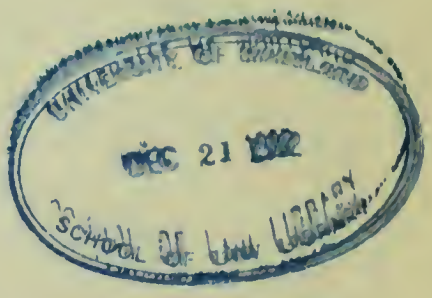
Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights

Vol. II: Proceedings
February 10 and March 10-11, 1981
Washington, D.C.



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

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 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.

Volume I of this publication compiled all papers submitted by consultation participants, as well as all other comments received by the Commission and the Commission's response. The transcript of the consultation proceedings is published here. 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.

Acknowledgements

The Commission is indebted to Jack P. Hartog, Assistant General Counsel and director of this project, and to staff attorney Susan McDuffie for her assistance during the consultations. The Commission is especially grateful to Sheila Bienenfeld for her efforts in planning the consultations, recommending participants, and offering them guidance on the contents of their papers and presentations. The Commission also expresses its appreciation to Michele Moree, who coordinated travel and other logistical arrangements for consultation participants, and who, with Lorraine W. Jackson and Frances C. Lee, provided necessary support services. Appreciation is also extended to Ruth Ford and Natalie Proctor for their assistance in staging the consultations.

Eugene Platt edited both volumes of the document. Final preparations for publication were handled by Audree Holton, Vivian Hauser, and Vivian Washington.

Eileen Stein (no longer a member of the Commission staff), General Counsel, had overall supervisory responsibility for the initial phases of this project, which was completed under the overall supervision of Paul Alexander, Acting General Counsel.

Contents

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

Consultations Sponsored by the U.S. Commission on Civil Rights, Washington, D.C., February 10, and March 10–11, 1981

Proceedings

February 10, 1981

CHAIRMAN FLEMMING. I will ask the meeting to come to order.

I wish to welcome everyone to this consultation. Today's session is the first part of the Commission's consultation on its proposed statement on *Affirmative Action in the 1980s: Dismantling the Process of Discrimination.* A lengthier session will be held on March 10 and 11 in the main Commerce auditorium on Fourteenth Street between E and Constitution Avenues.

Today and on March 10, participants will assess the proposed statement from legal, policy, and enforcement perspectives. On March 11, 1981, participants will address how to design and implement affirmative action plans and how to monitor and evaluate them once they are in place. Based on the presentations at the consultation, the Commission will review the proposed document and issue a final statement, accompanied by a transcript of the consultation.

The proposed statement is the third document dealing specifically with affirmative action that this Commission has issued in the past 8 years. During that time, the issue of affirmative action has been extensively debated within all parts of the government and throughout the private sector.

That public debate has often been acrimonious, particularly over such terms as "goals," "quotas," and other types of so-called "preferential treatment." These terms arouse strong emotions, and perhaps because of this, the debate surrounding them has frequently centered on the terms themselves rather than on what are the most effective methods for combatting discrimination.

Although few people today argue against working toward the goal of a nondiscriminatory society, reasonable people will disagree about how to go about identifying and combatting discrimination. Our goal, and that of the proposed statement, is to make that disagreement productive rather than destructive. Determining whether the proposed statement brings us closer to achieving that goal is the purpose of this consultation. We are optimistic about the proposed statement's usefulness, but we believe, as we state in the preface of the proposed statement, that its approach needs to be tested in the "court of public opinion and real world activities." We are, therefore, distributing the statement widely and we will welcome comments in writing from any interested person or groups.

In *Affirmative Action in the 1980s,* the Commission proposes a "problem-remedy" approach to affirmative action. This conceptual approach to affirmative action continually unites an understanding of affirmative action with an understanding of the problem of discrimination. The premise of the proposed statement is, the consensus on the remedy of affirmative action can best be achieved through consensus on the nature and extent of the contemporary problem of discrimination based on race, sex, and national origin.

This morning we are happy to welcome five distinguished legal experts who represent major civil rights organizations. I am going to ask Mr. Jack Hartog, who is a member of our General Counsel's staff and who has done a great deal of staff work on this proposed statement, to introduce the persons who have consented to be with us today and to participate in this discussion. After we have had the opportunity of listening to them, the Commission looks forward to engaging in dialogue.

I would like to say that in the 6½ years or so that I have served on the Commission, I do not know of any statement that the members of the Commission have spent more time on than this proposed statement, and I again want to emphasize the fact that it is a proposed statement. We have not reached final

conclusions on it by any means, but we are following this process and at this point distributing it widely, inviting comments and reaction, and then having these formal consultations. After we have had the benefit of all of these reactions, we will evaluate them and then reach a decision as to what should be the content of, not our final statement on, affirmative action—but content of our statement on affirmative action in the year 1981. This is an evolving process.

Mr. Hartog?

Assessments of *Affirmative Action in the 1980s* from a Legal Perspective

MR. HARTOG. Thank you, Chairman Flemming.

This morning we are pleased to have with us Thomas Atkins, general counsel for the National Association for the Advancement of Colored People; Mr. Jack Greenberg, director counsel, National Association for the Advancement of Colored People and the Legal Defense and Education Fund, Inc.; Ms. Judith Lichtman, executive director, Women's Legal Defense Fund; Mr. Stan Mark, senior attorney, Asian American Legal Defense and Education Fund; and Ms. M. D. Taracido, president and general counsel, Puerto Rican Legal Defense and Education Fund.

The Mexican American Legal Defense and Educational Fund was also invited to the consultation, but due to a last minute scheduling conflict, they have been unable to appear. Their written comments, however, will be made part of the record of this proceeding.

Each of our participants will have up to 15 minutes to make their comments on the proposed statements. They have also prepared or are preparing written comments on the proposed statement. These will also be made part of the record of this proceeding.

We will proceed in alphabetical order, and I will introduce each speaker first and then they will give their comments; then I will introduce the next speaker. The first speaker will be Tom Atkins, general counsel for the National Association for the Advancement of Colored People.

The NAACP is the Nation's oldest and largest civil rights organization. It has been in the forefront of the effort to achieve racial equality in America. The NAACP has brought or participated in virtually all of the major civil rights litigation of our time, including litigation addressing the issue of affirmative action. The formative role of the NAACP in the development of national civil rights law and policy is well established.

Mr. Atkins became general counsel of the NAACP following an illustrious career as administrator, State cabinet member, city councilman, and member of the Harvard University Board of Overseers. Mr. Atkins is a Phi Beta Kappa graduate of Northeastern University. He received the juris doctor degree from Harvard University in 1969 and is a member of the bar of the State of Massachusetts. Mr. Atkins was appointed general counsel of the NAACP in 1980.

Statement of Thomas I. Atkins, General Counsel, NAACP

MR. ATKINS. Thank you very much. Let me just correct one element of that introduction. I did not go to Northeastern University. My bachelor's is from Indiana University. I have an honorary Ph.D. from Northeastern.

I appreciate the opportunity to appear before the Commission and to comment on this statement which, as you will see in a moment, I consider to be a very excellent statement and one that will have a major impact.

I have, in light of the limitation on time—which I think is a good idea when you're dealing with lawyers—written out some comments, and I will, for the most part, read those because they say quickly what I might otherwise prolong.

I have several points I would like to make. The first is that I think this statement will contribute a great deal of light to an area that has tended, for the most part, to be covered with a lot of heat and not light. The Commission's status, enrolled as a teacher in the American society, is a very precious role, one that we think the statement will help to further.

In that connection, when the statement does achieve its final form, I would urge the Commission to see that it gets the widest circulation, and I would hope the copy marked number one will be sent to the President, who obviously needs the things it teaches about.

I would hope that you would also send copies of this to the Members of Congress and the Federal judges at all levels in our system. These are matters of which they can take judicial notice and, whether or not they take judicial notice, they ought to know about. Some of the decisions that come out of our courts indicate that some of them have not read

matters that would help them address issues of affirmative action.

On a more critical note, hopefully constructive criticism, I would suggest that more attention needs to be given to the nature and type of differences which characterize discrimination visited, on the one hand, on racial minorities, and, on the other hand, on women. There are some similarities, but there are also many striking differences. I believe that people have not in the past thought adequately about the differences, and as a result there has tended, over the last several years, to be near brush fires, increasing numbers of instances where minorities and women have seemed to be pitted against each other, seeking an inadequate amount of "set-asides" or opportunities that previously were denied them.

The Commission can play a very constructive and positive role in focusing on the nature of the differences and focusing on the need for remedial action in each instance, but remedial action that is keyed to the problems that have been differently faced by these two groups of excluded people.

By the same token, within the category of racial minorities, there are similarities as to the nature of the exclusions that have been faced. But again there are differences, and it is important that those differences be pointed out. Failure to point the differences out will mean that the remedies will not be as sensitive and will not be tailored, and again in some instances will mean that needless competition will be engendered by those who ought to be working together.

We, for instance, recognize the critical difference in the discrimination faced by Hispanics, if for no other reason than the language difficulty. It poses a need in the relief area that frequently is simply ignored. The NAACP sees no conflict recognizing and supporting relief that is tailored to that lingually caused element of discrimination. Sometimes it is the basis for the discrimination. In other instances, it certainly ought to be a part of the relief, and we urge the Commission to focus in its final statement in a somewhat more expanded way on the need to tailor relief, to take into account the differences within the category of racial minorities.

We would also urge the Commission to take into account that in the area of affirmative action, frequently the type of remedies available, the laws that apply, will differ when applied to public versus the private sector. Here again there are many similarities and problems. Indeed, they are very similar, and they flow from the same shared set of racist notions that frequently pervade our society. Nonetheless, in the public sector, there are frequently remedies available that are not available in the private sector, if for no other reason, based on the pragmatic assessment many judges and others, in the course of fashioning relief, will apply to the availability of resources. To some extent, were the Commission to focus on some of these differences—and I'm not suggesting atone, but to acknowledge—there, indeed, has developed a style that distinguishes public sector relief from private sector relief, and I believe the general area would be well served if you were to assist in explicating that difference.

In recent years much has been made of the need to show intent to discriminate as a predicate for relief from segregation or exclusion. It is this tendency that cuts across education and housing and employment, public resources, etc. Indeed, it has intruded into the area of voting rights.

Your 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 affirmative action 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 launched the collateral attacks on such efforts. Why should not there 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 bear. Perhaps they, too, should have to shoulder the heavy burden of proving intent. The Commission can do a lot to explicate the absurdity of the proposition but also, perhaps, to expand the discussion toward the kind of burden that one who would launch a collateral attack on affirmative action measures or plans should have to carry.

Finally, we would urge the Commission to include within this document—I know you have done it in other documents, but in this document—examples of some of the striking successes that have

flowed from the application of sensitively structured affirmative action measures, comprehensive affirmative action plans. The public has been led to believe that affirmative action is nothing more than a ripoff, that is, an effort to replace one form of discrimination with another form of discrimination.

There has been much loose talk that has been engendered by those on a political stump: it is good to run against minorities; it is good to hold women up as somehow raving maniacs when they ask merely to be placed in an equal status.

The Commission needs to tell and to teach this country that affirmative action not only is right and legally required, but that it has worked, and give some of the success stories in the public and private sectors through your State Advisory Committees. You can do it even on a more tailored basis. Show it by State, show it by region, so that those who are fashioning plans not only will know they are not asked to be heroes—we don't have very many of those in public sectors these days—and that they are not being asked to re-create the wheel, there are others who have been there before them and that it has worked and that they indeed can call somebody up and set a pretty good working model.

I would close simply by saying that I think if there were a major criticism I would make of the statement, Mr. Chairman, it is that the Commission's statement, I think, needlessly is defensive about the use of quotas. There is nothing wrong in this country with the use of preference. Ask the President, who has already begun preferring members of his party, about preferential treatment.

Ask the university admissions officers, who historically and continually prefer the sons and daughters of alumni, of faculty and staff members, of big donors. Ask the owner of a company what's wrong about preferring his son or his daughter to move up the lines of management. Ask the Fords, for instance.

This country, obviously, is no more against preferential treatment than it is against buses. It is a question for whom preference works and to where the bus will go.

We would urge this Commission not to defend itself when the need for quotas exists. There is nothing wrong with the word. We apologize to nobody for saying that where there has been systemic exclusion quotas may be the only way to correct, and if that bothers some people, let them be bothered. We know there has been some dissension even with our own ranks—the ranks of civil rights organizations. But the NAACP views a rose by any other name is still a rose; if a rose is going to be called a quota, so be it. Call it that. For that, I thank you for the opportunity, but will conclude what I began with, that I read this as an excellent statement, one that was meticulously prepared, for which you and the other members of the Commission should commend your staff and, if you can, give them a raise.

Thank you.

MR. HARTOG. Thank you, Mr. Atkins.

Our next participant is Jack Greenberg, director counsel of the NAACP Legal Defense and Education Fund, Inc.

The NAACP Legal Defense and Education Fund, Inc., has for many years played an instrumental role in the civil rights movement in this Nation. Litigation brought by the NAACP Legal Defense and Education Fund has established far-reaching precedents governing practically every aspect of civil rights law enforcement, including the desegregation of public schools and accommodations, criminal justice, housing, employment discrimination, and affirmative action.

Mr. Greenberg has had a long and distinguished career with the fund. He was assistant counsel from 1949 to 1961 and has been director counsel since 1961. During his tenure with the fund, Mr. Greenberg has argued many of the leading civil rights cases of our time before the United States Supreme Court. He also teaches law at the Columbia University School of Law and is the author of two books, *Race Relations and American Law* and *Judicial Process and Social Change.*

Mr. Greenberg.

Statement of Jack Greenberg, Director Counsel, NAACP Legal Defense and Education Fund

MR. GREENBERG. Thank you, Mr. Hartog. I want to join Tom Atkins in commending the Commission and its staff on an excellent product and also join Tom Atkins in his observations. I don't disagree with any of them.

I would like to address myself to perhaps an additional dimension which, in your final product, may deserve some attention, and that is some additional social, economic, political, and, if you will, philosophical factors that might be addressed in a total treatment of the subject of affirmative action.

One of these areas is the role of affirmative action in today's racial economy, if you will.

To my thinking, it is the only encouraging thing we see going on in the civil rights picture today. The historic economic indicators of racial pathology remain with us, and I will just refer to only two of them. This Commission has put out many reports that detail these factors in a variety of ways. First, the steady 60 percent median black income remaining at approximately 60 percent that of white. It will go up a few points; it will go down a few points. But it doesn't seem to budge very far from that mark.

Second, the historic black unemployment rate, which remains double that of white, and for teenagers much more than that—frequently as high as four times that of whites. That hasn't moved and that is not encouraging. Yet, at the same time, those of us who can look at the world around us know that some changes are taking place. We go into universities and we see many more black and other minority faces than we had ever seen 10 or 15 years ago. We walk down the corridors of corporations and we can make the same kind of observation. Why is that?

That is only because of affirmative action. We know, looking at statistics, the number of minority managers has gone up from about 3 to 8 percent, which is almost a tripling in the last decade or so. We know the number of minority law students 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 over that period of time.

To me, a startling figure is that the percentage of minorities graduating from high school who are now attending college is approximately equal to the percentage of whites graduating from high school now attending college, and when I cite that figure to people they refuse to believe me, and I have to go back and check the statistics, and it's true.

Now, the fact is many more of this number go to 2-year colleges than 4-year colleges; many more fail to graduate. It is also true that the large black dropout rate occurs before high school graduation. So the percentage of blacks graduating high school is disproportionately smaller than the percentage of whites. Nevertheless, that is an enormous improvement that has occurred in recent years, and I would submit that it is substantially and primarily 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 your age, unemployment rate and nothing at all encouraging going on in this country holding out hope for a better and more equal future in years to come.

Turning to another one of what I might call these "ambient" considerations that perhaps deserve additional attention, I think it's time that instead of urging a single argument in favor of affirmative action, as the one that Tom made, and with which I agree, or in denying the validity of a single argument against affirmative action, such as it discriminates against white males, that we draw up a balance sheet and we frankly acknowledge that there are many advantages to affirmative action and that, indeed, there are some disadvantages to affirmative action. And we total it up and we state our conclusion. And my conclusion is: when you add up the merits and you add up the demerits and you balance one against the other, the argument is strongly in favor of affirmative action.

I think a comprehensive treatment, which I have not seen fully developed anywhere, is one worth making, and I would like to suggest some of the factors that should be put into this more comprehensive treatment. One is the argument that Tom made, and that is, affirmative action should be seen as a selection method and a selection procedure, which is one of many selection methods and selection procedures that we see here in this country, and not terribly dissimilar from those that are in use generally, and certainly not disputed by those who are opposed to affirmative action, that is, the children of the alumni.

I am reminded of an episode in the *Bakke* case that actually never came out in the case, and that is that the chancellor of the university had three picks of his own that did not have to go through the admissions committee, and he picked kids who—I'm sure they were qualified—were no more qualified than many others who applied, but whose primary qualification was that they were the children of influential people in the community. And among those were the son and the daughter-in-law of the president of the medical society in the same year Bakke was admitted. This sort of thing goes on all the time. Anyone who is connected with university education or American corporate life or anything else knows that people in charge of things do take into account friendships, influence, possible personal

or institutional gain that may came from benefiting a child of someone who can confer that kind of gain on that institution.

There is the so-called "old boy" network. I am constantly amazed at the list of luminary children whom one sees attending some of our more distinguished universities who, when you encounter some of these children—they really don't seem much brighter than any of the others you are accustomed to meeting and, in fact, some of them seem conspicuously dumber, and you are really forced into the conclusion that it's their prominence that has something to do with where they are and not strict merit of test and scores.

So affirmative action has to be seen in that context. But then we ought to marshall what are the arguments for affirmative action that have been mentioned here today. One is compensation for past wrongs.

American blacks have been the victims of slavery, victims of 100 years of racial segregation which, when it ended nominally in *Brown v. Board of Education,* persisted, so far as actual remedies were concerned, at least until 1970 for schools and still is not yet dismantled.

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

Another argument we ought to take a look at and put into the calculations is the argument that Justice Powell used in the *Bakke* case: when blacks and whites, various groups, are together, they tend to learn from one another as a positive experience. To me, the most important argument—the one which you find in philosophical literature going all the way back to Aristotle and even earlier—is that it is important that one have a society in which there are not strong divisions among different groups and hostilities and differences which tend to tear the society apart. That's why arguments were made back in ancient Athens that the poor should be given high positions in the navy, which was a very important part of society, so that they would have a sense of oneness with the community at large and not be a divisive force.

I think we have to take a look at some of the downside aspects. I don't think we can, frankly, say that there are not white males who are equally qualified or better qualified for some positions who did not lose out in a quest for those positions to some beneficiary of affirmative action programs. I think that happens. But I think that has to be seen in the context of total selection procedures of all sorts and then in the context of what are the alternatives that are available to such white males.

If I may give a personal anecdote, I recall being berated by a relative of mine because her son was rejected from Harvard, and she said that he undoubtedly was rejected—very bright kid—because some black got in, and I had something to do with it. I tried to argue with her about that. The fact is, the kid went to Haverford, and he went to medical school, and he's none the worse for it. Indeed, if it is true that her son were rejected from Harvard because some minority got in, there's certainly no way of knowing that. He's not so badly off.

But if it were true, the black who did get into Harvard is someone who for the first time now will have an opportunity to enter into the mainstream and the higher echelons of society which otherwise would have been denied him.

It is argued that the self-esteem of minorities, women, who are selected because of affirmative action is impaired. I have no doubt that sometimes occurs. That has to be seen in total context. Perhaps it should be measured. I would imagine anybody whose self-esteem were sufficiently impaired wouldn't take the job or wouldn't stay there. But, in any event, I don't think we should pretend that kind of argument doesn't exist and that it doesn't have some level of merit. It is sometimes held that the esteem in which others, the community at large, hold people who achieve positions through affirmative action is impaired. That people will say, "Well, oh, he's just in that job because he's black, or she's the woman in the job," and so forth. I have no doubt that occurs sometimes. We ought to address that.

It is sometimes said that people are employed who cannot do the job just to fill it with an affirmative action hirer, as it is called, and sometimes there are jokes about that. We've heard them. We don't hear them anymore these days, but for awhile there were a lot of jokes about the telephone company.

I think we've got to address those. We've got to evaluate them. We've got to add them up and, I think, after we do that we will come out strongly on the side of affirmative action. But I just hear people talking past one another, and I think it would be much more effective if we acknowledge the issues, face them head on, and show that, all things

considered, affirmative action is the best thing we have going for us today in the civil rights picture.

Thank you.

MR. HARTOG. Thank you, Mr. Greenberg.

Ms. Judith Lichtman is executive director of the Women's Legal Defense Fund, a position she has held since 1974 after she helped found the organization. WLDF has approximately 1,000 members, predominantly women attorneys. It engages in pro bono litigation, administrative and legislation advocacy, and public education aimed at eradicating sex discrimination, especially in the area of employment. It has extensively monitored Federal equal employment opportunity efforts, commenting in detail on the administration and enforcement of the Federal contract compliance program. Its "friend of the court" brief in *Webber v. Kaiser Aluminum* was supported by 25 women's groups. Its wide-ranging activities have included projects on behalf of battered women, on a variety of women's health issues, and in support of the equal rights amendment.

Ms. Lichtman, in addition to her leadership activities with the WLDF, has brought her extensive experience and expertise to bear in a vast array of other civil rights organizations.

Ms. Lichtman.

Statement of Judith Lichtman, Executive Director, Women's Legal Defense Fund

MS. LICHTMAN. One thing you didn't say, which you probably should have, is that my start was at the Commission on Civil Rights, like many other civil rights lawyers in this country, I think.

As this panel goes on, I think we will all be in the unique position of being able to affirm everything that just was said before us or at least I hope that's the case—and I will cut out some of the things I was going to say that are redundant—I don't think you need to hear them twice—and try to limit my remarks to the section in your report on "structural discrimination" and those particular paragraphs—particularly one paragraph on the bottom of page 13 in the first column that concerns white women. I cannot urge you enough, I don't think, to delete that paragraph. It is, for me, an enormous red flag. I think it does exactly what you don't want to do in this statement: it pits white women against minority women and minority men. I think, indeed, to buy into the notion that because a woman has a man she is not discriminated against, is, in very large measure, making you guilty of the kind of structural discrimination that you are decrying in that paragraph above and below.

I think to not recognize the fact that women who have men must constantly be in fear of losing that man in order to keep their economic security, thereby limiting those very basic options that men have, is truly sexism, and I think that is a really regrettable paragraph.

To talk about sponsorship by men as the enjoyment of a privilege is to really turn your back on what sexism is all about. Now, your example in there is housing, and I would venture to guess that even in that area you are not correct. Two men living together with two incomes, my guess is, can buy a lot better house than a man and woman living together with two incomes, except for some of us wonderful professional two-income families, and even then, my guess is that I'm earning considerably less than my husband, having something to do with my sex and having something to do with the nature of my practice, to be sure.

But, if you look at white women living with white men in any other area, education and employment, for example, the virtue of their marriage is really rather irrelevant. I went to a meeting yesterday where several women, who are representative of a group that they called "The Cornell Eleven," most accomplished women, academecians, all of whom have been denied tenure or promotions within the university higher educational system at Cornell—and, by and large, the 5 I met representing the 11 were unemployed or underemployed. The fact that they had husbands, of whatever color, was hardly relevant to their ability to perform professionally.

With respect to affirmative action, more specifically with respect to women, I do agree with both Tom and Jack that this is a country that's full of preferences. We don't like to think of them as preferences, but that's exactly what they are and they've given some very good examples. My only other example to add is the one that peculiarly disadvantages women, and that's the veteran's preference.

When, within the past 3 years, women's groups that tried attacking the absolute veteran's preference—and nobody ever asked for the doing away of a veteran's preference. We're all very conciliatory and always asked for some limit, or some cap, on an absolute veteran's preference. We were arguing that we wanted women to be considered on the basis of merit. And what the Congress and the courts and

the past administration eventually said to us was, "No," in as strong and unequivocal language as they could, "you cannot be treated on the basis of merit. That there is a strong community interest and social interest in the United States to recompensing the service of males in military service for their government and, therefore, considering people on merit is really not what we're interested in doing, with respect to comparing veterans and nonveterans," who, I might add, are traditionally women.

It is really ironic that it is some of those same people who find goals and timetables and the more specific numerical statistical analyses that go into some affirmative action plans so repugnant. And I really think at some point that the hypocrisy of using preferences when it conveniences you and decrying preferences in other instances really has to be addressed.

I just have one, sort of personal, anecdote that I was reminded of when Jack Greenberg was talking and that is, I went to law school at a State university, the University of Wisconsin, from '62 to '65. There were 150 of us in that class; 2 of us were women. I went back for the 10th Women in Law Conference 3 years ago, and fully 40 percent of that law school class were women. And that didn't happen because, suddenly, women became more intelligent in 10 years. It happened because it behooved the University of Wisconsin to go out, affirmatively, and find those qualified women.

There were not even 3 faculty women in 1965; there were fully 10 in 1975. The differences to women were really just extraordinary, in terms of what they thought their options were. I was, veritably, a freak. I was a nice freak, a likeable freak, but people basically thought that it was very odd. That's just gone from the social scene, and I think it is true in many other professional schools as well, although not all, and I would caution that those are the positive results of affirmative action. Nobody questions anymore whether or not women can go to law school, whether they can be clerks for judges, except on the Supreme Court, perhaps, and in many other walks of legal professionl life.

Let me just close by saying, I think the statement does an enormous service to all of us, and the history of using your documents for court cases and in congressional testimony is legion, and I would urge the adoption of this statement, with some strengthening along the lines outlined by Tom and Jack, and certainly by the deletion of the paragraph on white women.

MR. HARTOG. Thank you, Ms. Lichtman.

Mr. Stan Mark is senior attorney with the Asian American Legal Defense and Education Fund. Formed in 1974 to assist Asian Americans throughout the Nation, ALDEF is an organization of lawyers, law students, and community workers who bring litigation and engage in public education activities. ALDEF has projects in the areas of alien rights, labor organizing, and bilingual issues relating to access to government by Asian Americans. With respect to affirmative action, ALDEF has written "friend of the court" briefs in *Webber* and *Fullilove* and intervened in lawsuits challenging affirmative admissions policies in California and New Jersey graduate schools. Mr. Mark, who has been with the organization for 4 years (3 as an attorney with the New York office of ALDEF), was the lead attorney in many of these efforts, which cover the full range of affirmative action issues.

It is a pleasure to have you with us today, Mr. Mark.

Statement of Stan Mark, Senior Attorney, Asian American Legal Defense and Education Fund

MR. MARK. Thank you. I would like to state that I agree with the remarks made by my colleagues here on the panel, in that ALDEF supports the problem-remedy approach for affirmative action as proposed by this Commission.

We also feel that this process of discrimination continues to permeate organizations and institutions throughout the society and that affirmative action can address aspects of that process affecting equal opportunity and access to that opportunity. For affirmative action to be effective, the discriminatory process itself must be analyzed in the concrete particulars so that appropriate remedies can be tailored to fit the particular discriminatory activities within organizations and institutions.

As Mr. Atkins mentioned earlier, there seems to be differences among minorities that have not been developed sufficiently, and with this kind of approach, I think the Commission has to do more data collection in this area, particularly with regard to language minorities.

The Commission also proposes a meaningful approach in understanding the particulars of the discriminatory process affecting Asian Americans. A problem-remedy approach adds assurances that

safeguard the inclusion of the Asian Americans in affirmative action plans, and affirmative measures that dismantle the process of discrimination are carried out properly by individuals, organizations, and institutions. This approach will assist in opening job training opportunities and governing benefits that are limited for or denied to Asian Americans by reason of their race or national origin.

Both the inclusion of Asian Americans in affirmative action and the related issue of access to opportunities and benefits are complicated by a cloud surrounding the status of Asian Americans as a minority. Stereotypes of Asian Aericans as a successful or model minority have placed an added hurdle in front of Asian Americans, who must continually convince policy and decisionmakers that Asian Americans be considered a minority, let alone be included in affirmative action programs. This attitude persists in our society even today, to the detriment of Asian Americans.

Most recently, there was a *New York Times* letter to the editor—I think it was October 1980—where an ethics professor excluded Asian Americans from affirmative action explicitly. And the political ramification of that, which I felt was very detrimental, was that it pitted minorities against one another. I think that type of attitude, that view of affirmative action, is destructive.

I also would like to commend the Commission on its report on the *Success of Asian Americans, Fact or Fiction,* that was issued in September of 1980. I think that goes a long way in clearing up this model minority [idea] and will help, in the future, assure that Asian Americans be included in affirmative action plans.

I would like to make some other comments, and I would like to say that one of the things that the Commission can do in terms of this report, in the section involving the steps for affirmative action plans, the very last—publicity and promotional aspects of affirmative action consolidating the gains that were made in affirmative action plans—I think that has to be utilized more, particularly with regard to how affirmative action has benefited white males.

You indicated in the report—the affirmative action plan at the Kaiser Aluminum plant—*Webber* actually allowed for the fact that white males, who were previously excluded from craft positions unless they had experience, were able to enter into that program. But for the existence of that program, white males would have not had the opportunity to get into those skilled positions. I think that kind of publicity about the success of affirmative action, increasing opportunities for all people, whites as well as minorities, should be emphasized more in the future.

In the main, I believe that affirmative action has benefited society overall and has increased their awareness of rights for people, both minorities and white majority. Thank you.

MR. HARTOG. Thank you, Mr. Mark.

The next participant is Ms. Taracido, president and general counsel of the Puerto Rican Legal Defense and Education Fund, organized in 1972 to protect and further the civil rights of Puerto Ricans and other Hispanics through litigation. PRLDEF has conducted a wide variety of activities, including successful efforts to secure bilingual education at the State level and bilingual voting. Its work in the area of affirmative action is also diverse. It has participated as "friend of the court" in *De Funis, Bakke,* and *Webber;* it has filed lawsuits seeking affirmative action in employment and housing; it has supported a State affirmative action program for minority contracting; and it has an active program seeking to place qualified Puerto Rican and other Hispanics in law school.

Ms. Taracido, who has been with PRLDEF for over 8 years, brings with her a lengthy and impressive history of involvement and activity in community affairs.

Ms. Taracido?

Statement of M.D. Taracido, President, Puerto Rican Legal Defense and Education Fund

MS. TARACIDO. I would like to indicate, also, that I am a former graduate of the Commission on Civil Rights in my fourth year in law school. I had the privilege of working in the Northeastern Regional Office and it was a real good experience.

I appreciate the opportunity to comment on the Commission's proposed statement. It is, in large part, a worthy addition to what I feel is a fine body of work the Commission has contributed to the public understanding of civil rights issues. There is no question that it is needed and that it is timely.

As is pointed out in the statement, despite civil rights laws and the noticeable improvement in public attitude toward civil rights, one cannot help but come to the conclusion that our history of racism and sexism continues to affect the present.

More importantly, it comes at a time when we appear to be facing a withdrawal from many of the inroads made in the civil rights in the last decade or two, as is evidenced by the demise of the Fair Housing Bill, the withdrawal of the proposed bilingual education from the Department of Education, and the threats to block the reauthorization of the Voting Rights Act. Therefore, we welcome the Commission's efforts to come to grips with the emotional issue of affirmative action.

The report, I think, makes two important contributions: it sets discrimination in a framework that recognizes its various components: individual, organizational, and structural. And that this interlocking discriminatory process routinely bestows privileges, favors, and advantages on the white males and imposes disadvantages on minorities and women. This process is rightfully identified as self-perpetuating and one in which seemingly neutral operations create stereotyped expectations that justify unequal results. In addition, it provides a well-documented discussion of legal bases for requiring or permitting affirmative action as a means for rectifying discrimination, a remedy that allows for the specific technique of employing race, sex, or national origin as the affirmative measure for this decisionmaking process.

In my opinion, however, it falls short on two counts: one is the question that has already been discussed by some of my colleagues on this panel, and that is that it doesn't take an affirmative stance with regard to supportng the principle that affirmative action is something that is appropriate and that, indeed, numerical affirmative measures are not illegal under certain circumstances. It seems to me that the structure of part C of the discussion in the statement should be done in such a way as to approach it as you have, which is to diffuse the opposition to terms such as "goals," "quotas," and "preferential treatment"; however, this should be done in a context in which we bring up front the definition of what affirmative measures are meant to do. And I refer you to the language, which I think is quite strong and eloquent, on page 42 of the statement, in which you discuss the question of what the reasons underlying affirmative measures are, and it is the last two paragraphs of column 2. That seems to me what the primary focus should be: you should bring the argument up front.

In addition, it seems to me that one should give greater emphasis to the legality of using numerical affirmative measures when you want to remedy proven discrimination, including the kind of voluntary rectification that is demonstrated in the *Webber* case and the congressionally recognized discrimination that warranted taking certain measures in *Fullilove.* In the process, I think it is absolutely appropriate for the Commission to try to deal with the opponents' and proponents' perceptions about what affirmative action is. Indeed, I think that that last section must make a focal point of the discussion. You should dispel some of the misconceptions. You do it substantively in terms of the actual language and work in that section. It is right. I am really talking about the organization of the presentation of the material. And so it seems to me that the next step would be to dispel those misconceptions that some proponents might have about the use of statistical data as a measure of discrimination, and also the question of using it as the means for equal representations without regard to the presence or absence of discrimination and as a means of asserting group rights.

On the other hand, you also, because you must be evenhanded—you should counter the argument that numerical affirmative measures stigmatize, that they unncessarily trample on the rights of whites, and that they are an attempt to discard the merit system. Indeed, you should talk about, as I would say, condemn, the whole discussion around the dishonest implementation of affirmative action measures.

