the company, these women became living demonstrations of how much skill and talent women can display given the opportunity. Indeed, since the project began, one of the female task force members has been given her own sales territory. The expectation is that this sales exposure, combined with previous managerial experience, will make her an excellent candidate to become the first female district manager. The mechanism for developing the affirmative action plan, then, became a first step toward achieving the program’s goals.

## Action Oriented

Finally, a central theme of the project was that it was not just more talk. It was constantly focused on *action*. The research and discussions were aimed at defining the problem of discrimination concretely within the day-to-day experiences of a sales representative. As particular areas were defined—territory assignment, lack of formal leave policies, less time with the boss—they suggested action that would remedy the difficulty. Tying problem definition to behavior made clear that specific changes could be made immediately. Some of the changes were under the direct control of RMs and DMs. Others, such as the policy changes, were longer range, yet they too could be set in motion by the task force. Participants both felt they had and in fact *did* have a great deal of efficacy in responding to the problems presented. The issues and data were always discussed in a context where participants were treated as experts—experts on the workings of the system and experts as managers. The message was that top management held every confidence in their ability and will to analyze the information and create effective action to remove the limitations. Both the content and structure of the interviews and the context of the presentations, then, focused attention on action options and on engagement of energy in a positive attempt to change the structures. The women in sales program became a challenge and an opportuni-

ty to provide a more rewarding and productive environment in which both men and women could develop their competence to the fullest.

# Affirmative Action: Making Change Possible Through Self-Interest

By George M. Neely\*

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## Introduction

The phrase, "An Equal Opportunity Employer," splashes the columns of the classified advertising sections of newspapers and trade and professional journals. Countless business and public sector executives endorse the goals of affirmative action in the rhetoric of luncheon meeting speeches and, perhaps, in the unreported discussion of routine business staff meetings.

But how real is organizational commitment to affirmative action? What types of resistance are encountered in implementing affirmative action plans and how can such resistance be overcome? How can an understanding of the problem of discrimination be translated into the design of effective affirmative action plans? What has proved effective in gaining meaningful organizational support for affirmative action plans?

These are the key questions as the new administration in Washington begins reshaping national policies with the announced intention of emphasizing deregulation, promoting supply side economic policies under what it interprets as its mandate for change.

Traditionally, organizational commitment to affirmative action has meant establishing hiring goals for minorities and women. The questions of promotional

opportunity, career development, work group support, leader facilitation, and interpretation of policy direction have received much less attention. Yet these are the critical questions—the questions that mirror the organizational climate which Katz and Kahn (1978)<sup>1</sup> view as part of the transformation process that turns the organization's inputs of human resources and raw materials into the organization's outputs—its *raison d'être*.

Some organizations have provided management training opportunities for minorities and women. This approach, though well-intentioned, fails to take into account that many successful executives lack management training, that the organization may be "blaming the victim" and perpetuating selection criteria inherently biased against the individuals they say they are trying to recruit. For example, potential employers, when asked about what they look for at interviews, respond "confidence, independence, ability to take charge." But, when the people who act this way are minority people or women, they think of them as "pushy, aggressive, hostile/distant, not team players," etc.

Thus, part of the problem stems from management's perception of the biases built into its structure against minorities and women. On the other hand, research has shown that there are differences in

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<sup>1</sup> D. Katz and R. Kahn, *The Social Psychology of Organizations*, 2nd ed. (New York: John Wiley & Sons, 1978).

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Some of the information cited herein comes from research

perceptions of blacks and whites concerning career development and promotional opportunities. In the literature, scant though it is, there is a paper by Alderfer, Alderfer, Tucker, and Tucker, "Diagnosing Race Relations in Management," prepared for the Office of Naval Research (1980).<sup>2</sup> The authors surveyed black and white managers in an eastern firm on several dimensions to determine their perceptions on general race relations, management groups, hiring, and firing, among others. To quote Alderfer et al.:

The picture of race relations in the XYZ corporation emerging from this diagnosis was complex. It suggested the possibility that Black and White managers conceptualize racial dynamics in fundamentally different ways. Blacks tend to make greater use of groups and system concepts and perceive of two groups—Blacks and Whites. Whites tend to make more use of individual and interpersonal concepts and see one group—Black. Day-to-day interpersonal relations between Blacks and Whites were perceived differently by the two racial groups, and the nature of these dynamics was such that without intervention it would be unlikely to change. The different patterns of understanding social causality repeated themselves in the opinions about job training and performance evaluation. On the subject of promotions, we found that both groups clearly thought the other had the advantage. (p. 33)

Fernandez (1974)<sup>3</sup> examined black and white managers in comparable positions in banks, public utility companies, and manufacturing companies. He administered a questionnaire to both black and white managers, inquiring about job satisfaction, and found that the more educated the black manager, the less the satisfaction with salary, job environment, and position. The highest percentage of dissatisfaction was among the ranks of the lower- or middle-level black managers who had been employed 4 years or less. Fernandez concluded that companies will have to be more committed to affirmative action if they are to adhere to equal employment opportunities.

In a study by Harold A. Brown and David L. Ford, Jr., "An Exploratory Analysis of Discrimination in the Employment of Black MBA Graduates,"<sup>4</sup> the researchers found that access discrimination

("limitations placed on an identifiable subgroup at the time a job or position is filled, examples of which include lower starting salaries and closure of higher skill level jobs," p. 50) did not exist for males, although it did for black females. Treatment discrimination ("invalid differential treatment of subgroup members once they had gained access into the organization—for example, slower rates of promotion and smaller or less frequent raises," p. 51) did exist. Brown and Ford make this same point, that future research should explore the "way" of the present findings, perhaps through longitudinal studies, in order to determine and trace what happens to black MBAs on the job. That is, as it stands now, we can say that discrimination is occurring; but, in order to confront it and on a more specific level to change it, we need to know more about the specific discrimination events (p. 55).

They suggest organizational development efforts could be used to change organizational norms. Any such efforts should include pre- and post-testing for differences in discrimination and assessment of organizational climate.

Shull and Anthony (1978)<sup>5</sup> in an article on problem-solving style differences between black and white supervisors conclude that attitudes toward racial discrimination may be the major difference between the two groups. They point to their data as support for the hypothesis that minority subcultural influences in organizational situations are offset by the processes of organizational acculturation.

In a second article by Brown and Ford (1975)<sup>6</sup> on job progression of minority MBAs, the authors explode a number of "myths" concerning their starting salaries, entering level, and rates of progression. They cite the beliefs held by many whites that, as a result of affirmative action, minorities "have it made" or experience a unique positive advantage over similarly trained white MBAs. The largest (60) percentage of black MBAs in the Ford and Brown study were at the first supervisory level. In comparison, a study by Gutteridge of white MBAs showed 53 percent of the sample at the upper- or middle-

<sup>2</sup> Clayton P. Alderfer, Charleen Alderfer, Leota Tucker, and Robert Tucker, "Diagnosing Race Relations in Management," Technical Report to the Office of Naval Research, contract no. N00014-79-C-0626, p. 33.

<sup>3</sup> John P. Fernandez, *Black Managers in White Corporations* (New York: John Wiley & Sons, 1975).

<sup>4</sup> Harold A. Brown and David L. Ford, "An Exploratory Analysis of Discrimination in the Employment of Black MBA

Graduates," *Journal of Applied Psychology*, vol. 61 (1) (1977), pp. 52-56.

<sup>5</sup> F. Shull and W. Anthony, "Do Black and White Supervisory Problem Solving Styles Differ?" *Personnel Psychology*, vol. 31 (1978), pp. 761-83.

<sup>6</sup> H. Brown and David L. Ford, "Minorities in the Management Profession," *Proceedings of the Academy of Management*, August 1975, pp. 448-50.

management level. Brown and Ford's results show only 26 percent of the black MBAs at comparable positions. Results on ratings of job progression for those who had received a promotion (53 percent in Brown and Ford's study) showed: 34 percent rating it as normal, 14 percent rating it faster, 2 percent slower, and 1 percent could not say when asked how fast his promotion occurred in comparison with his white colleagues with similar training and experience.

### **The North Carolina Experience**

As part of a study involving North Carolina State government, the affirmative action research project questionnaire was mailed to 4,287 North Carolina State government employees in eight governmental departments early in 1979. It contained 208 items concerning attitudes toward women and work, minorities and work, perceptions of various aspects of the work climate and organizational functioning, and perception of racial and gender discrimination, as well as sections asking the respondents to rate various components of affirmative action plans in terms of how important they themselves felt the component to be and the extent to which they believed the component was being stressed by their division.

For most items, there were seven response categories, from strongly agree to disagree, but for purposes of analysis these were collapsed into three categories, agree, undecided, and disagree. The questions regarding the importance of affirmative action plan components provided for four responses, from not important to very important. For analysis these were collapsed into two categories, important and not important.

Race groups sampled included whites, blacks, and other minorities. For purposes of reporting results, other minorities have been combined with blacks, since their numbers were too small to analyze results separately. The questionnaire was mailed in April 1979. Some respondents did not indicate their race or sex, or their division, on their questionnaire. The total number of respondents who did indicate all this information was 2,119, making an overall response rate of just under 50 percent (49.4 percent). Respondents varied considerably by race and sex, as well as by division, but overall, white males had the highest response rate with 61 percent, followed by white females at 54 percent, black and other minority

females at 40 percent, and black and other minority males at 27 percent.

In addition, 35 respondents did not list their race, 36 did not list their sex, and 60 did not list their division. (There was probably some overlap in these numbers; that is, some of the people who did not respond to one of these questions did not respond to others as well; 20 listed neither sex nor division, for example.)

Over half of all respondents, regardless of race or sex, report that they are not satisfied with their chances for getting ahead on the job. However, women report less satisfaction than men, and blacks and other minorities report less satisfaction than whites. For minorities and women, this lesser satisfaction with chances for advancement in the organization is associated with a perception that opportunities differ by race and sex, and that they, and others, have been discriminated against on the basis of race and sex. (See tables 1 and 2.)

For minorities, the evidence is even more striking that their satisfaction with their perceived promotion chances is related to their perception of a differential opportunity structure: Among minorities who are dissatisfied with their chances of getting ahead in the organization, 69 percent agree that promotion chances are better for whites (as opposed to 47 percent of the satisfied group); 74 percent of the dissatisfied group feel that others have been discriminated against on the basis of race (compared with 38 percent of the satisfied group); finally, 48 percent of those dissatisfied with their chances for advancement report that they themselves have been discriminated against on the basis of race (as opposed to 18 percent of the satisfied group). (See tables 3-6 for complete multivariate presentation.)

Minorities' and women's perceptions of limited promotional opportunities seem to be based on a realistic assessment of the situation (see, as an example, table 7, which compares a pay grade distribution table by race and sex).

Over three-quarters of all black females fall into pay grade 59 or below. Nearly 65 percent of black males and 62 percent of black females fall at grade 59 or below. By contrast, less than a third of white males are at or below pay grade 59. Correspondingly, at the upper end of the salary distribution, 16 percent of white males are at pay grade 72 or above.

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**TABLE 1****Percent of State government employees who responded to the survey who agree:**

"Promotional opportunities are greater for nonminorities."

Minority females	57.9	White females	32.3
Minority males	55.1	White males	27.7

"Favoritism is shown to minorities when it comes to special development opportunities."

Minority females	14.2	White females	29.1
Minority males	13.0	White males	34.3

"Since working in State government, I feel that others have been discriminated against because of their race."

Minority females	58.2	White females	24.3
Minority males	45.9	White males	23.7

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**TABLE 2****Percent of State government employees who responded to the survey who agree:**

"Promotional opportunities are greater for men than for women."

Minority females	75.1	White females	80.5
Minority males	7.5	White males	51.6

"Since working in State government, I feel that others have been discriminated against because of their sex."

Minority females	40.6	White females	38.1
Minority males	30.0	White males	22.7

"It is important for an affirmative action plan to review the current utilization of women: how many are currently working at what levels of the organization and comparison of their salaries with others at the same level."

Minority females	79.3	White females	66.9
Minority males	64.7	White males	47.4

"It is important for an affirmative action plan to provide for an accelerated program for women to move them more quickly into higher level positions."

Minority females	72.3	White females	43.7
Minority males	44.5	White males	13.6

**TABLE 3**

**IB15. "Promotional opportunities are greater for men than for women."**

IIIC25. "I am not satisfied with my chances for getting ahead in this organization."

	Women			Men		
	Agree	Disagree		Agree	Disagree	
Agree	89% 601	76	677 (73%)	59% 307	216	523 (59%)
Disagree	75% 193	63	256 (27%)	61% 222	141	363 (41%)
	794 (85%)	139 (15%)	933 (100%)	529 (60%)	357 (40%)	886 (100%)

NOTE: Nonresponses and undecided responses were excluded from the analysis. The percentage figure in the upper left-hand corner is a horizontal percentage: that is, it is the percentage that cell represents of the row total. For example, of those women who agree that they are not satisfied with their chances for getting ahead in this organization, 601 out of 677, or 89%, also agree that promotional opportunities are greater for men than for women.

**TABLE 4**

IIA2. "Promotional opportunities are greater for nonminorities."

		Minorities			Whites		
		Agree	Disagree		Agree	Disagree	
IIC25. "I am not satisfied with my chances for getting ahead in this organization."	Agree	69% 194	86	280 (74%)	36% 316	564	880 (64%)
	Disagree	47% 47	53	100 (26%)	31% 149	339	487 (36%)
		241 (63%)	139 (37%)	380 (100%)	465 (34%)	902 (66%)	1367 (100%)

NOTE: Nonresponses and undecided responses were excluded from this analysis. The percentage figure which appears in the upper left-hand corner of the cells is the percentage that cell represents of the row total.

**TABLE 5**

**IIIC26. "Since working in State government, I feel that I have been discriminated against on the basis of race."**

IIIC25. "I am not satisfied with my chances for getting ahead in this organization."

		Minorities		Whites	
		Agree	Disagree	Agree	Disagree
Agree	Agree	48% 131	143	9% 88	862
	Disagree	18% 20	89	1% 10	552
		151 (39%)	232 (61%)	98 (6%)	1414 (94%)
		383 (100%)		1512 (100%)	
		274 (72%)		950 (63%)	
		109 (28%)		562 (37%)	

NOTE: Nonresponses and undecided responses have been excluded from this analysis. The percentage figure which appears in the upper left-hand corner of the cell is the percentage that cell represents of the row total.

**TABLE 6**

**IIIC28. "Since working in State government, I feel that others have been discriminated against because of their race."**

		Minorities			Whites		
		Agree	Disagree		Agree	Disagree	
IIIC25. "I am not satisfied with my chances for getting ahead in this organization."	Agree	74% 197	70	267 (72%)	31% 274	610	884 (63%)
	Disagree	38% 40	65	105 (28%)	23% 118	406	524 (37%)
		237 (64%)	135 (36%)	372 (100%)	392 (28%)	1016 (72%)	1408 (100%)

NOTE: Nonresponses and undecided responses have been excluded from this analysis. The percentage figure which appears in the upper left-hand corner of the cell is the percentage that cell represents of the row total.

**TABLE 7****Pay grade distribution of NC State government employees by race and sex**

<i>Pay grade</i>	August 1979			
	<i>White males</i>	<i>White females</i>	<i>Minority males</i>	<i>Minority females</i>
48-50	0.6%	3.1%	8.8%	11.9%
51-53	5.7	4.6	17.9	7.1
54-56	11.6	34.4	25.4	41.9
57-59	13.8	19.7	12.5	17.4
60-62	20.4	8.7	20.9	6.0
63-65	11.4	11.6	4.9	6.4
66-68	13.5	9.0	4.1	5.5
69-71	7.0	4.3	2.2	1.5
72-74	8.6	3.2	1.8	1.7
75-77	4.0	1.0	0.8	0.4
78-80	1.9	0.2	0.3	0.1
81-83	0.7	0.1	0.1	—
84-86	0.3	—	0.1	—
87-89	0.1	—	—	—
90-92	0.3	0.1	—	—
93-95	0.1	—	—	—
	100	100	99.8	99.9
N =	24,333	13,107	5,073	4,245

Note: Columns do not sum to exactly 100% because of rounding error. Cells with a dash in them represent less than a tenth of a percent of that group.

## Potential Areas for Support of Affirmative Action: The Self-Interest Argument

If organizational commitment to affirmative action goes beyond token hiring practices and if management and worker perspectives can be identified, one method of approaching the complex problem of attaining affirmative action goals may lie in harnessing the self-interest motives of both management and workers to increase productivity.

Although some have argued that financial settlements in discrimination cases have made affirmative action plans an inexpensive alternative to continuing past discriminatory practices, management may find that linking affirmative action goals to their organization's plan may increase productivity. Further, individual organizations should link concerns for productivity to the area of affirmative action. Arguments supporting the need for and benefits derived from affirmative action may be made as a part of the profit and loss statement for businesses and the quality of education for academic institutions, to take two examples. For human service organizations, the mandate is to assess and remove barriers to minority and female utilization of services. For the Federal sector, it is tying government to the people in the form of policy and provision of services to underserved and high-risk populations in the health area, for example. For the civic group, the goal is providing a culturally diverse service offering to the community in nonpaternalistic ways. No matter what the products of an organization, attempts should be made to express affirmative action goals in terms of the major product, service, or activity in which it is engaged. Lumping all affirmative action into social responsibility is shortsighted and introduces a "softness" to eventual evaluation efforts (if any are undertaken).

Some arguments for affirmative action begin by noting the financial settlements in discrimination cases. Often employers try to cut their losses and conciliate agreements, only to retrench attitudinally. Avoiding the embarrassment of protracted legal involvement is one motivation for effective affirmative action. However, efforts to parallel affirmative action results with organizational productivity measures are not known to this author. At this point, caution is in order. Organizational change efforts when assessed often show "no change." Perhaps the measurement intervals are not sufficient for results to show up. At other times, there are unintended

byproducts that instruments have not been developed to detect. The absence of relevant evaluation criteria for assessing results in the affirmative action area may be linked to the lack of a conceptual framework.

The issue of top management commitment needs to be seriously considered. Rhetorical support of affirmative action is easily gained from today's enlightened organizational leader. However, managerial accountability is woefully underrepresented. Rarely have executives, managers, deans, and department chairpersons been reprimanded or suspended for failure to achieve affirmative action objectives. Likewise, fewer have been rewarded for accomplishment in this area.

Not only must organizational leadership endorse and support affirmative action, they must stand willing (convincingly so) to expect and get results in this area. One myth contributing to this problem is the idea that affirmative action is a staff function. This is not so. Affirmative action results are achieved by the line of the organization and should be part of the regular feedback and sanctions associated with advancement, merit increases, bonuses, letters of commendation, etc.

Looking at selected results from the affirmative action research project survey, we see the responses to the question of importance of several proposed elements on an affirmative action plan. When asked, individuals consistently place a higher importance on these components than they perceive their organization places on them. (See table 8.) Why can't this reported personal importance be translated into perceptions of organizational importance?

Surveyed workers in North Carolina State government seem to support components of affirmative action plans and at the same time view their organization as unsupportive. How can this be? Perhaps this individual/organizational dissonance results from lack of a clearly articulated, organizational self-interest tied to the organizational mission. Were achievement of affirmative action objectives an organizational priority reinforced by a set of positive and negative sanctions, perhaps we would see a closer tie between individual and organizational importance. Until such arguments are developed and made a part of organizational life, affirmative action will not be a high priority. Holding line managers accountable for their results in this area is important. Looking for new recruitment sources and implementing an aggressive career development

**TABLE 8**  
**Importance of affirmative action plan components**

Affirmative action plan component	% of group who consider it personally important		% of group who believe it is stressed as important in their division
Review of current utilization of minorities; how many are currently working at what levels of the organization and comparison of their salaries with others at the same level.	Minority females	85.5	32.5
	Minority males	80.7	42.7
	White females	61.1	36.7
	White males	54.0	51.7
Review of current utilization of women: how many are currently working at what levels of the organization, and comparison of their salaries with others at the same level.	Minority females	79.3	30.3
	Minority males	64.7	32.4
	White females	66.9	26.7
	White males	47.4	38.8
Job posting and advertising of all positions available	Minority females	87.4	52.9
	Minority males	85.0	65.2
	White females	83.6	51.4
	White males	78.5	61.3
Career development and counseling for women and minorities	Minority females	82.7	31.0
	Minority males	72.0	34.3
	White females	62.8	24.1
	White males	44.9	34.9
Special training opportunities for supervisors to help them understand their role in implementing affirmative action	Minority females	84.7	44.4
	Minority males	83.1	47.8
	White females	69.6	43.0
	White males	62.2	48.7

plan consistent with future minority/female utilization needs is important. Identifying organizational and individual barriers at regular intervals through surveys, interviews, and analysis of work force data is important. The operation of a grievance review that is perceived as fair by organizational members is important. The absence of victim blame is an important element of an effective affirmative action plan.

Another set of principles regarding the process by which the affirmative action plan is developed has implications for the plan's eventual success. Apart from top management and executive commitment, there is a need for the participation of minorities and women in the development of the plan. Plans that are drawn up by staff and "laid on" the line are usually resisted. At other times, asking the line to develop a plan based on guidelines provided by staff does not result in a plan. Line managers ignore the request, complete it halfheartedly, and generally do not expect to produce results in terms of new minority/female hires. If a person worries about losing his or her job for lack of results in this area, we may see a different approach to the problem.

Planning sessions that include females and minorities, as well as appropriate organizational leadership, are recommended in contrast to the purely line or staff approach. When possible, work groups should set and plan their affirmative action objectives together (Neely, Luthans 1979).<sup>7</sup>

### **Resistance to Affirmative Action**

The types of resistance to affirmative action plans are both organizational and personal. "Business as usual" is an organizational resistance to affirmative action. Although a soft one, this attitudinal approach is passive and represents a misunderstanding of what affirmative action is. Many employers think that they merely must not consciously discriminate against a minority person in order to be acting affirmatively. The following definition is offered:

Affirmative action represents those plans for, and results achieved from, efforts to recruit, hire, retain, promote, evaluate, benefit, compensate, retire, and develop employees *with* regard to race, gender, physical disability and ability, and utilization. It includes the analysis of all organizational policies, procedures, and practices to determine effect, as distinct from intent. Affirmative action

also includes an acknowledgment that institutionalized racism and sexism are the basis for discrimination and not in the long-term interests of the organization productivity-wise. Racism and sexism are problems that negatively affect productivity. Racist behavior is debilitating and introduces an organizational liability with respect to customers, clients, employees, and the community.

Individual resistance takes the form of direct sabotage, passive aggressive questioning, sexist and racist overt hostility towards women and minorities, the imposition of irrelevant subjective standards of evaluation, cultural denial, blocked opportunities—all based on the assumption that someone less qualified will be hired or advanced. These problems of resistance are tied to perceptions of quality and are an extension of the basic racism and sexism that are part of our society. Going against this racism and sexism has to be a conscious activity motivated by enlightened individual and organizational self-interest.

### **Self-Interest as a Strategy for Overcoming Resistance to Affirmative Action**

The current Republican administration does not seem to hold affirmative action as a priority. Indeed, there is much speculation that Federal enforcement will be deemphasized and pressures for desegregation decreased as a part of "getting the government off the backs of the people." It seems that a free market mentality will replace the classical regulation approach in an effort to increase productivity. But what are the costs? Any cost-benefit analysis should include calculations for the costs of the acts of frustration and desperation spurred by a struggling economy. We may be headed for a period of contraction. If it can be shown that an effective affirmative action plan can increase productivity and organizational effectiveness and efficiency, we have established its base solidly for some time to come. The absence of such a link and interest in tinkering or experimenting with the concept further reduces the likelihood of its operationalization.

Those organizations and individuals that have good past experiences with affirmative action will continue their plans. Those that have not begun affirmation action will not likely undertake the effort in the absence of pressure from the external or

<sup>7</sup> G. Neely and F. Luthans, "Using Survey Feedback to Achieve Enlightened AA/EEO," *Personnel*, May/June, 1978, pp. 18-23.

internal environment to do so. This pressure may come in the form of employee union activity, customer boycotts, and litigation growing out of treatment not in the welfare of clients served or people employed who are affected by organizational policies and practices.

In one situation a general strike threatened to shut down the operation of a major midwestern city. The few minorities and women who were in management positions were able to perform satisfactorily functions for which they had no formal training. For example, a black woman trained at the bachelor's level in a social science discipline operated the waste water treatment facility successfully during the strike. Before the strike, there were very clear ideas about the appropriate jobs for women and minorities. The realities of the strike forced experimentation that hopefully taught several lessons to the city regarding the stereotypes held about women and minorities.

A second example comes from the private sector. A major manufacturing company decided to get involved in the "Black/White" issue, as they put it. Middle-level managers formed a task force and undertook to plan how a hostile impersonal working environment could be improved. Blacks were invited to participate after a few meetings, and the issue became focused on the barriers to advancement that all members felt. As a result of group discussions and leadership commitment, resources were made available for a conscious effort to change perception of the organizational environment. Indigenous resource people were trained under black leadership to be resources to the entire organization. Organizational families participated in problem-solving sessions until approximately 70 percent of all organizational members had participated. Barriers to promotion were identified and removed. Whites as well as blacks, men as well as women, benefited from the change.

Often when one thinks of affirmative action, one assumes that the rewards and benefits of the pro-

gram are intended for and realized solely by minorities and women. This has not been the case. The risk-taking behavior of minorities who have questions of equity and justice usually results in a redress that benefits all. Women's questions about benefits and leave for pregnancy and weight and height requirements have pointed out numerous areas where we falsely thought a bona fide occupational qualification existed. The rigor required for job analysis growing out of affirmative action has resulted in new efficiencies and pointed out new areas of productivity.

## Summary

This paper traces the opposing views minorities, women, and whites hold regarding career development, the opportunity structure, the workplace, and components of affirmative action plans, in an attempt to establish the existence of discrimination growing out of institutional racism/sexism. Translating these data into an affirmative action plan with managerial support and accountability through process considerations is discussed. Sources of individual and organizational resistance are explored and alternatives proposed.

Self-interest directly linked to the organizational mission is presented as a means of energizing and sustaining the affirmative action plan. It is the author's opinion that affirmative action is a low national priority and sanctions are likely to be withdrawn. Within this context, the development of arguments to support affirmative action self-interest is imperative.

Finally, we have an expectation, albeit frustrated, that hard work will be rewarded. As long as there are examples of underutilization, sexism, overt/covert racist behavior, the denial of opportunity out of ignorance and denial, or the impact of institutional racism, we as a country and people face serious struggles that could be the basis for a new revolution of renewal or calamity. Let's choose renewal, for it is in the interest of us all.

# The Affirmative Action Program and the Organization: Structural Conflict and Role Dilemmas

By Mark A. Chesler and Cynthia H. Chertos\*

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Recent experience with affirmative action efforts to dismantle our heritage of discrimination by race and sex has not found them very effective. Significant gains in minority and female employment and mobility, particularly at higher level statuses and roles, have not been sustained over time (USCCR, 1978). Moreover, substantial disagreement and resistance have accompanied organizational efforts to implement affirmative action programs. Indeed, it appears to many observers that the affirmative action agenda is not necessarily consistent with the typical goals and operating structures of American corporations and human service agencies. These inconsistencies, or at least the perceptions of inconsistencies, have resulted in basic conflicts around the purpose and structure of antidiscrimination programs. One result of this history has been a great deal of strain on affirmative action officers and substantial conflict and confusion in their efforts to dismantle organizational discrimination.

Our primary concerns in this paper are twofold: (1) We wish to deal on a realistic and concrete level with the day-to-day problems and conflicts affirmative action officers and their staffs encounter; and (2) we wish to set these issues within the larger structural context of organizational purposes and programs. This form of analysis, we think, will

provide a more concrete basis from which to consider new ways of working toward affirmative action success and dismantling the process of discrimination. The data reported in this paper are abstracted from intensive interviews conducted with 18 affirmative action officers and related staff members in three large organizations.<sup>1</sup>

## Structural Conflicts in Organizations: The Setting of Affirmative Action Efforts

We begin by exploring the organizational structure that provides a context for the affirmative action office and its programs. This organizational context affects the definition and sets the limits for any local effort to alter discrimination, as well as provides resources in ways that support or impede the implementation of change. The success and/or failure of affirmative action efforts is not merely an outgrowth of the talent or wisdom of affirmative action officers, nor solely of their skill in designing programs and carrying out change. Rather, success or failure is strongly determined by the organizational structure within which any program for change operates and the ways in which an organization handles structural conflicts around such issues as goals, authority, division of labor, accountability, and resource management. Any reasonable review

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<sup>1</sup> These data were collected as part of a larger study being conducted by Ms. Chertos, partially supported by an NIMH

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of literature on organizations and organizational change suggests that several of these central features of organizational structure ought to be relevant to the practice and theory of affirmative action.

Our discussions with affirmative action officers consistently identify at least five of these problem areas: (1) the ways in which dominant organizational goals (and those multiple goals of various subgroups and subunits) may conflict with the goals of affirmative action; (2) the ways in which the location of the affirmative action office within the organization can inhibit its ability to carry out its mission; (3) the ways in which dual loyalties and accountabilities are created for the affirmative action office, those to organizational management and those to the women and/or minorities within the organization; (4) the ways in which the continuing existence of racism and sexism in the organization operates to inhibit effective affirmative action programming; and (5) the ways in which scarce resources allocated to the affirmative action effort diminish program potency and progress.

### Goals and Goal Confusion

The dominant goals of organizations in this society, whether primarily engaged in industrial production or public sector service delivery, generally are discussed in terms of productive efficiency (profit, low-cost service delivery, etc.). However, all organizations have other, less explicit goals, which also must be served. For instance, most organizations implicitly are committed to preserving society's prevailing status system, thus creating status relations among and between workers (and managers and others) consistent with those in the external community. The maintenance of an orderly and stable workplace is another key organizational goal, valued for its own intrinsic worth, as well as a means to the achievement of productive efficiency. Finally, most organizations portray themselves as being socially responsible, as contributing to societal values of social equality and justice, and rewarding meritorious achievement.

Many Americans, especially whites and males, may perceive affirmative action efforts to be inconsistent with these goals and purposes, and even to threaten them. For instance, many managers and workers fear that efficiency and quality of work will be threatened by hiring/promoting those who are seen as less competent or as undeserving (Lester, 1974; see also Koch and Chismar, 1976; Feagin,

1981). Certainly, workplace peace and order may appear to be challenged by the introduction of those unlike the majority, by clients or workers who are different, disliked, or perceived to be present on an "unfair" or illegitimate basis (see Purcell & Cavanagh, 1969). Moreover, the commitment to individual achievement and fair play may appear to be replaced by favoritism to minorities and women (McAlmon, 1977; Hook, 1977; also see Himmelstein, 1980). And finally, some feel that their own (semi) privileged status is threatened by the mobility of other race and sex groups (Blalock, 1967).

Some of these issues are reflected in comments made by affirmative action officers during the course of extensive interviews. Note their reports of comments regarding "unqualified people" and "unfair or arbitrary" programs. One result, as the last quote indicates, is that affirmative action officers must spend a lot of time dealing with goal unclarity or conflict and defending the program rather than working on it:

There's a pervasive feeling, both inside and outside the organization, that affirmative action means you will hire unqualified people.

When they say, "We can't possibly do that; it just won't work," it wouldn't work either because they never did it that way or because it threatened their ability to make the "best" decision. . . . You can have the strongest policy in the world, and people will find a way to get around it, particularly if they resent it and they think it unfair or arbitrary. . . . people are far more ingenious.

I spend an awful lot of time defending what I'm doing, rather than doing affirmative action.

Whether affirmative action efforts really do challenge these organizational values and purposes is a good question. While there is much debate on this issue, it does not appear to us that reasonable qualifications, good decisions, or fair procedures are threatened by affirmative action. However, it *is* clear that many people believe such threats exist, and organizational histories with affirmative action reflect this sense of threat. Prevailing cultural beliefs that reflect racism and sexism provide a fertile ground for interpreting organizational events and programs in ways that feed these fears. Moreover, incompetent and halfhearted (or perhaps sabotaged) affirmative action programs also lend fuel to these perceptions of unfair advantages, inefficient procedures, and overall negative impact on the organization. As long as traditional organizational goals and

cultural values are maintained and reinforced, change-oriented programs like affirmative action will continue to be perceived as direct threats to some organizations and some members of organizations.

While we have argued that affirmative action goals may be inconsistent with the primary missions of most organizations, many observers suggest that for tactical purposes it is imperative that antidiscrimination programs be justified on terms consistent with values of productive efficiency (Neely, 1981). In the short run, this approach may have sound advantages; in the long run, however, changes in primary goals and values will be required to promote and sustain changes in organizational racism and sexism.

The problems of goal confusion and conflict around affirmative action are exacerbated in organizations where purposes are somewhat unclear or already in conflict. Most organizations are composed of members of different interest groups (workers and managers, teachers and students, service providers and service recipients, staff personnel and line officers, etc.). At some level, each of these different groups, occupying a different position in the organizational hierarchy, has some different priorities and images of preferred outcomes for themselves and the organization. At the same time, these differences typically are submerged in the creation of a coalition to achieve higher level organizational outcomes. Yet the underlying conflicts of differences exist, nevertheless. When a controversial and potentially threatening program like affirmative action is dropped into this cauldron, it often forces other issues to rise to the surface, creating further turmoil (e.g., ways in which publicity about the conditions of work for minority persons or women escalates other workers' repressed concerns about the quality of their own worklife). Faced with such escalating conflict, many organizational members respond by closing ranks and scapegoating the proximate cause of conflict and tension, the affirmative action agenda.

### **The Location of the Affirmative Action Office**

In most organizations, the affirmative action office is designed as a staff component, with little or no line authority. It typically is isolated from the organization's most powerful units and decisionmaking core. When affirmative action officers report directly to the president, it often is assumed that affirmative

action is an organizational priority (Grossman & Grossman, 1977). However, this staff location often results in even greater isolation of the office from general organizational operations. These trends combine to make many affirmative action officers feel relatively powerless or at least isolated from the traditional and legitimate channels of organizational authority. The following comments by affirmative action officers and staff members demonstrate this dilemma:

To put affirmative action in the office of the president, but not give it line responsibility like the vice presidents, you grandly isolate it. . . . We don't have any power except the power to advise.

Well, the first problem always occurs when you've got two units trying to do the same thing, and they are in different vice presidential areas. . . . Although there can be cooperation between two units, because we aren't in the same unit, we frequently have different goals, timetables, or directives.

If you put affirmative action in personnel, the pressure from the outside is gone. . . . It's something like putting a wolf in to watch the chickens.

Without the organizational power to establish priority over competing agendas, and to monitor and enforce nondiscriminatory personnel processes, the affirmative action office often finds itself powerless to carry out its official mandate. The structural placement of the affirmative action function in a powerful location within the organization is critical to continuing change efforts to dismantle the process of discrimination.

### **Dual Loyalties and Accountabilities of the Affirmative Action Office**

The problems of organizational ideology (goals and values) and structure (location and access to power) further result in a problem of dual loyalty and accountability for affirmative action officers and staffs. On one hand, the affirmative action unit is committed to the improvement of the status and opportunities for minority groups and women—that, after all, is its stated purpose. The affirmative action office staff is more likely to be certain about loyalty and concern for these groups than are other organizational members. On the other hand, the unit also is accountable to the authority system of the organization and to the (usually white male) hierarchy that has hired the staff members and that probably supervises the unit. If we take seriously the sugges-

tion that organizations are composed of competing interest groups, in the life of the affirmative action unit we see this competition expressed quite clearly. If the interests of (white male) organizational managers and those of minority and female groups were (or were perceived to be) congruent with one another, we would have had affirmative action programs championed by these authority figures long before now. The recent invention of such programs, often in the face of authoritative ambivalence or resistance, further confirms the apparent conflict of interest. Several staff members we spoke with expressed this dilemma of dual loyalty and accountability in the following terms:

We couldn't operate without the groups (constituency groups). . . .The constituency groups come up with the issues. And then charge the director with doing something about them.

There are great pressures on the affirmative action offices. . . .The person would have to be drawn in any of two ways. One direction by protected groups. . . .But on the other hand, being pulled in the direction of management.

. . .I think if the person in this position is primarily interested in keeping the organization out of court, in compliance, then they'll have no credibility with people in support of affirmative action. The same is true vice versa.

Such competing pressures, those of protected classes and those of management, certainly impede the effective implementation of meaningful affirmative action programs. Because the interests of these groups often are perceived to be at odds, many elements of the affirmative action program may appear to be to benefit one of these interest groups at the expense of the others. The ultimate dilemma, of course, is that an affirmative action officer or staff member usually feels the need to receive some confidence and trust from both management and protected-class members in order to pursue an effective affirmative action program. Thus, affirmative action can become a balancing act, attempting to satisfy the needs of various competing interests simultaneously.

### **The Continued Existence of Institutional Racism and Sexism in the Organization**

Affirmative action units often are caught in a natural conundrum: They experience resistance to change on the very basis they are expected to bring it about. The existence of organizational racism and

sexism is a natural barrier to affirmative action efforts. We ought to expect this finding; it is evidence of the very discrimination that generates the need for affirmative action efforts. Organizational practices that disparage, inconvenience, harass, and/or discriminate against minorities and women and organizational cultures that interpret their lives and achievement in the most negative terms are commonplace. Not only do they make life oppressive and difficult for minorities and women, but those involved in a program that tries to deal with such issues ought to expect to discover and be thwarted by further evidence of discrimination. Consider the following comments from staff members:

I've quarreled a great deal with personnel about certain policies that they had when I was hired on here. They have five illegal questions on their application.

I think on the outside, the meetings that we (as affirmative action officers) are involved with don't present as many opportunities for, shall we call it, sexism,. . .but, it's inside, when you are trying to get your policies passed and things like that. There are a number of (sexist and racist) things that happen.

One big issue to me, as a black man, is effectiveness. How effective will the organization allow me to be?

The persistence of institutional racism and sexism (among other "isms") within the organization certainly presents a dilemma for the affirmative action office. Organizational investment in "business as usual," even when what is "usual" leads to discriminatory outcomes, means that staff members frequently cannot move swiftly and directly to dismantle the process of discrimination. Instead, they find themselves constantly fighting for unwelcomed change in established practices. In addition, affirmative action staff members often experience discrimination based on their own racial and sexual statuses, further reducing their effectiveness and comfort.

### **Inadequate Resources Allocated to the Affirmative Action Agenda**

In the midst of these structural conflicts regarding the affirmative action agenda in organizations, most affirmative action officers report they have too few resources to conduct their operations adequately. In one sense this concern refers to material resources, such as personnel, funds, materials, and the like. In another sense, however, this concern refers to the master resource of all in organizational change

efforts, power. Without power of its own (as a staff rather than a line unit), and without access to organizational power centers, the affirmative action unit may be a denuded front, operating on the basis of good will alone.<sup>2</sup> Moreover, the goal and value confusions discussed above often strip the affirmative action office of even the power of good will. In these circumstances, it is attacked as representing a threatening value or cultural belief system (see Himmelstein, 1980).

### **Role Dilemmas Experienced by Affirmative Action Officers**

One result of these structural conflicts is that the affirmative action officer's role is laden with ambiguity and inconsistency. These role confusions or dilemmas increase the human cost involved in working on the interface among organizational conflicts. They also compromise program efficiency.<sup>3</sup> Some common role dilemmas experienced by affirmative action officers and staff members include:

1. Within the organization, the affirmative action officer or staff member is caught between serving the interests of management and those of protected classes.
2. This dilemma continues as the Federal Government enters the arena—affirmative action officers must again decide which “face” to present to the Office of Federal Contract Compliance Programs (OFCCP), that of organizational protector or representative of minority and female interests.
3. The need to maintain managerial support for the affirmative action agenda results in dilemmas concerning what change tactics to use and how hard the affirmative action staff member should push for change.
4. Dual loyalties further create career dilemmas for the affirmative action officers or staff members—how can they get ahead if they do not satisfy people with power in the organization?
5. The perceived competition of interests among protected classes, especially between white women and minority men (Simmons, 1980), can make the affirmative action officer or staff member feel he or she must choose to some one group over the other.

<sup>2</sup> It is often the case that good will toward the affirmative action agenda is not present. However, even when good will does exist, it alone is not sufficient to accomplish the task of dismantling discrimination.

<sup>3</sup> Some have argued that these impediments to effective

### **Who Do I Serve Within the Organization?**

One typical role conflict already has been framed in organizational terms: the dual loyalty problem. For individuals it takes the form of: “Who do I serve?” Affirmative action officers themselves may be members of minority and/or female groups, both in demographic terms and as “representations” of these oppressed constituencies (Alvarez, 1979). In addition, however, on demographic and/or ideological grounds they may also be members of ruling groups in the organization. Fragmentation of personal identity and confusion about role accountability or primacy is a natural result of these conflicts. Consider the following comments:

We're acting on the one hand on behalf of the organization, and yet at the same time, we also have the rights and obligations of the protected parties.

It's a schitzy role. It's not clear that anyone should do it for very long. It's also not clear that very many people do it very well.

The relative powerlessness of the affirmative action office, without much access to the power of line authority, makes the staff highly dependent on persuasion alone. Thus, the affirmative action officer or staff member must balance generating pressure for dismantling the process of discrimination and maintaining the good will of organizational elites, who may be quite resistant to such changes.

### **How Do I Deal with External Agencies?**

In addition to these tactical dilemmas raised by competing groups within the organization, the affirmative action staff often must deal with external groups, such as community groups, national groups of oppressed peoples (NOW, NAACP, etc.), and governmental investigators or compliance agencies. How should they conduct their representative role if the organization is not complying with the spirit or the letter of antidiscrimination regulations? How should such a role be performed if the organization constantly resists and frustrates the affirmative action agenda? Should the officer “stonewall” the external group and be loyal to the organization's interests to be buffered and protected from challenge? Or should the officer engage in a cooperative

programming are by no means accidental and that the occurrence of these structural conflicts and role dilemmas should be taken as evidence of organizational resistance to the affirmative action agenda.

relationship with outside agencies, seeking to use them to help create internal pressure for change?<sup>4</sup> Affirmative action officers and staff members reflected this dilemma as follows:

. . . I think there is an understanding that we will. . . work very hard to avoid any major problem with the federal government. . . (to) maintain a cooperative relationship. . . .

(The affirmative action officer) is very clear on what her job is when DOL (Department of Labor) shows up: to protect the organization, keep it in compliance.

When we're dealing with entities such as the Department of Labor. . . we're acting on the one hand on behalf of the organization and yet, at the same time, we also have. . . the obligation to the protected classes.

In some cases, the external agencies are one of the only forces supporting or pressing for organizational change on the affirmative action agenda:

OFCCP keeps affirmative action going. We should be thankful that OFCCP is there on everyone's backs. Without them it wouldn't get done.

. . . they (OFCCP) are the only stick anybody's got to beat people into submission. I don't think a lot of places would be doing what they're doing without it.

Under such circumstances, the affirmative action officer's loyalty dilemmas are heightened considerably.

### **What Tactics of Change Do I Use and How Hard Do I Push?**

In programmatic terms, the above dilemmas can create uncertainty about appropriate strategies and tactics of change: How hard should one push the affirmative action agenda? On one hand, it becomes increasingly clear to all who work on these issues that some pressure or threat is a necessary component of such change strategies. On the other hand, persuasive approaches that return good will also are vital; too much pressure may alienate organizational authorities even further. Two officers reflected this dilemma in the following terms:

When you have done all the advising, assisting, and recommending that you can do, you then go into the line organization. You go to your boss, who then. . . decides

<sup>4</sup> If the external agents, such as EEOC and OFCCP, are concerned primarily with enforcement, it is difficult for them to provide technical assistance at the same time. The mixture of coercive (compliance enforcement) and cooperative (assistance)

whether he/she should take action to DIRECT people to do these things.

There are some times you take a harder advocacy line, but you take it more privately. Taking a strong advocacy line publicly all of the time would prevent you from doing the administrative stuff; no one would talk to you.

### **Where Do I Go from Here?**

Even when the problems of role definition and loyalty have been solved, the individual staff member's future in the organization often remains murky. Where do people go after they have worked as "lead agents" for organizational changes of this sort? What are their future careers? For some, there is no future:

Career progress. . . is dependent upon being thought of as a good manager. People are afraid because of the nature of this field, that they will get typecast into that, and won't be considered for more senior management positions.

For most, it's a dead end job.

Career advancement within an organization often is dependent on demonstrating broad managerial skill and in being considered a good "organizational person." Representing the organization, as organizational elites want it represented, is not likely for affirmative action officers and staff members who are committed to their work. Since their roles require them to surface challenges to current policies and procedures, even if they conduct such challenges gently, many will not be seen as having contributed directly to the organization's primary goals of productive efficiency. Further, when these members advocate for changes in basic organizational practices that reinforce patterns of discrimination, they may be seen as "troublemakers," seeking to disrupt the status quo. Finally, their jobs rarely involve managing a large staff; therefore, there may be little opportunity to demonstrate broad managerial skills. These factors hardly contribute to career advancement within the organization. While many affirmative action officers or staff members may juggle the competing interests of managers and protected classes (the dual loyalty problem), only those people who represent management have the power to reward these officers and help advance their careers.

approaches is quite reasonable, but not at the same time and by the same agent. In the area of school desegregation, the Title IV and VI programs separated these functions; perhaps this would be a fruitful structure for other monitoring agencies as well.

### Which of the Protected Classes Do I Serve?

One feature of a society or organization composed of competing interest groups is that the oppressed constituency also often is rent by internal conflict. Debates over the relative primacy of women and minorities, within a scarcity system managed by affluent white males, may make it difficult to hold a minority-female coalition together. Affirmative action officers especially may be suspect in serving one rather than another of their oppressed constituencies. Two affirmative action officers' comments serve to illustrate this dilemma:

I may bring some biases to the position, as a black woman. I may feel a little bit more sensitive to women, black or white, more so than I do men. . . . When a man comes through that door, it's like I really want him to prove that he was discriminated against, show me that he has a perfect employment record. But if a woman files a complaint, I have a lot of sympathy. I guess because I can identify with her quicker than I can with a man.

As an affirmative action officer, you get drawn by other issues that are important to you. Like blacks and women will pull on you. And they think that when one group gets a position, it is at the cost of the other. They see that available positions could go to one group or the other, and they try to pull you to act in favor of their group.

If resources were plentiful, or if the organizational hierarchy supported antidiscrimination efforts vigorously, there might be opportunity for members of all protected classes to gain; however, this is seldom the case. Moreover, an effort (conscious or not) to divide and pit oppressed groups against one another may help diminish their united capacity to press for change. While affirmative action officers may not invent this tactic or the organizational structure and resources that make it effective, they often may be caught in the middle when such internal fragmentation occurs.

One of the reasons these dilemmas are so pervasive is that the affirmative action agenda is a continuing one. It must be concerned not only with recruitment and hiring, but also with promotion, job satisfaction, and quality of worklife issues throughout the entire organization.<sup>5</sup> In this respect, the entire agenda of antiracist and antisexist work within the organization is a matter of concern for the affirmative action office. If the agenda is not

broadened continually, it will be encapsulated. Then, the gains of employment will be lost to attribution, nonmobility, and gradual reassertion of the norms of discriminatory treatment. On the other hand, if the agenda is broadened too much, it may challenge too many norms and power centers throughout the organization. Deciding which goals to pursue, with what tactics and how much pressure, with what support and from whom, and with what cost to oneself, is a daily set of tasks for many affirmative action officers.

### Attempts to Reduce Role Conflict

How do affirmative action officers resolve or reduce these role conflicts and dilemmas? Obviously, these dilemmas cannot be resolved in the abstract nor in solely personal terms. Resolutions, like the dilemmas themselves, work within an organizational context. The discussion that follows highlights four major ways we found affirmative action officers and staff members resolving these dilemmas. These include: (1) operating as if the interests of the larger organization and those of women and minorities are all the same; (2) practicing "minimal" affirmative action; (3) allying primarily with management interests; and (4) allying primarily with the interests of protected classes.

#### Operate as if the Interests of the Larger Organization and Those of Women and Minorities Are the Same

One resolution requires the staff member to see no conflict of a structural character. The construction of a mythic consensus organization, wherein the interests of oppressed groups are identical with the interests of ruling white male groups, permits one to transcend stress and competition and to see cooperation as always possible. This perspective denies the existence of organizational interest groups in conflict and denies the structural oppression justifying the affirmative action agenda in the first place.<sup>6</sup> Whether such organizations are mythic or not, this belief system does avoid or resolve several of the conflicts and dilemmas we have discussed. Comments reflecting this general approach include:

The director does see herself as an advocate in the sense that she sees as her constituency all the groups covered by

fact, represent a strategy of coping in an environment in which one recognizes conflict among various interests, but feels powerless to deal with that conflict in a meaningful way.

<sup>5</sup> We have dealt previously with the broader nature of the affirmative action agenda: see Chesler & Chertos, 1981.

<sup>6</sup> Often behavior that appears to be based on an assumption of consensus among all organizational members and groups may, in

the affirmative action legislation and executive orders. . . . But, I don't think she just goes in to advocate for certain groups. She has the best interest of the organization in mind.

If we work to make sure that the organization complies with the regulations, we are protecting it, and we are also protecting . . . the groups from historical discrimination. . . . It is in the best interest of the organization. . . . to not discriminate, to undertake affirmative action. . . . I am here to make sure it stays within the law, and also then, to make sure that women and minorities are protected by that law. In my head, it works together.

Affirmative action officers and staff members unaware of the presence of competing interests, or unwilling to choose between them, can argue that serving one of these interests also serves the others. Typically, however, the one that is served is that of the larger organization, often considered the "more general good." If primary goals of organizations do reflect the interests of all organizational members, all well and good. Since primary goals often serve primarily owners' and managers' interests, the decision to serve "organizational" interests can deny the interests of workers and of women and/or minority groups as well.

### Practice "Minimal" Affirmative Action

A second resolution involves doing nothing or at least nothing beyond what is required by regulations. In this approach, the affirmative action officer has solved the problem of dealing with confusion and resistance by giving up or by settling for minimal levels of compliance. In some cases, this may take the form of subtle or unconscious alliance with management in doing just enough to protect them from external scrutiny. Several informants discussed this approach:

All I'm telling them is that they have to fill in the form, and put something on that form that looks half way intelligent. I'm not really going to argue with them about what they put on the form, so long as they are ready to go to court and defend it. . . . I'm not going to lose any sleep over it. . . . I'm going to just do my job.

I had high expectations as far as saving humanity and helping people and all this other crap, and it didn't turn out that way. Here I look at my position more realistically and just decided that. . . . as far as helping people and fighting discrimination, my expectations would not be so high. And it's kind of helped me keep my sanity.

<sup>7</sup> As the legitimate spokesperson for the organization, managerial authorities often appear to represent the entire organization. Even if this is not the case, they clearly represent the most powerful

One aspect of this approach is to make organizational actions look as much like vigorous compliance as possible; it may include manipulating statistics, personnel categories, and role definitions. For the affirmative action office faced with feelings of powerlessness, the denial of personal responsibility (or giving up) may be a useful coping strategy. However, one cost is that women and/or minorities lose (or do not gain) a strong advocate for their interests.

Somewhat different from doing nothing is progressing slowly. As one affirmative action officer noted:

My personal feeling is that things are going too slowly. But working in an organization such as this, I've learned that one needs patience. . . . You accept that things will be a little slower than you want them to be, and you decide to work within the system.

This strategy assumes that working within the system's own limits is the most appropriate way to make change. Unlike the previous examples of those who cope by denying the issue or doing very little, the attempt to move slowly may enable the affirmative action officer to look and feel somewhat effective and credible.

### Ally with Management Interests

A third resolution is to ally oneself forthrightly with management interests in the pursuit of the affirmative action agenda.<sup>7</sup> This does not necessarily mean rejection of minority or female interests, but it does mean settling on a priority set of loyalties and tactics for change. Actions consistent with this approach might include: articulating managerial definitions of affirmative action goals, seeking female and minority cooperation with these goals, ensuring management does not (openly) violate Federal or State guidelines, and acting as management's representative in bargaining sessions with internal or external challengers.

If management interests and actions support affirmative action goals, this may be an effective approach to dismantling discrimination. However, management often resists these goals or at least resists protected classes' definitions of these goals. In the latter case, alliances with management may require affirmative action officers to help counter challenges to discrimination. This may involve:

interest groups, and many scholars argue that no change effort can succeed unless it is allied with these groups' concerns.

buffering white males from internal challenges, labeling and tracking minority or female troublemakers, cooling out vigorous members of female or minority constituencies, maintaining control over the affirmative action agenda, and “catching the flack” when minority or female members voice their grievances or complaints. As several officers have identified this resolution:

Because we are employed by . . . , naturally we have to be pro-administration. . . .

There were times that I took the organization’s needs first—or looked strictly at the regulations—and was faulted by people. It wasn’t often. But I had to remind them that I worked for the organization.

If I turned in this organization, it wouldn’t be just blowing my job here. There wouldn’t be another place in this country who would want an affirmative action officer on their staff who is essentially just there to copy information.

This strategy differs from that of operating as if the interests of the organization and protected classes are the same, in that these informants recognize that groups’ interests may differ. In this case, affirmative action officers and staff members consciously choose among competing interests and choose those of management. This strategy certainly resolves the dual loyalty dilemma. Moreover, it may provide greater opportunity for persuasion from within and career opportunity or job security for the affirmative action office employee. At the same time, it does eliminate some of the potential organizational pressure, threat, or challenge that could be generated by the affirmative action office.