You have a second part in which you discuss what would be, I suppose, termed by you in the initial part of the document, "the legal kinds of discrimination." Well, I think we have to say that in those cases, in those instances, what you should do is be encouraging to go beyond the need to address "illegal discrimination" and to really look at the "legal discrimination" discussed in the document. If the goal of dismantling discrimination is to be achieved and if we are to make sure that the gains we have made in the last decade or so are not lost, you want to tell people that there are ways of doing that.

You use the example of promotional layoff procedures, of work sharing, of inverse seniority, unemployment insurance policies that would support the principle of not cutting back on what has happened in the past. So what I am basically indicating is that part C, from my perception and my reading, is such that it really requires a refocusing, a reemphasizing of what is important; and what is important is that you sometimes can use quotas.

I absolutely agree with Mr. Atkins on that question. I don't think we should back off that. I think we should say that when it is appropriate, it is something that should be used. It is a measure that is available for use. And we should not try to fudge that issue, because I think that in the long run would be destructive. I think that the important thing to remember is that we want to make the public aware that affirmative measures—and when the discriminatory process ends—and that without affirmative intervention the discriminatory process may never end. Indeed, we've gotten some examples around the table here about the kinds of inroads that have been made because of affirmative action measures in this country.

I will give you a personal example as someone at this table just did. I went to law school in the 1970s. I entered law school in 1969. I graduated college in 1956, however, and in 1956 there were 150 Puerto Rican lawyers in New York City. When I went to law school in 1969, there were still 150 lawyers in New York City that were Puerto Rican. And between 1969 when there were approximately 70 Puerto Rican law students around the country in all 3 years and 1978, the latest ABA statistics have been increased to 444 in all 3 years. And we believe at this point there is a pool of at least 500 lawyers in the New York City area. So we're talking about work that has been done in the last couple of decades that is terribly important, that should be supported, and it is important for this Commission to make sure that message gets across.

Affirmative action is a way of dealing with past discrimination; it is a way of correcting and remedying, and there are occasions when it is absolutely appropriate to use quotas, goals. I don't think those words are dirty words. I know they have been used that way and perhaps, if you want to use your terminology, your process remedy, fine, you know, but I think it is just another word for the very same thing.

Thank you very much.

MR. HARTOG. Thank you, Ms. Taracido.

Chairman Flemming?

Discussion

CHAIRMAN FLEMMING. First of all, I would like to express to all of the members of the panel our very deep appreciation for these presentations. They have been very, very helpful. And at this point we would like to engage in a dialogue.

The Commission is meeting for the entire day, but Commissioner Saltzman is going to find it necessary to keep another engagement for a few hours in the middle of the day. In light of that fact, I would like to call on him first and see if he has questions or comments that he would like to address to the members of the panel.

Commissioner Saltzman?

COMMISSIONER SALTZMAN. Thank you, Mr. Chairman. I would like to express my appreciation for the very positive responses to this statement by all of you. It is very gratifying. I think we labored over practically every single word as if it were a contract we were negotiating with some of our Iranian counterparts, perhaps, for the release of hostages. In this case the hostages, perhaps, are the Nation, hostaged to former patterns of discrimination, and so your kind words about this, I'm sure, are very deeply appreciated by all of us and the staff.

I just would like to express a concern I have. I am not sure that we would promote the purposes of this statement by dismissing those who are opposed to it, implying that either they lack the intellectual comprehension and intelligence to appreciate the rationality and logic of what we have seen and they are beclouded in their ignorance, or that they are essentially bigots. There are some distinguished scholars, legal minds, who have set forth a point of view that some aspects of affirmative action endanger some of the premises of our society, and I do think we have to look seriously and respond seriously. And I think this is an attempt, albeit perhaps not as deeply rooted in the philosophical framework that some statements have reflected—but we have attempted to respond to the legitimacy of their arguments with our, hopefully, equally legitimate arguments to counteract what they seem to see in affirmative action as a danger to American society.

I guess, as has been pointed out, group entitlements, the danger to the meritocracy of American society, etc., are the points with which they take great issue, and I think we have to respond to that as carefully and as thoughtfully as we can. We ought not, I mean to say, trivialize their objection and, if this is not an adequate response, that's what I would like to know, because I think that's what I am most deeply concerned about.

I don't think—and I am not sure you were saying this, Ms. Taracido—we were afraid to use the words "quota" or "preferential treatment," or whatever the words have been, upon which some of the opposi-

tion has been based. Indeed, I think we do say in some places that it is appropriate to use a quota. I think my own concern and sensitivity is that we must maintain a broad coalition in this Nation which accepts and which is committed to the objectives of the civil rights aspirations that we have, and that affirmative action and the issue of quotas has been one of the issues around which that coalition has been dismantled. And I think we have to re-create that coalition for continued progress.

I would like it if the panelists would address these issues that I suggest are the core of the opposition and evaluate their response to that opposition, specifically, that quotas, when they are used, endanger the merit system. And I know there were some responses to that in the various remarks, and that preferential treatment, which I think I would note in the examples given—say it is right just because President Reagan is using preference in his appointments, or colleges give preference to alumni—I am not going to accede to the rightness or the morality of that kind of process—which ultimately becomes discriminatory, and then the argument is made: are we not sacrificing the ends ourselves by using means against which we object?

I think we have tried to respond in this, and I wonder whether there are any further responses on some of these crucial focal points that the opposition has made, by the panelists?

CHAIRMAN FLEMMING. This is a kind of general invitation to the members of the panel. Commissioner Saltzman is sharing with you some of his concerns as he has shared them with us as we worked on the statement, as we have discussed these matters together as members of the Commission. As he has indicated, you have touched, you have referred—a number of the members of the panel—to the issues that he has identified. I am hoping you just pick up where he has left off here and share with us any further views you have on the kinds of issues that he has identified.

MS. TARACIDO. It seems to me that the best one can do, even though we are dealing with a very emotionally laden issue—and I know when I said that quotas and goals are not a dirty word from my perspective, but I know they are from other people's perspectives—but the best it seems you can do is give the rational underpinnings for why these things are allowed.

COMMISSIONER SALTZMAN. You said we ought not to fudge. Do you think we fudge here?

MS. TARACIDO. Well, I have mixed feelings about it because I know what you're trying to do. You are trying to diffuse; you are trying to use another set of circumstances or a new terminology to try to get away from the dirty words, you know, the words that may have made people very unhappy, and I can understand your wanting to do that and, indeed, I think it probably appropriate because it is time for us to try to look at the issues from the perspective that you are suggesting anyway, which is, what is the problem and how can we best achieve equity, you know, what are the considerations that one should have in dealing with that issue?

However, it seems to me that the lay public has to be the lay public. I'm sorry, but I'm talking about a document that, hopefully, is going to be circulated very broadly, and I would like that public to understand that there are legal reasons why you can use a quota or a goal as one of the affirmative measures, using your language, to address the question of discrimination. I think that that has to be put up front. We have to let people know that if you argue that it is going to affect the quality or the merit of the applicants that you get, that that's wrong. If you are saying it is going to trample on the rights of whites, that's wrong, because there are cases that indicate you cannot do certain kinds of things. For example, bumping, you know. That argument must be right there.

COMMISSIONER SALTZMAN. Don't you find it here?

MS. TARACIDO. It's there. But when I talked about my comments on part C, I was talking not about the substance; I was talking about the organization of the material and the focus of the material and how the arguments are presented. The arguments are confusing, I think. I think people can miss what you are trying to say around those questions. That's what I think. It is a personal opinion. There may be others that disagree.

Maybe it is clear as glass for certain people. I don't think it is clear as glass, frankly, so that's the reason I am commenting in this way. I think it is very important to be very, very clear. This is an important document. We are going into very hard times and, you know, we have to be able to explain why, although it seems that things have been going on for a long time and life has continued in a way that, presumably, should have corrected and remedied discrimination. It has not and that message must be clear—that it has not.

CHAIRMAN FLEMMING. Mr. Atkins?

MR. ATKINS. Yes, Commissioner Saltzman, I think that you fudge, in answer to your question, on the issue of the use of quotas. I think there is fudging and I think—I understand the discussion that is reflected here and part of the problem I have is that in responding to those who have criticized affirmative action plans, as your statement does—and I think contributes significantly to this general discussion. You concede too much. You concede, for instance, in responding to those who attack affirmative action as somehow jeopardizing or threatening a meritocracy. You concede that there was one and there ain't been one.

This country has not been run on a meritocracy, and to begin an argument about, or defense of, affirmative action on the grounds that it does not needlessly or unnecessarily undermine the meritocracy that has existed concedes too much. What meritocracy? I haven't seen it at the local level; I haven't seen it at the State level; I haven't seen it at the Federal level; I haven't seen it in the private sector; I haven't seen it in the public sector; I haven't seen it in the schools; I haven't seen it in government service of any type. There has been no meritocracy in this country.

What we are talking about here is not whether or not there will be preference, but for whom, and how it will be arrived at—and affirmative action plans suffer precisely because their premises are outfront and explicit, whereas the previous preference systems have been implicit ones, and they have been around so long that they have come to be taken as articles of faith.

Yes, I believe, because of accepting to an extent, almost an article of faith, the prior existence of merit systems, there's fudging. I also think that the importance of re-creating, maintaining, and strengthening, whichever status it is now, the civil rights coalition is every bit as important as you have described it. It is terribly important that a means be found. It cannot, however, be done at the risk of proceeding to a least common denominator level. We cannot re-create that coalition by conceding, as it were, that affirmative action measureably put forward will not be a centerpiece of the thrust of the civil rights movement.

We face an economy that is bad and getting worse, and disproportionately, and almost with a vengeance, impacts minorities and poor people. And in that context affirmative action is a centerpeice of the civil rights thrust, and to the extent there are those who have difficulty grappling with how affirmative action will be pursued, then let's tackle that. Let's try to work that out. I don't care what we call it. If that's a problem, call it something else; call it "popcorn." But the issue cannot be sacrificed, because it is too important and I think that, to the extent the Commission has—and I believe you have in this statement—addressed this issue—my call to you is for emphasis, a greater emphasis on the permissibility of numerical measurement. Let those who oppose call it what they want to. They are going to call it what they want to anyway.

We're not going to be able to change the dialog about that, and I'm not particularly concerned. We have tried for years to convince the public that when courts order desegregation, it is not forced busing. We haven't convinced a single one of the Congressmen who vote every time a bill or amendment or rider comes up to change their mind, and we are not going to change it, because the use of the term "forced busing," like the use of the term "quota," is a tactical device. They use the term precisely to put you and us on the defensive, and we simply refuse to be on the defensive about it. They can call it what they want to.

MR. MARK. I would like to commend the Commission on their attempt in the report to make a distinction about how discrimination has—not distinction so much, but that they tried to explain how whites are possibly injured by affirmative action in the sense you make a distinction between expectancy and whites as a class, and I think that should be developed more and explained more to counter some of the misconceptions about affirmative action. But no one should delude themselves into thinking there will be individual whites who will have their expectancy harmed by affirmative action. But we should look, overall, in the main of society, that affirmative action has actually improved the opportunities not only for minorities but for white people as well.

There is increased enrollment in law schools, where many seats are taken by not only minorities but whites as well, and I think throughout the society where there is growth in different industries or areas, minorities are not taking positions or jobs away from white people. They are taking their share of the increase, and I think that's the way we should look at it.

CHAIRMAN FLEMMING. Vice Chairman Berry?

VICE CHAIRMAN BERRY. Thank you very much, Mr. Chairman.

Mr. Greenberg, you referred to what you call some of the social factors relating to this whole issue, and in your discussion I think you said something like: "affirmative action is the only game in town," and you talked about the continuing economic problems that blacks, in particular, face: the income disparity, the youth unemployment problem, and the like.

I know you are aware that there are a number of people who say that because affirmative action is the only game in town, these economic disparities persist and that, in effect, if we were to focus our attention on some other matters, such as economic incentives and the like, that these disparities might not persist, and that we should not applaud the fact that affirmative action is the only game in town, as I inferred you were doing, but we should decry that and simply focus our efforts elsewhere.

Do you have any response to that?

MR. GREENBERG. Well, I'm not applauding it as the only positive factor that we see at this time. I am merely pointing out that that is a very powerful reason why it should not be scrapped, and there are a lot of arguments being made that affirmative action programs should now be dismantled.

Of course, I believe that a variety of other measures must be taken by government and private persons, private agencies, with regard to employment and so forth. I am not an economist and wouldn't have a clue as to which of the many cures being offered are the best to be adopted.

I guess I have some political and personal preferences. I think a lot of things should be done. My remarks were addressed to those who now want to dismantle existing affirmative action programs with the commencement of the new administration. They say, "Let's do away with affirmative action," and all I am saying—that is going to do away with the only thing that is really working successfully, as far as I know, for minorities at this time. I wish there were more things working successfully, and I would be much more in favor of it.

VICE CHAIRMAN BERRY. Do you have any notion as to whether, under the Executive order perhaps, or in some of the laws on affirmative action, it would be possible to target efforts on what is now called "the underclass," those people who are unemployed and the like? Is there some way to interpret affirmative action so that one can focus on those specific groups of people in a legal way?

MR. GREENBERG. I am certain you could do that. The CETA programs, which I understand are to be dismantled, I think do that in a way. I know in our office, for example, we have hired CETA workers who we would never be able to hire, who would otherwise not be able to obtain employment, and that was, I think, that was one of many ways in which there is a targeting of disadvantaged groups, economically, racially, and otherwise. So there are a lot of ways of doing that.

VICE CHAIRMAN BERRY. To be more specific about what I mean, could one, for example, under the Executive order program, establish goals and timetables for blacks or Hispanics who are members of the underclass?

MR. GREENBERG. I'm certain you could, yes. It depends on how you fashioned it and what the justifications were. I'm sure that for many situations it could be done, yes.

VICE CHAIRMAN BERRY. Does anyone else care to answer?

Mr. Atkins?

MR. ATKINS. To the extent that, Commissioner Berry, your question is, could the Executive order and its implementation be more greatly focused on the needs and disabilities impacting this economic underclass, I think the answer is yes. To the extent your question is whether or not there ought to be a refocusing of the effort, I think the answer must be no. The reality is that racial minorities and women, in differing ways and to differing extents and circumstances that vary, face these problems, whatever their situation may be, and it is not adequate to say that we should focus our effort only on those who are the most disadvantaged, because it becomes very difficult, in our society as race conscious as it is, to single out and calibrate the degree of disadvantage and say we're going to give a score of 100 percent disadvantage on this and 83 on this one and 75 on this one.

The affirmative action efforts must be aimed at eliminating the disadvantages and the disabilities, wherever they are, to those who have been able, by one means or another, to prepare themselves through training programs and/or academic preparation, to take off, then eliminate that small barrier that prevents their takeoff. For those who have been precluded from getting in the door of the training program or getting out of the high school because of

racially discriminatory public education systems—then address those.

I think the answer is yes, it can be more greatly targeted, but they cannot be targeted in an effort that is characterized by some enshrining of a trickle-down theory. It is not going to trickle down to us.

VICE CHAIRMAN BERRY. So affirmative action, indeed, if I understand you correctly, is designed for middle-class people and their aspirations.

MR. ATKINS. No. I'm saying affirmative action has to be designed for disadvantaged people wherever they may be, middle income, lower income, under lower income, and it would be a fallacy to think that any of us here, or anybody else I've seen on the scene, has the capacity to identify that one sector of our society which alone needs this help. We simply have not reached that Nirvana yet.

Let me say one other thing. I think that it is not possible to pursue effective affirmative action efforts without unsettling the expectation of white males in this country. It is not possible to do that. We do not accept the notion that affirmative action should work only where there is an expanding pie. That locks in to an unacceptable extent the present effects of the past discrimination. We want to address that great bulk of the jobs where people are benefiting because of illicit expectations built up by the very interlocking system of discrimination which your report, in the first section, so adequately describes.

It is not possible for women and minorities to make gains in this country without there being a challenge to the expectancy of white males, because they have expected to benefit from the continuation of a discriminatory system.

VICE CHAIRMAN BERRY. Thank you, Mr. Atkins.

Ms. Lichtman, just one question related to your discontent with the paragraph on page 13. It seems to me, if I understand it correctly, that with the possible exception of changing the word "will" to "may enjoy," instead of "will enjoy," "women may enjoy," that this paragraph reflects information in some of the Commission's reports on social indicators and other economic data that we are familiar with, which indicates that, by and large, white males have greater incomes than minority-group males and that most white women who are married or who are white women or even the children of white males—or if they are married, they do, indeed, marry white males. So, although I understand your point that one cannot assume that because someone is a white female, one, indeed, is married, can stay married, and has married someone who has a high income, that if one were to change the word "will" to "may," that, in fact, a difference which does exist, is distinguished appropriately in the paragraph.

MS. LICHTMAN. That won't do it for me, and the reason it won't do it is that I don't view that status as a sponsorship of enjoyment. I view it as a cage. I think that goes to the very essence of sexism in America. It limits a woman's choices. A white woman's choice, perforce, psychologically, intellectually, economically, any way you want to count it, to know that she's got to, she must link her future to the existence of that white male, either the father or the husband, and to talk about that as enjoyment and not as the cage, that pedestal becomes a cage. I have a lot of trouble talking about that relationship as sexual security when I view it as bondage.

VICE CHAIRMAN BERRY. Well, I don't—I was only pointing out that does reflect certain economic data and it does not indicate that women are happy with the situation; it simply indicates that the cycle of poverty and discrimination does not—was not as taken hold in that regard.

MS. LICHTMAN. When you look at the economic statistics of the earning power of women, everything I've ever seen says that it goes men to women and that white women earn less than men, considerably less than men, and minority women earn even less than white women.

VICE CHAIRMAN BERRY. Sure.

MS. LICHTMAN. And to talk about that relationship of women to men as somehow benefiting those white women, I just don't understand it. I mean, I don't understand it. I don't understand your economic indicators.

If women, as a group, are earning less than men, as a group, white women cannot have it so good just because they are tied to those white men.

VICE CHAIRMAN BERRY. Well, I have no pride in the paragraph of authorship or otherwise.

MS. LICHTMAN. Good.

VICE CHAIRMAN BERRY. I simply wanted to point out, it did reflect that. I think whether it is included or not is partly a political question——

MS. LICHTMAN. I think it is a divisive paragraph.

VICE CHAIRMAN BERRY. —which relates to a point made earlier by two of your colleagues, as to whether we ought to distinguish differences and tailor remedies for different groups and talk about minorities separately, women separately, and the like.

I only have one other question, Mr. Chairman, but I feel I must ask it.

Mr. Greenberg gave a number of points concerning ways to support affirmative action in a more comprehensive fashion, a more comprehensive treatment, and I wondered if whether you would accept one argument that's been made by some people which is that, while others were being discriminated against, racial minorities, for example, white males are being discriminated in favor of, historically, and that one of the things you are doing with affirmative action is trying to alleviate the effect of having—giving advantages for so long to some people. And that relates to another point, which is that affirmative action addresses the aspect that in the past one could argue that a white male had a job just because he was a white male, just as now you might want to show that a minority has a job because he's a minority. So what we're trying to do is remedy this kind of historic situation. I wonder if you accept that as another argument?

MR. GREENBERG. I would accept it to some extent. One of the complexities of the thing we're talking about is that a lot of the preferences we are discussing, that is, the preference of the son/daughter of the rich alumnus, is probably going to continue whether you have affirmative action or not. And it is then argued that the cost is paid not by the son of the rich alumnus who is favored in the past or who will be favored now, but by somebody else, some other white male who never had been favored.

I think you have to face up to all those things, or say that they are right or wrong, or they're worth it or not worth it, or they exist to some extent or they don't, because every time you make an argument about affirmative action, somebody throws one of those arguments at you and they have different degrees of validity or invalidity. And I think somewhere or other there should be a comprehensive, social, philosophical analysis of the whole thing, and maybe this report is not the place to do it, because it may require enough, sufficient empirical reasearch that you won't be able to get that together in time for this report.

VICE CHAIRMAN BERRY. Thank you.

CHAIRMAN FLEMMING. Commissioner Horn?

COMMISSIONER HORN. One of the questions, obviously, that underlies many acts of society is, essentially, what is justice in a society? You represent groups that are fighting for justice because of intentional discrimination against people because of race or sex.

The question comes when you formulate a remedy in a particular program: is the relationship between alternative remedies and solutions to problems? And we are trying to posture here a problem-solving approach. So what I would like to lead you through is a series of questions that relate to various aspects of justice in relation to affirmative action.

For example, one of the overriding questions that administrators of programs must face—and, as you know, in March we will have some ex- or present administrators of affirmative action programs, in both the government sector and private sector before us—how does one measure progress under affirmative action, by what standard?

The word "share" was mentioned by Mr. Mark. What I would like to get at is your perception, either philosophically or legally, based on cases you have pursued, as to what is the share a group should have, based on affirmative action, based on job category. And I would just like your feelings, going down the line on that, on the record.

As you know, we look at underutilization. The question is, by which standard? If you are in a university, is it the number of people in a particular protected group that have the appropriate doctorate academic credentials that are expected in a university? If you are in an industrial plant, is it the number of people that have a particular level of skill, or is it simply the percentage of a protected group within a labor market area, within a national labor market area—whatever group from which you are recruiting? May I have your perceptions on that, Mr. Greenberg, moving down the line?

MR. GREENBERG. Well, I don't think there is an agreed-upon answer to your question. There have been various answers given at different times and under different circumstances. I would guess that the most typical, or the answer you would be most likely to find in an employment situation, is some definition of the geographical or labor market from which you are drawing, the percentage of members of excluded groups who are or can become qualified to undertake employment in those areas and some proportion comparable to that ratio.

If you are dealing in a university situation, for example, particularly with a national university, I guess you could take a national percentage; you could take a percentage of the area from which the university typically draws and so forth.

I guess the only thing you would find agreement on—and some courts have set up standards for different kinds of situations, but I don't think any of those are etched in stone. I mean, there is no Supreme Court standard for how you define your ratio. I think, generally, about all you have found agreed upon—there ought to be substantially more.

COMMISSIONER HORN. Substantially more what?

MR. GREENBERG. More members of minorities.

COMMISSIONER HORN. Okay.

MR. GREENBERG. And a number is put upon, is placed upon goals or quotas, if you will—is decided upon—which is tied to some one of the things that I have referred. There are other things as well.

COMMISSIONER HORN. Mr. Atkins, can you enlighten us?

MR. ATKINS. To some extent, Mr. Horn, you are in search of the Holy Grail, and I don't have the answer to that. However, let me preface my comments by saying, it seems to me that before we get to the effort of trying to define justice, I think we need to keep in mind that most affirmative action efforts, certainly as those of us here have pursued them, proceed first by defining and trying to eliminate the manifest injustice, and I think that it is important to keep that in mind because that's the first step. It is usually easier to identify the cause of the injustice in a particular operative context, and that should be dealt with first off.

Now, having done that, it may well be difficult, with precision and for all times, to define that illusive thing which will constitute justice. We have never been able to find it in any context—white people, rich people, poor people, etc.—and I don't think we are going to be defining it for minorities, either, and if this country is waiting on us to be able to do that as a predicate to addressing the manifest injustice, it is simply another example of a hypocritical standard. However, having said that, let me come back to what Jack was saying.

All things being equal, what we would have expected and what we believe we have a right to expect, is that, in in the absence of those elements of the manifest injustice which have been present, minorities and women would probably achieve their fair share of jobs available, or other benefits to be accrued, and that share in that context is measured numerically by reference to their presence in the market from which those benefits typically come and to whose residence they could typically flow. So, in a labor market area, yes, we look at the numbers of minorities available. But, as in a school context where you, having been told to dismantle the system forthwith—you are also told to take account of the practicalities of the situation. So, if the practicality of the situation tells you that, nowithstanding the facts, blacks, for instance, make up 15 percent of a particular labor market area, and as to engineers, they only make up 2 percent, you're not going to hold up 15 slots out of 100, because that's just silly.

So the practicalities further tailor what is possible and, therefore, sensible to pursue as part of a plan. But we would, yes, begin first with as clear an effort as possible to eliminate the barriers; second, to describe those who are benefiting in the area normally within whatever this institution or entity's turf is, and then ask the question, why not represent or see represented proportionately to their presence in that labor market area—if we're talking employment—minorities. And if your next question is, can you subdivide that and say, if blacks make up 12, then Hispanics make up 9½, and Chinese Americans make up 6½ I say, yes, why not? It may not be practical. If it is not, then you can't do it, but it seems to me like a pretty good line of inquiry to follow at the outset.

COMMISSIONER HORN. Again, your answer was, you would pin it by labor market in a particular occupation, I take it. It wouldn't be because 50 percent of a metropolitan labor market area or typical standard statistical area are minorities, that all occupations being filled within that area would also be 50 percent minority.

MR. ATKINS. I start with 50 percent for all occupations because I operate on the assumption that, all things being equal and in the absence of the systemic, historic, and pervasive discrimination which we have had, the likelihood is that minorities probably would be present 40, 50 percent in the engineers' roles and the programmers' roles, as well as in the secretaries' and managers' roles—however, reality says that all that discrimination has been operating and precisely because of that, what one would have expected in the absence of discrimination, obviously, is not going to be present because of the presence of discrimination. So you tailor your plan to that.

COMMISSIONER HORN. Well, you get an interesting cause and effect relationship.

MR. ATKINS. That's right, sir, Catch-22.

COMMISSIONER HORN. Can one really argue that it is race or sexual discrimination that has resulted in that differentiation by occupation, or can one argue that there is cultural interset or whatever that is not necessarily related to race and sex that results in an occupational distribution that is not perfectly proportional with the presence by race or sex in a given total labor market?

MR. ATKINS. One can argue anything. One cannot prove any of those things on a scope that one can prove the known pervasive, historic, and effective discrimination based on race. One finds it in all our national documents. One finds it in most of our State documents. One finds it in most of our local documents. One finds it in public jargon, privately or publicly expressed. So I am interested, as a philosopher, in all the things one might argue, like the number of angels on the tip of a pin; however, as a pragmatist, I look at those things more emotionally and those things you're talking about aren't.

COMMISSIONER HORN. Let's go down to what is easily measurable because that's the standard by which we judge affirmative action. And you, as general counsel of the NAACP—are you aware of court cases beyond those of elementary skill level—let's say assumption of high school graduation—to go on a police force or unskilled labor, etc., where there is a strict proportionality rule, based on race or sex in a total geographic area, as opposed to a particular potential labor market such as you would have with college faculty or bankers or whatever?

MR. ATKINS. I think that we go back to the nature and thrust of what Mr. Greenberg was saying earlier, and it is, you start from some point, and the point from which you start may not be where you wind up, but you have to have a point of departure. And in fashioning affirmative action plans, in the employment context—for the moment we'll stay with that—you start from the representation the protected class has within whatever is the relevant market area. If reality—and part of the reality being continuing operation of the prior discrimination—forces you to something other than what you started out with, then simple prudence, as well as common sense, dictates that you not rail against a tornado, and you adjust your plan to take that into account, but you adjust it in a way that acknowledges that the possibility for growth in numbers exists as the barriers previously constraining that growth are, themselves, dissolved. So affirmative action plans, among other things, must be careful not to lock into the future the present consequences of the past discrimination. They cannot become a ceiling, and they do become a ceiling if they are looking solely at present availability of people in areas from which they, historically, have been discriminated against and excluded.

COMMISSIONER HORN. Ms. Taracido?

MS. TARACIDO. I think that there are guidelines already available, as Jack already indicated, although it is not etched in stone, because we haven't had a Supreme Court decision on it. There are guidelines available to make some decisions with regard to how you determine how much representation one would have, let's say, in the employment sector, including the question of the kind of qualifications you would need for a particular job category. But my understanding was that your document was tying to go well beyond that; you were trying to recognize a pervasive discrimination that has existed in this country over time and the importance of being able to go beyond that point and look to measures that conceivably will recognize those discriminatory practices and the impact that they have had on minorities in this country. So, for example, one would hope that an affirmative action plan would try to get qualified people for jobs. I think we would want qualified people for jobs, but, nonetheless, if part of your process is to try to dismantle discrimination, then clearly what you have to do is also have some kind of program in place to give people a leg up and to, perhaps, as an example, have a training program that opens up opportunities that would otherwise not be available because of the pervasive discimination that has been impacting on minorities in this country. So what we do have is some legal basis for making decisions about the share of the market, so to speak. But, in addition to that, it is important to think about other ways of dismantling discrimination by looking beoyond that and seeing if there is any way to open up opportunities and identifying the measures that can be used to do so.

COMMISSIONER HORN. Well, again, the basic question, though, related to how one determines what is the appropriate share, and given that question, would you say that while you might try for the total percentage of a particular race, sex, in a labor market, however conceived, if you would take Mr. Atkins' view, that you have to deal with reality, be problem solving, be pragmatic, and you would try to relate that then to those that might potentially

be qualified through training, as you point out, or are qualified, not locking in the future, as was said, by a particular percentage demographically, but that would give representation by race or sex in whatever that pool was. Is that your position?

MS. TARACIDO. I would say that the question of a number, as such, is not the real focus. The focus should be opening up opportunities, and that means opening it to people who are qualified to do the job and if, indeed, we have what we do have, which is pervasive discrimination that has locked out people, opening up opportunities to train them to do the kind of jobs that are necessary for this society to function. So, consequently, I agree that we should not lock ourselves into some kind of a ceiling, as such, but, rather, looking at what can this society do about making sure that the minorities in this country have the same opportunities available to them as the majority population has had over time.

COMMISSIONER HORN. I agree with all that, but the facts of life are that when enforcement agencies come out and review affirmative action plans, they are looking at numbers. They are looking at underutilization, however defined, and this is what we're trying to fish for here: what are appropriate definitions and is there an interim term, short term, long term, whatever? And it isn't enough to have all these philosophical generalizations. But when you get down—and I'll get to this in a minute—as to whether funds can be shut off, as to whether mandatory quotas are imposed, whether you are taken into court, etc.—so I am trying to fish for your legal experience as to what kind of standards can be appropriately applied by which progress is measured in the implementation of affirmative action plans.

MS. TARACIDO. I think it's been answered. We have talked about the fact that there are already in place some guidelines, some standards that have been established through the courts to deal with that issue.

COMMISSIONER HORN. Well, okay. You are going to let it go at whatever the court cases are at this point? I'm trying to get your best judgment, as a professional, based on experience in a variety of legal settings, as to whether or not you have a particular standard, series of standards, whatever, that relate to sharing, which is what we get down to when we talk about justice.

MS. TARACIDO. Well, the philosophical principle of justice is a little different in talking about what you would be allowed legally. What is legally permissible is a very different discussion than one about the general concept of justice. Justice may well require that it should be 50 or 60 or 70 percent minority in a particular job category because those folks really had that potential to do that job. And yet, the way things have worked out, you may find them represented at the 2 percent level. So justice is a very different focus than the focus that deals with what you can legally be able to do in terms of sharing.

COMMISSIONER HORN. You and I understand, I think, that when you go into court as a lawyer defending, or a lawyer trying to further minority interests of one sort or another, you just don't seek what is legally permissible. That might be your bottom line, the state of the law. But, presumably, you would try to reach for what you think is right, what is appropriate given a set of circumstances. And I am trying to ferret out here whether we have some sort of summary statement based on that experience that can guide people as to what is the best approach, the criterion, etc., that one seeks, regardless of what the court has currently said is the appropriate standard.

MS. TARACIDO. I don't think I can say anything more than what I have already indicated, so I will pass it on to Mr. Mark.

COMMISSIONER HORN. Okay, Mr. Mark.

MR. MARK. I, too, feel that a share, a quota, or underrepresentation can only be a measuring stick of how far we still have to go with affirmative action. In other words, I don't think that there should be a ceiling. I think that share can be determined, as indicated in your approach, the specific nature and extent of the discrimination, with regard to whether it is employment or with regard to access to government benefits, and the reason why I raise that particular issue is that there was a project in Chinatown involving the social security office, where it was staffed by bilingual people for a period of a year. And, in that situation, what happened was there was an increase in productivity and an increase in delivery of services to the, mainly, non-English-speaking and limited-English-speaking personnel. So what I would suggest, in a situation like that, although it doesn't necessarily deal directly with equal opportunity for employment, that you also broaden the measurement away from the statistical numbers, with regard to how many people are on the job there as bilingual staff, but also to look at how services are delivered and if there is an increase

in efficiency and just overall effectiveness for that office. That would help indicate whether affirmative action is helping and benefiting the whole community.

COMMISSIONER HORN. Okay. Ms. Lichtman?

MS. LICHTMAN. I think the reason we are all having trouble with your question is that we basically don't approach our cases or our clients with the same bottom line. Certainly, employment and education and housing and credit all have to be viewed differently, and you would recognize that. I assume you are asking the question in the employment context.

I think what we are all saying is that our approach to our cases is very pragmatic. It is what we think—I'm talking about women dentists and women engineers, which I've never talked about, but I'll talk about them here—where there are very few, to talk about the fact that women are 51 percent of the population would be ludicrous. I couldn't convince you and there would be no point in trying to convince Lockheed that he should hire 51 percent of his aeronautical engineers as women. So our approach is really very much the one that Tom and these other people have suggested. It is very pragmatic. That is not to say that there are not guidelines that we follow.

We look carefully at those cases to see what they suggest. Certainly, the extent to which we can push that law—but you can't push it to 51 percent for dentists or engineers; you just can't do it.

And then, I think, EEOC did, within the past couple of years, come down with some general guidelines to be used as a rule of thumb, and, I think, your report cites that on page 29, which I think employers have generally responded to and thought were useful and helpful in helping them decide which way to go in defining their own analysis, their own work force analysis, and I am not sure we are going to be able to give you any more specific answer than that.

COMMISSIONER HORN. Okay. Let's take what we've heard and let's get back to a question raised by Commissioner Berry as to the underclass' socioeconomic problems.

Let me ask you, Mr. Atkins—you are a Phi Beta Kappa graduate of Indiana—can one say justice is served if your son gets a preference in a particular college or law school or medical school as opposed to a white sharecropper or West Virginia coal miner's son where the father has never gone beyond the third grade and the son has made it through high school and is maybe the first one in the family ever to get through high school, and yet that person is white; your son is black. You have, presumably, the advantages of being socioeconomic, middle-income class despite color. Where is justice served?

MR. ATKINS. I'm not in the middle income; I'm in the upper income until inflation catches up. The problem, Mr. Horn, is that I don't think any of us have been able to give you the kind of answer you are asking, because we reject the premise on which your question is based; that is, justice is numerically measurable. That's the problem with your question, as far as we're concerned, and I continue to have difficulty. So your question, as framed, is largely rhetorical.

My son, compared with the first-born, or third-, or fifth-born sharecroper's son, competes still in a world in which racism will favor the sharecropper's son simply because he is white.

COMMISSIONER HORN. In law school?

MR. ATKINS. That's the reality. Yes, the reality is that today whites with a high school diploma are more likely to earn in their lifetime more money than blacks with a college degree. That's reality. That's not related to ability. It is related to a societal context in which those who have structured the prior discrimination persist with the power to maintain an irrational result. So, when you ask me how would justice or Solomon deal with the selection dilemma you proposed, I would say Solomon will work very hard at it. I have not been called upon too often to be Solomon. We don't have that option.

So my earlier answer to you, I think, is one which might help you avoid some of the nicest kind of distinctions that you're trying to make. If you focus first on eliminating the barriers, focus second on creating the opportunity, and then, as a means of measuring progress in the realization of that opportunity, start from some point and you sprinkle that with practicality, and that's going to be about as close as you can get to that component of justice which might be made up by an affirmative action plan.

We all contend, and I would hope you recognize, that justice is not something that can be put in a box and put on a scale, even a scale held by that lady with blindfolds.

COMMISSIONER HORN. Yes, Mr. Atkins, what I recognize here is that we have a major factor that generally goes ignored in affirmative action plans.

MR. ATKINS. Which factor?

COMMISSIONER HORN. That is the socioeconomic class factor.

MR. ATKINS. I don't agree with that. That's a contention with which I don't agree.

COMMISSIONER HORN. And I want to get your feelings on the record, based on legal cases, etc., and your own philosophical views as to the degree to which, if any, such a criterion of socioeconomic class is appropriate and ought to be pursued within a race-sex affirmative action context.

MR. ATKINS. No. Well, we are usually not given an opportunity, Mr. Horn, to try, as it were. Even in a Federal courtroom, one with powers of the Federal judge, elements of society as it has been reduced into behavior patterns (laws, regulations, policies) that come to have the impact of law and the power of law do get tried. We are not usually given an opportunity broadly to try society and all those who yield the power that set the social context in which individual things take place and, therefore, it would be somewhat ludicrous to try factoring in, after the fact, factors which we were not able to, and we have not, in any context with which I'm familiar, been able to try and to fix as a measure of responsibility.

Yes, it is true that most Federal judges do proceed from a premise—if you're talking about a case—that there has been some difficulty measuring, but, nonetheless, some societal discrimination, and that societal discrimination provides a backdrop against which individual policies and practices get reviewed.

COMMISSIONER HORN. Look, I'm trying to get down to some much more specific things.

MR. ATKINS. I understand that.

COMMISSIONER HORN. When you go into court, you use as evidence of societal discrimination, systemic discrimination, plant, the employment, labor market area discrimination, such factors as we've already heard mentioned by almost every panelist. What is the relative economic status of high school graduates who are black versus white, or high school graduates who are white versus college graduates who are black, and you use that. You use it for women in relation to men, etc.

Now, what I'm saying is very simple: if that is a legitimate standard—and I think we all agree it is one of the legitimate factors by which one measures relative status of mobility in society—why is it not also true that we should look at all similarly situated people based on economic class, and maybe if you are black and female you've got two check marks or benefits you ought to get, and if you have a certain socioeconomic class status within it you've got three. But then I'm saying, what about the person that is white—and we know, absolutely, there are more poor whites in this country than minorities, but proportionately there are many more poor minorities in the given total number of areas—why is it not appropriate to use that standard within a race-sex context?

MR. ATKINS. I have no difficulty with the general notion that whites in this country, who also have been victimized by an aristocracy, should be liberated, as it were. To the extent you are suggesting that they are natural competitors, or that minorities should be sharing with them those limited gains that have been acquired, I think it is sort of a self-defeating argument, if it is an argument.

I think that a more appropriate focus there would be to focus on those problems that the sharecropper faces and to eliminate the barriers to advancement that face the sharecropper and his son and to create opportunities and to try to measure their progress that their distance from sharecropper status and the underclass of being a sharecropper still represents in our society. Your question, however, ignores that component of underclass status which is caused solely by race.

COMMISSIONER HORN. Not ignoring it a bit. I'm merely——

MR. ATKINS. You can't separate it out, and the problem we have not—at least I have not—seen any empirical data with which I'm comfortable which can calibrate that part of the job discirmination which was based on the applicant's sex, from the applicant's race, from the applicant's parents' socioeconomic status, so that we can then say that, "Well, yes, you were rejected, but only 30 percent of it was related to your sex. The other 70 percent was related in equal quantities to your family's economic status and the fact that you were a woman."

I mean, when someone comes forward with data which probes the mind of the bigot sufficiently to make it possible for the bigot to give a rational explanation of what we, up to this point, have historically said was fundamentally irrational, namely prejudice, it may then be possible to respond in a

numerical fashion to the question you raised. Until that is done, until we have more confessions on the record by those who have been the discriminators, it will continue to be difficult to calibrate a response to that admission.

COMMISSIONER HORN. Ms. Lichtman, do you agree on—with that comment on the calibration between race and sex?

MS. LICHTMAN. I think it is real hard to separate out that kind of discrimination when you've got them both in the same place. I do. I don't have any trouble with Tom's articulation at all.

COMMISSIONER HORN. There are several groups that are not represented among these general counsels with which the Commision has a concern. One is the disabled which we now have jurisidiction on. Another is a group that has been arguing before us for appropriate recognition. We have also heard it in Congress. That is, for want of a better euphemism, so-called Euro-ethnic communities—immigrants generally from Eastern, Southern Europe feel they have problems comparable to those faced by some minorities.

Now, obviously, if they're females, that's one thing; they are protected to a certain extent. If they are male, they are not protected.

I wonder what is the feeling, if any, in the civil rights community as represented on this panel as to the degree to which governmental policy in this country ought to be concerned with discrimination vis-a-vis the so-called Euro-ethnic communities. Have you discussed this? Do you have any feelings on it, etc.?

Mr. Mark?

MR. MARK. For myself, I think that Asian Americans have suffered from legally sanctioned discriminatory laws and that, if Euro-ethnics can produce a history of discrimination along those lines and can prove that they're been racially discriminated against or discriminated against based on national origin, they would probably qualify under your methodology that you put forward in your proposed statement. That's a question in my mind. I am unaware of the existence of that kind of data.

COMMISSIONER HORN. Mr. Mark, you are arguing then, if groups can prove a pattern or practice based on discrimination because of national origin, in this case perhaps religious discrimination, of one sort or another, that they, too, should be included within a protected category, such as is represented on the panel?

MR. MARK. I think I have to think about that a little more. When you say religious discrimination——

COMMISSIONER HORN. One could argue part of the Euro-ethnic discrimination is due to particular forms of religion that are practiced in some areas. That is considered a reason to discriminate.

MR. MARK. I would have to then look to see if this discrimination persisted to the present.

COMMISSIONER HORN. Persisted beyond the emigre?

MR. MARK. Right, persisted.

COMMISSIONER HORN. Ms. Lichtman?

MS. LICHTMAN. I would guess there won't be anybody on the panel that says discrimination against some people is all right, but against that constitutency it is not. Nobody is that dumb, frankly, to say that to you. If there is a pattern or practice of discrimiantion, we're against it, no matter who it's for. Certainly against disabled people, certainly against Southern Europeans, or whoever.

COMMISSIONER HORN. Ms. Lichtman, let me ask you, then, when you get out of the protected category class. That question might be more appropriately directed toward Mr. Mark, but if you look at the social indicator statement, the fact is Asian Americans score higher than white males in several categories. If you look at the argument we all know occurred in Congress, Asian Americans were at least temporarily excluded from some benefits in terms of small business. Now, by what standard does the government judge progress having been made in a particular area and no longer offer protected status to one in a category?

Mr. Mark, you might want to comment on that.

MR. MARK. I think that if there are statistical analyses that indicate overrepresentation in a certain profession or occupation, or in certain areas of opportunity in the society, we should also examine those statistics to check whether it has been broad enough to include other categories which may have been ignored.

For example, in your report of September 1980, *The Success of Asian Americans, Fact or Fiction?*—it is true that Asian Americans on the whole—within certain sub-Asian American groups, like Japanese Americans—they may have slightly higher income than their white counterparts. Overall, for Asian Americans, in fact, they have lower incomes than the white majority with commensurate education.

But if you're going to look at subcategories of Asian Americans with regard to affirmative action, whether they should be included or not, there should be sufficient data gathering to determine whether they should be excluded or not. What I'm trying to get at is, yes, there are suggestions that Asians have achieved certain economic success. But, historically, Asians have been pushed into certain kinds of professions because they're been exlcuded out of others. The legal profession is one area where there has been very small numbers of Asian Americans. There are laws that prohibited Asians from practicing as attorneys.

I guess in the last 3 or 4 years, for the first time in history in this country—been graduating any number of Asian American attorneys. I think the statistics indicate that on the average, for Filipinos, 1 attorney for over 2,000—that's based on the '70 census—and 1 Japanese attorney for every 1,700, and approximately one Chinese for every 1,200 or 1,300. If you were to look at that and say, "Well, in another generation, there are substantially high numbers of Asian Americans who may be practicing, not substantially higher but higher than their proportion in the white counterparts," I would say that you would have to look at data of underserved Asian American communities with two other factors: one, the number of bilingual Asian Americans practicing law, and also, the second factor you would have to consider, is their disadvantaged state.

Where are these people coming from [and what was] the socioeconomic bracket that made them disadvantaged and unable to attend law schools? These kind of people may have a commitment to come back to serve their community.

What I am suggesting is that whenever those questions are raised, the analysis that you use, the statistics that you use, have to be broad enough to cover other categories that would indicate whether they should be excluded or not from the particular affirmative action plan.

COMMISSIONER HORN. Well, I would agree with your point. If seems to me within the Hispanic affirmative action, within the Asian American affirmative action, we have a very interesting situation where some groups that have the overall label appropriately applied are much better off than other groups within that category, and you cited some of the recent emigres in terms of Filipinos, Vietnamese, and others, Koreans, which are the greatest wave of Asian immigrants now, much more than Japanese and Chinese. Should we not come to the time when Japanese and Chinese Americans should be excluded from the protected category, but we recognize that Korean Americans, Filipino Americans, Southeastern Asian Americans have not had the advantages that others have had?

MR. MARK. I would say, theoretically, that I would agree with you, but I would have to again express my caveat that you would have to check all types of social indicators to determine whether the process of discrimination, in its varied forms, has been dismantled, that type of discrimination, in fact, is eliminated before you can draw the conclusion to exclude certain Asian American groups. But, in theory, I agree with you.

COMMISSIONER HORN. Two last questions—one I won't pursue very long, but I want to raise it for the record, and that is, as we look at the situation in Miami, as we turn on the evening news, as we pick up the newspapers, we see not only the problems of an underclass within a particular racial minority primarily, we see the problems of, say, illegal aliens, half of which might be Hispanic in this country in either the South or the North or other parts, some of which are Asian, some of which are European, Canadians, etc., in the other half, and we see these groups in job competition with those that are having the most difficult time even getting on the economic ladder in the urban areas of this country; yet we see hardly anything being done about it by the Federal Goverment. We see the civil rights community generally, as I perceive them, not willing to face up to the problem because there's a lot of political pulls and tugs in terms of census support for reapportionment, and whatever it is, and there are a lot of crosscurrents there. I would be curious as to the degree to which, in pursuing affirmative action for American citizens, permanent residents, those who have the legal right to work, that the civil rights community feels it should be concerned with the impact illegal aliens are making in terms of job opportunities for people primarily in minority groups in this country.

Mr. Atkins?

MR. ATKINS. The problem with the gatekeeper philosophy is that the gatekeeper is always the person who has already gotten through the door. Today's illegal aliens may be painted differently or maybe just 50 years ago would not have been considered either illegal or aliens; they simply would have gotten in under a different definition of entry into this country. All the Americans, with the

exception of the American Indians, are illegal aliens, somehow or other legalized. So the question becomes how far back do you carry that concern.

We are concerned about how this country applies its immigration laws and its statutes and its procedures. We detect a decidedly uneven application of the standard in the quotas that are set by the country for admission, in the degree to which the country aids those who get in, by whatever means, and the degree with which those who have gotten in and are pursued or are harrassed. Indeed, some of these concerns have been expressed in lawsuits that have been filed by various people.

America has not yet, Mr. Horn, reached a point where it needs to spend a great deal of its resources hounding aliens.

COMMISSIONER HORN. Even if there were 3 to 12 million in the country which denied black youth an opportunity to get a job in center cities?

MR. ATKINS. Even if there are 12 to 15 million of them, or 20 to 30 million of them, because they do not yet exercise the power that excludes black youth from opportunties. It is not they who have structured a society of exclusion. They are competing at the bottom of the society based on exclusion.

Our enemy is not the illegal alien who is escaping from societal pressures perhaps even greater than those that are here. Our enemy is not the Hispanic speaker who slipped across the border from Mexico. Our enemy is the person who has, historically—and still today, benefits from structuring a racist society and who benefits from keeping an underclass in place and whose frame of mind is such as to justify keeping an underclass as an economic necessity for the operation of this country's economic system. No, our enemies are not the aliens, whether from another country or another planet, if some of these get here.

COMMISSIONER HORN. Let me pursue that with you. That's an interesting speech. Fine. But when you get down to deal with reality, how do you explain in New York City and in Los Angeles, California, that black youth cannot get the jobs—that the illegal alien over the border and off the boat in the case of the Chinese in the garment industry in New York, the Mexican Americans and other Latin Americans in the garment industry in Los Angeles can seem to walk in and get the job. They are also in a minority category.

How do you answer that question and how do you explain that when you go to Miami that 16 percent of that city is black and has been completely bypassed, in essence, in terms of job opportunity?

MR. ATKINS. I think it is fairly easy to explain that. The illegal aliens have been exploited by employers who have preferred them because of their lesser ability to utilize and benefit from the laws that protect workers in this country. If employers were to be hounded, penalized, fined, and jailed for exploiting workers, be they alien or resident, much of the problem to which you refer would disappear.

To the extent we focus our effort on the criminal, for instance, who is a handbag snatcher rather than a cool crook who defrauds a million dollars, we continue a society of disequal or unequal opportunity and we disproportionately allocate resources to deal with the symptoms of problems rather than the causes. The problem in Miami is not blacks that have been totally passed over; the problem to some extent is that it is economically desirous for employers to have as a captive group people who are afraid to complain about the sweathouse conditions under which they work—people who are unable, because of language problems, to press a complaint of job and promotional discrimination and near-captivity under those circumstances.

The same problem exists in Texas. It exists to a lesser extent, but also in a different form, in California. That's the shame in the area of immigration.

COMMISSIONER HORN. I couldn't agree with you more. To get at that problem, would you favor employer sanctions, then, in terms of employment of illegal aliens?

MR. ATKINS. If we're going to have laws that say there are certain illegalities attached to worker conditions, to employment conditions, yes, then the place you start is with the employer.

COMMISSIONER HORN. All right. To help the employers and to help the government enforce it, would you favor a national identification card?

MR. ATKINS. Of course not.

COMMISSIONER HORN. You wouldn't. Then I say your solution would never work.

MR. ATKINS. That may well be so.

COMMISSIONER HORN. My last inquiry comes on the legal basis which I think we ought to get into the record.

MS. TARACIDO. May I just add one thing to what—those employers you just described would not, I think, hire the people we're talking about. They are there to exploit workers, so, consequently, the impact of jobs in those industries where these

workers are being used is not going to be spilling over in terms of whether or not opportunities would be available for minority youth in this country. And that's a very important thing to remember.

COMMISSIONER HORN. Do you feel Puerto Rican minority youth in New York City are being denied jobs because of the presence of illegal aliens in New York City?

MS. TARACIDO. I think Puerto Ricans in New York City are being denied jobs by institutional discrimination that exists. I think that the jobs that you are talking about—and I will repeat it—the jobs you are talking about are not available to the Puerto Ricans, because that employer is there to exploit workers.

COMMISSIONER HORN. You see, the economic facts of life are that in every single job category in this country a majority of the people in that job category are American citizens or legal permanent residents, and yet in every job occupation in which illegals are present, wage rates are depressed in every one of those areas. Now, that, to me, when you look at those statements, really!

MS. LICHTMAN. That's what you ought to go after. It seems to me that last question between you and Tom—I'm not sure that he heard you right—the question you asked was whether or not you think you ought to prosecute employers for employing illegal aliens.

MR. ATKINS. You should force them to pay a proper wage.

MS. LICHTMAN. Right. That's what I thought Tom meant.

COMMISSIONER HORN. I'm all for it. The fact is, in some areas they are paying a proper wage and they are hiring them exactly for the reasons you state, which are they are more docile, they are more subject to intimidation, they're not going to join labor unions, they won't complain to FEPC [fair employment practices commission], whatever. Then I ask you, what would you do to them? Have employer sanctions? Sure. Great idea! Okay. How do you then prove that? How do you protect the employers so they then don't discriminate against every brown and black face that shows up, and that's where I lead myself like it or not, since I try to deal in reality, down to an employer/employee identification card.

MS. LICHTMAN. We've never needed employee identification cards for the Minimum Wage and Hour Bureau of the Labor Department, the fair labor people to enforce the Equal Pay Act, or to go out and enforce the minimum wage or maximum weightlifting requirement.

COMMISSIONER HORN. Ms. Lichtman, the minimum wage is being paid in many of these jobs. Let's not kid ourselves on that.

MR. MARK. I disagree with that. I disagree, and from the experience that we've had—first of all, I would like to clear up something. I think illegal aliens, historically, have been used as scapegoats, and from our experience in working in the Asian community in New York, I even doubt the numbers that people dream up about how many illegal aliens there are in this country at least are factually true, or Asian Americans. There are, I'm sure, undocumented workers in New York City, in Chinatown, particularly, but I really don't believe that they are taking away jobs from mainstream America. I think those jobs are there because, precisely, they are the only jobs they can get.

VICE CHAIRMAN BERRY. A point of clarification, since we have gone afield into immigration.

Mr. Atkins, you said something about all Americans were illegal aliens, and that is the first time I ever heard black Americans described as illegal aliens. I just wondered if you meant that or if you wanted to clarify that. Does that include black Americans?

MR. ATKINS. If one pushes the notion of who belongs here to a logical conclusion, one stops with American Indians as the residents, and everybody after that, also, is an illegal alien in one form or another. And if pushed to that point, it makes it clear that it is an absurd notion.

CHAIRMAN FLEMMING. Might I suggest, the Commission did put out a report on the undocumented worker. There were differences of opinion on the Commission, relative to some of the issues that have been discussed here, but I would like to have this discussion stay with the pending inquiry.

COMMISSIONER HORN. It is directly related, and the fact that people ignore it is simply beside the question.

CHAIRMAN FLEMMING. I recognize the interrelationship and overlapping relationship here, but I would like to come back to the current statement.

COMMISSIONER HORN. I am trying to get back. Commissioners Freeman and Horn felt that—Freeman isn't here to speak for herself anymore.

My last inquiry is on the legal basis for affirmative action. I would like your views on the record—and

anything you wish to file, please feel free to do so—on the argument that is being made, that since affirmative action in the Federal Government is based on an Executive order and since that Executive order was issued after the 1964 Civil Rights Act was passed, in which the legislative record says these individuals—it is, presumably, clear that the fund cutoff was not to be an avenue of sanction under Title VII. Is it then appropriate to have, as one of the enforcement tools of the Federal Government to further affirmative action plans, fund cutoff as a basis, when that is not what Congress enacted, but rather that is an Executive order issued by President Johnson in 1965? I would like your insights, based on the security of the basis of the affirmative action Executive order in relation to the sanction of fund cutoff. Does anybody wish to comment?

MR. GREENBERG. I think that legislative history, to which you refer, is sufficiently obscure that I have not heard that argument. And that doesn't mean it doesn't exist, but certainly it has not risen to a level of visibility which can make anyone say that it is so. The one thing we do know about equal opportunity law is that the Congress seems to have been committed to a multiplicity of overlapping and complimentary remedies, and we see that in a variety of areas—employment, housing, other areas as well. So it is not at all incompatible to have the EEOC bringing actions and having private suit and having fund cutoff and having State and local remedies, and I think, without a doubt was the overriding intent of Congress.

I think if Congress wanted to repeal fund cutoffs, it would have said so, and it hasn't said anything resembling that, that I'm aware of, except, possibly, extrapolating by the most convoluted means, but certainly no court has been persuaded of that.

COMMISSIONER HORN. Any other comment on this question? If not, let me put it specifically. This argument is made in the *Wall Street Journal* of November 28, 1980, in an article entitled, "Challenge to Affirmative Action," by professor of law at Vanderbilt University School of Law James F. Bloomstein, and he makes the point that Title VI has several limitations that undermine the validity of the Executive order program.

First, funds can be withdrawn only from specific programs guilty of noncompliance. Do you agree with that statement or do you feel funds can be withdrawn from the total program, not simply the specific program where discrimination, in terms of affirmative action, has occurred?

MR. GREENBERG. I think my answer has to be, that's an issue that is in dispute.

COMMISSIONER HORN. His second point is, Title VI is explicitly inapplicable to any employment practice of any employer—employment discrimination under the statute is exclusively covered under Title VII. The point I made earlier: nothing in Title VII authorizes the use of the fund cutoff remedy.

MR. GREENBERG. I've already answered that. I think the Congress is committed to overlapping and complementary remedy.

COMMISSIONER HORN. I would like this article inserted in the record at this point.

CHAIRMAN FLEMMING. Without objection, that will be done.

Commissioner Ruckelshaus?

COMMISSIONER RUCKELSHAUS. I would like to thank you all for your statements and your responses to the questions that have preceded my questions.

I am a little bit uncomfortable when anybody agrees with us, even to a degree to which you have, so I would like to ask you for some help here. What we propose to do in this document is actually what you say. We are trying to get past the involuntary response by some people to certain words that have been drawn up in the history of affirmative action as a remedy for discrimination. We are trying to go really back to the basis of this question of discrimination; to identify it for some people who have come on the scene, really, since the whole question was such a hot social issue; to reidentify it for other people; to, in a sense, make it as simple as possible to understand how affirmative action came about; to identify systemic interlocking discrimination and the way it has historically existed in this country. But we have some problems here.

Mr. Mark and Mr. Atkins have stated that it is a reality that some of the white males' expectations will not be met. That they will, in fact, be living in an era of diminished realistic expectations. We have the problem in the private sector where the majority of persons still work, at least the last time I looked, that affirmative action has imposed a machinery of compliance that has become difficult and expensive for business, and we are in an economic period now where business needs are going to be attended to very closely.

My conversations with EEOC officers and private corporations and businesses lead me to believe that

they all believe in the process of eliminating discrimination in their hiring and promotion practices, but they have a lot of trouble with the mechanism that the Federal Government has imposed on them for demonstrating compliance and good will. So there is a lot of resistance, individually and in the private sector at large. And what we are trying to do with this paper is, to the extent to which we have, as a Nation, accepted that the elimination of discrimination is in our national interest—we are trying to extend that acceptance further and help explain how people who are still listening understand why affirmative action is, in fact, an extension of that national interest.

I want to know, have we done that? Did we get to that in this paper? Have we really led people to an acceptance of a mechanism of affirmative action as a necessary tool, a tool that is in the national interest if we can lift our heads above individual interests? I wonder if you can help me with that?

MS. TARACIDO. I think I would refer you back to what I said earlier, which is: the document is such, in terms of presenting the legal bases, I think you have a very good discussion of that in part B. But part C really doesn't, as forcefully as it could, present that message, and I really would urge you to look at that section again and do some redrafting that will allow for a clear message of that kind to be articulated in part C.

COMMISSIONER RUCKELSHAUS. By the way, on that point, you did mention the fact that we seem to accede to the fact that meritocracy, heretofore, existed and we are now going to interrupt it a little bit. I'm not sure we did that. And I think we talked about exactly what you talked about, but it may not have been stated in a way that was direct or forceful enough.

MR. ATKINS. One of the things I think this statement would be strengthened by doing is giving examples of success. To some extent, the whole discussion about affirmative action has gone forward amidst the sound and fury of the assaults made on the concept. So people hear, in graphic terms, about the pieces of paper necessary to comply, about the number of men and workhours required to comply. They hear about the requirements that are piled on by each of several Federal agencies. What they don't know is what has come out the other end. And I think all of us here have suggested to you that one of the best ways to get across to the American people that, painful though it may be, difficult though it may be, it has been worth it, is to show what has happened. And there have been results in the private and public sectors, at the local, State, and Federal levels. It is important to show that. And even though those results are not nearly as great we think are needed, it does show that this is not simply an exercise in the circulation of paper.

So, in answer to your question, I think the statement approaches the demonstration that affirmative action is in the national interest as an expansion or as an extension of the national commitment to end discrimination based on race, sex, creed, color, etc. I think it can more fully do that by arming those who would listen with examples of how the national interest has been served.

COMMISSIONER RUCKELSHAUS. That's a very good point. Because we intend to go on in our March consultations and get very particular with some repesentatives of business and the government. This is, in fact, the kind of an umbrella-opening, philosophical statement—and maybe delaying that kind of information and good news until later on is not appropriate. Maybe we ought to be a little more——

MR. ATKINS. I think the problem with that, Commissioner, if it is sort of like the initial statement, which is subsequently retracted in the newspaper—the retraction never quite runs as fast as the first blast. And I would think that the EEOC, for instance, and the Justice Department, the Office of Federal Contract Compliance Programs—each of them would be able, without a great deal of your time being spent, to give you information on results. That is their job. They have people over there who do that. And I don't think the consultation you have scheduled for March will do that.

The consultation in March will help you understand, as I look at the list of people, some of the difficulties in administering existing structured programs. But none of the people—well, not many of the people you have are going to have access to the kind of data necessary to fill out this report, and I would strongly urge you not to view this in a phase one, phase two, but to view it as complete a statement as you can make it in the time you have available.

COMMISSIONER RUCKELSHAUS. That's a very good point, because part of the argument for affirmative action surely will be that it has existed and it does work, not that it existed and we're having a lot of trouble with it.

MS. LICHTMAN. My only additional suggestion is in that section on other concerns, in which you attempt to answer some of those sort of myths or shibboleths that are raised, that you take on the notion of meritocracy much more forcefully because, I think, it is really as much a myth as anything. The notion of getting ahead or getting some place on pull is as much a tradition as meritocracy in America and somebody should say that.

COMMISSIONER RUCKELSHAUS. That's all, Mr. Chairman.

CHAIRMAN FLEMMING. Mr. Nunez?

MR. NUNEZ. I would like the panel to, perhaps, address our attempt to assess when affirmative action is a necessary mechanism to take on as a measure to deal with the problems of discrimination. And we deal with that on page 41, where we set four criteria as to when an affirmative action plan is an appropriate measure.

I would like your thoughts as to whether they meet your view of what the tests should be in getting an affirmative action plan underway. It appears on the last column on page 41.

MR. ATKINS. Let me be one of those to respond to that. I have no problem with those four indicators. I may well supplement my statement by reference, specifically, to those four and suggest that there are either nuances to each of them or an additional category or two that you might want to include.

I think this is a helpful formulation. I am not certain it is complete, though.

MR. NUNEZ. You don't have a specific——

MR. ATKINS. That was one of the things that I grappled with, and I have not reconciled my own arguments internally sufficiently to want to talk about it.

MR. NUNEZ. Let me see if I can help you a little bit more with what I'm getting at. In a way these are descriptive and they set standards, but they are also somewhat restrictive. In other words, if a group, at this point in its history, has entered the mainstream, even if it was a group that had a history of discrimination, no longer should affirmative action be an appropriate measure. Would you agree with that concept?

MR. ATKINS. Not necessarily. I understood that was what you were grappling with, and, philosophically, it's an attractive notion. The problem is trying to calibrate that point in time where——

MR. NUNEZ. What we were grappling with was the assertion that every group could ultimately be entitled to affirmative action because everyone in our society, at one time or another, could claim they were discriminated against. And how do you set a standard when you say everyone is discriminated against? That was an attempt to begin to address that issue. Then the issue becomes a little illusionary.

MR. ATKINS. That's why I said I think it is a helpful formulation because it will trigger some thought. I am not certain that it is definitive. That doesn't mean you shouldn't do it.

MS. TARACIDO. One thing that occurs to me is that we have already identified a number of ethnic and racial minorities that have been identified in the publications you all have put out, showing that they are really at the bottom of the heap, so that, at least, easily, right now, we can talk about blacks and Mexican Americans and Puerto Ricans and Asian Americans, and I think that it is difficult to start to look at when do you deterine that the person is no longer disadvantaged in the socio-indicators—I think the name of the book you all put out—show. But you have that beginning and I don't think that we're going to be moving away from those groups at the moment, not any time soon.

CHAIRMAN FLEMMING. As I say, I have been very much interested in the dialogue that has taken place, the issues that have been raised. I was particularly interested, Mr. Greenberg, in your suggestion of the balance sheet approach. That has been picked by—or an aspect of it, anyhow—been picked up by other members of the panel. I am not only interested in it, but I think it is a very constructive approach, because it seems to me that oftentimes we do miss the opportunity of getting some persons on our side by not frankly recognizing both the liabilities and the essence attached to the development and the implementation of an affirmative action plan.

I kind of link that up with what Mr. Atkins and, I think, one or two others pointed out too: that in developing a balance sheet you, in effect, recognize that you cannot implement equal employment opportunity laws—you cannot develop and implement an affirmative action plan without having some impact on some members of the white society.

As I listen to you along that line, I recall some experiences that I have had in the area of age discrimination where I've talked with administrators who have said to me, "Well, yes, maybe we have been discriminating against older persons and we are

willing to stop it, provided you can get us some additional money." In other words, they were not willing to make the hard decisions which would result—in this case older persons getting a fair share of resources or benefits, whatever might be at stake. And it does seem to me that the development of that kind of a balance sheet would point up the fact: yes, some hard choices have to be made—difficult ones—and I don't think that we gain anything by ducking that. In other words, my approach has been, as we implement equal employment opportunity laws, we do disturb the status quo. And we are disturbing the status quo, particularly in the white society. That does create opposition, and it is that type of opposition that we have to deal with.

I think this will be increasingly true in the period that lies just ahead. So that I think I am kind of looking forward to our seeing what we can do in the way of that balance sheet and being very blunt and being very frank about the fact if you are going to implement an affirmative action plan, it will disturb the status quo and it will mean that some persons will not get jobs who otherwise would have obtained jobs, in all probability. But some people who have been discriminated against, who have been the victims of discrimination, will have some opportunities opened up for them.

I don't know whether any of you want to amplify that any more than you have. And, Mr. Greenberg, I don't know whether—am I interpreting correctly the point that you made in your opening statement—and Mr. Atkins and the others—the comments that seemed to me you made which were related to Mr. Greenberg's point?

MR. GREENBERG. Yes, you are interpreting what I said correctly. I think that one makes one's most effective argument by facing up to the validity of the arguments against you and not pretending they do not exist. I think, to the extent that I can perceive those arguments made against us, I think there is something to them. But, nevertheless, they are inadequate to defeat the principle of affirmative action. But they are there and it just doesn't do you any good not to look at them comprehensively and give such responses as there are.

CHAIRMAN FLEMMING. In other words, you come out with—on balance, you mean you've got assests and liabilities. But, on balance, the assets outweigh them, if you are committed to the concept of equal employment opportunity and not discrimination, in the area of employment.

MR. GREENBERG. There are a lot of factors that you will put into your calculations that are really not quantifiable. There are going to be a lot of value assertions. But then, you have to identify what your values are and what values you are arguing. But I think it is important to analyze it and lay it out and understand what it is and come to some calculation.

The thing that gets me about it is that whenever you hear the thing argued, somebody will say, "Well, I heard about this black man who got a job in a law firm and he really hated himself because he didn't know whether he was hired because he was good." I'm sure there is a person like that, but you really have to look at it comprehensively and take all those arguments into account.

CHAIRMAN FLEMMING. Right.

MS. LICHTMAN. And look at that guy who didn't get the job in the law firm and how he feels, knowing he was black.

CHAIRMAN FLEMMING. I was also sure that one member of the panel made a point in developing a balance sheet—you have to keep in mind that is not overstating the liabilities, because someone pointed out—well, I guess, use *Webber,* as an illustration of the fact that that opened up some opportunities for members of the white society also. And they introduced a training program that was not extant. And the training program was helpful to both minorities and to members of the white society.

MR. GREENBERG. A very good lawyer friend of mine once gave a prescription for the best way to write an effective brief. He says, "You start out by giving away what you know they can take away from you later." It is a technique in advocacy. I am an advocate in this. But I think we are more effective if we face up to what the problems are.

MR. ATKINS. I think I agree with Jack and I think that there is, simply, no way around the reality that the status quo is one in which there has been a disproportionate and irrational allocation of benefits to white males.