### **Ally with Protected Classes**

A fourth approach involves these role dilemmas by allying oneself forthrightly with oppressed groups and advocating their interests. This resolution of the dual loyalty problem is the counterpoint to alliances with management. It can be managed in an open and direct way, although that is rare. Or, rather, it is rare to find open and direct advocates lasting very long on the job. An alternative is to adopt a more subtle advocacy approach, one that requires establishing support networks among minority and female members, perhaps engaging in occasional sabotage of ruling white male groups’ agendas and concerns, and potentially informing on

the organization to external monitors or advocates. As one officer noted, the ways of advocacy, and of working effectively, are many:

Some will resolve it by staying advocate all the way; working against the system. . . .And that’s a way to cope. Each of us takes a different approach.<sup>8</sup>

A total commitment to oppressed groups implicitly recognizes the competing interests involved in the affirmative action agenda and again represents a conscious choice among them. The benefits of this strategy for the protected classes of organizational members is clear: they do have an advocate in the affirmative action office. The personal costs to the affirmative action officer or staff member may be quite high, with organizational credibility and support for these efforts substantially lower than those representing any of the other strategies presented. Because organizational respect and support is critical to full accomplishment of the affirmative action agenda, the total advocate probably cannot operate alone, but may be most effective in combination with other staff members who are able to assume a variety of other strategies.

### **Frustration and Burnout**

Finally, it is important to note that another approach occurs by default—burnout. Consumed by frustration, failure, impotence, and/or rage, some affirmative action officers turn their feelings inward and destroy their own capacities (and perhaps health as well). Deprived of support from above or below, and without a sense of satisfaction in this important work, some simply expire at their desks. Consider the following comments:

The burnout rate is high. The frustration rate is high. The ulcer rate is high.

I have times when I go home at night and throw things because I’m so sick of it.

### **Some Principles Guiding More Effective Programs**

With these experiences and options in mind, what can we suggest to improve the success of organizational affirmative action programs? Several caveats appear important in such a discussion. First, it should be clear that organizations differ from one another. Not only are schools, hospitals, factories,

Rather, most seemed highly invested in his or her own strategy as being THE appropriate one, discounting those of others.

<sup>8</sup> Not many informants presented the legitimacy of multiple coping strategies as this affirmative action office staff member did.

and clerical offices different, but the nature of discrimination and the resources (personnel, money, social support) available to challenge it vary considerably with these families of organizations as well. Thus, the discussion of general principles is only the beginning of an action plan, and change designs must be specified further for each work group, local unit, plant, or firm.

Second, it appears clear that some combination of good will and pressure are required for changes to occur and be sustained. Sole reliance on the good will and commitment of white males fails to acknowledge the American legacy of racism and sexism, and peoples' investments in enjoying the (even unmerited) benefits of such sustained privilege. Recent history confirms that change simply will not occur on a meaningful scale if it relies solely on tactics of good will and organizational or unit autonomy in implementing change programs. Pressure, in the form of monitoring, accountability to minorities and women, or even threats and coercion, probably is required. While coercion may lead to some degree of compliance, it also may generate resistance in the form of coverups and sabotage—or perhaps outright “stonewalling.” Moreover, since the longer range agenda of affirmative action stretches beyond hiring to improving opportunities for equality and justice throughout the workplace, resentment and resistance generated by a sole reliance on coercive tactics tend to corrode the possibilities of long-range success.

Third, there are limits to the role of the United States Commission on Civil Rights, the Office of Federal Contract Compliance Programs, or any other removed and Federal bodies. Although these agencies are important in setting a policy framework, and in monitoring and occasionally threatening organizations or local units, they cannot be relied on as the primary strategy for implementing structural or human change in the workplace. They simply cannot get far enough into an organization to mandate change on the many subtle issues and practices that sustain inequality; internal organization advocates must play this role. Moreover, when the agendas of these agencies wax and wane (as well may be the case during the early 1980s), local interested parties must be prepared to carry on.

With these limits in mind, we offer here some suggestions for how the success of affirmative action programs can be enhanced at the local level. One critical element in any effort to alter racism and

sexism in organizations is a better understanding of the situation at hand. On a general level, we need better theories and data about the ways in which organizational discrimination is maintained (Alvarez and Lutterman 1979) and the ways in which the affirmative action program's success is impeded. How does resistance work, for instance? While we have begun an exploration of those issues in this paper, much more careful analyses must be conducted. On a more local level, such efforts can aid the process of tactical planning, by providing an informal data base indicating which strategies of change might work best, with what constituencies or targets, and under what organizational conditions.

A second critical element is that there must be clear organizational leadership for the affirmative action program. In order to challenge the American ideology and investment in racial and sexual superiority of whites and males, and in order to help dismantle the accumulated privileges such groups defend, it is vital that people with power and privilege demonstrate their commitment to this agenda. Without their support, a truly revolutionary approach is required. With their support, oppressed groups may be able to join with such leaders to create a reformist change effort. Such new leadership must articulate alternative organizational goals and purposes that are more consistent with an affirmative action agenda and create organizational structures and programs that readily support such efforts and that provide the power to implement these efforts throughout the organization. The good will of organizational leaders must be present in the form of pressure they place on recalcitrant units.

While most observers agree with these principles, they do not all agree on how the support of top leadership can be created or maintained. Some suggest it will be and only can be forthcoming on a voluntary basis. Others suggest that the use of human relations training programs or organizational development efforts will bring it to the fore. Still others suggest that some degree of external coercion or pressure will be required.

A third critical element is that there must be pressure for change from oppressed constituencies themselves (and their allies). There simply is no evidence that managerial good will and leadership is forthcoming in sufficient degree to provide the power for change. Thus, much of the power for change must come from those people and groups who feel strongly on the issue. Sometimes mobiliz-

ing oppressed groups is an internal organizational approach, involving the establishment of cadre groups among organizational members. Support systems and "rap" or gripe sessions can be the building blocks for such internal mobilization.

In addition, however, external consumers, taxpayers, female and minority groups, and some supportive white males can be drawn into the organizational struggle. These external groups may offer resources without the risk experienced by organizational members themselves. In a number of cases, governmental agents (EEOC, OFCCP) have been utilized as part of an external mobilizing strategy. Affirmative action officers sometimes have created informal coalitions with these parties to share information, use their presence as an implied threat, or otherwise add them to a growing power base in order to better achieve the goals of affirmative action.

A fourth element is support and survival training for affirmative action officers themselves. The statements reported here, and other reports from the field, make it clear that these agents of social change need help and support in order to prevent burnout and impotence, increase skills, and provide a sense of support and linkage to others on a national basis. In terms of the role dilemmas presented here, affirmative action officers identify the need to sharpen their abilities to: work effectively in an adversarial arena; use pressure and coercion, at the lowest possible cost to themselves and others; search for and align themselves with every possible cooperative option or party; and survive as whole persons.

In a sense, the tactical and role dilemmas facing affirmative action officers are the same as those facing all of us committed to social justice in America. The struggle with societal racism and sexism, and with the structural impediments to change, creates conflicts and confusions in all our work and in all our daily lives. The commitment to a continuing agenda of affirmative action requires all of us to sharpen our skills, bring to bear all the good will and power we can muster, modify our typical role behaviors, and challenge "business as usual" in the structures and operations of organizations throughout the society.

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# **MONITORING AND EVALUATING AFFIRMATIVE ACTION PLANS**



# Affirmative Action as a Means for Organizational Change

By Elsie Y. Cross\*

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Affirmative action has been a major intervention into organizations and has provided management with an important process for unfreezing a static condition of white male dominance in employment in virtually all areas except secretarial, clerical, and menial. Affirmative action has provided a process for organizational renewal that has resulted in increased productivity, a more creative and diverse work force, an improved organizational climate, and more efficient personnel practices. Affirmative action has also provided minorities and women some belief that the system can work for them to remove barriers which have prevented their access.

As a significant change strategy, affirmative action provided management with an important tool for revitalizing management procedures and for involving more persons in the participative management process, resulting in increased productivity and job satisfaction and an improved quality of worklife. Affirmative action plans have been significant instruments for developing and managing organizational change and for changing the composition of the work force. Without equal employment opportunity and affirmative action, there would be virtually no minorities and women in positions of responsibility and decisionmaking in businesses, educational institutions, and government and private agencies. If EEO and AA were to disappear in 1981, there would be, in most instances, an immediate and continuous decline in the progress that has been made. Further, without the force of law little would have been done voluntarily. Nor has enough mo-

mentum been generated to suppose that the effort would continue. There are not enough women and minority managers in positions of power and authority to sustain the progress in recruiting, hiring and promoting, and assessing and evaluating applicants and employees that would continue the process of nondiscriminatory hiring and promotion. Nor has there been an indication of sufficient commitment at the top to expect a continuation of affirmatively hiring and promoting people of color and women.

I believe that the Commission's report, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, is an important and much-needed approach to understanding the background, rationale, and direction needed to correct past as well as continuing discrimination. The interplay of institutional and individual racism and sexism is often missed or little understood by persons in organizations responsible for developing policy and/or charged with implementing affirmative action plans.

As background for this presentation, I interviewed executives, managers, supervisors, personnel officers, affirmative action officers, internal and external organization development consultants, all of whom work in or consult to major corporations. I also spoke to women and minorities who do not fit the above categories. There is clear agreement that organizations and their agents would continue to discriminate against minorities and women in the absence of EEO and AA, and there would not be the level of success in recruiting, hiring, and promoting women and minorities that has been achieved,

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without affirmative action and the force (or threat) of Federal enforcement! Without affirmative action in the 1980s, the process already in place will erode and forward movement will stop.

Over the last 15 years there has been a dramatic change (albeit inadequate) in America's work force. Blacks, women, and other minorities have been hired into technical, line, and staff positions, in major organizations, and there are minority men and women and white women in key policy and managerial positions in major U.S. corporations. This is true despite resistance to change and despite the fact that in many places little change has occurred. For the first time in U.S. history, there are black men and white women at officer level in several major companies. Nearly every corporation has at least an affirmative action plan on paper. There have also been unanticipated benefits, such as improved recruiting and hiring practices, better performance appraisal and evaluation techniques, improved opportunities for training and career development, the ability to manage conflict more productively, etc. These improvements have been the direct result of the affirmative action planning process and of the demands placed on the organization caused by the hiring of minorities and women. The unintended benefits have worked to the advantage of everybody, not just women and minorities!

As an external organization development consultant, I have employed the following procedures and programs as change strategies to (1) increase the representation of minorities and women; (2) overcome resistance among white men and to gain commitment from the top; (3) change behaviors that militate against women and people of color; and (4) create a more positive organizational environment..

The most significant way to proceed to a total organizational change effort includes the following steps: entry and diagnosis of a system's readiness for change; planning and presentation to significant parts of the organization; critical mass development and education of resource persons, top-level group and operating heads; research and study of what the organization is now; goal setting; implementation; monitoring and evaluation of the plan. (Kaleel Jamison, OD PRACTICER, December 1978.) This approach ties responsibilities for planning, accountability, and commitment for implementation into the power structure of the organization. Minorities and women serve as resources to the process, but the force of work is the organization.

Another strategy often used as a single intervention and one given the most attention is awareness training, which is often directed toward managers in order to increase their awareness of the problems created by the organization and white men as minorities and women enter the work force.

Management development of minorities and women has proven useful in providing a sufficient pool of trained people to provide adequate selection. Such development is done internally as well as in "public" programs run at universities or by private organizations. Other techniques related to management development are mentoring, creating support groups, providing tuition support, and part-time employment for full-time study.

I have used a needs assessment process of women and blacks and other minorities as a major planning tool for all components of a major organization. The resulting planning process involved line managers in incorporating AA plans into operating plans. As an adjunct to this process, training of managers and supervisors in awareness and skills in how to manage diverse work groups more effectively resulted in an increased pool of effective managers and supervisors. Work related to the management of a diverse group of people creates new energy for developing improved methods for giving helpful information to minorities and women about their performance, better performance appraisals, and career planning.

Working with administrative and management groups around solving problems of sexual harassment, threats, violence, withholding information, making prejudicial job assignments, and failing to give attention to the need to change work climates has often produced a willingness to grapple with pervasive forms of discrimination.

There are problems in the way affirmative action is implemented. Affirmative action departments are, for the most part, positioned fairly low in organizational hierarchies, well below the level of power needed to bring about significant change. The same people responsible for the discrimination have assigned responsibility for change to relatively powerless people, resulting in faulty or nonexistent monitoring and evaluating.

There is a need for accurate and full information from authoritative sources, such as the U.S. Commission on Civil Rights, about the current state of discrimination and oppression in employment, housing, education, the criminal justice system, and wherever else it exists. There is little agreement

among whites or white men that institutions and organizations have discriminated and continue to discriminate. There is ignorance about the relative benefits black women versus black men derive from affirmative action programs, for instance; about the level of competence minorities and women bring to their positions; and about the function of affirmative action goals.

Affirmative action in employment without affirmative action in housing and education will have limited long-term benefits and is creating a wider gap between middle-class blacks and working-class and nonworking blacks. Also, it is becoming more

difficult to find certain minority candidates for technical and professional positions because of the difficulty engendered by an inadequate educational system. There also needs to be more effort at understanding the high loss rate for minorities from major corporations.

Finally, we need to recognize and advance the benefits to be derived from a multicultural work force. The existence of differences can mean a more creative and productive group than a monolithic one. We need to develop more skills and an appreciation for managing differences and the positive aspects of the conflicts that result.

# Combatting Institutional Racism in Police Departments: Applications of a Problem-Remedy Strategy

By Raymond G. Hunt\*

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## Abstract

This paper contains an example and a critique of the problem-remedy approach to affirmative action. It describes a three-phase, action-research project that sought with some success to reduce institutional discrimination in five American police departments. Discussion of this project illustrates factfinding strategies for identifying institutional problems in the areas of affirmative action planning; police recruitment; selection and hiring; training, evaluation, and promotion; and organizational climate. It illustrates methods of devising remedies for these problems and reviews impediments to the effective implementation of those remedies. Some of these impediments may be found in any organizational change effort. Others are more or less peculiar to police agencies. Some general lessons are adduced from the discussion: i.e., the need for institutionalization of change processes, the avoidance of technical traps, the perils of rationalism, and the usefulness of external leverage. Two general conclusions are drawn: (1) Affirmative action programs are best designed as organic change processes that proceed in phases with affirmative action goals formulated as specific tasks; and (2) affirmative action in the 1980s must maintain national initiatives that lay greater stress on the cultural and ideological foundations of institutional discrimination and, at the same time, maintain a

focus on the moral objectives of affirmative action as an administrative remedy for social injustice.

## Combatting Institutional Racism in Police Departments: Applications of a Problem-Remedy Strategy

As a means of acting more effectively against historical inequalities of opportunity in American society, the Commission on Civil Rights has proposed a problem-solving strategy of affirmative action (U.S. Commission on Civil Rights, 1981). Its "problem-remedy" approach concentrates on institutional sources of discrimination against minorities and women—i.e., on disadvantages for minorities and women in competition with white males that are based in societal and other organizational structures, policies, and procedures. The problem-remedy approach envisages an affirmative action program planning process in which specific "problems" of institutional discrimination are identified in particular settings, after which "remedies" are selected or designed that suit the problems in kind and scope. Under a problem-remedy strategy, concrete affirmative action programs are tailored to the needs of particular situations; and they are evaluated in terms of their effectiveness in appropriately modifying those situations. This rational program has great conceptual appeal; but, quite apart from obvious problems of sloth and inertia, it faces certain practi-

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contributions, and collegueship of the anonymous police agencies, officials, and members who, through four difficult years, made this project a very special experience.

cal difficulties. My plan for this paper is, first, to describe an affirmative action effort that followed a problem-remedy strategy and, second, to use my experience with this illustrative case as a springboard for a friendly critique of such approaches.

## A Problem-Solving Approach to Institutional Racism

In 1976, together with a group of colleagues associated with the Institute for the Study of Contemporary Social Problems,<sup>1</sup> I began a multi-year action-research effort against institutional racism in five cooperating law enforcement agencies scattered throughout the United States.<sup>2</sup> The project was designed in a problem-remedy mold (see Locke & Walker, 1980, for a general description of it). It progressed in phases from factfinding, through planning, to implementation.

For the project's purposes, institutional racism was construed in terms of the comparative consequences of organizational policies and practices for racial minorities and nonminorities. (For practical reasons alone, women were not included as subjects of the study.) The definition of institutional racism encompassed two types of "errors."

1. *Errors of Commission*—which are organizational policies and practices that, regardless of their motivation, are directly or indirectly disadvantageous to racial minorities (e.g., height minima, assignment of black police officers only to black neighborhoods); and

2. *Errors of Omission*—which are chronic manifestations of individual racism to which there is no serious organizational response (e.g., verbal racial slurs, discriminatory acts by individual supervisors).

The second type of institutional "error"—omission—is not often discussed. Indeed, I have been told that it is not a form of institutional racism. I disagree, of course. It is an important form of it. It has to do with the "climate" of an organization—the quality of its social environment that determines its human habitability. When this climate is discriminatory by race or gender and only selectively hospitable, the theory of affirmative action implies a managerial mandate to eliminate the discrimination. Failure to act on this mandate is *ipso facto* an institutional error (as well as an individual human one perhaps). It has

serious implications for the retention of minorities in an organizational work force, as well as for their career progression, and eventually for the organization's ability to attract new minority members. Inattention to type 2 errors can vitiate affirmative action and severely attenuate its impact.

With this in mind, the project was designed in three phases:

Phase I—Organizing and Factfinding

Phase II—Developing Prescriptive Packages for Change and Planning for Implementation

Phase III—Monitoring Change Tactics, Providing Technical Assistance, and Disseminating Findings and Recommendations

There was no formal evaluation phase, although some short-term assessment was part of Phase III, and much more resulted simply from the process of performing the project.

Phase I—Organizing and Factfinding—consisted of three steps:

1. *Establishing liaison* with the participating police departments and negotiating the procedural ground rules that would guide our interactions with them. In each department liaison was dual: i.e., via both the chief and a minority representative who was appointed by the chief. This minority representative (minority rep, for short) in two cases was a patrol officer, in two others a supervisory officer (lieutenant or captain), and, in the fifth, a civilian administrative aide. Negotiated ground rules called for common communication with the chief and minority representative, subject to our safeguarding the chief from surprises. A lagged communication sequence was used—chief first, minority rep second—but there were no secrets between project staff and either the chief or minority rep.

There was a rationale for this communication ground rule that went beyond simple acknowledgment of the status and special interests of the chief. It reflected our wish to establish and preserve a particular kind of relationship with the chief and the police department that I shall briefly describe.

We take as a premise of action-oriented research—evaluation research, broadly conceived—that it must provide information for decisionmaking. As Patton (1979) has put it, the fundamental question in any evaluation (in addition to "What's wrong?") is

<sup>1</sup> Principal among these colleagues were Hubert G. Locke, Calvin W. Humphrey, and Franklin W. Zweig.

<sup>2</sup> The project was supported by funds from the National Institute

of Mental Health, Center for Minority Group Mental Health Programs.

this: "What do the findings tell decisionmakers about what to do?" The basic objective for evaluation must be to generate information useful to decisionmakers in managing their agencies. Doing this effectively requires one to "bring together evaluators, decision-makers, and information users in an active-reactive-adaptive process where all participants share responsibility for creatively shaping and rigorously implementing an evaluation that is both useful and of high quality" (Patton, p. 289).

Obviously, an evaluator or consultant alone cannot decide the usefulness of particular kinds of evaluation information. It is necessary to depend upon managers and information users for those assessments. Accordingly, in the project I am describing, we put heavy stress on the role of the chief and minority rep of each participating police department and of each department's project task force (which I shall describe presently) and our relationships with them. In an active-reactive-adaptive fashion, we interacted with these decisionmakers and information users not just at the beginning and end of the project, but continuously. Since our goal was to provide information that would "empower" decisionmakers to act effectively in their uncertain political environments, the key criterion we used for evaluating our tactics was necessarily the extent to which those tactics could yield information having high potential for utilization by those actors.

In beginning work with a police department, we cast ourselves in the role of evaluators of the department's structures, policies, and operations. As work progressed, we continued in this role, but we enacted it in a consultative fashion. The police administrators and officers with whom we interacted we treated as "coproducers" of the evaluation as well as ultimate users of the information it yielded. The information produced in the evaluation, we felt, was needed to help those decisionmakers define the problems they needed to solve and to suggest ways of solving them. Otherwise, the information could not be used, and we should have essentially failed in our mission of encouraging change.

One implication of this strategy was that evaluation questions framed at the outset of the project had to be seen as provisional and subject to change as work progressed. Initial formulations of evaluation questions can do little more than suggest rather obvious places to begin gathering information about organizations. Other questions are always possible; and, in any case, the final test of any evaluation

information, I have said, must be its utility to its users, not its "interest value" to the evaluator (or others). I would not wish to be misunderstood here, however. I am not suggesting that third-party evaluators act as passive agents of established organizational interests. We certainly did not work this way. To the contrary, we played an active advocacy role but we did it in a utilization-focused framework where agency decisionmakers are treated as coproducers of the evaluation (see Whitaker, 1980). Our aim was to get something done. Therefore, we tried to initiate a *process* that would yield evaluation information of high utilization potential during the project and that would also continue working in each police department after we had gone.

Returning to my description of phase I, in each department a "task force" of members was formed as the project's "agent" in the department. In some cases this group was chaired by the chief, in others by another command officer, and in others by the minority rep. Sometimes the chief was a member of the task force, other times not. In every case, the task force included minority and nonminority officers, some who were command officers and others who were not, except in one department where there was no minority officer having rank above sergeant.

The task force was crucial to the project's effectiveness. It was responsible for continuity of operations during and beyond the project. It was the project's "eyes and ears" in a department. It was a major source of information and procedural guidance for project staff. It was a forum for reviewing and evaluating the judgments of project staff about institutional racism in a department. It was at least in some sense an affirmative action planning body. It was an instrument for certain affirmative action efforts. And it was a body that could evaluate the effectiveness of the project as a whole. In consultations between project staff and the chief and minority rep, the membership of each department's task force was carefully chosen to reflect apparent political and social realities within the department as well as the goals of the project.

2. *Data collection* relied heavily on the task force and minority rep. In group discussions, examples of racist behavior were reviewed and argued. Some, where agreement was reached that they were institutional phenomena, were eventually selected for further investigation. Discussions were generally organized around critical incidents of racism experi-

enced by minority members of the task force or known to them.

These discussions led to more extensive individual interviews with members of the task force and other key informants in the police department or outside it. At minimum, in addition to minority personnel, regular police department personnel and training and internal affairs officers were interviewed (often repeatedly), as were union or police benevolent association officials. Relevant personages of city/county government (e.g., city managers, personnel directors, affirmative action officers, and others) were also interviewed, and so were community figures, when that seemed desirable.

Relevant document files, both in the police departments and other city offices, were searched for information suggesting patterns of discrimination. These files included department general orders (i.e., operating policies and procedures), affirmative action plans, and hire-fire and discipline records (including selection methods), to name some major ones.

Finally, a self-administering opinion survey was given to all members of each department. The survey covered such topics as job and racial attitudes, concepts of the police role in society, and perceptions of community characteristics, among others. This self-administering questionnaire was intended to collect information, obviously, but also to provide a means of universal participation in the project by members of the subject organizations.

Data gathering was thus a mixed method process of "triangulation" (Jick, 1980) on possible indicators of institutional discrimination (racism). It used qualitative and quantitative methods, and mingled elements of self-study with, so to speak, consultant input. By this method, we sought, in the end, to rule problems either in or out by a preponderance of evidence. Apparent contradictions among the indicators served as pointers to areas where additional clarifying information was needed. Unfortunately, it was not always available. Consequently, the "facts" that we found sometimes were vague and equivocal. The "diagnoses" of problems of institutional racism that were based on them could not always be straightforward. This reality much influenced the final step of factfinding.

3. Using a kind of *survey feedback* method, written diagnostic reports, with supporting evi-

dence, were prepared by project staff and forwarded to the chief, minority rep, and task force members in each department. The project director subsequently visited each department for detailed review and critique of the staff "diagnoses." This process, which, deliberately, resembled a courtroom-like adversary proceeding where evidence was offered and argued (see Levine, 1974), was repeated one or more times—sometimes with further factfinding intervening—as we sought consensus on a set of indicators of institutional racism that could serve in each department as a basis for planning affirmative action and other organizational change programs during phase II.

**Phase II—Developing Prescriptive Change Packages and Planning Their Implementation**—also moved in three distinct steps.

(1) *Development of prescriptions for change* began with project staff-developed briefs or diagnoses of institutional racism.<sup>3</sup> These documents typically pointed to more problems in a department than could be dealt with at once. Hence, a further consensus was sought on which ones were to be change "targets." Priorities were attached to particular change targets as part of a "need assessment" in each department, which was propaedeutic to actual tactical planning. The priority-setting process took into account both the inherent significance of a potential change target and the feasibility of affecting it with the resource at hand, plus other constraints. It was thus pragmatic—sometimes more so than might have been wished.

2. Prescriptive packages—prioritized need assessments—specified change targets. It remained next to devise concrete ways of achieving them—of *designing and implementing specific changes*. Strategies needed to be converted to tactics by the task force in concert with the chief and other powerful parties. The result was variable by department, both as to the form and scope of change.

3. The last step in planning was to allocate tactical responsibilities. *Who does what?* was an important question to be answered in the planning process. Clarification of roles and expectations and coordination of the efforts of the task force, the minority rep, the chief, and of course, project staff was a significant organizational requirement of this project operation. Its mode of satisfaction in our project was naturally variable because of the differ-

<sup>3</sup> These always were treated as provisional working documents, never as "final reports." They were arguable points of orientation and reference for planning.

ences in the individual characteristics of the several departments.

**Phase III**—The last part of the project had somewhat different meanings for the departments and the staff. For the former it was (at least nominally) a period of action—implementing change. For the staff it was a period of monitoring this implementation, commenting on and urging progress, and occasionally, evaluating results. During phase III, project staff mainly provided technical assistance to the departments, either directly or by obtaining outside consultants. In keeping with an emphasis on “organic” change—encouraging change in directions fundamentally consistent with the existing dispositions of organizations (see Hunt, 1974)—the change efforts themselves were the department’s own. They designed them and they ran them (when they did).

Meanwhile, apart from its direct involvement with the participating police departments, the ISCSP, during phase III, undertook to disseminate information about the project. To this end it has addressed research, police, and practitioner communities via conference and publications.

## Problems

So much for methodology. What of the problems that factfinding revealed as potential targets for remedy? Space allows only a brief summary of them, and the reader is to understand that not all of them were found in each department. Furthermore, when a problem was found to be general, it was not necessarily so in equal measure everywhere. I shall group the problems under half a dozen headings beginning with affirmative action planning and programming and ending with organizational climate.

### Affirmative Action Planning and Programming

By and large the written affirmative action plans under which the five participating police departments operated were platitudinous, vague, and confined mainly to statements of broad objectives. They uniformly lacked implementation plans (i.e., explicit prescriptions for how to get from where they were to where they wanted to be in some time period). And they never included provisions for evaluating achievement of their objectives. Moreover, departmental affirmative action plans were but loosely integrated with city/county plans or with departmental manpower policies and programs (if

there were any). At most, affirmative action planning was abstract and pro forma. In no sense did it produce useful management tools. Furthermore, public commitment to affirmative action as department policy was not evident—not that it was avoided, it just wasn’t evident.

Thus, none of the five police departments in our study could be said to have operated under a visibly coherent plan that might encourage affirmative action, organize decisionmaking regarding it, or guide evaluation of its achievements. Affirmative action planning was essentially reduced to preparing a written statement of apparently honest intentions. It (planning) was not generally regarded as a problem-solving strategy for the elimination of institutional discrimination. Small wonder, then, that few specific problems had been identified by the departments in their planning process or in its products, and fewer solutions found. Small wonder, too, that what actual affirmative action existed was mostly compelled by agencies external to the police departments (e.g., courts) and was reduced to “numbers games.”

One apparent consequence of all this was widespread rank-and-file cynicism about affirmative action in practice. Responding to our opinion survey, members of the departments, on the average, described the ways affirmative action was practiced in their departments as both “ineffective” and “phony” (Hunt & McCadden, 1980).

### Recruitment

No police department in our study had a complement of minority employees that represented parity with any reasonable community population or work force criterion. Some showed signs of progress in this direction; others showed none or even experienced retrogression. Recruitment was a major problem, made especially so by the fact that there is probably no institution of society where parity of minority representation is more important than in policing. Yet, for the most part, minority recruiting efforts were passive and tended, again, toward the pro forma. Recruiting budgets were uniformly low, and there was weak minority involvement in the process despite the well-known facts that police recruitment is very much a matter of one-on-one persuasion and that recruitment of minority individuals (blacks especially) into police work is difficult at best. Furthermore, department recruiting was poorly integrated with the activities of city or

county personnel departments. In one case, for instance, the police department was uninformed about when or even whether county civil service selection examinations were scheduled.

### **Selection and Hiring**

We found evidence of many procedures inimical to the prospects of minority persons for gaining employment in the police departments in the study, especially as sworn police officers. In addition to poor preparation for examinations, there were signs of prejudice and discrimination by interviewers in oral examinations and in background investigations. There was also failure to make effective use of alternative entry mechanisms (e.g., police cadet programs) to further affirmative action objectives, and there were frequent indications of "cultural racism" (Jones, 1972) in the selection/hiring process. I'll return to this subject later, but simply to illustrate my meaning here: An internal affairs officer (responsible for pre-hiring background investigations) commented to me that blacks "have a problem" when they come to the department and try to "act the way they always did" (i.e., according to black folkways), and are unwilling to change toward closer conformity to the standards of behavior preferred by the department. Obviously, these standards of behavior are not simply "police standards"; they are white standards.

### **Training**

Blatant racism—prejudice and discrimination—still exists in police academies, but it was not prevalent in the places where we worked. As with most other modern manifestations of racism, its appearance today in the training of minority police officers tends to be subtle and hence hard to pin down. It is evident, however, that the weeding out of minority rookies during probation is disproportionate. This appears to be the result of a combination of factors. One of them is fallout from playing numbers games during recruitment: Poorly qualified minority persons are recruited to satisfy "quotas" and appearances, sometimes with full expectation that they will fail and, in the process, "prove" the argument that minorities (and women) are unsuited to police work. In one case known to us, virtually

<sup>4</sup> It is easy to be misled by apparently nondiscriminatory practices. When the circumstances of different employee groups (men and women, minorities and nonminorities) differ, treating them all alike may seem evenhanded, when in fact it is

the entire minority contingent of one recruit class "washed out" during probation or shortly after it.

A second factor contributing to failures by minorities during probationary periods is incompetent and insensitive supervision of field training. The difficulties facing a minority recruit to police work are many. The importance accorded to the early socialization of rookies by their fellow officers is always high. But probation and field training is an especially difficult time for minority recruits. Often, as a price of acceptance, they must demonstrate exceptional competence along with an absence of propensities toward troublemaking. And many minority rookies themselves experience considerable inner conflict over going to work for "the man." The position of the minority rookie is, therefore, exceptionally delicate. Plainly, this is a situation calling for supervisory skill and compassion. Both are commonly lacking. In one department, for example, field training officers were selected by vote of their fellow officers. It was a frivolous custom in this department to elect only "odd balls" to this position. In no department studied was field training carefully supervised, nor were field training supervisors themselves thoughtfully selected or trained to perform their tasks. In general, open acts of prejudice and discrimination aside, training and probationary practices in police departments seem to take no serious account of differences in the circumstances of white and minority rookies. They are, in this respect, nondiscriminatory.<sup>4</sup>

### **Evaluation and Promotion**

Somewhat surprising to us was the absence of career development planning or programming from the police departments we studied. In most of them, standards and methods for making decisions about promotion (and assignment) tended toward the mysterious and commonly lacked credibility among white as well as minority officers. Informality and cronyism was widespread; casual judgment by supervisors was the consistent rule of performance evaluation.

For minorities in certain departments, seniority-related structural impediments to promotion existed. More generally, however, promotional prospects for minority officers seemed to relate more to ineffec-

discriminatory. The effects of personnel practices, for instance, may well vary across employee groups, possibly in ways antithetical to affirmative action goals.

tive or discriminatory work assignment patterns and supervisory evaluations than to clear institutional barriers. Minority officers tended to be assigned to staff positions in "community relations." They tended not to be assigned as often to "detective bureaus." When they received "special assignments"—which are important in preparing officers for promotion—they tended to be exploitatively assigned to "keeping the lid on" minority communities. This not only does not help much toward diversifying their experience, and so is not helpful in advancing their police careers, it often exposes them to inordinately hazardous duty, for which they commonly received neither recompense nor even thanks.

### **Organizational Climate**

Many of the problems I've described suggest something about the atmosphere of police departments as workplaces. In addition, we found cases of de facto segregation—blacks were not invited to membership in one police benevolent association, for instance; and frequently there was poor control by management of (and, in fact, participation in) individual acts of racism—giving voice to racial slurs, jokes, discriminatory acts, off-the-job harassment, and the like. In some places, minority solidarity was deliberately made tenuous, even when it might have been desirable as a stimulus to action against discrimination, by threats and selective acts of favoritism. Complaints by white officers of "reverse discrimination" typically added to the tensions of departmental life. It is an understatement to say that police departments tend not to be comfortable work environments for minority and female persons. The implications of this for turnover and retention hardly need pointing out.

### **Remedies**

Turn now to some remedies for these problems.<sup>5</sup> Keep in mind that the remedies were developed as collaborative ventures by the departments and project staff. I'll summarize some of them under the same headings that I used for the problems.

#### **Affirmative Action Planning and Programming**

In two instances, temporary project task forces were institutionalized as standing departmental affirmative action committees responsible, so to say, for

grassroots planning and monitoring of affirmative action and related efforts. In two cases, departmental affirmative action officers, who had been found to be neither effective nor committed to affirmative action principles, were replaced. And also in two cases, possibilities for better coordination between the police agency and other relevant city/county offices, personnel in particular, were increased by the establishment of interdepartmental liaison.

#### **Recruitment**

Among the efforts undertaken on the recruitment front was extension of abstract strategy- or goal-oriented affirmative action planning to include the planning of concrete implementation tactics. This resulted in broadening recruitment efforts and in their reorientation. New means were devised for identifying individual minority candidates for police appointment and for "supporting" them through the selection period (e.g., via a "buddy" system in which minority police officers shepherded individual minority candidates into and through the selection process, making sure they got to examinations, kept appointments, etc.).

#### **Selection and Hiring**

Where it was indicated, oral examination boards were recomposed to assure minority representation; minority participation in the background investigation of candidates was enhanced; and "prep" programs were initiated to orient candidates to the often unfamiliar and anxiety-provoking examination and selection procedures they would encounter. Of particular interest was renewed use of alternative avenues of entry to police work (e.g., cadet programs that aggressively recruited minority high school students).

#### **Training**

Group discussion of the role and responsibility of field training officers was initiated in certain departments. Increased care in the selection and supervision of these officers was also initiated, and practices such as electing them were terminated.

#### **Evaluation and Promotion**

In one department, a major overhaul of personnel evaluation and career development programming was undertaken to make it, first of all, more

was enjoined during the period of the study. Hence, all these remedies were essentially "voluntary."

<sup>5</sup> Of the five police departments studied, only one operated under a court-ordered desegregation rule, and its implementation

systematic and “visible” as a process and, second, to increase the accountability of supervisory personnel in their evaluations of subordinates. In other departments, less sweeping, but still consequential, changes in personnel practices were undertaken; and in most of them, provisions were introduced to make the use of special assignments a more self-conscious process that took into account the career development of individual officers. Mostly, these changes had equal potential for benefiting white and nonwhite or male and female officers.

### Organizational Climate

Executive orders were issued, together with admonitions to command officers to enforce them, in order to improve managerial control over expressions of individual racism within certain of the departments. Measures were taken in some places to encourage communication between departmental management and representatives of minority interests; and, in one case, a major departmentwide program of human relations training focused on combatting racism was undertaken.

### Outcomes

So what was the impact of these remedies? Are minorities now better represented in these police departments, for example? Well, yes, in some cases they are, but they might have been anyway. Furthermore, in some cases, minority representation in them has declined. The outcomes of projects like this one are hard to gauge in these terms because cause-effect linkages of project “inputs” and departmental “outputs” are hard to demonstrate. The success of such things as recruitment efforts is subject to influences other than conscientious affirmative action (e.g. competition from other employers, to name one), and, as we know, well-laid plans sometimes are unhappily overtaken by events. In any case, we were frankly more concerned with initiating a program planning *process* within the cooperating police departments than in producing particular, measurable, short-run results. On this count, we were well-satisfied with some aspects of our experience, but not at all satisfied with other aspects of it.

\* Once more, factfinding or self-study on questions of institutional discrimination necessarily generates heat within affected organizations. The administrators of those organizations often perceive this as subversive of the rational problem solving that is their touchstone of effective management. Consequently they

A review of these dissatisfactions and of my understanding of the reasons for certain of them may be instructive. But before getting to that review, I would note for perspective that I am concerned here not just with organizational “change” in some disinterested, spiritless, antiseptic sense of the term. I am concerned with literal reform of the institutions of society. I see this as a moral as well as a technical task. Dismantling the process of discrimination cannot be free of emotion. That’s one reason why there is organizational resistance to it. Passion is inconsonant with the iron rule of bureaucratic rationalism. Eradicating discrimination also threatens established interests; indeed, it may well question their legitimacy—their morality. That tends to generate passion, too, regardless of how cool its expression may be.

Obstacles to implementing programs for eradicating institutional racism are numerous, as of course we know, and hard to overcome, as we also know. Some familiar ones that we experienced in this project were these:

- Denial of a problem. This was manifest in quibbling about the evidence of institutional racism, discrediting of witnesses to it, victim blaming, and characterizations of the carriers of “bad news” as subversive troublemakers.<sup>6</sup>
- Professions of helplessness. Financial exigencies and appeals to insurmountable external barriers (unions, city personnel policies, etc.) were frequently offered to explain or justify inaction even in the face of acknowledged “problems.”
- Displacements of responsibility for devising remedies. Whites want blacks to do it, and blacks think it is up to whites to be better people.
- Organizational inertia. Organizations—large ones especially—have heavy “sunk costs” in their existing structures and ways of doing things. Moreover, they are complex systems with many interdependent elements. They are hard to understand and harder to control. Hence, they are difficult to change even when in some sense they want to do it.
- Ambiguous alternatives. When alternatives to a familiar course of action are ill-defined and equivocal as to their outcomes, the way solutions to social problems usually are, they tend not to be preferred.

seek to suppress it (the heat), or dampen it, or divert it, or to abandon the activities that generate it. Any of these reactions is subversive of authentic problem solving. One is not going to do genuine factfinding on institutional racism without venting some intense feelings.

- Risk aversion. This is a reason for avoiding ambiguous alternatives. Organizations, like people, vary, of course, but, by and large, they avoid uncertainty and risk. They tend to prefer the devil they know, especially if that devil seems benign as far as the personal careers and social interests of their dominant members are concerned.

- Excessive and inappropriate expectations. The frustrations and disappointments that result from expecting too much from change efforts, or the wrong things, has disastrous effects on the motivation necessary to sustain long-term programs in the face of the resistances already enumerated.

Some sources of resistance to change, like the ones above, are common to virtually all organizations. Others involve particular features of individual organizations (or kinds of organizations). In the case of police departments, our experience suggests that these include:

- The feudal nature of police organization. It is only somewhat exaggerated to compare modern police departments with the manorial fiefdoms in Europe in the Middle Ages. The central figure of the local chief looms uncommonly large in the highly decentralized context of policing. The quasi-military command structure, customs of obedience to the chief, and traditions of reciprocal loyalty further encourage an analogy between police organizations and feudal systems of vassalage. The point of the analogy is to emphasize that police agencies in the U.S. exhibit concentration of power, but in a framework of still more powerful local custom. This marks the character even of the 17,000 or so modern-day metropolitan police agencies. The power of the local chief is *within* a system. And it does not include a license to change that system, quite the opposite.

Instead of feudal analogies, one might prefer to think of police organization in Weberian terms: as a species of "traditional" bureaucracy. Unlike more familiar, rational-legal bureaucracies, where individual loyalty attaches to a system of formal rules (e.g., a constitution), police organizations attach loyalty to the person of a leader who serves and is guided by "ancient" traditions. But whether feudal or traditional bureaucracy, the point is that police departments are comparatively closed systems, markedly resistive to outside influence or change. Moreover, the power of the chief to control them is less than it may seem, for it depends upon his consistent conformity with expectations of his "vassals" that he

preserve a status quo and the "faith" that sustains it. Local custom, in short, is more powerful than chiefs.

- Professionalization of the police. This in some ways clouds the organizational case I've just argued. It suggests bureaucratization in the rational-legal sense. But in any event, emphasis on professional self-regulation helps further to close the boundaries of police organizations to external influence. Converting customs into formal professional standards that control entry to police organizations and the practice of police work helps institutionalize an organizational status quo. It (the status quo) then no longer needs to be legitimized merely by tradition and the crass preferences of its incumbent members; it can be justified by its consonance with more universal professional standards. At the same time, the normal internal political interests of the police themselves may be screened or idealized by the forms of "professional standards."

- Militant unionism. In many police organizations, the rank and file has taken effective command. To some extent this has come about because of mounting rank-and-file concern with compensation, benefits, working conditions, and the like; but it also, and more important, reflects an attempt by police personnel to control redefinitions of the police role in society and, with it, the instruments of its practice. This is at once a defensive response—a closing of ranks in reaction to threats against established interests—and a proactive attempt to control the future course of events.

- The basic nature of the police role. Two features at least of the traditional police officer's role warrant mention in this discussion because they, too, constrain against change. One is the suspiciousness required of the police officer who must be ever watchful for signs of transgression and personal danger, and award his trust carefully. This tends to isolate him from the citizenry while promoting solidarity with a brotherhood of officers who share a common fate and tradition.

Quite different, but also working to buffer police organizations against outside influence and change, is their concept of themselves as neutral, apolitical guardians of the public's safety, the thin margin between civility and anarchy. This idea argues strongly against the propriety of intrusions by external "political" forces (e.g., affirmative action) into policing. By definition this is an inappropriate intrusion, because of the ostensible neutral evenhandedness of police practice.

- The technocratic orientation of police departments. There are two aspects of this too. One, police departments stress efficiency and rationality. They deemphasize nontechnical issues in their practices, their training, and in their system of values. Despite their function as “human service delivery systems,” police departments give relatively short shrift to human relations issues and skills. Second, by and large, the police lack managerial traditions and the skills one associates with them. Traditional bureaucracies, their role models are individualistic and charismatic. Police agencies cannot easily be brought to grips with social problems (other than crime, which they are disinclined to think of as a social problem) or made easily responsive to collective solutions to such problems as institutional discrimination.
- The influence of local circumstances. This is the last impediment to change I want to mention here. It underscores the fact that policing in the U.S. is a local enterprise.<sup>7</sup> The character of American policing is shaped by local contexts and the network of influences embedded in them. The problems of American police departments vary greatly with these contexts, and universal remedies for them are hard to find.

### Some Lessons Learned

In one form or another, many of the impediments I've mentioned—possibly most of them—confront change efforts in any organization, any time. A full-fledged, problem-remedy approach to program development should, therefore, include provision not only for the identification of problems of institutional discrimination and the formulation of remedies for them, but provision as well for anticipating impediments to the application of these remedies and the formulation of remedies for those impediments. In our own work we handled some of these difficulties reasonably well, but others poorly, if at all. In the process, however, we learned (or relearned) some lessons that have general utility. Four of them have particular relevance, I think, to the problem-remedy approach to affirmative action. They have to do with the institutionalization of change-making processes, the avoidance of technical traps, the perils of rationalism; and requirements for external leverage to sustain change programs.

<sup>7</sup> There are something like 40,000 *public* police organizations in the U.S., 17,000 of which are “large,” and no national or even statewide constabulary as is true in Europe.

### Insufficient Institutionalization

A change effort of any scope takes time. During this time, obviously, a variety of forces opposed to it may surface. Management is needed in order for these forces to be overcome and program continuity maintained. A mechanism for administration and problem solving is necessary for program follow-through. We anticipated that the departmental task forces would play this role and, in concert with the chief, would manage the change process. This strategy necessitated our making certain, as it proved, problematic assumptions: (1) that basic managerial skills existed in the host organizations and were represented in the task forces responsible for implementing remedial programs; (2) that there would be continuity of commitment to the goals of these programs in the departments; and (3) that the instruments of change and hence the change process itself would be institutionalized within the host organizations. I cannot take the space here to discuss these problematics, except to say that we overestimated both the commitment to change and the managerial skills to direct it that existed in the cooperating police departments. Turnover of key people, chiefs in particular, complicated the problem. For instance, in the five police departments participating in the study, we worked with a total of nine different chiefs. Each succeeding chief had views about the project different from his predecessor's, as well as different ideas about its methodology and commitment to it. Programs were implemented under auspices different from those under which they were designed. A continuing process of negotiation and adjustment was, therefore, essential to sustain the thrust of programmatic change over time and emerging circumstances. Sometimes this proved impossible. We went away from three of the five police departments dissatisfied with the extent to which either their task forces or organizational change processes had become effectively institutionalized in them.

### Technical Traps

The factfinding part of a problem-remedy approach to change requires collection of data. Most social data are subject to interpretation, and some of it is apt to be inconsistent with others. Two unfortunate things happen as a result. One is that factfinders become preoccupied with the details of

data, their specific interpretation, and their interrelations. They begin to treat the problem as an abstruse social scientific (or, equally bad, legalistic) exercise and, in the process, lose sight of the forest of discrimination problems for the trees of their indicators.

The second thing that happens is that opponents of change concentrate on the “facts of the matter” and literally nitpick a fledgling program to death. Plainly, data are important in designing constructive change efforts. But, in most circumstances, the “facts” are rarely definitive in themselves and are ambiguous in detail—we’re not yet very good at social measurement, unfortunately. Little good, however, can come of particularistic debates on the meaning of data. The purpose of diagnostic data is to inform, not determine, thoughtful planning. Suggestive indication of problems and possible remedies is about all that can be asked of most social data. The experiences that come from acting on plans probably does more to clarify a situation than most before-the-fact data gathering (see Weick, 1979).

### **The Perils of Rationalism**

Americans are a rational people, as our attraction to such ideas as problem-remedy strategies for social change attests. The managers of American organizations are especially rational, and police officers are rational people among rational people. Such at least are the images. Whether they are true or not, people act on these images. They *intend* to be rational, and they accept evaluation on norms of rationality (see Thompson, 1967). In the affairs of rational men, emotion and conflict are believed to be dysfunctional, as I’ve said several times now. But programs to dismantle discrimination can hardly be undertaken in an ivory tower. Conflict and emotion *must* be accepted as a *functional* part of it. One may wish to minimize their more destructive features, but trying to avoid them altogether simply means avoiding coming to grips with the substances of racism and its human consequences. These are emotional subjects. Confrontation with the “irrationalities” of emotion and conflict is an inescapable and, really, a modest price that must be paid for progress toward social justice.

### **Requirements for External Leverage**

I’ve noted already that organizations and institutions are hard to change. It follows from this fact that there are limits to organizational self-reform.

External power often needs to be applied in order to change them, or to help direct change, and surely to sustain it. Leverage can come from the courts, from unions, community action organizations, and a variety of other sources. In our work with police departments, we often found the help of individual elected officials, minority organizations, and private agencies helpful in keeping reform on track. But, in the end, it is government that generally has the decisive role here. Its agencies, the Commission on Civil Rights, for instance, are responsible for imbuing society with a moral tone and for holding individuals and organizations accountable to the public interest. It is imperative that government maintain an active and aggressive role in moving the United States toward social justice and equality of opportunity for its citizens. Otherwise, there is likely to be less justice, but more pain.

I might note that there is a practical side benefit to be gained from providing organizations with outside leverage toward change. It gives an excuse for changing things that may be more convenient to managers than moral argument—“It’s not really me who wants this fellas, it’s them; what can I do?” This diffuses responsibility for unpopular changes and allows managers to preserve their personal occupational interests and friendships, and yet to press ahead with reform. Without the opportunity to shift some blame to powerful “outsiders” (the courts, Title VII, the mayor, EEOC, etc.), even a sympathetic executive might understandably shrink from actions prejudicial to her or his job or long-standing personal affiliations.

## **Conclusions**

As I look back over the attempts by my colleagues and me to reform institutional racism in police departments, I am led to a couple of conclusions. One of them is procedural; the other is philosophical.

### **First Conclusion**

In 1974 I wrote a book called *Interpersonal Strategies for System Management* (Hunt, 1974). In chapter four of that book, I described a strategy of organic change, one facet of which I mentioned earlier, namely, the idea that planned organizational change consists mostly of helping organizations to move in directions essentially consistent with their *existing* dispositions. In addition to that notion, I argued:

that [organizational] change and development are calculated to be gradual, fitful, agonizingly slow at times, and certainly piecemeal. Sensational results are the exception, not the rule. One must be wary of simplistic and excessive expectations for change in complex social systems (Hunt, 1974, p. 71).

Furthermore, I suggested that:

Organizational effectiveness has to do with how well a social system mobilizes resources to achieve its goals. But complex organizations have a multiplicity of goals. . . . This not only makes it hard to define goals; it also makes it hard to know which resources are important. . . . As one moves closer to operational levels, goals become ever more specific, practical, occupational, and segmental. Executive-level organizational goals probably mean next to nothing to personnel at working levels. . . . [But it] should always be possible to reconcile lower-level goals with higher-level goals (Hunt, 1974, p. 71).

I conclude from these propositions that rational programs to dismantle racism and discrimination will best proceed by translating their goals into specific operational terms—into concrete tasks that can be done by someone who can be identified. “Goals” themselves can be restated as specific indicators or criteria of accomplishment of the tasks. For example, one may wish to increase minority membership in the sworn ranks of police agencies because factfinding shows underrepresentation. In order for this to happen, however, minorities must get on the civil service lists from which hirees are chosen, and to do that they must take an examination. One can translate an affirmative action goal, the way one department in our study did, into the specific task of identifying minority candidates and getting them to the examination and then assign responsibility for performing this task to specific individuals. Effectiveness of performance of the task can eventually be measured by the proportions of minority candidates taking the examination, compared with some baseline.

Task-oriented approaches to changing organizations have the advantage of organizing it in relation to tangible activities. This helps to get things started. People have something they can do. Once they start, they also have a way of getting feedback that can lead them to a better understanding of their problems and hence to more effective remedies for them. It helps, too, if a sense of proportion guides the selection of change targets (tasks) and if they are acted upon selectively so as not to dissipate scarce

resources (time, money, energy, etc.) in trying to do too many things at once.

Working this way husbands resources and helps initiate action by relating it to “possible” tasks; it provides a sense of achievement to the performers of the tasks; and, if not achievement, then a kind of data-driven basis for rethinking programs and redefining the tasks by which they are implemented. Too, it provides a sustaining sense of being in control of events rather than being helpless in their face, something that is especially important to voluntary change efforts.

A related idea suggested by an organic strategy of problem solving is that it go forth step by step, in stages or phases, as well as task by task.

Phasing [change] efforts, like the concept of organic development, is a more or less direct extension of the system perspective on organization. By introducing change [progressively] and purposefully, opportunities for planning and thoughtful selection of change targets and tactics are increased. Furthermore, chances of detecting both signs and sources of resistance to change and unanticipated consequences are improved, as are prospects for finding timely solutions to them. Most importantly, phasing provides for the progressive development of structures and feedback loops that can support planning and change in successive organizational subsystems (Hunt, 1974, p. 75).

Taking the example of a moment ago—increasing the number of minority police officers—phasing of effort so as to focus successively on recruitment (as described above) and then, for instance, on selection is a constructive way of proceeding. It conserves resources and provides a base of experience for planning differently oriented specific tasks at later times.

Of course, phased change efforts are by no means unfamiliar among desegregation programs and other attacks on institutionalized discrimination. I think, for one example, of the Federal court-ordered school desegregation process in Buffalo, N.Y., where I live. Still, it is worth mentioning the concepts again, whether or not they are familiar. My experience in the work, which has been the subject of this paper, confirmed me in my belief in their worth. Indeed, had we followed them more assiduously, our particular project might have benefited from it. Yet, I perceive a dilemma. Ideas about planned organizational change (or organizational development—OD) with which I am familiar assume that organizations have at least some general

notions about where they'd like to go, but are needful of orderly ways of getting there. Planned change technologies are intended to satisfy this instrumental need. The problem with OD strategies in affirmative action environments is that the organizational problems there may not be entirely tactical. Assumptions of organizational purpose may not hold. If they do not, planned change methodologies may, at best, be impotent as ways of dismantling institutional discrimination. Many American organizations, both public and private, have yet to embrace genuine affirmative action as a part of their missions, and OD procedures are not well-adapted to helping them do it.

What is more, organizational change strategies are fundamentally "local" in their orientations. They focus on organizations one at a time and, as the problem-remedy dictum counsels, seek accommodation of change programs to the novel features of individual organizations. But, if it is sought local organization by local organization, social change at societal levels may be extraordinarily slow in coming. A few local success stories may suggest unwarranted promise for this approach as a way of achieving national purposes. Engaging as OD strategies may be—and effective as they may sometimes prove—one must, I think, hesitate to advertise them as solutions to national problems of institutional racism. Individual psychotherapy, for example, may be effective for individual sufferers from mental illness, or it may not be. Either way, however, individual psychotherapy is infeasible as a solution to the *social* problem of mental illness because it takes too long and costs too much. One wonders if the same might not be true of organizational development approaches to social justice. I am also aware of what seems to me a tension between these methodological concepts and some basic aspects of American race relations that I have not so far mentioned except in passing. Hence, to my second conclusion.

## Second Conclusion

Rationalist approaches to change, of the phased-organic or problem-remedy varieties, run a risk of not fully comprehending the realities of racism and institutional discrimination. I've sought to emphasize that these are not entirely rational phenomena. I'll come back again to this general point, but first I want to consider a procedural matter related to it.

As I mentioned before, deliberate planned change runs up against "irrational" human emotions. It also runs up against the impatience of its eventual beneficiaries. The victims of institutional discrimination want relief from it now, not in phase 4. Who can blame them? And who can ask them to wait while we figure out what to do, particularly when they believe they already know. Anyway, why should they trust white planners ever to do anything? Whites have not historically shown enthusiasm for the job of dismantling institutional discrimination. And often in the past, the invocation of "technical problems" has been but a code word for "going slow."