That's the status quo and it is intolerable and you cannot change that without unsettling those expectations. And we have to acknowledge that at the outset. And the question is not whether, but how.

CHAIRMAN FLEMMING. And you've got to build your strategy around that fact.

MR. ATKINS. That's right.

CHAIRMAN FLEMMING. Otherwise, we're not going to make progress. Does anybody else want to comment?

One thing I gathered from the opening remarks and some of the specific comments you made since then: you do feel there is real value in emphasis in this statement on the role of institutional discrimination and why affirmative action is the only kind of a tool that you can really use effectively to combat institutional discrimination. I may say that it is that part of it, or it is that thrust, that really appealed to me as the staff worked on it and first presented the results of their work to us and so on because we all know that there is such a thing as institutional discrimination.

Unless we, it seemed to me—maybe we were rendering a service and trying to bring that out on top of the table and turning the spotlight on, and then trying to point out the fact that there's only one way you can combat that and that is through the development and implementation of an effective affirmative action plan. But do you feel that in handling court cases that the development of that aspect of the statement can prove to be helpful?

MR. ATKINS. Well, one of the realities is that the institutions in our society are so powerful that unless you tap their strength as a means of addressing the problems, the problems will always continue to exist. An affirmative action plan is a way of tapping the strength of the institution to solve or help solve the problems that its strength has created. And I think the statement, in addressing the structural elements of discrimination and the institutional elements of how that discriminatory intent has been carried forward, is a very, very important way of forcing acknowledgement of the fact that we are not dealing here with, simply, a collection of individual prejudices. We are dealing with individual prejudices that have, over time, come to be institutionalized and made a part of the way we do business.

CHAIRMAN FLEMMING. Affirmative action plans change the way we do business. I sometimes refer to it as a management tool.

MR. ATKINS. It is that.

CHAIRMAN FLEMMING. Which we are using for the purpose of achieving a very definite and specific objective, and I sometimes say, if I'm after an agency, I can talk over a long span of time about the fact that I believe in nondiscrimination and employment and providing equal opportunities and so on and so forth, but that nothing will happen as a result of that talk, because the discrimination that's built into the institutional process will make sure of the fact that objective that I have stated is not achieved. But, if I use this management tool, then I begin to use the resources that are available within the institution for the purpose of achieving this particular objective and I may get——

MR. ATKINS. Commissioner Ruckelshaus raised a question about whether the statement addresses adequately the need to describe and demonstrate how affirmative action is in the national interest. One measure of that will be when employers and managers are evaluated, at least in part, on how successfully they have achieved expanding opportunities along, not in place, but alongside of how they have contributed to increasing profits.

COMMISSIONER RUCKELSHAUS. Or the measure now whether you kept us out of court or not.

MR. ATKINS. Yes. Usually they don't.

CHAIRMAN FLEMMING. Are there any other comments that any member of the panel would like to make at this time, before we bring this part of our consultation to a close?

If not, we are indebted to you for spending this time with us, indebted to you for getting acquainted with the statement and coming in and giving us your reaction. And we hope you will keep in close touch with this process, and if any further ideas or suggestions occur to you, that you will get them to us.

Thank you all very, very much. We are in recess.

March 10, 1981

CHAIRMAN FLEMMING. I will ask the meeting to come to order. My name is Arthur S. Flemming, Chairman of the United States Commission on Civil Rights. I wish to welcome you to this consultation. The other members of this Commission are Vice Chair Mary Frances Berry, professor of history and law and senior fellow at the Institute for the Study of Educational Policy at Howard University, Washington, D.C.; Stephen Horn, president of California State University, Long Beach; Blandina Cardenas Ramirez, director of development at the InterCultural Research Association, San Antonio; Jill S. Ruckelshaus, former special assistant to the President for women's affairs, Washington, D.C.; and Murray Saltzman, rabbi, Baltimore Hebrew Congregation, Baltimore. Louis Nunez is the Staff Director of the Commission.

Today's session is the second part of the Commission's consultation on its proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination.* The first session was held on February 10, at which time the Commission heard from five distinguished legal experts from major civil rights organizations. They assessed the Commission's proposed statement on affirmative action from a legal perspective.

Today's participants will assess the proposed statement from policy and enforcement perspectives. On March 11, 1981, participants will address the design and implementation of affirmative action plans and how to monitor and evaluate them once they are in place. Based on the presentations at the consultation, the Commission will review the proposed document and issue a final statement, accompanied by a transcript of this consultation, in the fall of 1981.

In order to explain to today's audience the purpose of this consultation, I will repeat the remarks I made at our opening session in February.

As you may know, the proposed statement is the third document dealing specifically with affirmative action that this Commission has issued in the past 8 years. During that time, the issue of affirmative action has been extensively debated within all parts of the government and throughout the private sector.

That public debate has often been acrimonious, particularly over such terms as "goals," "quotas," and other types of "preferential treatment." These terms arouse strong emotions, and, perhaps because of this, the debate surrounding them has frequently centered on the terms themselves rather than on what are the most effective methods for combatting discrimination.

Although few people today argue against working toward the goal of nondiscrimination, people will disagree about how to go about identifying and combatting discrimination. Our goal, and that of the proposed statement, is to make that disagreement productive, rather than destructive. Determining whether the proposed statement brings us closer to achieving that goal is the purpose of this consultation. We are optimistic about the proposed statement's usefulness, but we believe, as we state in the preface of the proposed statement, that its approach needs to be tested in the "court of public opinion and real world activities." For this reason we are distributing the statement widely and we welcome comments in writing from any interested persons or groups.

In this draft statement, *Affirmative Action in the 1980s,* the Commission proposes a "problem-remedy" approach to affirmative action. This conceptual approach to affirmative action endeavors to link an understanding of affirmative action with an understanding of the problem of discrimination. The premise of the proposed statement is that consensus on the remedy of affirmative action can best be achieved through consensus on the nature and extent of the contemporary problem of discrimination based on race, sex, and national origin.

We are deeply indebted to the Office of General Counsel for the work that has gone into this draft. The Commission itself has considered it on a number of occasions, and I am going to ask Mr. Jack Hartog, from the Office of General Counsel, who has done a great deal of work on this, to introduce our guests of the morning to the Commission, but I just want to personally welcome them as a group and tell them how indebted we are to them for their willingness to help us in dealing with this very difficult issue.

Mr. Hartog?

Assessments of *Affirmative Action in the 1980s* from a Policy Perspective

MR. HARTOG. Thank you, Mr. Chairman.

Good morning. I would like to welcome our panelists. They are Mr. Morris B. Abram, Dr. John Bunzel, Dr. Kenneth Clark, Dr. Joe Feagin, and Dr. Isabel Sawhill.

As is standard Commission procedure at its consultations, each panelist will be given up to 15 minutes to deliver an oral presentation to the Commission on the subject matter of the consultation. All our panelists have prepared or are preparing comments on the proposed statement on affirmative action, and these comments, as well as the remarks this morning, will be made part of the record of this proceeding.

We will proceed according to the order on the agenda. Our first speaker this morning commenting on the proposed statement will be Mr. Morris B. Abram, who is a partner in the law firm of Paul, Weiss, Rifkind, Wharton and Garrison in New York City. He was president of Brandeis University from 1968 to 1970 and has served as president of the Field Foundation since 1965.

Mr. Abram's distinguished career of public and community involvement has included serving as the first general counsel to the Peace Corps, president of the American Jewish Committee, United States Representative to the United Nations' Commission on Human Rights, and cochairman of the planning conference for the White House Conference on Civil Rights in 1965. He currently is Chairman of the President's Commission for the Study of Ethical Problems in Medical Care and Bio-Medical and Behavioral Research.

Mr. Abram is coauthor of a monograph entitled "How to Stop Violence in Your Community," which has become the model for legislation in 5 Southern States and 50 cities to curb the threatening activities of the Ku Klux Klan.

He was a Rhodes Scholar in 1948 and holds bachelor's degrees from the University of Georgia and from Oxford University. He is a graduate of the University of Chicago School of Law.

Mr. Abram, it is a pleasure to have you with us.

Statement of Morris B. Abram, Partner, Paul, Weiss, Rifkind, Wharton and Garrison

MR. ABRAM. Thank you, Mr. Hartog. Mr. Chairman, members of the Commission: I wish that all of us—I'm sure on this side of the room and throughout the city—would like to pay honor to the principles which brought this Commission into being. I can remember very well during the days when I lived in Atlanta, and which were the days of your genesis, with what joy and satisfaction those of us who were waging the civil rights struggle in the South greeted the establishment of this body.

Now, I turn to the statement because my time is short. The proposal is a piece, in my judgment, of social engineering of great proportions which would have dire consequences for this country. Our concern and the concern of the authors of the statement, of course, arose from the battle against real discrimination—the fact that this country had a history of not treating men and women as equals before the law, both human and natural.

I and others who fought in this battle, early, never had the thought that we were fighting for a world in which society's benefits would be assigned on the basis of classifications which we declared to be indivious and odious, that is, by race, by religion, by ethnic origin, or by sex.

The proposal, therefore, is the very antithesis of all our struggle. It fights and rejects the principle of neutrality of people before the law. It is directed against the principles of merit in the Federal civil service and throughout life; it will be a break on productivity which we so sorely need so that we can have a larger pie that fairly distributes. And it targets a limited group—white males as the group—against which all relief must be sought, failing to bear in mind that white males—for example, the Appalachians—are some of the poorest members of our society.

How did we get to this position in which such a proposal could be regarded as something to be considered by the Commission on Civil Rights? Well, we were faced in this country by a history of exclusion by race and by gender. Men and women were excluded from juries and from voting and they were excluded from jobs. And in these cases the fact that there was disparate impact proved, almost beyond a reasonable doubt, that there was discrimination.

How could one in my hometown of Fitzgerald, Georgia, have a jury of no blacks when 40 percent of the persons were black? Obviously, that meant discrimination. And so it was with voting. So, once we began to wipe out the discrimination against race and gender in these areas in which people are people and fungible and no particular skill is required and

impact presents a picture of discrimination, then the discriminators devised tests—grandfather clauses in the case of voting, educational tests in other instances. And then job tests, which were not related to the job as, for example, in *Griggs* and *Albemarle,* two Supreme Court cases. *Griggs,* bear in mind, involved coal handlers, just like voters. If you have coal handlers in the Duke power region that has 30 percent black and only 2 percent are employed who are black, obviously, there is discrimination.

My own firm recently took a case against the International Paper Company, which was a production line case in which the fact of discrimination is shown clearly by the failure to have anything other than a fairly even impact.

But, undeniably, those considerations do not apply in athletics. Jack Robinson did not get into the major leagues because he was a black, but because he was a fine athlete.

Such considerations of randomness do not apply to college professors. The Supreme Court recognized that and the court of appeals did in *Lieberman.* Randomness is not present even in typing. Some people do type better than others and most can learn to type as well as others, but a typist has to type. It does not apply as a test, a real test, in the merit system, but if randomness is the route and all tests are suspect and that's where you come out, then you make proportionate hiring and proportionate passing the route. And even if a proper test is established that is without the purpose of discrimination, and if the impact is adverse, then you say, "Well, oh, sure you can validate it."

Now, validation inevitably (in the field involving qualifications where randomness is not the natural order of things) produces a quota. Justice Blackmun, in *Albemarle*—and he's a good authority—says, "I fear that a rigid application of EEOC guidelines will leave the employer little choice—save an impossibly expensive and complex validation study—but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." But that's where you are in this proposed statement.

Now, of course, you say, "Well, let the American Psychological Association validate the test." Who validated the American Psychological Association? When did the EEOC look to see how many blacks and how many Hispanics and how many Asians are in the American Psychological Association? Who validated their admission tests?

Now, interchangeably, your paper uses the words "quota," "preference," "target," "goals," and finally, quite candidly, says this is a semantic dispute. It is a game of four-card monte, but you may well say, "Is this not compensation?"

Well, my question is (as a person who wants to be fair), who is to pay it? To whom? For how long? And in what currency? Let me give you this illustration. There is no area of human life which is more important in a democracy than voting. There is no area in human life in which the black has been denied longer and more pervasively and more persistently his human rights than in voting. There is no area in which the aftereffects linger on more in a pernicious way.

Look at the Georgia Legislature. Look at the Mississippi Legislature. Look at the voting rolls, proportionately white to black in the South and in the North. Now, using your test and your remedies, you know what you should do; you should say there should be no more white registration until black registration has caught up with it proportionately. Or, alternatively, since blacks don't vote in the same numbers as whites even when registered, you could say hold whites at the poll until a black has come in and voted or until some other discriminated minority in the past has come in and voted.

The whole thing is absurd, if it were not pathetic. Now, where is this all leading to? Exactly where this paper directs us: to the inversion of the very principles on which this country was established. The principles argued by Thurgood Marshall of neutrality and a colorblind Constitution, Justice with her blindfold on.

He argued that in *Brown* for a colorblind Constitution. It is leading us to the core maxim of the Japanese exclusion case, which is a hated part of this system. You have, specifically, in this paper rejected the principle of legality in this country. You say the legal issue is no longer whether affirmative action is lawful, but whether it's appropriate. For what? Appropriate for discrimination?

And you have targeted white males as the enemy. Now, look at the results. If blacks and Hispanics are 20 percent of the population; Indians, 2 percent; ethnics, 30 percent—these have all been discriminated against at some point in history—Catholics, 30 percent; Jews, 3 percent; Asians, 8 percent; women, 51 percent. And if you divide society in that way, I suggest to you that, mathematically, the whole is less than the sum of the parts.

I asked the Lawyer's Committee for Civil Rights yesterday—which it entered into a consent decree with the government in the *Luvanno* case, involving the PACE examination, in which preference is given by quota (20 percent to blacks and Hispanics) and across the country—Iasked my colleagues yesterday, "What are you lawyers going to do when an American Indian brings a class suit in Albuquerque, saying that these, the poorest of Americans, are being discriminated against by this decree? What are you going to do? And if your name is the Lawyer's Committee for Civil Rights, you are going to take the case against your own decree."

So amongst those who are protected under your guidelines and EEOC guidelines are Asians. This includes the Chinese, who have a family income far higher than the average in America, and Japanese, which are even higher. In the case of blacks, the West Indian blacks have a family income almost equal to the family income of the United States as a whole, and educated black women earn more than white educated women through college. The Hispanics include the Cubans, one of whom has just become the chief executive officer of the Coca Cola Company.

We are making progress in this country. We have risen from 274,000 blacks in colleges—and I happen to have been the president of the United Negro College Fund, the chairman for 9 years—to the point where we have 1,100,000 black young people in college.

I turn to what you call the problem-remedy. Let me suggest a real problem and ask you, ladies and gentlemen, to search for a real remedy. The 1970 figures are the last I have, but they show that the overall median family income of Americans is $10,678; West Indian blacks almost as high; American blacks, pitifully lower—constituting only 60 percent; Puerto Ricans, about like the blacks; the Indians, even less.

Now, in 1969, black income was only 61 percent of American white income. They are poor as a group. As a group, 1978, it had fallen to 59 percent. Now, why? Despite the fact that five times as many blacks were in college, despite the fact that the middle-class blacks were advancing on a scale and closing the gap in every category, this gap was closing, except—where? Except with respect to the single-family, female-headed household, in which case the household was earning, on an average, one-third of the black family household in this country.

Now, what had happened? Between 1962 and 1979, the number of black female-headed households pathetically had risen from 23.2 percent—almost doubled—to 40.5 percent. There's where the poverty is so awful—children so deprived—tragedy endemic—and, also, in our white households of similar character. Need is need. Poverty is poverty. The frail family is a frail family; the failed family is a failed family.

You have focused on trying to invert American principles of neutrality, legality, and fairness and applied it to those on the upward escalator towards success and have not addressed yourself, at all, to the real problem: to search for the real remedy to poverty. I'm going to make a final suggestion, Mr. Chairman. You yourself, sir, have served long the principles I believe in. I have known you for years—when you were the president of the National Council of Churches of Christ in America—and I appeal to you and to every member of this panel as follows: this is a country of great diversity. It has so many different religious views that it could not establish a religion, because to have done so would have created an awful civil war. Out of the heterogeneity of the country and the religious diversity, we had to agree on neutrality, and out of that grew the neutral principle of freedom of speech. You see, I'm not going to like what some members of this panel may say, but the price of my saying what they don't like is that I must listen as they say what I don't like. America is a land in which we have had peace and freedom because of the principles of neutrality—the fact that we draw no distinctions of race, color, creed, or sex.

Now, what you are proposing is you invert the principle and erect the hated principle into a shrine. You are opening the door to a vast confrontation and the destruction of the very principles which Thurgood Marshall argued for in 1954 and which Justice William O. Douglas, a few years before he died, spoke eloquently for when he said, "The purpose of a constitution is not to erect race again as an invidious discrimination. It is not only invidious to me; it is absolutely odious." And I beg of you to address yourself to the real problems and let us try to search—I don't have the answer—for the real remedies. They probably lie in better education. They probably lie in better medical care. They probably lie in better training. They don't lie in inverting the principles of our national life.

MR. HARTOG. Thank you, Mr. Abram.

John H. Bunzel has been senior research fellow at the Hoover Institution at Stanford, California, since 1978. From 1970 to 1978, he was president of San Jose State University in San Jose, California. He has taught at several colleges and universities, including Michigan State University. He was also a visiting scholar at the Center for Advanced Study in Behavioral Sciences at Stanford, California. Dr. Bunzel is the author of three books: *The American Small Businessman, Issues of American Public Policy,* and *Anti-Politics in America.* He holds a bachelor's degree from Princeton University, a master of arts degree from Columbia University of California, and a doctorate in political science from the University of California at Berkeley.

Statement of John H. Bunzel, Senior Research Fellow, Hoover Institution

DR. BUNZEL. Thank you very much. Mr. Chairman, members of the Commission, let me say again, to all of you whom I haven't had a chance to thank for the invitation to be here—I am sure that Morris Abram speaks for all of us here.

We are here out of a deep commitment to the very principles that we share, and each of us could take your time and discuss the intensity with which we are committed to some very basic propositions. I accept that as a given, as I know you do.

This is one of those issues that I believe and I have felt for as many years as it has been with us—the whole question of affirmative action is one of those issues that comes along infrequently—by which, I mean, an issue that has moral dimensions, political dimensions, philosophical dimensions, ethical considerations, economic underpinings.

It is an issue that is so candid and, in some respects, involves the taproots and nerve ends of so many different interests that it would be a foolish man and woman, indeed, to claim to know the precise solution. All I know, and want you to understand in the comment that I want to share with you: that I do not believe that only the morally defective are on the side that opposes, let us say, racially preferential treatment or quotas by any name. Because I believe very strongly that honest men and women can have very serious differences. And many of us in this room—on each side of this platform—and across this country have spent many years together out of a sense that race was irrelevant, that the moral worth of an individual human being was the only important criterion for a free society.

Some of us still believe this, not because there are absolutes in the world, but because it is as close to an absolute for a free society on which to operate as a principle—which in turn should be put into some kind of practice in a society in which, indeed, there is evidence that the more we move to race as consideration, the more we fragment ourselves. But that's an issue that is arguable and we will have our opportunity to do this.

I want you to know that it comes very close to the marrow of my bones, however, that race is a problem that I think is exacerbated to the degree we elevate it to any other consideration and certainly to a consideration above the moral worth of an individual.

Finally, by way of prologue, please understand that, as a basic premise, I think the issue is not just a question of the ends of affirmative action, but the methods by which we want to achieve a variety of ends we might hold in common. I agree with Aristotle and many others since that bad means cannot make good ends.

I am unhappy with the suggestions to expand the use of racially preferential treatment as a way of overcoming discrimination in our society. The idea that disproportionate or unequal results index race and sex discrimination, in my judgment, is not a rigorously empirical proposition. Much of what I will try to say this morning will have an empirical cast to it in the sense that I think it is incumbent upon this Commission to move from many of the important statements it has committed itself to at the legal level to a concern for some of the very difficult everyday ways in which affirmative action is viewed and practiced. I am concerned with practice. I am concerned with it in operation, and I'll say a little bit about that in a few moments.

I am sure you know that there are millions of Americans who have steadfastly opposed all practices that give persons an advantage, or impose upon them any disadvantage, because of anything extraneous to their ability, achievement, and promise. I don't believe these individuals are past their prime, and I think many of these millions of Americans would be very saddened and discouraged to learn that they might find in the Commission's report the view that the really true pathbreakers today—those who really oppose discrimination—are those who fight for preferential policies and quota-ridden strat-

egies based on race, sex, and national origin. At the very least, a very arguable proposition.

The Commission has made some use of the public polling data. I wish it had been more balanced or, at least, had the opportunity to include some other aspects of this whole question, which seems to me terribly important if one is going to deal again with the empirical character of public attitude. More balance on the part of the Commission—and I hope it will include this in its final report—would, at least, make some statements along these lines: that 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.

To put this very simply, Americans approve of what has come to be called "compensatory action" to help make up for past discrimination based on race and sex and poverty or other grounds. But, ladies and gentlemen, what most Americans do not support—by every poll that I've ever seen, ever taken in the last 10 years—is preferential treatment. Not just quotas, which are opposed by most Americans, as we all know, but any form of absolute preference. Thus, a Gallup poll shows that an overwhelming proportion of the public—8 in 10—oppose preferential treatment. Eight in 10 college students took the same position, and so on.

There is evidence which I would invite the Commission to consider. I have presented in my own paper a discussion of a particular corporation, the XYZ Corporation, which is a Fortune 500 company that was charged with sex discrimination. I have used this because I wanted to find a way of trying to address the Commission's attention to the whole premise with which it operates that suggests that intergroup statistical variations and numbers and ratios and percentages virtually, if not automatically, point to discriminatory behavior.

Now, in many respects, reading through the Commission report, it is like reading Hegel. There is something for everybody to quote, and it is not entirely clear, precisely, in every respect, as, indeed, the Bible isn't precise as to what it really says. But there is a common thread, nonetheless, which I find, and one of those threads, one of the initial assumptions, is that when you find the various percentages with respect to underrepresentation of women and minorities, whether in higher education or what have you, that this points to discrimination.

I presented, in quite some detail, an analysis done by a consulting firm to take a look at the particular problem in a major corporation. And the conclusions of that report are worth, I believe, the Commission's attention because the data make it clear that male and female clerks at XYZ were promoted in almost exactly the same proportion as they expressed interest in promotion.

The consulting firm was able to demonstrate from its data that the difference in promotion rates between male and female clerks was not due to company policy or practice. The differences in behavior that did produce the difference in promotion rates appear to lie—so the data now shows—in this corporation 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 their 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 men's. This difference was present when they were hired. It was not something the XYZ Corporation created.

There were varieties of other data that came out of this study, which I hope the Commission will have an opportunity to examine. There is an important postscript to this particular case study. If this survey had not been conducted, the XYZ Corporation would probably have lost the lawsuit and would have probably had to have paid something in the neighborhood of millions of dollars in damages and been subjected to injunctive procedures setting up goals and timetables for the elimination of discrimination. But the consulting firm 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.

Now, these are not data that came about on something I dreamt up a week or two ago, and, as a point of fact, it came about because the Huffman Research Associates, a North Carolina consulting firm, conducted a nationwide study of the personnel practices of the XYZ Corporation. The facts were of

interest to the corporation because they had a nondiscriminatory policy.

They were sued. They wanted to find out, in fact, what the data might show. Now, perhaps, the Commission will believe that the situation at XYZ does not constitute discrimination, and I would hope, if that's the case, that it would say so. It might believe that, perhaps, this example was not typical. My challenge to the Commission is that, against the backdrop of this case, it recognize that the criteria for discrimination it has adopted and which are applied by such agencies as the EEOC too often reinforce the ideology of quotas, by whatever name, that are now prevailing in many quarters and undermine important values of the democratic ethic in this country—individual rights, initiative, and the competition for social benefits and opportunity.

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, of course, in many quarters 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, which reverses the ordinary requirements of legal procedure. It is as if our colleges have sometimes 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. Now, it would be foolish to claim that underrepresentation never provides evidence relevant to the discovery of discrimination. Of course it does. 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."

I think 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, of course, tragically exacerbated these differences, sometimes making them into heavy burdens or vicious stereotypes which have barred the way of some minorities to advancement. We know that, and 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 it is that should 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, indeed, 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 to 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 not only perfectionistic, but 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. I believe 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.

Let me take just a few more moments of the Commission's time, since I have a few more moments left. I hope later we'll have a chance to talk about what I consider to be a major deficiency in the report: its having stayed above the clashes of affirmative action and the fact, as I have tried to suggest, that in resting so much of its analysis at an arguable legal level, that it is light years away from affirmative action in practice.

The Executive order which originally established the policy of affirmative action was clear. I need hardly remind this Commission that it says, and I'm quoting, "The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, and so on. The

contractor will take affirmative action without regard to their race."

I quote from the original Executive order establishing affirmative action. It would give me great satisfaction if the President of the United States were to issue a new Executive order or a clarifying declaration to all departments in the government to return to the original purpose of the Executive order on affirmative action, 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 employers' labor market or in the population.

Finally, Mr. Chairman, I would urge—because it is the legislation-making branch of this country—that the Congress give some consideration to its own responsibilities and begin to examine, because, I think, it has been reluctant in shouldering this burden, how it is we wish to define the roads by which we all want to arrive at a greater sense of equality.

If race or ethnicity—once abolished by the Supreme Court as a permissible basis for governmental classification—is to be reinstated as a legitimate and desirable ground for awarding jobs and social benefits or opportunities, and if rights and special preferences are to be given to certain groups but not to others, then I believe the courts, or the rulemakers in EEOC, are not the ones to take on this burden.

I think these are political decisions, basically and fundamentally, and ought to involve the Congress and engage it in the political process. Thank you very much.

MR. HARTOG. Thank you, Dr. Bunzel.

Dr. Kenneth B. Clark, an eminent educator and psychologist, is chairman of the board and president of Clark, Phipps, Clark and Harris, Inc., a consulting firm in New York City. Dr. Clark was formerly distinguished university professor of psychology and is presently distinguished professor emeritus at City College of the City University of New York. Dr. Clark's career includes service as social science consultant to the NAACP, personnel consultant to the U.S. Department of State, and member of the board of regents of the State of New York.

Among Dr. Clark's numerous published works are: *Desegregation: An Appraisal of the Evidence, Prejudice and Your Child,Dark Ghetto,A Possible Reality,* and *The Pathos of Power.* He also is coauthor of *A Relevant War on Poverty* and *How Relevant Is Education In America Today?*

Statement of Kenneth B. Clark, President, Clark, Phipps, Clark & Harris

Dr. Clark holds a bachelor of arts and master of science degree from Howard University and a doctorate from Columbia University.

DR. CLARK. Thank you. First I would like to say that I find it difficult to react to the Commission's statement because I am in almost total agreement with it. It is always easier for me to react to something with which I disagree. I read it very carefully and reread it, and my reaction to the approach and particularly the emphasis on remedy was extremely positive, and I could summarize my reaction by quoting Justice Blackmun's decision in *Bakke* as follows—and this is probably one of the most important paragraphs in the number of civil rights decisions that came before the United States Supreme Court since *Brown.* Justice Blackmun stated:

> 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 into account the 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 perpetuate racial supremacy.

Let me repeat, ladies and gentlemen, to me this is one of the most important points made in the hundreds of thousands of words that have been devoted to the decision. The question is remedy, that one cannot remedy a disease by pretending that there is health. The fact of the matter is that the Civil Rights Act of 1964, Title VII, and the Executive orders came out of the recognition of a problem of a disease that was hitting at the very heart of American society and it required remedy.

I would like—since I have been given 15 minutes in which to share thoughts—I repeat, I could stop my comments with Justice Blackmun's decision; however, I do have a few other ideas to share with you that come out of my experience as a student of this complex problem of American racism. I have been studying this problem for over 45 years.

In the past 6 years I have had specific experience as the director of a consulting firm working with private corporations, educational institutions, and

Federal governmental agencies. I would just like to summarize some of the problems which were highlighted for me—more clearly than when I was a student—during this past 6 years, as a person actually dealing with affirmative action and equal employment problems in the real (rather than just the academic) world.

One, it is clear to me that affirmative action rules and regulations, at best, have been inadequate and spasmodic, and particularly in enforcement. Regulatory agencies, clearly, did not have a staff adequate to deal with these problems and, apparently, have never really developed an approach similar to that of the IRS in trying to bring about compliance. They were, for the most part, required to fulfill their responsibilities in what I consider really a discriminatory manner; that is, to select highly visible corporations and to seek consent decrees and judgments on the assumption that this visibility would have sort of a filtering effect. As a result, many, many corporations, agencies, institutions that were required to comply with the law, were rarely audited, even under conditions of complaints. You all know about the tremendous waiting lists, etc., that have existed in the regulatory agencies. And my own personal observation is, this really was not remedied very much with the 1977–78 consolidation, where most of the authority and power was placed in the hands of the EEOC and the OFCCP. The problem of inadequate enforcement—spasmodic—is a problem which, interestingly enough, is very rarely discussed, and I was fascinated that my colleagues on this panel who preceded me did not mention this rather obvious point. They acted as if the question of preferential treatment and rigorous enforcement was not a question, and for those of us who are concerned with remedying what I'm saying—and I suppose I would speak for myself—that the remedy has been less than adequate in terms of the agencies that have the responsibility.

Further problems, which I believe cannot be ignored—and this comes from discussions with some of my clients—is that the attempts at enforcement seem more often to be concerned with paperwork, bureaucracy, etc., and it was not at all difficult for agencies and corporations which would seek minimum compliance to get compliance by manipulation of statistics, by changing titles, by engaging in rather obvious approaches to changing a verbal or statistical reality rather than functional reality.

Some managers and executives say this outright, that this is quite possible, that one can move toward "objectives" by changing titles of females without changing function.

One of the problems—to me even more complex and disturbing set of problems which interefere are barriers to effective enforcement of existing laws, rules, and regulations—are what I call the present, more complex and subtle manifestations of American racism, and the residues of the past, more flagrant forms of racism. I was fascinated to hear the two previous speakers talk as if racism—which these in employment—which these laws are attempting to remedy—is something of the past.

I was fascinated to hear my good friend Morris Abram talk as if the objectives and the goals—the civil rights struggle of which he was certainly a part—have all been achieved. I haven't had the opportunity to say this to Morris before, but I want to say it publicly: that's fiction. The evidence is clear that, if anything, racism is alive and virulent and more insidious and more complex than the symptoms were when we were dealing with the racism that was honestly open in the civil rights movement of the fifties and the sixties.

I'll give you some symptoms of the more insidious forms of racism that must be dealt with somehow, and, certainly, I would hope that the statement of this Commission might be the beginning of developing, hopefully, an effective formula for dealing with the present, more complex, insidious, closet, but operational forms of racism and sexism. It is a fact that it is no longer fashionable for a manager, a supervisor, an executive, or a personnel director to come out and state racist or sexist stereotypes as a basis for denial of employment. There is no question that, if there is any one spillover of the civil rights laws and Executive orders, it is that they have controlled the rhetoric of prejudice and bias even if they have not controlled their operation.

By the way, the only way you can tell whether bias is operating is no longer whether people say, "I am biased. I don't like niggers. I think that women should stay in the kitchen," because they should no longer say that, but the only way you can tell is whether there has been any change in the personnel of the institutions and corporations.

A very important problem is the change of semantics of contemporary forms of racism—such as preferential treatment—when the facts are clear that minorities and females are not given preferential

treatment. Quotas—the term quota has meant exclusion. When I was a student at Columbia University, it was generally known that in the department of psychology of that distinguished university, there would be only one Jewish student admitted for doctoral work per year. That was in the late 1930s. They did not have quotas for blacks, because there weren't enough blacks applying.

What I cannot understand in this new rehtoric and semantics of racism is why a term that had been consistently used for the policy and practice of exclusion is now being used—the same term is being used for an attempt to remedy past exclusion. I think one of the things that I saw in this statement—and I wish it had been more frequent and repeated—was instead of quotas, using the term "objectives." What are the indications? What are we going to use as the indices of movement toward compliance?

I think it's been a serious mistake, for those of us who are still concerned with remedying racism in America would permit the subtle, sophisticated, intellectual diversion of the dialogue into terms which bring with them unnecessary—for example, it should not have been necessary for me to have devoted 2 or 3 minutes to this very obvious point: that we are not talking about quotas as an exclusionary device; we are talking about how do we remedy the manifestations of past and present racism.

Let me move on now. The fact of the matter is that racism—discriminatory practices in employment felt by upper class blacks, upper income blacks, better educated blacks to a greater degree than lower income blacks—in this regard Dr. Feagin's results, which he presents in his paper, confirms a study of 1,500 blacks on a national sample, where they state, unequivocally, that discrimination in employment is not a residue of the past, but something which operates at the present.

I conclude by saying, I commend the Commission in the fact that it is not being taken in by the neoconservative, very sophisticated forms of resistance to dealing with the still very important and virulent problem of American racism in our society.

MR. HARTOG. Thank you, Dr. Clark.

Dr. Joe R. Feagin is currently a professor of sociology at the University of Texas at Austin. He has instructed graduate students for more than 10 years and has been a graduate adviser in the graduate program.

For the last 15 years he has done extensive research and writing on a broad variety of racial, ethnic, and gender issues. His published work includes more than four dozen articles and 10 books. His most recent books include *Discrimination American Style, Institutional Racism and Sexism, Racial and Ethnic Relations,* and *Affirmative Action and Equal Opportunity.* Dr. Feagin has been a scholar-in-residence at the U.S. Commission on Civil Rights. He has also consulted on race and sex discrmination issues for the Department of Defense Race Relations Institute, for the Committee on Church and Race of the Presbyterian Church, the U.S. Civil Service Commission, and for plaintiffs in discrimination cases before Federal courts. Dr. Feagin holds a doctorate in sociology from Harvard University.

Statement of Joe R. Feagin, Professor of Sociology, University of Texas

DR. FEAGIN. Mr. Chairman, Commissioners. I, too, would like to express my appreciation for this opportunity to talk before the Commission on the very important issue of affirmative action in 1980s. I think it is safe to say that affirmative action and equal opportunity programs are in trouble in the 1980s. The white male backlash against civil rights progress for minorities and women began in earnest in the early 1970s and has moved to a crescendo of protest, containment, counteraction as we move into the 1980s. Today, in fact, there are powerful and articulate spokesmen against affirmative action and equal opportunity at the highest levels of business, government, and academia. For example, the recent report of the 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.

In his new book *Wealth and Poverty,* the influential George Gilder has argued that there is no need for affirmative action, first, because it is now "virtually impossible to find in a position of power a serious racist"; and, secondly, because "discrimination has already been effectively abolished in this country."

Gilder goes so far as to say that race and sex discrimination are now myths in the United States of America. This book is, according to *Time* magazine, the "bible" of many in the Reagan administration and in business circles.

In addition, the influential report of the Heritage Foundation, titled *Mandate For Leadership,* argues vigorously for sharply reducing or totally eliminating many Federal affirmative action and equal opportunity programs. There has been an amazingly

rapid acceptance of these reactionary views at the highest levels of business, government, academia, and the mass media in the United States. I think one has to understand this context of reaction in order to understand the bold and creative contribution of this report, *Affirmative Action in the 1980s: Dismantling The Process of Discrimination.* It appears at a very opportune time, and I, for one, would like to commend the Commission for taking this bold step of introducing the twin issues of discrimination and affirmative action back into public policy debates and discussions for the 1980s.

As far as I can tell, this is the first major report by a Federal Government agency which gives extended and systematic attention to basic types of race and sex discrimination and at the same time provides a clear discussion of the linkage between that race and sex discrimination and programs to remedy it, programs of affirmative action.

Most government reports and court cases on equal opportunity and affirmative action use the word "discrimination," but few have given the definition in dimensions of discrimination much attention. Apart from a few words about sharp declines in race and sex discrimination, most affirmative action critics also focus on the operation and effects of affirmative action and neglect the background and context of continuing present-day race and sex discrimination.

The great contribution of this report is to argue that an adequate defense of affirmative action programs must be grounded in a demonstration of the problem of race and sex discrimination in specific organizations.

This report helps to counter widespread arguments about the declining significance of race and sex discrimination in the United States. However, it is only a start. What is needed for the 1980s is a major effort by this Commission and other civil rights agencies to demonstrate in detail, and specifically for organizations, the extent, character, and depth of discrimination in this society. In my judgment, this research on discrimination cannot come too soon.

We have already heard public opinion polls mentioned, so let me pick my favorite public opinion poll. White and black opinion in the United States on discrimination and affirmative action has polarized sharply in the last decade. White Americans tend to see the situations of black Americans as a relatively rosy picture. White Americans see great progress for black Americans; they see relatively little discrimination for black Americans today, and they have tended to worry more about reverse discrimination—so-called reverse discrimination—than they do about existing traditional race discrimination.

Black Americans, on the other hand, sharply disagree. In a little-known research study, which has received virtually no mass-media attention—a 1979 survey by the prestigious Mathematica research firm—in this survey the firm interviewed 3,000 black households nationwide—to my knowledge the largest survey of black Americans ever done. Two-thirds of these 3,000 black heads of households said that they believed there was still a great deal of discrimination in the United States. Moreover, the same survey, the same 3,000 black Americans were asked, "Is the push for equal rights for black people in this country moving too fast, about right, or too slow?" Three-quarters said, "too slow." That is a sharp increase in the black community since 1970. In 1970 Louis Harris asked the same question of black Americans. In that 1970 poll, 47 percent of black Americans said, "Too slow." In 1979 three-quarters of black Americans now say "too slow," and this is supposed to be a decade of great progress in affirmative action and equal opportunity efforts.

The recipients of those efforts do not see as rosy a picture for the 1980s, the late 1970s and 1980s, as do many other commentators on the situation. I think we ought to pay some attention to this survey and to black opinion about the slowness of the movement in equal rights and the continuing patterns of a great deal of discrimination.

Now, in my paper for the Commission, I go into some detail on the idea that discrimination is a multifaceted problem. Discrimination is a multifaceted problem, and I suggest that one way to start an additional research on discrimination—what I am really calling for is a massive new effort to research the extent and character and depth of discrimination—is to look at the seven basic dimensions, seven specific dimensions. I suggested them. The first dimension is motivation for discrimination; the second is the discriminatory actions themselves; the third dimension is the effects of discrimination; the fourth is the relation between the motivation and the action; the fifth, the relation between the action and the effects; the sixth, the immediate institutional context within which discrimination takes place; and seventh, the larger societal context within which

institutions exist within which discrimination takes place.

Now, most of our court cases, social science research, policy debates have focused on some aspects of discrimination—selected aspects of discrimination—and we have neglected other aspects. For example, in the case of motivation, most of the focus on motivation has been on prejudice and bigotry. We have not done enough research, policy argument, and debate thinking on the issue of gain-motivated discrimination. It is a discrimination motivated by a concern for economic gain.

Again, we have spent a great deal of attention on discriminatory effects, both psychological and statistical structural effects, of discrimination. That has been necessary. It has been good. It has been important. When one sees bear tracks in the snow, one usually expects to see a bear. So it is important to focus on the effects of discrimination. But one of the debates today is that effects—statistics on effects—do not prove discrimination.

I think one way of meeting this criticism is for civil rights organizations and other interested researchers to look more closely at the discriminatory action itself. One major contribution of this report is to refocus the discussion on discriminatory actions themselves. Effects are very important to look at, but at least as important as looking at the effects is to examine, to document, to research the discriminatory actions lying behind those effects.

Now, discriminatory actions are still very widespread in society. I agree here with Dr. Clark. We are talking about present-day problems and not something back in the 19th century in slavery. Discriminatory action still takes many different forms in this society, both individual and institutional. Considerable institutional and individual discrimination remains in this society.

In my paper, I suggest two types of discrimination which have been recently well-documented: one, the practice of steering—discriminatory steering—in real estate practices in the United States. There have been several recent studies on this which indicate that it is very widespread—very widespread discrimination.

I have also suggested that recent research on sexual harrassment of women in employment also signals very widespread employment discrimination against women.

The practices of steering and of sexual harrassment are widely institutionalized and informal practices in many organizations in this society. They are informal, institutionalized, sometimes very subtle, but sometimes quite blatant as well. Those whites and males who engage in the practices, for the most part, know what they are doing. Most such 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 in employment have not eradicated major types of institutionalized discrimination.

I think another very important contribution of this *Affirmative Action in the 1980s* report is tieing affirmative action to the subtitle of the report, the *Dismantling of Discrimination.* I think tieing those two things together helps us better understand some of the misconceptions that exist in the country about affirmative action. Let me take one major misconception.

One major misconception is that affirmative action efforts have been so effective that white male resistance has been weak and inconsequential. Much opposition to affirmative action seems to suggest this misconception. However, from my research and reading I judge that civil rights progress has been met by massive institutionalized resistance by whites and white males in the society. Containment is a major strategy to limit the progress of dismantling race and sex discrimination. Containment means intentionally attempting to slow down or end the process of dismantling institutionalized race and sex discrimination.

Diana Kendall, for example, has completed a recent study of medical schools in the Southwest. She found a variety of discriminatory patterns, institutional and individual, 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."

The second and third lines of defense, these containment lines of defense, can include more informal or subtle forms of race and sex discrimination. One example—tokenism is a major containment strategy. Many organizations have retreated to a second line of defense called tokenism. Part of the

tokenism strategy is they hire minorities and women for nontraditional jobs and put them in inconspicuous and/or powerless positions.

Dr. Clark has noted from his work as a management consultant that blacks moving into nontraditional jobs in corporate America have frequently found themselves trapped into ghettos within the organizations, such as the department of community affairs or of special markets. Other ghettos include equal opportunity officer, affirmative action officer. Relatively few women and minorities have moved into line managerial positions in organizations and business, industries, and academia.

It was only a century ago that a decade or two of great progress for minorities, which we called the Reconstruction period, was followed, all too soon, by a dramatic resurgence of conservatism and reaction called the redemption period. While there are 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 now seem to be moving again in a conservative and reactionary direction. It is in this climate of reaction and containment that the brave report *Affirmative Action in the 1980s* appears as a beacon beckoning us back to the core issues of individual, institutional, and societal race and sex 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 action—such as affirmative action—in detailed research by organizations on their specific operations which perpetuate the burdens of race and sex discrimination.

MR. HARTOG. Thank you.

Dr. Isabel Sawhill is program director for employment and labor policy at the Urban Institute in Washington, D.C.

From 1977 to 1979, she was Director of the National Commission for Employment Policy. During her tenure with the Commission, she organized and directed a number of studies, focusing particularly on CETA (Comprehensive Employment and Training Act) and on youth unemployment. Dr. Sawhill has been a policy analyst with the U.S. Department of Health, Education, and Welfare from 1968 to 1969 and with the Office of Management and Budget from 1969 to 1970. She was assistant professor of economics at Goucher College from 1969 to 1973 and chairman of the economics department at that institution from 1971 to 1973.

Dr. Sawhill has written extensively and is coeditor of the book *Youth Employment and Public Policy.* She is currently writing a book which will focus on the role of labor market policies in reducing inflation and unemployment.

She holds a bachelor of arts degree and a doctorate in economics from New York University.

Statement of Isabel Sawhill, Program Director, Employment and Labor Policy, Urban Institute

DR. SAWHILL. Thank you. I, too, appreciate the opportunity to be here this morning. I want to express my appreciation to Sandra Tangri, who helped me in drafting the written comments on your report.

I would also like to commend the Commission staff for having done what I can see as a really excellent job, both in terms of producing a scholarly report and one which is policy relevant, and the Commission itself for providing a forum for the diversity of views which we have all just heard this morning.

It is hard for me to say anything new at this point, being the last on the panel. I would certainly agree with Dr. Feagin, for example, that we are seeing a new conservative mood in the country now and some reaction against the concept of affirmative action. And I think it is in this context that the Commission's statement is particularly significant because it attempts to move us beyond the semantics that have characterized the recent debate on this subject.

I can also agree with Dr. Clark, that because this document is very much in line with my own views on the issues, it is hard for me to say anything particularly provocative in reaction to it, but let me make a few specific comments and, hopefully, I will be brief. And then we will have time for what I think we are all eager to see, and that is more open dialogue with you.

First of all, I think that I would have to agree with some of the critics of affirmative action measures, that in an attempt to rectify past injustices and deeply ingrained stereotypes and practices, we have imposed some costs on individuals and on society. The paperwork burden alone associated with affirmative action has imposed some inefficiencies on the economy, and it has caused most personnel directors that I know ulcers in the process.

I think it is true, also, that at times affirmative action has resulted in some people being placed in academic programs or in jobs which were over their heads, and that this has been a disservice, both to them and to the organizations in which they found themselves.

I think that at times there have been suits brought against innocent employers. This is a tool which must be used with some judgment and some discretion if it is not to be overly blunt and not to be counterproductive.

The question, it seems to me, is not whether there may have been such costs, such abuses—any attempt at social change involves cost. I think the real question is whether the benefits have justified these costs and whether there are ways, as we move into the 1980s, to improve that ratio of benefits to cost.

I would assume that we all agree about the goal, which is simply a society in which race and sex and national origin are not correlated with status and well-being. So the question is only, how do we get there and how long will it take?

It seems to me that the major contribution of this report is to show the many ways in which neutral behavior produces discriminatory results. In other words, what this report says to me is that without some form of affirmative action we are not going to achieve that goal. I challenge the critics to tell me why years of laissez faire, of strict neutrality, have failed to achieve the objective that we all seek.

It is not clear why such neutrality would work any better in the future than it has in the past, and if affirmative action is not the mechanism, or at least one of them, for achieving social justice, then what is?

Some of the critics seem to be saying that what we need is much greater emphasis on education, training, and other human resource investments. I would agree. But I think that if we only focused on those remedies without affirmative action, it would not be entirely successful. And the reason is because the incentive to take advantage of education and training opportunities, for example, depends upon women and minorities knowing that there will be opportunities in the larger economy if they work to prepare themselves for them.

I read with interest the case which Dr. Bunzel told us about of the XYZ Corporation, where the problem seemed to be the female clerks did not aspire to upward mobility as much as male clerks. This does not surprise me in the least. It is simply a reflection of the fact that aspirations themselves are heavily conditioned by the opportunities that exist. Now, there will never be any objective way to count whatever the costs might be on the one hand of an affirmative action effort and what the benefits are on the other, especially since the costs are, mostly, short term and the benefits are quite long run.

I've just given, I think, a very important example of a long-run benefit, and it has to do with feedback of evidence of progress in the labor market for younger individuals who are still preparing for their adult life. It is also difficult because how you value these costs and benefits depends upon where you sit. White males have not experienced the deprivation, the indignities, and the powerlessness associated with being a member of a minority group or being a woman. As a result, it is not surprising that they do not value the benefits quite as much as the victims of past discrimination and current discrimination. Still, I believe we are a society which finds current inequalities an affront to our democratic ideals and that we can, through greater education and research, make it clear that discrimination exists and that we must find a way to deal with it.

I also believe that a commitment to affirmative action, a governmentally sanctioned commitment, not just a private one, has produced progress for women and minorities. There can be debate about this. I won't take the time now to review the evidence with you. I did so in my written comments, but both psychological theory and historic evidence suggest that the law has contributed to a change in attitudes and to progress for women and minorities, and this in spite of the fact that these programs have had an extremely short history and have been implemented quite imperfectly during the period of time during which we have had experience with them.

Now, since the debate about benefits and costs will never be fully resolved, the most constructive thing, it seems to me, that we could do would be to call a truce in the large philosophical and political war and focus more on ways of improving opportunities for discriminated-against groups. In actual practice, I think that this entails doing very much what the Commission has recommended, and that is, trying to tailor the remedy to the specific problems. And that means looking at the operation of discrimination in practice and the operation of affirmative action in practice, rather than in theory.

For example, one form which discrimination commonly takes—at least in my definition of discrimination and in the Commission's as well, it appears—is to recruit employees and students through informal channels, which depend heavily on who one's family and friends are. An obvious remedy to this situation has been more open posting of jobs and a much more aggressive outreach to expand the pool of candidates. I think we have done this. I think this has been enormously significant and has contributed to the progress that we have seen.

To take another example—which I would hypothesize may be the other side of this coin—one form which discrimination less commonly takes is the firing of a worker because of their race or sex, regardless of performance. My hypothesis is that once employers have had actual experience with women and minority employees, if those employees are performing well, they are unlikely to simply dismiss them without cause. Therefore, in this case, affirmative action is a "less appropriate remedy." In fact, the threat of a suit from a disgruntled employee may inhibit employers from hiring members of protected classes in the first place. So these are the kinds of situations that I think we ought to be discussing in specific terms, with the objective being to focus more on where affirmative action programs have been used well and have been successful and where they may have been used less well and they have been less successful.

Based on that kind of specific discussion, perhaps we could begin to reshape these remedies in ways which would, hopefully, lead to less polarization of views on this subject. Thank you.

MR. HARTOG. Thank you, Dr. Sawhill.

Chairman Flemming?

Discussion

CHAIRMAN FLEMMING. The issuance of this proposed statement was preceded by a vigorous discussion within the staff of the Commission and vigorous discussion at a number of Commission meetings. The Commission, recognizing the importance of this issue, felt that it would like to have the opportunity of listening to others participate in a vigorous discussion relative to this issue.

We are indebted to the members of the panel for having provided us with that opportunity. We now look forward, as members of the Commission, to engaging in some dialogue with the members of the panel. It seems to me members of the panel have done a good job of keeping on schedule here, and I think possibly the dialogue would proceed a little bit better if we took a break for 10 minutes. It is now, according to my watch, 10:06, so we will resume at 10:16. We will be in recess. [A short recess was taken.]

CHAIRMAN FLEMMING. I will ask the meeting to come to order.

Members of the panel have been engaging in, really, some dialogue with one another during the morning, and I want to encourage that as we proceed. Also, I will recognize for questions or comments members of the Commission, but I want to urge my colleagues—I don't know that I really need to do that—that, if a particular dialogue inspires them to kind of get into it and ask a question in connection with the dialogue that is going on between one of their colleagues and a member of the panel, that they feel free to do that.

In other words, I would like this to be as informal a dialogue as we can make it under the circumstances. First of all, I would like to recognize the Vice Chair, Commissioner Berry.

VICE CHAIRMAN BERRY. Thank you very much, Mr. Chairman. I do have a few questions and I would like to be as brief as possible and they will be rather pedestrian. They will focus on our document and we have some questions related to that.

I have a few for you, Mr. Abram, first. I'm reading your testimony very carefully; I did not hear what I understand was one of the real tours de force in your presentation. We have assumed in our statement (over on page 4) that there are continued inequalities. You say on page 5 of your statement that, "Our proposal would reintroduce the hated element of racism into the social fabric"—at the top of the page.

On page 4 of our statement we simply point out that we believe there are continued inequalities that compel the conclusion that our history of racism and sexism continues to affect the present. One may differ about whether that is valid or not, but we did not see it as reintroducing racism, but that we were simply dealing with the facts.

If I may just point out two or three other places there, and what I would like to do is ask whether there is some confusion about what we had to say or if you could interpret for me your understanding of what we were trying to say.

Over on page 6 of your statement—am I going too fast for you, Mr. Abram?—over on page 6 of your

statement, at about the middle of the first ending paragraph, you say that the philosophy of the paper under discussion is, you fear, a presumption, that every opportunity in life, meritorious candidates selected must necessarily include minority applicants in their proportionate numbers.

You say that—and I would point out that over on page 40 of our statement we state, specifically, that we do not assume—41, if you look under the heading "Group Rights" and that first beginning paragraph—it says here that it is not based on the premise that there should be perfectly proportional representation of racial and ethnic groups in every organization and institution. We say that there and I would note some other places, but I won't, in the interest of time, when we say it.

Also, you say in your next paragraph, that "The underlying principle of the proposal is that group rights are more important than individual rights."

We say, on page 41, beginning paragraph under the heading "Group Rights," that we are not interested in a method for serving group rights, and then go on to explain that, in point of fact, that we are not.

On page 7 in your statement you have some concern about whether we want to deal with discrimination against other groups—British West Indians—you talk about Japanese, Asians, Hispanics of Argentine origin, how they would be treated. I would point out that on page 42 of our statement, in the paragraph on the left side beginning with "The conclusion. . ." it says, "The conclusion that affirmative action is required to overcome discrimination experienced by persons in certain groups does not in any way suggest that the kinds of discrimination suffered by other groups is more tolerable and the Commission firmly believes that active antidiscrimination efforts are needed to eliminate all forms of discrimination," but that our purpose is that "the problem-remedy approach insists that the remedy be tailored to the problem" from which we, I think, believe that, if Hispanics or anyone else have a problem, we should tailor a remedy to deal with their specific problem.

Then I may have one more. Well, I'll just leave it at that. I had some concern about whether you didn't agree with what we said or whether we didn't say it clearly enough or just what the difficulty was that you found.

MR. ABRAM. Thank you, Dr. Berry, for your questions. And since they are multiple, I'm going to try to group them into some kind of framework.

Now, first, as to the clarity with which you have spoken. Like all texts, it can be read in several ways. But there is a thrust in this text, and this thrust is to take race and gender into account and to remedy discrimination by making one group, white males, the group from which must be extracted the remedies.

Now, as to your first question, that is my assertion—that I thought you were reintroducing racism into American life. Justice Powell's decision in *Bakke* was the ruling decision—if there were a ruling decision in the case.

What he said is what I profoundly believe and is the basis for my assertion: "preferring members of one group for no reason other than race or ethnic origin is discrimination for its own sake."

Preference based on race is racism; preference based on white race—which I lived with and hated all of my life—is racism. Racism is racism is racism.

Now, you may reply—in the words of my distinguished colleague, Dr. Clark, quoting from Mr. Justice Blackmun—"In order to get beyond racism, we must recognize it."

Now, the way Dr. Clark used that—to be a lawyer and, if I may say so, one who would like to practice logic—is somewhat illogical. In order to deal with racism one must recognize it and identify it. But, how do you go from the principle of recognizing and dealing with racism and crime to practicing it? In order to go beyond crime, you need not practice crime. In order to go beyond racism, one must ignore it, not practice it. And my point, Commissioner, is: Justice Powell, and everybody else who considers this matter deeply, knows that—as Thurgood Marshall argued triumphantly in the Supreme Court—the Constitution and the laws of this country must be colorblind.

Now, my friend Dr. Sawhill says we must simply ignore these philosophical and political science and political theory questions. One will dissolve the Republic if one does. This country is founded on the philosophy of the neutrality of the law and the colorblind Constitution. Someone said a moment ago—this is certainly implicit in the question—that we must not be taken in by neoconservatism. The principles of liberalism, the principles of nonracism, since the Enlightenment, were the individual enshrined as an image of God, the sacred rights of the

individual, merit recognized, creativity recognized, and no invidious distinctions by race, creed, or gender.

Now, let me say this, Madam Commissioner: if one says—as Dr. Clark has said—that a quota is simply an exclusionary device, may I ask, in logic, how can one person be preferred and another person, who would have been preferred, not be excluded? Now, how can that be?

Dr. Clark was brilliant in pointing out—it was touching—that there was only one Jew to be permitted in the psychology department as a graduate student when he was at Columbia. Is this problem to be redressed now by giving Jews a quota which will exclude Dr. Clark or exclude other people?

My point, Madam, is: whenever one recognizes these odious and invidious distinctions of race, one is treading on dangerous grounds, indeed. And, as far as I'm concerned, we are inverting the principles of the country.

Now, you said one thing I want to finish by replying to—and I don't know how I—whether I got it down exactly as you said it, but you asked something about how can you be preferring—you said you are not ignoring other groups. Okay. Now, you weren't here, Commissioner, when I pointed out in the recent PACE decrees, that decree—which I think your staff would agree with, and maybe you—gives a preference to blacks and Hispanics.

Now, in trying—in a court decree, the violation of which will create a contempt situation, Indians were not included. Now, in Albuquerque you've got a very heavy Indian population. Maybe they want to be internal revenue commissioners. Maybe they want to be civil service examiners. Maybe they want some of those 118 goodies. Suppose they don't get them, because that decree prefers blacks and Hispanics? What are you going to do about it?

The United States is going to be subjected to a suit under Title 1981, and I hope those Indians win it, if they are persons who would have been employed but for the decree. Do you see that you cannot overbalance one area without cutting into another? And if the determining factor is race, that's racist.

VICE CHAIRMAN BERRY. I understand your point. I think Dr. Clark wanted to intervene, did you not?

DR. CLARK. I just wanted to remind Morris that the time I was at Columbia was one Jewish graduate student—Ph.D.—per year.

MR. ABRAM. Yes, I understand.

DR. CLARK. I would like to respond. Morris said that attempts to remedy past racism is practicing racism and that the only way one can not practice racism is to ignore race as a factor. That, Morris, gives me a rather strange position, feeling—because if one were to apply that type of thinking and logic to other problems in our society, you would be confronted with this kind of absurdity: for example, if one were dealing with disease, say, that the way to deal with disease is to ignore the symptoms, ignore disease and, if one were to take that approach, obviously you wouldn't have hospitals.

You say, look, and you use the term "crime." I'm sure you wouldn't say that the way to deal with crime is to ignore crime. I mean, if the society is confronted with a problem, it has to find realistic, reasonable, legitimate, legal ways of dealing with the problem. You cannot deal with social problems by pretending they don't exist.

Certainly, in the latter part of my paper, I said that one of the most important approaches—things imperative for an effective affirmative action program—is facing the problem, not denying it. By the way, this is a technique that American society uses not only in the area of race. I mean, we do have sort of a tradition of optimism about social problems that sometimes, to me, verges over into the area of pretense.

For example, when I used to teach, one of the things I used to have my students look at in social psychology courses is the myth—and seemingly, a very effective myth with some advantages, but a myth nonetheless-—of classlessness in American society. Interestingly enough, America—before we got into affirmative action and the EEO stage—never pretended that it didn't have race. In fact, it often used race as a way of obscuring the fact that it also had class among whites. We cannot deal with complex social problems by sugar-coating them, glossing them over, or, as you say, ignoring them, or being neutral about them. And whenever you see a society taking that direction, you know that this is a danger signal because those problems will get worse rather than get better, which is what I think is the approach that you are suggesting.

CHAIRMAN FLEMMING. Commissioner Berry, do you have another question?

VICE CHAIRMAN BERRY. I think—Dr. Bunzel, do you want to comment on that?

DR. BUNZEL. Could I comment on that particular question?

CHAIRMAN FLEMMING. Yes, sure.

DR. BUNZEL. I think you've hit on an important point. I would like to try a different approach, if I may. I am not entirely certain that we do ourselves justice to the complexity of the problem if we cast the discussion in the rather large and unwieldy, but nonetheless real, thicket of racism.

Racism is something about which I think there isn't anyone on this platform or in this room who doesn't take strong objection. The problem here, seems to me, is what we are talking about in practice and if we can use the term in ways that will give the Commission some sense of direction. For example, I was very attentive to Dr. Clark's statement earlier on about the widespread poison of racism in our society. Of course, he is right. But I notice that in the Commission's own report, it says that the expressions of prejudiced attitude towards blacks and women have continued to decline and that there has been a noticeable improvement in public attitudes towards civil rights. That doesn't contradict the problem of racism, but it does suggest that progress of various kinds—not all kinds—has been taking place.

But more important than that, when I listen to the question of how one is to talk about racism in the context of affirmative action, I am not so much concerned about only the question of quotas or targets that are numerical—or percentages, or ratios, or whatever they should be called—and some have suggested we could dismiss it with a concept and perhaps call it a banana.

Joseph Rauh make the comment quite clearly at one point, Mr. Bookbinder, that you have to have preference for blacks if you really want affirmative action, period.

Now, the real issue, to me, is how one is going to talk about race. With respect, for example—and, as an educator, I am terribly concerned about this—with respect to admissions of students to medical schools, law schools, university graduate programs, and the like, the question, it seems to me, is, when race is to be taken into account, are considerations of past achievement and performance subordinated to racial or ethnic identity? And if, in fact, we find evidence to suggest that, indeed, this is the case, then we ought to discuss whether these are the appropriate means.

For example, Madam Chairman, I recently came across some figures in the latest supreme court decision in California that the Commission should deal with, and I present this at the moment without any comment, but suggest that the problem here is real. Justice Mosk was looking at some figures, some data, and if you will allow me just to quote a paragraph or two from the decision itself to make the point. 1975–76 is the year that he's talking about. For that school term, he writes: "1,138 males applied for admission; 175, or 13 percent, were accepted. At the same time, 458 minorities applied; 133, or 29 percent, were accepted. Thus, nearly 46 percent of the entering class was comprised of minorities."

Now, this would be unobjectionable, Judge Mosk continues, by criteria other than race. Again, "The facts," he says (and I'm quoting), "regrettably are otherwise. The mean law school admissions test scores for minorities was lower by several yards—feet, inches, numbers, whatever measurement one wants to use in varying cases—the mean grade point average for minorities was lower."

"In 1972," he writes, "only 5 percent of white male applicants were admitted, compared to 26 percent of minority applicants."

But the point here is that—and this is what he stresses—"that the increase would be laudable if, absent considerations of race, the minority admittees had equal objective qualifications, but the figures demonstrate otherwise."

Let me be the first to say that I have not resolved the problem. I have tried to restate it in the context in which the usual discussions of quotas and the rest only come to part of the problem. These are real problems, and one of the biproducts of this kind of affirmative action, I regret to say, is that it spreads the kind of cynicism that I don't think our society can afford.

VICE CHAIRMAN BERRY. Is that a majority or minority opinion?

DR. BUNZEL. That was the minority opinion.

VICE CHAIRMAN BERRY. That was not the opinion of the court?

DR. BUNZEL. No, it was not. The figures come from Justice Mosk's assenting opinion.

VICE CHAIRMAN BERRY. I had only a couple more pedestrian questions for Dr. Bunzel and I will be finished, Mr. Chairman, if you will permit me.

Let me just say that when I read your testimony—which I read very carefully—I noted over on page 3, you say that "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."

And then you go on to say that the Commission fails to recognize that action which has a differential effect is still not unconstitutional.

I would point out to you that on page 21 of our statement, in the first beginning paragraph on the left side of that page, we say, and I quote, "All employment selection mechanisms that have a disparate effect. . .are not unlawful."

We also say, over on the next side of the page, "Numerical evidence of unequal results. . .is not conclusive proof that illegal discrimination has been committed."

I have a couple of others and then what I'd like to ask you, again, is whether it is a lack of clarity on our part that seems to confuse. Over on page 6 of your testimony, you say that the "Commission report is critically flawed by a disregard of evidence and experience that disconfirms its contention. It is as if the age, education, income, and cultural values of American women and ethnic groups were not decisive considerations in considering salary, promotion rates, and the like."

You repeat a similar statement over on page 13 of your testimony, where you state that, "The fact is that many of the differences of group outlook 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 the like.

I point out that on page 41 of our statement, Dr. Bunzel, we say—at the top of the page on the right, beginning at the bottom of the page on the left—"The Commission recognizes that in a diverse society overrepresentation in a particular occupational group may occur without discrimination based on race, sex, or national origin. However, to assure that such discirmination has not occurred, an analysis needs to be conducted."

In other words, we recognize that there may be some other factors, but, at least, we ought to note that overrepresentation and, perhaps, query whether there are some problems with it.

Finally, on page 15 of your statement, you say that—this is on the merit issue—that ". . .it undermines the fundamental ideal and precept of individual performance and merit; and that the proper goal is to hire the best qualified person," whenever people are hiring, and you say that, "The Commission ought to assert that it is in favor of quality and in favor of maintaining standards."

I would point out to you that, over on page 40 in our statement, in the paragraph on the right, we say on the issue of standards that, "Valid standards may also exacerbate discrimination in such situations where, because of the pervasive and cumulative effects of the process of discrimination, some minorities and women may lack the necessary skills, experience, or credentials that are valid qualifications for the positions they seek. In such situations, there are no legal obligations that would require their selection."

And in that next paragraph, we further explicate that point again by saying that, "Affirmative action, therefore, while leading to the dismantling of the process of discrimination, need not and should not endanager valid standards of merit."

My only question is whether, indeed, we have failed to state with some clarity our position on those issues?

DR. BUNZEL. Madam Chairman, my problem with the Commission's statement (as I suggested in my opening comment) is not simply that it does not have sprinkled throughout the report the kinds of comments and points that you have just made. I read them carefully and, if I were to isolate them and extract from them and make of them pricicples, I, indeed, could use them to buttress my own position here this morning. So, in one sense, if I may say again, it is like having to quote from Hegel or the Bible. There is something in the report for Mr. Abram, Dr. Clark, for me, Dr. Feagin, Dr. Sawhill. There are a variety of things that are said with which all of us will have no exception. It is the question of how one puts these things to use and is there a central thrust and direction in the Commission's report? Are there some major threads that seem to take these different kinds of statements out of isolation and put them in the context which suggests that the Commission does have explicitly, and not implicitly, a real solution or set of solutions to the problem which go beyond any of the isolated statements we might choose?

Let me say that my reason for bringing to the Commission's attention the story of the XYZ Corporation—and I was listening to Dr. Sawhill on this very carefully—was not because I had, in any sense, a reason to feel that what she has pointed out is incorrect. That is, there are many reasons for the aspirations of women—in varieties of lives, corporations, universities—to be different from men and so

on, in degree as well as in kind, and I think she is correct about this.

The question, however, is whether or not this corporation practiced discrmination. What I am really suggesting for the Commission—and what I am really asking—is that the Commission state whether what happened at XYZ is discrimination in the meaning of its full report and, if it is, is it the kind of discrimination that the Commission feels should be remedied by government action?

One of the problems that I have with the Commission's report is that after it has said a great many things—some of which I disagree with rather strongly and some of those which I can accept quite easily—there is the need, I feel, for the Commission to take a look at some of the activities that would tend to go beyond the guidelines of the Commission itself. I would like to urge the Commission to blow the whistle on some of the practices with which it is in disagreement, and there are numbers of examples.

One could take (just to make the point) a most recent kind of example. *The Harvard Law Review*, as you well know, is now in the process of debating whether or not the traditional merit critieria for appointment to the board should be compromised, should be sacrificed, in any way diluted, so that a certain number of positions to the board will be reserved for, in some way, minorities and women.

Now, I don't know whether the Commission, based on its report, finds that a marvelous idea, supports it with enthusiasm, finds that it does not square with its basic commitment, has reservations about this—because it dilutes meritocratic criteria. But I think the credibility of the Commission would be enhanced enormously if it dealt with problems of this kind and staked out some positions to show what it does not approve of, and state as clearly in the practice of affirmative action those areas and those examples which if finds uncongenial.

It might help for those of us who read these reports carefully to get a better sense, then, of what the Commission really wants to see.

VICE CHAIRMAN BERRY. Thank you, Mr. Chairman.

CHAIRMAN FLEMMING. Dr. Feagin?

DR. FEAGIN. If I may, I would like to comment on part of this discussion. It seems to me that a good bit of this discussion is missing the major contribution of the report on the affirmative action side, and that I find on page 35, pretty close to where you were citing; the report says very clearly that, "The starting point for affirmative action plans within the problem-remedy approach is a detailed examination of the ways in which the organization presently operates to perpetuate the process of discrimination."