The whole rationalist problem-remedy apparatus runs a risk of converting the enterprise of dismantling institutional racism from a hopeful human social reform into an abstract technical or legalistic exercise. If it does that, it will have done a profound disservice to the cause of social justice in this country. The root values of human social equality cannot be dissolved in some technocratic potion without diluting them. Affirmative action programs, whether phased, organic, or what have you, are instruments in the specific service of equity values. This fundamental fact—and the values themselves—must be kept prominent in the processes of remediation. They define the reasons for the programs, and they innervate them. Without a moral reference, there are no criteria for equity decisions. Without a compelling moral force to counter vested interests, organic development is merely a synonym for no change at all.

Racism is both ideology and manifestation. Institutional discrimination may be racism's most visibly significant manifestation, but ideology is the tacit network of beliefs and values that encourages and justifies these (and other) discriminatory manifestations. Ideas about white supremacy epitomize American racist ideology. Benjamin Bowser and I have spoken to this point as follows:

Racism, in other words, is multi-dimensional—individual, structural, and cultural. To describe it or combat it along any one dimension may not comprehend or reduce it on another. It spills over from any of these levels into the others. . . .A social order acts out racism. It does this because it is influenced by economic and political interests which benefit from racism either as an intended condition or unintended consequence of pursuing those interests. . . .[But] at bottom racism is a cultural phenomenon. . . .Cultural racism has been necessary to the acting out and reinforcement of racism, both in social structure

and individual behavior. . . Racism generated through culture is self-generative and, consequently, hard to change. One can believe that real changes have occurred when in fact only appearances have altered (Bowser & Hunt, forthcoming, 1981).

I have no wish to close this discussion on a pessimistic note or to minimize the importance of correcting institutional racial bias. But I do wish to sound cautionary and admonitory notes. At the base of institutional discrimination is racism and white supremacist ideology. If, as the Commission states it, our national purpose is to "create a climate of equality that supports all efforts to break down the structural, organizational, and personal barriers that perpetuate injustice" (1981, p. 42), then we shall have to consider carefully George Fredrickson's (1981) warning that, "equality and fraternity do not result automatically from the elimination of Jim Crow laws and practices."

Values and ideologies sustain discrimination. As we look ahead to affirmative action in the 1980s, and backward to accomplishments since the 1960s, we must also take seriously James Jones' (1972; forthcoming, 1981) argument that racism today is chiefly manifest in cultural forms. If Jones is correct, and I think he is, on the whole, we have come from blatant prejudice of the individual bigot and the well-documented institutional inequalities of American society that prompted governmental responses such as *Brown v. Board of Education* and affirmative action to the hard-to-crack nub of the matter: invidious institutional systems rooted in white European values that, mostly subconsciously, lead to a devaluing by Western whites of Third World cultures and to consequent disadvantages for their people.

Obviously, America needs to move aggressively to devise and set in place administrative remedies for institutional discrimination. But affirmative action is a moral as well as, or more than, an administrative remedy. Yet ideological themes and critiques of human social and moral values are largely missing in explicit form from the Commission's *Statement*. If it is to use administrative remedies well, and remove racist barriers to a truly just society, America will need to become more self-conscious than this about the difficult ideological and value premises of discriminatory social systems. Seeing to it that America does this strikes me as a special responsibility of the U.S. Commission on Civil Rights, together, of course, with the Nation's President.

At the same time that we Americans are encouraged to confront our racist dark side, we may constructively reemphasize another side of our ideological natures. In his review in *The New Republic* (Feb. 21, 1981) of George Fredrickson's book on white supremacy, Nathan Huggins makes helpful note of the important historical fact that:

The rationale of the [American] government, despite contradictions in practice, assumed that men were born equal and that just governments rested in the consent of the governed. . . White Americans [have not shared] political or economic power with blacks, yet their political faith argued that they ought to (p. 32).

Moreover, Huggins goes on to say that:

Our sense of our history has been more than the imperialistic "white man's burden." . . We think providentially about our past and purpose. . . we have set ourselves up as exemplars for the rest of mankind. From the point of view of America's oppressed and underprivileged, our exalted sense of mission might have made scant practical difference, but it has been a source of embarrassment, guilt, ambivalence, and of a predisposition—when circumstances made it convenient—to reform (p. 32).

Of course there are dangers here of hypocrisy and sanctimonious false pride, but this is an inspiring sense of national purpose nonetheless. It affords a moral grounding for administrative affirmative action, while simultaneously arranging a guilty collective conscience as a practical motivational impetus for it.

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# Affirmative Action: Total Systems Change

By Alice G. Sargent\*

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Affirmative action measures are designed to end discrimination. In actuality, affirmative action programs have become the litmus test to identify ineffective management practices that affect white males as well as the new work force of women and minorities. In seeking to deal with discrimination in organizations, management has tried to utilize the current management systems of recruitment, selection, training and development, career paths, performance appraisal, alternative work schedules, developmental assignments, and ongoing boss-subordinate communication. These systems have proved to be weak, outmoded, and lacking developed data bases. They have not been able to support affirmative action or other ongoing management processes. This has led to accusations that affirmative action costs organizations too much, whereas much of the cost comes from developing management systems that have been ignored over a long period of time.

In seeking a remedy over the past decade in business, government, and higher education, training departments have stressed programs such as career development, life planning, management skills, assertiveness training, racism and sexism or antidiscrimination awareness programs, and leadership training for women and minority groups. This approach focuses on "the victim" of discrimination, often increasing the negative self-concept of the "disadvantaged" persons, who feel flawed if they must change so many behaviors and attitudes to succeed.

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The process often evokes guilt and frustration among white male managers who are responsible for implementing the needed changes. Gradually, management is beginning to realize that dealing only with the disenfranchised harms those persons while producing resistance in others. Such efforts are designed to move minorities and women into the predominantly white male mainstream without questioning whether the mainstream itself needs changing. More and more people are challenging this model of affirmative action. These people believe that the goal is not to homogenize minorities and women, but to reappraise and restructure the organization to include values that are feminine as well as masculine and minority values as well as majority. Women and minority employees find themselves in an environment where white and male values, attitudes, beliefs, and behaviors predominate.

The only way affirmative action can succeed is to become a mainstream, priority management issue. Some organizations link affirmative action to the increased importance they attach to human resources management, which deals with having the right people at the right place at the right time, and with concern for an effective performance management system that includes both career development and appraisal. Other organizations classify affirmative action as a quality of worklife issue, as part of what Juanita Kreps, former Secretary of Commerce, calls "the second bottom line for corporate social

Company, 1977) and *The Androgynous Manager* (AMACOM, New York, 1981).

responsibility.” The first line is profit; the second is the concern for social factors such as the utilization of human and environmental resources.

## Fair Is Not Equal

The full benefits of affirmative action may be a long time coming, certainly not in the lifetime of this author. Some organizations have set numerical goals for women in management—as low as 10 percent by 1985 in heavy manufacturing corporations and as high as 25 percent in insurance companies. Under the Federal equal opportunity recruitment program, government agencies have begun to conduct assessments and to develop informal numerical goals for the number of minority and women applicants who must be screened for each job.

A preliminary question must be asked: What benefits will white men derive from responding positively to the desire of women and minorities to share in the power? Pragmatically, the white male manager will seek to make affirmative action work because his performance as a manager is based in part on how effective the affirmative action program is. Morally, the white male manager may feel responsible or guilty about the current elitist allocation of resources. The strength of the enforcement of the law makes it economically important for corporations to be in compliance. In order to take ownership and pride in the social evolution of the work force, white males need yet additional personal and professional reasons for welcoming women and minorities—and their values, beliefs, and behaviors—into the organizational world.

White males could enjoy fuller and richer lives by allowing themselves to express feelings and to develop close relationships (generally conceived of as feminine behavior). They could have closer friendships with other men and with their families. By adopting cooperation as well as competition as an acceptable organizational value, males could ease the effects of the stress diseases, strokes, heart disease, and ulcers. Such an approach holds out the vision of a blend of skills and behaviors as valuable to both men and women.

In addition, males might become better managers by adopting some feminine values. The typical, analytical, problem-solving mode of most male managers tends to be limited in effectiveness, according to Harold J. Leavitt, professor of organizational behavior at the Stanford University Business School. Leavitt writes, “It may be time to bring

minorities and women into the organization, not to be socialized into prevailing white male managerial styles, but to socialize male managers into alternative styles.” He suggests that intuition and the ability to deal with emotion may be more useful in identifying problems and implementing solutions than the rational analytical approach.

The current piecemeal approach moves too slowly and forces women and minorities to adopt the behaviors and attitudes of white males. A more effective and integrated approach would call for whites and men to learn from women and minorities about being managers, workers, and people just as women and minorities have learned and will continue to learn a lot from whites and men. A more meaningful strategy that attempts to reduce both domination and dependency, that needs to be concerned with change for those in power as well as for those seeking power, must be developed.

If managers set out to develop a total systems affirmative action program that involves both majority and minority issues, they will need to consider the following issues:

- What is the present organizational climate like for women, minorities, and white males?
- Is this the best possible climate for the employees and the organization?
- What sort of management resources are necessary to make affirmative action work in the areas of recruiting, hiring, training, mentoring, monitoring the progress of women and minorities, and increasing the effectiveness of supervisors?

## The Model for Total Systems Change

The facets of a total systems model are numerous and focus on most management practices. The stages an affirmative action intervention might include are as follows:

I. Appoint *top management task force* to oversee the development of goals and objectives for the affirmative action process, to develop a plan, and to ensure enforcement. In order to proceed this team needs data on utilization; a work force analysis by sex, race, and job classification; an availability study for each job group; statistical information on selection, training programs attended, promotion; and determination of minorities and women in all job classifications.

II. Conduct *climate survey* to collect data on the quality of worklife for women and minorities. Utilize group sensing sessions for the data collection so that

there can be group discussions in both homogeneous and heterogeneous groups.

III. Design effective *recruitment* and hiring program that utilizes women and minority recruiters. Identify areas of underutilization and analyze barriers.

IV. Assess *management systems* for their effectiveness in the affirmative action effort, particularly the performance appraisal process to monitor the equal employment opportunity component and the career development system.

V. Provide *training* programs to include managers of the new work force. Boss-women managers pairs training; boss-minority manager pairs training; boss-secretary workshops. Mandate team building for teams with women and minorities. Conduct awareness session on racism, sexism, and antidiscrimination.

VI. Promote *supervisory* relationships that carry out the human resource management functions of managerial coaching, career development, performance management, and utilization of high potential and poor-performing employees.

VII. Assess *upward mobility* programs to evaluate effectiveness of placement and targeting for jobs.

VIII. Provide *alternative work schedules*, flex-time, job sharing, part-time work, and child care opportunities.

IX. Encourage *network building* among women and minorities, i.e., minority managers' work group.

X. Establish program with *spouse involvement* to explain affirmative action program and deal with concerns such as men and women traveling together.

XI. Create *affirmative action teams* to orient, sense issues, and carry out programs.

## I. Top Management Task Force

A key decisionmaker needs to be in charge of the task group in order to assure organizational commitment and clout behind affirmative action efforts. The task force cannot be directed by personnel or the equal employment opportunity office, although these offices need to serve as staff to the task force. The goals of the task force are to change the climate, the structures, the policies, the practices, and the interpersonal relationships within the organization to eliminate discrimination and to build a multicultural environment.

Affirmative action task forces commonly begin their team-building efforts offsite, taking several

days together in order to: increase team members' awareness of the issues, build better understanding among team members, and start the planning process. In one instance, the task force consisted of all male managers. Before they could effectively buy into the effort, they needed to find their own reasons for joining the affirmative action group. These men were asked to list 10 benefits they would receive from affirmative action. For several, the only obvious answer was that helping promote women and minorities was one measure of managerial effectiveness on their performance appraisal. Several managers wanted to understand the issues because women members of their families were deeply involved in consciousness-raising groups or were returning to work or school. None of the managers was able to suggest more than two reasons.

A reading list helped task force members learn about the issues, particularly to identify male sex-role expectations. Some men in manufacturing doubted that women could perform the required physical work. Therefore, task force members talked about the implications of sex-linked characteristics such as the genetic effects of androgen in increasing rough and tumble play and higher activity levels in boys. The men felt that physical education programs and sex-role stereotypes in the education system helped to perpetuate the physical differences between the sexes. There was still a lingering concern that women had less energy. The most compelling logic was that the bona fide occupational requirement for lifting in most States ranges from 35 to 50 pounds; women routinely lift children or grocery bags that exceed 35 pounds.

A significant breakthrough occurred when spouses were involved for one of the sessions. Frequently, organizations try to separate work from family lives, even though the two systems overlap significantly. For this reason, the inclusion of spouses raised considerable concern. For many, however, this was the high point. The spouses had the chance to voice their anxieties about their husbands and wives traveling with the other sex, and a subsequent meeting between spouses and women managers was arranged. In addition, an ongoing series for spouses was developed to deal with relevant issues such as geographical mobility patterns and extended working hours during startup of a new plant.

The task force developed an action plan that established affirmative action goals for the next

several years. The goals included data collection on the climate for women and minorities; recruitment (with women helping to recruit for the first time); and hiring objectives. The goals included an upward mobility program that considered educational background other than engineering, including engineering technology and math. Other goals were supervisor training; boss-secretary workshops; family awareness groups in the plant; work groups for women managers; and mini-affirmative action teams composed of male-female pairs and minority-white pairs for each manufacturing module, which was comprised of approximately 75 employees.

## **II. Climate Survey**

The first step is to develop an interviewing team of women and men to conduct individual and group interviews for groups of white women managers, minority women, and minority men to delineate the factors that contribute to a good or bad climate for women and minorities. When conducted through group discussions, the climate survey increases awareness about the issues, whereas paper and pencil questionnaires given to individuals without discussion tend to measure the level of awareness more than the nature of the climate.

## **III. Recruitment Programs**

The central need in the recruitment of women and minorities seems to be the identification of new networks and new contact persons different from the traditional white male network. In all areas, be it civil engineering or energy law, there are networks of women and minorities who can lead organizations to minority persons and to women. However, institutional mechanisms are lacking that could draw upon these resources and radically shift old hiring patterns. In addition, credible relationships need to be built with women and minorities in the universities so that they will refer their students. These approaches require a significant change in organizational attitudes and practices.

## **IV. Assess Management Systems: Performance Appraisal**

The performance appraisal process is the critical management system that needs to be in place in order to give credibility and maintain the changes sought for in an affirmative action effort. If managers are not evaluated and rewarded or punished in terms of their behavior in implementing affirmative

action, then the system will lack accountability. Therefore, each manager must have a management-by-objectives plan with critical elements tied to performance with respect to women and minorities in the areas of hiring, development, promotion, and supervision. The more clearly defined the levels of performance in each of these areas, the better the feedback and the accountability can be to the manager.

## **V. Training Programs**

Awareness workshops are needed for the many white male managers who report that they have neither work experience nor friendships with professional women or many minorities. In many cases, they grew up in all-white neighborhoods, married a high school or college sweetheart, served in Vietnam, and went back to work at a level of management where there are no professional women. A workshop for managers of the new work force should be designed to look at issues of men and women in organizations. Three important issues that emerge between men and women in these workshops are competence, control, and sexuality. Furthermore, if coalitions or support systems between women and minorities are developed prior to the workshops with men, then the women and minorities can increase the awareness, skill, confidence, and sense of support necessary to articulate their feelings in the workshops.

In the affirmative action effort described earlier, the following material was covered in theory presentations on men and women in organizations:

### **Issues of Competence in Relationships Between Men and Women at Work**

Since competent men and women may not have the same style, it is important to be able to recognize the differences between them. A woman who encourages cooperation may get the job done as effectively as a man who stresses competition. But because managers are used to awarding points for competitiveness, the woman's achievement may not be recognized sufficiently. Women also tend to exhibit more faith in the formal organizational processes, while men exert influence through the informal power system, which is more available to them because it tends to be predominantly male. In addition, women value intrinsic rewards such as self-esteem and fulfillment more highly, while men value extrinsic rewards such as visible signs of power. It is

important to know and understand these differences when judging managerial competence.

Women also differ from men in their styles of speaking and presenting themselves. Women frequently react rather than take the initiative. Sometimes this behavior is counterproductive because it discounts and denies competence and lacks an out-front, take-charge style. Elizabeth Aries' research found that men take up two-thirds of the speaking time in male-female groups and women one-third. Eileen Morley of the Harvard Business School has pointed out that women tend to feel/think and men to think/feel. In other words, a woman who is asked what she is thinking may report her feelings; if a man is asked what he is feeling, he may report his thoughts.

In a world heretofore dominated by male values, it is important to learn how to tell what a woman knows or if she is competent when she is not behaving like a man. Another factor in the competency issue is familiarity with the other's style. A number of men reported that they compared the woman manager they were working with to the last woman manager they had known, which might have been as long ago as 6 years. They did not compare her to male managers with whom they had worked. That meant that they might have a very small data base. It meant, furthermore, that if the last woman manager with whom they worked was ineffective, the current woman had a lot to overcome.

#### **Issues of Control in Relationships Between Men and Women at Work**

Control is another central issue when men and women get together. Men are used to being in control in mixed groups, and women are not. This method of interacting mimics a "father-child" relationship. The issue of control and habitual patterns of responding to control becomes critical when men and women managers work together and when women manage men. Then, ways must be found to build adult-adult relationships.

If man-woman and woman-woman communication is the goal in work interaction, the following behaviors need to be eliminated:

- Men using women managers as mothers—telling them personal information but not treating them as real colleagues with whom they also solve problems and perform tasks: mother-boy.
- Women managers not sharing their competence with one another: girl-girl or mother-girl.

- Men and women managers using sex to play out power and control issues: father-girl and mother-boy.
- Male managers being angry at women employees but protecting them: father-girl.
- Male manager deferring to the female manager in emotional situations in which pain is being expressed. Woman manager comforts woman secretary who is crying while the male manager steps aside: mother-boy.
- Woman manager deferring to male manager concerning policymaking: father-girl.

A father-child interaction may be more comfortable because it is habitual. It keeps control on familiar ground and removes the issue of sexuality for both the male and female manager. Awareness workshops for managers need to explore these relationships and to reeducate men and women so they can interact as adults.

#### **Issues of Sexuality in Relationships Between Men and Women at Work**

Both actual incidents of sexual relationships developing through work and fantasies and anxieties about them make sexuality a more pervasive issue in the workplace than many people anticipated. As a result, spouses were invited to the managers' awareness workshops. The major concern to both husbands and wives was men and women traveling together on business. Obviously, the situation presents opportunities to try out and to act out. It triggers great fears in the spouse who is left behind in the seemingly "less glamorous" position. Introducing spouses to managers of the other sex gives them the opportunity to scale down fantasies, to begin to build relationships in which they share mutual concern for each other. And eventually they may have the opportunity to discuss their feelings.

Sexuality is always present in male-female interactions. It can be positive or negative, that is, a factor of attraction or discounting. Rare, indeed, is the situation in which men and women do not appraise one another sexually. In situations where employees reported no concern for each other sexually, it often turned out that both sexes had appraised each other and found the other wanting.

Without discussion, men and women may not be clear about the reasons they became sexually involved with each other. These include curiosity, the desire for power or control, boredom, joy, and love. The opportunity to talk about these issues may

diffuse fantasies. When people are attracted to one another sexually in a way that interferes with work, the situation needs to be discussed for the sake of the people involved and of the organization. Failure to discuss issues of sexuality may only heighten fantasies of attraction and increase a sense that people are under the control of their feelings rather than having a choice and that reason and emotion can exist side by side.

### **Differentiated Competency-Based Training Modules**

Due to sex-role stereotyping and differential socialization, some men and women have learned different competencies. Masculine competencies have tended to be valued more highly than feminine in influential positions in business, government, and academe. Both men and women need training to recognize each other's skills. Organizations also need to learn to value the skills women already have and to learn that men can benefit from learning those skills.

Women, particularly women managers, need training in problem solving and analytical reasoning. They need to learn to generalize rather than to personalize issues and thereby to react less personally to criticism. Men, conversely, need to personalize as well as generalize, to express emotion, and to permit themselves to be vulnerable. Let us look in greater detail at what women need to learn and what men need to learn, perhaps from each other.

#### **Women need to:**

- be powerful and forthright and have a direct, visible, impact on others rather than functioning behind the scenes;
- be entrepreneurial, desire to have a unique impact;
- state their own needs and not back down even if not immediately accepted;
- focus on a task and regard it as at least as important as the relationships of the people doing the task;
- build support systems with other women and to share competence rather than compete with them;
- intellectualize and generalize from experience;
- behave "impersonally" rather than to personalize experience;
- stop turning anger, blame, and pain inward, thereby rejecting feelings of suffering and victimization;

- reject feedback if the information does not come in a helpful way;
- respond directly with "I" statements rather than with blaming "you" statements;
- be effective problem solvers, which means being analytical, systematic, and directive rather than fearful or dependent;
- stop self-limiting behaviors such as allowing oneself to be interrupted or laughing after making a serious statement; and
- be risk takers, although it is particularly difficult at this time when each woman feels that she is regarded as representative of all womankind.

#### **At the same time, men need to learn to:**

- be aware of feelings rather than avoiding or suppressing them;
- regard feelings as a basic and essential part of life, rather than as impediments to achievement;
- assert the right to work for self-fulfillment rather than only to meet the obligations of the "provider" role;
- value an identity that is not defined so totally by work;
- accept a share of responsibility for "providing" but to refuse total responsibility for it;
- be able to fail at a task without feeling they failed as men;
- accept and express the need to be nurtured when feeling hurt, afraid, vulnerable, or helpless, rather than hide those feelings behind a mask of strength, rationality, and invulnerability;
- touch and be close to both men and women;
- listen actively and be empathic without feeling responsible for problem solving;
- accept the risk and vulnerability that the sharing of feelings implies;
- build support systems with other men, sharing competencies without competition and feelings and needs without dissembling;
- personalize experience, rather than assuming that the only valid approach to life and interpersonal contact is "objective";
- accept that the emotional, spontaneous, and irrational are valid parts of oneself to be explored and expressed as need be, and to express openly feelings of love, anger, pain, joy, loneliness, and dependency;
- understand how men value women as "validators of masculinity," a haven from the competitive male world, the expressive partner;

- understand the impact that being male has on shaping their lives and their responses; and
- nurture and actively support men and women in their efforts to change.

Compensatory programs to address these differences come in a variety of training packages: interpersonal competence for men; leadership and management training for women; training in the problem-solving process; assertiveness training; microtraining skills, including active listening, empathy, influencing, and conflict resolution.

Black identity development and white identity development theories are used in training programs to raise the level of personal racial awareness, to help individuals understand the impact that a particular stage has on others. (See table 1.) Dr. Craig Washington, a consultant in Washington, D.C., also uses these stages to help people learn alternative styles of communication; to team-build boss-subordinate relationships; and to work with teams comprised of white men, women, and minorities.

## VI. Supervisory Relationships

The most critical component for women and minorities in getting ahead is frequently related to the relationship with the supervisor. This comes as no surprise given what we know about the importance of "expectation effects" in teacher-pupil relationships and intimate relationships. Expectation effects are critical to success or failure on the job, in school, in marriage. As Rosenthal (1969) reported on IQ scores, the children with higher numbers (although they were fake scores) improved more quickly because the teacher expected them to. The so-called "bright" rats learned the mazes more quickly because the researcher expected them to. The supervisory relationship is regarded as one of the most critical factors to women's or minorities' success.

Research on personnel interviewers by Rosen and Jerdee (1974) underscores how interview bias can affect whether women or men enter a system. Furthermore, supervisors may hold the same stereotypes as the interviewers. For example, interviewers in industry expect men to be effective because men understand financial matters, size up situations accurately, have leadership potential, like science and math, know how to set long-range goals, and want to get ahead. But the interviewers expect women to be home oriented as well as job oriented. Characteristics attributed to women include enjoyment of

routine, sensitivity to criticism, timidity, jealousy, too much emotionalism, sensitivity to the feelings of others, a tendency to quit more frequently than men, and a propensity to put family matters ahead of the job.

The facts are that women do not have more job instability than men, for example, and they do not necessarily enjoy routine more than men. Managers who hold such stereotypes are likely to act upon them. For instance, male supervisors report that they are more sympathetic when home life interferes with a man's work. The manager helps male employees by suggesting solutions to the problem such as different kinds of services or counseling. The supervisor's sense is probably that, "After all, he's the predominant breadwinner." But hopelessness frequently greets a woman employee with the same problem. "I knew it was going to happen," is the predominant attitude among supervisors when a woman's home life interferes with her work.

To illustrate sex-linked differences in expectations of supervisors, Kay Bartol and Anthony Butterfield reversed the names of men and women in a number of case studies. They found sex-linked differences of rating effectiveness on two components of managerial behavior from the Ohio State leadership inventory, initiating structure (considered masculine) and showing concern for others (considered feminine). A male manager received an effective rating when he spent 3 weeks in a new office finding out what was happening and then developing a reorganization plan. A woman who followed a similar pattern was judged as autocratic, taking too much initiative, and undemocratic. However, a woman was rated effective when she sought the opinions and feelings of others and got involved in their personal lives. But a male manager was rated as wishy-washy and becoming too involved when he used the same approach.

The point is not that the man should give up his proactive organizing style nor that the woman should become directive at the expense of feelings and concern for others. The effectiveness of both sexes would be enhanced by learning the attitudes and behaviors generally attributed to the other sex. Compensatory training is greatly needed for both sexes to develop qualities of so-called masculine independence and feminine nurturing.

Similar issues about building a multicultural environment across races need to be raised. There is much that is valid in the values learned from the black experience that could change the nature of

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**TABLE 1**  
**Racial Identity Development**

White Identity Development\*

Black Identity Development†

STAGE I Active Acceptance

Believes minorities are inferior because of physical traits and genetic traits.

Goal: to keep minorities in rightful place, i.e., one-down.

Uses racist language.

Actively works to maintain whites in one-up position.

Whiteness is right; devalue blackness or other minorities.

STAGE II Passive Acceptance

Supports subtle forms of racism.

Sees no race problem—color blind.

You can do anything you want to.

Everyone is alike.

It is a black problem. Blaming the victim.

If black people would just get in line and shape up.

Liberal response—still supports the policies and law, yet is paternalistic.

STAGE III Active Resistance

Explosive, angry stage.

People feel they have been sold or bought a bill of goods that is incorrect—that they are supporting norms that are wrong.

Looking at institutional patterns and standards to see what is racist (height requirements for police force that rule out Hispanics).

Anger—hostility—resistance—fighting outward in angry, hostile ways.

Energy is directed at destroying white institutions.

STAGE 1 Passive Acceptance

Attempt to gain approval from whites.

Conform to whites standards. Accept cultural norm of what is acceptable to whites.

Denial of one's own blackness.

Self-hate.

STAGE II Active Resistance

Tries to gain power by actively rejecting all that is white.

Labeled militant.

Expresses a lot of hostility.

Begins to appreciate multicultural differences.

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## **TABLE 1 (cont.)**

### **Racial Identity Development**

#### White Identity Development

##### STAGE IV Redirection

Redefinition of yourself in terms of your own whiteness.

Whiteness is not from a one-up or one-down point of view.

What does it mean to be white in America? Tries to answer question.

Women and minorities always have to define who they are.

Norm for how one should perform in many professional situations is white male. Tries to understand the implication of this.

##### STAGE V Internalization

Individual maintains own positive feeling about being white, but is also able to deal with minorities and women in a self-respecting and mutual manner.

Appreciates cultural differences.

Social change agent.

#### Black Identity Development

##### STAGE III Redirection

Ignoring labeling of white society.

Building a positive blackness.

Black people who are attempting to redefine who they are—begin to use their own identifications.

Developing a positive identity around being called black.

Developing black networks—norms—policies that support blackness.

Going back to roots.

##### STAGE IV Internalization

Deal with cultural norms of America as a social change agent.

Recognize that racism is inherent in America individually, culturally, and socially.

Proactive about rights.

Maintain own positiveness and yet is effective in engaging in direct mutual communication.

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\*Source: Dr. James Elder, University of Massachusetts.

†Source: Dr. Bailey Jackson, University of Massachusetts.

organizational life. There is an arrogance that is learned subconsciously by the majority group that could be tempered by humility. There is an overreliance on rationality that could be mediated by a common sense, natural approach that many minorities bring.

## **VII. Upward Mobility Programs: Career Development**

The area of career development clearly points out deficits in current management systems. As management looks at effective promotion of women and minorities, it will find lack of clarity about career paths and lack of long-range, human resource planning. It is essential for effectiveness and for morale for all employees to have a sense of where they are going in the organization and what it takes to get there. This comes through specific information about career paths, targeted jobs, and developmental assignments that lead to a specific position.

## **VIII. Alternative Work Schedules**

While alternative work opportunities have been widely supported by women, men are now discovering the value as well. The specific alternative work schedules that have been tried and found successful in organizations include: flexible working hours, the compressed work week, permanent part-time work, and job sharing. The advantages to the organization of these options include increased productivity; higher morale; reduced absenteeism, tardiness, and turnover; and a progressive image, which may attract other employees. The advantages to the individual include more leisure time for: education, homelife, developing other sides of one's identity, commuting at different hours, increased time at home when children are away, and opportunities for additional work.

## **IX. Coalition Building Among Women and Minorities**

### **Coalitions Among Women**

Networks for women and for minority managers are extremely helpful to new and old employees. Such groups also aid the organization in recruitment, orientation, and retention of employees. I worked in one organization where the women formed a women managers' group within the plant and then met with women managers' groups from other plants. They even met across product lines,

which is quite unusual for the corporation. Within each plant and at corporate headquarters, the women identified 17 key issues of concern to them, ranging from promotion to maternity leave to part-time work. They asked to be consulted by the plant managers' group when such issues were up for discussion.

Many women prefer the notion of coalition building or network building over the concept of support systems. Support systems seem to demand too great an emotional commitment. Over a period of time the development of coalitions can alter the typical pattern of entry by women into the system. New women employees often try to succeed first in the male-dominated workplace without turning to other women for friendship and support. They tend to spend the first few years learning their way around the organization on their own without adequate linkages to other women in the community. In this process of proving themselves, many women take on masculine characteristics and suffer a great deal from a sense of failure. The typical organizational socialization of women and minorities is to educate them in values of the dominant culture. On pre- and post-test scales, women moving into several manufacturing settings changed along sex-role dimensions. After a year in the plant, women's scores increased in expressed control and a desire to influence and persuade others, and lessened in expressing inclusion and affection. In other words, they increased masculine behaviors at the expense of feminine behaviors.

Many women report that they avoid being branded as too seductive or nurturing by cutting down their emotional responses if they are the only woman in a group. In one corporate affirmative action program, the problem of the lone woman was dealt with by focusing on a natural work group such as a mechanical engineering department. When a woman was about to join the group, members talked about the issues involved both before and after she joined. It was critical to hold followup sessions with the group because instances of isolation developed quite rapidly. She just wasn't "one of the boys" and part of the informal communications network.

Women's networks offer an important way to deal with the problems of isolation, loneliness, and pressure to conform to male norms. They provide a sanctuary where feelings of frustration, anger, or loneliness can be expressed in a concerned environment. As a result of these coalitions, a number of

women indicated that they felt better able to hold on to their own style and sense of self-worth rather than merely adopting the dominant male patterns.

### **Coalitions Between Women and Minorities**

Affirmative action efforts highlight tension and the lack of communication around developing a common agenda for women and minorities. Often style differences create barriers. Some of the tension between black men and white women is the fear that they will be coopted and used by the other. The relationship is complicated by fantasies about power and sexual attraction. Women think black men can have power because they are men; black men think white women have access to power by asking their men for it. Both would be better off if they joined forces and acknowledged that neither of them had much access to information or power.

The network among white males is so deep rooted that frequently white males do not even recognize it. David Halberstam described the political-military network in eloquent detail in *The Best and the Brightest*. For example, white males usually know who is in line for a promotion, but black men and women and white women may not. In one corporate group, a black male told of watching for "For Sale" signs on managers' homes to learn who was being moved elsewhere. Some of the white males were shocked that others hadn't heard first through the "grapevine." Blacks and women need networks that will provide them with crucial information. A lot more could be done by building coalitions and alliances than by fighting for the already too small slice of the pie.

### **X. Spouse Involvement**

While a number of organizations indicate that they like to keep the personal lives of their employees quite separate from their worklives, the issue of women in the work force raises questions about such a notion. Probably the area where there is the most concern is men and women traveling together on business trips or to present papers. The norms are relaxed when people travel together and the opportunities are much greater to make contact. Rather than pretending that such issues could never arise, organizations which dealt directly with sexual attraction and sexual harassment have found it productive and have been able to defuse some of the fantasies. One byproduct of spouse involvement in learning about affirmative action has been to change

the traditional, stilted, ritualized parties (such as the Christmas party), when typically wives stay quite separate from the husbands. In fact, involving spouses not only to talk about the presence of women in the organization, but also about the mobility policy and involving them in planning for a move has improved morale and cooperation.

### **XI. Affirmative Action Teams**

Affirmative action miniteams were established in one organization: male-female and black-white pairs for each department. It was believed that issues of sexism and racism could not be dealt with effectively within the same pair. The job of these teams was to orient new employees to what was happening in affirmative action. The teams also tried to sense the development of cooccupational stereotyping—what became women's work in the plant. For example, quality control jobs were quickly set aside as women's work. In addition, the teams monitored the progress of women and minorities and served as troubleshooters when problems developed.

When possible, each team included the technical training director. In manufacturing, the training director was able to get additional, technical training for women. The program was so successful that men also sought the training. In this way, affirmative action provided everyone an opportunity, and ineffective management training practices were altered.

### **Summary**

In the total approach, affirmative action becomes a management problem. Managers are viewed as the experts who can solve the problem with important assistance from critical groups, including the industrial relations office, women, and minorities. The goal is for key decisionmakers to take on the problem and to bring their analytical and interpersonal competence to bear on its solution. Furthermore, the approach is a *systems approach*. All decisionmakers were involved so that issues of invasion of someone else's territory could be dealt with.

Social and psychological research indicates that *behavior changes precede attitude changes*. If we seek action, we may elicit a different kind of response from the habitual one. Then, by changing the reward system, further changes can be brought about in both behavior and attitudes. The first phase of change is to unfreeze the situation by increasing awareness and ownership of the issue. Momentum is

maintained through incentives such as the performance appraisal process, through development of coalitions among women and minorities, and by a temporary structure within the system, an affirmative action miniteam.

At least 3 to 5 years are needed to get the process under way and for initial changes to occur. In this time period, an agency or a corporation could begin to diagnose the dysfunctional attitudes and behaviors and develop a plan that treats affirmative action as an issue for top management. The plan would

include recruitment, a hiring program, a training program for both women and minorities, and an awareness component for all managers.

This approach benefits both the white male who is now in power in the corporation by increasing his life options and his work options, and the women and minority persons who seek full participation in the power and influence process in the workplace. The total system approach offers the chance to change organizational patterns of majority dominance and minority dependence.

# Monitoring and Evaluating Equal Opportunity Programs in the Army

By Peter G. Nordlie\*

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## Introduction

Racial strife, beginning with Little Rock in 1957 and culminating in the riots following the murder of Martin Luther King, Jr., in 1968, did not seriously surface within the Army until 1969. In the summer of 1969, major violent racial confrontations erupted at almost every major Army installation in the U.S. and overseas. The ability of the Army to perform its mission was suddenly jeopardized.

Racial strife was, perhaps, more immediately critical to the Army than other large organizations, especially civilian, because the Army is composed of teams or units that must function effectively together. The Army is highly personnel intensive, and it is team intensive. Racial strife threatens the ability of units to function effectively and thereby threatens the ability of the total organization to perform its mission. For this reason, I believe, the Army was one of the first large organizations to commit itself to programs aimed at reducing racial tensions. And this, I think, is important in the history of affirmative action because the Army's commitment involved substantial resources and considerable support for the programs from the top, and the scale was large since the Army is the second largest single Federal organization. The Army's experience with active affirmative action has extended now over nearly a decade.

I do not intend to review the Army equal opportunity program as it evolved over this 10-year time span, because my focus will be directed more specifically at monitoring and assessment efforts.

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However, a brief thumbnail sketch is in order to provide some background for those not familiar with the Army's programs.

In the early seventies the core of the Army's race relations equal opportunity program (RR/EO) was mandatory racial awareness training for all Army personnel. Training was required in all units and in all schools. In addition, a race relations/equal opportunity organizational component was created somewhat outside of the normal chain of command. Individuals in RR/EO offices were responsible for conducting training, investigating for compliance, receiving complaints, and advising the unit commander with respect to RR/EO issues. In the early days the training emphasis was on racial awareness and improved communications between races—at that time, essentially white and black. There were other elements of the total program, but the primary emphasis and commitment of resources was for racial awareness training.

By the mid-seventies the content and character of the program began to change. The curricula for unit and school training were modified, but the objectives remained essentially the same, promoting racial harmony and stimulating interracial communication. There was a detectable movement away from experiential learning methods and toward more usual forms of Army instruction.

In 1977 new equal opportunity policy and guidelines were promulgated. Major commands were given considerably broader latitude in tailoring the program to their own needs and supplementing the

regulations as they saw fit. No requirement for minimum hours was specified. Perhaps the most significant change was to return the control of the EO program to commanders. No longer was there to be a "stovepiped" equal opportunity organizational element. The EO function was considered a normal staff function subject to the chain of command as is any staff function. The responsibility for unit EO training, if held, was taken out of the hands of the EO specialists, who had received special training to perform their training function, and placed squarely in the hands of commanders who, for the most part, had had little or none. The new guidelines also suggested a procedure wherein the commander should first determine the needs of personnel in his unit for equal opportunity information and then select the method and content of the training needed based on his initial determination. The tools for performing this determination did not become available until 2 years later.

In theory, today, EO training is required in all Army schools. Unit training is the responsibility of major commands, and they can decide on and implement their own program.

The Army equal opportunity program,<sup>1</sup> initiated 10 years ago as a "special" program, was launched in the midst of violent racial strife and had evolved, by 1980, into a normal routine staff function. In another paper, I characterized the changes in the Army program over this period as:

1. From emphasis on black-white relations to emphasis on equal opportunity, other racial and ethnic minorities, and women
2. From creating racial awareness to creating management skills designed to produce equal opportunity
3. From a high-priority to a low-priority program
4. From improving interracial communication to eliminating discrimination
5. From a vocabulary of race relations to a vocabulary of equal opportunity
6. From mandatory to nonmandatory
7. From race relations specialist to human resources management
8. From confrontation to mechanics

<sup>1</sup> The vocabulary of affirmative action has changed in the Army from race relations to race relations equal opportunity to equal opportunity.

<sup>2</sup> U.S., Department of the Army, Headquarters, Army regulation

9. From intensive research and development to none

It is a fair surmise that in no other organization have so large a number of people been exposed to some aspect of an identifiable affirmative action plan. This, then, is a thumbnail sketch of affirmative action programs in the Army. My remarks will focus primarily on techniques and methods the Army has developed and used to monitor and assess its affirmative action program.

## The Components of the Army's Equal Opportunity Program

Army policy describes its equal opportunity (EO) program as consisting of a single program with two equal but separate components.<sup>2</sup> (1) "The Affirmative Actions component consists of a series of initiatives aggressively pursued to search out areas of inequity and discrimination [in order] to take corrective action. The objective is to assure that treatment of all personnel is based on merit, fitness, capability, and job-related factors, and not arbitrarily on race, color, sex, age, national origin, religion or other irrelevant factors. (2) "The Education and Training component is a continuing Army-wide effort to impart to all members of the Army an awareness concerning equal opportunity matters, to develop positive attitudes toward the program, and to foster good relationships among individuals and groups. . . ."

A third component, not defined in the regulation, but which has been an integral part of the total program until this past year when all such activity ceased, has been a research and development component. Over the past 10 years, some of the activities for which this component was responsible were:<sup>3</sup>

- a number of surveys of racial climate in the Army and attitudes toward and perceptions of the EO program;
- assessments of EO training in Army schools at all levels;
- development of equal opportunity handbooks for leaders;
- development of an Army-wide EO training model;
- development of equal opportunity leadership training for company-level chain of command;

AR 600-21, September 1977, Subject: Personnel—General, Equal Opportunity Program in the Army.

<sup>3</sup> See list of references for specific studies.

- a study of racial factors in the military justice and discharge systems;
- development of guidance materials for the evaluation and counseling of individual performance in the area of equal opportunity;
- studies of the relationship between EO training and unit effectiveness;
- studies of experimental EO training methods;
- development of a system of objective indicators to assess the status of EO in the Army; and
- development and field testing of a unit equal opportunity training diagnostic system.

Clearly, the Army has had a large and sustained equal opportunity program for over a decade, and it has undertaken research and development activities designed to assess and improve the program. Most of those methods the Army has utilized in monitoring and assessing its equal opportunity programs.

## Methods for Monitoring and Assessment of EO Programs

These methods can be grouped into five categories. These are:

1. Surveys—attitudes toward and perceptions of: (a) racial climate and (b) equal opportunity programs
2. Studies of required training in schools and units
3. Annual assessment, including objective data on composition, promotions, training, and miscellaneous internal reports (e.g., serious incident reports, I.G. inspections, reports from major commands)
4. Overall objective indicators of the status and progress of equal opportunity
5. Diagnostic and assessment tools

<sup>4</sup> Robert L. Hiatt and Peter G. Nordlie, *An Analysis of the Unit Race Relations Training Program in the U.S. Army*, ARI Technical Report TR-78-9B, and *Technical Appendix*, ARI Technical Report TR-78-B9A (Alexandria, Va.: U.S. Army Research Institute for the Behavioral Sciences (ARI), 1978).

William S. Edmonds and Peter G. Nordlie, *Analysis of Race Relations/Equal Opportunity Training in Korea* (McLean, Va.: Human Sciences Research, Inc., 1977).

Marcia A. Gilbert and Peter G. Nordlie, *An Analysis of Race Relations/Equal Opportunity Training in USAREUR*, ARI Technical Report TR-78-B10 (Alexandria, Va.: ARI, 1978).

Robert L. Hiatt, *An Analysis of Experimental Race Relations/Equal Opportunity Training* (McLean, Va.: Human Sciences Research, Inc., 1977).

William S. Edmonds and Peter G. Nordlie, Human Sciences Research, Inc., and James A. Thomas, ARI, *Analysis of Individual*

I will review all these categories with special emphasis on the last two, which are of the most direct relevance to the concerns of this conference.

## Surveys of Racial Climate in the Army

One method employed to diagnose race-related problems was Army-wide surveys, which, until now, have been conducted approximately every 2 years since 1972. These surveys provided an overall assessment of racial climate. Typically, the surveys tapped three separate populations:

1. A large randomly selected sample of enlisted men
2. A smaller sample of officers in the chain of command
3. A sample of EO specialists, both enlisted men and officers

In addition to survey questionnaires and interviews, other information was collected on EO training by observation and by review of training records and materials. Normally, the survey data were analyzed and results presented by race so that the differences in responses by race could be clearly discerned.

The results and detailed findings from these attitude and perception surveys, and their comparison over time, are voluminous and cannot, of course, be presented here. What I will try to do, instead, is to sketch briefly some of the overall conclusions. These conclusions are drawn largely from the reports of the last of these Army-wide surveys published in 1978.<sup>4</sup>

The racial situation in the Army changed rather dramatically between the early seventies and late 1977. Interracial physical violence on a large scale, prevalent in 1969 and the early seventies, had virtually disappeared by 1977 and this during a period when the nonwhite population in the Army doubled in size. The trend lines on indicators of

*Race Relations and Equal Opportunity Training in Army Schools*, ARI Technical Report TR-78-B15 (Alexandria, Va.: ARI, October 1978).

Byron G. Fiman, Ph.D., *An Analysis of the Training of Army Personnel at the Defense Race Relations Institute*, ARI Technical Report TR-78-B14 (Alexandria, Va.: ARI, 1977).

Peter G. Nordlie, Human Sciences Research, Inc., and James A. Thomas, ARI, *Analysis and Assessment of the Army Race Relations/Equal Opportunity Training Program: Summary Report of Conclusions and Recommendations*, ARI Technical Report TR-78-B8 (Alexandria, Va.: ARI, 1978).

Peter G. Nordlie and William S. Edmonds, Human Sciences Research, Inc., and Dwight J. Goehring, ARI, *Commanders' Handbook for Assessing Institutional Discrimination in Their Units*, ARI Technical Report TR-78-B13 (Alexandria, Va.: ARI, 1978).

objective differences between whites and blacks on such dimensions as speed of promotion, type of assignments, awards, etc., were showing improvement, as will be discussed in a later section. On the other hand, the picture regarding attitudes and perceptions depicts a quite different trend. The improvements in racial attitudes and perceptions evident from the 1972 and 1974 surveys had stopped by the 1976-1977 survey; racial tensions, which had appeared to be decreasing in the earlier period, appeared to be increasing by 1977. This increase in racial tensions was evident even though, on the whole, minorities were acknowledging that there had been substantial progress in reducing racial discrimination in the Army.

By 1977 a new source of race-related tensions surfaced and appeared to be growing in magnitude and virulence. Once, it was primarily the frustration and bitterness of minorities that provided the fuel for racial tensions. Gradually, a new source of tensions had emerged: the anger of an increasing number of whites who see themselves as victims of what they see as "reverse discrimination," by which they mean the idea of benefits unfairly accruing to minorities at the expense of whites. Thus, there has been a tendency for whites and nonwhites to be more sharply "polarized" on race relations/equal opportunity issues than they were in an earlier era when whites tended to see themselves as largely uninvolved in race relations/equal opportunity issues.

Another "polarization" had been developing over this time period among the white population. In the early seventies the vast majority of whites reflected a position of lack of involvement and concern with race relations/equal opportunity issues. Over time this noninvolved group has virtually disappeared as it has split into two "polarized" groups. One segment of the white population appears to be moving toward a heightened awareness of, and interest in, and concern for, race relations/equal opportunity issues and tends to be supportive of efforts aimed at eliminating racial discrimination in the Army. A comparably sized segment appears to be moving in the opposite direction, perceiving equal opportunity programs as unfairly benefiting nonwhites at the expense of whites. This group charges "reverse discrimination" and tends to be hostile to any such programs. Thus, in addition to the clearcut and strong polarization of attitudes and perceptions between whites and blacks in the Army with respect to race relations/equal opportunity

issues, the white population itself has shown signs of splitting into two roughly equalized camps, each having distinctly different views.

Another important change in the race problem in the Army is that in the late sixties and early seventies the problem was highly visible and prominent in the form of riots and a high frequency of violent racial confrontations. That high visibility and immediately tangible nature of the problem has changed to one of low visibility and few obvious indicators. If one believed that the severity of the race problem is to be measured by the frequency of overt racial incidents, then one would probably conclude that a race problem no longer exists in the Army. That was precisely the view expressed by many commanders interviewed in the 1977 study.

This point speaks to the issue of how Army leadership defined its race problem, especially in the beginning. It is fairly clear that for much of Army leadership the problem was racial violence. Thus, with the decline of overt interracial confrontation the race problem was seen to be solved. This may well account for the declining priority of equal opportunity programs. It is only when one understands that the basic race problem has to do with racial discrimination, institutional or otherwise, that one realizes immediately that the problem is far from solved.

With regard to racial tensions, the report of the 1977 study concluded: "that racial tensions are very much present and may be increasing in the Army. . . ." They are not very visible, however, because it appears as if an *interracial detente* exists wherein both whites and nonwhites have tacitly agreed to avoid fanning the sparks that could ignite the tinderbox of suppressed interracial tensions. The tinderbox, however, is still there.

### **Surveys of Attitudes Toward and Perceptions of Equal Opportunity Programs**

Until recently the Army has undertaken research for the purpose of determining how the equal opportunity program was working and how it could become more effective. I would like to make one point here. If it is possible to find fault with the program, it is only because the Army studied itself and obtained data that is largely lacking for most other organizations. If we are able to diagnose deficiencies, it is only because the Army had the fortitude to examine its own programs and the courage to make the result public. This has contrast-

ed sharply with the more frequently encountered approach of papering over deficiencies in such programs, publicizing how much effort goes into the program, and steadfastly proclaiming that the program is achieving what it was intended to achieve, offering no hard evidence in support of the claim.

What were some of the major conclusions that were drawn from these studies of the equal opportunity programs themselves? First, not more than half the training required by regulations was actually being given. Second, the training actually given was frequently of low quality and often related to race relations or equal opportunity in name only—the subject matter being often far removed or only tangentially related.

Another critical conclusion is that whatever training is given is reaching only the lower levels of the organizations. For the most part, training was reaching the level of E-5s and below, but is definitely not reaching all levels as the policy and doctrine intended and required. Thus, leaders who by virtue of their role in the organization have the most power to effect change are the least likely to participate in unit training.

In general, equal opportunity training was accorded very low priority by most leaders. This view was not shared by the bulk of the troops. It was a curious but consistent finding in surveys over a number of years that most soldiers disliked whatever equal opportunity program they were exposed to and viewed them in negative, if not hostile, terms. However, there was consistent high consensus on the *need* for equal opportunity training. Thus, while they didn't like what they were getting, the perceived need for a program remained high.

Army policy calls for equal opportunity training in all schools and, until 3 years ago, mandatory training in all units. Overall, there appears to have been far more emphasis on unit training than on individual training in the schools. It was concluded from the study of equal opportunity training in Army schools that, on the whole, equal opportunity instruction was considered a low-priority subject matter and was only reluctantly incorporated into course curricula. With so little individual equal opportunity education and training occurring in the schools, the entire burden of equal opportunity training was, by default, laid on unit training, a task for which unit training alone is not equal. An

effective equal opportunity education and training program will require a more balanced division of labor between schools and units.

Army policy places the responsibility for equal opportunity training squarely and unequivocally on the chain of command. It further specifies that individual education for Army leaders, managers, and supervisors will be institutionalized throughout the Army school system at all levels. It was concluded in the 1978 study<sup>5</sup> that:

most of the failings, problems, and inadequacies of the equal opportunity training programs stem directly from the fact that chain of command personnel have *not* been adequately prepared to carry out the responsibilities with which they have been charged. The single greatest lack in the whole program has been the overall failure to educate and prepare Army leaders. With respect to their views of the equal opportunity program, we characterized Army leaders, especially at the company commander level as being:

- (a) uncertain of its objectives;
- (b) distrustful of its intent;
- (c) unconvinced of its importance;
- (d) untrained with respect to its content; and
- (e) uncomfortable with the subject matter.

To the extent this characterization is accurate, it should help account for why equal opportunity training may have been less than fully effective in most instances and, indeed in some instances, counterproductive.

Other conclusions from the study of the Army's equal opportunity training program included:

1. The need to develop a new approach to EO training with a number of specified characteristics
2. The need to take a number of steps to increase the credibility of the equal opportunity training program
3. The need to ensure that the program successfully transitions from the status of "special" program to normal routine mode of operations

These, then, are some of the overall "learnings" that came from the several surveys undertaken over about 6 years that were aimed at better diagnosing the problem and assessing the success of the program. There were, of course, hundreds of detailed and specific findings too voluminous to review here.

<sup>5</sup> Peter G. Nordlie, Human Sciences Research, Inc., and James A. Thomas, ARI, *Summary Report of Conclusions and Recommendations*, 1978.

## The Difference Indicator System

Ever since affirmative actions programs began, those concerned have been interested in some objective way of tracking what effects the programs are having. The essential issue in affirmative action is how to change organizational practices that result in racial or sexual discrimination. Any successful effort to change such practices needs to begin with a demonstration that they exist and end with the documentation that they have been eliminated. My discussion will focus on a management tool designed for the Army to diagnose the presence of institutional discrimination and to monitor the success with which such discrimination is being reduced within the organization.

In 1972 the Army Research Institute sponsored a study to develop measures that could be used to examine changes in institutional racial discrimination in the Army. Its purpose was to provide the capability for routinely monitoring the status of equal opportunity and treatment in the Army.

The concept of institutional discrimination was formally defined as follows:

Institutional racial discrimination is a difference in what happens to people in an organization—a difference which has three characteristics:

- (1) is associated with skin color;
- (2) results from the normal functioning of the organization;
- (3) operates to the consistent disadvantage of persons of a particular skin color.

With this definition in mind, we undertook to identify all the actions or decisions made by the Army that affect its individual members. These tend to be personnel actions. Very generally, people are recruited, trained, promoted, assigned occupational specialties, assigned specific jobs, housed, provided services, administered military justice, reenlisted, discharged, and retired. These were the areas we examined to see if there were consistent differences in what happens to people of different skin colors. The original study was able to utilize data on only one racial minority, blacks, because reliable data on other racial minorities were not then available. The concept is applicable, however, to any defined group, including women, and can be used wherever such data are available.

\* In the original publication the name used for this indicator was the "discrimination indicator," but in subsequent publications it was renamed the difference indicator. In some Army publications,

The core of the system of indicators was the calculation of what was called "the difference indicator."<sup>6</sup> This indicator was so constructed that it immediately reflected the direction and magnitude of any difference occurring between whites and blacks with respect to any particular personnel action. For example, for the personnel action, *promotion to E-5*, the indicator would directly reflect the way and extent to which the promotion rate for eligible blacks differed from the promotion rate for eligible whites. An indicator showing a large difference between whites and minorities does not, by itself, prove the presence of discrimination. There may be a perfectly legitimate reason for the difference. But if so, one should be able to specify what the reason is. The indicator is just that, an indicator. It serves as a pointer, indicating where, among all potential problem areas, the biggest ones are.

The difference indicator is basically a ratio between the percentage of eligible blacks receiving a particular action and the percentage of eligible whites receiving that same action. The percentage of eligible whites receiving a given action was taken as the "expected percentage" of blacks receiving that action. That is, if race were of no consequence, then eligible blacks would be treated the same as eligible whites. The ratio determined by dividing the actual percentage of blacks by the expected percentage was then multiplied by 100 to convert it to a percentage, and 100 was subtracted from the resulting percentage to give an indicator that was zero when the actual and expected percentages were equal. The meaning of the resulting indicator can be read directly. An indicator of zero means there is no difference between whites and blacks on that personnel action. A plus 40 would mean that blacks were 40 percent overrepresented on that action compared with whites, and a minus 40 would mean blacks are 40 percent underrepresented relative to whites.

Over 100 personnel actions were identified as appropriate dimensions on which to calculate difference indicators. In the study itself, suitable data could be obtained on only 58 of these personnel actions, which can be grouped into the following categories:

1. Promotions
2. Training and education

it has been designated the representation index. They are all the same thing.

3. Awards
4. Command assignment
5. Nonjudicial punishment
6. Unprogrammed discharges
7. Reenlistment

Difference indicators were calculated for these 50 personnel actions for each year from 1970 to 1973. For some indicators, it was possible to go back as far as 1962. The indicators were all presented graphically in bar diagram form to facilitate immediate visual inspection in order to counter the natural resistance of managers to have to pore over masses of statistical data in which they must discern patterns and trends.

The difference indicators can best be presented in at least three ways:

1. A time slice in which all indicators are presented for the same time period
2. A trend line where an indicator is presented for successive time periods
3. A comparison of units where indicators for the same actions calculated on different units is shown

There are, of course, various combinations of the above. A few selected examples of various presentations are presented in this paper.

Figure 1 shows an array of all indicators for the total Army for the year 1973. By reviewing this array, one can see immediately for what dimensions the bars are very long on either side of the zero line. The longer bars point to the potentially more serious problem areas. The bars at or near zero show areas where there is little or no difference in what happens to whites and blacks.

An example of a trend line presentation is shown in figure 2. Figure 2 shows difference indicators for types of discharges received by enlisted personnel in the years 1970 through 1973. It can be seen immediately from this figure that blacks are consistently underrepresented among those who leave the Army, are consistently underrepresented among those who receive less-than-honorable discharges, and the more undesirable the type of discharge, the more likely blacks are to receive it.

Still another form of presentation is illustrated in figure 3. Here, we have formed a combined index of the difference indicators at each rank and grade level to produce an indicator reflecting how blacks are distributed across the rank and grade structure.

A zero on this figure would mean no difference in how whites and blacks are distributed. The higher the indicator, the less racially representative the entire rank and grade structure is. As you can see, the trend lines are fairly consistent down toward zero starting from the high point of 1962, to the low point—approaching zero—in 1975. Subsequent data not shown in the figure indicate a general rise in these indicators since 1975.

The difference indicators can be used in a variety of useful ways as illustrated in the next two figures. In figure 4, we've compared the speed of promotion of white and black enlisted personnel for the grades E-4 to E-9. The form of the indicators in the next two figures is somewhat different from the difference indicator format because of the particular form in which the data were available, but the overall point would be the same if we had been able to convert these data to difference indicators.

The bars in figures 4 and 5 represented the average number of months above or below the mean number of months to make each grade. When one decomposes the total enlisted population into blacks and whites, one sees immediately that whites are promoted faster than blacks at every grade and the differences become larger the higher the grade. Whites make E-9, for example, 17.5 months faster than blacks on the *average*. This particular finding appeared worthy of closer scrutiny. We thought perhaps that since blacks generally scored lower on the Army's aptitude test (AFQT) that these rather dramatic differences could be accounted for by the differences in AFQT scores rather than by race. We then took the data in figure 4 and divided whites and blacks into groups having high and low AFQT scores. The result was surprising to say the least. For whites, high AFQT scores were associated with faster promotion than low AFQT scores as one would tend to expect. For blacks, however, the reverse was true. *Lower* AFQT blacks were being promoted *faster* than higher AFQT blacks. This is certainly a finding that deserves further study.

The difference indicator system was developed for the Army as a total organization. The next logical question was, Could it be modified so that it could be utilized by commanders of divisions, brigades, and battalions to examine their own units? Another ARI-sponsored study undertook this task.<sup>7</sup>

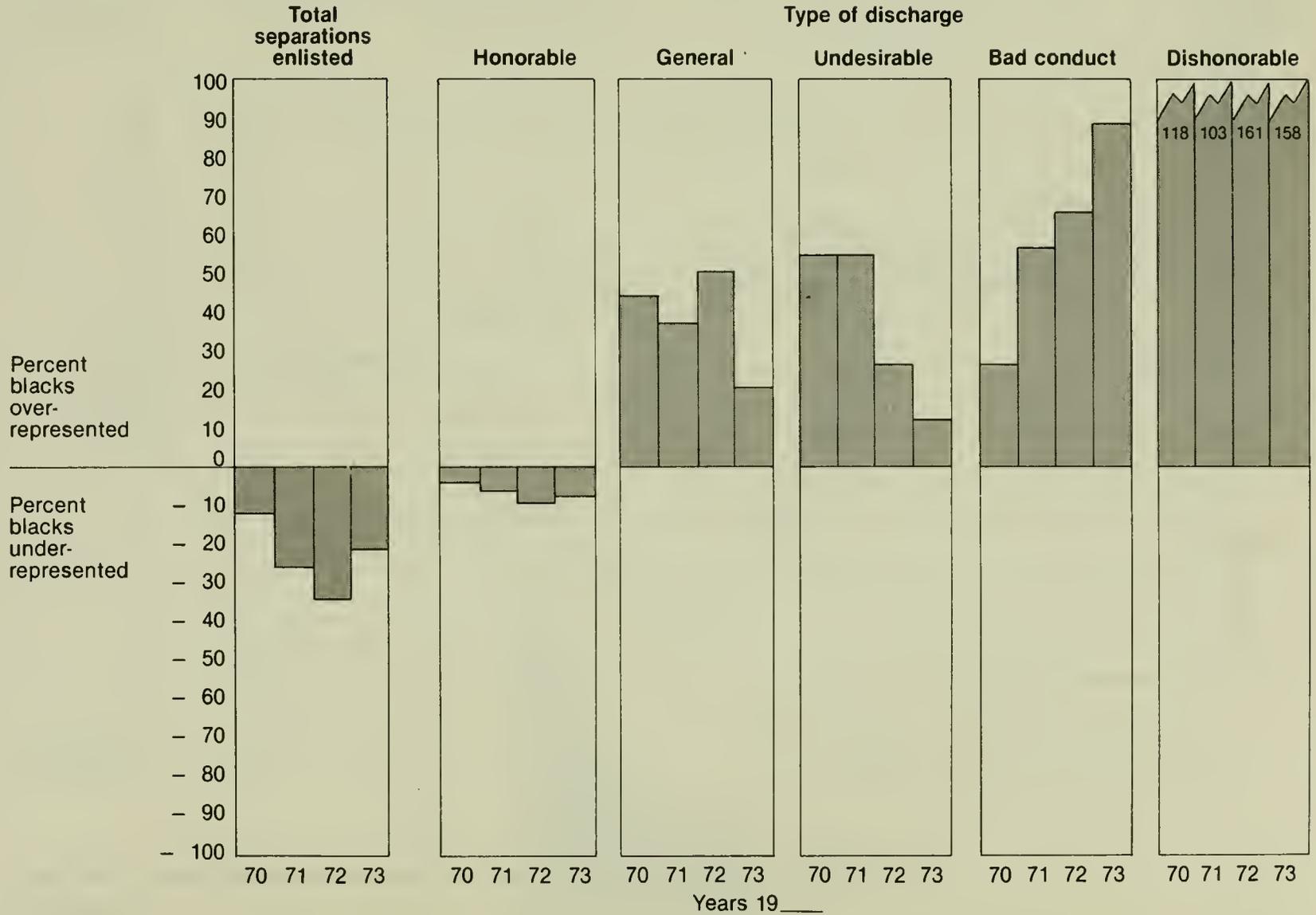
<sup>7</sup> Peter G. Nordlie and William S. Edmonds, Human Sciences Research, Inc., and Dwight J. Goehring, ARI, *Commanders' Handbook*, 1978.

**FIGURE 1**  
**Difference indicator for the Army — 1973**



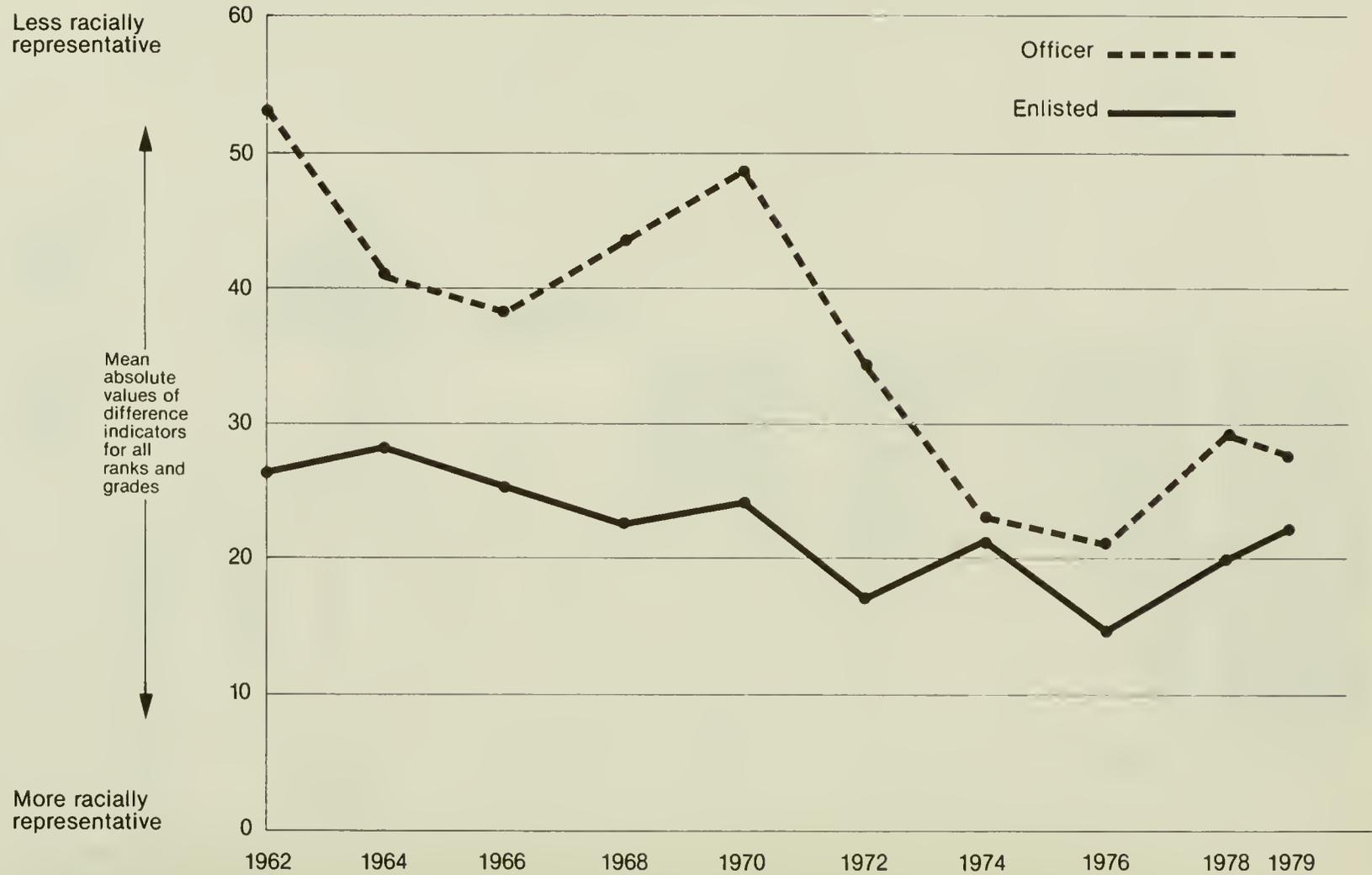
\*Occupational specialties data were only available for the end of 1972.

**FIGURE 2**  
**Difference Indicators for Enlisted Separations**



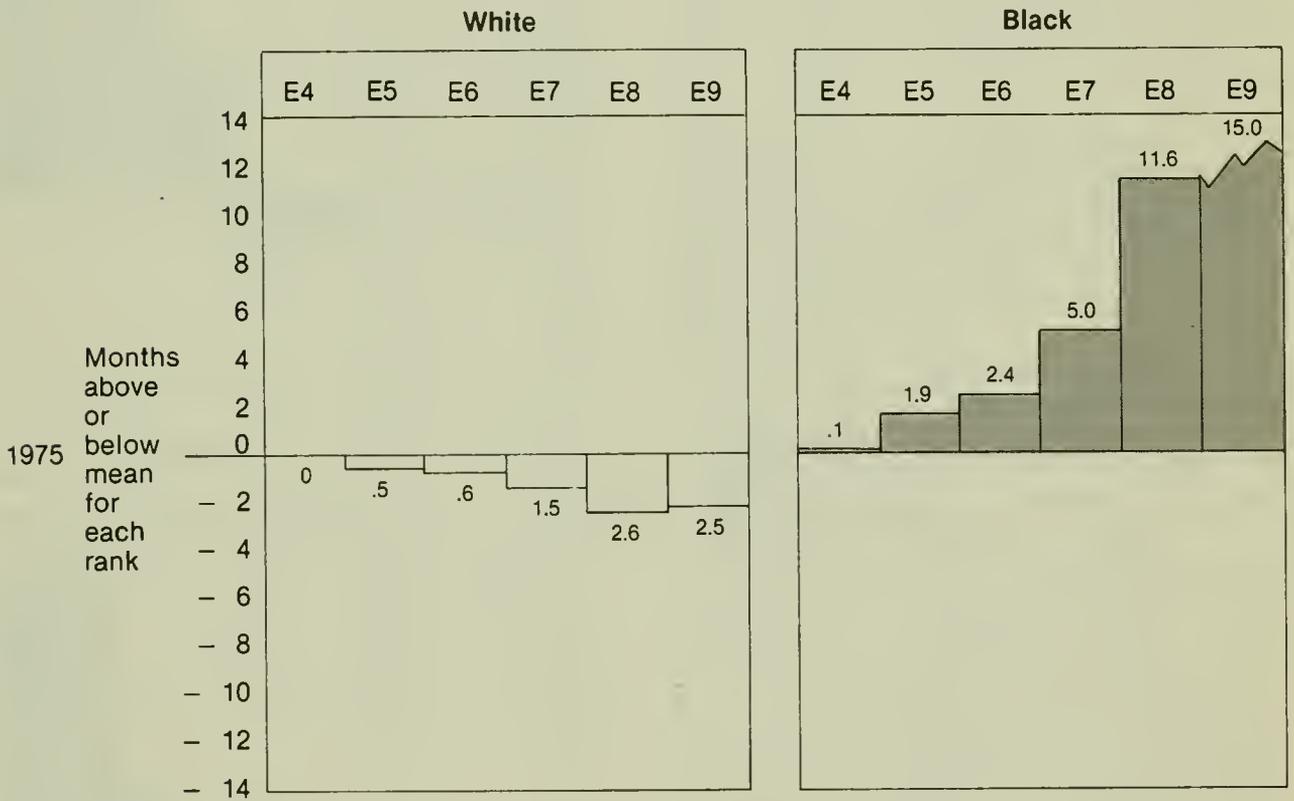
**FIGURE 3**

Changes in racial representativeness across officer ranks and enlisted grades



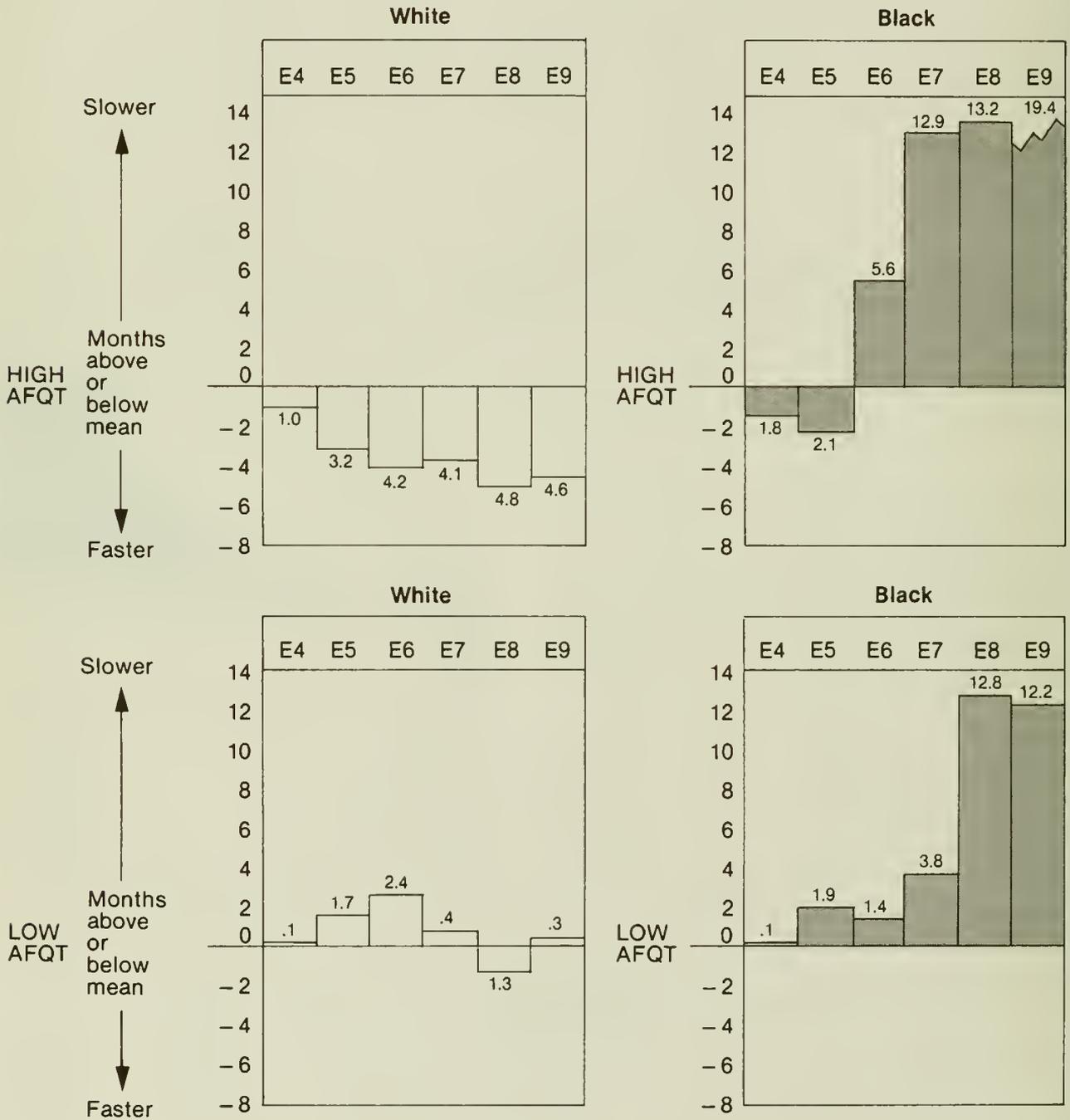
# FIGURE 4

Months above or below mean months to make present rank by race and year (1975)



**FIGURE 5**

Months above or below mean months to make present grade by race, AFQT level, and grade — 1975



The number of personnel actions was reduced to only those concerning which of these lower levels of command have some say-so or input. This resulted in a list of 27 personnel actions. A handbook was prepared that provided all the instruction necessary to carry out the system by these unit commanders or their designees. The handbook reviewed equal opportunity policy in the Army and specifically the responsibilities of the chain of command. It described the meaning of institutional discrimination, the effects of continued discrimination on racial climate and unit readiness, and the need to eliminate all forms of institutional discrimination. The handbook goes on to describe the difference indicator system and provides detailed instructions on how to collect the data, calculate and present the indicators, how to interpret the results, and how to plan appropriate courses of action. The handbook is completely self-contained and includes all forms, blank graphics, and instructions to carry out the system. It was in the process of being field tested when the Army ceased further work along this line.

Overall, the difference indicator system has had an impact within the Army. The Army's affirmative actions plan of 1975 was completely revised on the basis of the original study. Since 1976 the Army's annual assessments of equal opportunity programs have utilized the difference indicator system for the presentations of some data. Some of the largest major commands have utilized the difference indicator concept in the equal opportunity reporting systems they require routinely of their subordinate units. Difference indicator data have played a major role in executive seminars held for general officers in many major commands. It was developed as a diagnostic and assessment tool and has had some degree of utilization in those functions. It has proved easier to utilize at the total Army level than with smaller subordinate units below the level of major commands.

## The Annual Assessment

Another method the Army has employed to provide periodic monitoring of its equal opportunity program is the annual assessment,<sup>8</sup> prepared by the Office of the Deputy Chief of Staff for Personnel. The fourth annual assessment, completed in May

<sup>8</sup> U.S., Department of the Army. *Race Relations and Equal Opportunity Annual Assessment of Programs* (data cover calendar year 1975) (Washington, D.C., DA, Office of the Deputy Chief of

1980, has just recently been issued. This assessment is an important monitoring device because it is comprehensive in scope, covers the entire Army plus the Reserve and National Guard, and provides the means for monitoring changes over time. The annual assessment is a valuable compendium of detailed quantitative data information reflecting minority participation in all aspects of Army life. Since the current assessment is the fourth one, most of the data presentations are provided over a 4-year time span that allows the detection of trends as well as current status.

There are eight major topics covered in the annual assessment and a set of 16 appendices that provide detailed backup data tables. I will briefly review these topic areas and indicate the type of data provided. In most instances, data are broken out by race and ethnic group and women.

### Minority and Female Composition

The racial, ethnic group, and female composition of the active Army, National Guard, and Army Reserve is presented in terms of totals and percentages for officers and enlisted, non-prior-service accessions, first-term and career reenlistees. A few observations are of interest.

- The black percentage of officers has risen from 5.2 percent in FY 76 to 6.9 percent in FY 79. The black percentage of enlisted men has risen from 23.7 percent to 32.0 percent in the same time period.
- Black non-prior-service accessions have risen steadily from 24.4 percent to 36.8 percent.
- For first-term and career reenlistment rates, not only are the black rates higher than whites for all 4 years, each year the differences increased.
- In recent years black recruits were *more* likely to have a high school diploma than white recruits.
- In the enlisted population, Hispanics have increased slightly over the past 4 years, comprising 4.2 percent in 1979; among officers, the percentage of Hispanics has remained at a pretty steady 1 percent.
- The percentage of women officers rose, in the past 4 years, from 5.6 percent to 8.0 percent; the percentage of women enlisted rose from 6.5 percent to 8.3 percent.
- Similar increases in percentages of minorities and women occurred in the National Guard and the

Staff for Personnel, n.d.); and, *Second, Third, and Fourth Annual Assessment of Programs* (February 1978, March 1979, and May 1980, respectively).

Reserve. These are a few of the conclusions one can draw from the data on minority composition of the Army.

### Minority Representation Within Career Fields

Another area of equal opportunity concerns is differential representation in career fields between whites and minorities and women. The Army has initiated a number of programs intended to help correct existing disproportions. The existing disproportions tended to resemble the patterns found in most other organizations; i.e., whites in career fields with higher prestige, more technical, and more valued in the civilian marketplace, whereas minorities tended to be found disproportionately in career fields with opposite characteristics.

In this section of the annual assessment, the over- and underrepresentation of minorities and women in various career fields is presented and various changes over the years noted. The most striking example of change is with respect to the representation of blacks in combat arms career fields. Data are presented showing a 44 percent overrepresentation of blacks in the combat arms in 1964, which has fallen sharply since then to zero by 1979.

### Commissioning Programs

Equal opportunity in this area is concerned with increasing enrollment of minorities and women in commissioning programs and to increase the distribution of scholarships to minorities and women. Percentage goals and achieved enrollment are presented for West Point, U.S. Military Academy Preparatory School, ROTC, Officer Candidate School, and National Guard. The data presented are too detailed and mixed to provide an overall summary statement as well as the fact that no justification for the particular goals presented is offered. Nonetheless, this kind of data does provide the Army with a means for assessing its minority recruiting programs.

### Career Development

In the career development section, the focus is on promotions, schooling, command selection, and assignments. Promotion board results for the different ranks are presented, broken out by minority group

and women so that one can immediately discern how the promotion rates of the different groups compared with the Army average.

Data on a number of factors that influence promotions are presented by racial and ethnic groups and women. These include:

- Average primary military occupational evaluation score
- Average skill qualifications test score
- Average enlisted efficiency report scores
- Educational level

An interesting analysis of the differences in time in service to make a given grade for enlisted personnel of different races and ethnic groups is given. This is an update of a 1975 research study finding, referred to earlier, that whites were promoted much faster than blacks at all grade levels. These differences were large. For the highest enlisted rank, E-9, for example—whites reached that grade, on an average, nearly 18 months faster than blacks. The analysis presented shows that these earlier large differences had been virtually eliminated by 1979, with a few exceptions.

Comparative data on promotion selection rates are presented for each officer rank. Affirmative action goals and numbers actually realized are presented for selection to Command and General Staff College and Warrant Officer Senior Course. Similar data for enlisted educational opportunities are included. The same kind of data are presented for key assignments to Army General Staff, Office of the Secretary of the Army, Army Element, JCS and Army Element, Office of Secretary of Defense.

### Separations, Confinements, and Serious Crimes

It has long been established that blacks have been seriously overrepresented among those receiving bad quality discharges (i.e., not honorable discharges) and among those subjected to punishment and confinement under the discharge system and the military justice system. These have been important areas of concern for the Army. Data are presented by racial group on types of discharges, serious crimes, and confinement. The data continue to confirm that blacks are still heavily overrepresented in almost all these areas.<sup>9</sup>

*Discharge Systems* (McLean, Va.: Human Sciences Research, Inc., November 1979), submitted, but not yet approved for release. I. Summary Report, Peter G. Nordlie, Exequiel R. Sevilla, Jr., William S. Edmonds, and Silas J. White.

<sup>9</sup> A special study was authorized by the Chief of Staff in 1978 and was completed in March 1980, although as of this date it has not been released for publication. The final report consists of five volumes: *A Study of Racial Factors in the Army's Justice and*

## Selected Observations of the Racial Climate

In this section are included data on serious incident reports, discrimination complaints, and selected survey results for officers and enlisted personnel. Also included is a listing of all Army-initiated information dissemination and public liaison activities.

## Major Army Commands

This section shows the racial composition of 16 major commands that make up the Army and includes selected narrative reports from the various commands.

All in all, the Army's annual assessment of military equal opportunity programs provides comprehensive and valuable information on the status of equal opportunity in the Army. The presentations of data are fairly simple to understand and have been compressed to a usable volume. The format and mode of presentation could probably be further simplified to make the critical information even more readily accessible and understandable to managers and policymakers. In those presentations where actual numbers or percentages are compared with quantitative goals, interpretation is difficult because no information is presented on how the goals were determined. Another weakness lies in the source of some of the data provided. Most of the data are picked off computerized personnel files and reflect objective facts. Some data, however, are of a different form and should be studied to determine how valid they are for monitoring and assessment purposes. For example, there are data presented on the number of serious racial incident reports and the number of discrimination complaints received. Many factors influence the reporting of these kinds of data. There is a lot of pressure on unit commanders not to have serious racial incidents, and there may well be a tendency for commanders to classify what truly are racial incidents as something else. The number of discrimination complaints received can go down, for example, if soldiers lose confidence in the discrimination complaint system. To the extent such factors operate, the numbers reported may be quite misleading. Overall, however, it may be said that the Army does have a detailed, quantitative, objective, and comprehensive monitoring and assessment system in

*II. Differences by Race in Army Discharges*, Peter G. Nordlie and William S. Edmonds.

*III. The Military Justice System*, Exequiel R. Sevilla, Jr., and William S. Edmonds.

place. It goes without saying that such a system has value only if it is used as the basis for future program actions.

## The Equal Opportunity Diagnostic and Assessment System

The last monitoring and assessment tool I will describe is a self-contained system designed to provide unit commanders with the capability for diagnosing race relations and equal opportunity problems in his or her own unit, using that diagnosis as the basis of a training program tailored to the peculiar needs of that unit and assessing the success of the training program or other actions aimed at reducing the problems found. The philosophy underlying this system is totally consistent with the Commission's emphasis on tailoring the remedy to fit the problem. This system is called the diagnostic and assessment system (TDAS) and consists of:

1. A paper and pencil questionnaire to be administered to all personnel in the unit
2. OpSCAN answer sheets, compatible with equipment found on Army posts, designed to provide rapid scoring
3. A computer program for analyzing the questionnaire data
4. A feedback report format that specifies the form in which data will be provided to the commander
5. A user's manual that describes every step in the procedure
6. Lesson plans for a 4-hour course of instruction for the commander and whomever is designated to carry out the various tasks involved

The intent was to produce an entirely self-contained package to provide unit commanders with guidance and aids for carrying out their equal opportunity responsibilities using only the resources available to them in their own units.

The genesis for this concept derived largely from the equal opportunity policy changes that were enunciated in September 1977. In the policy document, AR 600-21, there is formal recognition that the commander is responsible for equal opportunity in his unit, with the equal opportunity staff officer serving in a staff capacity to provide advice and consultation to the commander as required. This

*IV. Attitudes and Perceptions*, Silas J. White and Exequiel R. Sevilla, Jr.

*V. A Comparison with the Civilian Justice System*, Silas J. White.

change satisfied the “stovepipe” criticism of the EO program, but it left a different problem in its wake. That is, the EO program is now the direct responsibility of those with the least training in EO matters to conduct or supervise EO-related activities. That commanders are responsible for planning EO training in their units is a case in point. Guidelines provided in AR 600-21 state that commanders will:

1. Determine the level of awareness and degree of knowledge of equal opportunity of personnel currently assigned to the organization.
2. Select the best method of training based on the initial survey of basic needs.
3. Once the commander determines the topic and method of presentation, the instructor/project officer/NCO is selected, and time and training sites are established and confirmed.
4. Finally, the commander will assure that the training is scheduled and attendance is mandatory for all unit personnel. Adequate compliance monitoring procedures must be implemented to assure quality of training and maximum participation of all members of the command without exceptions.<sup>10</sup>

The fact is that the vast majority of commanders at company level do not have the training and expertise necessary to carry out these requirements, nor do they have the resources within their units to delegate responsibility. To meet the need, a project sponsored by the Army Research Institute was undertaken to provide commanders with the necessary guidance and aids.

It was determined that the system to be developed should have the following characteristics:

1. Be viewed as an aid to the commander and not as an added burden
2. Be relatively simple to implement
3. Require a minimum of personnel time
4. Have face validity in that the implications for unit training are directly relevant and obvious
5. Be compatible with standard operating procedures in the unit
6. Be compatible with and take maximum advantage of existing resources outside the unit

The system was viewed as having three major components: an instrument for acquiring assessment and evaluation data, an administrative component with clearly defined assignment of responsibilities for operating the system, and a training component

for orienting commanders and others to the proper utilization of the system.

The final questionnaire that evolved from three pretest iterations consisted of 120 items. These items yielded 21 scale scores, each of which indicated the presence or absence of a particular problem area. The names of these scales should provide an indication of the questionnaire coverage. They are:

- Unit racial climate
- Perception of discrimination against minorities and/or favoritism toward whites
- Perceptions of discrimination against whites and/or favoritism toward minorities
- Negative behavior by whites
- Negative behavior by minorities
- Racial confrontation and violence
- Favoritism/discrimination in the delivery of services to unit members
- Treatment received on post by unit personnel (by race)
- Treatment received by unit members off post (by race)
- General perceptions of women in the Army
- Perceived discrimination against women and/or favoritism toward men
- Perceived discrimination against men and/or favoritism toward women
- Treatment received on post by unit personnel (by sex)
- Treatment received by unit members off post (by sex)
- Access to public facilities
- Negative behavior by women
- Negative behavior by men
- Knowledge of Army EO policy
- General racial attitudes
- Attitudes toward racial integration
- General attitudes toward EO for women

As you can see, the questionnaire was pretty comprehensive and capable of generating a considerable amount of information. The next problem was how best to present this considerable array of information to the commander. The development of the questionnaire was inextricably related to the development of the feedback report. The objective of the feedback report was to provide as thorough an analysis of the survey data as possible in as much a “pre-digested” fashion as possible so as to minimize the commander’s task. The concept of the computer-

<sup>10</sup> U.S., Department of the Army, Headquarters, *op. cit.*, p. D-1.

generated feedback report was to present the results in such a way as to lead the commander from very general to progressively more specific levels of detail. This was done by presenting first the responses of all respondents, broken out by race, sex, and rank, to a set of global questions about racial climate and equal opportunity in the unit. This was followed by a listing of several different areas of possible concern in the unit. These areas were rank ordered, with the most serious at the top. Then, frequency distributions of responses to all items in the survey broken out by race, sex, and rank of the respondent.

The TDAS system was field tested at three Army posts. While a number of problems surfaced during the field tests—largely concerned with administrative and computer program issues, which suggested additional modifications—the system did work. It is currently being used at a number of locations on a purely voluntary basis and, I am told by the ARI project officer, that requests from the field for the TDAS package continue to be received by his office. Further development of the TDAS essentially stopped when equal opportunity R&D in the Army ended.

A final step in the development of the TDAS package was never undertaken. This step would have provided the commander with a compendium of lesson plans from which he could choose depending upon the particular diagnosis revealed by the feedback report. This step would have closed the loop in the whole system by providing high-quality lesson plans tailored to a wide variety of potential problem areas and, thereby, provide assistance to the commander at this vitally important step in the whole process.

## Summary and Conclusions

These, then, are some of the major means for monitoring and assessing various aspects of equal opportunity and affirmative action that the Army has developed and employed over the last decade. All have involved the collection and presentation of statistical data. Generally, two kinds of data are involved:

- (1) Objective facts aggregated for subpopulations and the total Army population;
- (2) Attitudes, perceptions, and experiences of individuals.

The first kind is usually generated from existing computerized personnel files, the second kind from

questionnaire surveys. It is my opinion that the higher in the Army structure one is, the more important is the first kind of data because the concern at these levels is more with overall policy and program planning. At the lower levels, the reverse is true; at the company commander level, his concern is with the attitudes, perceptions, and behavior of his personnel because they relate to his ability to mold a high performance unit, and he can do little to directly affect aggregate statistics.

I believe the objective facts data such as provided by the difference indicators can be most useful to policymakers and planners if they are comprehensive, readily interpretable, and calculated at periodic time intervals. It is well within the state of the art for the entire process of producing such objective indicators to be computerized so that periodic readouts, or readouts on call, can be made routinely, inexpensively, and fast. At present, the lack of file coordination precludes such a system, but the technical problems of making it possible are relatively trivial. A computerized, Armywide, equal opportunity management information system is entirely feasible.

At the lower levels of the organization, knowledge of how people are thinking is a prerequisite to designing effective affirmative actions programs.

The importance of both kinds of data cannot be overemphasized. Affirmative action is a vacuous charade unless it includes the continuous assessment of the extent to which it is actually achieving its stated goals. The use of statistical indicators keeps the focus on results of affirmative action and not on intentions or input into the program.

One of the problems with statistical indicators is that they can and do intimidate and confuse many managers who have need for them, especially when they are provided in massive arrays that must be studied and digested in order to extract trends and basic findings. Every effort needs to be made to keep such indicators limited in number, easy to interpret, and directly providing the manager with the essence of the information he needs.

Affirmative action is a commitment to change the status quo. No organization that claims commitment to affirmative action can be credible without being accountable to itself by documenting the change it claims to affirm.

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# **EXECUTIVE EXPERIENCES WITH AFFIRMATIVE ACTION PLANS**



# The Survival of Affirmative Action in the 1980s: Have We Come of Age?

By A. Diane Graham\*

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## Summary

The Commission's call for this consultation on *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* dramatizes the present need for a sober refocusing of the Nation's intellect and conscience upon the historical, legal, and social bases of the practice of affirmative action in employment.

The Federal Government as an employer has adopted an overall approach to affirmative action that, in conjunction with specific implementation measures, has yielded positive results in accomplishing its objective of making its work force more representative of the people it serves while ensuring the competence of that work force through adherence to merit system principles.

The government's quantitative approach to affirmative action/employment programs is rooted in section 310 of the Civil Service Reform Act of 1978, which provides a working definition of the concept of "underrepresentation." Underrepresentation for Federal affirmative action and equal opportunity recruitment program purposes is a situation in which the representation of minorities (or women) in a category of employment constitutes a lower percentage than the percentage which that minority represents within the civilian labor force of the United States, based on Bureau of Census data. Since implementation of the CSRA in 1979, both women and minority employees have shown both numerical and percentage increases in spite of decreases in total full-time permanent employment.

Notwithstanding the empirical successes, it must be emphasized that unless the quantitative measuring and goal-setting systems and the affirmative action/employment systems they are designed to support are managed efficiently, intelligently, and, when needed, diplomatically, even the great body of authority now supporting affirmative action programs may not see the practice safely through the 1980s. It is increasingly important not only that the mandates of affirmative action policies be communicated to and understood by management, but that personnel officers, supervisors, and program managers be provided with the technical assistance which will enable them to fulfill their affirmative action commitments. The key to the survival and long-term success of affirmative measures is to routinize and diversify them, integrating new methods into existing ones and drawing upon traditional sources to produce innovative results.

Affirmative action/employment practitioners in the Federal sector can point to numerous programs and/or strategies that have yielded positive, tangible results. Among them are the following:

**Cooperative Education**—A well-established agency staffing method that provides periods of study-related, fully paid employment in suitable types of work for students in 2-year or 4-year colleges who are pursuing a baccalaureate curriculum in a qualifying educational institution.

**Worker-Trainee Opportunity Program**—Since 1968 Federal agencies have effectively used the worker-trainee concept to fill vacancies at the

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lowest levels of Federal employment with low-skilled and disadvantaged persons. Federal worker-trainees are placed into either regular jobs that provide basic training and general career guidance services or developmental jobs that require more specific types of training and developmental experiences leading to target positions at higher grade levels. OPM allocates 1-year personnel ceiling exemptions to agencies for persons placed in this latter category, affording the acquiring agency a year in which to evaluate the W-TO employee's performance before having to count him or her against ceiling.

**Upward Mobility Programs**—Defined as systematic management efforts that focus Federal personnel policy and practice on the development and implementation of specific career opportunities for lower level employees (below GS-9 or equivalent) who are in positions or occupational series that do not enable them to realize their full work potential, upward mobility programs have proven themselves to be among the most cost-effective instruments in the affirmative employment/action planner's inventory. They flourish when decisions to recruit, hire, and train employees must be viewed against a backdrop of leaner and leaner budgets and soaring costs.

**Alternative Testing Procedures**(Under OPM-Delegated Examining Authority)—Several agencies that have assumed delegated examining authority from OPM showed extremely encouraging results in terms of increasing representation in their applicant pools. The Social Security Administration, for example, has been able to consider a larger number of minority applicants for social insurance claims representative positions through its claims representation examination, social security (CRESS) examination than was possible under the professional and administrative career examination (PACE). More than 30 percent were minority, and preliminary information on hiring showed that a similar percentage of minorities was being selected. Another position that was removed from PACE through delegated examining was bank examiner at the Federal Deposit Insurance Corporation. That agency also reported a much larger proportion (20-25 percent) of minority-group eligibles than in the past.

**Other Effective External and Internal Recruitment Activities**—Special outreach programs, campus re-

cruitment, skills banks, career seminars, career counseling, employee referrals, and agency intern programs have all contributed to successful implementations of affirmative action plans.

The creative affirmative action manager will make use of many, all, or some of the above measures in different combinations, as the situation calls for. Many of them are overlapping in effect; that is, although primarily designed to benefit one group, they can be used in connection with targeted recruitment or other planned measures to satisfy the double-edged demand of getting qualified applicants and making the work force representative of the Nation's population. No one affirmative measure will do it all—nor should we expect it to.

### **The Survival of Affirmative Action in the 1980s: Have We Come of Age?**

President Ronald Reagan's first official statement on the government's role in affirmative action came on January 29, 1981. Between questions on decontrol of natural gas, Iranian treatment of the former hostages, and other high priority economic and foreign policy issues, the President was asked if his administration were going to retreat from the government's traditional advocacy of affirmative action programs generally and in Federal hiring of blacks and Hispanics specifically.

"No," the President answered, "there will be no retreat. This Administration is going to be dedicated to equality. I think we've made great progress in the civil rights field. I think there are some things, however, that have (been) but may not be as useful as they once were, or that may even be distorted in the practice, such as affirmative action programs becoming quota systems and I'm old enough to remember when quotas existed in the United States for the purpose of discrimination, and I don't want to see that happen again."<sup>1</sup>

Of the many messages that can be heard in the reporters' questions and the President's response, this paper focuses on two. The first is the growing need for a sober refocusing of the Nation's intellect, if not its conscience, on the discriminatory processes and practices that gave rise to the concept of affirmative action. The second message, coming loud and clear from the President's brief remarks, is that, like managers in virtually all segments of American society, from the auto industry to the food stamp program, from the social security system to

<sup>1</sup> White House Press Office, "Press Conference No. 1 of the President of the United States," Jan. 29, 1981.

heads of households, affirmative action program managers must rise to new levels of effectiveness and efficiency. As the Nation struggles through periods of retrenchment, slow growth, and recession, those of us involved with EEO enforcement, and particularly affirmative employment and affirmative action programs, must see that our programs come of age, that they meet the ends for which they were designed—quickly so, or we will be lost in the shuffle. What we hear in the President's response is an invitation for more efficiency and intelligence in managing affirmative action programs, and it's an invitation that we must take seriously.

We hope to share with the readers of this text and with the participants in the consultation both some specific measures and an overall approach to affirmative action implementation that have yielded results in accomplishing the objectives of affirmative action plans as we have used them in the public employment sector.

### **The Need for the Commission's Statement**

The timing of *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* and its companion consultation is most appropriate, for, in an environment where the government spending patterns of several decades are being drastically altered, every group or interest that has a claim to stake must stake it, if that claim is worth saving. The new administration's first few weeks of budget cutting have seen many popular programs eliminated or severely curtailed. The Commission on Civil Rights (CCR) is to be commended for calling the public's attention to the real origins of this often misunderstood idea called affirmative action at a time when the concept needs defending. The proposed statement is precisely what is needed for those who have come to equate affirmative action with "reverse discrimination."

The question put to President Reagan illustrates the crucial need for the CCR's analysis. The reporter prefaced his question with the following remark: "Mr. President, some administration officials have promised adherence to the civil rights laws which are on the books but there has been considerable discussion about dismantling the affirmative action aspect of that [which] give[s] those laws, to some people, greater meaning. . . ." It is disturbingly ironic that the object of the "dismantling" in this

context was not the process of discrimination but rather the affirmative action laws themselves! The reporter's concern might have been precipitated by a recent article in the *Washington Monthly* entitled, "Spirit of Affirmative Action Lost in Hassles."<sup>2</sup> Calling affirmative action "an idea spawned in an era of generosity of spirit," author Leonard Reed asserts that "doubts about the Government's affirmative action program are epidemic in the Federal service, . . . most dramatically among Federal managers who have long considered themselves conscientious liberals." More on this article later.

The danger of giving increased exposure to this view, that affirmative action has gone too far, is that such suggestions will further warp the public perception. The wisdom of the Commission's strategy is that it deals not with the voluminous empirical evidence in support of continuing affirmative action efforts, but with the more important task of refocusing public perception on what gave rise to affirmative action in the first place. The premise of the statement as we understand it is that affirmative action is a remedy for the problems (present effects) of past discrimination and that the remedy of affirmative action should be prescribed depending on the nature and extent of the problem.

While we agree wholeheartedly with this philosophic or conceptual framework, we maintain that, still, every employer and enforcement or advisory group needs objective, measurable standards that trigger affirmative action measures. Unless some basic assumptions are made, there are certain difficulties in moving from the conceptual framework of the problem-remedy approach to the quantified standards which the Federal Government as a public employer has adopted in its own affirmative action guidance and under the Federal equal employment opportunity recruitment program (FEORP). The Commission's support of the Federal Government's approach seems to be tentative. The problem-remedy approach recommended by the Commission may place too much reliance upon a finding of discrimination, whether individual, organizational, or systemic. Affirmative action in government, however, now relies upon the proposition that the Federal or the agency work force should be reasonably reflective of minorities and women in the appropriate labor force. This starting point for analysis is cast in legislation, and the aim of affirmative action method-

<sup>2</sup> Cited in *Kansas City (Mo.) Star*, Jan. 11, 1981.

ology is to analyze and dismantle, where appropriate, the processes that account for the disparate effects which these processes cause in the work force.

FEORP and affirmative action plans (AAPs) of Federal departments and agencies are, therefore, activated by statistical determinations of underrepresentation within an agency's work force. However, it is important to understand that a finding of underrepresentation is by no means a finding of discrimination. It does, however, under the AAP, trigger the kinds of barrier and causal analyses referred to on pages 22-24 of the proposed statement. Under the FEORP, a finding of underrepresentation triggers targeted recruitment efforts.

The government has recognized, as the Commission suggests in its discussion of the cyclical, self-reinforcing nature of the process of discrimination, that the causes and effects of discrimination are often not distinguishable and that by dealing with and altering the effects, one can eradicate the social memory of the discriminatory cause if not the cause itself. This rather pragmatic approach, if properly administered, has enormous advantages over one that attempts to find the causes of disparate effects first—primarily because the causes are so myriad. These underlying causes are frequently rooted in aspects of society other than employment. To spend time attempting to locate and solve them before taking action to reverse their apparent effects would only mean more time lost in the struggle of women and minorities to gain economic and social parity.

The great worth of the proposed statement lies in its documentation of the judicial cases and principles and administrative initiatives supporting the case for affirmative action. By its sharp analysis of the consequences of "neutrality,"<sup>3</sup> the CCR makes a solid case for continuing affirmative action measures. However, as the statement suggests,<sup>4</sup> there is difficulty in reaching consensus as to what these measures should be and to what extent they should be employed. The next section of this paper deals with that "thorny" issue from the perspective of the FEORP and other affirmative employment programs and mechanisms that are now in use under Federal (executive or legislative) authority. Some historical perspective is useful in appreciating these methodologies.

## Highlights in the Recent History of Federal EEO

The most significant recent developments in the area of affirmative action in the Federal sector have been the Reorganization Plan No. 1 of 1978 and the Civil Service Reform Act of 1978. On January 1, 1979, the Reorganization Plan transferred the function of Federal equal employment opportunity from the Civil Service Commission (CSC) to EEOC. The basic principles upon which the EEOC was to rely in replacing the largely qualitative methodologies of Federal affirmative action used by CSC with quantitative methods of numerical goal setting and statistical determinations of underrepresentations were codified in section 310 of the Civil Service Reform Act of 1978. That provision of law, often referred to as the Garcia amendment, calls on each Federal agency to conduct a continuing program "for the recruitment of members of minorities for positions in the agency. . . in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment," that is, in various occupations and grades. Underrepresentation is defined in the law as a situation in which the representation of minorities in a category of employment constitutes a lower percentage than the percentage that minority represents within the civilian labor force of the United States, based on Bureau of Census data.

The law assigned responsibility to the EEOC for making initial determination of underrepresentation and for establishing guidelines for the recruitment program. In December of 1978, EEOC issued its "Guidelines for the Development of a Federal Recruitment Program to Implement 5 U.S.C. 7201." The following are some of the key features of those guidelines:

- Recruitment programs "should be designed to result in applicant pools with sufficient qualified members of underrepresented groups." That, in effect, is the basic objective of FEORP recruitment.
- The guidelines provide that where availability "appears to be low, the program should be designed so that recruitment efforts stimulate interest of underrepresented groups in those occupations where there are realistic projections of Federal employment opportunities." That recognizes that there are

<sup>4</sup> Ibid., pp. 3, 19, and 37.

<sup>3</sup> U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*. Proposed Statement. Clearinghouse Publication 65, January 1981, p. 21.

problems of availability, but places an obligation on agencies to do something about it.

- The guidelines instruct OPM to use broad occupational categories, to the extent possible, in developing program guidance. They recognize that data used in support of the program must be kept to manageable proportions.

- In the guidelines, EEOC recognizes the need to allow “flexibility in development and design of each . . . agency’s recruitment program,” but requires statistical comparisons computed in accordance with EEOC’s approach. This approach includes the requirement to consider the representation of the minority/sex group in both the national civilian labor force and the local civilian labor force and to use the higher percentage when computing underrepresentation. These provisions confirm the necessity of maintaining a common data base for the program. They also make it clear that those components of agencies that are located in areas of high minority concentrations must assume a greater share of the responsibility of eliminating underrepresentation within the agency.

- The guidelines provide for coverage of both internal and external recruitment under the FEORP program. This recognizes that problems of underrepresentation in higher level jobs can often be addressed through internal action because of concentration of minorities and women in the lower levels.

- EEOC also made clear that coverage under the program extends to women as well as to minorities. The net effect was to include nonminority women as a target group for the elimination of underrepresentation.

While the law assigns responsibility to EEOC for initial determination of underrepresentation and for guidance, it charges the Office of Personnel Management with responsibility for implementing the program by regulation and for monitoring, evaluating, and reporting on the program. In the regulations that it issued to implement the recruitment program, OPM committed itself to:

1. Provide data to assist agencies in making underrepresentation determinations.
2. Provide guidance on grade and occupational groupings for program purposes.
3. Provide guidance on identification of job categories where external recruitment would be most appropriate and where internal recruitment would be more effective.

4. Identify major sources of minority and female applicants.

5. Supplement agency recruitment efforts to the extent possible.

6. Examine existing Federal personnel procedures under OPM’s control to identify those that may impede equal opportunity recruitment.

7. Determine the race/ethnic/sex composition of applicant pools.

OPM also took a number of steps as the government’s central personnel agency to carry out each of these functions in support of agency recruitment programs. Some of these steps were:

1. A step-up of assistance to agencies in the development of cooperative education programs at all levels—4-year colleges, 2-year schools, accredited business, trade, and technical schools, and high schools that have significant minority and female enrollments.

2. Establishing a national clearinghouse of minority and women’s organizations and encouraging similar efforts on the part of our regional staffs, to develop an actual list of appropriate organizations as an appendix to regular program instructions.

3. Giving agencies maximum authority and flexibility for their personnel programs and encouraging major delegations of examining responsibilities to agencies while urging the agencies to delegate those authorities down through their organizations.

In December of 1979 the EEOC published a set of instructions that for the first time in affirmative action instructions required the government to measure itself against the external standard of the relevant civilian labor force and to set numerical and percentage goals for the hiring and promotion of women and minorities.

## **Measurable Results**

OPM’s best results have been achieved while functioning as advisors, consultants, and facilitators, and we would urge others engaged in the work of implementing affirmative action policies to adopt this role to the maximum extent possible. We have occasionally found it necessary, however, to assume a more compliance-oriented role, reminding agencies of their obligations under existing law and Federal regulations and of the consequences of neglecting or ignoring these obligations. This situation will determine the appropriate role. What is crucial, regardless of the situation, is not only that the mandates of affirmative action policies are

communicated to and understood by management, but that personnel officers, supervisors, and program managers are provided with the means or techniques that will enable them to fulfill their affirmative action commitments.

What are the results of the government's new quantitative approach to affirmative action? Data thus far assembled clearly indicate that in the past 4 years minorities and women have made substantial gains in Federal employment. The degree to which EEOC's and OPM's affirmative action plan and FEORP requirements have been responsible for these gains cannot be determined with precision, but it is certain that the most significant factors accounting for the increased representation are those quantitative processes introduced in the CSRA and the reorganization efforts of 1978. The following statistical summary, extracted from OPM's second annual (1981) report to Congress on FEORP,<sup>5</sup> gives a breakdown of these changes.

Both women and minority employees have shown both numerical and percentage increases despite decreases in total full-time permanent employment. From November 30, 1976, the number of minorities increased from 362,655 (20.4 percent of total full-time permanent employees) to 394,361 (22.4 percent) in May 1980. That represented an 8.7 percent increase. Women increased from 603,856 (34.0 percent) to 644,359 (36.6 percent), a 6.7 percent increase.

Numerical and percentage increases were achieved for each of the designated minority groups. Blacks increased by 6.61 percent, or 17,368 positions, from 261,702 in November 1976, to 279,070 in May 1980. Hispanics showed a 10.8 percent increase (a gain of 6,770 positions) from 62,476 to 69,246. Native Americans increased by 23.6 percent, or 4,568 employees, from 19,356 in 1976 to 23,924 in 1980. Asian Americans showed a gain of 15.7 percent, or 3,000 employees, from 19,121 to 22,121.

Both women and minorities made gains in all general schedule (GS) and equivalent grade groupings since November 1976. At GS-5 through 8 and equivalent grades, the percentage of women increased from 51.2 percent in November 1976 to 65.1 percent in May 1980; minority representation increased from 22.9 percent to 25.9 percent. At GS grades 9 through 12, minority representation in-

creased from 11.7 to 14.2 percent, while women's representation increased from 21.3 to 26.1 percent. At the GS-13 through 15 grade levels, minority representation increased from 6.4 to 7.9 percent and women's representation increased 5.5 to 7.5 percent.

Women and minorities have made substantial gains in executive categories since November 1976. (For these data, executives are defined as employees in general schedule and equivalent grades 16 through 18, executive pay system, and SES.) Women executives increased 135 percent, from 188 in 1976 to 441 in 1980. Minority executives increased by 72 percent, from 307 to 529.

While these gains are impressive, the fact remains that minorities and women continue to be concentrated in the lower grades (GS-1 through 4) and to be seriously underrepresented in grades GS-13 and above. Thus, although we have come a long way, we still have a long way to go.