Discrimination is interpreted in the full report to include subtle practices, widespread cross-institutional practices, as well as more blatant kinds of practices. And, I think, in the case of Dr. Bunzel's XYZ Corporation, and the women who didn't aspire to upward mobility—is that they didn't look deeply enough or carefully enough at the patterns of discrimination—that I predict with probably a 90 percent probability are there if they would have looked more closely.

For example, sexual harrassment. If you train your women in an organization in clerical positions to always think of themselves as sex objects or inferior or not fit for management and you don't give them the support or encouragement for management training programs, you suddenly shift, in a given year, to begin to give them more opportunity and their aspirations do not seem very high to move upward, you haven't looked at the broad array of factors that act as barriers to the movement of women into nontraditional kinds of positions. So I think that the report is very clear. I see no lack of clarity on the point that affirmative action plans are not abstract debates about merit, quotas, and what not, but they should be tied to specific findings of discrimination in organizations and then targeted to those specific types of discrimination.

If you find sexual harrassment of women in the organization contributing significantly to their depressed aspirations, you ought to have an affirmative action plan that deals with sexual harassment. And, if the two studies by Farley and MacKinnon, which have recently come out, are anywhere close to being accurate, of women on the job—is a massive problem in society and would contribute to these other problems of low aspirations.

CHAIRMAN FLEMMING. Commissioner Horn?

COMMISSIONER HORN. I agree with some of the comments that there is a little bit for everybody in some of this report. I think that's obvious when you have a Commission made up of six members and a creative staff bombarding it with proposals. You're bound to have a few things get through.

My own position, I think I should state before I get into the questions. I regard affirmative action as simply good personnel practice. I believe an employ-

er does have a duty to analyze the work force, to look at relevant data as to proportions of so-called protected groups, which are recognized in the society as being underutilized, and the degree to which individuals with the appropriate qualifications from those groups might be eligible for jobs and, if there is a deficit, to look at recruiting practices, personnel selection, etc., to see if that can be remedied.

I think that where we get into the problem, as Dr. Bunzel has suggested, is when you get down to the making of the tough choices. And I would like to cite some of those choices, just to get your reaction to help clarify my own thinking.

Let's take universities. All of you have been involved with universities. In time of layoff in the university or, you could say, in a factory, what system would you use to determine who gets laid off? Merit or seniority? When we realize that essentially minorities and women have been the last at bat to get the jobs in many factories except in the Second World War—certainly in most universities—and if we use seniority, and the principle of last-in, first-out, it will be minorities and women that are excluded from the community of scholars or from the workplan.

What is your advice to us and to the people that have to grapple with that problem as to what is our criteria to pick and choose among people in a situation such as a layoff?

DR. BUNZEL. May I make a comment on that? But before I do, I want to be certain that the record shows what I meant to say. When I was quoting, what I hope I said was that the distinguished attorney Joseph Rauh, who has made the comment that, "You have to have preference for blacks if you really want affirmative action"—this was in an exchange with Mr. Bookbinder, but it was a comment made by Mr. Rauh, and I would not want the record to suggest that it was a comment made by Mr. Bookbinder, who takes a different point of view.

Commissioner Horn raises a very difficult question and a very important question and it would be nice if I thought that any of us here on the panel had the easy answer.

If the choice is simply does one stick with seniority or some other alternative with respect to layoff, I would want to know what the other alternatives are and what they amount to. If I had to make a cold choice, I would make the observation that I would think the issue of tenure needs to be raised and discussed, not just in the context of layoffs, which is real enough, but that to talk about it fruitfully. And from the point of view of those who are to be touched by any decision, it needs to be discussed in the context of whether it is appropriate in the 1980s as the reward for people who become tenured in the university or whether it is not.

If it is not, what are the alternatives: no tenure, contracts for every 5 years, the judgment of the president—perish the thought—or are there varieties of other alternative efforts?

The point I'm making here is that if you force me to choose between seniority and the question mark, I will go with seniority. But that is not an absolute. My reservations about tenure today are many. But I also share the general proposition that Winston Churchill once made about democracy itself: "It is probably the worst form of practice or a sense of government, democracy, but it is better than any other that has ever been conceived."

I don't know whether there is a happier alternative to the principle of tenure. There many be some alternatives to the way it is practiced, and, indeed, I think we face a certain kind of problem today that's quite severe. But many of those who have tenure in varieties of organizations, from unions to universities, ought to be the first ones to be involved in the resolution, if not the discussion, of this problem. And I would certainly not want to see the Commission or the Government decide this problem for the universities.

COMMISSIONER HORN. I didn't ask you to choose between seniority and question marks; I asked you to choose between seniority and merit on the way out as, presumably, universities select based on merit on the way in. When we realize on the way out in layoffs, which is what American universitities are facing in the eighties—3,000 of them—changing demographics—in an era of layoff, the people most affected—the disparate impact, if you will—are those of the late hires. And those are proportionately many more women and minorities in American society than those that were the complexion of American faculties of 20, 30, 40 years ago. Many of them are still on faculty.

DR. BUNZEL. I don't know whether the principles here—because the person has been in the university for 20 years and has done an execullent job—if that person has been awarded a tenure by merit criteria that I can accept should be dismissed first in the

context of layoff problem. I am not prepared to come to that problem.

COMMISSIONER HORN. Suppose a person has been at the university for 20 years, has tenure, has not done an excellent job, and just is still breathing, and nobody has had the guts to do anything about it—which is the usual condition in most American universitites, including peer group and academicians—and you have bright minorities and women in the lower grades of the university and the crunch comes, and they go and the survivors still stay on. What does that do for merit in the American universitites?

DR. BUNZEL. If you're asking me to make a comment that suggests I have some diminished commitment to merit, of course, you know that is not the case. The problem here for me if not whether or not merit itself can be the criterion. There is nothing that assumes that those who have been 20 years in the professor's salary or a full professor have been awarded their positions on the basis of merit, but I take that as a proposition that it is generally the case.

I suspect there is nothing automatically true about the fact that all women and minorities have been accepted on the basis of merit, but I will accept that, too. If you are asking me do I believe that merit will be the preferable way to make all decisions with respect to universities, of course, I would agree with that. But we're talking here about the kinds of polar opposites that, indeed, raise very fundamental questions, and I'm not prepared to come to a decision.

COMMISSIONER HORN. Is there any other enlightenment from the panel? Dr. Sawhill?

DR. SAWHILL. I think you have raised a very interesting question, and I would just add the comment that this is an excellent example—the use of seniority—not just in the university enviornment with respect to tenure, but across American industry in general—is a very good example of the way in which employment practices are nonmeritocratic, and I think we are engaged in some sort of false debate here.

You raised a question earlier, Dr. Bunzel, of should we subordinate considerations of performance to those of race or sex? I don't think those of us that are in favor of affirmative action are answering yes to that question. We are saying that judgments of performance are always judgments, just that, and that in close cases it makes a lot of sense to give extra attention to such factors as race and sex, given the legacy of past discrimnation, etc.

I am not in favor, on the other hand, of completely subordinating questions of merit and performance. Far from it. I think, if that were done, you would get exactly the kind of cynicism and counterproductive result that you talked about. But, I think, what we have to face up to is the large numbers of examples in which seniority is only one in which hiring decisions, promotion decisions, and retention decisions have not always been based solely on matters of performance and, if we could talk about that, then I think we could get beyond this somewhat sterile debate.

COMMISSIONER HORN. Before I ask Mr. Abram to comment, your comment, Dr. Sawhill, reminds me of my former colleague Commissioner Freeman's comment that she will believe affirmative action has arrived when an incompetent black can remain in the work force as [easily as] an incompetent white.

Mr. Abram?

MR. ABRAM. Dr. Horn, I would like to try to answer your very interesting question. First of all, quite obviously, I think that merit should be the basis of retention. Quite obviously, neither tenure nor seniority are the determinative measures of merit. I speak from experience.

I'll tell you where I come out. I want the determination made without regard to the professor's religion, race, or national origin, using some principle that does not make that invidious determination the basis for the elimination. Seniority has a certain neutrality as to these invidious and odious methods of classification, though I must, quite frankly, tell you that I do not think that is a criticism; but I think that the horror system is the use of a religious or racial test.

COMMISSIONER HORN. Any other comments from any member of the panel on this query?

[No response.]

Let me raise one more example and then I'll pursue certain other issues. We had a discussion of the performance of students in universities, particularly minorities. I believe, Mr. Abram, that you mentioned that there was a greater number of blacks in college, etc. The social indicators report of the Commission showed that while there might be many more minorities—blacks in particular—that are in college, as related to a floating standard, using the white male as the criterion for progress or lack of

progress, that, really, blacks, as such, were not better off than they had been a decade or so before.

What concerns me with the figure you gave—more than a million blacks in college, which, I will agree, is impressive if you just look at the number in college—is that, I think, if you examine them, most are in community colleges. And one ought to ask what is the graduation rate? One ought to ask how many are able to go on to professional schools? One ought to ask, if they go on to professional schools, how many drop out the first year of law school, etc; how many are retained at graduation?

I think we've got a major problem in the area of minority access to higher education in professional schools.

In my own State of California, one of the most underutilized and excluded groups is the Hispanic American, primarily the Mexican American. What advice do you have to give us, or anyone, as to how affirmative action plans can be devised that take into account some of the considerations you mentioned that we do not have invidious discrimination, but, on the other hand, that mean we reach out to get individuals properly educated and trained through the schools so they have the credentials needed to gain access to the key positions in our society?

MR. ABRAM. Yes, sir. In a sense, you've asked, Mr. Horn, a question that is derivative of Dr. Sawhill's point. She said, why did years of neutrality fail?

I'll tell you why they failed. we didn't have neturality. Neutrality will succeed. Now, turning, specifically, to your question, I came from a little country town of Fitzgerald, Georgia; graduated from high school in 1934. There were 55 kids—all white—and, with the exception of myself, all Protestant. And three of us went off to college. Any kind of college. The University of Georgia, where I went to, had 5,000 students; 3,000 in the undergraduate school of liberal arts from the whole State. Today the University of Georgia has 20,000 to 25,000. And in my hometown, practically everybody now goes to college. It takes a little time. There are no bars, that I know of, to the gaining of education by race in this country. And if a person has the opportunity, and given time and neutrality, we will make progress within the Constitution and preserve the society. It isn't necessary, Mr. Horn, in my judgment, for us to take the body fabric and to rend it, simply because of the fact that there are residuals after neutrality has been achieved before all persons are able to use the principle of neutrality. There is always a little danger in putting too much heat under the pressure cooker.

COMMISSIONER HORN. Just to get to this point a little more, I would like to ask Dr. Clark, Dr. Sawhill, Dr. Feagin this question. Let's assume a university, in its attempt to reach out for a diverse student body most of us agree is in order has 5 percent of its undergraduate student body black. It is a selective process; it isn't automatic as to who gets it. But they look at GPA, test scores, so forth, and they are down to the last slot, and they still have several thousand applicants they can't accommodate. Two people seem to be equal in terms of their GPA and their test scores. One is the black son of a Park Avenue M.D., or we could say, is a Park Avenue, New York, Ph.D. The other is the white son of an Appalachian coal miner who never went beyond the third grade. Both the test scores are equal. There is one slot left. Who do you pick and why or why not, under your approach, Dr. Clark?

DR. CLARK. How many Appalachian students do they have?

COMMISSIONER HORN. I said they had 5 percent black. I didn't state the number from Appalachia. Let's say they had 2 or 3 percent.

DR. CLARK. This is a college or university seeking a diverse——

COMMISSIONER HORN. Seeking a diverse student body.

DR. CLARK. —population. It would seem to me that they would move toward increasing that group that they have less of than they have of other groups. You see, one of the things that seems to me to be lost in the discussion of affirmative action and these types of decisions in terms of choice of employees—well, let me stick to students and the academic institutions which I know. It is fascinating to me that we talk about factors entering into choice of individuals as if these are discussions that arise only in regard to race or affirmative action.

The fact of the matter is that one of the closest associations I had with Morris Abram, interestingly enough, was not in his role as a very effective and eloquent civil rights advocate, but in his role as a college professor.

Do you rememeber that, Morris? You used to call me up at Brandeis for us to talk about educational problems. One of the problems we talked about was diversity, that a very positive contribution of an educational institution is to expose student and

faculty to the variety of human beings who are in the quest of intellectual goals, who, for some reason, believe that the academic intellectual approach to understanding is a positive approach to trying to make constructive roles in society.

Before 1964–65, the goals of diversity, the right of—in fact, the responsibility of those with the decisionmaking powers to choose faculty and students, to see that that power was used in order to have a diverse, a nonhomogeneous student body, or faculty, was considered a positive thing. I am fascinated by the fact that it started to become questioned only when we started to include race.

For example, when I first went to City College and was on the faculty there, I was being touted not so much as a token black, interestingly enough, because that was in 1940. That was before it was fashionable to have token blacks. I was being touted and being presented by the dean and the president as an example that City College was trying to get on top of the problem of inbreeding. That here they had a graudate of Howard University rather than City College on the faculty.

Now, I couldn't care less what their reasons were. I'm glad to be there because I was teaching at City College. But I'm saying that the questions of inbreeding, the question of diversity, the question of having a representative sample—in fact, the status of many colleges and universities is directly related to the diversity of their student populations, etc. So I will take the Appalachian, if you can give me one.

COMMISSIONER HORN. Let me ask if anybody would disagree with Dr. Clark's choice? I'm just curious.

DR. CLARK. Certainly Morris can't, because Morris did a terrific job in doing that at Brandeis. I watched him.

COMMISSIONER HORN. Dr. Sawhill?

DR. SAWHILL. I think you have a knack for asking easy questions.

COMMISSIONER HORN. That's because I live in the real world of making decisions.

DR. SAWHILL. I think in the real world one would look at a whole lot of other factors which, in a simple simulated example like this, I can't get at, but let me say something about it anyway. It seems to me that the goal here is not to provide just an opportunity for this one individual. Even in your simulated example we are assuming that there are many applicants out there who can't be accommodated and many members of the population who can't go on to receive this extra education and training; therefore, it is very important to create examples for others and to provide leadership for the next generation.

Remembering then that within the poverty population itself you have a tremendous disproportion of minorities, I would give a lot of weight to race as a factor, quite apart from social class. As Morris has said, it takes a long time—even if we did have nondiscriminatory behavior at the current time, which I don't necessarily agree with. But suppose we did. It would still take a long time to eliminate the current effects of past discrimination, and this is one way that I think one can do that.

COMMISSIONER HORN. Well, you lead into my next question, which is, how do we disentangle the problems of socioeconomic class versus race? As far as the affirmative action policies of this country go, as far as the Supreme Court decisions of this country go, we are really talking only about what is protected in the 14th amendment, varied statutes of Congress, Executive orders under that which are essentially race, sexual discrmination, etc. And yet, if you look at many of these problems, I think one would have to say that underlying much of the discrminatory aspects is a problem Dr. Abram mentioned earlier—poverty, socioeconomic class, etc.—that conditions the response of various individuals and their inability or ability to take advantage of the opportunities offered.

Do you have some wisdom for this Commission as to how we can separate those issues? I always see where your preference is, but I would like to get your advice as to how we disentangle them.

DR. SAWHILL. I'll just say, very quickly, that I think we have to tackle poverty as well as race and sex discrimination. I see them as intertwined, but, nevertheless, somewhat separate issues and that the remedies for one are not the same as the remedies for the other.

The point has often been made that one of the ways in which women differ from blacks, let's say, is that by definition women are no more economically disadvantaged by birth on the average than are men. Therefore, they don't carry the same history of economic disadvantage and deprivation that many minority groups do. But that does not mean that there is not still a problem with respect to status of women in our society and that it doesn't show up at times in the form of deprivation for women themselves and their families. We have had some discus-

sion already of families headed by women and the tremendous hardship that they face in our society, and the term used in the Commission's report was that women are all right as long as they have male sponsorhip.

Male sponsorship is a temporary phenomenon which only lasts as long as the male sponsor is willing. Gender is a permanent attribute. So we do have to think about moving beyond the kind of dependency of women on men that is so much a part of our culture that many people might not even define it as discriminatory.

I didn't mean to go into this disgression, but just to come back to your major point: I think it is terribly important that we address, directly, problems of poverty with other kinds of programs in addition to affirmative action, which can then interact with them.

COMMISSIONER HORN. Dr. Feagin was next, and Dr. Bunzel.

DR. FEAGIN. Dr. Horn, I think that is an extremely difficult set of questions that you have raised about class and race, and, certainly, the debate on race relations in the United States is increasingly focused on class or race, or class as more important than race. So, I think it would be an area that the Commission might consider getting further into, as well.

COMMISSIONER HORN. I think you should know, and perhaps you do, we are conducting and/or starting a study on the underclass in American society, which is primarily focused on race, but in which socioecomomic class factors will have relevance. This is something I wanted to do, essentially, for 11 or 12 years.

DR. FEAGIN. And I think I would agree with Dr. Sawhill that there are very intimate interconnections between the fact that blacks are twice as likely to be unemployed as whites and past and present history of emmployment discrimination. Both blacks and whites have serious unemployment problems, but the black unemployment rate has stayed remarkably stable—at double the white rate—for as long as I can remember and is today.

Perhaps a better place to start looking at class and race might be the housing area. You can take your favorite city—and I will take Austin, for example. Austin, Texas, has a significant black and Chicano population virtually all of whom live in segregated areas of the city in 1981, regardless of their income. There is a sprinkling of upper-income and upper-middle-income blacks and Chicanos in white areas, but it is a tiny token sprinkling, which the real estate interests, I think, help to perpetuate. But if you look at the median house prices for areas in Austin and median rentals—what does it cost to rent an apartment? What does it cost to buy a house? A very large proportion of that segregated black community can afford those rental units—which is usually more important for blacks than housing—and can afford median price houses.

That would exclude two or three elite white areas of the city, which are very high priced, but they are small areas. Most of the white areas of the community have housing that a very large proportion of working-class and middle-income blacks can afford, but the city is still a segregated racial community. Is it class or is it race? Is it income?

It doesn't seem to be, because a lot of blacks in the community can afford to live all over the community. So income would seem to be a minor problem in the fact that, say, you have to move 90 percent of the white people and 90 percent of the blacks to get a desegregated city of Austin, residentially. So you are left with other explanations: racial discrimination in real estate practices, racial discrimination by homeowners and landlords who are renting to minorities, seems to be the major problem.

Even though it is more underground now, it takes the form of steering. It is more subtle. There are fewer landlords and real estate agents who slam the door in a black person's face, but there seems almost as many who are willing to steer blacks one way—"You will love that housing area"—and whites this way—"You will love that housing area"—and you end up with a segregated city.

I think most American cities are very segregated residentially. Is that income or race? It seems to be race.

COMMISSIONER HORN. Dr. Bunzel?

DR. BUNZEL. Dr. Horn, the question that you teased us with is one, of course, that is not easy to resolve. As you know, Justice Powell, in his *Bakke* decision, concluded that race may not be considered for the purpose of increasing the number of minorities in a university and the professions, but that race can be considered as part of the discretionary process, enhancing the educational diversity of the student body. If we had the time, I would raise some questions as to precisely what is involved in the whole concept of educational diversity, because

there are numbers of issues here that simply have not been fully addressed.

Professor Gershowitz said at Harvard University—has made this comment, which, I think, is worthy of the Commission's attention in terms of trying to address the question you have posed: are there any other alternatives? I don't think we have fully answered your question, even though I doubt but we can.

He says that even if the goal of affirmative action were diversity of the student body for purposes of enhancing educational experiences, a goal whose importance he happens to question, it would not follow that race, as such, would be a significant, contributing factor. His point is that an applicant's potential ability to contribute to the diversity of the student body is uniquely a function of his or her individual experiences, interests, approaches, talents, and characteristics, and, picking up on the theme that you raised yourself, Dr. Horn, he makes the point that the prep school black brought up in a middle-class neighborhood by professional parents might contribute far less diversity than a Hasidic Jew from Brooklyn, a Portuguese fisherman from Bedford, a coal miner from Kentucky, or a recent emigre from the Soviet Union.

I would prefer to see this Commission—this is my own bias, which may tell you something about my own values—rather than using a race-conscious test, I would prefer the test of disadvantage. Not because that would solve our problems, but because, I think, the test of disadvantage is more in keeping with more of the values that more Americans are prepared to accept in the sense of trying to come to a consensus of how we apply means to these goals. There are disproportionate numbers of minorities of all kinds, but blacks, American Indians, Hispanics in various parts of the county who would clearly be caught in the net of disadvantage if the disadvantage test were attempted—it seems to me we would have a chance to find out whether we would do two things: make it possible for affirmative action to succeed and proceed without regard to race and at the same time contribute to the increase in the number of minorities.

COMMISSIONER HORN. Can you, very briefly, tell us the elements of a test of disadvantage, besides economic? I assume there is an economic test. Is there an educational background test of family? What would be your elements? This is very important to me.

DR. BUNZEL. Yes. I think there are. Let me just show you a good example of this that I just happen to have here in front of me, if I can find it.

COMMISSIONER HORN. You can file it for the record, if you like.

DR. BUNZEL. No. Such things as poverty, whether English is spoken in the home, the variety of accidental as well as purposive correlations with poverty—all of these, it seems to me, would not do an injustice to any of the groups to which this group is committed, but at the same time, by this kind of disadvantage test, would not discriminate against groups in a society that is made up of so many groups on the basis of race.

COMMISSIONER HORN. Okay. Dr. Abram and Dr. Clark.

MR. ABRAM. I am so very pleased that I came here, Mr. Horn, if for no other reason than to hear the Commission is about to engage in a study of the underclass. As you can see from my original presentation and my paper, I think it is the most dangerous, pathetic problem in American life. So far as I know, it is, perhaps, the most understudied problem, and I congratulate you and I'm delighted to know that you've been persisting in your own interest in it.

I would like to deal with your question of the interlinkage, if any, between class and race. I just asked my friend here, Dr. Feagin, where he's from. I hear that southern accent and I find that he comes from the Southwest. He comes from the western part of Texas. So that leaves me the only deep southerner on this panel. Therefore, I think I can speak with some intimacy, if not authority, with respect to racism.

I have always felt that one of the real problems in the elimination of prejudice lies in the confusion that we suffer in trying to disengage class and race. I began to say this in the early fifties. If you look at America and draw a line between black and white and then—that would be a vertical line—then draw horizontal class lines, you would find that on the white side there is a significant class of privilege. On the black line there is a very insignificant class of privilege, based, I think, more on merit and education than is the case with respect to the white section of privilege, which frequently is based upon family and money. But the white side of the line has a distinct class of privilege and the black side has an insignificant class.

Then you turn to the middle class. The vast numbers of whites at any one time at least consider

themselves to be in the middle class. On the other hand, when I began first to use this illustration, the blacks in the middle class were quite a few, but then when you look at the class of the underprivileged, there is then and still is an enormous black underprivileged class and a significant but not nearly so great a disproportion of whites who are in the class of underprivileged.

Now, Mr. Chairman, when you were working at this problem 25 years ago, when we had the issues of Little Rock, what we were asking was not only that people vault over the already difficult questions of race because of our indoctrination and the failure of our religious principles to be applied to our hearts, but we were more often than not asking that people, while vaulting over the irrelevances of race, ignore the distinctions of class. And when one did it with respect to the blacks, you were saying to the whites, "You middle class, now, accept in all of your institutional and other life—particularly in your students—you accept the underprivileged as well as the differentiated persons of color."

So great a problem is this that when my late friend Martin Luther King, Jr., wanted to send his children to school in my then hometown of Atlanta, he applied to the private schools where those children were originally denied admission, but to which they were later admitted. The problem of class is one of the most difficult and intractable problems of American life and we are, perhaps, as we say, as classist as any society. So, when you touch, as you are going to, Mr. Horn, the problem of class, you are going to deal inexorably—and I would say, in an effective way—with the problem of race. It is a tragedy, in my judgment, that Ken's work *The Dark Ghetto,* which pointed up the tragedy of this black underclass, which, to a large extent—not completely—is composed of a growing factor of the single-parent, female-headed household, which has one-third the income of the other black households. When you begin to grapple with this, you are going to be grappling with a central question. And I dare say that I never agreed more with any proposal than your proposal, Mr. Horn. Nor with your analysis, Jack, when you say that the test of how to deal with this is the test of disadvantage.

Now, how do you measure? I don't know. It's a very difficult question. You've asked an extraodinary question. I'll tell you one thing about disadvantage: I went off from that high school to the University of Georgia. It was not the greatest in those days, particularly. But, you see, it only had 5,000 students and the people who were there mainly came from the bigger towns who had 12th grade schools. I came from an 11th grade school and a country school, and I remember my English professor, chairman of the department, when examining us on Shakespeare—we read *Macbeth*—he wrote on the blackboard, "Give all the instances of anachronisms that you found in the play."

And up went my hand: "Professor, what is the word anachronism?" I never heard of it. The others had. I came from a country school—11 grades.

He said, "You don't know the word?"

I said, "No."

He said, "Well, then, you can't answer the question."

I said, "That's right. But," I said, "that's unfair, because maybe I will be able to answer the question if you would tell me what the word means."

And that gentleman looked me straight in the eye and he told me—I was very glad he told me—he said, "Abram, if you never learn anything else, you will learn what the word anachronism means and you'll never forget it." I was disadvantaged.

COMMISSIONER HORN. Dr. Clark, you wanted to comment?

DR. CLARK: Yes. I would like to caution a too simplistic approach to the problem of class and race. As you ladies and gentlemen know, I have been involved in that debate. I have felt, with my very good friend Professor Wilson at the University of Chicago, who wrote the book *The Declining Significance of Race,* who was dealing with the problem simplistically, and I said in a number of discussions with him that I am convinced that not only has he been optimistically premature that race has been subordinated to class in terms of life chances of blacks in America, and that that issue has become what I consider diversionary, but I think that Tom Sowell's more recent picking up of it has spotlighted the fact that the race/class, class/race issue is another one of the subtle and not-too-subtle sophisticated diversions from the still unfinished business of American racism.

The fact is that a core of American racism—is that it does effectively block economic, educational, and, therefore, class mobility among blacks observably, measurably, in a differential way from the opportunity of class mobility among almost every other group in the United States, including the light-skinned Hispanics.

I would like to repeat that, that I would like to warn against a simplistic dichotomous approach to the class/race discussion or debate. They are inextricably tied—and the fact is, one of the functions of American racial discrimination, prejudice, inequality—and the product of it is the blockage of mobility for blacks.

As Morris says, and as the evidence does indicate, there are examples of blacks who have made it into the middle class, the upper-middle class, and economically, I suppose, there are, as Mr. Frazier pointed out, a small percentage of blacks who made it at the lower rungs of the higher economic levels.

The next point I would like to make in regard to the blacks who have made it, however, is to me a very disturbing point, and it is related to Dr. Bunzel's point of putting the focus on the disadvantage.

I have every reason to believe that the next step—and the most complicated, confusing step in the civil rights struggle in America—is when there is an increasing number of advantaged blacks. Advantaged blacks will be more of a threat to American racism than disadvantaged blacks. A very important component of American racism is benevolence, patronizing, condescending approaches of whites towards blacks. It becomes difficult for whites socializing in essentially a racist society to relate to a black with whom he cannot—or she cannot—condescend.

It interferes; it makes for awkward relationships. But please take my word for it. Let me give you an example. Dr. Bunzel, early this morning, asked me if it was my son who was a student at Kent School in New England. I said, yes, it was my son. Kent School is a school for the most part, I guess, upper-middle-class whites and blacks who can afford to pay the tuition. Interestingly enough, that's just about one-third or one-half of the cost of keeping a black youngster in a correctional institution in New York State. You know, one of the fancy privileged schools. But what I didn't tell Dr. Bunzel was that Kent was not the first school that my wife and I visited in seeking to get our son in one of those schools where he would learn how whites that control the society learn to control it.

We went to Groton and we spent a whole day at Groton. The liberal headmaster, who had heard of my wife's and my work and was very happy to talk to us about Hilton's coming to Groton—at the end of the day, when we were about to leave, he took us into his study and he said, "Dr. and Mrs. Clark, we're very happy that you've come here and very happy to have Hilton as one of our students. How much scholarship do you want?"

We said, "We really don't want any scholarship, because it just so happens that Hilton's grandfather set up a trust fund for him to go to school and to college. We hoped we could get through college without affirmative action."

Affirmative action wasn't talked about there. We noticed the headmaster's face change. The idea of a black couple coming to Groton without seeking a scholarship was unheard of. This is a fact. Three weeks later we received a letter from Groton saying, "Unfortunately, we decided that we would admit here the son of a dressmaker"—I don't think he used the term black at that time—"from the Roxbury area, and we are not, therefore, able to admit Hilton."

My wife and I were quite happy with this because, actually, we had on paper the kind of condescension, patronizing manifestation of high-level American racism. We are moving, and I certainly hope that we are able to move more and more blacks into this category of nondisadvantaged, but I am positive—and it certainly won't happen in my lifetime—that that will not be the end of the problem. It will be the beginning of a new and more complex set of problems. It will be a situation in which blacks would have entered into that cycle of increasingly intense competition which, so far, has been reserved only for white males, and, by the way, it is also interesting that in discussing these problems, we act as if white males don't have conflicts, difficulties, and problems in competing among themselves for increasingly limited higher status positions.

When whites recognize that there are blacks who can get into that cycle of higher level competition without the condescension of whites, the fur is going to fly. And race will be there. And no way in the world class is going to obscure the fact that a new competitive force is a highly qualified black who will compete for chairmanship of boards, who will compete for chief executive officer, etc., and who will be subjected to all of the problems that go with it.

VICE CHAIRMAN BERRY. I want to thank you, Dr. Clark, for your caution about our study on the underclass and to recognize the relationship between race and class, and for the story that you told about

the condescension and paternalism, which comports with my own experience. I thank you very much.

DR. CLARK. And I frankly don't think that blacks should be required to apologize for successful upward mobility in the face of a horrendous amount of barriers, and that is what is happening insidiously.

MR. ABRAM. I draw exactly the opposite conclusion from that, if I might, Mr. Chairman, because it is right on point.

CHAIRMAN FLEMMING. Yes.

MR. ABRAM. I see. I think the story about Hilton is an extraordinarily interesting story, and I understand Ken's disenchantment with the attitude of the headmaster—or whoever he was—at Groton.

DR. CLARK. I told him to go to hell.

MR. ABRAM. I agree. I came into contact with the same thing and I want to tell you I draw different conclusions from it. It is a result of the attitude—if I may say—which—I don't know where to assign it, but it certainly is prevalent, and I think it infuses this paper. Let me tell you what I mean. When I was president of Brandeis, it was quite easy in those days to go out and get, for the scholarships that were available, extremely well-qualified blacks. Hilton, for example, or any number of men and women like him. That didn't satisfy at all, because, unless you've brought somebody out of the poolroom who didn't qualify on merit, unless you drag somebody out of a position of disadvantage, despite the fact he or she may not have been anixous for the education, you hadn't done a public service.

In other words, you were treating blacks differently and that's what that headmaster was doing. And that's exactly what the liberal white admission officers all across this country were doing. They were taking race into account and they were not treating people equally. Whites had to be from a certain educational background and that usually meant class. But blacks—you had to reach down and bring them out of oppression—qualification or no—and that, I see, is the tragedy of this.

COMMISSIONER SALTZMAN. We're getting late.

CHAIRMAN FLEMMING. We're getting pretty close to it and we have three other colleagues here who want to get into the discussion.

COMMISSIONER SALTZMAN. Let me see if I can be brief. Let me first speak to one of the issues you have raised, Mr. Abram, about the paper's presentation of the issue of legality. And you suggested, I think, that—and it is on page 19—the Commission was not concerned with legality. Unfortunately, I don't think you, perhaps, considered the context. Of course, we are concerned with the issue of legality. It is the last sentence on page 19 of the first paragraph. All we are saying is that, in many respects, the legal issue of affirmative action is settled by law passed by Congress and, certainly, by the Supreme Court decisions. And we are suggesting that we want to get onto the business and the significant aspect of how is affirmative action applied in the best possible manner and not that we are lacking a concern about legality.

But with respect to legality itself, I think you have presented an impassioned, beautiful statement with respect to the majesty of the law. As you were speaking, and throughout your comments—as usual, my respect for you is very high for your abilities and the deference to logic, which is characteristic of your words and thoughts—and I thought of a few things relative to, for example, *A Man For All Seasons,* Thomas More, in that wonderful play, who, too, in a great impassioned manner, supported the majesty, the consistency of the law and its logic as he opposed King Henry, who was, for personal reasons, bringing about fundamental change in English society.

I don't know who was right or wrong, but I certainly applaud the ultimate end, the change that was wrought in English society despite some of the twisting of the absolute majesty of law and logic. It caused me then to think about a rabbinic statement, an argument between two rabbis in the Talmud. One rabbi saw his position in absolute terms and suggested that God could be nowhere but on his side, and to prove his conviction to his opponent he said, "I'll have the sun stand still and God will, thereby, prove that I'm right."

In the absolute position he had taken about the law and logic, and—indeed, the sun stood still. Then he said, "I'll make the river go backward. This will be a sign from God that I'm right." And, indeed, the river went backward. But his opponent, the famous Hillel, said, "These are not proofs. Once the law has been given to man, it is necessary for man to deal with it in a human way, where life becomes the imperative, rather than an absolute, in any sense, in this imperfect world." And it was the famous Hillel, too, who given the Biblical concern and tenet for the seventh year, and the requirement that the land lie fallow, overturned Biblical law because of his reverence for life and that people had to survive. You just couldn't observe the Biblical requirement

in any absolute sense, though he valued the Biblical requirement, and introduced the legal fiction in order to get around the Biblical requirement.