## Consequences

The quantitative approach to affirmative action is not without its drawbacks. If not properly and intelligently administered, an affirmative action program that relies heavily on the use of statistics can be readily perceived to be a "numbers game," or worse, a quota system, especially by those who are disinclined to support the principle of affirmative action in the first place. An editorial in the January 11, 1981, edition of the *Kansas City Star* responded to the complaints reported by Leonard Reed in the *Washington Monthly* article cited earlier that in Federal employment programs "the emphasis is on quota, not qualifications." Acknowledging that the "enforcement zeal" of the Federal Government has contributed to the perception of affirmative action as a "mindless quota system," the editorial nevertheless insisted that affirmative action needs a realistic chance and a fair appraisal. The simple truth, asserts the editorial, is that "until affirmative action became law, many employers were unaware of the talent to be found by looking beyond white male faces."<sup>6</sup>

The Civil Service Reform Act states that it is the policy of the United States to strive for a work force that is representative of the Nation's diverse population. It is this principle as well as the concept of affirmative action as evolved in American common law that justifies the quantitative approach to affir-

<sup>5</sup> U.S., Office of Personnel Management, Office of Affirmative Employment Programs, *Annual Report on Implementation of the Federal Equal Opportunity Recruitment Program*, Jan. 31, 1981.

<sup>6</sup> *Kansas City (Mo.) Star*, Jan. 11, 1981.

mative action. But—and this point cannot be over-emphasized—unless the quantitative measuring and goal-setting systems and the affirmative employment action programs they are designed to support are managed efficiently, intelligently, and, when needed, diplomatically, all the present conceptual justification and legislative, executive, or judicial mandates may not see the practice of affirmative action safely through the 1980s. It may well be, as Leonard Reed states, that “it is doubtful Reagan can scrap the program, however unworkable,” because of the “enormous bureaucratic and judicial momentum” that affirmative action has gathered. We should be far enough into the process of designing and implementing affirmative action, however, not to have to rely on currents of “momentum,” but rather on the conviction that we are successfully addressing problems vital to the well-being of the Nation.

### Specific Affirmative Measures

The key to survival and long-term success of affirmative action measures is to routinize them, to make them a part of an organization’s everyday personnel practices, by integrating new methods into existing ones and by drawing up on old time-honored sources and techniques to accomplish affirmative action objectives.

A good example of the latter strategy is the use by government agencies of special authorities aimed at hiring certain veterans that, at the same time, has worked to increase the complement of minorities in career positions in the agency. Traditionally, advantages given to veterans, and particularly disabled veterans, have been viewed as obstacles to implementing affirmative action. But effective use of special authorities for hiring veterans and disabled veterans has proved to be a valuable tool for getting minorities and, to a lesser extent, women on board—and one readily accepted by managers and personnel offices. Fiscal year 1979 data extracted from OPM’s central personnel data file show that of the 15,785 appointments under the veterans readjustment appointment program (Public Law 95-520), 6,080 or 41 percent were minorities. Ten percent were female. Another veterans authority permitting non-competitive appointment of veterans with disabilities rated 30 percent or more has been somewhat

successfully used as a means of bringing on board minorities, females, and the handicapped.

Some of the more well-established and commonly accepted Federal personnel programs that have proved valuable for bringing minorities and females into the work force are briefly described below. The list is by no means all-inclusive.

### Cooperative Education

Cooperative education<sup>7</sup> is an established agency staffing program that provides periods of study-related, fully paid employment in suitable types of work for students in 2-year or 4-year colleges who are pursuing a baccalaureate curriculum in a qualifying educational institution. It is conducted in accordance with a planned schedule and a working agreement between the employing agency and the educational institution. Upon graduation the successful cooperative education student is eligible for a noncompetitive appointment to an entry-level position in the occupation for which he or she qualifies.

Cooperative education is a supply-oriented program whose initial costs are usually provided for by grant monies awarded to colleges by the Department of Education under Title VIII of the Higher Education Act of 1965, Public Law 89-329, as amended. The grants are made to enable colleges and universities to initiate, strengthen, and expand their cooperative education programs and to provide for training and research. The money is not used to subsidize student salaries during their periods of work experience. The cooperative education concept has proved so successful that many colleges operate cooperative education programs without Federal grant monies.

The Federal Government is the largest single employer of cooperative education students. Since formalized Federal cooperative education programs were initiated in 1971, enrollment levels have increased at a rate of almost 2,000 students annually, to a current level in excess of 14,000 students. Of the 12,251 students successfully completing the program since 1971, 7,369 (60 percent) were retained in permanent positions by their employing activities. As an alternative to customary competitive staffing procedures, cooperative education has proven to be a most productive and cost-effective recruitment vehicle.

*of Cooperative Education Students, FY 1979, summarization of Federal agency reports, BRE-63.*

<sup>7</sup> *Federal Personnel Manual*, chapter 308, subchapter 2, “Cooperative Education for Baccalaureate Students,” Aug. 18, 1978. See also, U.S., Office of Personnel Management, *Federal Employment*

Agencies have found cooperative education to be a critical "missing link" for entry-level recruiting, especially during periods of budget restrictions. Students are given the opportunity to demonstrate their ability to perform on the job prior to receiving a commitment for permanent employment. As a result, there is built-in quality control at a fraction of the cost normally associated with the recruitment of permanent staff. Also, there is generally less turnover among co-op graduates than regular new hires due to the fact that ample opportunity for decision-making is provided prior to graduation.

### Worker-Trainee Opportunity Program (W-TO)

Since 1968 Federal agencies have effectively used the worker-trainee<sup>8</sup> concept to fill vacancies at the lowest levels of Federal employment with low-skilled and disadvantaged persons. Worker-trainees have proven to be productive employees to the agencies that hired them, and many have demonstrated potential for higher level jobs.

In 1973 the Civil Service Commission (now OPM) established the worker-trainee opportunities program (W-TO) to provide systematic developmental opportunities for *all* worker-trainees. Under the plan persons given temporary appointments to the worker-trainee program are placed into one of two job categories: (1) regular jobs that provide basic training and general career guidance services, or (2) developmental jobs that require more specific types of training and developmental experiences that lead to target positions at higher grade levels. A real advantage of this program is that OPM allocates 1-year personnel ceiling exemptions to agencies for persons placed in this latter category who are given TAPER appointments or who are appointed under the veterans readjustment appointment (VRA) program at the GS-1 or WG 1/2 levels. This means that the agency has a year in which to evaluate the W-TO employee's performance before having to count him or her against ceiling.

Worker-trainees who are placed into *regular* jobs are provided with assignments that utilize their abilities, permit them to develop self-confidence, relate work accomplishment to the mission of their organization, and help them recognize the impor-

tance of good work performance. Persons placed in regular jobs receive:

- Orientation designed to explain work duties, responsibilities, and benefits; describe the environment of work; and define the agency's and the work unit's mission.
- Systematic appraisal of skills, knowledges, and abilities as these relate to the work setting. Supervisors, with assistance from the personnel office, will generally make this appraisal.
- Career counseling services. Counselors and employees will discuss work performance, progress, career opportunities, and work-related problems in an effort to assist employees, supervisors, and managers in meeting the requirements of this plan.
- Training experiences, on the job and/or formal, as appropriate, that provide the skills, knowledges, and abilities needed to perform in their present job.

For worker-trainees who are selected for developmental positions, agencies:

- Identify entry and target jobs. The target positions are generally jobs at or above the GS-3 (or equivalent) level.
- Prepare worker-trainee development plans (W-TDP)
- Provide work experiences with a mixture of the kinds of tasks associated with the present position and the kinds associated with the target position.
- Provide training, in accordance with chapter 410 of the *Federal Personnel Manual (FPM)*, especially designed to help the trainee meet the specific qualification requirements of the target job specified in the W-TDP.

### Part-Time Direct Hire Program

In April 1979, OPM launched an experimental 2-year program that permits selected Federal agencies to fill part-time jobs in the career civil service under streamlined procedures.<sup>9</sup> The program allows participating agencies to make direct offers of permanent part-time jobs to qualified candidates they recruit.

The program was designed to help agencies carry out the Federal Employees Part-Time Career Employment Act of 1978 (Public Law 95-437) and to help them deal with the shortages of qualified part-

<sup>8</sup> U.S., Office of Personnel Management, *Federal Personnel Manual Letter No. 713-33*, "Worker-Trainee Opportunities Program—W-TO," Oct. 3, 1975. See also U.S., Civil Service Commission, *Worker-Trainee Opportunities Operation Manual*, September 1973 (Revised May 1974).

<sup>9</sup> U.S., Office of Personnel Management, *The Part-Time Career Employment Act of 1978—An Agency Guide on P.L. 95-437*, BRE-79, April 1979. See also "New Part-Time Program," *Spotlight (OPM)*, vol. 12, no. 3, March—April 1980, p. 1.

time candidates that agency personnel officers are reporting in some occupational fields.

One of the most important features of Public Law 95-437 was the provision changing the method for determining personnel ceilings in each agency by requiring the counting of part-time employees on the basis of the fractional part of the 40-hour week actually worked. Prior to the implementation of Public Law 95-437 in October 1980, agencies were constrained in their use of part-time employees by part-time ceilings.

The program is so new that as yet no data have been generated on the race, sex, national origin, or numbers of participants. However, between 1977, when the program was conceived, and April 1980, when OPM published its implementing regulation, Federal agencies had established more than 20,000 new permanent part-time jobs.

### Upward Mobility Programs

The veritable plethora of Federal upward mobility programs have for years served government affirmative action managers, supervisors, and program managers alike in good stead, particularly during periods when restrictions are placed on external hiring. With names like DARE, GO, SUMPT, CADE, TAP, START, JOST, STEP, and STRIDE, they are cited as the pride of each agency's personnel system.<sup>10</sup>

Upward mobility in the Federal service is formally defined as follows:

A systematic management effort that focuses Federal personnel policy and practice on the development and implementation of specific career opportunities for lower level employees (below GS-9 or equivalent) who are in positions or occupational series which do not enable them to realize their full work potential.<sup>11</sup>

Within this definition, upward mobility provides developmental opportunities to lower level employees that go *beyond* normal staff improvement practices. For example, the design of bridge and trainee positions that enable lower level employees to

qualify for pre- or paraprofessional jobs is one means of providing upward mobility. Affording typing and related training to a GS-2 mail clerk who lacks qualification for an identified GS-2 or GS-3 clerk-typist position, or providing required training for a typist to qualify for a targeted stenographic position are other examples of upward mobility. However, training and developmental efforts primarily designed to improve *current* occupational performance should *not* be regarded as upward mobility. Likewise, career intern, cooperative education, student employment, and other programs using outside recruitment are *not* examples of upward mobility for lower level employees. Each agency should apply these concepts to develop a variety of upward mobility opportunities adapted to its organizational and mission requirements.

Upward mobility programs have proven themselves to be among the most cost-effective instruments in the affirmative employment/action planner's inventory. They flourish when decisions to recruit, hire, and train employees must be viewed against a backdrop of leaner and leaner budgets and soaring costs.

Effective and successful upward mobility programs identify and develop human resource potential within the organization and provide assistance to managers in reducing total salary costs by restructuring jobs to entry or trainee levels; avoiding downtime resulting from vacated positions by filling positions more rapidly; and reducing high turnover, absenteeism, and worker dissatisfaction by providing expanded career goals and opportunities for employees with potential. Upward mobility programs are at the heart of more efficient human resource accounting. They are another tool for the cost-conscious manager.

No exact figures are available on the number and race, sex, and national origin composition of those employees who have successfully completed Federal upward mobility programs, but certainly the participants have numbered into the tens of thousands, with minorities and women comprising the

(CADE) at the Department of the Treasury; the job opportunities and skills training program (JOST) at the Department of Agriculture; the STRIDE program and Project START program (not acronyms) at the Department of Health and Human Services (formerly HEW).

<sup>11</sup> U.S., Civil Service Commission, Federal Personnel Manual Letter 713-27. "Upward Mobility for Lower Level Employees," June 28, 1974. See also OPM's *Upward Mobility: Considerations for Program Planning and Development*, WLA-2, November 1979.

<sup>10</sup> U.S., Office of Personnel Management, *Spotlight on Upward Mobility*, reprinting articles from the *Spotlight*. The full names and sponsoring agencies of the programs whose acronyms are given are as follows: development and advancement for regulatory employees (DARE) at the Nuclear Regulatory Commission; growth opportunity (GO) and specialty training for entry professionals (STEP) at the National Aeronautics and Space Administration; scientific upward mobility training program (SUMPT) at the National Oceanic and Atmospheric Administration; career development program for lower level employees

bulk of participants. In fiscal year 1977 alone, over 16,000 employees participated in upward mobility programs in Federal agencies. On an average, agencies that year filled 1 vacancy in 10 below GS-9 through an upward mobility program.<sup>12</sup>

### Other Effective Recruitment Activities

In their required annual report to OPM on FEORP implementation, Federal agencies commonly identified the following measures as being effective in recruiting minorities and women. One agency noted that, "it is very difficult to isolate the effect of any one technique, since recruiting activities are carried on simultaneously." For external recruitment, effective techniques reported by agencies included:

- special outreach programs designed to bring members of underrepresented groups into entry level positions and to develop them for higher level jobs;
- extensive campus recruitment at schools with high enrollments of minorities and women;
- visits to American Indian tribal councils;
- use of the National Urban League's skills bank for senior-level positions (i.e., GS-13/14/15);
- participation in career seminars relating to specific occupations; and
- establishing working relationships with organizations specifically involved in minority recruitment such as the Vacancy Outreach Service and the Consortium for Black Professionals.

For internal recruitment, the most effective recruitment activities and methods reported were:

- staffing through the upward mobility program at the GS-5/7 level;
- allocating a percentage of agency intern program positions to be filled internally;
- seeking referrals from current employees for positions through the GS-8 level; and
- enlisting the support and involvement of special emphasis program managers and coordinators (e.g., Federal women's program and Hispanic employment program) in identifying and attracting minority and female applicants.

A number of agencies reported that their participation in interagency recruitment efforts had been quite effective. In the Washington, D.C., area, participation in the Interagency Minority and Female Recruiters Association (IMFRA), an organiza-

tion established specifically as a result of FEORP and supported by a number of Federal agencies, was identified as a useful approach to recruitment of minorities and women.

Agencies also frequently indicated that their efforts tended to be more productive when they had the flexibility of direct hiring authority. In addition, several agencies that had assumed delegated examining authority from OPM showed extremely encouraging results in terms of increasing representation in their applicant pools. The Social Security Administration, for example, indicated that it has been able to consider a larger number of minority applicants for social insurance claims representative positions through its claims representation examination (social security CRESS examination) than was possible under the PACE exam. More than 30 percent were minority, and preliminary information on hiring showed that a similar percentage of minorities was being selected. Another position that was removed from PACE through delegated examining was bank examiner at the Federal Deposit Insurance Corporation. That agency also reported a much larger proportion (20-25 percent) of minority-group eligibles than in the past.

The creative affirmative action manager will make use of many, all, or some of the above measures in different combinations, as the situation calls for. Many of them are overlapping in effect; that is, although primarily designed to benefit one group, they can be used in connection with targeted recruitment or other planned measures to satisfy the double demand of getting qualified applicants and making the work force representative of the Nation's population. No one affirmative measure will do it all—nor should we expect it to. Many "wind-fall" programs that would have been a boom to minority and female recruitment have not made it off the drawing board. The original "Special Emphasis Program" (SEP), the so-called Sugarman plan, is an example. It called for allowing agencies to fill up to 20 percent of their vacancies in certain selected occupations by use of a noncompetitive appointing authority known as Schedule A. The minorities and women appointees were to serve 2-year trial appointments in lieu of a written examination and upon satisfactory completion of that term be converted to career-conditional (tenured) status. Actually a harbinger of the quantitative-oriented

<sup>12</sup> Data extracted from the Office of Affirmative Employment staff data sheet on upward mobility activity in 103 Federal agencies in fiscal year 1977.

programs later introduced by the CSRA, the original SEP proposal nevertheless fell victim to heavy resistance charging that it amounted to an institutionalized system of hiring quotas.

One very popular program that eventually ran aground was the original outstanding scholar program. It permitted applicants with a 3.5 cumulative grade point average or those within the top 10 percent of their college graduating class to waive the PACE exam altogether. A favorite source of candidates from predominantly black colleges, the outstanding scholar program was scaled down by OPM's predecessor, the Civil Service Commission, under pressure from organizations charging that it was abusive of the merit system and competitive principles.

The failure or demise of these and similar programs suggest that the Federal employment sector, or its overseer, the Congress, is unwilling to support alternatives to traditional measures of hiring that take on proportions of major selection systems or that are used exclusively for one sex or minority. At the same time, the turbulent history of the Federal Government's largest applicant screening method, the professional and administrative career examination (PACE), underscores the danger of relying too heavily upon one avenue of entry—even the most "objective." The latest of these skirmishes has resulted in a consent decree that, in effect, requires the government to adopt a method which can be validated and which has less of an adverse impact on minority competitors. More pertinent, however, is the fact that, even before the litigation which resulted in the consent decree, the number of selections from those who took and passed the PACE had decreased from roughly 10,000 in 1974 to only 4,674 in 1980.<sup>13</sup>

From its vantage point as the government's personnel manager, OPM has been able to make greater contributions to the EEO effort now piloted by EEOC by identifying, among other things, practical methods by which agency managers and supervisors, in consultation with their personnel officers, can achieve their affirmative action goals. The goals of OPM's Office of Affirmative Employment Programs reflect the full range of these contributions: increasing awareness of affirmative employment and equal employment opportunity;

increasing knowledge of the Federal equal employment opportunity recruitment program; monitoring the status and implementation of FEORP; expanding communications with community organizations and activities; providing central affirmative employment programs resources and information services; assisting Federal agencies with program guidance and providing support for agency programs; and monitoring all personnel management regulations, practices, and procedures to assure the personnel system is open and free of barriers.

Affirmative action and merit selection *are* compatible. The key to reconciling them is to understand that neither concept is absolute. Just as there can be no requirement that a certain number of minorities or women *must* be placed in a certain number of jobs, as a "quota" or "forced hiring" system would dictate, there can be no guarantee that candidate A will outperform candidate B once candidate A is selected, even though the "objective" indicators so suggest. (Tests, after all, are only probability measures.)

It *is* clear that race, sex, or ethnicity *may* be considered for affirmative employment purposes in the development and implementation of a selection process. It is also clear that these factors may *not* be used as an absolute screenout or as the sole selection factor. FPM chapter 335 and the merit system principles listed in the Civil Service Reform Act (CSRA) do prohibit discrimination and require selection based on job-related criteria. However, Congress has made clear that race, sex, or ethnic-conscious programs continue to be permissible in a merit context. CSRA is "not to be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action." (5 U.S.C. 2302(d)) It is only programs that are exclusive to, or segregated by, race, sex, or ethnicity that are impermissible.

## New Directions

In addition to the traditional approaches described above, OPM, in conjunction with other Federal agencies, has recently embarked on a number of innovative programs designed to make its work force more representative. Among the most notable of them was a highly successful outreach effort targeted at improving Hispanic representation and

<sup>13</sup> U.S., Office of Personnel Management, News Release, "Hiring Freeze Defers Pace Exam," Feb. 13, 1981. See also Luevano v. Campbell, "Joint Motion for Entry of an Order Granting

Preliminary Approval to the Consent Decree," U.S. District Court for the District of Columbia, Jan. 9, 1981.

called the interagency Hispanic placement program. Sponsored by OPM and funded by the Department of Labor, this program terminated on December 15, 1980. It left behind 239 new Hispanic employees in 16 Federal agencies. The program was intended to fill approximately 300 positions in the Washington metropolitan area where there is a shortage of qualified clerk-typists. To conduct the necessary recruitment for these positions, DOL awarded two contracts, one to the National Puerto Rican Forum (NPRF) and the second to One America, Inc. (which subcontracted to the Mexican American Women's National Association (MANA)). Besides conducting the recruitment, the two contractors provided new employees with counseling, initial housing, and other relocation services. By December 31, 1980, approximately 260 placements were made, with the National Puerto Rican Forum making about 73 percent of the total placements.

One of the most promising affirmative action efforts now underway involves the entry of women into nontraditional, blue-collar occupations.<sup>14</sup> Serious steps to increase employment of women in the trades, whose salaries are often far more lucrative than their white-collar counterparts, is underway in at least two Federal agencies, the Department of the Navy and the General Services Administration (GSA).

At the Navy's Public Works Center in Norfolk, Virginia, 37 women have been recruited into blue-collar jobs since the program began about 4 years ago. The program boasts an exceptionally high retention rate. Three-and-one-half years into the program, only 2 of the 37 participants had left—one to a similar, better paying job in private industry.

This successful program did not happen by chance. Unfortunately, not every organization has had such a positive experience. But the Public Works Center planned carefully to combine these elements that are essential for success:

1. The recruitment program had top management support, beginning with the commander and extending down to the first-level supervisors.
2. First-level supervisors were included from the beginning in the planning process; the new women were not "pushed" on them from above. Also, the three supervisors on the committee were supportive and adaptive.

<sup>14</sup> U.S., Office of Personnel Management, *Women in Action*, "Women in Trades and Labor," vol. 9, no. 4, April 1979.

3. The program was planned to make sure the new apprentices understood what to expect on the job.

4. The new apprentices were treated equally on the job, and women took responsibility for their fair share of the work and their personal learning.

The GSA's program is still in the planning process. But if management commitment is any indication of the program's chances of success—and certainly it is the most important intangible factor in the affirmative action formula—the GSA's program will be an outstanding success. The following are excerpts from an October 28, 1980, memorandum from the GSA Administrator, R.G. Freeman III, to all his regional administrators, heads of services, and staff offices. The subject of the memorandum is "women in the crafts and trades."

The purpose of this memorandum is to provide guidance and directions for initiating a special emphasis program designed to increase the number of women in skilled craft and trade occupations within the General Services Administration (GSA).

I am very concerned that this agency has not taken the pioneering lead in this area of equal employment opportunity and achieved more significant affirmative action results, particularly for minority women. . . .

To ensure that maximum attention is given to increasing the number of women, particularly minority women, the Office of Personnel and the EEO Office must communicate with the selecting officials regarding deficiencies, goals established, and alternative courses of action when conventional processes do not prove successful. Rewriting, reannouncing, and lowering level of entry into the position are just a few examples.

I consider the implementation of this program to be a top management priority. *This particular endeavor will be assessed as part of all performance appraisals of managers and supervisors with responsibility for these programs.* [Emphasis added.]

The following are among the wage systems thus far targeted in the GSA program: electrician, laborer, painter, pipefitter, plumber, carpenter, utilities systems repairer/operator, general maintenance mechanic, air-conditioning equipment mechanic, elevator mechanic, automotive mechanic, warehouse person.

## **Beyond Statistics: Our Coming of Age**

On page 36 of its proposed statement, the Commission lists the elements of an affirmative action plan. "The basic elements," it says, "are simply explained." The affirmative action components listed by the Commission are, in fact, essentially the same as those outlined by the EEOC in its initial affirmative action guidance to Federal agencies (*Management Directive 702*). By now the elements of a good affirmative action plan are a matter of common knowledge.

But as the Commission goes on to acknowledge, "a far more complex and controversial matter, however, concerns the ways in which affirmative action plans use race, sex, and national origin." In this paper we have reviewed the philosophical and practical bases for the Federal Government's use of its race, sex, and national origin data for setting quantified affirmative action goals and objectives.

In describing the concept of underrepresentation, detailing the results and the shortcomings of the quantitative methods, and by presenting in detail a number of strategies and techniques by which affirmative action has been made a reality in the

Federal sector, we have addressed in particular two items on that list, namely: (1) the identification of areas of underutilization and the analyses of the discriminatory barriers embedded in organizational decisionmaking; and (2) specific measures addressing the causes of underutilization and removing discriminatory barriers. We have emphasized the need for a high level of awareness on the part of Federal affirmative action managers of all the tools available to them and of the importance of employing a variety of these tools to achieve results through the organization's managers and supervisors.

With the passage of the Civil Service Reform Act, the Federal Government's policy for affirmative action within its own ranks came of age. As affirmative action managers from both public and private sectors, we must bring the total array of available affirmative action resources to bear upon the "present effects of past discrimination," especially in the area of recruitment, lest we be boxed in by the very constructs we have fashioned to get the job done. Thorough program planning and intelligent implementation are the order of the day.

# Statement

By Winn Newman\*

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## Introduction

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE), represents approximately 300,000 employees in the electrical equipment manufacturing industry. More than a million women are employed in this industry. No other durable goods manufacturing industry has any comparable number of women workers. Approximately 40 percent of the workers in the electrical equipment manufacturing industry are females, and approximately 40 percent of the IUE's membership is female.

IUE is pleased to offer its experiences, insights, and recommendations to the Commission in the hope that it can be of assistance in finalizing its statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*.

First, I would like to focus on the Commission's call for affirmative action. There seems to be a great deal of confusion as to just what constitutes affirmative action. There is affirmative action in the sense of doing something over and above what is required by law to eradicate the vestiges of discrimination, which is sometimes called "voluntary" affirmative action. And then there is affirmative action in the sense of a *remedy* for past or present *discrimination* after an administrative agency or court finds that a specific employer has, in fact, *violated* the law.

Both concepts of affirmative action are valid and important, but the industrial relations world understands the concept best when used in its *remedial*

sense. For example, the National Labor Relations Act empowers the NLRB, when it finds an unfair labor practice, "to take such *affirmative action*, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." (Emphasis supplied.) Similarly, section 706(c) of Title VII expressly provides that *when discrimination is found*, courts:

May enjoin the respondent from engaging in such *unlawful employment practice*, and order such *affirmative action* as may be appropriate, *hiring* of employees. . . or any other *equitable relief* as the court deems appropriate. (Emphasis added.)

*Remedial* affirmative action is required to correct the blatant sex discrimination that I believe exists today in virtually every industrial plant in the United States and perhaps most other establishments that have historically employed women. In IUE's experience, affirmative action as something over and above what is required by law has been treated as secondary to the concept of bringing about *compliance with the law*. We have found that, given limited resources and personpower, we can get the greatest results—the biggest bang for a buck—by concentrating first on the persistently flagrant and obviously illegal discrimination currently engaged in by employers who continue to discriminate more than 16 years after the passage of the Civil Rights Act of 1964. We then have engaged in *remedial* affirmative action to remove such discrimination.

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\* Winn Newman is general counsel of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

Second, although the Commission's statement on affirmative action is excellent, it fails to address the affirmative role that unions can play in achieving either concept of affirmative action—*voluntary* or *remedial*. Unions can make significant contributions to the enforcement of fair employment laws. Through their knowledge of plant practices and access to civil rights-related information from employers, unions can bring to light discriminatory practices by employers, inform workers about their rights, and assist them in seeking redress from authorities. Where litigation is necessary, unions can provide sorely needed financial and legal assistance, and they can offer moral support and valuable information.

Third, from its founding in 1949, the IUE has sought through collective bargaining, including legal action where necessary, to eradicate race and sex discrimination in the workplace. IUE's leadership role in attacking employment discrimination was acknowledged by former National Labor Relations Board Chairman Betty Murphy, who—in a dissenting opinion—recognized that IUE “has been a prime mover for equality in the workplace” and “is dedicated to bettering the working conditions of its members and . . . to wiping out any vestige of employment discrimination.”<sup>1</sup>

AFL-CIO President Lane Kirkland, in a recent statement to EEOC on “comparable worth,” stated that “[i]t is no mere happenstance that the two organizations that have been at the very forefront of pushing the issue of wage discrimination to the center of our consciousness are the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and the Coalition of Labor Union Women.”

The IUE has been in the forefront of efforts to obtain Federal legislation to protect the rights of minority and female workers, notably the Equal Pay Act, Title VII of the Civil Rights Act, and the Pregnancy Disability Act.<sup>2</sup> It has also attempted for many years to end discriminatory employment

practices through collective bargaining at the national and local levels, and through grievances and arbitration where these remedies are available. Finally, and most important, the IUE has recognized that discrimination will generally not be corrected at the bargaining table, at least not without using the law for support.

Pursuant to its mandate to eliminate invidious discrimination in employment, for the past 9 years, since 1972, IUE has undertaken a major Title VII compliance program (discussed in detail in section 1 following) to enforce the rights of its members under fair employment laws, which stresses the elimination of systemic discrimination.

As part of this policy, the IUE has conducted an extensive legal program to assist employees in filing charges of discrimination and in instituting legal actions to enforce fair employment laws. Many of these cases have been brought by IUE and its locals as named plaintiffs, and IUE has supported individual employees in many other cases in which the union was not named.

The IUE approach, which has been acknowledged as effective in achieving EEO, as shown by our results (described in section 1), relies on basic trade union principles such as plantwide seniority and job posting and bidding to achieve maximum equal employment opportunity. The IUE program thus avoids the “[h]eated controversy . . . over particular methods affirmative action plans employ,” referred to in the Commission's report, since the IUE program does not rely on such controversial terms as “goals,” “quotas,” and “preferential treatment,” which are anathema to the industrial relations world.

Fourth, union efforts to enforce or support the enforcement of fair employment laws have been seriously hampered by various obstacles, legal and nonlegal, which are detailed in section 3, such as:

1. employer refusal to give EEO information to unions on the ground that EEO is none of the union's business;

the enactment of Title VII. E.g., *Hearings on H.R. 405 and Similar Bills to Prohibit Discrimination in Employment Before the General Subcommittee on Labor of the House Education and Labor Committee*, 88th Cong., 1st sess. 66 (1963). After the decision in *General Electric v. IUE and Gilbert*, 429 U.S. 125 (1976), discussed later, the IUE strongly supported legislation to amend Title VII to require employers to provide disability benefits for pregnancy. *Hearings on S. 995 Before the Subcommittee on Labor of the Senate Committee on Human Resources*, 95th Cong., 1st sess. 222 (1977).

<sup>1</sup> *General Motors Corp.*, 243 NLRB No. 19 (1979), 101 LRRM, 1461, 1464, *enfd.* — F.2d— (D.C. Cir. 1980), 105 LRRM 3337 (1980).

<sup>2</sup> In 1962 and 1963 the IUE presented testimony on several occasions endorsing Federal equal pay legislation. E.g., *Hearings on H.R. 3861 Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st sess. 108 (1963); *Hearings on H.R. 8898 Before the Select Subcommittee on Labor of the House Committee on Education and Labor*, 87th Cong., 2d sess. 169, 181 (1962). The union also strongly supported

2. hostility of employers toward union filing of EEO charges *after* signing a collective-bargaining agreement;
3. the threat of creation of an employer's right to contribution from a union; and
4. most important, negative government attitudes and policies as to the role of unions in implementing fair employment laws.

Until recently, EEOC and DOL consistently refused to recognize and encourage the positive and active efforts of IUE and other industrial unions, who have taken strong action to achieve Title VII compliance and affirmative action.

Fifth, recent actions by EEOC and the Department of Labor, modifying their own administrative and litigation practices and calling for more union involvement in the compliance and investigative process, have recognized the important contribution that unions can make to the enforcement of the fair employment laws, and these agencies have encouraged greater enforcement efforts by unions. However, much more needs to be done. Indeed, government civil rights agencies can become more effective by taking advantage of the efforts of unions such as the IUE that actively seek to correct discrimination.

At the end of this statement, the IUE respectfully suggests ways to encourage unions to take aggressive action to achieve Title VII compliance and affirmative action, so that the recent efforts of EEOC and DOL to take advantage of union resources and to encourage unions to take a more affirmative role in correcting discriminatory practices will be continued and vigorously implemented by the Reagan administration and not turn out to have been mere lipservice to union involvement in EEO compliance efforts. These suggestions include urging the appropriate civil rights agencies to:

1. educate and train staff to cooperate with unions by seeking valuable information the union might have and not automatically making the union a respondent irrespective of the union's complete lack of responsibility for the discrimination or the charging party's refusal to name the union as a charging party;
2. encourage unions to get information, analyze data, bargain with employers, file EEO charges, etc., with the full knowledge that if a union makes a genuine, good-faith effort to correct discrimination it will not be worse off than it was before in terms of exposure to liability;

3. support the realignment of unions seeking to become plaintiffs to assist in correcting discrimination;
4. look for EEO solutions that do not upset the collective-bargaining agreement or that seek to achieve EEO changes in ways consistent with the concept of collective bargaining and the National Labor Relations Act; and
5. "thaw" out and implement the now "frozen" OFCCP regulations calling for full union involvement in the compliance process.

The IUE strongly urges the United States Civil Rights Commission to incorporate in its final statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, strong language concerning the positive role that unions can and have played in the design, implementation, evaluation, and monitoring of affirmative action plans in employment, as shown by IUE's experiences detailed throughout its statement, and to exhort other government civil rights agencies to take full advantage and to recognize and support the effort of those unions that actively seek to eliminate discrimination in the workplace.

Sixth, the Commission appears to be saying that selection procedures that lead to the initial assignment for entry-level jobs of females or blacks to lower pay jobs while white males are initially assigned to higher pay entry-level jobs may not be violative of the law, although such practices should be corrected by "voluntary" affirmative action. Contrary to the Commission, IUE's experience, as detailed in section 3, demonstrates that initial assignment discrimination and its "kissin' cousins"—occupational segregation and wage discrimination—constitute obvious and significant, but neglected, *Title VII violations* in their own right.

Initial assignment discrimination, particularly for entry-level unskilled jobs, is at the heart of occupational segregation, wage discrimination, and future promotional opportunity. Discrimination in the initial assignment or placement of newly hired employees is a major contributor to occupational segregation, is relatively easy to prove, and is an essential part of the solution to the issue of wage structure bias. Wage discrimination (not covered by the Equal Pay Act) could not exist without occupational segregation. It is this symbiotic relationship between the four areas—initial assignment discrimination, occupational segregation, wage discrimination for the work performed, and denial of promotional

opportunity—that accounts most heavily for the current earnings gap suffered by women and minorities. The gap will continue as long as women and minorities are shunted into the lower paying jobs upon hiring and remain there, are denied “equal pay for work of comparable value,” and are denied access to higher paying jobs.

It’s “Catch 22”! First, women are denied the better paying jobs. Second, after being assigned to traditionally female jobs, women are paid less than men who are performing different jobs, but jobs that require no greater skill, effort, and responsibility.

Breaking down entrenched occupational segregation and all the social mores that contribute to it will not be easy and will take time. But we believe it would be relatively simple to cause a significant decrease in occupational segregation by dealing more directly with initial assignment discrimination as a clear and blatant *violation of law*, particularly in those situations where the employer assigns newly hired applicants to entry-level jobs on a sex-or race-segregated basis, which, as shown by the IUE data discussed in section 3, continues to be the rule in most manufacturing establishments that employed women on a segregated basis prior to the passage of Title VII.

I would like to discuss:

1. the IUE’s Title VII compliance program and its implementation;
2. IUE’s extensive experience in litigating intra-plant wage inequities based on sex;
3. the prevalence today of sexually segregated job patterns in the electrical equipment manufacturing industry;

<sup>3</sup> IUE’s collective-bargaining efforts with respect to EEO issues at one of the major employers in the electrical equipment industry were recently summarized by the National Labor Relations Board (NLRB):

In the 1954 national negotiations the Union unsuccessfully proposed contract clauses providing for equal pay without distinction as to sex, and extension of hospitalization benefits to cover pregnancy and childbirth. In 1958 IUE added a proposed clause eliminating wage differentials based on sex, and in 1960, also proposed extending contractual pension provisions to widows and survivors. In 1963 IUE again submitted the above proposals, together with a proposal to amend the antidiscrimination clause of the National Agreement (Section IV, paragraph 3) to include a reference to sex. The latter proposal was resubmitted and adopted by the parties in 1966, and the reference to women’s and men’s jobs was simultaneously deleted from the contract. In 1970 the antidiscrimination clause was again amended to add a reference to age. The clause is not subject to contractual arbitration, although the National Agreement leaves the

4. the obstacles, legal and nonlegal, unions encounter in negotiating and implementing affirmative action plans; and

5. how government civil rights agencies can become more effective in implementing equal employment opportunity by recognizing and encouraging the efforts of unions which actively seek to correct discrimination.

## 1. The IUE’s Title VII Compliance Program and Its Implementation

For many years the IUE has attempted to end discriminatory employment practices through collective bargaining at the national and local levels—with partial success in certain instances<sup>3</sup>—and through grievances and arbitration where these remedies are available. However, while collective bargaining is often helpful to achieve equal employment opportunity objectives, it frequently is not enough.

Accordingly, at its convention in the fall of 1972, the IUE recognized the need to spell out a specific course of required action to correct discrimination, and the IUE executive board implemented a Title VII compliance program at its next meeting. This program was spelled out in detail in a November 8, 1974, statement by the IUE president to EEOC, entitled “EEOC Could Improve Administration of Title VII by Encouraging Affirmative Role of Unions in Correcting Discriminatory Practices by Employers” (attachment 1), which was made by IUE on behalf of the AFL-CIO civil rights committee to the five EEOC Commissioners.

The program was revised by the IUE executive board following the landmark decisions won by the

union free to strike over nonarbitrable grievances. In 1966, 1970 and 1973, the Union unsuccessfully proposed that the clause be made subject to binding arbitration. In these negotiations IUE made other proposals which related or purported to relate to the status of female and minority group employees. In 1966 and 1970, IUE proposed clauses to prohibit sex discrimination in upgrading and layoffs, extension of disability insurance coverage to pregnancy, and training of females for higher paying jobs. In 1970 and 1973, IUE proposed a layoff and recall system based on plantwide seniority, and plantwide posting of job opportunities. In 1973 IUE also proposed a joint employer-union committee, coupled with binding arbitration, to review rates alleged to be discriminatory, and elimination of all contract provisions which treated pregnancy in a different manner from other forms of disability, e.g., a provision requiring 9 months employment as a prerequisite for receipt of benefits. *Westinghouse Electric Corp.*, 239 NLRB 106, 128 (1978), 99 LRRM 1482, *enfd.* —F.2d— (D.C. Cir. 1980), 105 LRRM 3337 (1980).

IUE before the NLRB after 6 years of litigation in a series of cases, including *Westinghouse Electric Corporation*, which will be discussed in detail later.

Briefly, the IUE Title VII compliance program emphasizes the elimination of systemic discrimination and consists of the following elements:

1. An educational program for both staff and our membership;
2. A systematic review of the number and status of minority members and females at each of our plants;
3. A systematic review of all collective-bargaining contracts and plant practices to determine whether specific kinds of discrimination exist; and
4. *Most important*, requests to employers for detailed information, broken down by race, sex, and national origin, relating to hiring (including the job grade given to each new hire); promotion and upgrading policies; initial assignments; wage rates; segregation of job classifications and seniority; copies of the employer's affirmative action plan (AAP) and work force analysis; and copies and information concerning the status of all charges filed against them under the Equal Pay Act, Title VII, Executive Order 11246, and State fair employment practice laws.

After analyzing the data, if we conclude that discrimination exists, the IUE:

1. requests bargaining with employers to eliminate the illegal practices or contract provisions;
2. files NLRB refusal-to-bargain charges against employers who refuse to supply information or to agree to eliminate the illegal provisions;
3. follows up these demands by filing Title VII charges and lawsuits under Title VII and Executive Order 11246.

Repeated instructions were sent by memoranda from the IUE president regarding the union's Title VII compliance program and demonstrate considerable effort to implement it. (Attachment 2 consists of an index of these memoranda and a few of the memos issued by the IUE.) Local unions were requested to examine their existing contracts and practices using guidelists prepared by IUE to determine whether there was discrimination. Local unions that found practices they believed to be discriminatory were urged to seek immediate changes from the employer.

In order to facilitate the review process, the IUE executive board subsequently asked local unions to obtain from employers certain statistical and other

information related to the employers' compliance with Title VII and the Equal Pay Act. (A sample of IUE's request for EEO information is included as attachment 3.) When a number of employers refused to provide this information for bargaining purposes, IUE filed unfair labor practice charges, which led to the landmark right to EEO information cases, including *Westinghouse Electric Corp.*, which will be discussed later.

IUE also gives substantial emphasis to Title VII issues in various publications and special directives. For example, IUE periodically publishes for its locals *Keeping Up With The Law*, which prominently features Title VII decisions and legal developments.

Despite the Supreme Court decision in *Teamsters* that most seniority systems did not have to be changed to comply with Title VII, IUE President David J. Fitzmaurice advised all IUE locals to continue to insist upon the establishment of broader seniority units from job or departmental seniority to plantwide seniority for promotion and layoff purposes, wherever necessary to combat the effects of past discrimination. Locals were also urged to insist upon the advertisement of vacancies through job posting and job bidding in order to correct the effects of past discrimination.

To educate our members concerning the Pregnancy Disability Act, IUE summarized the provisions in *Keeping Up With The Law* and followed this up with memos containing proposed contract language, form letters to employers, and copies of the EEOC Pregnancy Guidelines and Questions and Answers.

Pursuant to the IUE Title VII compliance program, we have filed more than 500 charges of sex and race discrimination with EEOC or with similar State agencies and more than 50 lawsuits to eliminate sexually or racially discriminatory employment practices. Ten cases involving initial assignment discrimination, promotions, wage discrimination, and other employer discriminatory practices are currently pending before Federal courts under Title VII. In each of these cases, the IUE or its locals have been named as plaintiffs along with women employees in the bargaining units.

The Title VII compliance program has achieved significant results, both in modifying employers' future practices and in providing relief to protected-group employees for prior discrimination. The following includes some of the areas in which we have concentrated:

## Pregnancy

A major early focus of IUE's Title VII compliance program has been employer practices that disadvantage pregnant workers. Even prior to the promulgation of EEOC's sex discrimination guidelines, which held that discrimination against pregnant employees constitutes a violation of Title VII, IUE filed charges with the EEOC alleging that the three major employers in the electrical manufacturing industry—General Electric, Westinghouse, and General Motors—and many other employers discriminated against pregnant employees in a number of their practices. Subsequently, nationwide class actions were filed by IUE in Federal court against the three companies. In one of these, *IUE and Gilbert v. General Electric*, IUE was successful in the district court and the court of appeals in establishing that the denial of sickness and accident benefits for pregnancy-related disabilities violated Title VII, but the Supreme Court ultimately reversed.

However, IUE's loss soon led to the passage of the Pregnancy Disability Act of 1978, which overruled the Supreme Court's decision. In the *Westinghouse* pregnancy case, we achieved a settlement, based on pre-1973 practices, which provides for \$300,000 in backpay, as well as pension, seniority, and other benefits for women who suffered from a number of the company's pregnancy policies. A settlement has also been proposed in the action brought against General Motors.

## Pensions

IUE has successfully settled multimillion dollar pension cases where employers have discriminated against men by allowing early retirement for women with full pension, but allowing males only early retirement with a reduced pension, and discriminated against those women by failing to give additional pension credit to female employees who continued to work after age 60.

## Height and Weight Restrictions

As a result of an IUE Title VII lawsuit involving height restrictions at General Electric's Tyler, Texas, plant, way back in 1972, the company agreed to discontinue its requirement that all employees be at least 5 feet 7 inches tall and to make whole all female discriminatees by hiring them and paying backpay and back seniority, pension, and other benefits. The basis of the lawsuit was that the height restriction had a disparate effect on females and was

intended to discriminate against them, since 94 percent of the males, but only 34 percent of the females were 5 feet 7 inches.

## Initial Assignments and Promotions

IUE cases have ended discrimination in initial and other job assignments and promotions, have produced job posting and bidding for promotions and transfers, and have brought about the modification of narrow seniority systems to true plantwide seniority, resulting in promotions of low-paid minorities and women from within, as well as layoffs on basis of true plantwide length of service.

## Wage Discrimination

IUE wage discrimination cases, which will be discussed in detail later, have increased wage rates to correct wage inequities for significant numbers of employees and resulted in substantial backpay amounting to many millions of dollars. The increases in wage rates and the elimination of job rate inequities, as well as the obtaining of job posting and bidding and broader seniority units, had been proposed and fought for by the union for many years. Title VII became the delivery vehicle—i.e., the threat of filing charges made employers more amenable to IUE's proposals.

One of the additional side effects of the lawsuits has been to bring about a multitude of changes to correct discrimination through grievances and negotiations at the local union level. It is clear the IUE's program has provided the "muscle" or the incentive for local unions and companies to agree to change.

## Support of Title VII Plaintiffs

IUE has organized and filed *amicus* briefs on behalf of plaintiffs in more than 20 cases, including *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), supporting the government's position on Title VII and affirmative action, in which IUE was joined by CLUW, UAW, AFSCME, Woodworkers, NEA, VFW, VMW, OCAW, and the Coalition of Black Trade Unionists, and *Gunther v. County of Washington*, one of the key "comparable worth" cases that is now pending before the Supreme Court, in which IUE was joined by the AFL-CIO, the UAW, the National Treasury Employees Union, and the National Federation of Federal Employees.

## Interface Between Title VII and National Labor Relations Act

As stated, IUE has filed NLRB refusal-to-bargain charges when employers have declined to give IUE information concerning the racial and sexual makeup of their work force, leading to the landmark NLRB decisions in *Westinghouse Electric Corp.* and other cases. IUE is continuing to press employers for affirmative action plans even though employers say that they are none of the union's business and they were denied to IUE by the NLRB.<sup>4</sup> We believe that because AAPs contain a detailed self-appraisal of the companies' problems in the areas of women and minority employee employment and utilization and may contain the companies' explanation for any underutilization, they are essential to the union in identifying areas of discrimination in the bargaining unit, as well as individual employees whose rights under the nondiscrimination clause of the collective-bargaining agreement have been violated.

As early as 1974 and on many occasions since then, the IUE, with the full support of the AFL-CIO, proposed to EEOC that it recognize positive union efforts to eliminate race and sex discrimination in employment and that it not find liability against a union under the Civil Rights Act where evidence shows that the union had made a "good-faith" effort to correct the discrimination.

As a direct result of these proposals, EEOC formed a special task force on collective bargaining, under the leadership of EEOC Vice Chair Daniel Leach, to find ways to encourage the parties to a collective-bargaining agreement to eliminate discrimination. Last year EEOC adopted a "Resolution on Title VII and Collective Bargaining" designed to encourage unions to engage in affirmative action, which made clear that if a union made a good-faith effort—"concerted, aggressive action of a compelling nature"—to correct discrimination and failed because of the employer's refusal to remedy the discrimination, the union would not be held responsible for the continuance of the discrimination.

The IUE Title VII compliance program was specifically cited by EEOC as an example of a successful voluntary union program that will be encouraged by an EEOC policy rewarding such efforts. EEOC relied on IUE's victories before the National Labor Relations Board in *Westinghouse*

*Electric Corp.* and *General Motors*—recently affirmed by the United States Court of Appeals for the District of Columbia—which held that unions are entitled to receive such detailed equal employment data from the employer. EEOC hailed these decisions as giving "the 'green light' to both unions and employers to engage actively in voluntary affirmative action by providing the legal support and insulation for such specific endeavors."

These decisions found that IUE's request for information was a "legitimate function of the union" and that the employer must supply the information even if the union refused to agree, as a condition for getting the information, not to use the information as a basis for filing an EEO lawsuit against the employer.

In upholding the IUE's contentions, the court stated that data on discrimination and advancement of women and minorities are part of a class of information "so intrinsic to the core of the employer-employee relationship as to be presumptively relevant." (105 LRRM 3337, 3341). The court further stated that:

[O]nce anti-discrimination clauses like those in the present agreements become part of the collective bargaining agreement, it becomes the duty of union representatives engaged in bargaining and monitoring the agreement to see to it that an employer meets its obligations under those clauses. *Id.*

Here, the court continued, the

Union's bargaining representatives were doing just that, and the employer's duty to bargain in good faith. . . included that *duty to supply requested information needed to enable the Union's representatives to properly negotiate and perform their agreement-related duties under the anti-discrimination clause.* *Id.*

These significant NLRB and court decisions weave the National Labor Relations Act and Title VII together in accord with the Supreme Court's edict that the elimination of discrimination should be "of the highest priority" and cut new ground in union-management relations in the area of equal employment opportunity.

<sup>4</sup> The NLRB held that a union would be entitled to the AAP if the union established that it was relevant. In subsequent situations,

IUE has persuaded the NLRB General Counsel to issue a complaint on the ground that IUE had established relevance.

## 2. IUE's Extensive Experience in Litigating Intraplant Wage Inequities Based on Sex

A longtime concern of IUE in its efforts to eliminate sexually discriminatory employment practices has been the problem in the electrical manufacturing industry of systematic underpayment of jobs—such as assembly line jobs—traditionally performed by women.

Attention first was drawn to this situation more than 35 years ago by the War Labor Board, which found that the two largest employers in the industry, General Electric Company and Westinghouse Electric Corporation, had arbitrarily reduced the wages for jobs performed by women by as much as one-third below the proper rates determined by their own job evaluators.<sup>5</sup>

The basic pattern of discriminatory wages of women uncovered by the War Labor Board in the electrical equipment industry more than 35 years ago is still prevalent today. As part of its Title VII compliance program, IUE has negotiated many successful settlements of wage discrimination cases. The following is not all inclusive, but is intended to show that litigation by one union or the possibility of litigation in these cases has produced significant results.<sup>6</sup>

- Long before “comparable worth” became fashionable, in early 1970, IUE filed what we believe was the first sex-based wage discrimination lawsuit alleging, *inter alia*, wage structure bias at the Westinghouse Mansfield, Ohio, plant. The settlement in 1977 provided for increasing the rates for nine job classifications that had been restricted to women and for \$166,000 in backpay.<sup>7</sup>

- In 1973, IUE filed a national charge with EEOC (case no. TPI4-0569) that alleged wage structure bias as well as discrimination against women and minorities at more than 30 Westinghouse locations represented by IUE in initial assignment, hiring, promotion, transfer, training, upgrading, and seniority.<sup>8</sup> In 1975, IUE filed suit challenging the wages paid to female employees at four of these Westinghouse plants (Fairmont, W. Va.; Buffalo, N.Y.; Bloomfield, N.J.; and Trenton, N.J.).

<sup>5</sup> In *Re General Electric Co.*, 28 War Lab. Bd. R. 666, 681 (1945).

<sup>6</sup> This does *not* include the many changes negotiated at the local level, as part of the international union's Title VII compliance program.

<sup>7</sup> This settlement, like others discussed later, required the establishment of a job bidding and posting system for vacancies,

Following the filing of these lawsuits, Westinghouse, in a so-called “voluntary” affirmative action, increased the rates of large numbers of female jobs at its locations in Bloomfield, N.J., and Buffalo, N.Y.

The Trenton case, which is one of the leading “comparable worth” cases, is currently pending in the Supreme Court in IUE's and Westinghouse's petitions for *certiorari*. A decision is expected in late spring or early summer.

- The Westinghouse Fairmont case was settled by the IUE in return for the company's agreement to raise the labor grades of 13 job classifications a total of 22 labor grades, to pay backpay to the persons who occupied these jobs in the preceding 5 years, to expand job posting practices to include posting of all job vacancies, to establish new training opportunities for craft jobs traditionally filled by men, and other relief.

- More recently, the IUE local that represents employees at the White-Westinghouse plant in Edison, N.J., another plant formerly owned by Westinghouse, filed a grievance alleging that about 11 female assemblers at labor grade 1 should receive the same pay as labor grade 2 male assemblers who performed different work. The company agreed that an inequity existed and increased the rates for the women with backpay.

- In January 1972, IUE filed suit challenging pay practices at General Electric's Ft. Wayne, Indiana, plant under the Equal Pay Act. IUE obtained a settlement providing \$350,000 in backpay and \$1 million annually in future pay increases for about 2,000 employees who occupied traditionally female jobs classified below their actual value. Virtually all the female jobs in the plant were raised.

- In July 1973, IUE Local 739 filed wage discrimination grievances at a GE plant in Tiffin, Ohio. At that time, 84.6 percent of the female employees in the plant were concentrated in the four lowest labor grades, in contrast to only 12.1 percent of the male employees. After 8 months of negotiations, the company agreed, in accord with the principles established in the Ft. Wayne settlement, to eliminate entirely the two lowest wage levels, which were nearly all female, and to increase 29 other job

changes in the seniority system to provide greater opportunity for women and minorities, and other changes not directly related to wage inequities.

<sup>8</sup> EEOC has not investigated this still-pending charge. The Commission has, however, intervened or filed *amicus* briefs in several of the IUE v. Westinghouse lawsuits.

classifications. Altogether, 760 employees (55.9 percent of the total work force), most of them female, received wage increases of from one to four steps. (The union official who negotiated the settlement worked in the plant and did not use a professional job evaluator.)

- In 1972, IUE filed suit alleging discriminatory wage practices at General Electric's Cleveland, Ohio, wire plant. The complaint alleged that GE paid female wire drawers from 40 cents to 87 cents per hour less than males who performed related jobs. Shortly after the suit was filed, GE announced a "reorganization" of the wire drawing jobs, as a result of which employees in the three traditionally female wire drawing jobs received increases of either two or three steps. These increases did not, however, raise the women to the male rate; rather, the rates for some male jobs were reduced in an effort to decrease the disparities (with incumbent male employees being "red circled").

In 1978, on the eve of trial, GE agreed to a settlement that achieved equity between female and male wire drawers and permitted females to earn for the first time the highest rate historically paid to male wire drawers. The settlement also restored the reduced rates for the male jobs.<sup>9</sup> In addition to the increase in future rates, GE agreed to pay \$130,000 in backpay to 62 members of the IUE bargaining unit, including many male employees who had recently been employed on the "female" jobs.

- As a result of another IUE grievance, General Electric in 1976 agreed to permit a professional evaluation of the wages of traditionally female jobs at its Youngstown, Ohio, plant. After studying 29 different jobs for 25 days, the evaluator concluded that "there has been in the past and continued to be today, conclusive evidence of employment discrimination against female employees. . . ." He found at least 23 traditionally female jobs that were paid less than three traditionally male jobs, although the job content for the female jobs was greater when rated according to a standard job evaluation plan. In response to the evaluation and the local union's efforts, GE agreed to increase the rates for 21 jobs a total of 25 labor grades. Again, as in the Ft. Wayne GE settlement, this settlement was without prejudice to IUE's claim that it did not fully correct the

discrimination and that employees would be entitled to additional backpay under the IUE national charge against GE.<sup>10</sup>

### **3. The Prevalence Today of Sexually Segregated Job Patterns in the Electrical Equipment Manufacturing Industry**

Initial assignment discrimination, particularly for unskilled jobs, is at the heart of occupational segregation and wage discrimination, is relatively easy to prove, and is an essential part of the solution to the issue of wage discrimination. Discrimination in the initial assignment or placement of newly hired employees also constitutes an obvious and significant Title VII violation in its own right.