And I suggest that many of your arguments and Dr. Bunzel's are extremely attractive to me and probably to every member of the Commission. There is a problem inherent in the end spectrum of affirmative action, whether you call it a quota or whatever it might be, or preferential treatment. I don't think any of us support that as an absolute ideal. Quite the contrary. I think we support the ideal of individual merit and the suggestion you made of every human being created in the image of God and that being a perfect absolute. But we are not living in a perfect world, of course. How do we secure the advancement in our society of those who have a history of being excluded?

I was just talking recently to a dean of a college in my community in Baltimore. He was indicating that sometimes when they want a particular person—Dr. Sawhill was pointing out how favorably she was impressed with the posting that goes on—given the requirements of posting, they post with the qualifications that are directly related to the person they've already chosen. So that means that everyone is going to be excluded because they have defined—in defining this job—a particular person. They have posted it and it conforms to all of the requirements of law in affirmative action, but they have chosen the person, and the posting, without so indicating, has already defined the job qualifications in terms of a specific person.

I think we are deaing with the necessity to preserve life, which here ought to have us speak as, I believe, this paper speaks to, creating the kinds of specific definitions related to the problem and its remedy, and I emphasize that, which I think has been emphasized by Dr. Clark and Dr. Feagin. How do we proceed to remedy the situation without getting caught in the tangle of philosophy and not in any way wanting to endanger the fundamentals of the Consitution, certainly, or endangering the objective of preserving individuality in this country. But how do we proceed in a society that did place odious—and that's where the term must be truly applied—odious discrimination against groups of people, so odious that that must be what we look upon as ultimately being intolerable? How do we move forward from that odious reality—still a reality in our society—which precludes the right of individuality to black people, the opportunity of individuality to black people and women? How do we move in that direction?

Let's deal with the specific remedy, which is what this paper, in totality, is trying to say. Let's look at the problem. And it is not that we are for quotas; we are for a remedy. And where the problem dictates a remedy, let's design a remedy that works to bring in those who have been excluded. Thank you.

CHAIRMAN FLEMMING. Commissioner Ruckelshaus?

COMMISSIONER RUCKELSHAUS. I would like to start by thanking all our panelists for being with us this morning and for the very important provocative contribution you have all made to the thought process that has been going on in the Commission—certainly as long as I've been a member—and, I can assure you, will go on in a more heated state after our 2 days of hearings.

I think we could probably all agree that a truly neutral, colorblind society and Constitution—as described by Thurgood Marshall and advocated by Mr. Abram—is ideal. My experience—and, I'm sure, everybody's experiences—concludes that is not the case. That we have indicia that indicate that this is not the case. It is not helpful to us to pretend that it is. If it isn't, it is interesting to try to discern whether, Mr. Abram, you feel that any attempt to deal with that fact—in employment, for instance—constitutes an attempt to recognize the fact that women and minorities do not get hired and promoted in a totally sex- and color-neutral environment.

Does that recognition, in itself, constitute social engineering as to constitute a steering that results in unfairness?

MR. ABRAM. I said, Commissioner Ruckelshaus, that beginning with the—well, I'll tell you from my paper that I have no objection to affirmative action as I understood the premises to be at the time the phrase was coined. I think I made many speeches in favor of it and I said that the basic elements—as you call them in this report or proposal—are acceptable.

In fact, I said those basic elements—and these are the elements that are the conclusion of your report—reflect the approaches and steps which I have always thought and which I understood to be the meaning of the term "affirmative action" when the phrase was first coined.

Now, what do I mean? You identify those who would not otherwise be identified. You uncover pools of talents, qualification, interest, and earnest—

which aren't covered up. Those who have the disposition and the talent, and who are not properly trained and educated, you seek out and give education and even remedial education, but you don't take the hurdle and say that because a black man or woman or a Hispanic or a Chinese or a Catholic or a Pole is going to jump it, you make it 2 feet, because the person will never be encouraged to jump the 4.

You do everything to qualify a person who has the disposition and the potential to do the jump. But I happen to agree with that distinguished colleague at the bar, William Coleman, when he said that you—speaking (someone did) about the *Harvard Law Review*+m-take a system which has produced the most distinguished legal journals in the country and then affirmatively pick people by race and sex and qualify them, when they would not otherwise be qualified—Bill Coleman said it was plain dumb.

I want to tell you this, Commissioner. Not only is it plain dumb, but it is destructive of a human personality, Rabbi Saltzman. There is a young man in a law firm in New York who is black and who wrote a piece in the *New York Times*—and he is in a distinguished firm—and he said, every time, every time he comes to work in the morning he is gnawing with that assault to his dignity. He wants to know is he there because he's good or because he's black.

Now, finally, I was dreadfully ill, I was dying, had six doctors. None of them seemed to be able to coordinate their various remedies. Immunologists, oncologists, hematologists, liverologists (called hepatologists) and none of them coordinated. And finally I got them all together and I turned to a woman who was about my own age and said, "You're it. You're the switchboard. You're my doctor." And later I told her why. Because I knew she was there not because of any affirmative action. She was there beause she had to even be better, having passed through the sieve 20 or 30 years before.

Let's don't destroy human dignity, self-respect, productivity, and the principles of fairness. Yes, I'm for affirmative action. But I am not for a result-oriented type of numerical assignment by race, color, creed, or sex.

COMMISSIONER RUCKELSHAUS. Thank you. Dr. Clark?

DR. CLARK. I would like to ask Morris a question.

Morris, you pointed out this young black man who every morning when he was going up the evelator was asking himself——

MR. ABRAM. He wrote that.

COMMISSIONER SALTZMAN. Henry Ford asked himself that every day, I guess.

DR. CLARK. You took my line. I was going to ask, are there some young white males who have as broad a perspective of the fragility of the human ego, without regard to accident of birth or anything else, sometimes labeled so. "Am I as competent as I would like to be? Am I here in a law firm because I am a competent lawyer or because I am a political image that would add to the prestige of this law firm?"

MR. ABRAM. Yes, I think so. But not——

DR. CLARK. Why tie this all to race?

MR. ABRAM. There's one thing for sure. I was having dinner Saturday night with a distinguished dean of a distinguished law school who had turned to one of the faculty of the Harvard Law School and he said, "I want to tell you something. From now on, when your law graduates go to the distinguished law firms and ask for a job and say they're in the law review, I bet you mine are accepted in place of yours, because you don't know what was the basis at Harvard anymore."

DR. CLARK. Did we know before?

MR. ABRAM. Yes, we did.

DR. CLARK. What did we know?

MR. ABRAM. We knew they were the top of their class or the top of their writing ability and were not chosen by sex or by race.

DR. CLARK. What was wrong—may I?

MR. ABRAM. Yes.

DR. CLARK. Suppose one of the purposes of a law review is to expose students to problems, dilemmas of the law—and I, certainly, many times have worked with lawyers, as you know——

MR. ABRAM. You worked with me.

DR. CLARK. There are problems in the law, right? There are problems that require differences in perspective, differences in background, maybe even differences in terms of qualities of academic or intellectual approaches. What is wrong with trying to get within manageable bounds as many variations of these differences that would add to the quality of what is being discussed?

MR. ABRAMS. I'm so glad you used the famous words—you asked me that question. You and I were on the same side of the fence when Nixon tried to put a gentleman by the name of Carswell on the Supreme Court, and you and I were on the same side of the fence when Roman Hruska, the Senator from

Nebraska said, "Well, Carswell is not so good. He's not even a good lawyer. But we have so much mediocrity in this country, it ought to be represented on the Supreme Court."

Mediocrity should not be represented on the *Harvard Law Review* or in the Harvard Medical School.

DR. CLARK. Maybe we have different standards of criteria of mediocrity.

DR. BUNZEL. Madam Commissioner, I am fascinated by this discussion, because it goes to the whole question—Dr. Clark raises it quite properly—as to whether or not the contradictory injunction that we should abandon the merit principle has always worked and, of course, it has not. But that does not seem to me to be a reason for anyone—and he is not suggesting this—that we abandon the merit system.

Now, if I may say just a word about merit itself, because I think it is important for us to understand or, at least, for me to try to articulate my understanding of what merit is about. The injustice of discrimination is, by definition, an injustice suffered because someone has not been treated according to a universal standard, but by some arbitrary or some incidental aspect of their identity. Their accent, perhaps, their height, their color has become the basis of judgments about them, rather than judging them by reference to a standard or merit that applies equally to everyone.

The most important aspect of this distinction is that it is only in terms of a universal standard of merit that one can conclude that discrimination or injustice has taken place. If such a merit standard had never been articulated, the entire attempt to discover the existence of injustice could never be made. And that being the case, we are so often confronted these days by the advocates of quotas or numerical percentages or fixed ratios or what have you, with a contradictory injunction that we should abandon the merit principle, despite the fact that the very discovery of the existence of discrimination rests on the principle of merit.

COMMISSIONER SALTZMAN. We're not suggesting abandoning the merit system.

DR. FEAGIN. Let me say something here.

CHAIRMAN FLEMMING. Pardon me, just a minute, Commissioner Ruckelshaus.

COMMISSIONER RUCKELSHAUS. I don't want to interrupt this. Although my moment for making this remark seems to have been passed, I can't resist making it, so I am going to interject it.

I think that the situation you raise of the person who comes to work and wonders, "If I deserve to be here or am I, in fact, here because I am a member of a specific preferred class? Or, am I a woman or a member of a minority?" That's probably a real problem. I can imagine that people deal with that. But I think that's probably a more bearable burden than a woman who goes to work every day and knows she's not going up to the executive level on the eighth floor because she is a woman. She's very clear she's where she is because she is, she has no worry about that. And that's a certainty that minorities and women have also dealt with for years and I find that more burdensome.

DR. BUNZEL. I have one last sentence to add to the point I was making, because I do think it bears on the principle of merit. When I was president of San Jose State University, the administration there was deeply concerned about the fact that there were no women in the administration, for example, and over the period of 8 years there were more women appointed to high administrative positions than in the entire history of the university. All right. The point I make is this: those women said to a number of us in the administration, "Given your position, Jack, on affirmative action, please understand that we know and we can hold our heads high around here that we were not appointed on the basis of our sex as a token. We know that you would not have appointed us unless we had merited the appointment."

That's a terribly important point about affirmative action. That is what affirmative action is about. They were proud—we were proud—they were the best qualified and we increased the number.

CHAIRMAN FLEMMING. Dr. Feagin?

DR. FEAGIN. I think we need to return to the problem of the fact that most major organizations and institutions in the society are still heavily dominated by white males at their upper- and middle-management levels. These white males—the evidence seems to indicate across most organizations—still participate in huge amounts of race and sex discrimination that keep out qualified women and minorities.

The question is, how do you get those white male administrators to bring in those pools of qualified women and minorities without a stick? If you just sit there and let them operate, they will keep on bringing in—I watch it in all of the organizations I am in; you take a little heat off them and they will

keep on bringing their favorite good old boys right back into the system from now until 2100 A.D., and unless we have some massive intervention, the extent of race and sex discrimination in organizations is so extensive—you know, I can understand this *Harvard Law Review* concern, but most blacks and women are not at that level; they are in corporations, businesses, school boards, and supermarkets and factories around the country, and they are the ones who are being underutilized, and white males who are in control of those shops will keep them white male shops as long as they can, unless some heat and pressure, in the form of affirmative action with a stick behind it, is brought to their behinds.

COMMISSIONER RUCKELSHAUS. Can I make a brief further remark? I was interested that Mr. Abram seemed to be touching on a point that Dr. Bunzel raised in his paper, about the acceptability of compensatory actions as opposed to unacceptability of preferential action, and if you're taking compensatory action, if you are going out to find and discover pools of talent, if you are trying to recruit minorities and women, if you have an awareness in your mind that you are trying to overcome the exclusions of those groups, isn't that, in fact, race conscious? That's not neutral. Isn't that sex conscious? That's not neutral. Those are specific preferential actions.

MR. ABRAM. No, I would apply it across the board to all persons who are disadvantaged. I wouldn't hesitate to tell you that I do not believe that race, sex, or religion should be the determination of the application by society of remedial measures to bring—or compensatory measures to bring—every individual within the society, and you cannot be so evenhanded as to be perfect up to the level of their disposition and merit.

CHAIRMAN FLEMMING. Commissioner Ramirez?

COMMISSIONER RAMIREZ. I defer to the Chairman. Go ahead.

DR. CLARK. May I make a point? The assumption, as I hear it from Morris and from the people who raised this merit question, is that merit is a monopoly of white males.

MR. ABRAM. Who says that?

DR. CLARK. And the fact of the matter is, Morris, one of the bases of the resistance to serious affirmative action is that when females and minorities get into situations from which they previously had been excluded, they will explode this myth of merit. And you used the word mediocrity. Mediocrity is the norm in most of our institutions controlled by white males. It can't be any more so than it has been. I am tired of hearing this term merit as if it is some sacred thing that must be preserved by resisting affirmative action, when most of the operations that I see in this society are—my own department (that sent more students toward a Ph.D. in the United States up until open admissions) was a department of very nice colleagues, most of whom functioned in terms of law of economy of effort, produced very little, and argued they were meritorious because they were white.

COMMISSIONER RAMIREZ. Very well then, I'll take the opportunity to ask Dr. Bunzel a question about this XYZ Corporation.

The human situation described in that corporation is something very dear to me. Most of the women in my life work for the XYZ Corporation. I remember when they were the first to get into the XYZ Corporation because they were light-skinned Hispanics, and they stayed in clerk situations throughout their working lives because they were Hispanics still and women.

Dr. Feagin has described and Dr. Sawhill has described a more discrete definition of discrimination than the one which was applied to the XYZ Corporation case.

If you look at discrimination as a hierarchy of attitudes and behaviors leading to the discriminatory practice, their hierarchy is more discrete than the one that was applied to that case. What are your views on defining discrimination in those more finite terms?

DR. BUNZEL. Well, there is a point, Madam Commissioner, when things become so discrete and so refined that they become abstract enough so that you cannot measure them, because there is no test. I am not quarreling at all with Dr. Sawhill's discussion or yours about the kinds and forms of discrimination that may take place. Only a fool would pretend that these kinds of instances do not happen.

The point of my citing the XYZ Corporation was to ask the Commission to indicate whether or not—when the data that had been done and gathered on this kind of incident or these sets of examples show that there has not been discrimination, will the Commission say so publicly? Will it state that given the results, given the study that was done, given the fact there was no lawsuit, that there wasn't discrimination? Is that the kind of test and result that the Commission can accept?

You asked—or someone else asked earlier today—about sexual harrassment. Sexual harrassment is something that I don't think anybody here can condone, but I will point out—which was in my paper, but I was not able to point out verbally this morning—only a negligible proportion in the XYZ Corporation complained about discrimination of any sort (sex, race, religion, or age) and, as it turns out, males were more likely to complain than females. All I'm asking is that, if this is the kind of discrimination that did not take place, will the Commission say that, therefore, either this is the only corporation around of which we have any data that suggests so, or that is willing to have studies done of this kind or all kinds of corporations, because I don't happen to believe this automatically is a typical case throughout the country. But I would ask that the data be available, so we can determine when and when not there has been discrimination. If this does not meet the Commission's test of discrimination, say so.

COMMISSIONER HORN. Commissioner Ramirez, I think this is a very crucial problem and let me just carry it one step further.

The question you raised as to that study by the XYZ Corporation which, according to the consultants, said it was really not the fault of the corporation that these women were not involved more representationally throughout the hierarchy; it was the lowered expectation of women, as I recall, and they did not apply for the job.

Now, earlier there was a comment on that and I think that's another relevant point. Should this corporation, in the guise of or in accord with the policy of affirmative action, be asked to make up for the cultural deprivation, societal deprivation, that women had had throughout the educational process where their expectations have not been raised higher?

I think if you are asking the Commission, you have to ask them two questions: one, did that study show the corporation, per se, was free of discrimination? I think on the evidence, not knowing the study one way or the other, one could say, yes, that's a reasonable approach to take; that's really what affirmative action calls for. Isolate your problem; identify it and see where the problem is. And the problem is clear. There wasn't a question of the corporation not promoting them; it is a question of not applying to be promoted. But it seems to me we have then to go beyond that, as to what are the conditions that result in their own behavior, and do we, as a Nation, not simply a Commission, hold the corporation to make up for the failure of the school system, all the other blips and beeps that come into people from society that result in that particular stereotype?

VICE CHAIRMAN BERRY. I did not understand it that way at all. I understood Dr. Feagin and Dr. Sawhill, especially, in their comments to be pointing to some other factors that may have existed regarding the corporation that were not considered in the XYZ case, as opposed to saying conclusively it was a question of societal discrimination per se.

DR. BUNZEL. It may well be that they have read the report on the XYZ Corporation and perhaps they will find things in it that no one else found. All I was trying to point out—and here I disagree with Dr. Horn——

COMMISSIONER HORN. I have not stated, I am just raising that question, which, I think, ought to be addressed.

DR. BUNZEL. The kind of discrimination that one would have expected to find was not found, and, indeed, the XYZ Corporation was not found guilty of discrimination.

Now, it seems to me that it is a fair test. Beyond that, I would remind you, Dr. Horn, that Justice Powell (in the *Bakke* case) made it very clear—and I use the University of California-Davis only to make a point—that it is not permissible for a university, in this case, to take on numbers of people by race to correct societal discrimination. Societal discrimination was something expressly knocked down by Justice Powell.

COMMISSIONER RAMIREZ. I would just like to point out, Commissioner Horn, that the study, if I remember correctly, looked at aspirations and not at expectations. And I think that that may be part of the problem with the study. But I would really like to hear what Dr. Feagin and Dr. Sawhill have to give us briefly on this issue.

DR. SAWHILL. Having been socialized not to be particularly assertive, I have wanted to interject a couple of times prior to this and didn't have the courage to do so. So, if I could skip that issue and go back to a couple of others that are more important to me and then let Dr. Feagin speak to your issue—and I will be brief.

CHAIRMAN FLEMMING. Dr. Sawhill?

DR. SAWHILL. Basically, there are two kinds of evidence that I wanted to just call your attention to

on two issues that have been very much debated here. One was the question of race versus class.

I think that one would do well to look at the evidence on occupational mobility across generations within the minority community. That evidence is pretty clear that middle-class or well-to-do blacks cannot transmit their advantages to their sons and daughters in anywhere near the same way that white males can. You know, unless you've looked at that evidence, you wouldn't understand why it is so important to give the opportunity to that hypothetical young person whose father happened to be a Park Avenue doctor or whatever.

The second piece of evidence that I wanted to bring to your attention has to do with this debate over merit as a basis for hiring and so forth. Here the studies on evaluation bias are absolutely telling on what's involved. Now, I have not seen studies on this issue for minorities. I am mostly familiar with these studies on women, so I am speaking about women only now.

Give people an article to read, a resume to review, do nothing other than change the name at the top of that article, or the top of that resume from a male name to a female name, and the evaluation, based on a large sample of such exercises, of the individual goes way down. Nothing has changed but the sex of the individual. How do we explain that?

Is that not a phenomenon of current discrimination, stereotyping? Is that not going to hinder the individual woman whose credentials, performance, merit, whatever you want, is absolutely up to snuff? That I think is a very serious piece of evidence that could be reviewed in this debate.

CHAIRMAN FLEMMING. Dr. Feagin, we have reached the time, 12:30. I am going to cut it very quickly, because I don't believe in running very much over the time, as a courtesy to our guests, and due to the fact we also have to pick up again this afternoon with another panel discussion.

DR. FEAGIN. Thank you, Mr. Chairman. Let me take 2 or 3 minutes just to tie this point on. Dr. Rosa Beth Kanter of Yale University did a major study of the corporation called the Industrial Supply Corporation, and she also found in studying women clerical employees in that large corporation that they tended to have low aspirations for mobility out of clerical positions and secretarial positions, and her analysis showed to her that this was for structural reasons within the corporation, that the corporation's treatment of women clerical employees, tracking them into secretarial jobs, women got promoted on the basis of their boss' promotions; a secretary got promoted not so much for her skill but because of her boss' skill, but the structure of the Industrial Supply Corporation created, as it were, slaves who were happy with their conditions, and then suddenly you take that off and you say, "My goodness, these women don't want to move up," when for 50 or 100 years you've been beating them down and telling them they were inferior, only fit for secretarial work, only fit for clerical work, and all of a sudden you give them a little survey, and their aspirations are not very high.

You've got your cake and you're eating it too. You've kept your aspirations down, and now you've used their low aspirations to suggest why you shouldn't promote them aggressively and encourage them and give them support to move on up in the corporation.

Now, societal discrimination plays a role here, but the point is, within the organization there are interlocking institutionalized practices over a long period that have retarded women's aspirations, and you can't take that off in a few minutes. It's too massive.

Thank you.

CHAIRMAN FLEMMING. I want to express to each member of the panel our deep appreciation for the contributions you have made and also say this, if in the light of the discussion that has taken place here this morning, you have some additional ideas that you feel will be of help to us when we sit down to come to grips with this statement again, we would appreciate very much your giving us the benefit of those additional ideas.

As you have gathered from comments made by members of the Commission and from reading the document itself, this document really seeks to deal with the issue of institutional discrimination on the basis of race or on the basis of sex. It seeks to recognize that it is necessary to tailor or develop some kind of an instrument for dealing with this institutional discrimination. That tool or instrument has carried the label "affirmative action" that has been discussed here today, but I do think that the statement makes a contribution in terms of linking the two, insisting that the two should be linked up in our thinking, in our discussion together.

I appreciate the fact that it is a very difficult problem. We have set forth what represents our best thinking up to that particular point as to the best

way of dealing with this problem of institutional discrimination.

We will certainly consider very carefully the ideas that have been presented to us this morning and the ideas that will be presented to us the rest of the day and tomorrow before we issue a final statement, but you certainly have made a very real contribution for thinking, and we are grateful to each one of you. Thank you very, very much.

The hearing is in recess until 2:00 o'clock.

Assessments of *Affirmative Action in the* from an Enforcement Perspective

CHAIRMAN FLEMMING. First of all, I want to welcome our three panelists for the afternoon and tell them how much we appreciate their being with us and being willing to give up some time as we try to think through a very difficult issue.

Mr. Hartog from our General Counsel's Office has had a great deal of responsibility for working on this statement with the staff and with the Commissioners and developing the plans for these meetings. He will introduce the members of the panel and, after you make these presentations, we will just engage in dialogue.

MR. HARTOG. Thank you, Chairman Flemming. Our panelists this afternoon are Mr. Lawrence Z. Lorber, who is an attorney with the law firm of Breed, Abbott and Morgan in Washington, D.C.; Mr. Weldon Rougeau, former Director of the Office of Federal Contract Compliance Programs for the Department of Labor; and Ms. Eleanor Holmes-Norton, former Chair of the Equal Employment Opportunity Commission. All of our panelists this afternoon have extensive experience from within the Federal Government and from without with respect to the Federal civil rights enforcement effort. They have been asked to draw upon these years of firsthand involvement with the Federal civil rights enforcement effort, and with affirmative action, to comment on the Commission's proposed statement.

As is standard Commission procedure, in a consultation each panelist will be given a maximum of 15 minutes to deliver an oral presentation. All our panelists are prepared or have prepared comments on the proposed statement, and these comments will be made part of the record of this proceeding. We will proceed in the order given on the agenda.

Mr. Lawrence Z. Lorber is a partner with the law firm of Breed, Abbot and Morgan in Washington, D.C., specializing in labor and administrative law. Prior to joining the law firm, Mr. Lorber was Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs. As Director, he had responsibility for enforcing Executive Order 11246, governing the equal employment opportunity and affirmative action requirements for Federal contractors. Mr. Lorber has spoken extensively and published several articles on equal employment opportunity and on various regulatory issues. Mr. Lorber received the A.B. degree from Brooklyn College and the J.D. degree from the University of Maryland Law School.

Statement of Lawrence Z. Lorber, Partner, Breed, Abbot and Morgan

MR. LORBER. Thank you, Mr. Hartog. Mr. Chairman Flemming and the rest of the Commissioners, 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 which 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 which 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 broad 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 which any dialogue on equal opportunity now seems to require. Thus, we are reminded by this Commis-

sion 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 make the particular effort to reaffirm their own commitment to equal opportunity but abhor quotas and other manifestations of government policy generally considered under the present-day perception of affirmative action.

I believe it might assist the public debate 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? Or 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 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 statement 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 analytical 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 discrimanatees 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 productively participate 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 which 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 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 a geographic area from recruitment activity because it contains 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 prohi-

bited 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 analysis, 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 attempts 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 which is 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 which 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 had 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 which 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 analysis 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 now seems 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 definition 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 which has evolved over the past decade. In particular, the Commission seems to have adopted the methodology developed by the Office of Federal Contract Compliance in its enforcement of the Executive order requiring affirmative 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 administrataors. 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 singleminded focus significantly distorts that 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 which decided to keep the Executive order authority separate 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. 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 systems 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 nonreflective of necessary skills requirements. Is it affirmative action to require employers to hire the unskilled or lesser skilled? It is "invidious" discrimination to deny employment to the better skilled because of their race or sex? These are questions which 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 which 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 divisive and potentially discriminatory quota.

A continuation 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 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 which 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 no 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 and 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.

Thank you.

MR. HARTOG. Thank you, Mr. Lorber.

Weldon J. Rougeau is former Director of the Office of Federal Contract Compliance Programs of the U.S. Department of Labor. He was appointed to this position in 1977 and served until 1981. In this capacity, he was responsible for the implementation of Executive order 11246, as amended, requiring businesses that contract with the Federal Government to agree as a condition of their contract not to discriminate and to take affirmative action. He was formerly field director of the voter education project of the Southern Regional Council in Atlanta, Georgia, and field secretary for the Congress of Racial Equality in Louisiana, Florida, and Georgia.

Mr. Rougeau holds a bachelor of science degree in sociology from Loyola University in Chicago and a law degree from Harvard Law School, where he was a Felix Frankfurter scholar.

Statement of Weldon J. Rougeau, Former Director, Office of Federal Contract Compliance Programs

MR. ROUGEAU. Thank you, Mr. Hartog. Chairman Flemming and members of the Commission, thank you for inviting me to share with you some of my thoughts about your statement on affirmative action in the 1980s.

I believe the 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 which 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 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 of our society 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 efforts. 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.

I look forward to discussing with you the proposed statement and its implications for the future efforts to eliminate discrimination from our society. Thank you.

MR. HARTOG. Thank you, Mr. Rougeau.

Eleanor Holmes-Norton, a constitutional and civil rights lawyer, is the first woman appointed to chair the U.S. Equal Employment Opportunity Commission, which is the government agency that enforces Title VII and the Civil Rights Act of 1964 prohibiting employment discrimination. She served in that capacity from June of 1977 to February of 1981. Prior to her tenure at the EEOC, Mrs. Norton was assistant legal director of the American Civil Liberties Union and chair of the New York Commission on Civil Rights. Her work in equal rights began in the civil rights movement and included the sit-in movement, the Mississippi Freedom Democratic Party effort, and campaigns in the North for equal rights. She has also been especially active in behalf of women's rights. Mrs. Norton is presently affiliated with the Urban Institute in Washington, D.C.

Mrs. Norton is coauthor of the book *Sex Discrimination and the Law: Causes and Remedies.* She has also recently announced her intention to write a book that will address the issues currently included in the ongoing debate on the subject of affirmative action.

Mrs. Norton is a graduate of Yale University Law School. She also received a master's degree in American studies from Yale University and a bachelor's degree from Antioch College.

Statement of Eleanor Holmes-Norton, Former Chair, Equal Employment Opportunity Commission

MS. NORTON. Thank you, ladies and gentlemen of the Commission. Mr. Chairman, 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 instituted. Moreover the confusion in public understanding cuts across racial and philosophical lines and reaches from the highest leadership levels to the man and woman in 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 as a senior fellow at the Urban Institute. 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 proposed statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination.* 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 City 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,* the decision that opened up Title VII to the broad reaches that were to follow. By the time I resigned from the Commission with the coming of a new administration, Title VII was a fully mature statute. It would be hard to think of another Federal statute that developed so fully so quickly.

During these very years 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 potency culminated with the consolidation of the compliance functions into the Department of Labor, Office of Contract Compliance, in 1978.

This rapid development in law and regulation outpaced the mechanisms that enforce them. Only in the past 3 years have the primary instruments of enforcement, the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance, undergone significant change.

Each received important new functions and funds that significantly 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 systems that have reduced its backlog, as well as management systems and the establishment of the first formal systemic program designed to make class action work equivalent in importance to individual case processing at the Commission.

I believe I can be most useful if I try to draw upon the history and operation of the government enforcement to indicate future directions that seem to me to be most likely or rational. My references, of course, will be to EEOC, the agency I know best. But I should say at the onset that there is no credible way to look at government and our discrimination enforcement in the 1980s piecemeal.

The President's civil rights reorganization did not complete consolidation, but the consolidation and coordination which have occurred have led the public to expect rationally structured enforcement without duplication and conflict by whatever means are available to the agencies.

The underlying thesis of my remarks is that government enforcement by EEOC will change markedly, with the government dominating and in some instances preempting the field, a sharp turn from the private party law enforcement that often dominated during the past decade. This will put unprecedented pressure on government to produce strong, streamlined, and fair procedures for enforcement.

By the role of government I am, of course, not talking about our affirmative action in the contract compliance sense, for that is based on contract rather than law enforcement theory and is all government because it has as its nexus the government contract. By the role of government I mean in law enforcement that takes place through the EEOC and private actions brought by individuals and in actions initiated by EEOC in a quasi-prosecutorial role.

Contrary to common impression, EEOC has not always been the principal actor in antidiscrimination law enforcement. Section 706(f)(1) of Title VII authorizes suits by private parties as well, a somewhat unusual provision. It was a compromise reached at the time of the enactment of the statute: rather than give the agencies cease and desist authority, the tradeoff was to let private parties to go to court. Indeed, EEOC could not itself go to court at all until 1972.

This is one of those compromises that business may have come to regret. A single agency, no matter how efficient, could never have brought more than a few hundred cases a year. Instead, with private party law enforcement buttressing government enforcement, thousands were brought each year. There was a veritable garden of lawsuits. Those who were in the defendant end might call them weeds, but the fact is that they greatly accelerated the broad and liberal development of the statute.

Without the private bar bringing lawsuits in every district court of the United States and in every court of appeals, Title VII would never have developed in so short a time. Between 1971, when *Griggs* was brought, and 1979, when *Weber* was decided, this

statute became a fully mature statute in something under a decade. The courts in hundreds of cases had interpreted Title VII as a broad and powerful instrument, but almost all the major cases that shaped the statute were brought by private individuals, though EEOC played a critical role as intervenor or amicus, supplying money, manpower, and expertise to help counsel.

However, the familiar names that established the most important law enforcement principles all are cases brought by private parties and not the government: *McDonnell Douglas,* which established that statistics can make out a prima facie case of disparate treatment which the employer must rebut; *Moody v. Albemarle,* which established a virtual mandatory requirement for backpay, perhaps the most powerful deterrent under the statute; and, of course, *Griggs v. Duke Power,* the leading case in the field, which established the theory of disparate impact, that employers are responsible for a discriminatory impact, even if there is no discriminatory intent.

But the era of law enforcement by private lawsuits is over. There will always be private suits, of course, but the cost and complexity of lawsuits is and will continue to severely limit the capacity of the private bar to mount significant litigation of a kind brought by private litigators in the 1970s. The small private practitioner that dominated the field in the early years of the statute has already dried up; a somewhat larger firm is necessary to mount these cases today.

During my tenure at EEOC we set up a highly structured referral panel system in our district offices to refer parties to where EEOC had chosen not to litigate or where the party desired private representation. EEOC is encountering considerable difficulty in getting private lawyers to take such referrals today. We can see this in the statistics from the courts that show for the first time that private lawsuits are falling rather than rising as has been the custom throughout the development of the statute. For the year ending June 30, 1979, there were 4,804 private lawsuits brought in the district courts of the United States. For the year ending June 30, 1980, the number had fallen to 4,394 suits, a drop of 410 suits, or about an 8 percent drop in a single year.

I think you can expect a decline in private lawsuits to continue. The reason for the drop in private litigation can be seen most readily in the cost of mounting litigation that today takes on many of the aspects of antitrust litigation in its complexity.

The smallest class case today cannot be mounted for much under $15,000 for the statistical work alone, the work for the computer, key punching, coding for the programmer, for the systems analyst, for the computer time. And a case of any size at all—again, for the statistical work alone—and I am not dealing with the many other expenses, especially the expert expenses and for the discovery and the other necessary expenses of litigation—the statistical work alone in a case of any size will run $25,000.

Now, virtually all cases today depend upon, absolutely depend upon, the use of experts. The cheapest expert may be a labor economist because he doesn't depend upon support people, works with the statistician on ideas and approaches in identifying the available pool. It is not unusual for that expert alone to cost $10,000. Or it may be an industrial psychologist or medical doctor in an age case, for example. In any case, it will be a very high price expert.

A case that EEOC is about to bring in a $2 million settlement on, affecting a class of 1,600 people, looks very impressive. However, it took $350,000 to mount that case and its expenses. Of course, a private attorney can recover his costs and fees, but only if he wins and in any case he will need to raise considerable up-front money just to carry the litigation for the years it can take before some consent decree or win in court develops.

Why does it cost so much? First, the easy cases are all gone, as one might expect 15 years after the statute was enacted. All that are left now for the most part are cases of deeply institutionalized discrimination where the proof is necessarily more difficult. Secondly, as the statute has matured in case after case, the courts have refined the statistical and other proof necessary. While some decry this, I am a grownup lawyer and always expected it to be that way, that as the employer began to litigate back, the courts would be forced to narrow and refine the statute. For example, very often in the beginning population statistics could suffice to prove a case, and they almost never do today, and more refined statistics are most often needed. This leaves only the government, in my judgment, in the 1980s with the capacity to mount the kinds of cases that are left.