The discrimination is most evident in dealing with unskilled jobs, e.g., the initial assignment of newly hired females to assembly jobs and of newly hired males who apply at the same time to higher paid "common labor" jobs such as janitor, material handler, or floor sweeper. In making the original initial assignment, the employer delivers a not-so-subtle message—if a woman is assigned to a "female" job in an area occupied predominantly by women, it does not take long for her to learn that the boss prefers she stay in the area he placed her.

Women and minorities who are initially assigned to the least desirable and lowest paying jobs in a plant are kept in those jobs by promotion policies and/or social pressures that discourage women and minority workers from leaving those jobs.

The initial assignment and subsequent wage practices derive from a common set of biases about women and minority workers. The employer who assigns women, for example, only to assembly jobs because he believes they are not suited for heavier jobs also inevitably believes that the jobs performed by women are of less value than the "physical" jobs performed by men. Put another way, the same employer who believes that women should not be placed in jobs of importance and responsibility, because of the employer's conception of the role of women in our society or of the "innate" abilities of women, is almost certain to believe that the jobs women are permitted to perform have less value than the jobs performed by men.

<sup>9</sup> On behalf of other individuals, the Department of Labor settled the Equal Pay Act complaint on a substantially lesser basis. IUE believed the DOL settlement was inadequate and refused to agree.

<sup>10</sup> An IUE lawsuit alleging discriminatory wage rates, initial assignment, and promotion discrimination and other matters is also pending against GE at its Lynn, Mass., complex.

The following examples, taken from data supplied by employers to IUE, pursuant to its Title VII compliance program,<sup>11</sup> demonstrate that the War Labor Board's exposure of sexually segregated job patterns and wage discrimination had little impact on the subsequent hiring policies of employers in this industry.

- A common flagrant example of wage discrimination is the payment of female employees doing assembly and similar type jobs below the rates paid to males for unskilled common labor jobs. At one large company, 43.6 percent of female employees at IUE locations were paid below the unskilled common labor rate, while only 6.1 percent of the males were paid below the rate. At some facilities the figures were even more stark. (See table 1.) The data from which these figures were compiled also show that the average straight time hourly earnings for women were 75 cents an hour less than for men (\$4.22 vs. \$3.47).

- At another large multiplant electrical company in 1973, the comparison is even more revealing—76 percent of the female employees were employed at the common labor rate or below, while only 7 percent of the male employees were employed at the common labor rate or below. (The 1976 data show slight improvement.)

- As shown by table 2 Employer A employed 920 persons in a production and maintenance unit in Bloomfield, N.J., represented by IUE. In 1979, 458 of these employees were men and 462 were women, virtually a 50–50 split. Yet, 81.8 percent of the women are employed in jobs in the four lowest labor grades, while only 5 percent of the males are employed at the same low levels. (In the lowest 5 grades, 84 percent are women and 5 percent are men.)

- At another plant operated by Employer A in Trenton, New Jersey, in November 1975 there were 182 women (85.4 percent) and only 1 man (1 percent) working in labor grades 1 to 4. (See table 3.)

- Employer A also operates a plant in New York State that illustrates the persistence of segregated job patterns over time. In 1973 women comprised 23 percent of the work force, but occupied more than 97 percent of the jobs in the two lowest labor grades

(labor grades 2 and 3). Almost 70 percent of the women held jobs at labor grade 4 or below, the labor grade of janitors; in contrast, under 5 percent of the male employees held jobs at labor grade 4 or below. Nearly 90 percent of the women held jobs at labor grades 5 or below, while only 16 percent of the men held jobs at labor grade 5 or below.

In February 1978 the situation at this plant was still substantially the same. Jobs in this plant are divided into roughly 200 "occupations"; some occupations contain only one job description, while others contain a number of different jobs at different labor grades. Approximately 30 percent of the women were employed in some 15 occupations, each of which was almost entirely female; over 80 percent of these women held jobs at labor grade 4 or below (70 percent in 1973) and over 97 percent at or below labor grade 5 (90 percent in 1973). In contrast, approximately 70 percent of the men were employed in over 100 occupations, which were—and always have been—almost entirely male; 4 percent of these men held jobs at labor grade 5 or below (16 percent in 1973) and 0 percent at labor grade 4 or below (5 percent in 1973).

Even in the few sexually integrated occupations, women were, in February 1978, still relegated to the lower rated jobs. In the assembler occupation, for example, there were 49 women and 231 men. All but 4 of the women held jobs at labor grade 5 or below (92 percent), whereas only 4 of the men held jobs at labor grade 5 or below (1.7 percent). Similarly, in the stator winder occupation, 22 of the 25 men held labor grade 8 jobs, while none of the 70 women held jobs at that rate. Conversely, 65 of these women held jobs at labor grades 5 and 6, while only 2 of the men were at that level.

- Employer B is a nationwide company that has long been a leader in the manufacture of radios, televisions, and more sophisticated communications equipment. It operates a major manufacturing facility in New Jersey, which in 1978 employed 1,035 males and 224 females in the production and maintenance unit. (See table 4.) Ninety-seven women (43.3 percent) worked in the lowest rated jobs in the plant (labor grade 1), while only 18 men (1.7 percent) worked at labor grade 1. At the same plant, 151 of

<sup>11</sup> The data furnished to IUE do not ordinarily distinguish between skilled craft jobs and semiskilled or nonskilled jobs in the bargaining unit. Our data may, therefore, overstate slightly the extent of segregation that results solely from sex or race. In

general, however, no prior skills are required for entry-level jobs and most of the other jobs in IUE bargaining units and other industrial units require only the skills learned on the job.

**TABLE 1**

<u>Location</u>	<u>Females paid below common labor rate</u>	<u>Males paid below common labor rate</u>
Syracuse, N.Y.	75.4%	4.4%
Youngstown, Ohio	89.2	10.8
Bucyrus, Ohio	87.0	4.8
Newark, Ohio	90.2	9.2

**TABLE 2**  
**Bloomfield, N.J.—1979**

<u>Labor Grade</u>	<u>Males</u>		<u>Females</u>	
2	2	} (5.2%)	10	} (83.5%)
3	9		217	
4	7		96	
5	4		55	
6	2		8	
7	0		1	
8	7		10	
9	33		41	
10	57	} (73.6%)	23	} (0.0%)
11	36		0	
12	39		1	
13	203		0	
14	47		0	
Sp	12		0	
	<u>458</u>		<u>462</u>	

**TABLE 3**  
**Trenton, N.J.—1975**

Labor Grade	Males		Females	
1	0	] (1.3%)	6	] (85.4%)
2	0		33	
3	1		125	
4	0		18	
5	21		16	
6	4		14	
7	3		0	
8	2		0	
9	3		1	
10	4		0	
11	0		0	
12	19	] (50%)	0	] (0.0%)
13	19		0	
	<u>76</u>		<u>213</u>	

the women (67.4 percent) worked in labor grades 1-6, as compared to only 90 men (8.7 percent).

Forty-three of 165 blacks (26.1 percent) and 5 of 16 Hispanics (31.3 percent) worked in the labor grade 1 jobs, contrasted with an overall figure of 9 percent in labor grade 1. Seventy-one blacks (43.0 percent) and 12 Hispanics (75 percent) worked in grades 1-6, contrasted with an overall percentage of 19 percent of the employees in labor grades 1-6.

- Employer C is located in Tennessee. As of January 4, 1980, 788 of the female employees in this plant (86 percent) were employed in labor grades 1-3, as compared to 165 men (28.3 percent). In contrast, 418 men (71.7 percent) were employed in labor grades 4-11, as compared to 130 women (14.2 percent). (See table 5.)

- Employer D is one of this Nation's largest and best known companies. At one facility, in Warren, Ohio, 219 (38.4 percent) of the female employees during the period 1977-1978 were paid less than \$5 an hour, in contrast to 15 (14.2 percent) of the men. At another facility in Massachusetts during the same period, 167 (58.2 percent) of the women received \$5.50 an hour or less, while only 14 (12.8 percent) of the men received \$5.50 an hour or less.

- Segregated job patterns are the result of discriminatory initial assignment practices by employers. For example, an analysis of initial assignment data furnished to IUE by Employer D in March 1976 showed that in December 1975 the median labor grade assignment of new hires at the employer's facility in Vermont was R-12 for men and R-7 for women. In one of the employer's Ohio plants, it was R-14 for men and R-9 for women. In another facility in Massachusetts, it was R-10 for men and R-5 for women. Our data show that this pattern applied to almost all facilities of this company. An earlier study showed that, between January and September 1972, 91 percent of the women hired at the company's Indiana plant were assigned to grades 8-10, while 88 percent of the men hired were assigned initially to grades 13 and 14. Grades 13 and 14 included the janitor, material handler, and other unskilled common labor jobs.

- An analysis conducted as part of the IUE-initiated action in Federal court of new hire data for a plant operated by Employer A in New York showed that in 1973 and 1974, the last period prior to late 1979 when hiring took place, a total of 336 females was hired, 59.5 percent of whom were assigned to the two lowest labor grades in the plant

and 84.5 percent of whom were assigned to the lowest three grades. At the same time, 975 men were hired, only 0.4 percent of whom were assigned to the two lowest labor grades and 13.5 percent to the three lowest.

- In another plant of Employer A in New Jersey, an analysis of data showed that in a 3-month period a total of 28 females was hired, 100 percent of whom were assigned to the two lowest labor grades in the plant. At the same time, 109 men were hired, none of whom was assigned to the lowest labor grades and only 4 percent of whom were assigned to the third lowest grade.

- Data provided to an IUE local by Company E, located in Arkansas, showed that in a 5-month period 92 females and 57 males were hired. Of these, 90 of the females (97.8 percent) were hired into jobs in grades 7-9, the lowest paying jobs in the plant, while only 14 of the males (24.6 percent) were assigned to these same 3 lowest labor grades. Forty-three of the 57 males were hired into labor grades 5 and 6 (75 percent), while only 2 females were hired into labor grade 6 jobs (2 percent).

- Finally, to demonstrate what can happen when a union merely requests race and sex information, it is interesting to note that data supplied by Employer A with regard to one of its plants in Muncie, Indiana, in 1973 showed no women employed at this location, which had a force of 1,183 men. The employer's obligation to supply the information to IUE obviously had a very therapeutic effect. Information supplied by the company in 1976 showed that the company discovered that females did indeed live in the city of Muncie, and it hired 67 of them. However, despite the pendency of an EEOC charge, the employer followed its standard initial assignment discrimination pattern and placed 94 percent of the newly hired females in the four lowest labor grades, as contrasted with about 15 percent of the newly hired male employees who were assigned to these grades.

#### **4. The Obstacles, Legal and Nonlegal, Unions Encounter in Negotiating and Implementing Affirmative Action Plans**

##### **Employer Refusal to Give Information**

Factfinding is the essential first step to meaningful negotiation concerning equal employment opportunity. Many employers have voluntarily supplied the information requested by IUE, detailed above, con-

**TABLE 4**  
**New Jersey—1978**

Labor Grade	Males	Females	Blacks	Hispanics
1	18 (1.7%)	97 (43.3%)	43 (26.1%)	5 (31.3%)
2	1	0		
5	51 (8.7%)	16 (67.4%)		
6	20	38		
7	35	1		
8	44	1		
9	38	2		
10	25	1		
11	28	44		
12	21	4		
13	12	0		
14	19	13		
15	49	1		
16	77	5		
17	4	0		
18	26	0		
21	32	0		
22	241	0		
23	42	0		
24	30	0		
26	140	1		
28	82	0		
	<u>1,035</u>	<u>224</u>	<u>165</u>	<u>16</u>

**TABLE 5**  
**Tennessee—1980**

<u>Labor Grade</u>		<u>Males</u>		<u>Females</u>	
1	92	(28.3%)	}	436	(86%)
2	63			324	
3	10			28	
4	91	(71.7%)	}	89	(14.2%)
5	135			19	
6	53			18	
7	26			0	
8	29			4	
9	1			0	
10	80		0		
11	3		0		
	<u>583</u>			<u>918</u>	

cerning the racial and sexual composition of the work force, AAPs and work force analyses, and outstanding EEO charges and complaints. Unfortunately, many other employers believe that a union has no role in the EEO area and have refused voluntarily to furnish IUE with this data. In these situations, as described above, IUE has been forced to file refusal-to-bargain charges with the NLRB for failure to furnish the requested information. Although the filing of unfair labor practice charges has usually resulted in the employer's furnishing the information, recalcitrant employers have forced full litigation, which has resulted in the landmark "right to EEO information" cases discussed previously.

### **Employer Attitude Toward Union Filing of EEO Charges**

If after we have all necessary race and sex information, employers are unwilling to agree to correct the discrimination by changing contract language or plant practices to assure compliance with Title VII and other EEO laws, the IUE has filed Title VII and State FEP charges and lawsuits. However, in many instances employers have cried foul when the IUE has filed EEO charges *after* signing a collective-bargaining agreement when the IUE was unsuccessful in negotiating nondiscriminatory contract language or a change in discriminatory practices.

But unions regularly file charges before the NLRB, the Occupational Safety and Health Administration, and other governmental agencies when the union believes the employer has insisted on maintaining practices that violate the law. Such litigation is part and parcel of the collective-bargaining process, e.g., litigation to compel compliance with the Employee Retirement Income Security Act or the Occupational Safety and Health Act is obviously part of the collective-bargaining process. The collective-bargaining process includes the right to obtain race and sex data, the right to file charges with appropriate governmental agencies, and the right to bring lawsuits to effectuate the rights of members.

Indeed, the NLRB in *Westinghouse Electric Corporation* stated:

<sup>12</sup> See, e.g., *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D. N.Y. 1973); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D. N.Y. 1976); *IUE v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976); *IUE v. Westinghouse Electric Corp.*, 17 FEP Cases 16 (N.D. W.Va. 1977).

The collective-bargaining process is continuous. It does not end once a contract is signed, or when arbitration is utilized, or when a charge is filed with the Board, or when a lawsuit is instituted. IUE General Counsel Newman testified that, with respect to the Union's responsibility to eliminate discrimination, "We felt that it was better to go through collective-bargaining machinery than through [the] EEOC and the Courts." but that, if no agreement was reached about these matters, the Union "reserve[d] the right to use other forums to take care of the discrimination problem." (99 LRRM 1482, at 1488-1489)

### **Employer's Right to Contribution**

In every major case filed by IUE, the employer has counterclaimed for contribution.<sup>12</sup> IUE has successfully resisted these claims on both factual and legal grounds.<sup>13</sup>

Creation of an employer's right to contribution would hamper union efforts to enforce or support the enforcement of fair employment laws in three significant ways. First, if charges of litigation filed by or with the assistance of a union can lead to greater liability for that union, unions will necessarily be discouraged from undertaking such efforts. The result will be that many discriminatory employment policies and practices will remain uncorrected and unredressed.

Second, a claim for contribution provides a tactical weapon that employers regularly use to hamper fair employment litigation initiated by unions. The mere assertion of a claim for contribution against the union has been held to create a conflict of interest that prevents union counsel from also representing the aggrieved employees, thus forcing the employees to retain independent counsel, causing substantial delay in the litigation, and in some cases restricting cooperative efforts between union counsel and independent counsel. Thus, a right of contribution undercuts a major value of union Title VII enforcement—the provision of paid counsel to represent the aggrieved employees in the litigation.

Third, recognition of a right of contribution would undercut union support of Title VII actions brought against employers by individual or government plaintiffs. The EEOC, for example, regularly joins unions as defendants in Title VII actions under rule 19(a) where the unions were not named in the

<sup>13</sup> The question of an employer's right to contribution from a union is an issue that is currently pending before the Supreme Court in *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, and *Air Line Pilots Association, International No. 79-1056*.

underlying charge of discrimination. In such cases, if we determine the lawsuit has merit, IUE regularly lends its support to the EEOC by moving to realign as a plaintiff<sup>14</sup> or, where realignment is not allowed, by filing crossclaims of discrimination against the employer.<sup>15</sup> Similarly, IUE often supports the efforts of individual employees by moving to intervene as a plaintiff in private Title VII actions.<sup>16</sup> If an employer were permitted to obtain contribution against the union, the union would necessarily be encouraged to aid in the defense of the action, not in its prosecution.

### Governmental Attitudes Towards Unions

Unfortunately, until fairly recently, when EEOC adopted at IUE urging its "Resolution on Title VII and Collective Bargaining," designed to encourage unions to engage in affirmative action, the EEOC had taken a quite negative attitude as to the role of unions in implementing Title VII. It had consistently refused to recognize efforts of unions to eradicate race and sex discrimination by encouraging and/or insisting that an individual who wanted to name the employer alone as a respondent should also name the union and by forcing unions to defend actions brought by EEOC after the unions had made strenuous good-faith efforts to eliminate discrimination.

In *Northwest Airlines*, at the court of appeals level, the EEOC took the position as *amicus curiae* that, as a general proposition, an employer who is found guilty of violating Title VII may seek contribution from a union even though the union was not named by the charging party in the EEOC charge or in the lawsuit that established the employer's liability. We were pleased that after the issuance of its "Resolution on Title VII and Collective Bargaining" under the leadership of former Chair Norton and Vice Chair Leach, referred to previously, EEOC reversed its position before the Supreme Court and urged that contribution against unions should not be permitted under Title VII because, among other things, contribution would discourage unions from enforcing Title VII.

EEOC field staff has repeatedly followed a policy of assuming that unions are equally responsible with the employer in all instances in which there is a

charge against an employer, even when the union has admittedly condemned the employer practices as unlawful and made efforts both at the bargaining table and through EEOC charges and court proceedings to correct such practices. This attitude by EEOC field staff, as stated, often results in a policy of requesting all persons who file charges against an employer also to name the union as a charged respondent. We have encountered repeated reports of incidents arising in different parts of the country in which employees who went to EEOC offices to file charges against an employer were told the charge would be no good unless they also named the union. Numerous employees have reported to us instances of insistence by EEOC staff on naming the union even after the employee said he or she did not want to charge the union and even in one instance in which the employee insisted the union had always fully supported him.

Similarly, the mere mention in a charge of a collective-bargaining agreement, either with or without mention of the name of the union party to the collective-bargaining agreement, has been often treated by EEOC staff as a charge against the union, even though in form the charge was only against the employer.

When unions have moved to be realigned as plaintiffs, EEOC has often filed an opposition to the union motion. The IUE was gratified that the EEOC resolved in its collective-bargaining resolution to modify its own administrative and litigation practices in cases where unions are involved in order to encourage greater enforcement efforts by unions. The EEOC action recognized the important contribution that unions such as IUE can make to the implementation of the Federal fair employment laws. Nonetheless, despite the strong positions of former Chair Norton and Vice Chair Leach on this issue, EEOC needs to develop and publicize its collective-bargaining policy and to require its full implementation by its field staff in order to encourage unions to initiate actions to correct discrimination in the workplace.

EEOC was by no means alone in being slow to recognize the positive role that unions can play in EEO enforcement. The Department of Labor for years provided for little or no union input in the

<sup>14</sup> E.g., *EEOC v. Chrysler Corp.*, 8 FEP Cases 343 (S.D. Ohio 1974).

<sup>15</sup> *EEOC v. Chrysler Corp.*, —F.2d— (6th Cir. 1980); *cert. denied*, —U.S.— (1980), DLR 12-1-80.

<sup>16</sup> E.g., *Henry v. Westinghouse Electric Corp.*, 13 FEP Cases 799 (S.D. Ind. 1976); *Guy v. Robbins and Myers, Inc.*, 525 F.2d 124, 126 (6th Cir. 1975), *aff'd sub nom. IUE v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976).

contract compliance process. Again, the IUE spearheaded a movement to provide for more union involvement in the compliance process, with the active support of the AFL-CIO, CLUW, UAW, and Steelworkers, which involved speeches, presentations, and comments to DOL officials. Under the leadership of Assistant Secretary Elisburg and OFCCP Director Rougeau, these suggestions led to the promulgation of new OFCCP regulations in the closing days of the last administration that:

1. Give unions the opportunity to participate in conciliation discussions to the extent those discussions relate to any proposed changes in the collective-bargaining agreement or the terms and conditions of employment covered by the agreement between OFCCP and the contractor relating to such matters;
2. Provide that OFCCP will give written notice to the union of any onsite investigation of compliance with the Executive order at the same time the contractor is notified;
3. Instruct contractors to inform unions and other workers' representatives of items disclosed in the compliance review that require changes in a collective-bargaining agreement and initially to seek a resolution with the union.<sup>17</sup>

The IUE comments, which were joined by the labor organizations mentioned above, urged DOL to provide for more union involvement in the compliance process so that unions can offer their expertise, information, and suggestions as to how equal employment opportunity could be maximized by using approaches consistent with trade union principles and without adversely affecting the union's collective-bargaining agreement. (See attachment 4.)

In this regard, unfortunately, government agencies have, in general, refused to accept union alternative means of achieving compliance with equal employment requirements, which are equal to or better than government proposals, but which are less disruptive to the collective-bargaining agreement and are consistent with trade union principles. *"Goals" are not the only way.* Government agencies have demonstrated an unwillingness or inability to understand that, in some circumstances, the application of standard collective-bargaining techniques, adjusted to correct for past discrimination, will often accomplish greater equal employment opportunity than the establishment of goals. This will be true,

<sup>17</sup> Unfortunately, these regulations have been "frozen" by the Reagan administration along with many other regulations pending further review.

where, as in the electrical equipment industry, the protected class has been employed, but relegated to low-pay segregated jobs. In such cases, the application of plantwide seniority with a good job posting and job bidding system will frequently result in the protected class jumping over the higher paid but junior males.

Frequently, workers are reluctant to accept "preferential treatment" and risk the opprobrium of fellow workers. However, where a union is supportive of EEO enforcement efforts, a large number of the protected class will be willing to exercise true seniority rights to jump over junior but higher graded males.

To illustrate the problem, in May 1978, GE and EEOC reached a settlement of former Commissioner Brown's national EEOC charge against GE by a vote of 2-1. IUE, together with a large number of other unions who bargain with GE, including IAM, IBEW, Plumbers, Sheet Metal Workers, Steelworkers, Allied Industrial Workers, UAW, Firemen and Oilers, Professional and Technical Engineers, and Glass Workers, opposed the settlement.

Basically, the unions argued that the GE-EEOC settlement proposal should be rejected as it would fail to terminate and redress race and sex discrimination in hiring, initial assignments, and promotions. It would provide benefits to persons who were not victims of discrimination and would fail to provide relief to those who were. The unions also argued that it would also leave important areas of discrimination untouched, while at the same time providing GE with immunity from Title VII liability.

In addition, IUE delivered data which showed that the application of plantwide seniority would result in promotional opportunities for women far in excess of the goals established by the settlement agreement, e.g., at one GE plant in Cranston, R.I., the union demonstrated that of the first 20 vacancies which came open above the level of the "female jobs" and below the level of the craft jobs, virtually all would be assigned to women, if plantwide seniority were controlling. (See attachment 5.) Because the union's proposed remedy was consistent with trade union principles concerning seniority, all the unions, including those not usually in the forefront in EEO, were fully supportive of a solution that also maximized EEO.

Thereafter, in May of 1978, IUE Local 201, which represents over 10,000 employees, filed a Title VII lawsuit in Boston in an effort to secure the relief the unions proposed to EEOC in connection with the GE national charge settlement effort. In defense, GE relies on the EEOC settlement. The IUE lawsuit is pending.

### **5. How Government Civil Rights Agencies Can Become More Effective in Implementing Equal Employment Opportunity by Recognizing and Encouraging the Efforts of Unions Which Actively Seek to Correct Discrimination**

As stated previously, through their knowledge of plant practices, often dating back many years, and their right of access to pertinent information from the employers, unions are in an excellent position to identify discriminatory practices by employers, which may otherwise have gone unrecognized by the affected employees. They are also able to inform affected workers about their rights and to assist them in bringing their complaints before the proper authorities. Moreover, as a number of courts have recognized, through their ability to offer financial resources, knowledge of the plant, expertise, and the moral support of their members, unions can contribute immeasurably to the effectiveness of fair employment litigation.<sup>18</sup>

We commend the recent efforts of EEOC and DOL to take advantage of such union resources and to encourage unions to take a more affirmative role in correcting discriminatory practices. However, we are concerned that these salutary policies be continued and vigorously implemented so that they will not end up as mere lipservice to union involvement in EEOC compliance efforts.

Accordingly, because we believe that the cooperation of unions with civil rights agencies in eradicating discrimination in employment is essential if the objectives of Title VII are to be fully realized, we respectfully suggest the following ways to encourage unions to take strong action to achieve Title VII compliance and affirmative action:

1. Both EEOC and DOL need to educate and train their field staff to cooperate with unions by seeking valuable information the union might have and not automatically making the union a

respondent, irrespective of the union's complete lack of responsibility for the discrimination or the charging party's refusal to name the union as a charging party.

2. EEOC should take advantage of its "Resolution on Title VII and Collective Bargaining" by encouraging unions to get information, analyze data, bargain with employers, file EEO charges, etc., with the full knowledge that if a union makes a genuine good-faith effort to correct discrimination it will not be worse off than it was before in terms of exposure to liability. (IUE experience shows that where there are no prior complaints from employees, IUE activity asking the employer to correct discrimination frequently wakes people up and causes complaints to be filed against the employer and the unions.)

3. The government should support the realignment efforts by unions seeking to become plaintiffs to assist in correcting discrimination.

4. To the extent possible, the government should look for solutions that do not upset the collective-bargaining agreement or that seek to achieve EEO changes in ways consistent with the concept of collective bargaining and the National Labor Relations Act. For example, unions will generally not oppose remedies based on broader seniority and these remedies, as shown above, often can result in greater equal employment opportunity than goals and timetables, particularly in plants that have traditionally employed females and minorities and relegated them to low-paying jobs.

5. The Reagan administration should "thaw" and implement the now "frozen" OFCCP regulations calling for full union involvement in the compliance process. How sad it would be if, after all the effort that the Department of Labor, EEOC, and the various unions put into securing a significant union role in EEO enforcement, this positive policy should be dropped by the stroke of a pen.

Finally, the United States Civil Rights Commission can contribute greatly to this issue by incorporating in its final statement on *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, strong language concerning the positive role that unions can and have played in the design, implementation, evaluation, and monitoring of affirmative

<sup>18</sup> See *International Woodworkers of America v. Georgia-Pacific*, 568 F.2d 64, 67 (8th Cir. 1977); *Local 194 v. Standard*

*Brands, Inc.*, 540 F.2d 864,866 (7th Cir. 1976); *IUE v. Westinghouse Electric Corp.*, 73 F.R.D. 57, 59 (W.D.N.Y. 1976).

action plans in employment and exhorting other governmental civil rights agencies to take full advantage and to recognize and support the efforts of those unions that actively seek to eliminate discrimination in the workplace.

### **Conclusion**

IUE stands fully ready to give the Commission and other governmental agencies entrusted with

responsibility in the equal employment opportunity area any and all assistance necessary to facilitate governmental understanding of the important contribution that unions can make to the enforcement of fair employment laws and to encourage greater enforcement efforts by unions.

## **EEOC Could Improve Administration of Title VII by Encouraging Affirmative Role of Unions in Correcting Discriminatory Practices by Employers**

**Statement of Paul Jennings, President, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, November 8, 1974**

The IUE, during the past 2 years, has devoted substantial manpower and financial resources to a program of correcting employer practices which violate Title VII. The two dozen cases in which it has been a party on behalf of the plaintiffs, the six cases in which it filed amicus briefs on behalf of the plaintiffs, and the more than 500 charges filed with EEOC and State FEP agencies represent only the instances in which its efforts through the usual collective bargaining processes have been unsuccessful. Even on such controversial issues as disability benefits for childbirth, where IUE has pioneered with the favorable decision against General Electric in the district court, it has negotiated more than 40 collective bargaining agreements under which such benefits are today being paid in full compliance with EEOC guidelines.

IUE's program has involved a systematic review of the number and status of minority members and females at each plant where IUE is the bargaining agent. It has involved an educational program for both IUE staff and membership and a followup *action* program.

### **IUE Title VII Compliance Program**

Following the issuance of the Commission's revised sex guidelines and court decisions superseding protective laws, IUE determined that it must reexamine *all* contracts and plant practices covering its local unions. (Prior to issuance of the revised guidelines, IUE had filed lawsuits against employers in the Federal district courts attacking protective laws, wage rate, hiring, layoff, and pregnancy-related discrimination and pension plans.)

In March 1973, the IUE Executive Board implemented earlier convention policy. The policy, which was communicated by letter from the international president to all local unions and was published in the

*IUE News*, called upon all local unions to examine their agreements and the practices within the plants to determine whether specific kinds of discrimination existed. Local unions were asked to fill out questionnaires relating to segregation of jobs, discrimination in wage rates, discriminatory assignment and promotion policies, pension plans, pregnancy-related discrimination, and other matters. (Correspondence including the questionnaire (Guidelist) is attached as attachment A.)

Thereafter, because many of our local unions were unable to supply detailed data, we requested precise data from employers relating to their hiring policies, wage rates, segregation of jobs, and promotion policies. (Copy of a typical information letter to employers is attached as attachment B.) We also have involved our district presidents and international field staff in following up with locals who for various reasons did not comply with our request.

We have also requested from employers a copy of all charges or complaints filed against the employer alone under the Equal Pay Act, Title VII, Executive Order 11246, and State fair employment practice laws, and information on the status of the charges. We made this request to become involved in complaints even where the union was not named as a respondent because we are determined to do everything we can to remove once and for all all discriminatory practices in the plants we represent.

Where the union concluded that discrimination existed, we have requested bargaining with the employer either at the end of the contract or midterm in the agreement. To the extent that employers were refusing to bargain over the elimination of what the union believed to be illegal provisions in the contract or practices and to the extent that employers refuse to supply such information, we have filed charges with the National Labor

Relations Board alleging a violation of section 8(a)(5) of that act, which required employers to bargain in good faith. Many of these NLRB charges brought about the requested bargaining or information and the charges were then withdrawn. Where the employers did not comply, these charges are now pending before the Board.

The IUE has followed up these demands by filing charges under Title VII and suits under Title VII and the Equal Pay Act, including the largest class action lawsuits filed by any private organization against an employer. For example, we have filed class actions on pregnancy-related issues on behalf of all female employees of General Electric, General Motors, and Westinghouse. We have filed a national charge with EEOC against each General Electric, involving 128 different locations, and Westinghouse, involving 42 locations, represented by IUE alleging discrimination in hiring policies, wage rates, promotion policies, training, and segregation of jobs.

In addition to the pregnancy-related lawsuit against GE, IUE has filed five other lawsuits against GE, three under Title VII and two under the Equal Pay Act. The first filed under the Equal Pay Act, a suit involving the GE plant at Fort Wayne, Indiana, was settled for \$300,000 back pay and annual increases in excess of a million dollars. The first of the Title VII suits against GE involved hiring practices at the Tyler, Texas, plant and was settled with full back pay and full prehire seniority for all plaintiffs. The other GE suits are still pending.

We have also filed three lawsuits now pending against Westinghouse involving plants located at Mansfield, Ohio, Buffalo, N.Y., Fairmont, W.Va., Trenton and Bloomfield, N.J. These allege violations at every level of the employment relationship, e.g., hiring and promotion policies, wage rate discrimination, segregation of jobs, training, etc. We believe that when a union embarks on such a course of conduct, it has fully demonstrated its desire to correct discrimination wherever it finds it and that it is entitled to be given an opportunity to do so.

The IUE program has encountered many problems. A number of these problems are due to present policies and practices of the EEOC which seem to reflect a basic failure of the members and staff of the EEOC to understand how labor unions function and the crucial importance to EEOC of utilizing to the fullest extent possible all the union cooperation and assistance which is available.

## Charges

Any effective program of cooperation between EEOC and unions requires that unions be promptly informed of the contents of charges filed against them, against employers with respect to employees represented by the union, and that unions and their members be free to file charges bringing violations to the attention of the EEOC without thereby automatically making the union a respondent irrespective of the union's complete lack of responsibility for the discrimination.

### *Providing Union Promptly with Copy of Charge*

Where a union is engaged in an honest and dedicated effort to establish equal opportunity for minorities and females, as is the IUE, there is obviously everything to be gained and nothing to be lost by providing the union with a copy of each charge filed against it, immediately upon the filing of the charge. It is the IUE's policy that even where the charge is groundless, if there is anything that can reasonably be done to make the charging party satisfied, the IUE will do it. In several instances there has been delay in the learning of the charge and hence an unnecessary delay in rectifying the situation, which, as is usually true, only becomes exacerbated by the delay.

In most instances, charges against the union also call for action by the union involving the employer, as pressing a grievance which the union is accused of failing to file or process properly or changing collective bargaining arrangements such as seniority, bumping, layoff, posting, or maternity leave policies.

With respect to grievances, delay in serving often defeats effective action by the union, for necessary evidence is unavailable at a later date which might have been available earlier, or problems of periods of limitation on the filing and processing of grievances or the invocation of arbitration are needlessly created solely due to the late date at which the union learned of the problem. We can think of no way in which the ultimate goal of a satisfactory resolution of charges over failure of adequate representation by the union can be helped by a delay in informing the union of the name of the charging party and the contents of the charge.

This is certainly true with respect to practices which require changes in the collective bargaining agreement. The earlier the union begins educating its members to the necessity of supporting this effort to get the employer to make the necessary change and

the earlier negotiations are opened with the employer to effectuate the change, the sooner minorities and females will be able to benefit from the rights to which Title VII entitles them. Even where conciliation seems unlikely, failure to serve the charges on the union not only has the effect of delaying the ultimate institution of legal proceedings but may result in the loss of evidence that would help support the case against the employer, which could have been collected, and preserved had the union known of the charge earlier.

Whether the charge is against only the union, both the employer and the union, or only the employer, providing the union that represents the affected unit of employees with a copy of the charge may save the EEOC all sorts of unnecessary investigation where the union is genuinely pursuing the same objectives as the EEOC. In many instances, the union will already have been in possession of the relevant facts and be able to move at once with the employer to try to rectify the violation. Where the union does not have all the facts needed for the investigation, the union may have the kind of access to and cooperation from individuals who can supply the necessary facts which can save the EEOC all sorts of time when and as it gets around to investigating.

Charges against locals should be made immediately available to the international union as well as the local. The IUE has many small locals which do not fully appreciate the meaning and importance of Title VII, despite the many years during which IUE has attempted through its publications and meetings to educate all portions of the union on Title VII. Some locals are so small and made up of such poor people that the local cannot afford to send any delegates to conventions and meetings, and they fail to understand the correct meaning of typed or printed communications about Title VII. Similarly, some locals rarely have any personal contact with representatives of the international. The local and a small employer get along together in their own way, with the local in name a part of the IUE but actually operating quite autonomously. Certainly, if such a local has violated Title VII, the quickest and most effective way to correct the situation is for the international to know at the earliest possible time what the local has done, so it can be in a position to advise the local of the full implications and meaning of what it has done *and* what must be done to achieve compliance with Title VII.

All internationals should be informed fully of charges against their locals so that the international can advise the local and, if the local has been at fault, bring the influence of the international to bear on the local in order to secure compliance.

#### *Present EEOC Procedures Respecting Service of Notice of Charges Are Inadequate*

Under present EEOC procedures the union receives nothing but a notice that a charge has been filed. The notice does not inform the union of the nature of the charge, except merely whether it pertains to race, sex, religion, or national origin and the general category within which the charge falls. When the IUE receives a "Notice of Charge of Employment Discrimination," it has immediately written the regional director of the EEOC acknowledging receipt of the notice, pointing out that the notice did not comply with the requirements of Section 706(b) because it failed to advise us of the "circumstances of the alleged unlawful employment practices," and requesting that IUE be furnished with either a copy of the charge or a statement of the "circumstances of the alleged unlawful employment practices." We regularly wrote:

This union has had an affirmative policy of correcting race and sex discrimination wherever it exists and has filed charges to do so in a number of cases. We are anxious to do everything we can to learn the facts and circumstances in this matter so that we may correct any discrimination which may exist. We would appreciate your supplying this information, by mail or telephone, as soon as possible.

The district directors appear to have a form reply for such requests. We have regularly received by way of response a letter stating that the Commission's procedural regulations require service of the charge only at the time the Commission is prepared to initiate the onsite investigation of the charge, which may be several months hence because of the Commission's tremendous backlog of charges "and that no action on your part is required at this time." On several occasions we replied that we did not believe the Commission was complying with section 706(b) of the act in that "we do not believe that the Notice of Charge Form does advise the Respondent of the circumstances of the alleged unlawful employment practices."

We replied and renewed our request stating:

As stated in our April 28 letter, this organization has an affirmative policy of correcting race and sex discrimination wherever it exists and we, therefore, want to investi-

gate immediately any charge of discrimination and take corrective and other affirmative action if the circumstances warrant. Your reply indicates, however, a desire that we wait for the Commission to initiate its investigation and that we take no investigative or remedial action. In view of the Commission's present backlog, I assume this means waiting for a year or so, during which time the alleged discrimination would continue. We are not interested in perpetuating discrimination and we hope the Commission will join with us in helping to eradicate it as soon as possible.

The requirement that the respondent be advised of the circumstances of the violation first appeared in the 1972 amendments to the act and was intended to correct the Commission's failure to supply a copy of the charge under the original act. But the Commission now provides less information than it earlier determined it would provide, in at least some cases. For example, we understand that in August 1966, the Commission determined to send out interrogatories to respondents even before it commenced its formal investigation of the charges, in certain types of sex discrimination cases, and to invite the respondent to submit a reply or make an offer of settlement. We submit that charging parties are entitled to relief if a respondent is prepared to grant such relief, and that the Commission should not insist on perpetuating the discrimination until such time as it reaches the backlogged case. Moreover, if, as a result of the union's receipt of a copy of the charges, the union can secure reinstatement or promotion for the discriminatee but without back pay or other forms of relief to which the Commission believes the discriminatee is entitled, the Commission need not enter into the settlement and may pursue additional remedies.

#### *EEOC Appears to Have a Policy of Charging Unions Irrespective of Culpability*

Increasingly, it has come to our attention that EEOC seems to be following a policy of assuming that all unions are equally responsible with the employer in all instances in which there is a charge against an employer. In conversations with members of the EEOC staff, we encounter outright assertions that unions should be held for anything the employer does, even though the union has admittedly condemned the employer practices as unlawful and made efforts both at the bargaining table and through the EEOC charges and court proceedings to correct such practices. We have even been told by members of the EEOC staff that the EEOC has

no way of knowing whether the unions' bargaining efforts were genuine and not mere window dressing, that, therefore, the union should always be charged, that the EEOC should always find reasonable cause no matter what the facts, leaving to the court any resolution on the basis of evidence of the union's actual involvement in any discrimination.

This attitude by EEOC seems to have culminated in a policy of requesting all persons who file charges against an employer to also name the union as a charged respondent. We have encountered repeated reports of incidents arising in different parts of the country in which employees who went to EEOC offices to file charges against an employer were told the charge would be no good unless they also named the union. Numerous employees have reported to us instances of insistence by EEOC staff on naming the union even after the employee said he did not want to charge the union and even in one instance in which the employee insisted the union had always fully supported him. EEOC should take appropriate steps to instruct its staff that no person should ever be asked to name a union unless that person believed the union was responsible for the unlawful employment practice charged.

#### *EEOC Should Not Treat Charge Against Local As Charge Against International or Vice Versa*

The EEOC and its staff repeatedly assume that an international and its locals may be treated as one as far as charges are concerned. Both legally and realistically, most international unions are distinct and separate from their locals. Thirty eight percent of IUE locals have fewer than 100 members and in most cases have a monthly income of \$200 or less. The officers work in the plant and do their union business in their off-duty time on a voluntary no-pay basis. These union officers often have difficulty in understanding the complexities of law, particularly where new decisions are daily affecting the application of the law. Employers of 100 employees are far better equipped to handle the issues. As mentioned above, when aware that a local has been charged the IUE will act vigorously to assure compliance by a local. But until the international has been notified of a violation by a local, there is no basis in law or commonsense to assume that the international is liable for everything the local is liable for or vice versa.

While we are as anxious as EEOC that no unnecessary technicalities be added to the already

overly technical statutory framework under which EEOC operates, it does seem to us that it is an absolute requirement that if a local is named in the charge, only the local be regarded as the charged party. If it later appears that the international should have been named, the charge should be amended or a new charge filed naming the international.

*The Mere Mention in a Charge of a Collective Bargaining Agreement with a Union Should Not be Treated by EEOC as a Charge Against the Union*

Members of the staff of EEOC have expressed the view that the mere mention in a charge of a collective bargaining agreement, either with or without mention of the name of the union party to the collective bargaining agreement, constituted a charge against the union which, in fact, was a party to the agreement, even though in form the charge was only against the employer. This view is obviously based on a complete misunderstanding of the orderly processes which require that, both as a matter of fairness and of law, only the persons named in the charge as charged persons are to be treated as charged persons.

The EEOC should act vigorously to inform its staff of the reasons for having charge forms showing who is named as a charged party and the reasons why it is completely wrong to treat as a charged party anyone not named formally as a charged party. This is but a symptom of the complete abandonment of all semblance of fair and orderly procedure which characterizes even some lawyers on the EEOC staff.

**Union Liability**

The cooperation of unions with EEOC in eradicating discrimination in employment is essential if the objectives of Title VII are going to be realized. The short-term advantages are obvious: employer practices may be proved with the cooperation of the union which would be difficult or impossible to prove if the employees in the plant are not encouraged by the union to be willing, honest witnesses; union support for change may make the difference between employer acceptance and rejection; changes in employment practices which are supported by the spokesmen for the majority of employees can be effectuated much more rapidly and completely than if opposed. These should prompt EEOC to encourage and cultivate union cooperation.

But it is the long-term advantages which make the cooperation of unions absolutely essential. If minorities and females are going to have equal opportunities, unions are going to have to insist on employer practices which give minorities and females their "rightful place" not only on seniority lists but in every aspect of the plant's industrial and social life. Repeated charges, conciliation agreements, court decrees, back pay awards are only going to be sporadic, isolated incidents unless unions make part of their normal day-to-day operations the integration of minorities and females into the running of the union and its collective bargaining and grievance and arbitration processes, as well as the equal pay and the equal job rights in the plant.

The IUE (and other unions) have worked at having a racially and sexually balanced union leadership and union staff as well as achieving nondiscrimination in the plants it represents. The IUE would be the first to admit that it still has a long way to go but justifiably believes it has made sufficient progress and given adequate evidence of its *bona fides* to warrant very different treatment from what it has been receiving at the hands of the EEOC.

In its program for achieving nondiscrimination in the plants which it represents, we have operated on the assumption that we had the obligation to determine what practices existed which were either on their face discriminatory or operated in a discriminatory manner, to institute, even during the term of a collective bargaining agreement, bargaining with the employer to change such practices and, if unsuccessful, to file EEOC charges and cooperate with the EEOC in its investigation and effort to conciliate the charges and also to file refusal to bargain charges with the NLRB. We have assumed that a union which follows the foregoing line of conduct vigorously and in good faith would not be liable for the mere continuance by the employer of the challenged practices.

We did not assume that the foregoing line of conduct would exonerate a union of any liability which might exist on its part for inaction or participation with the employer prior to the time a union notified the employer of the illegal contract provisions or practices which the union deemed illegal and requested changed, and if the employer would not make the requested or other appropriate changes, that the IUE would and did file EEOC charges.

Although aware that as a legal matter, if charges were filed against the IUE in less than 6 months (or whatever statutory limitation period is applicable due to State FEP laws) the IUE was not absolved of any liability which existed prior to its efforts to change the illegal provisions or practices, the IUE did anticipate that its ferreting out of all illegal provisions and practices, its condemnation of their illegality, and its following of all appropriate legal steps to correct the illegality would count in a discretionary way with the EEOC or the courts if the question of union liability based on the earlier period ever arose.

However, in a series of charges filed against IUE and various of its locals arising out of the continued operation by Sperry Rand Corporation of a pension plan containing lower retirement age and greater early retirement benefits for females than for males, the EEOC has taken a position which amounts to holding that only by going on strike and giving up bargaining rights if the strike is lost can the union escape liability. While we hesitate to mention a specific IUE case, we do so because it illustrates how under EEOC policy a union may be worse off by filing a charge than by never having done so.

In November 1969, IUE realized that the Sperry Rand pension plan violated Title VII. After unsuccessful efforts to correct the discrimination by collective bargaining, the IUE filed charges with EEOC in February 1970 and a suit in the Federal district court in November 1970. No charges were filed against IUE or any of its locals until 1972. (These changes may have resulted from the publicity given the IUE lawsuit.) Various employees have filed a series of charges dated variously in 1972, 1973, and 1974. When the 1970-1973 agreement expired, the IUE refused to sign a new pension agreement because IUE refused to be a party to the illegal early retirement for females but not for males.

The EEOC noted in its decision finding reasonable cause against the IUE that the IUE had not signed any new pension agreement when the 1970-1973 agreement expired but stated that the union had participated in implementing the pension. Actually the pension is administered entirely by the John Hancock Insurance Company, and neither the employer nor the union have any participation in implementing the retirement provisions. It is not clear what, if anything, the EEOC would have had the IUE do to escape liability. The only course left open to the union was a strike. The company was

adamant against changing the pension plan to grant males equal retirement rights. It is unrealistic to expect all employees of Sperry Rand to go on strike to equalize pension benefits. Would they ask the company to stop paying all pensions? If the union had gone on strike, how long would they have had to remain on strike? If the company replaced strikers and operated during the strike, could the union have authorized its members to return to work? If so, would the union be required to give up its bargaining rights?

IUE believes that its efforts to change by bargaining followed by its filing of EEOC charges fulfilled its duty and that it could not properly be thereafter held liable. And with respect to Sperry Rand, it did more; it filed suit in the Federal district court and has spent many thousands of dollars pursuing that suit. If it is now in the eyes of the EEOC to be held liable anyway, IUE is puzzled as to what its course of action with respect to other employers shall be. Can it afford to ferret out discriminatory practices and bring them before the EEOC by bringing charges if the result is going to be a liability on the IUE, which very likely would never have come to light if the IUE had not made a successful effort to hunt up all discriminatory practices and bring them to EEOC's attention, where the IUE was unsuccessful in its efforts to persuade the employer to correct the practices?

The IUE had kept the EEOC fully informed of IUE's affirmative action program to locate all discrimination and correct it, followed by the filing by IUE of charges where unsuccessful in bargaining for a correction. IUE had assumed that EEOC approved. What is needed now is a firm understanding between EEOC and the unions on a program which the unions can follow without thereby subjecting themselves to reasonable cause findings by the EEOC.

In a related development, Sperry Rand has filed a charge with the National Labor Relations Board against IUE and its locals which represent Sperry Rand employees alleging that by refusing to sign a new pension agreement and by seeking to enjoin the employer from "carrying out of pension terms agreed upon" the unions have been guilty of the unfair labor practice of refusing to bargain collectively in violation of section 8(b)(3) and 8(d) of the National Labor Relations Act (NLRB Case No. 29-CB-1947). The IUE has likewise filed a charge with the NLRB against Sperry Rand alleging that Sperry

Rand was guilty of a refusal to bargain in violation of section 8(a)(5) of the NLRA because it made inclusion of an illegal provision a condition to the signing of the pension agreement (NLRB Case No. 29-CA-4064). Although it is Title VII rather than the National Labor Relations Act which creates the illegality of the pension provision, which Sperry Rand insists upon including as a condition to the signing of the agreement, we believe the NLRB can properly find Sperry Rand's insistence to constitute a violation of the National Labor Relations Act. The Supreme Court of the United States has admonished (*Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47):

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

The Board has repeatedly held with respect to contract provisions made unlawful by the NLRA that insistence on inclusion of such provisions as a condition of signing a collective bargaining agreement constituted an unlawful refusal to bargain. Typical is the following statement of the NLRB in *Amalgamated Meatcutters Union (Great Atlantic & Pacific Tea Co.)*, 81 NLRB 1052, 1061:

The duty to bargain which rests alike on the employer and the representative of the employees, involves the obligation to bargain in good faith concerning terms and conditions of employment which are permitted by law. Neither party may require that the other agree to contract provisions which are unlawful. *And when, as here, one of the parties creates a bargaining impasse by insisting not in good faith, that the other agree to an unlawful condition of employment, that party has violated its statutory duty to bargain.* (Emphasis supplied)

The IUE urges that the EEOC support the position of the IUE before the NLRB that Sperry Rand was guilty of an unfair labor practice by

insisting on inclusion of a provision in the collective bargaining agreement which EEOC had found discriminated because of sex in violation of Title VII. We urge EEOC to inform NLRB that EEOC supports IUE's charge that Sperry refused to bargain in good faith when it insisted that IUE sign the illegal agreement, and urges issuance of a complaint against Sperry Rand Corp. and dismissal of the charge against IUE.

The EEOC in administering Title VII is under a like obligation to give effect to the policies of the NLRA which encourage employees and unions to refrain from striking when other legal means for resolving a dispute exist. IUE believed that the validity under Title VII of the early retirement provision of the Sperry Rand pension plan was appropriately for determination by the courts and hence did not require a strike.

IUE had requested an opinion letter from General Counsel Carey of the EEOC as to whether it could sign a collective bargaining agreement under protest, accompanied by the filing of EEOC charges, in instances where an employer insisted, as a condition of the agreement, on continuing in effect provisions or practices which violate Title VII. General Counsel Carey acknowledged receipt of our letter but stated that the law was unsettled and hence he could not give us an opinion letter.

A responsible administration of Title VII requires that the EEOC either make public its position that unions must strike and how long the strike must go on, if this is actually EEOC's position; if it is not EEOC's position, then it should vacate and withdraw its just cause findings based on a failure to strike and give unions a firm assurance that EEOC will not hold them liable for merely signing a collective bargaining agreement under protest, accompanied by the filing of EEOC charges and full cooperation with EEOC in investigating the charges and attempting to secure conciliation with the employer.

## Attachment A

[Facsimile, IUE memorandum, March 16, 1973]

To: All IUE Local Unions  
From: Paul Jennings, President

On March 15, 1973, the International Executive Board reviewed the Civil Rights and Women's Resolutions which were unanimously adopted at the International Convention of June 1972. These resolutions called upon the IEB to adopt a "national IUE program that will be implemented from top to bottom" which would require that all Local Unions review "contracts and practices in their plants to determine" whether race and/or sex discrimination exists, and to take corrective action, including proposals for a nondiscriminatory job posting and bidding procedure.

After noting that such resolutions calling for the "total elimination of all forms of discrimination in the community and on the job" have been consistently and unanimously adopted by the delegates at our District and International Conventions and have been supported by our Local Unions, the IEB stated:

Despite all of the Union's efforts to eradicate all vestiges of discrimination, it is evident that many employers still engage in practices which perpetuate race and sex discrimination causing all of our members, both males and females, to suffer loss of pay, promotions, and other benefits. Although the International Union and some local unions have filed charges of discrimination and lawsuits whenever we became aware of the discriminatory practices of a number of companies under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, we are learning that the extent of discrimination is greater than anticipated. It is, therefore, essential to embark upon a coordinated and detailed program throughout the entire International Union.

Pursuant to the enclosed resolution of the IEB, which was adopted unanimously, the International President is charged with carrying out the Board's detailed and specific program to implement the Convention action. The first step of that program requires that prior to May 1, 1973, each Local Union shall:

1. Examine its contract for any provisions which have a discriminatory purpose or effect—for example, any provision which makes distinctions based upon sex, whether with respect to pregnancy, seniority, job assignment, promotion, rates of pay, or some other benefit or condition of employment.
2. Examine practices within the plant to see whether there are any which discriminate against females or minorities, including black employees and Spanish-surnamed employees. (Enclosed are two Guide Lists, which cover the more obvious kinds of sex and race discrimination, that are to be used for this purpose.)
3. If a Local Union concludes, after examining its contract and plant practices, that sex and/or race discrimination exists, it should immediately write the employer and send a copy of the letter to the District President and to me. The letter to the employer, if related to sex discrimination, may be worded along the following lines:

This is to advise you that we have examined our collective bargaining agreement and work practices within the plant, and find that discrimination exists with respect to pregnancy and related benefits and the denial of equal pay and better jobs to women.

We request a meeting to bargain over the elimination of contractual provisions and non-contractual practices which are discriminatory, as well as the substitution of non-discriminatory provisions and practices.

Each Local Union should change the above letter, where necessary, to cover the particular problems at its plant, and may expand upon this approach by citing specific contractual provisions or plant practices that are discriminatory. It should also amend the letter to include racial discrimination if such discrimination exists.

4. Local Unions that do not write the employer are requested to advise the District President and me by May 1 of any other action they may have taken in this matter.

5. The International Union will review all replies from Local Unions, and all copies of letters to employers received by us, in order to provide assistance where necessary.

6. Local Unions having contracts that expire prior to July 1, 1973, may handle the necessary contract changes during the regular negotiating period. International Representatives will be in touch with these Local Unions.

Please write me if you have any questions about this matter.

PJNM

Enclosures

cc: International Executive Board  
International Representatives

## Resolution on Race and Sex Discrimination

IUE has always stood for the total elimination of all forms of discrimination in the community and on the job. Our problems have been particularly race and sex discrimination. Resolutions dealing with such discrimination have been consistently and unanimously adopted by the delegates at our District and International Conventions and have been supported by each Local Union.

Our most recent International Convention unanimously passed a resolution entitled "Women Workers" which, among other points, included the resolve that:

IUE will propose immediately a job-bid-and-posting system to all employers who have in the past made promotions unilaterally with the result that women as well as other minorities are concentrated primarily in lower paying jobs and urge upon the employer the adoption of such a system as a means of remedying prior discriminatory promotion policies.

All local unions which have not already done so, should immediately review all existing contracts and practices in their plants to determine if there is any violation of equal pay legislation or other discriminatory conditions and where a violation is found should take steps through grievance and arbitration procedures, complaints to the Office of Federal Contract Compliance (OFCC), state and federal EEOC and courts to correct such violation.

Our resolution on Civil Rights which also passed unanimously at the same convention, stated:

That the International Officers, the District and Conference Board officers, share in the responsibility of making the IUE civil rights and social action programs a viable policy thereby assuring that the IUE's commitment to the equality of participation, equal justice and equal opportunity for all, *is not just Convention rhetoric, but a national IUE program that will be implemented from top to bottom.*

Despite the Union's efforts to eradicate all vestiges of discrimination, it is evident that many employers still engage in practices which perpetuate race and sex discrimination, causing all of our members, both males and females, to suffer loss of pay, promotions, and other benefits. Although the International Union and some Local Unions have filed charges of discrimination and lawsuits whenever we became aware of the discriminatory practices of a number of companies under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, we are learning that the extent of discrimination is greater than anticipated. It is, therefore, essential to embark upon a coordinated and detailed program throughout the entire International Union.

Accordingly, as directed by the Convention, the Executive Board hereby adopts the following "National IUE Program that will be implemented from top to bottom" by the International President:

1. Each Local Union shall examine its contract and practices to determine whether race and/or sex discrimination exists and shall review the Guide Lists on sex and race discrimination prepared by the International Union.

2. If the Local Union concludes that the employer is engaging in sex and/or race discrimination, it should write the employer. The Local's letter should advise the employer that it believes discrimination exists with respect to pregnancy and related benefits and/or the denial of equal pay and better jobs to women, and should request a meeting for the purpose of bargaining over the elimination of the

contractual provisions. Where appropriate, the Local's letter should refer to race discrimination or other forms of sex discrimination. A copy of the letter to the employer should be sent to the International and District Presidents.

Local Unions having contracts that expire prior to July 1, 1973, should handle the necessary contract changes during the regular negotiating period.

3. Locals that do not write the employer shall advise the International and District Presidents by May 1 of any other action they have taken on this matter.

4. The International Union shall review all replies and give assistance where needed. District Presidents will assign representatives to all Locals that have not completed their review or otherwise appear to need assistance and will advise the International President of such assignments.

5. The International Executive Board shall review the progress of the program at the June IEB meeting, and shall prepare to take appropriate legal steps with respect to any employer who refuses to amend existing agreements in order to comply with the policy of this Union and the requirements of the law.

**GUIDE LIST ON SEX DISCRIMINATION\***

1. Are female janitors paid less than male janitors?
2. Are female inspectors paid less than male inspectors doing substantially equal work and having substantially the same skills, training, and responsibility?
3. Are jobs classified as light or heavy with light jobs paid less and assigned to females?
4. Are females paid less for substantially the same work as males?
5. Are certain classifications, jobs, or departments all or nearly all male, others all or nearly all female?
6. Is the average rate of pay for females less than for males?
7. Are females denied the same promotion rights as males? Is there a failure to promote females to "male" jobs?
8. Does the pension pay different benefits or contain different eligibility provisions for each sex or in any way refer to sex?
9. Are women required to go on maternity leave even though they want to work?
10. Are women refused the right to return to their jobs with no loss of seniority following childbirth?
11. Are sickness and accident benefits denied or limited to women who are disabled by childbirth or suffer complications arising from pregnancy?
12. Are pregnant employees denied the same medical and hospitalization benefits given other employees or wives of male employees?
13. Is the hiring-in rate different for women and men?
14. If the hiring-in rate is the same, state:
  - (a) approximate number employed at hiring-in rate:  
—(men); —(women).
  - (b) approximate number employed in bargaining unit above the hiring-in rate:  
—(men); —(women).

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\* If answer to any questions 1-12 is "yes", the employer has probably discriminated. If the percentage of women at the hiring-in level is greater than that of women above the hiring-in level, the employer has probably discriminated.

**GUIDE LIST ON RACE DISCRIMINATION**

1. Are most of the dirty or menial jobs held by minorities\* with very few or no minorities in clean or skilled or semi-skilled jobs?
2. Are certain jobs or departments occupied exclusively or almost exclusively by minorities, while others are occupied exclusively or almost exclusively by white employees?
3. Are minorities hired in at lower rates of pay than for whites?
4. Is the average rate of pay for minorities less than for whites?
5. Is there a departmental seniority system which operates to keep minorities in certain departments?
6. Are minorities denied the same promotion rights as whites?
7. Does the employer require that an applicant for employment pass I.Q. tests or other tests unrelated to the specific job to be filled?
8. Are there jobs for which the employer refuses to hire minorities?
9. Are there segregated facilities?
10. Are there any minority supervisors?
11. Are there any minority clerical employees?
12. Are there any minority craftsmen?

If answer to any of questions 1-9 is "yes," the employer has probably discriminated. If answer to any of questions 10-12 is "no," the employer has probably discriminated.

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\* The term "minorities" is intended to include blacks and Spanish-surnamed persons.

[Facsimile of IUE form letter.]

Dear

The IUE has had a consistent program calling for the total elimination of all forms of discrimination in the community and on the job. In accordance with the policy of our International Union and this local and our duty to represent all employees in the bargaining unit, we have been looking into these matters and find that the employer can best furnish certain information. Accordingly, we would appreciate your supplying the following to us:

1. The number of male, female, black and Spanish-surnamed employees in each classification in the bargaining unit. Please also state the wage rate for each of these classifications.
2. The number of persons hired in each classification during the past twelve months, with a breakdown as to race, sex, and Spanish-surnamed employees showing the sex of all black and Spanish-surnamed employees.
3. The number of promotions or upgrades for the last twelve months, broken down by race, sex and Spanish-surnamed persons showing the job level of each upgraded employee prior to and subsequent to each such upgrade and the race, sex and whether Spanish-surnamed for each of these upgraded employees.
4. A list of all complaints and charges filed against the company under the Equal Pay Act, Title VII, Executive Order 11246, and state fair employment practices laws and copies of each complaint or charge. Please advise also of the status of each of these cases.

In connection with each of the above, please show the sex of all white, black and Spanish-surnamed employees, i.e., white male, white female, black male, black female, Spanish-surnamed male and Spanish-surnamed female.

If the information is not available in the form requested, we will accept such alternatives as may be convenient to the Company so long as they will essentially provide the best available bargaining information concerning the foregoing subjects. To facilitate the receipt of this information, it is requested that you provide some or any part thereof as soon as it is prepared and becomes available. In addition, if you have any questions concerning what information is requested or whether an alternative form will be appropriate, please communicate with us so that its receipt may be expedited.

Sincerely,

[Facsimile]

**IUE COMMUNICATIONS TO LOCAL UNIONS AND DISTRICT  
PRESIDENTS ON RACE AND SEX DISCRIMINATION POLICY**

**Index**

1. March 16, 1973 Memorandum to all IUE Local Unions from President Jennings explaining the March 15, 1973 International Executive Board review and policy determinations based on International Convention Resolution. Attachments included guide lists on race and sex discrimination, and the IUE Convention Resolution.
2. March 28, 1973 Memorandum to all IUE Local Unions with contracts expiring prior to July 1, 1973, from President Jennings explaining contractual changes necessary to eliminate discriminatory provisions and practices.
3. April 23, 1973 Memorandum from President Jennings to all Local Unions who did not have contracts expiring prior to July 1, 1973, but had not yet responded concerning action taken on March 16 Memorandum (above), emphasizing the need to review contracts and practices.
4. April 27, 1973 Follow-Up Memorandum to March 28 Memorandum (above) to District Presidents from President Jennings, emphasizing the importance of implementing, during contract negotiations, contract provisions that eliminate vestiges of race and sex discrimination.
5. May 9, 1973 Letter from President Jennings to *each* District President noting the local unions that had responded to the program, and requesting that an International Representative be assigned to each Local in the District that had not yet responded.
6. May 25, 1973 Memorandum from President Jennings to District President and follow-up letters.
7. October 11, 1973 Letter from President Jennings to each District President listing the Local Unions that had responded to the program, requesting that guidelists be filled out and returned and meetings be set up with employers, and that form letters requesting information be sent by the Union to each employer.
8. October 12, 1973 Memorandum from President Jennings to IUE Conference Board Chairmen advising them of the October 11, letter to District Presidents, with guidelists and employer form letter enclosed.
9. April 17, 1974 Memorandum from President Jennings to all local unions requesting them to inform Winn Newman if their insurance plans or pension plans were discriminatory, attaching the *Gilbert v. GE* decision by Judge Merhige.
10. July 1974 Memorandum from Winn Newman to Local Presidents who had responded to President Jennings' April 17 Memorandum, requesting pension and insurance information. This memo enclosed draft letters for the local union to send employers requesting changes in discriminatory contract and plan provisions and requesting information on race and sex discrimination.
11. July 26, 1974 Memorandum from Paul Jennings and Dave Fitzmaurice to all IUE Field Representatives discussing the Representatives' duty to support and comply with IUE International Union policies. The memorandum enclosed another memorandum on IUE policy concerning Title VII, of the Civil Rights Act and the Equal Pay Act.

12. July 28, 1974 Memorandum from Winn Newman to All District Presidents regarding local union responses to President Jennings' April 17 Memorandum and requesting staff follow-up on instructions that had been sent to responding locals.
13. October 25, 1974 memo from Winn Newman to All District Presidents regarding Title VII Compliance Program and non-responding locals, requesting that the District Presidents assign Staff Representatives certain locals and ask that the Reps obtain certain information from the local and follow up on requested action.
14. October 30, 1974 memo from Winn Newman to All District Presidents regarding the Title VII Compliance Program and locals which responses indicated possible Race and/or Sex Discrimination but who had taken no further action. This memo requested that District Presidents ask Staff Representatives to take followup action regarding these locals.
15. October 31, 1974 Memo from Winn Newman to All District Presidents regarding Title VII Compliance Program and locals which had requested meetings and/or information but who had not received responses. The memo asked that Staff Representatives be assigned to follow up on these locals.

[Facsimile of memorandum dated March 28, 1973.]

To: All IUE Local Unions With Contracts Expiring Prior to July 1, 1973

From: Paul Jennings, President

Re: Race and Sex Discrimination

On March 16th a memorandum regarding Race and Sex Discrimination was sent to each local union. It spelled out a detailed procedure to be followed by each local to ensure compliance with the Equal Employment Opportunity Commission's rules on discrimination. Since that particular procedure requires considerable time to implement, that procedure may not be completely appropriate for locals whose contracts will be expiring during the next few months. Each local should, time permitting, follow the procedure including the guide list outlined in the March 16th memorandum. However, for those locals not having sufficient time, the following procedure should be followed:

The EEOC has found that many companies are engaged in a number of practices, including the maintenance of a discriminatory hiring pattern, a lower pay schedule for females and the denial to them of better jobs, which violate Title VII of the Civil Rights Act of 1964. In fact, a number of lawsuits involving such matters are now pending in Federal Courts. In order to bring about a total and complete end to such practices, it is necessary that contractual changes be made to eliminate all discriminatory provisions and to include new provisions to correct existing discriminatory practices including:

(a) Arbitration as a matter of right for grievances alleging violation of the prohibition on discrimination because of race, color, sex, etc. EEOC has held that a union is in violation of Title VII if the contract does not require arbitration of a sex discrimination grievance.

(b) Establishment of a joint union-management committee to review rates which are challenged as discriminatory either because the female is being paid at a lower rate than a male doing substantially equal work or is paid at a rate which is lower than an evaluation of the job would reasonably have fixed under standards applied to males. If the joint union-management committee cannot agree, the dispute may be referred by either party to arbitration.

(c) A system of in-plant job posting or advertising of all job vacancies and affording all employees an opportunity to make known their desire to be considered for the vacancy. This is an essential first step toward ending discrimination against minority groups and females in promotions. The job stratification which presently exists in many companies—all or nearly all women on certain jobs and all or nearly all men on other jobs—shows that employers have hired and promoted on the theory that certain jobs were appropriate for males, others for females. In such cases the courts have held that failure to post job vacancies, is itself a violation of Title VII and that the posting should contain a description of the job, rate of pay, qualifications required for the job and statement of how anyone desiring the job may apply.

The objective of the posting and bidding procedure is to make the jobs known to *all* employees and to give *all* employees an equal opportunity to be placed on the job to the end that the stratification on the basis of sex or race will disappear.

In accordance with court decisions, the contract should provide that in any instance in which the company contemplates filling a vacancy with anyone other than the senior applicant, the company shall notify the local, meet with representatives of the local and explain to them its reasons for deviating from seniority and hear their arguments before making the final selection. If the senior

employee is not chosen, the employer should give a written statement of why the senior employee was not chosen. Disputes in such cases should be arbitrable.

(d) The elimination of all provisions in the agreement which single pregnancy out for special treatment. As long as pregnant employees are able to work, they should be treated exactly the same as other able-bodied employees. To the extent that an employee is disabled by pregnancy, childbirth or complications arising therefrom, the rights to leave, to return to work, and to accumulate service credits and sickness and accident benefits should be the same as for any disabled employee. Similarly, there should be no exceptions of any sort from medical expense benefits such as X-rays or lab tests involving pregnancy. Benefits payable under hospitalization and surgical plans should treat pregnancy and childbirth the same as any other surgical procedure requiring hospital confinement and should not provide a disproportionately lower amount for payment for delivery or a specified number of hospital days when the number of days for other hospitalization is not limited.

(e) Pensions should provide the same level of benefits to all workers under both normal and early retirement provisions irrespective of sex. If there is a difference, the law requires that the disadvantaged group must be brought up to the level of the advantaged; e.g., if the plan permits women to retire at an earlier age than men, the early retirement age for males must be reduced; similarly, if women are compelled to retire at an earlier age than men, women must have the right to work to the retirement age for men.

As I mentioned in my March 16th memorandum, despite our efforts in the past there are still many companies engaged in discriminatory practices. It is therefore essential that we follow this program to ensure equal and just treatment for all those whom we are privileged to represent.

Should you need any assistance in implementing this procedure, please be sure to contact your district president, the legal department or the collective bargaining department.

Thank you for your cooperation on this important matter.

WN/PJ/nd

cc: IUE Executive Board

## DRAFT LETTER TO EMPLOYER

[Facsimile dated May 25, 1973.]

IUE has had a consistent program calling for the total elimination of all forms of discrimination in the community and on the job. For example, the recent flood of lawsuits filed against employers and unions by EEOC (nearly 100 in the past month) shows that it is essential for us to look into existing contractual provisions as well as practices which may not be spelled out in the Agreement which may be in conflict with Title VII of the Civil Rights Act of 1964.

In accordance with the policy of our International Union, and this Local Union, we have been looking into such matters but find that you, the employer, can best supply certain information. Accordingly, on behalf of the International Union and this Local Union, we would appreciate your supplying the following information to us:

- (1) The number of employees designated by sex and race in each labor grade or classification level in the bargaining unit.
- (2) In regard to the hiring of any employees, please state:
  - (a) Hiring rate for men.
  - (b) Hiring rate for women if different from that of men.
  - (c) Number of men and women hired for the period January 1–May 31, 1973. If the new hires were hired in more than one labor grade or classification, state the number of men and women hired for each labor grade or classification during this period. If during the period January 1 through May 31, 1973, the number of persons hired is not sufficiently large to indicate the hiring pattern, please supply such information for a longer period which will be representative of your hiring practices.
- (3) Are certain classifications, jobs, or departments all or nearly all male, others all or nearly all female?
- (4) What is the highest rate paid a man and the highest rate paid a woman?
- (5) Are certain jobs or departments occupied exclusively by minorities, while others are occupied exclusively or almost exclusively by white employees?

We are anxious to investigate this matter and take whatever corrective action, if any, is necessary as soon as possible. We would, therefore, appreciate an early reply. If for any reason, you cannot supply all of the information requested, please give us whatever is available at this time.

[Facsimile of memorandum dated April 17, 1974.]

To: All IUE Local Unions  
From: Paul Jennings, President  
Re: Race and Sex Discrimination

Enclosed is a copy of a Federal District Court decision which holds that the denial of sickness and accident benefits for childbirth and pregnancy-related disabilities by General Electric violates Title VII. The decision also holds that "absent complications, there is no medical reason for not allowing women to work to the day before delivery."

A company and union will both be liable for back pay if the collective bargaining agreement contains any limitations on the right of pregnant employees to work, the right to receive sickness and accident benefits for childbirth and other pregnancy-related disabilities and/or the payment of hospital or medical payments for pregnancy-related causes. In the GE case, the Court found that IUE had tried since 1950 to remove the discriminatory S&A provisions from the contract and the court held that GE *alone* was liable for back pay. In other cases, however, the union will also be liable for back pay to all women who have suffered discrimination.

It is imperative that we eradicate all aspects of discrimination which may be expressly stated in our contracts or which, although not spelled out in the contract, exist in practice. This letter is devoted to cleaning up contracts which expressly contain illegal provisions. These are normally found in the treatment of pregnant employees and in the different treatment of men and women for pension purposes. Accordingly, we request that your local advise General Counsel Winn Newman within 10 days of the following:

1. Does your contract or health and welfare plan contain any reference to pregnancy? (Please check particularly the sickness and accident provisions *and* the hospitalization benefits.)

2. Does your pension plan refer separately to men or women?

3. Please send your reply to these two questions to Winn Newman by May 1. If the answer to either of these questions is "yes," please send Winn Newman a copy of the contract and health and welfare plan and indicate which sections contain such references.

PJNC

cc: International Union Executive Board  
International Representatives

[Fascimile of memorandum dated July 26, 1974.]

To: All IUE Field Representatives

From: Paul Jennings, President

David J. Fitzmaurice, Secretary-Treasurer

As you know, the policy of the International Union is formulated at IUE Conventions. The policies of the Union are established in the Constitution and by Resolutions adopted at the Convention. Between Conventions, the IUE Executive Board implements Convention action and adopts other policies which conform with the objectives of the Union as set forth in the Constitution and Convention Resolutions. IUE has had no lack of far-sighted programs but we have sometimes lacked effective follow-through. That is the purpose of this letter.

While *individual employees of the Union* have the right, and are encouraged, to express their views to the Officers of the Union on International Union policies and to make suggestions for change, they are expected to fully carry out and encourage in every way good faith compliance with all policies until such time as they are changed. District Presidents and Conference Board Chairmen are also responsible for directing the carrying out of such policies. Accordingly, Field Representatives are required to implement the programs and policies of the Union, regardless of personal feelings which may or may not result from frustrations in negotiations or servicing of IUE local Unions.

The International Constitution, particularly the Oath of Office, requires that all Local and International Officers comply with and give affirmative support to the policies of IUE.

The attached memoranda on IUE policy and position on Title VII of the Civil Rights Act and the Equal Pay Act will be followed by others. Some subjects to be covered in the future memoranda are: IUE Local Union Pension Plan, COPE, OSHA, strike reports, organizing techniques, trusteeships, local union close-outs, etc. It is suggested that you save these memoranda as a reference and reminder of the role you are expected to play. Your semi-monthly staff reports will be expected to contain reference to the carrying out of these policies.

Attachment

DJFN/EMD

cc: International Executive Board  
IUE Department Heads

[Facsimile of memorandum, dated July 1974.]

Subject: IUE Policy—Title VII, Civil Rights Act, Equal Pay Act.

During the April 1974 meeting of the International Executive Board, there was considerable discussion as to whether International Representatives are always fully aware of IUE policies and whether all staff fully recognized its obligation to apply and affirmatively carry out those policies. The Board determined that the staff should be advised of several of the more important IUE policies and of specific obligations that arise in particular cases.

The IUE Constitution mandates our affirmative obligation to eliminate all race, sex, religion, and national origin discrimination and the IUE and its leadership have always been in the forefront of Civil Rights legislation from the days of President Roosevelt's Fair Employment Practice Commission. As a result of the unanimous adoption of civil rights resolutions at every IUE Convention, each local union is on record in support of these policies.

The Convention resolution adopted in 1972 recognized that employers in our industry have not been complying fully with court decisions which interpreted Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. The Convention unanimously called upon all locals to examine their contracts and practices which have developed over the years, and also directed the International Executive Board to implement the resolution. Not a single delegate voted against this resolution.

On March 15, 1973, the Executive Board adopted a procedure to implement that program. For various reasons, a large number of locals either have not responded or have responded in a way which suggests a lack of understanding of how courts have interpreted Title VII. Indeed, practices which once were considered non-discriminatory, such as the hours and weight limitation imposed on women by protective laws, are now being held illegal by the courts. While many disagree with some of the court decisions interpreting Title VII, IUE is committed fully to comply *voluntarily and affirmatively* with the law.

Court decisions over the past few years make clear that in most cases where employers had hired and assigned women in conformity with state protective laws, discrimination now exists, unless an affirmative program which permitted women to achieve their "rightful place" was adopted to end the segregated employment pattern. To correct such discrimination, Title VII may require revising the seniority system, possibly by substituting plant-wide seniority for departmental or job seniority.

Title VII will also require employers to agree to a job posting program, to increase wage rates for women and minorities, institute training programs and make many other changes which IUE has fought for over the years. Title VII provides a vehicle for carrying out IUE's long-standing program.

In order to comply affirmatively, representatives are expected to express the policies of the International Union before meetings of local executive boards and local unions. This must be done even if such policies may not be popular with certain members. Staff representatives are expected to give a written report of the discussion which took place.

Within the next few weeks, staff representatives will be given specific assignments in this area regarding locals that have not responded to the March 1973 letter or have responded inadequately. You will be asked to investigate and report on areas of discrimination which must be corrected in order to comply with existing court decisions, opinion of the IUE Legal Department and IUE policy.

DJF/wm:emd

cc: International Executive Board  
IUE Department Heads

### Attachment 3

[Facsimile of IUE letter.]

Dear Mr. Brantley:

The IUE has had a consistent program calling for the total elimination of all forms of discrimination on the job. Our right to obtain detailed information about an employer's hiring policies and work force as part of our legitimate collective bargaining responsibilities and our duty to represent fairly all employees in the bargaining unit has been recently confirmed by the National Labor Relations Board in *Westinghouse Electric Corporation*, 239 NLRB No. 19, and *The East Dayton Tool and Die Co.*, 239 NLRB No. 20. In accordance with the policy of our International Union which was reviewed at our recent International Convention, and which has been further implemented by the International Executive Board in view of the issuance of the *Westinghouse* and *East Dayton* decisions, we would appreciate your supplying us with the following information requested of Westinghouse and East Dayton, to which the Board has determined that IUE is entitled:

1. Your most recent Affirmative Action Program if you have filed one under Executive Order 11246 and Revised Order 4 requiring equal opportunity statements of all government contractors. Also, if you have filed any other affirmative action reports, EEO-1 reports and/or Workforce Analyses (if these are not included in the AAP's required by the EEOC or any other state or local fair employment agency, please send us a copy of such report(s) and/or compliance reviews which have been made for each of the years 1975 through 1978.

2. If you have not compiled the above reports or programs, or those reports or programs do not contain the following information, please supply us with this information concerning the bargaining unit represented by IUE Local 849.

(a) The number of male, female, black and Hispanic employees at each labor grade.

(b) The number of male, female, black and Hispanic employees in each classification in the bargaining unit. Please also state the wage rate for each of these classifications.

(c) The number of male, female, black and Hispanic employees in each classification in each plant who are paid on a daywork basis and who are paid on an incentive basis.

(d) The number of male, female, black and Hispanic employees who have less than one year seniority, 1-2 years seniority, 3-4 years seniority, 5-9 years seniority, 10-19 years seniority, and 20 or more years seniority.

(e) The number of persons hired in each classification during the 12-month period immediately preceding the effective date of the information covered in Items (a)-(d) above, or such other 12-month period as may be mutually agreed upon by the parties, with a breakdown as to male, female, black and Hispanic employees.

(f) The number of persons who sought employment in each classification during the same 12-month period with a breakdown as to male, female, black and Hispanic applicants for employment.

(g) The number of promotions or upgrades for the 12-month period, broken down by race, stating Hispanic separately, and by sex within racial groups, showing the job level of each upgraded employee prior to and subsequent to

each such upgrade and the race (including Hispanic) and sex for each of these upgraded employees.

In connection with each of the above, please show the sex of all black and Hispanic employees, i.e., black male, black female, Hispanic male and Hispanic female.

3. In addition to the reports or information requested, please send us a list of all complaints and charges filed against the company under the Equal Pay Act, Title VII, Executive Order 11246, and state fair employment practice laws and copies of each complaint or charge. Please also advise as to the status of each of these cases.

If the information is not available in the form requested, we will accept the information in such alternative forms as may be convenient to the company as long as they will provide us with the best possible up-to-date bargaining information concerning the foregoing subjects. We would appreciate a reply within 15 days of the receipt of this letter, at least notifying us of the extent to which we may expect to receive the requested information, and when we may expect to receive it.

If you have any questions concerning what information is requested, whether an alternative form will be appropriate, or when you can supply the information, please contact Secretary-Treasurer George Hutchens so that its receipt may be expedited. If, for any reason, you cannot supply all of the information requested, please give us whatever is available at this time. We will keep the Local Union advised. Thank you for your anticipated cooperation.

Sincerely yours,

David J. Fitzmaurice  
President

[Facsimile]

**COMMENTS ON PROPOSED RULES OF OFFICE OF FEDERAL  
CONTRACT COMPLIANCE PROGRAMS ON "GOVERNMENT  
CONTRACTORS: AFFIRMATIVE ACTION REQUIREMENTS"**

**BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF  
INDUSTRIAL ORGANIZATIONS UNITED STEELWORKERS OF AMERICA,  
AFL-CIO-CLC INTERNATIONAL UNION OF ELECTRICAL, RADIO AND  
MACHINE WORKERS, AFL-CIO-CLC INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA COALITION OF LABOR UNION WOMEN**

February 22, 1980

Pursuant to notice published in the *Federal Register* on December 28, 1979, the AFL-CIO,<sup>1</sup> the United Steelworkers,<sup>2</sup> the International Union of Electrical Workers,<sup>3</sup> the United Autoworkers<sup>4</sup> and CLUW<sup>5</sup> join in submitting the following comments on proposed rules which would revise a number of regulatory provisions under Executive Order 11246, as amended.

These labor organizations represent more than 15,000,000 employees in all sectors of industry, a majority of whom work for government contractors or subcontractors. We have pledged ourselves to work towards the elimination of race and sex discrimination and have devoted substantial effort and resources to this end. We therefore have a substantial interest in an effective and fair contract compliance program. In addition, we also have an obvious interest in seeing that the employers with whom we bargain do not lose valuable contracts because of a failure to meet the requirements of the Executive Order.

The proposed rules do not provide for sufficient union participation at any level of the Contract Compliance Program. Indeed, in some instances they fail to implement what the Department of Labor has stated the policy of OFCCP to be with respect to the subject of union participation. Overall national labor policy and the cause of equal opportunity both stand to suffer at the hands of the rules as proposed.

In the comments set forth below, we show in what specific ways the proposed rules fail to accord the collective bargaining representative its proper role in the Compliance Program, at the affirmative action development stage, at the OFCCP investigative stage or at the enforcement stage. We conclude by demonstrating that union involvement generally is not only a matter of right, but is also a key ingredient to the success of the Compliance Program.

<sup>1</sup> American Federation of Labor and Congress of Industrial Organizations.

<sup>2</sup> United Steelworkers of America, AFL-CIO-CLC.

<sup>3</sup> International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC.

<sup>4</sup> International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

<sup>5</sup> Coalition of Labor Union Women.

## I. WHERE THE RULES FAIL

### A. The Affirmative Action Development Stage

Under the National Labor Relations Act, the union is exclusive collective bargaining agent for all employees in the unit. Once a contract has been entered into by the parties, the employer cannot unilaterally modify that agreement, no matter how laudatory his motives, without running afoul of Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). That being so, it is essential that the union be involved at the *earliest* stage—the development of an affirmative action plan.

There is some recognition of the union's legislatively prescribed role in existing pronouncements. Thus, OFCCP regulations now state that contractors should "meet with union officials to inform them of the [affirmative action] policy, and request their cooperation."<sup>6</sup> OFCCP has interpreted this requirement to mean "that the union should be involved in the development and implementation of the AAP from its inception."<sup>7</sup> The problem is that the proposed rules do *nothing* to implement this announced policy. Contractors are still not *required* to meet and consult with the union in developing an Affirmative Action Plan. Until such a requirement is adopted and enforced by OFCCP, employer contractors will continue to ignore unions in this process, at considerable cost to the declared aims of the Executive Order.

Based on our experience, a union could assist a contractor in the development and implementation of an affirmative action plan by:

- reviewing collective bargaining agreements or practices thereunder which are discriminatory or potentially discriminatory or which are having a discriminatory effect;

- suggesting and participating in internal training programs and identifying female and minority members who are interested in nontraditional jobs, thus increasing the availability pool;

- educating its membership and encouraging the upward movement of minority and female members to help the contractor company meet its established goals;

- suggesting alternative sources as a means of filling goals;

- noting discriminatory situations which have been brought to its attention as the employee representative and providing evidence with respect to such situations; and

- suggesting alternative and perhaps less disruptive ways of remedying discriminatory situations such as the institution of plantwide seniority for all employees along with posting and bidding systems for promotions rather than awarding retroactive seniority to a small class of discriminatees.<sup>8</sup>

There are other practical reasons why union involvement is essential at this stage. If the union is a party, it will be motivated to take steps to assure compliance

<sup>6</sup> 41 C.F.R. —60-2.21(a)(6).

<sup>7</sup> Brief of the United States Department of Labor as *Amicus Curiae*, at 6, in *IUE v. Westinghouse Electric Corporation*, 239 NLRB No. 19 (1978), now pending on appeal.

<sup>8</sup> The industry-wide consent decree between the government (Labor, Justice and the EEOC) and the Steel Industry which was signed in April 1974, was the first major case resolved by instituting a form of plantwide seniority system for all employees. The Steelworkers Union was involved in those settlement discussions from the very beginning.

by the employer and the employees, which would contribute immeasurably to the plan's success.<sup>9</sup> If, on the other hand, the union is kept an alien to the process, even though its vital interests are so clearly at stake, the likely result is at best disinterest and at worst hostility. Either way, the goals of the Executive Order will suffer.

## **B. Pre-Award Review, Compliance Review and Complaint Investigation Procedures**

The proposed rules contain no provision instructing OFCCP compliance officers to consult with union officials in the course of making a pre-award review, compliance review or complaint investigation. Thus the rules do not give the union the opportunity to identify areas of discrimination which may have come to its attention. Nor do they guarantee that the union will be allowed to propose alternative methods of remedying discriminatory situations which may affect the collective bargaining agreement, so as to assure that any change leaves the agreement intact to the maximum extent possible while still meeting the goals of the Executive Order.

The following proposed or existing rules should provide for OFCCP notice to and consultation with the Local *and* International Union.

—60-1.21 Pre-Award Reviews.

—60-1.20 Compliance Reviews.

—60-1.24 Processing Complaints

At a minimum, the union should be notified, consulted and invited to participate in:

(a) All audits and onsite investigations and review procedures involving bargaining unit positions and procedures under the collective bargaining agreement.

(b) The Entrance and Exit Conferences with complainants and contractors.

(c) Physical Inspection.

(d) Employee interviews where requested by interviewee.

(e) All meetings with the contractor at which efforts are made to secure compliance through conciliation and persuasion where compliance may involve a collective bargaining agreement or bargaining unit employees (see discussion below);

(f) Assisting in identifying affected class of incumbent, rejected or terminated employees and providing any additional areas of investigation or additional names of employees to interview.

Section 60-1.9(c) of the proposed rules is the only one which deals with union participation in the pre-show cause stages of the process. All it does is provide that when compliance "*necessitates* a revision of a collective bargaining agreement or otherwise *significantly* affects a *substantial* number of employees represented by the union, the collective bargaining representatives shall be given an opportunity to present their views to OFCCP."<sup>10</sup> (Emphasis added.)

<sup>9</sup> One reason the Steel Industry Consent Decree enjoys overwhelming success and a high degree of acceptability among employees is the fact that the Steelworkers played a key role in negotiating its provisions.

<sup>10</sup> The provision which the above proposal would replace now reads as follows:

"—60-1.9(a).

Whenever compliance with the equal opportunity clause may necessitate a revision of a collective

In our view, fundamental fairness requires that the union be invited to participate whenever it is possible that compliance may result in a revision of the agreement. Also, we do not believe that union participation in these non-revision cases should be limited to those in which the OFCCP decides that there will be significant impact on a substantial number of employees. The bargaining agent should be involved whenever there is *any* impact on *any* unit employees.

Perhaps even more crucial, is the timing of union participation. The union must be involved before “tentative” agreements are reached and the positions of the contractor and OFCCP have hardened. Otherwise, the opportunity to be heard will be a meaningless one. The importance of this point is underscored by the fact that the proposed rules (—60–1.20(c)) still contemplate that there will be informal efforts to secure compliance through conciliation and persuasion *before* a show cause notice is issued. Accordingly, it is essential that in addition to the notice rights discussed above, proposed —60–1.9(c) should be revised to read as follows:

—60–1.9(c).

Whenever compliance with the Order or with Sections 402 and 503 may necessitate revision of a collective bargaining agreement or otherwise may affect the wages, hours and working conditions of employees represented by the union, the collective bargaining representatives shall be given an opportunity to present their positions and supporting evidence to OFCCP prior to any informal determination by OFCCP and prior to any formal, informal or tentative agreement relating to such matters between OFCCP and a contractor.

### C. Show Cause and Enforcement Stage

The proposed rules —60–1.25(d) do provide for notice to the union and an opportunity to participate in conciliation discussions to the extent those discussions relate to proposed changes in the terms or conditions of employment governed by the provisions of a collective bargaining agreement.

We believe this rule should be clarified along the lines discussed in the previous part to insure that union participation will be invited when conciliation *may* involve changes in working conditions and at a time when it will be meaningful, that is, *before* the other participants have reached an agreement between themselves. Union involvement early in the conciliation process would have staved off at least one lawsuit in which OFCCP procedures are under due process scrutiny.<sup>11</sup>

## II. UNION INVOLVEMENT IN THE CONTRACT COMPLIANCE PROGRAM

In this part, we discuss the legal and practical framework which underlies our specific comments.

bargaining agreement the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the director.”

Thus, under the current rule, unions are brought into the matter when compliance “may necessitate a revision of the collective bargaining agreement.” Under the proposal, however, Unions are not brought in unless compliance *does* necessitate a revision of the agreement or the revision is one which *significantly* affects a *substantial* number of employees. Moreover, in the current provision, unions are to be given an *adequate* opportunity to present their views while under the proposal they are merely given an opportunity.

<sup>11</sup> *USM, Corporation, Farrel Company Division v. United Steelworkers of America, et al.*, C.A. No. N77-435 (D. Conn.).

## A. Leading Cases

The leading cases in point are *Meyers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *amended and modified* at 556 F.2d 758 (5th Cir. 1977) and *Southbridge Plastics v. Rubber Workers*, 565 F.2d 913 (5th Cir. 1978). *Gilman* disapproved certain portions of a consent decree entered into by Title VII plaintiffs and the company because those portions were not necessary to assure compliance with the law. In doing so, the Court said:

[R]egardless of past wrongs, a court in considering prospective relief is not automatically empowered to make wholesale changes in agreements negotiated by the employees' exclusive bargaining agents in an obviously serious attempt to comply with Title VII. Allowing such changes without findings of inadequacy in the . . . agreements would conflict with the policies reflected in the National Labor Relations Act., 29 U.S.C. —151 *et seq.* (NLRA).

*Southbridge* also arose in a Title VII context. There, the EEOC had found reasonable cause to believe that a facially neutral seniority system in the union contract perpetuated the effects of prior assignment discrimination against women. The company and the EEOC then entered into a conciliation agreement establishing seniority overrides on behalf of women. The union objected to this abrogation of the contractual seniority provisions and demanded arbitration. By the time the case reached the Fifth Circuit, the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), had already been handed down. *Teamsters* and *Gilman* taken together, the Court held, meant that the conciliation agreement between the company and the EEOC could not stand. It then announced this rule:

[T]hat terms and conditions of employment, such as seniority, which are agreed to by management and union, can be overturned on a Title VII challenge *only to the limited extent necessary to comply with that statute...*In this case, there was no showing of any discriminatory purpose inherent in the seniority system. Accordingly, wholesale destruction of this system, as authorized by the conciliation agreement, cannot be permitted. (Emphasis added.)

These cases establish that the terms of a collective bargaining agreement cannot be changed over the objections of the bargaining representative unless the change is required by law.

## B. Practical Aspects

As we indicated earlier, the Department of Labor gave the principle of union participation some recognition when it stated that "it is OFCCP policy that unions be involved in the development of affirmative action programs."<sup>12</sup> What is needed now is that this position be written into the regulations as a plain statement of policy. Beyond that, it is time that the regulations permit meaningful union participation at all stages of the process, including pre-award review, compliance review, complaint processing, conciliation and the hearing. The proposed rules, as we have pointed out, are wholly inadequate in the way they address these matters.

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<sup>12</sup> Brief of the United States Department of Labor as *Amicus Curiae*, at 5, in *IUE v. Westinghouse Electric Corporation*, 239 No. 19 (1978).

Moreover, the problem is acute, for the prevailing practice among contractors and OFCCP administrators is to avoid—not encourage—union participation. Because employer-union cooperation in the contract compliance area is so vital, we believe the proposed changes in the rules have overlooked one of the essential ingredients to the success of the program.

Unfortunately, contractors seldom, if ever, seek union involvement either in the development of the AAP or in its implementation. In fact, some of the major contractors with whom we bargain have taken the position they do not have to disclose the contents of the AAP to the union. We have, during the course of collective bargaining, requested companies to provide us with employment practice data, including AAP's. The repeated refusals of companies such as General Motors and Westinghouse to comply with these data requests, thereby preventing us from bargaining intelligently to change illegal contract provisions and frustrating our efforts to protect the interests of minority employees, have led to the IUE's successful "refusal to bargain" cases under the National Labor Relations Act.<sup>13</sup> Both the OFCCP and the EEOC have supported our position that a union is entitled to access to affirmative action programs and other race and sex data.

Our experience with OFCCP at the field level is not substantially better. As a rule those who monitor compliance with the Executive Order almost never notify, consult or involve the collective bargaining representative before tentative determinations are made or positions have become fixed. Typically, the Agency and the employer reach agreement on a seniority change without union participation. The employer is then dispatched, indeed deputized, to win over the union. Leverage is applied in the form of threatened job losses from the withdrawal of government business. The union, having been excluded from the process by which the "affected class situation" was determined, and having had little or no input in shaping the contractor-Agency "solution", is now asked to accept that solution or else it will be implemented anyway. Union counter-proposals, ferried to the government by the Employer, are likely to be rejected out of hand for both the Employer and the government regard themselves as the principals in this transaction and the union as a rank outsider. Moreover, the two of them have acquired a possessive interest in the agreement—which may be the cheapest the contractor could get—and both are loathe to modify it.

The clash between the union's legislatively sanctioned role and the current administration of OFCCP is nowhere better illustrated than in "affected class" situations. Theoretically, the contractor is required as part of its self-analysis to identify such situations including those caused by seniority practices or clauses in collective bargaining agreements. Since "an affected class problem must be remedied in order for a contractor to be considered in compliance" (41 C.F.R. — 60-2.1(b)), and since the attainment of affirmative action goals may require the override of employees' expectations based on collectively bargained seniority systems which are defective, the process of complying with the Executive Order may involve deviations from or alterations in the collective bargaining agreement.

But Congress, in the National Labor Relations Act, has made the union the exclusive collective bargaining representative of all employees in the unit. It has also declared in Section 8(d) and 8(a)(5) of the Act that unilateral changes by the

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<sup>13</sup> *IUE v. Westinghouse Electric Corporation*, *supra*, and *IUE v. The East Dayton Tool and Die Co.*, 239 NLRB No. 20 (1978); *Automation & Measurement Division, the Bendix Corporation*, 242 NLRB No. 8 (1979); *The Bendix Corporation*, 242 NLRB No. 170 (1979); *White Farm Equipment Company*, 242 NLRB No. 201 (1979); *General Motors Corporation*, 243 NLRB No. 19 (1979). (Appeals pending.)

employer clearly violate the law. This means that an employer would breach his duty to bargain under the law in the case where its affirmative action program has the effect of superseding a legal provision in the collective bargaining agreement simply to gain a government contract. It also means that a violation of the duty would be found in the case of an employer who unilaterally changed a contract provision which was illegal under the Executive Order or Title VII.

Permitting unilateral action in the first case would mean that an employer could abrogate its contract with the union in order to profit from another contract. The government should not include in its procurement process a procedure which leads to violations of the National Labor Relations Act and to breach of contract.

In the second situation, although clauses in collective bargaining agreements which violate federal law would not be enforceable, an employer still has an obligation to bargain with the union if there is more than one way to modify the contract to bring it into compliance. For example, the Employee Retirement Income Security Act of 1974 provides three alternative vesting schedules. Before a company may change its pension plan to comply with ERISA, it must bargain with the union concerning which of the three alternative proposals to adopt. Similarly, where there are alternative means of achieving compliance with equal employment requirements, each of which would involve modifications of existing collective bargaining agreements, the employer has an obligation to bargain with the union.

Regulations proposed sometime ago but never adopted did speak positively to this problem. Thus, Section 60-1.12 of the proposed rules published in September 1976, provided for cooperation between contractors and unions by requiring bargaining between the two parties, without government intervention, whenever a revision in a collective bargaining agreement was necessary for compliance purposes. If the negotiations proved unsuccessful, the proposed rules granted the union an adequate opportunity to present its views to the compliance agency.

We trust the final rules will include proposals such as these. True affirmative action, whether it be voluntary, contractual, or the result of enforcement action, can only succeed with the support of all parties concerned. The government should take steps to prevent unnecessary controversies by establishing a mechanism which will permit unions to cooperate in bringing about equal employment opportunity and to play an active and positive role in the formulation of an appropriate affirmative action plan.

## CONCLUSION

The proposed OFCCP Rules and Regulations should be revised to:

1. Provide for meaningful union participation at all stages of the contract compliance process, including pre-award review, compliance review, complaint investigation, conciliation and hearing.
2. Require employers to meet and consult with the union in the development and implementation of the AAP from its inception.
3. Provide for cooperation between contractors and unions by requiring bargaining between the two parties, without government intervention, whenever a revision of the collective bargaining agreement or changes in working conditions may be necessary for compliance purposes.
4. Whenever compliance with the Order or with Sections 402 and 503 may necessitate revision of a collective bargaining agreement or otherwise may affect

the wages, hours and working conditions of employees represented by the union, the collective bargaining representatives shall be given an opportunity to present their positions and supporting evidence to OFCCP prior to any informal determination by OFCCP and prior to any formal, informal or tentative agreement relating to such matters between OFCCP and a contractor.

5. Provide for notice to the union and an opportunity to participate in conciliation discussions when conciliation may involve changes in working conditions and at a time when it will be meaningful, that is, before the other participants have reached an agreement between themselves.

[This was signed by the following: for AFL-CIO by Lawrence Gold, Special Counsel; for IUE by Winn Newman, General Counsel; for United Steelworkers by Carl Frankel, Associate General Counsel; for UAW by John Fillion, General Counsel; and for CLUW by Joyce Miller, President.]

**TABLE A5.1****General Electric Co.—Cranston, R.I.—IUE Local 218**

The following are the 20 employees with the most seniority working in labor grades 1–10 (including incentive positions within this range):

<u>Employee No.</u> <u>("Man #")</u>	<u>Sex</u>	<u>Seniority</u>
105	F	478 mos. (2/38)
698	F	460 mos. (8/39)
859	F	458 mos. (10/39)
182	F	458 mos. (10/39)
709	F	457 mos. (11/39)
730	F	439 mos. (5/41)
098	F	429 mos. (3/42)
687	F	425 mos. (7/42)
729	F	419 mos. (1/43)
035	F	418 mos. (2/43)
010	F	417 mos. (3/43)
093	F	411 mos. (9/43)
102	F	401 mos. (11/44)
296	F	391 mos. (5/45)
028	F	388 mos. (8/45)
712	F	387 mos. (9/45)
203	F	386 mos. (10/45)
629	F	386 mos. (8/46)
829	F	385 mos. (11/45)
069	F	376 mos. (8/46)

Source: GE-produced seniority list, dated 12/7/77.

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**TABLE A5.2****General Electric Co.—Cranston, Rhode Island—IUE Local 218**

<u>Labor Grades</u>	<u>Men</u>		<u>Women</u>	
	<u>No.</u>	<u>Avg. Sen'y</u>	<u>No.</u>	<u>Avg. Sen'y</u>
R1-R10, including incentive positions within this range	63	60 mos.	344	120

There are only 9 women in the Cranston, R.I. plant working above R-10.  
Source: GE produced seniority list, dated 12/7/77.

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**TABLE A5.3****General Electric Co.—Salem, Va.—IUE Local 161**

A. The 20 employees with the most seniority working at a rate below \$5.00

<u>Employee No.</u>	<u>Sex</u>	<u>Seniority</u>
00373	F	254 mos.
00398	F	253
00358	F	251
00167	F	220
00680	F	217
00714	F	215
00770	F	208
00781	F	205
00500	F	197
00808	F	195
00806	F	193
07964	M	189
00826	F	187
00866	F	184
08060	M	184
00870	F	183
00877	F	180
00883	F	174
00917	F	168
00979	F	161

18 Women  
2 Men

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**TABLE A5.4**

B. The 20 employees with the most seniority working at a rate between \$5.00 and \$5.25:

<u>Employee No.</u>	<u>Sex</u>	<u>Seniority</u>
05266	M	318 mos.
05193	M	262
05195	M	262
05650	M	257
00246	F	256
06018	M	255
00327	F	255
00189	F	254
00396	F	253
00393	F	252
00411	F	252
00417	F	252
00426	F	252
00440	F	251
00523	F	250
00543	F	250
00558	F	249
00564	F	248
00606	F	238
07349	M	217
00685	F	217

15 Women  
6 Men

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**TABLE A5.5****General Electric Co.—Providence, R.I.—IUE Local 283**

<u>Male</u>		<u>Female</u>	
<u>No.</u>	<u>Avg. Sen'y</u>	<u>No.</u>	<u>Avg. Sen'y</u>
202	133.8	76	183.33

Source: GE-produced seniority list, dated 3 3 78.

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**TABLE A5.6****General Electric Co.—Warren, Ohio—IUE Local 722**

<u>Wage Range</u>	<u>Men</u>		<u>Women</u>	
	<u>No.</u>	<u>Avg. Sen'y</u>	<u>No.</u>	<u>Avg. Sen'y</u>
Below \$5.00	25	116.4 mos.	219	204.5 mos.
\$5.00-\$5.25	20	18.2 mos.	235	138.4 mos.
\$5.255-\$5.50	49	63.9 mos.	114	173.2 mos.
\$5.51-\$6.00	22	157 mos.	2	375 mos.

Source: GE-produced seniority list, dated 8 3 77.

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**TABLE A5.7****General Electric Co.—Wilmington, Mass.—Aerospace Instrument Products**

<u>Wage Range</u>	<u>Men</u>		<u>Women</u>	
	<u>No.</u>	<u>Avg. Sen'y</u>	<u>No.</u>	<u>Avg. Sen'y</u>
\$5.00-5.25	2	5.5 mos.	27	163 mos.
\$5.255-5.50	12	40.5 mos.	140	186 mos.
\$5.52-6.00	47	143.7 mos.	97	231.6 mos.
\$6.05-6.25	48	189.9 mos.	23	311.7 mos.

Source: GE-produced seniority list, dated 1 9 78.

**TABLE A5.8**  
**Memphis, Tennessee—Local 731**

Labor Grade	Males		Females	
	No.	Avg. Sen'y	No.	Avg. Sen'y
R4	1	115 mos.	26	164 mos.
R5	5	159 mos.	225	189 mos.
R6	1	153 mos.	89	191 mos.
R7	1	92 mos.	48	185 mos.
R8	3	143 mos.	0	—
R9	2	169 mos.	4	253 mos.
R10	0	—	19	252 mos.
R11	1	359 mos.	27	335 mos.
R13	8	10 mos.	3	182 mos.
R14	4	167 mos.	2	360 mos.
R16	17	21 mos.	1	21 mos.
R17	11	148 mos.	1	354 mos.
R18	1	1 mo.	0	—
R19	2	153 mos.	0	—
R20	4	130 mos.	0	—
R21	162	158 mos.	3	187 mos.

\*No females above R21.

# Affirmative Action: It's Not Too Late to Make It Work

By Ray J. Graham\*

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Fifteen to 20 years ago American society placed in motion certain forces for change that I believe are irreversible. Our reasons for doing so were simple and pragmatic: Most of us had come to the realization that the United States could not continue to prosper while permitting the systematic exclusion of large groups of citizens from full participation in our economic system. Those citizens were, of course, members of minority groups and women of all races. The question was, and to a large extent remains, how do we change the processes that brought us to the present state of imbalance? And, can that change be accomplished without social and economic disorder of an unacceptable magnitude?

When contemplating improvements in any system, care must be exercised to avoid a cure worse than the original condition. Recall the old admonition, "If it ain't broke, don't fix it." My underlying premise here is that if affirmative action as required by current guidelines isn't broken beyond any hope of repair, it is so badly bent from its original shape and intent as to require major overhaul. The procedures cannot be considered effective either as a management tool to encourage creative changes in what the Commission calls the *process of discrimination* or as a monitoring device for enforcement agencies. As the title of this paper implies, I do not think affirmative action is working very well today, but I am optimistic that it can be fixed.

This failure of affirmative action to achieve the very laudable goal of equality in the workplace—or to have moved us closer than we are—is traceable to

certain early, fundamental mistakes on the part of the principal participants in the effort. For the past dozen years government regulators and employers have been wrestling with affirmative action issues—and each other—with frequent calls on the courts to act as referee. Despite such efforts, we are still struggling as a society with the question of how to change long-accepted habits.

The Commission's proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, agrees in principle with my view that improvement in affirmative action procedures is needed if we are to achieve improved results. My purpose here is to examine the relatively brief history of this new concept and to suggest some improvements. In that examination I will develop responses to two basic questions: "What went wrong?" and "How can we fix it?"

The answers will not come from the perspective of a psychologist or sociologist, but from my experience as a generalist suddenly faced with the challenge of developing and overseeing the implementation of an affirmative action program covering 400,000 employees in some 2,000 establishments. For 13 years I was the director of equal opportunity and was deeply involved with a major corporation coming to grips with the problems and complexities of this new management challenge. My answers will be further influenced by my years of interaction with hundreds of other corporations, trade associations, and public interest organizations, with whom I

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shared my company's program on many occasions and in many forums.

In part A, for purposes of historical perspective, I will look back at what employers and the Federal Government had been doing in the field of affirmative action prior to the Civil Rights Act of 1964. In part B, I will explore the reasons affirmative action has turned from a common-sense, results-oriented idea to a recordkeeping, defensive quagmire. In part C, I will share a unique success story, and I will recommend to the new administration changes to affirmative action which will support my contention that, "It's not too late to make it work."

## Part A—Historical Backdrop to Affirmative Action

Although the roots of job discrimination in America extend deep into our national history, I will confine this backward glance to the period between 1935 and 1964, looking first at employment standards and activities of most employers and then at the activities of the United States Government.

The plain facts are that from 1935 to 1964 the personnel policies of American corporations reflected little, if any, influence of what we know today as affirmative action. Generally speaking, *all* companies, large and small, were hiring, firing, training, and promoting employees at all job levels on grounds of their own choosing. Throughout the country, standards for personnel practices were shaped by individual corporate preferences. If this was a discriminatory process—and frequently it was—it was nonetheless the accepted practice, it was legal, and it was the virtually unchallenged standard operating procedure of nearly every employer in the Nation, public or private. In short, employers as a group can lay no special claim to affirmative action leadership in an era when job discrimination, as defined *since* 1964, was the accepted order of the day.

Let us also examine the policies and actions of the Federal Government during this same period. It is generally assumed that Washington's effective entry into the field of affirmative action began with the Civil Rights Act of 1964, and before its passage, government took no action to influence national employment policy. But this is not the case.

During the time span being considered here, the Federal Government was, in fact, creating significant policies directly affecting the American labor force through legislation that influenced all seg-

ments of our economy. Paradoxically, however, in light of the events that have occurred since 1964, the Federal employment policies created between the thirties and the sixties actually *discouraged* the employment and advancement of minorities and women, and strongly *avored* a white male labor force. Consider the influence and effect of just three important congressional acts of this era: the Social Security Act of 1935, the Draft Act of 1940, and the G.I. Bill of Rights of 1944.

The Social Security Act was a sweeping piece of legislation designed to protect millions of American workers and their families against various financial adversities. Yet, in both spirit and letter, the provisions of this act and its subsequent amendments assumed an image of the typical American family, consisting of a breadwinning husband, a homemaking wife, and dependent children. Through the structure and administration of its benefit programs, the Social Security Act effectively discouraged women from seeking employment and encouraged the growth of a work force that was predominantly male.

The Draft Act of 1940 extended government sponsorship of a male-dominated work force still further. Its purpose was to conscript and train recruits for service in the armed forces during World War II. However, since the training of thousands of military personnel also equipped them with skills and knowledge for civilian use, this act effectively put the government into the business of vocational training. And its trainees were predominately *men*. Equally important, this act also set up racially discriminatory patterns. Since the armed services in both World War II and the Korean conflict imposed a ceiling on *black* inductees amounting to less than 10 percent, the draft acts also contributed to training a labor force that was not only male, but also predominately *white*.

Still another act, the G.I. Bill of Rights, along with similar veterans benefits laws, gave special financial support for the education of discharged service personnel. Since the preponderance of the veterans thus benefited were white and male, the net effect of these acts was to create a labor force, trained by the government, that precluded a fair representation of blacks, other minorities, and women. These are, of course, only the landmark acts that served to solidify discriminatory patterns in American employment practices. Many less significant

laws, regulations, and government practices contributed to this same imbalance.

It is not my purpose here to pass moral judgments on the actions of either the business community or the government. It is my purpose to contend that in the period between 1935 and 1964, while employers did little to advance the cause of equal opportunity, the Federal Government did much to retard and delay it through a series of legislative actions that withheld opportunity from minorities and women in the labor force, and distinctly favored white men.

It was both this government action and employer inaction that created the urgent necessity for the drafting and passage of the Civil Rights Act of 1964, followed by President Johnson's issuance of Executive Order 11246 in 1965. With the establishment of these two dominant legal prohibitions against workplace discrimination, the stage was set for the difficult task of reversing the personnel policies of nearly all American businesses—policies that had existed for more than a century.

### **Part B—What Went Wrong?**

I earlier identified the principal participants in the affirmative action arena as government regulators and employers. This is not to ignore the key roles played by Congress in the passage of civil rights legislation, by the courts in a wide range of precedent-setting decisions, or by protected-group members in pursuit of their perceived rights. I simply assert that affirmative action was originally conceived as a tool to encourage voluntary compliance by employers—a tool that, properly used, should have lessened the need for legislation and litigation. That it was not properly used by the two principal groups is, in my opinion, the major cause of the almost impossible situation we have today. Let's examine what happened.

Despite their criticism of regulation, most business people today recognize the need for a basic set of marketplace rules and, perhaps reluctantly, agree that government probably has to establish them. They also recognize that the relationship between the regulator and the regulated is essentially and properly adversative in nature. In the case of government equal opportunity enforcement agencies, unfortunately, this healthy tension quickly deteriorated into a hostile and counterproductive stance reflecting an "all employers are bad guys" attitude. While the agencies may vigorously deny the charge and point to employer recalcitrance as

the cause, I believe there is overwhelming evidence from the late sixties and early seventies to justify it. In those early years there was a trend among employers to accept the concept of affirmative action. This acceptance was particularly apparent among the pacesetters whose actions are closely monitored and finally followed by much of the employer community. Whether it was prompted by fear of legal action, concern for public image, belief it was good business, feelings of good will, or simply acceptance of the seemingly inevitable—probably some combination of all—is immaterial. The fact is that such a trend was developing and, properly nurtured and encouraged by the agencies, could have provided the impetus for voluntary compliance. And voluntary compliance, after all, *is* the only real hope we have for affirmative action ever achieving the desired results. Certainly, we could never afford the army of equal opportunity specialists it would require to monitor every personnel action in the land.

But it was not to be. Never mind that limited resources severely restricted the extent to which ever more stringent regulations could be enforced; disregard the original intent of the law to encourage voluntary compliance, to settle discrimination disputes, and to cause the removal of employment barriers for minorities and women; ignore the fact that testing the outer limits of the statutes and Executive orders would clog the courts' calendars; plead innocent of any knowledge that many companies were making conscientious efforts to understand the law and fashion policies to comply.

The agencies, in particular the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance, seemed determined to presume the worst case reaction from employers and proceeded to try to close every possible loophole by issuing a steady but confusing and often conflicting stream of guidelines, regulations, orders, and interpretive bulletins. Instead of concentrating their resources initially on the basic elements of the task and gradually expanding their reach, they attempted everything at once, while engaging in interagency bickering over who had authority for what. They quickly developed an insatiable appetite for employer data despite an obvious lack of resources to utilize them, an astonishing absence of a workable retrieval system, and without any demonstration that earlier information had been fully considered. Equally improper, from the employers' viewpoint, was the

agencies' cavalier attitude toward confidentiality requests regarding the data being provided; they were frequently ignored unless legal protection was sought.

The preceding litany of complaints against the agencies will receive nods of approval from most employers. But wait. While it is true that I place the brunt of the blame for the needlessly overblown conflict and unproductive requirements on the government, I can by no means absolve employers, unions, referral agencies, and the majority society in general from a considerable share of blame for an even more fundamental failure to act affirmatively. Any continuing optimism about society's potential for improvement in this regard may be hopelessly naive, but I still maintain that it was a general societal resolve to change our treatment of minorities and women that resulted in the legal prohibition against workplace discrimination in the first place; if more of us had held more firmly to that resolve, we would by now have made greater progress toward equality *in spite of* government failures. In far too many instances, distrust of enforcement agencies and criticism of their ineptitude became a convenient excuse to retreat from earlier commitments. When quick success in absorbing greater numbers of minorities and women into jobs from which they had been previously excluded did not come, or when enforcement activity was perceived as unreasonable, the typical reaction of employers was to retreat into a defensive shell. Great sums and much energy were spent in defending the status quo. Indeed, I am convinced that if both government and business had expended as much energy, time, and money in mutual efforts to find creative ways to effect change, we would now be considerably closer to our stated goal of equality.

The predictable result of these failures on the part of the regulators and the regulated has been confusion, conflict, and chaos. That, in my opinion, is where affirmative action stands today.

### **Part C—How Can We Fix It?**

Fortunately, the record of affirmative action is not entirely negative. In fact, considerable progress on the part of minorities and women has been seen in the past decade. No doubt a great deal of that is due to affirmative action requirements. But, as my earlier criticism indicates, my position is that a great deal more could have happened, at much less cost, had effective procedures been in place.

Since I have had the good fortune to compare experiences with many of those pace-setting companies mentioned earlier, I can report that, regulatory excesses notwithstanding, ways can be found to get the job done. A number of those employers over the past decade have shown steady growth in minorities and women employed and in their increasing representation in supervisory and management positions. My former employer is among them. The success story that follows comes from my experience as the company's equal opportunity director.

The story begins in 1973 when, because of continuing management concern for affirmative action, our chairman convened a meeting devoted exclusively to that subject. He conducted an in-depth review with the top 250 officers and senior managers to evaluate problems and progress and concluded that more could be accomplished with even stricter requirements in our affirmative action program. As a result, a new feature of the program was implemented in 1974, and today it remains unique as the most demanding self-imposed affirmative action procedure in the country. Its basic elements are: a requirement that every new hire or promotion action be delayed while the potential for filling the job with a protected-group member is considered—50 percent of all job opportunities where underrepresentation exists are to be filled with minorities and women unless prior, written, upper management approval for a deviation from the requirement has been obtained—for each individual facility; a monthly analysis of all job openings filled, by race and sex, is reviewed by upper management; and corrective action is taken where unexplained violations are found.

The effect of this new procedure has been to dramatically accelerate the company toward its long-range goals, with minority officials and managers having reached 11.4 percent and women 37 percent in 1979. Our success here supports my earlier statement that, notwithstanding regulatory excesses—and we were subject to our share of those—management determination can get the job done.

At the outset I indicated my optimism that much of what's wrong with affirmative action can be corrected. The original concept of an outreach process to enable increasing numbers of minorities and women to participate fully in our economic system was entirely sound. That simple, workable concept was somehow turned into a mass of coun-

terproductive rules and regulations that now require a complete overhaul.

The steps I think the new administration can take immediately will be expressed as desirable principles. If there is agreement on them, then the technical procedures for implementation will follow. They are:

- Require that all equal employment opportunity guidelines and regulations—regardless of the agency promulgating them—adhere to a single body of discrimination law, Title VII of the Civil Rights Act of 1964 as amended.
- Eliminate overlapping enforcement agency jurisdiction. This is not a vote for or against the single enforcement agency idea; it would simply require, as an example, that OFCCP jurisdiction be limited to seeking prospective relief and that EEOC be the single agency empowered to seek retrospective relief.
- Give employers good business reasons to engage in creative efforts to upgrade minorities and women in their work forces. Eliminate the punitive, threatening agency approach except in cases of violations of law or obvious recalcitrance. Find ways, such as tax credits and reduction of reporting requirements, to encourage voluntary compliance and provide management incentive for self-enforcement of affirmative action principles.
- Keep it simple! The new Office of Federal Contract Compliance Programs Manual is at least two inches thick, and lawyers are required to interpret it. Quit trying to close every possible legal loophole and deal with exceptions as they arise.

- Devise an IRS-type sequential procedure for auditing affirmative action progress instead of demanding the same information from all employers regardless of compliance status or history. Start with consolidated employer EEO-1 data over a several-year period and identify those who seem to be making little progress. That will trigger a request for more detailed information from some. Such requests should concentrate on perceived problem areas only, and the burden would be on the agency to demonstrate the need for the additional detail.

I have discussed these issues at great length with hundreds of corporate executives, lawyers, government officials, and representatives of minority and women's organizations and am well aware of the absence of consensus about the causes or the solutions to the affirmative action problem. My proposals for simplifying the procedures will probably be seen by regulatory agencies and public interest groups as too lenient and subject to abuse; they will be viewed by some lawyers as lacking in legal precision; some corporate executives who have found a way to accommodate the current requirements and their attendant costs will argue against change.

My response to all is to say that we simply cannot go on as we are. The process of discrimination will not be dismantled using present procedures, and we all know that. From both a societal and a business viewpoint, the costs are prohibitive and, without change, we are inviting growing unrest and discord among large groups of our citizens.

# Affirmative Action at The Equitable Life Assurance Society of the United States

By William T. McCaffrey\*

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## Introduction

It is indisputable that the major social force in America in the last quarter century has been the accelerating movement of minorities and women to their rightful place in the educational, economic, and political sectors. The continuation of issues raised by this movement in the forefront of the Nation's consciousness, however, is ample evidence that real equality of opportunity has not been attained. While more than a quarter century has passed since the landmark *Brown* decision, and the Civil Rights Act of 1964 is soon to reach its 17th anniversary, it is apparent that legal mandates do not, of themselves, alter the dynamics of society "with all deliberate speed." In recognition of this fact, concerned individuals and organizations have devised numerous affirmative action programs to refocus existing social patterns to ensure, within an acceptable time period, achievement of true equality.

The cutting edge of such affirmative action initiatives has been in the area of employment. The Equitable Life Assurance Society of the United States (Equitable), the 3rd largest insurer and 13th largest business organization in the country, has long been a proponent of affirmative personnel programs. Since at least 1958 the company's published policies have made specific reference to equality of opportunity in hiring and promotion; Equitable was an active participant in President Kennedy's Committee on Employment Opportunity and was among the

first major corporations to adopt an employment "Plan for Progress," which was formally accepted by President Johnson in 1964. The commitment based on these early initiatives has been carried forward with ever-increasing vigor, and Equitable today employs a work force that is 25.2 percent minority, including a 21.7 percent minority representation at the highest officer, manager, and professional levels, with female representation at the same levels numbering 42.7 percent. As might be anticipated, these results derive from a variety of interrelated programs, undertaken with varying degrees of success, and answering to both external and internal pressures and directives. What follows is a summary account of those aspects of Equitable's affirmative action experiences that have proven to be the most significant over the course of time.

## Socialization of the Affirmative Action Concept

It is beyond argument that racial and gender stereotypes continue to be manifest in many aspects of American life. To the extent that stereotypical expectations operate unexamined in the corporate environment, a process of discriminatory hiring, placement, and promotion may continue to exist, even absent any indication of specific or intentional ethnic and sexual distinctions. A reasoned examination of societal assumptions is not an easy task for a corporation to undertake, however, since as a

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thinking body it is most immediately an aggregation of the thoughts of each of its employees, many of whom accept, or actively support, historically discriminatory patterns. The primary affirmative action task, therefore, is the establishment of a discrete corporate value system with respect to equality of opportunity.

Fortunately, the makeup of the American corporation lends itself to the accomplishment of this purpose. Management speaks for the corporation, and in its hierarchy the chief executive speaks for management. Aggressive, vocal statements of support for the affirmative action concept from the chief executive officer, delivered consistently to appropriate management, employee, and external audiences will define both corporate principles and expectations.

In Equitable's experience, the activity of senior management has been crucial to the success of its affirmative action initiatives. Coy Eklund, the current president and CEO, has personally supervised the establishment of hiring goals for women and minorities on an annual basis in consultation with the company's senior executive officers. His identification with affirmative action concerns has been encapsulated in his management directive of "coming right with people" and has been underscored by numerous external activities, chief among these being his recent tenure as chairman of the National Urban League.

Nor is this senior executive commitment limited merely to words. Management staff has been clearly apprised of its responsibilities with respect to affirmative action, and effective social performance has been made a key element of the managerial performance appraisal system. Indeed, for those senior officers participating in incentive compensation programs, attainment of prearranged affirmative hiring goals has been established as a key indicator of financial reward.

In short, through repetition, emphasis, and example, the chief executive officer can, and must, impart to the corporation a sensitivity to affirmative action concepts and results. Without this imposition of corporate conscience from the top, affirmative initiatives will be unfocused and hesitant, as employees respond to individually derived opinions of what is appropriate with respect to affirmative action. Only when that question is answered by highest corporate authority can the entity freely turn its energies to substantive attainments.

## Specific Affirmative Programs

The long participation of Equitable in affirmative employment programs has resulted in an identification of those efforts that appear to be most substantively valuable. As a government contractor, Equitable has, of course, undertaken to establish and maintain affirmative action programs pursuant to the suggested regulatory formats, utilizing statistical analyses and comparisons against preestablished norms. Equitable has learned, however, that the most effective affirmative initiatives are those which are generated internally to address significant employment issues and employee constituencies. As a mature affirmative action employer, Equitable considers its own innovative employment and training programs, rather than its ongoing compliance with formal, externally imposed standards, to be its important affirmative action activities. Examples of these activities in the areas of communications and employment follow.

### Communication

An essential requirement for the identification of potential employees, and their effective utilization once employed, is an ongoing communications link between representatives of targeted employee pools and management. Equitable has established the usual relationships with external organizations representing minority, female, and other special employee interests, and makes full use of the various recruitment organizations active in this area. Because of its past success in recruiting individuals from these targeted groups, however, Equitable has available to it identified employee pools, which are much more valuable sources of information than any external grouping. Various communication vehicles have been established to utilize this internal resource profitably.

Three rotating advisory panels consisting of black, Hispanic, and female employees meet on a quarterly basis with the chief executive officer and other senior personnel to discuss areas of particular concern to each group. Agendas, which are developed in a series of preliminary meetings among panel members, are designed to focus on specific issues and to present senior management with proposed action steps. Typical of the issues addressed in recent sessions have been performance appraisal procedures, affirmative action goals, child care facilities, and employee privacy concerns. The panels are not policymaking groups, and there is no

expectation that issues once raised will necessarily be acted on. Experience has shown, however, that many of the concerns identified by the panels are deserving of attention. The panel sessions have proven to be an important resource for management in structuring and fine tuning affirmative action programs as well as serving as an obvious index of management concern for the represented employee groups.

Similar to the advisory panels but on a higher level is the black opportunity council, comprised of all black Equitable officers, currently numbering 18. The council meets on a semiannual basis with the chief executive and all senior executive officers, and acts as a policy advisory committee on corporate matters that have particular importance for the black community. In preparation for these meetings, the council acts through a three-person steering committee, which formulates position statements on employment, investment, and social responsibility. The council serves as the formal conduit for discussion between the chief executive and senior black company officials.

An Hispanic opportunity council, with a charge similar to that of the black officers' grouping, has recently been established. Similar councils representing black, Hispanic, and female members of the agency sales force also regularly meet with senior management.

Perhaps the most innovative communications tool being used in support of Equitable's affirmative action programs is the series of mentorship programs that have been established. Recognizing that an unintentional but sometimes decisive factor working against minority and female employees is the unavailability of an informal exchange of information in an "old boy" network, Equitable has facilitated voluntary, individual, mentor-protege relationships between minority officers and white senior officers, and between minority management personnel and white officers. It is anticipated that these relationships, after time, will serve as a valuable resource for minority employees in advancing in the corporate structure.

### **Employment**

Among a plethora of special employment programs currently underway, the most significant is that undertaken by the chief executive officer after consultation with the black opportunity council, which has as its goal the employment between 1980

and 1982 of 100 blacks, from external sources, into positions with salaries of \$30,000 or more per year. This program is perhaps the most aggressive affirmative action initiative yet adopted by the company and is a response to a self-identified perception that black managers, pursuing traditional succession tracks, would not be available from internal sources in sufficient numbers in the near future. Noteworthy in this regard is the fact that, measured against currently available data, the company now employs more than a representative number of blacks in these senior positions. A similar program for Hispanic hires is currently being considered.

Another example of a noteworthy employment initiative is Equitable's sponsorship of a training program for minority actuarial students. At the current time fully accredited minority actuaries in the United States number fewer than 10. As part of its affirmative action self-assessment, Equitable determined that a need existed to prepare minority students for careers in actuarial science. As a result a comprehensive educational and employment program has been established, offering a series of summer programs to qualified candidates from historically black colleges. This program represents a valuable extension of the affirmative employment concept beyond its traditional company-specific sphere.

While the program descriptions set out above are necessarily brief, and are illustrative of only a part of the overall Equitable affirmative action commitment, they do serve to demonstrate the type of strategies that flexible, self-generated, affirmative action plans can contain. It should be emphasized that these programs are undertaken in addition to, and apart from, the formal exercises attendant to Equitable's status as a government contractor. Whether this latter series of reporting requirements adds to the substantive attainment of overall affirmative action commitments is a question that should be examined separately.

### **The Role of Government Monitoring**

As the American workplace has recognized and responded to new social and legal realities, the concept of affirmative action has evolved from a relatively unfocused drive to raise the sheer numbers of employees from previously underrepresented groups to a more selective process of addressing areas of substantive concern. Many employers like Equitable have long since accepted the viability of

ongoing affirmative action plans and have moved beyond a formalistic counting exercise to programs designed to ensure a dynamic, well-trained, and truly representative work force. It has been our experience, however, that governmental oversight agencies have not kept pace with this evolutionary development.

Compliance standards currently enforced by government agencies emphasizing numerical displays and columnar analyses were perhaps appropriate to the earlier, more naive "counting" approach to affirmative action. These compliance tools are inappropriately used, however, when they are mechanically and inflexibly applied to every component of an employer's organization, with no recognition given to imaginative and substantive programs, such as those outlined above, that are the hallmark of a mature affirmative employment commitment. It can only be counterproductive, and sometimes actually hurtful, for compliance to be founded on a "correct" percentage of women and minorities, where no efforts have been undertaken to ensure that the individuals counted in that percentage are "employed" in the fullest sense of that term—in real jobs, fully integrated into the business needs of the enterprise, offering a sense of present achievement and potential growth, and addressed by a caring and responsive management structure. The latter points are the focus of fully evolved affirmative action plans; unfortunately, they count for little in the bureaucratic paper shuffle that has come to characterize affirmative action compliance.

Indeed, the eye of the chief enforcement agency has been drawn almost entirely from substance in the recent past. Well-publicized litigations have been contested over entirely procedural issues, which had little, if any, relevance to the ultimate task at hand, a helpful partnership of government and the private sector to establish an environment in which the full talents of all working individuals can be utilized. The misdirection of resources and energies occasioned by such contests, besides drawing wholly artificial battlelines between putative partners and perplexing employee groups generally, squanders opportunities for the establishment of substantive affirmative employment initiatives.

Nor is it only in litigated situations in which resources are squandered and opportunities lost. For a major, nationwide employer such as Equitable, the costs of day-to-day compliance with regulatory

directives and reporting formats is considerable—in our case exceeding \$1 million per year.

We submit that these expenditures have been incurred with little substantive benefit. The paper-intensive compliance that is presently enforced has not substantively contributed to the affirmative action commitment of the organization. Indeed, to the extent that formal requirements impose a seemingly profitless paperwork burden on management, the current compliance strictures sometimes engender negative organizational attitudes towards the affirmative action process.

Equitable believes that the regulatory environment must be changed. While relatively close scrutiny may be a necessary prod for some employers, those which demonstrate a progressive commitment to affirmative action must be freed from the rigid, burdensome, and ultimately unavailing constraints currently covering all government contractors. Such employers must be given the flexibility to fashion programs that are appropriate to their own situations and that will nurture the dynamic interaction of employee systems, which is the basis of a successful affirmative action plan.

Employers should be evaluated on the sole criterion that is a true indicator of commitment, the number of women and minorities who enter and progress through their organization. Measured on this "bottom line" basis, the truly effective affirmative action program will be identified as the one that yields a steadily increasing representation of women and minorities in the work force. Ineffective programs, including those that are merely paper exercises designed only to address the step-by-step procedures of the compliance regulations, will similarly be identified. Regulatory activities might then be refocused to a more rational standard, reducing the unnecessary monitoring of already successful programs.

## Summary

The Equitable Life Assurance Society of the United States has long been an active proponent of affirmative initiatives to encourage the selection and promotion of female and minority employees. After more than two decades of developing and testing various strategies to support these initiatives, Equitable has identified several factors that are essential to successful affirmative action.

The most basic requirement for an effective program is an aggressive, vocal, and public commit-

ment to the principles and reality of affirmative action on the part of senior management. Absent a clear statement of corporate purpose, organizational components may lack the direction necessary to support local and companywide programs; when affirmative action is identified as an integral part of management focus, effective implementation is assured.

Building from the basic foundation, the mature affirmative action program will utilize an ongoing series of employment and communications strategies to establish and maintain a dynamic environment in which female and minority individuals will be able fully to utilize their talents and meet their potential. Innovative programs currently underway at Equitable include:

- A special external hiring program to introduce 100 blacks into high management positions over a 3-year period;
- A training and development program to identify talented minority students who may be interested in careers in actuarial science, a field in which minority representation has historically been extremely low;

- Formalized communications vehicles through which black, Hispanic, and female employees meet with the chief executive and other senior officers on a regular basis;
- Mentorship arrangements that join minority managers and white officers in helpful and supportive relationships.

Programs such as these illustrate a thoughtful affirmative action commitment, the efficacy of which is underscored by the significant and increasing minority and female representation in the Equitable work force. Notably, these programs are undertaken in addition to, and apart from, the exercises of formal compliance with government contractor obligations. For Equitable, these obligations as historically enforced have added little to the success of affirmative action. Indeed, paper-intensive reporting has on occasion diverted resources away from internal affirmative programs. A change in the regulatory environment and a rationalization of the compliance process is suggested.



# **OTHER COMMENTS AND COMMISSION RESPONSES**



# HARVARD UNIVERSITY

OFFICE OF THE PRESIDENT

MASSACHUSETTS HALL  
CAMBRIDGE, MASSACHUSETTS 02138

March 16, 1981

Dear Mr. Flemming:

As I promised, I have read the draft statement which you sent me and have prepared the following brief comments.

The draft does a good job, in my opinion, in exploring the subtler forms of discrimination and in explaining the reasons for the current arsenal of weapons to deal with these problems. It also performs a useful service in dispelling some of the exaggerated fears about affirmative action and in repudiating some extreme remedies. In these respects, the paper is thoughtful, balanced, and clear.

On the other hand, the draft studiously ignores many of the problems that are most vexing to many institutions in this country. Those problems are primarily concerned with the administration and implementation of the program. In illustrating my point, I must confine myself to affirmative action as it relates to higher education, since I am not familiar with the industrial program. I should add that the points I will make should not be construed as criticisms of the particular officials with whom I have dealt at Harvard.

Among the problems are the following:

1) The continued emphasis on extraordinarily elaborate plans that require institutions to spend much valuable time and money that could better be devoted to actually trying to achieve concrete results.

2) The use of detailed statistical analyses to set goals and indicate underutilization, using methods that are dubious, since they rely on seriously flawed conceptions of the relevant pool of potential candidates for faculty positions.

3) Frequent changes in the methodology required for reporting to the government which often accomplish little except to cause further administrative expense and continuous uncertainty.

4) The lack of effective strategies for using scarce agency resources for compliance in order to achieve maximum results for the greatest number of colleges and universities.

5) The lack of personnel sufficiently trained to understand affirmative action and the peculiar problems and workings of universities.

March 16, 1981

(The behavior of such persons is the cause of repeated instances of misunderstanding and resentment on the part of university administrators.)

6) Continued, protracted delays in approving affirmative action plans, thus creating needless uncertainty and frustration on the campus.

I am sure that affirmative action officers from many universities could supplement this list with many more problems. Since your draft is apparently aimed at the private sector rather than the government, you may not wish to analyze these issues in detail, let alone recommend improvements. But I do feel that you must acknowledge the problems in some clear and convincing way, or your draft will lack credibility and will seem biased in tone and content. The problems you do address are real enough. But many people in the audience you are trying to reach will agree with most of what you say but will have strong objections and resentments which are not touched by your draft. For these people, the problems are not in the conception but in the execution. Unfortunately, poorly executed programs create misunderstandings and prejudices that also impede the realization of your goals, and hence deserve attention in your draft if it is to serve its purposes.

Best wishes,

Sincerely,



Derek C. Bok

Mr. Arthur S. Flemming  
United States Commission  
on Civil Rights  
Thomas Circle S.  
1121 Vermont Ave., NW  
Washington, DC 20425



# The American Jewish Committee

Institute of Human Relations • 165 East 56 Street, New York, N.Y. 10022 • 212/751-4000 • Cable Wishcom, N.Y.

April 9, 1981

Paul Alexander, Esq.  
Acting General Counsel  
U.S. Commission on Civil Rights  
1121 Vermont Ave., N.W.  
Washington, D.C. 20425

Dear Mr. Alexander:

The purpose of this letter is to comment on the Proposed Statement of the Commission on "Affirmative Action in the 1980s: Dismantling the Process of Discrimination." Our organizations, namely, the American Jewish Committee, the American Jewish Congress and the Anti-Defamation League of B'nai B'rith, have long supported both the principle and the practice of affirmative action to rectify the consequences of past discrimination in America. It has been our view that special efforts are indeed required to recruit, train and advance those who have been historically discriminated against or disadvantaged. It has also been our view, however, that the use of quotas or preferences based on race, ethnicity or gender undermines the concept of individual merit and the principle of equal opportunity itself.

The issue of the proper limits of affirmative action programs has been intensively debated for many years, and our organizations have been among many which have participated in this debate. We have examined carefully the Proposed Statement of the Commission. We wish to state for the record that we have serious misgivings about it. Our misgivings are encapsulated in an excerpt from the testimony submitted to the Commission at its consultation on this subject of March 10 by the distinguished civil rights lawyer, Morris B. Abram. In his words:

The undeniable thrust of the proposal is for the apportionment of opportunities by race and sex, call it what one will. For in truth, short of all the camouflage, this proposal is a call for quotas -- for a numerically proportionate sharing of American opportunity by race and gender.

(cont.)

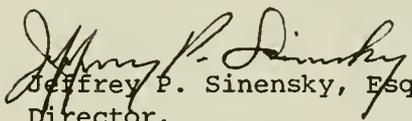
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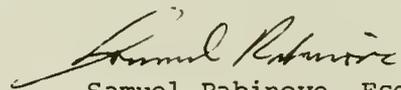
The Proposed Statement has been issued at a time when a new Federal Administration, as well as a new Congress, will be examining the whole area of affirmative action and, perhaps, may be taking some action to restrict its implementation. It is our hope that there will evolve a national policy which, on the one hand, will reaffirm the national commitment to genuine equal opportunity for all and to legitimate affirmative action in every field and, on the other, will seek to eliminate the many abuses and excesses which have developed from distortions of the affirmative action principle. As the Proposed Statement acknowledges:

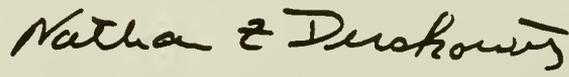
Affirmative action plans have been subject to abuse. If undertaken with little or no understanding of the nature of the problem that affirmative steps are designed to remedy, such plans at best lead to mechanical compliance in a continuing climate of animosity among racial and ethnic groups and between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

In sum, although the Proposed Statement certainly deserves very careful attention, so do our misgivings and reservations about it. It would be tragic indeed if laudable efforts for the purpose of "dismantling the process of discrimination" were to be emasculated because of the excesses of group quotas and preferences.

Very truly yours,

  
 Jeffrey P. Sinensky, Esq.  
 Director,  
 National Law Department  
 Anti-Defamation League

  
 Samuel Rabinove, Esq.  
 Director,  
 Discrimination Division  
 American Jewish Committee

  
 Nathan Z. Dershowitz, Esq.  
 Director,  
 Commission on Law and Social Action  
 American Jewish Congress

EQUAL EMPLOYMENT ADVISORY COUNCIL

SUITE 1220

1015 FIFTEENTH STREET, N. W.

WASHINGTON, D. C. 20005

(202) 789-8650

May 5, 1981

Mr. Paul Alexander  
Acting General Counsel  
United States Commission on  
Civil Rights  
1121 Vermont Ave., N.W.  
Washington, D.C. 20425

Dear Mr. Alexander:

As indicated in my conversation with Jack Hartog some time ago, the Equal Employment Advisory Council has had a long-standing policy of limiting its public statements to written documents - its amicus curiae briefs, comments, and publications. As a result, the Council has been unable to participate directly in your planned consultations. We have, however, reviewed with a great deal of interest your proposed statement entitled, Affirmative Action in the 1980's: Dismantling the Process of Discrimination, and would like to contribute the following comments in lieu of a personal appearance.

Since its organization in 1976, EEAC has presented the views of employers generally in litigation involving equal employment laws and regulations. Its membership consists of a substantial cross-section of employers and trade associations, and is firmly committed to the principle of equal employment opportunity and to the goals of our nation's equal employment laws. It is EEAC's function through amicus curiae briefs and appropriate comments, to assist both the courts and administrative agencies in their efforts to grasp the practical impact of precedent-setting decisions. Substantially all of EEAC's members or their constituents are subject to the statutes and executive orders implemented by the Equal Employment Opportunity Commission (EEOC), and the Office of Federal Contract Compliance Programs (OFCCP) and, therefore, have an understanding of and commitment to affirmative action. Clearly, any discussion of the future of the concept or its philosophical direction is of great interest to the Council and its members.

In general, our comments address four basic issues raised in the proposed statement: (1) the definition of affirmative action and discrimination; (2) the correlation between Title VII

law and affirmative action; (3) the requirements of the federal contract compliance program; and (4) the focus of the problem-remedy approach. The Council agrees that a better understanding of the problem of discrimination is a necessary prerequisite to an objective selection of effective remedies, and hopes that these comments will assist in making our collective understanding of discrimination and its remedies as accurate as possible.

I. The Definition of Affirmative Action and Discrimination

The Commission should be commended for its statement that the term, affirmative action, represents a variety of different affirmative steps that can be taken to prevent or remedy past discrimination. Such steps include the use of goals and timetables or the implementation of remedial quotas to provide relief to those individuals found to have been the victims of discrimination. As the Commission notes, however, these steps and the term affirmative action are not synonymous. The former are but two examples of the many activities which comprise the latter.

This definitional distinction has become increasingly important. When objections to goals and timetables are raised, there is a tendency by some to presume synonymy and these objections are focused on affirmative action in general. Similarly, there is a tendency by some to presume that those who question any remedial device conceived by a regulatory agency must also disapprove of the general concept of affirmative action. Both presumptions are wrong, and the Commission's definition of affirmative action should help to discourage their use.

Unfortunately, the same can not be said of the Commission's definition of discrimination. It is so broadly stated that it would appear to include most of the affirmative remedies which are advocated in the proposed statement. Moreover, it refers to "legal discrimination," or that discrimination for which:

"...there may be practical difficulties in establishing that a legal violation has, in fact, occurred or the discrimination, despite consistently unequal results, is entirely lawful." (Page 19)

Such a pejorative use of the term is unnecessarily confusing. In passing the existing civil rights laws, Congress reviewed the numerous methods used to differentiate among people. It prohibited many. Those which it left intact, such as seniority systems, were found by Congress to have a countervailing validity of their own. By labeling these practices "legal discrimination," the Commission inaccurately categorizes practices which neither differentiate in an illegal manner nor require redress under existing law.

## II. Affirmative Action and Title VII

Summarizing its explanation of the correlation between civil rights law and affirmative action, the Commission concludes on page 30 that:

"[t]he 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."

This assessment is troublesome for two reasons. First, it overstates the precedential value that can be drawn from these and other Supreme Court cases concerning affirmative action programs. Second, it ignores the absence in Title VII of a statutory requirement necessitating the preferential treatment of minorities and women.

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four justices argued that it was unlawful for race to be made a factor in the University's admission policies. Justice Powell reasoned that, while the University's set-aside program was unconstitutional, race could be taken into account in order to develop a racially diverse student body as long as its consideration was not the single determinative factor. Justice Powell also contended that race could be taken into account where there had been a judicial, legislative or executive finding of past discrimination. While the remaining four justices would have approved the California program without those qualifications, they indicated that their views, read along with Justice Powell's, meant that race could be considered in employment decisions at least where there had been findings of discrimination against minorities made by an appropriate governmental body.

In United Steelworkers and Kaiser Aluminum & Chemical Corporation v. Weber, 99 S. Ct. 2721 (1979), the Court resolved in the affirmative the question of whether a company could voluntarily adopt a racially based affirmative action plan. The Court took notice of the fact that minorities had been victimized by a well-established pattern of discriminatory exclusion from the industry involved. It also noted that the plan was temporary, limited in scope and did not unnecessarily trammel the interests of white employers. Similarly, the 10% set aside in Fullilove v. Klutznick, 438 U.S. 567 (1978), was premised upon a Congressional finding of discrimination in the awarding of federal contracts and the affirmative relief itself was limited in its extent and duration.

Taken together, these decisions indicate a much narrower commitment on the part of the Supreme Court than asserted by the Commission. They clearly point to a willingness by the Court to approve racially-based affirmative acts where there has been a finding of past discrimination by a court, legislative, or executive body of sufficient competency to make such a determination. The Court also takes into consideration the effect the plan will have on majority male rights and its duration.<sup>1/</sup> The extent to which the court will approve voluntary plans appears to depend, in large part, on the degree of previous discrimination and the entity, public or private, adopting the plan.

When the Bakke, Weber, Fullilove trilogy is read in conjunction with other discrimination cases, a more complete picture emerges. The Supreme Court clearly has demonstrated a willingness to tailor affirmative remedies to fit the kind of discrimination proven and not to approve routinely all forms of affirmative redress.<sup>2/</sup> This interpretation is reflected in most of the cases sighted in the Commission's footnote 116 on page 31 of proposed statement. All involve judicially-approved,

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<sup>1/</sup> International Brotherhood of Teamsters v. U.S., 431 U.S. 431 U.S. 324 at (1977); Weber, supra, 443 U.S. at 208.

<sup>2/</sup> See e.g., Swann v. Charlotte-Meklenburg Board of Education, 402 U.S. 1, 16 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).

racially conscious remedies which were based upon, in most part, a finding of past discrimination.3/

Nothing in these cases warrants, however, an interpretation that the Supreme Court or a lower court would approve racially-based quotas or other forms of affirmative relief to remedy what the Commission calls "legal discrimination." All the cited decisions involved discriminatory acts specifically prohibited by statute. In those instances where courts have been requested to extend affirmative remedies to acts not prohibited by statute, they have routinely refused.4/

Moreover, preferential treatment is not required by Title VII. The Commission incorrectly implies on page 24 of the proposed statement that employers have an obligation to give preference

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3/ In Detroit Police Officers' Assn. v. Young, 608 F.2d 671 (6th Cir. 1979), and Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979) the racially-based hiring and promotion ratio was based upon a finding of a systematic exclusion of blacks from the police force. In Price v. Civil Service Commission, 161 Cal Rpt. 475, 604 P.2d 1365 (1980), the court stated that the race-conscious program sought to eliminate proven patterns of racial segregation in Sacramento County hiring practices. The affirmative action program at issue in Tangren v. Wakenhut Services, Inc., 480 F. Supp. 539 (D. Nev. 1979), was voluntarily adopted to overcome previous underrepresentation against blacks. The program approved in Maehren v. City of Seattle, 92 Wash. 2d 480, 599 P.2d 1255 (1979) was described by the court as necessary to eliminate past discrimination in the city's hiring practices. In Chmill v. City of Pittsburgh, 412 A.2d 860 (1980), the court approved a plan to remedy "a judicial finding of discrimination."

4/ See e.g. California Brewers Ass'n. v. Bryant, 100 S. Ct. 814 (1980); International Brotherhood of Teamsters, 431 U.S. 324 (1977).

to minorities and women over equally qualified majority males until all protected groups are fully represented. The accuracy of this statement is far from clear under the Executive Order program and clearly is inaccurate under Title VII. In Texas Department of Community Affairs v. Burdine, 49 U.S. L.W. 4214 (U.S. 1981), the Supreme Court rejected this argument and stated:

The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.

This interpretation is evident in other decisions by the Court. In Furnco v. Waters, 438 U.S. 567 at 579 (1978), Justice Rehnquist stated that the obligation imposed upon employers under Title VII is to provide:

"an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce."

Similarly, in Griggs v. Duke Power Co., 401 U.S. 424 at 430 (1971), the Court concluded that:

"in short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. (Emphasis added).

Even the Bakke, opinion of Justice Brennan, which was strongly supportive of voluntary affirmative action, stated that "...Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own..." 98 Sup. Ct. at 2775 (emphasis added). Justice Brennan noted, however, that such an objective

was consistent with the remedial goals of the statute.<sup>5/</sup>

When read together, the aforementioned cases indicate that the Supreme Court will not adopt all forms of racially-based affirmative relief. The Court has never demonstrated a commitment to approve preferential treatment to remedy what the Commission refers to as "legal discrimination." To make Part B of the proposed statement accurate, the Commission should amend its analysis and include an explanation of the restraints the Supreme Court has imposed on the use of affirmative action. Only then will it be able to portray correctly the legal framework in which remedial actions must be developed.

### III. The Federal Contract Compliance Program

On page 23 of the proposed statement, the Commission accurately notes that under Executive Order No. 11246 a contractor is required to develop "goals and timetables to measure employer success or failure in overcoming under-utilization." But it then states that "...[t]he goals are generally expressed in a flexible range (e.g. 12 to 16 percent) rather than in a fixed number," citing 41 C.F.R. § 60-2.12(e).

This latter observation is clearly inaccurate. In OFCCP's Compliance Manual, the agency defines goals in terms of a specific number or percentage. (See Sections 1-60.9 and 2-190 through 2-190.4c). No mention is made of using a range, nor can any support for the Commission's description be found in the citation contained in the proposed statement. Section 60-2.12(e) states that goals must not be rigid quotas but in no part authorizes the use of ranges.<sup>6/</sup>

<sup>5/</sup> This Court's school desegregation decisions also support this distinction. See e.g., Swann, et al. v. Charlotte-Mecklenburg Board of Education, et al, 402 U.S. 1, 16 (1971) ("To [prescribe a ratio of Negro to white students reflecting the proportion for the district as a whole] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.") (Emphasis added). Accord, Milliken v. Bradley, 418 U.S. 717, 744 (1974); and Dayton Board of Education v. Brinkman, 433 U.S. 406, 417 (1977).

<sup>6/</sup> See e.g., Office of Federal Contract Compliance Programs v. Firestone Tire & Rubber Co., Inc., 23 FEP Cases 526 (D.C. Tex. 1980).

It is imperative that the Commission correct this error, because its subsequent description of the contract compliance program builds upon this false presumption of flexibility. As currently administered, the program is routinely inflexible. In fact, in its most important comparisons, the program requires exact matching. For example, whenever minorities and women are underutilized, an employer must establish a goal, even where current representation is less than one person away from full utilization. For example, if availability for minorities for a certain job group is 10% and there are 65 people in that job group, the goal a contractor would be required to meet would be 6.5. It would have to employ six and a half minorities in that job group. If the contractor employs only 6 minorities, it would still be considered by the agency to be underutilized and would have to set a goal for that half person. (See OFCCP Compliance Manual Section 2-190.1(a).)

Similarly, the agency states that underutilization exists where there are fewer minorities and women than would "...be reasonable expected by their availability." 41 C.F.R. 60-2.11(b). It also states, elsewhere, however, that any numerical disparity between availability and current representation constitutes underutilization. (See OFCCP Compliance Manual Section 1-60.103 and 2-180.2). As with goals, exact matching, not a flexible range of acceptability, is the determinative standard.

The Commission should not be misled in its assessment of the federal contract compliance program by an incomplete understanding of its regulations and requirements. Today, the program has a reputation for bureaucratic arbitrariness and institutionalism. Recent enforcement activities demonstrate a growing preoccupation with form instead of substance.<sup>7/</sup> As a result, the Commission should not limit its discussion of the program to a colloquy on whether goals are the equivalent of quotas. Equally important questions relate to the manner in which the program can be made more practical in its demands and requirements and less punitive with respect to those

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<sup>7/</sup> See Firestone, supra.

Paul Alexander  
April 10, 1981  
Page Nine

contractors which engage in affirmative action. Most valuable of all would be a discussion of how to assure that the program emphasizes the creation of equal opportunity instead of mere adherence to an ever-changing series of rigid forms and standards.

#### IV. The Focus of the Proposed Statement

The principal focus of the proposed statement and the problem remedy approach, of course, deals with what the Commission describes as the process of discrimination. Its explanation of this process provides, according to the Commission, the conceptual, factual and legal authority for affirmative action. As suggested above, we believe there are several errors in this description but, more importantly, the statement is cause for greater concern because of its omissions than for its inclusions.

The Commission accurately notes that affirmative action is a term representing an assortment of remedial acts, yet it never addresses the practical question of which types of affirmative acts are effective. For example, are goals and timetables under the federal contract compliance program effective? Have court imposed quotas accomplished their purpose? Has the attention given these methods deflected attention which should be given to training programs? What are the most realistic types of affirmative acts given today's economic restraints?

These are only a few questions which the statement leaves unanswered, but, until the Commission addresses these concerns, its report will lack a necessary component - an authoratative assessment of how best to remedy the process and individual acts of discrimination. Any discussion of remedial relief clearly is incomplete if it fails to ascertain the effectiveness and practicality of the remedies being discussed and advocated.

Respectfully submitted,



Kenneth C. McGuiness  
President

UNITED STATES COMMISSION ON CIVIL RIGHTS

---

Washington, D. C. 20425

Mr. Kenneth C. McGuiness  
President  
Equal Employment Advisory Council  
Suite 1220  
1015 Fifteenth Street, N.W.  
Washington, D.C. 20005

Dear Mr. McGuiness:

We wish to thank you for your thoughtful letter on behalf of the Equal Employment Advisory Council commenting on our proposed statement on affirmative action. Given the Council's impressive history of involvement with affirmative action, we regret that you were unable to participate in the Commission's consultation on our proposed statement.

Your letter and this response will be published in a separate document that records the proceedings of the consultation.

The comments in your letter were extremely helpful, enabling us to sharpen and clarify the final draft of the statement. We especially appreciated the comments concerning the requirements of the Federal contract compliance program. We have revised that section of the statement to reflect the letter's analysis. The flexibility that does exist in OFCCP's program is not in the goals themselves, as was suggested, but in the availability analysis that generates those goals, and in the procedures the employer decides to use to reach those goals.

We also share the belief, expressed in the last paragraph of your letter, that there is a need for "an authoritative assessment of how best to remedy the process and individual acts of discrimination." As a step in this direction, the Commission has added a brief appendix to the statement providing guidelines for effective affirmative action plans. This new section is based on information gathered at the consultation on the proposed statement from social scientists, organizational consultants, and labor and management representatives with personal experience in designing, implementing, monitoring, and evaluating affirmative action plans. The appendix also draws from the limited published literature on the practical aspects of affirmative action planning. We hope this appendix provides some of the needed information your letter calls for.

With respect to the other two points your letter raises (concerning our definition of discrimination and the correlation between Title VII case law and our analysis of affirmative action), we believe the positions expressed in the proposed statement should remain unchanged.

Your letter states on pages 2-3 that although our broad definition of affirmative action is helpful, our correspondingly broad definition of discrimination, particularly the term "legal discrimination," is "unnecessarily confusing." The statement uses this term, in our judgment, descriptively, not pejoratively. "Legal" discrimination helps distinguish minimal legal requirements, which prohibit illegal discrimination, from maximum policy objectives, which discourage all other forms of discrimination, including those where no individual or entity is legally responsible or morally blameworthy. The distinction is explained, and examples of "legal discrimination" are given in the text on page 26 of the proposed statement. "Legal discrimination," as we explain in notes 2 and 84 in Part B, is often referred to as "societal discrimination." By including such forms in our definition of discrimination, we do not mean to suggest that decisionmakers who fail to remedy legal (or "societal") discrimination are or should be found in violation of Title VII. Our point is that decisionmakers who are committed to carrying out equal employment opportunity policies should extend their remedial efforts beyond that which is minimally required for compliance with the law. They should voluntarily attempt to eliminate all forms of discrimination. Moreover, the law should facilitate, rather than obstruct, such voluntary actions. See the discussion of United Steelworkers of America v. Weber on page 29 of the proposed statement. These points will be clarified in the final statement.

The letter also takes the position, with which we disagree, that the trilogy of affirmative action cases (Bakke, Weber, and Fullilove) indicates a more narrow commitment to affirmative action on the part of the Supreme Court than that contained in the proposed statement. In our judgment, the proposed statement does not overstate the precedential value of these cases. Your letter on page 3 accurately quotes page 30 of the proposed statement that there are limits on the use of these cases as precedent. The limitation on such use, however, results more from the absence of a single standard governing affirmative action to which a majority of the Court subscribes than from a lack of judicial commitment to the use of race-conscious plans to eliminate discrimination (proposed statement, pages 30-31).

The EEAC's position, as we read your letter, is that Justice Powell's opinion in Bakke accurately reflects the state of the law ("racially based affirmative acts [are lawful] where there has been a finding of past discrimination by a court, legislator, or executive body of sufficient competency to make such a determination"--EEAC letter, page 4) and that nothing in the trilogy of Supreme Court cases or the lower courts "warrants...an interpretation that the Supreme Court or a lower court would approve...affirmative relief to remedy...'legal discrimination.'" We disagree. Justice Powell's perspective is not shared by any other member of the Court. It is not the prevailing law of the land. Moreover, in Weber neither the courts nor any other governmental body of "sufficient competency" made a finding of past discrimination before the plan was implemented. Nonetheless, the Supreme Court upheld a voluntary affirmative action plan created by a union and an employer in the private sector to remedy discrimination for which neither the union nor the employer was legally responsible. Thus, Weber stands for the proposition that voluntary affirmative action plans may remedy "societal" or "legal" discrimination. Similarly, in Fullilove Justice Burger, unlike Justice Powell, did not use language suggesting that Congress had to find illegal discrimination before it could promulgate the challenged 10 percent set aside program for minority businesses. Compare 448 U.S. at 477-478 (opinion of Burger, C.J.) with 448 U.S. at 502-506 (opinion of Powell). Finally, we read the lower Court opinions cited in note 3 in your letter and in note 116 of Part B of the proposed statement, as either acknowledging or sharing the viewpoint set forth in the proposed statement. None explicitly reject it.

The remaining issue is your view that the statement implies on page 24 that employers have an obligation to give preference to minorities and women over equally qualified white males until all protected groups are fully represented. No such general implication was intended.

We cannot find language on page 24 or anywhere else in the proposed statement that Title VII has a general requirement that employers give preference to minorities and women over white males. Nor can we find language inconsistent with the case law propositions you cite on page 6 of your letter. Our point is the same as that which you attribute to Justice Brennan in Bakke on pages 6-7 of your letter: voluntary action by employers to remedy discrimination by hands other than their own is fully consistent with the remedial goals of Title VII.

In our final draft, we will include language based on Burdine (101 S. Ct. 1089 (1931)), decided after the release of the proposed statement, which we hope will avoid misinterpretations of the Commission's position on this issue.

We appreciate your taking the time to share with us your ideas and thoughts on affirmative action. Your comments were very useful in the final preparation of a document that we hope will contribute needed distinctions to the national debate over this vital issue. A copy of the finished statement will be forwarded to you upon publication.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul Alexander", followed by a horizontal line.

PAUL ALEXANDER  
Acting General Counsel

UNITED STATES COMMISSION ON CIVIL RIGHTS

---

Washington, D. C. 20425

Jeffrey P. Sinensky, Esq.  
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c/o The American Jewish Committee  
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165 East 56 Street  
New York, New York 10022

Dear Sirs:

Thank you for your letter succinctly stating your major reservations and misgivings about our proposed statement. We appreciate your groups' contribution to reasoned debate over the proper limits of affirmative action. We can assure you that the Commission has given very careful thought to the perspectives your letter articulates.

Your letter and this response will be published in a separate document that records the proceedings of the consultations the Commission held on its proposed affirmative action statement.

The second page of your letter accurately targets the objective of the Commission's statement: the need for a clear conceptual approach, and its vigorous implementation, that advances "genuine equal opportunity for all" while eliminating "the many abuses and excesses which have developed from distortions of the affirmative action principle." The problem-remedy approach applied by the statement argues that increased clarity about the

nature and extent of discrimination will effectively further this shared objective. Reasonable people can disagree over whether a particular remedial measure that takes race, sex, or national origin into account should be tried in a given context. This disagreement, the statement explains, can be minimized or resolved through common understanding of the discriminatory problem that must be overcome. Debates over affirmative action cannot be productive if they are divorced from the actual dynamics, forms, and scope of discrimination experienced by minorities and women.

We must take sharp issue, however, with your overall characterization of the statement as "a call for quotas--the numerically proportionate sharing of American opportunity by race and gender." The proposed statement painstakingly seeks to make clear that affirmative action is not synonymous with quotas.

The document consistently distinguishes affirmative action plans, which will use a variety of antidiscrimination measures, from the specific antidiscrimination measures within affirmative action plans that take race, sex, and national origin into account. See, for example, pages 5-6 of the proposed statement. Quotas are only one kind of antidiscrimination measure which the courts, employers, and unions have found indispensable under certain conditions. See pages 24-25 of the proposed statement. Quotas are not panaceas. The proposed statement emphasizes on page 38, and elsewhere, that "the nature and extent of discrimination [should be] the primary basis for deciding among possible remedies." The final revised document will further clarify the Commission's position on this issue.

Your opinion that the proposed statement is a "call for quotas" lead us to believe that our conscientious efforts to specify the proper use and the improper abuse of numerical data in affirmative action plans have failed. An example of these efforts appears on page 36:

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.

The quoted material and discussions in other parts of the proposed statement (for example, on page 41) are inconsistent with the position you attribute to the Commission.

To eliminate numerical data from affirmative action plans--as your letter implies--would guarantee their ineffectiveness. Because numerical data are essential in helping to detect discrimination (see pages 20-21 of the proposed statement), such data also are essential in assessing progress in combating discrimination (see page 22 of the proposed statement). Our final revised document, particularly its new appendix with guidelines on effective affirmative action plans, hopefully will be more successful in demonstrating how affirmative action plans should properly use numerical data.

We hope the finished version of Affirmative Action in the 1980s, a copy of which will be forwarded to you upon publication, serves to diminish the polarization characterizing the national debate over affirmative action. We can assure you that the Commission has developed the problem-remedy approach in order to extend equality of opportunity, not mindless numerical apportionment, to all realms of American life.

Sincerely,



PAUL ALEXANDER  
Acting General Counsel

UNITED STATES COMMISSION ON CIVIL RIGHTS

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Washington, D. C. 20425

Mr. Derek C. Bok  
President  
Harvard University  
Massachusetts Hall  
Cambridge, Massachusetts 02138

Dear Mr. Bok:

Thank you for your letter commenting on our proposed statement on affirmative action. The letter accurately summarizes the key issues in the controversial area of Federal civil rights enforcement. We regret that you were unable to share your thoughts with us at the Commission's consultation. The points raised in your letter, however, have received careful consideration by the Commission, not only for purposes of the final revision of our statement, but also as indicators of Federal enforcement ineffectiveness.

Your letter and this response will be published in a separate document that records the proceedings of the consultation.

We are grateful for your timely warning that our draft statement might appear biased because it did not address the serious problems impeding Federal civil rights enforcement efforts. Our final revised statement seeks to correct any misunderstandings by acknowledging the most common concerns regarding Federal enforcement programs. For example, in the revised introduction to the statement we will explain that, although we are aware of the significance of these issues, and deeply troubled by their negative impact on civil rights enforcement, our statement does not focus on the improvement of Federal enforcement procedures. Our document instead aims to provide a solid conceptual foundation for the advancement of civil rights.

We agree that overzealous or misinformed enforcement does a disservice to civil rights by failing to provide effective assistance to those who need Federal protection, while overburdening and antagonizing those who would voluntarily execute affirmative action plans. Federal enforcement procedures should be flexible in their support of those who

comply voluntarily with civil rights laws, while remaining sufficiently strong to compel compliance by unwilling parties. For both of these purposes, a clear conceptual framework is needed. The Commission believes that a clearer understanding that the nature and extent of discrimination forms the basis for affirmative action will result in better design and administration of affirmative action programs and more effective enforcement efforts.

As you know, one of the statutory duties of the Commission is to conduct periodic reviews and appraisals of Federal civil rights enforcement activities. The Commission regards this as one of its most significant functions. We have already published numerous reports on Federal civil rights enforcement efforts, and plan to continue our analysis of Federal enforcement activities, their strengths and weaknesses, in the future. For example, enclosed is a recent report, Promises and Perceptions: Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action, from 13 of our State advisory committees, relating various perceptions of five key Federal equal employment opportunity programs. The Commission's statement on affirmative action, however, has a different thrust, and does not purport to be a study of the shortcomings of Federal civil rights enforcement programs.

We thank you again for including a careful reading of our draft in your busy schedule. Your comments have been most helpful to the Commission. A copy of the finished statement will be forwarded to you upon publication. We hope this document, particularly its appendix containing guidelines for effective affirmative action plans, will be of some assistance to you and others charged with the difficult and demanding task of administering affirmative action programs.

Respectfully,

*Arthur S. Flemming*  
ARTHUR S. FLEMMING  
Chairman

Enclosure

UNIVERSITY OF MARYLAND  
BALTIMORE, MARYLAND