EEOC has spent the last 3 or 4 years trying to put itself in a position to carry this burden for the first time in its history. Your Commission is aware of many of the changes in operations made at the EEOC; as long as it had the 100,000-case backlog, it

would have been more than unequal to this task. That backlog is now two-thirds gone, should have been gone, expected it to be totally gone by end of FY 82; with the budget cuts announced it will be FY 83 before all the old cases are gone. However, it now takes 4 months to process an individual case at EEOC, whereas it took 2 years to process an individual case when it came, freeing up staff resources to do other work, the all-important systemic work.

Remedies have risen from $1,400 per case to $3,200 per case today. A major system program has been mounted where, for the first time, systemic units are present in every field office so that EEOC may give equal importance to class action work. The structural changes in antidiscrimination agencies I alluded to in the beginning of my statement did not come a bit too soon.

The changes in particular are placing similar statutes in the same agency, EEOC, and in placing compliance functions in the OFCCP. A function that is perhaps less well known to the public but of great importance is the coordination function given EEOC, which now commands that the Federal Government speak with one voice in equal employment enforcement. Without that the government would have not been gainful to the task they must pursue in the eighties to be even reasonably effective—one set of policies, one way of doing investigations, one way of collecting data, one way of engaging in other practices. The present civil rights reorganization was clearly good for enforcement, but that was only one of the reasons it passed overwhelmingly.

The other reason, and perhaps the predominant reason, was the relief it gave business from duplicative, overlapping, and conflicting actions that were cost and paper intensive. There are many bonuses that have already been realized from the transfer of the coordination function to EEOC's jurisdiction.

If I could name but three examples, for example, all guidelines today are adopted by all the agencies instead of having conflicting guidelines. The conflicting guidelines had bizarre results in the past. For example, the basic document in the field is the Uniform Guidelines on Employee Selection. When I came to the Commission there were two sets of uniform guidelines on employee selection. There is, of course, now one. There were two sets of pension guidelines, although this had to be sorted out by the courts.

Another example of what coordination can do for enforcement is the EEOC-OFCCP approach to systemic work today. EEEOC will not bring a case if there has been a recent compliance review by OFCCP. No more "two on one," which wasted government resources, got no mileage for protected classes, and was unfair to respondents.

Large questions are, of course, still left open. The present civil rights reorganization has already responded significantly to the outrage that accumulated for years among the public, which had to respond to a dispersed and uncoordinated many-legged equal employment octopus.

But the two major pieces of the enforcement machinery remain separate. If they continue to do so, that will have a major impact on enforcement in the 1980s and beyond. Most of the remaining problems in government enforcement require a comprehensive approach. For example, some of the major questions that trouble employers under the Executive order simply would not arise if these functions were in one agency, such as the controversy over whether or not OFCCP should be awarding backpay after it has done a compliance review.

If targeting of employers were done by the same institutions, the targeting would be much more rational and fair, since one could tailor the remedy to the particular employer. Even with the excellent memorandum of understanding that mandates joint decisionmaking on targeting and even with the excellent cooperation between the two agencies, these targeting decisions, who to pursue—the all-important decision—will necessarily be a compromise process if EEOC and OFCCP remain separate and independent institutions.

An important example of how this worked was EEOC's recent $23 million settlement of the Ford complaint—8-year-old Ford complaint—where Ford refused to sign the consent decree until there was a signoff by OFCCP, and well it might when it was giving up that kind of money. So the process had to go on for several months longer while, of course, we met with OFCCP. That would have been done contemporaneously if these were one agency.

I am not overestimating the difficulties of consolidation. If not done under planned and expert management, it is better that it not happen at all. But the logic of this is irresistible: we will not have a rational and efficient enforcement machinery until consolidation occurs sometime in the future.

It would be shortsighted not to understand the relationship of voluntary enforcement to consolidation. The—I'm sorry; I have 1 more minute. I can't begin that. Perhaps I should stop.

CHAIRMAN FLEMMING. Ms. Norton, go ahead.

MS. NORTON. Voluntary enforcement is, in my judgment, the wave of the future, if government enforcement is strong and therefore is a deterrent. The most egregious patterns have already been rooted out in the first 15 years of work by EEOC and OFCCP. Ironically, the worst remaining patterns are female ones because of the strong prevalance of virtually all-female occupations.

Women are concentrated in about 20 occupations, men in about 230. Thus, it is still possible to make out in many instances a prima facie case on statistics, or not much more than statistics alone, in female cases. But since EEOC has introduced rational targeting in systemic work on a worst-first basis, we have found it necessary to pass over many companies, and certainly many units of companies, because they are hiring in accordance with availability.

It was hardly the picture 10 years ago. Therefore, if OFCCP and EEOC are to operate in a fair and efficient manner in the future, they will have to exercise great care to hone in on the persistent violators, or they will be going after people who really do not need government oversight.

In that case both agencies will lose their credibility as enforcers. Such care in targeting is much harder to achieve if agencies continue to operate in two separate institutions. However pejorative the term "affirmative action" has become for some, it is a strong tool buttressed by many years of statutory, regulatory, and court sanction. If greater care is taken to encourage better public understanding of these remedies, there will be greater public acceptance.

To cite just two among many points that need to be clarified, that these are transitory remedies, not permanent fixtures in the American workplace. These remedies recede and disappear. As discrimination is overcome, as we see in the systemic work we are doing now, and the companies we are passing over, because they do not appear to need government enforcement.

Secondly, these are last-resort remedies, and I think the public has little appreciation for what the process was in reaching these remedies finally. Lesser remedies were tried for many years with virtually no success, and, I emphasize, they did not budge. They didn't move at all the patterns that were blatantly discriminatory.

If the sad history of remedy-failure is laid out clearly, I believe most Americans will come to see why the Congress, the State legislators, and the courts have all finally unanimously embraced these remedies. The alternative was simply unthinkable: permanent second-class status for minorities and women.

What must be faced is that strong and sure application of these remedies alone can guarantee their disappearance. These remedies hold the seed of their own destruction; the law so requires. It will not be a destruction to be decried, for with it will come equality.

But there is no easy and totally painless way to get there. These patterns were built in leadened attitudes and practices centuries in the making. They must be taken apart step by step. It is a labor for the whole society. It need not be long in the doing. It can be largely accomplished, in my view, before the end of this century, but the quid pro quo is strong affirmative action now to end the past and begin the future.

Thank you and I apologize for going over my time.

MR. HARTOG. Chairman Flemming?

Discussion

CHAIRMAN FLEMMING. We are very appreciative of all three presentations and I am now going to invite my colleagues to raise questions, make comments based on the presentations, and invite the panel also to break in and engage in the discussion with us at any point if you so desire.

I know that Vice Chairman Berry has another commitment just a little later on, so I'm going to recognize her at this particular point.

VICE CHAIRMAN BERRY. Thank you very much, Mr. Chairman. I listened with great interest to the presentation with you, and, Mr Lorber, I had some difficulty understanding your paper. I read it as you gave it. I had a hunch there were a lot of things sort of hidden that I didn't really understand, and then after I listened to Ms. Norton and Mr. Rougeau, I had some clearer understanding about your complaints, not fully understanding what you were complaining about when I first read it.

Let me just ask a couple of questions of each of you. I noticed, Ms. Norton, that you said backpay—and I took this down—was one of the most powerful deterrents under the statute—and you were talking

about Title VII—and I note in your paper, Mr. Lorber, you seem to say that—you complain about backpay and the emphasis on backpay as a remedy, and you juxtapose that with the notion that they should be creating jobs. I assume you were talking about OFCCP, and not about Title VII, or is it that you are just opposed to emphasizing backpay altogether?

MR. LORBER. Oh, no, not at all. I think the problem that I had with the Commission's report and obviously not represented accurately is that I think there is a distinction between affirmative action and nondiscrimination. I think the two are certainly related to each other, but as a governmental effort the nondiscrimination focus of the EEOC should certainly continue. Obviously, backpay is a part of it. The Supreme Court, as Chair Norton has indicated, said it was a necessary part of it.

I don't question that, but I do question the affirmative action agency, the agency charged with that responsibility, from engaging in the efforts that Ms. Norton indicated were duplicative, perhaps redundant, and I would submit those problems still have not changed. The consolidation helped matters, but you still have two agencies trying to find employers guilty, essentially doing the same thing, and that they had to wait several months for the Ford settlement to be completed, I think, is an indictment of the system and not something that should be applauded. I think the two functions to work should be separated, and affirmative action, prospective job creation, should be kept separate and apart from the necessary and continuing obligation to find and remedy discrimination.

I think the point is that you blur the distinction between the two. I think the two are distinguishable.

VICE CHAIRMAN BERRY. Was that the same point you were making, or a related one when you kept emphasizing the necessity for one arm of the government to work on innovational job creation as you put it?

MR. LORBER. That's right.

VICE CHAIRMAN BERRY. You were referring to the OFCCP?

MR. LORBER. Or the Labor Department, or any other, you know, however that function gets developed. I think it is an appropriate function. I think it should be done. I don't think it is being done very well now.

VICE CHAIRMAN BERRY. The other point was, you seem to indicate, that you believe that using statistical work or using statistics will be less important; you say that the Commission is emphasizing sophisticated statistical imbalances and you think that will be less important because employers can simply show a rational reason for their decision, and I thought I understood you to say, Ms. Norton, to say something about statistical imbalances being used increasingly as evidence and becoming more complicated. Is there any conflict between these two points of view?

If I could ask Ms. Norton first? Have I understood?

MS. NORTON. If Mr. Lorber seemed to decry the complications involved in the statistical proof, I would have thought he would have agreed to them because it is much more difficult now to make the proof because the courts increasingly require very precise statistical proof. I don't understand why one would decry that.

For example, it is accepted universally that to prove an antitrust case will necessarily be complicated, and we understand, because we all want the end values that come with antitrust enforcement, that that is part of the price you pay. I haven't heard people complain about antitrust enforcement because it is difficult to prove.

As discrimination becomes harder to prove, we are moving into some of the same difficulties. Are we to be a society that accepts and pays for statistical proof in antitrust violations but decries and refuses to pay for statistical proof in discrimination violation?

MR. LORBER. Without addressing the antitrust problems, because I am not an expert, I merely point out that the development of statistical analysis is not, I don't believe, necessarily simply a burden-of-proof problem. What has happened is that discrimination—somebody is being denied opportunities—a rather discrete problem, a problem that I think Congress tried to address in 1964, has been converted into a new definition where, by any objective characteristic, an individual employer who had an individual employment process can be deemed to have violated the law, to have discriminated, to have denied persons opportunities because of some statistical analysis based on some comparisons which may not be relevant at all.

Two standard deviations off the norm constitute a prima facie case of discrimination, whether or not Justice Stevens' law clerk has indicated in a footnote he agrees or disagrees. You have all of those

problems, and it seems to me that if we are dealing with discrimination, and the predicate of the requirement to take affirmative action is discrimination, then what you are doing is unduly complicating things; what you are really saying is that the basic problem of individuals or groups being denied opportunities has been dealt with. We don't need the agencies anymore. We don't need the laws anymore. There is a need for bureaucratic self-preservation. You develop new, more sophisticated techniques to deal with problems. I don't believe that's true. I don't believe it is necessary, and I think we are spending an inordinate amount of time and, as Ms. Norton said, money keeping statisticians wealthy, psychologists and a whole host of other folks, where we might devote our attention to some more basic problems of people being denied jobs.

VICE CHAIRMAN BERRY. I was interested in your statement, Mr. Lorber, that you didn't believe the vast majority of employers today would choose to disregard qualified individuals because of their race or sex, and I was interested in that because it seemed to me the issue, instead, was whether employers would hire only some people who were qualified and ignore others, and that that was really the issue, not whether they disregarded qualified people. They might disregard some women and minorities who are qualified at the same time that they might hire some white males who are ostensibly qualified. I would put the issue differently. Would you quarrel with that framing of the issue?

MR. LORBER. As I listened to it I don't know that we differ greatly at all. I'm not blind to that fact there are people who won't hire blacks and hire women. I think they should be dealt with and I think the law is designed to do it. I simply don't believe most employers today, because of the operation of the law, because it is 1981 and not 1964, will consciously engage in exclusionary employment practices.

COMMISSIONER HORN. When you enforce affirmative action, how do you avoid some of the abuses that we heard about this morning and we talk about in our paper? Do you think we have explained it in such a way that if one follows what is in the paper, interfering with merit standards, for example—I'm asking each of you, not just you, Mr. Lorber—forcing employers to hire unqualified people, giving preferential treatment, engaging in reverse discrimination—and, while you enforce Title VII or 11246, how do you in fact avoid putting employers in the position of having to abandon merit? I just wondered. How do you do that?

MR. ROUGEAU. I don't think it is ever a question of abandoning merit in trying to take affirmative action. I have interpreted the Commission's paper, that statement, as embracing "affirmative action" in rather global terms, fairly expansively to deal with a whole continuum of problems that might militate against the effective use of minorities and women in a work force, housing, what have you.

A lot of the discussion has been about employment, but I take it that the Commission statement goes way beyond employment and seeks to embrace all the various social sectors. I think it is important in enforcing affirmative action requirements for the government to be flexible and to be fairly objective in looking at compliance with affirmative action requirements.

It is necessary, I believe, to look at good-faith efforts, as I indicated in my statement, to determine whether or not an employer has, in fact, created a false system, sort of the faulty implementation process that your statement goes into by saying we are going to bring on blacks or Hispanics or women if we can find them.

It doesn't matter that normally we have looked for people with certain generic qualifications. That, I think, is a wrong way to enforce affirmative action, for employers to take affirmative action. Where there have been instances, however, that white males have been brought on without certain requirements, meeting certain standards, and they have been hired for certain jobs, and they have been moved in a certain career path, then I think the argument of merit becomes a rather bogus one and fairly specious, because invariably you find minorities and women being confronted with a certain set of standards in order to get into the process, whereas many white males, and the majority of them if you look back 10, 15, 20 years, did not have to meet those standards.

I think any enforcement agency in looking at the quality of compliance with affirmative action has to look very specifically at what that employer is doing and how it is trying to achieve its bottom line, which, with affirmative action, is to bring, to facilitate more members of previously excluded groups into the work force or any other place.

COMMISSIONER HORN. Mr. Lorber, do you think we have carefully explained the concept in such a way in our paper that we will help people to avoid

violating merit standards and the like, as they enforce affirmative action?

MR. LORBER. Well, I guess the answer is no. I think what you have done is defined an affirmative action which is a remedy for discrimination. I think what Mr. Rougeau just described in most instances probably would be called discrimination, where different standards were used to employ one group than another group to the detriment of the second group. To the extent you have proved discrimination and you choose to remedy that discrimination, monitor that remedying of discrimination, you might call it affirmative action, as the statute does, or you might call it whatever you wish.

As I understood the purpose of the Commission's statement, what you wanted to do was develop a thesis to encourage affirmative action as a general perspective, at least in my understanding, in the employment context, certainly in others, where employers would not simply react to somebody saying "you are guilty," where an employer would not wait for that moment, would step out and make every effort to increase representation of women, minorities, handicapped, whatever in its work force.

To that extent I would believe the type of analysis that Mr. Rouguau just went into, the result, the reaction to discrimination is going to become a hindrance. Employers are in business to be in business. If they believe that if they take an action, that action will result in an indictment which will, while perhaps increasing job opportunities, at the same time result in a finding that they have discriminated, with the statutory remedies of backpay, with other remedies, with court orders, with court review and maintenance of control over the employer's personnel system, I think employers will probably say, "We'll defend when attacked" and simply not step out. I think what you are doing is making that stepping out a dangerous act, and I personally don't think it is necessary to the extent you are doing it, separating the police function, the appropriate police function, the Title VII function, from the function which would assist employers in creating jobs, perhaps redefining merit, reviewing their processes, that is inclusive and not exclusive would be helpful.

That is why I think there is a distinction between the two terms. If you are viewing it simply as a remedy, where the statute provides that, I don't believe the Congress would change the statute and maybe we'll all go about doing something else. If you are trying to develop a thesis where employers are encouraged to undertake other actions, then I think it is important to separate the two concepts.

COMMISSIONER HORN. Do you, Ms. Norton, agree with Mr. Lorber or Mr. Rougeau or none of the above?

MS. NORTON. I am always concerned about the question you raise about abuse because of the widespread sense that this is all about abuse. Of course, where millions, literally millions, of hiring and promotion decisions are made each day, one cannot expect an all-pervasive expertise of the kind one would like to see always. Indeed, I believe it is remarkable the extent to which personnel people, supervisors of all kinds, have absorbed some of the rather technical standards as they develop about how to hire and promote.

There will certainly be instances of abuse. They can be corrected in my judgment by professionalizing personnel practices, including making that professionalization available to supervisors and others who may not be professionally in personnel. The fact is that employers can always defend against actions by EEOC and OFCCP by demonstrating that there was not the availability either of us thought, and the fact is that employers have had extraordinary success in demonstrating that. But the fact remains that, I suppose if one were to look at unemployment rates, one would understand why one has to press very hard and why such pressure occasionally may result in abuse or be abused—I think it is correctable and has always been correctable—but the fact is white males' unemployment rates, even in hard times, tend to be so low as to indicate that people are moving from one job to another.

They are remarkably low if you take them out from among other unemployment rates although in times of recession they too go up. The reason for this is that they are the most readily available, to fill most of the primary jobs. They are in fact the most readily available. They are the easiest to identify. They are the ones most used to stepping forward, and, if the employer did what was natural, he would end up, as he has always ended up, with that white male work force.

What I think is the burden on those who oppose strong affirmative action is to show what is the alternative. After years of trying other alternatives to this, I would like to ask Larry, because I think his is rather a radical proposal, he talks about job creation, whether he is really asking that the Office

of Federal Contract Compliance be absorbed into CETA. I can't understand what job creation means in the context of affirmative action and nondiscrimination, especially since we know that even when jobs are plentiful, minorities have an experience in the work force that is greatly different from that of whites. Even when minority unemployment was at the lowest that I can remember in a long time, in 1969, something over 6 percent, white unemployment was at 3 percent.

If you create jobs, it looks like in this society you do not bite into this continuous problem, and I just would be interested in hearing him elaborate on it.

COMMISSIONER HORN. I'm interested.

MR. LORBER. I suppose CETA may not be the appropriate vehicle anymore. The experiences I understood—and maybe Weldon could elaborate on this—in the Labor Department in the last 3 or 4 years—they did institute a linkage program between some of the CETA training efforts and the OFCCP enforcement whereby jobs with persons who were being trained in jobs have some relationship to the job needs and requirements in any individual location. I think that type of effort should continue to the extent there is a Federal involvement with job creation.

I understand there will be a continued Federal involvement in private sector job creation, that portion of CETA, the PSIP program that is supposed to continue. If it does, I think there should be a close nexus between the legal requirements of government contractors, the discrete group of employers who are hiring, to have some relationship to the jobs that are being trained and created, and vice versa, the job training efforts have some relationship to the places where Federal contracts are going to go.

You have a legal obligation, a contract relationship, and I think those two activities should be increased. It will make job creation meaningful. It will give some meaning to the lipservice of creating jobs in the private sector and not in the public sector, so to the extent to which you want to make the affirmative action obligation, the affirmative action program a part of whatever evolves as a Federal job training effort, I would not be opposed to it.

To the extent to which there might be staff resources and financial resources left over which had previously been focused on ferreting out nondiscrimination, which, at the moment, is a requirement of the Executive order, a requirement of OFCCP, perhaps further efforts along the lines that Ms. Norton indicated, about consolidating nondiscrimination efforts, should go forward.

At the moment I don't have any bureaucratic desire to have OFCCP be as large or whatever. And maybe there would be some rationalization towards increasing and focusing, and for the final time, putting the nondiscrimination function in one agency which would devote its resources to ferreting out discrimination which is still there and having another agency of the Federal Government devote its resources to job creation. That was the basis upon which the Philadelphia plan was upheld. That was the basis upon which in 1972 OFCC then, OFCCP now, was maintained as a separate entity, that it was to be different from the OFCCP, that it was to focus on job creation. If we come to the conclusion that that is simply unattainable, maybe we should only have a nondiscrimination agency as a remedy for finding discrimination. Call it affirmative action, call it whatever you want—it is very much a cause and effect relationship, and hopefully, eventually within this century, or perhaps the next, discrimination will be ferreted out.

I think it is going to take a long time. I think it is mixing two concepts, and reordering the bureaucratic structure might make some sense. At the moment you have a lot of duplication, and today they announced the unemployment figures, and black unemployment, according to the *Star*, is twice white unemployment. Those problems are still continuing. Maybe we should look at the results of 15 years and not say we haven't done enough, but say maybe we should try something different.

VICE CHAIRMAN BERRY. Thank you.

CHAIRMAN FLEMMING. Mr. Rougeau?

MR. ROUGEAU. Dr. Berry, let me indicate something here because what I would like to do is take an industry which is now experiencing a tremendous growth, the electronics industry. It is projected to create upwards of 200,000 new vacancies in the next 10 years, in the decade of the eighties.

Now, if you go to most electronic firms—and the last time I looked there were somewhere around 2,600 nationwide—you will find very few blacks, very few Hispanics, and very few women, although the numbers of women are certainly increasing around the country.

As I view your statement, you are saying, "Okay, this is an instance of historic discrimination," if you

will. Blacks and Hispanics could not get into many engineering schools, certainly in the South; women could not get in.

This is an instance where employers could certainly take some type of affirmative action. What will be the quality or character of that affirmative action? Well, maybe that employer, in concert with other members of the electronics industry, could decide on a program to facilitate the entrance into and graduation out of schools of engineering so that the supply could be created or enhanced.

That I view as the kind of affirmative action you are saying is going to be necessary to dismantle the process of discrimination, and as I view it—and I think the way your statement articulates it—you are talking about discrimination that goes way beyond what the courts have determined to be discrimination.

We are talking about the kinds of things that all of us have experienced at one time or another, or have known to occur and which we know are still occurring. How do you dismantle that process of discrimination? I think there are creative ways that members of particular industries, indeed companies, that are large enough can begin the process of creating pools of experienced people to enter into selected fields.

If it is not done, I can assure you in 1990 we will still be talking about the black unemployment rate being twice what it is today, and you are still going to have token blacks, women, and Hispanics in highly skilled jobs but that industry, for example, is going to continue to grow into the 21st century.

CHAIRMAN FLEMMING. All right. We certainly appreciate the dialog that has just taken place. I would like to ask a question, but I'm not necessarily going to ask members of the panel to take the time to reply to it at this point.

You may think about it and you may be able to give us some leads. Throughout the day, as we expected, there have been a good many references to a growing negative feeling, negative attitude, toward the utilization of affirmative action or the development and implementation of affirmative action plans.

Personally, I am not surprised at that. I am not surprised that we are at that particular point in our history so far as civil rights is concerned. You can't enforce civil rights laws without disturbing the status quo, and you can't disturb the status quo without creating opposition, so I don't think we should be surprised at that. But I am wondering—I recognize the fact that all three members of the panel had enforcement experience until very recently and have been right in the middle of enforcement activities.

Mrs. Norton, that is why we value your testimony so highly. Growing out of your experiences, can you identify situations where there was resistance to developing and implementing an affirmative action plan, but where, as a result of experience with an affirmative action plan, a positive attitude has replaced the negative attitude that the employer started out with?

I personally have run across a number of situations where that kind of an evolution took place, where an employer was very negative, but he was forced into the development and implementation of an affirmative action plan, and he did develop and he did implement, and as a result of the experiences that he had, he became a person who supported the concept, supported it enthusiastically. I am just wondering if it is possible to identify persons who have gone through that kind of evolution as far as their thinking is concerned. We hear about those who are at the point where they are very negative because somebody is trying to force them to do something or other, but so often we don't hear about those who have gone through the evolution that I have described and who will come out with a very positive attitude.

It seems to me they are there and they will develop the kind of public opinion, if I can use Ms. Norton's thought, looking down the road, or the turn of the century, and it will mean that the needs will begin to fade simply because of the fact that more and more persons will be sold on the fact that they must come to grips with whatever aspects of institutional discrimination are left and do things that it is necessary to do to bring about a correction.

MR. LORBER. I think, Dr. Flemming, we should view one other part of your question and that is to find those who are unhappy—what is it they are unhappy with? Are they unhappy with taking affirmative action that means forcing them to review their personnel policy, create a scheme by which they will increase participation, or are they unhappy with the problem that once they do this, they will be judged not on results but on a rather detailed review of the paper documentation that they went into? You have those.

I think it is very difficult to separate those two problems. I think you can find a lot of employers now, not certainly all of them, who accept the concept of inclusion, if that means affirmative action, but who view it as an impossible task in that they will forever be judged guilty of violating one regulation or another. Now, I am just as responsible for those regulations—in some respects more so, than anybody else here.

The problem is, it is very difficult to distinguish the sources of unhappiness.

CHAIRMAN FLEMMING. I appreciate that, and I appreciate it falls in various categories, but I still feel there is a category of persons who have gone through an experience who will come out of it with a very positive attitude rather than a negative attitude.

MR. ROUGEAU. I think there are. I think there are many companies that, for the first time, have developed affirmative action programs, certainly those that fall under the jurisdiction of the OFCCP, where there is a requirement to develop an affirmative action program, if an employer has a contract of $50,000 or more and 50 or more employees.

I have encountered some employers who, for the first time, developed an affirmative action program the way it is supposed to be developed according to the regulations, and they have said they came out of the process feeling a lot better about it because they thought they had put together a result-oriented program toward which their managers could then work.

If the implementation of an affirmative action program is not viewed as a working business document around which an entire management team unites, then it is not going to succeed.

In those instances where companies have viewed affirmative action programs in that context, I think they have had far more success than in others, and the usual case that the OFCCP will encounter is an employer who thinks it has developed an adequate affirmative action program only to be told its program does not comport with the rules and regulations of the Labor Department.

Then it goes through the process. It grinds out some of the paper, but it learns something about its personnel system and how seasoned government investigators view the way they are implementing their personnel and other administrative systems.

I think it is a very healthy system. I think there are many employers who could be identified. Indeed there are large employers who will tell you, Fortune 500 companies that will tell you, that since they have had to develop affirmative action programs, they have been able to unite themselves around goals and objectives.

CHAIRMAN FLEMMING. Those are the kinds of experiences I think we can identify more than we have to get into the discussion that is going on at the present time.

Ms. Norton, do you want to comment on that?

COMMISSIONER HORN. Two of you are former directors of OFCCP. Let me ask you this question, just so I am apprised as to your understanding of the state of the law. Is it the policy of OFCCP that when a work unit has underutilization of a protected class, that any member of that class who is minimaly qualified, that is a job applicant, must be appointed to a vacancy in that work area ahead of those who are much more qualified until the underutilization no longer exists?

Is that your understanding of Federal policy?

MR. ROUGEAU. I'm not sure I really understand your question fully.

COMMISSIONER HORN. Would you like me to repeat it?

MR. ROUGEAU. At the time I left OFCCP I think there were instances where employees were underutilized. If they passed over persons who were more qualified than a minority, or a woman, and could justify passing that person over, I know of no instance where they were found in noncompliance for failure to hire the lesser qualified person.

There were some instances where employers felt that they were compelled to hire lesser qualified persons, but in many of these instances throughout our investigations we determined that standards that were used were standards which had not been applied to white males previously, and in those instances our response was normally, "Let's not create a standard now that minorities and women are competing for jobs. Let's hire them on the same basis as before."

That's about as specific as I can be in regard to your question.

COMMISSIONER HORN. Mr. Lorber, do you understand the question because I'll be glad to repeat it.

MR. LORBER. No. I think I do. I think the answer in several instances is yes, that if there is underutilization, significant pressure is put on employers to hire in those work units members of classes that are underutilized. I would transpose it not only as an

OFCCP problem, however, Commissioner. I think part of the concern that some find with the Uniform Selection Guidelines—maybe Ms. Norton can address it—is to the same thing.

If you have adverse impact, the employer has two choices: either validate, which some say is impossible, others say is extremely difficult (more expensive perhaps than they wish to bear), or you hire until the adverse impact is gone and you hire, almost by definition, minimally qualified or lesser qualified persons.

I think that is a problem. I don't know that there is necessarily much you can do about it in a practical vein with both agencies, that the regulations of OFCCP and Uniform Guidelines I think lead to that. Whether or not there is another way out I don't know, but to say they don't lead to that result, I think is simply closing your eyes to how things are.

COMMISSIONER HORN. Do you know of a specific regulation of OFCCP that requires that the employer hire a minimally qualified person when there is statistical underutilization ahead of much more qualified people? Is there a specific regulation at OFCCP?

MR. LORBER. There is a manual and I don't have it before me and I don't have the section numbers before me. I will not even guess—someplace in chapter 2—that does have language to that effect, where there is, however one determines underutilization—you must hire the minimally qualified, at least until such time as that underutilization is abated.

They have it as policy, and I suppose it can be presented to you. I will be glad to look at it.

COMMISSIONER HORN. I would appreciate it being filed for the record.

CHAIRMAN FLEMMING. At this point if there are no objections, it will be inserted into the record.

MR. ROUGEAU. The manual is not a regulation. I think your question was whether there is a regulation.

COMMISSIONER HORN. That's correct.

MR. ROUGEAU. I know of no regulation that requires that. The manual, of course, does have language that seeks to——

COMMISSIONER HORN. If I could hold the record open at this point, I would like the Staff Director to pursue with OFCCP what is the specific language of the manual that compliance officers use that might relate to this particular area.

Ms. Norton?

MS. NORTON. I think you will find that many employers find the area you just addressed within the good-faith effort, that an employer who is able to show that he needs people who are more qualified to address that and do address that, by indicating that he has not met goals during this period because of good-faith effort did not in fact result in people of qualifications that he needed, and I think that could be a defense for not hiring minimally qualified persons.

I think one also has to look at job-related qualifications for the job, and my question to you would be whether or not the minimally qualified person was minimally qualified on job-related standards, whereas a person who is "much better qualified" was qualified on standards that did not necessarily relate to the ability to do the job. That happens to be a very important question.

COMMISSIONER HORN. I understand that.

MS. NORTON. Because courts have indeed found, and often found, that a person who is much better qualified, nevertheless, should not necessarily have been hired, because those much better qualifications did not go to performing this particular job. One of the things that has been most difficult for the public to understand, in a country where some people have been able to obtain only minimal qualifications, that it is discriminatory to keep that person from a job by referring to a person who was trained to do that plus something else.

I do not agree that the guidelines lead to the hiring of the most minimally qualified, either. I believe that the very same reasoning would apply. The uniform guidelines do attempt to make it easier for the employer to avoid the very paperwork that Mr. Lorber decries by saying, "You have two options." You didn't used to have two options. You used to have to validate every test, but after some years of experience we say, "Look, you can either validate the tests and it may be important to you to do that because you may find people who pass this test are people who can basically do the job, or better do the job." Fine, validate the test and then no matter how adverse the impact, if it screens all minorities and women, if you have a validated test, you may continue to give that test, but some of you may not like that process. Some of you may have the problem Mr. Lorber has with paperwork and with the technical aspect of validation.

For you we say you may hire on what we have called a bottom-line basis; that is to say, if you in fact

are using minorities and women in accordance with their availability, even though you have not validated your test or all the credentials, we, the government, at least, will not look at the validation process; we will only look at the bottom line.

This we thought was part of the process of accommodating employers. I don't think you can have it both ways: you can't decry validation and decry the bottom-line approach at the same time.

COMMISSIONER HORN. I understand that. My example is based on validated, work-related standards, but 1 person or 2 people, or 10 people, are twice as fast as the other, and the question is, what's the employer to do in that situation? If the employer does pick the other person, to what degree is that contrary to government policy?

As I hear the answer, it is, A, there is no government policy that mandates that you hire the minimally qualified, but, B, the thrust of the enforcement manual is the investigators could go and pursue that, look at that, encourage that, pressure for that, etc. I bring that out because it is partly based on a personal experience with OFCCP where at my university we had investigators for 5 months fishing around and trying to find cases.

I think they are down to four, and this was one of the arguments, and when we had an exit conference (and they never convened the last one) we pointed out to them the premise for their investigation had no basis in law, at which point the supervisor agreed with the university and took the investigator out in the hall and told him that what he had been doing for 6 months was based on a false standard. That's the last we have heard from him for several months.

We also had the experience where the investigator said, "We're not interested in the plight of the minorities; we're interested in what's happening to women." This was a male investigator. Why? Because OFCCP is under class action pressure to do something about women.

All I'm doing in bringing out this type of hodgepodge governmental policy—and when I get my hands on two directors here who really know where the bodies are buried—is to point out it is one thing to have pretty rhetoric be it in law which a lot of us have helped pass (Executive orders, directives, what not)—but it still gets down to that human being in the field and what are the guidelines that guide not only the enforcement staff but send signals to employers so that they know by what standards are we to be judged.

I think, frankly, that there is a great deal of confusion here. Let me move from that example to another one. This came up this morning. One of the thrusts made by several critics of our statement—and while I have supported our statement for a draft discussion, I am somewhat historically sympathetic with this thrust, regardless of whether we're talking about this area or another area, that is, you ought to stress individual rights and individual characteristics—and may I say, I've heard our Chairman wax eloquently on this over the years with regard to the aged, in which he has taken a lead and a pioneer end—and that we ought not to discriminate against people because of individual characteristics, but that we should get away from blanketing people in broad group categories. So we get down to a historic premise of American democracy, as to the group versus the individual.

We're really dealing with that here. We're dealing with certain "protected" categories, and right now in the broad brush—I'm talking about blacks, Hispanic Americans, Asian Americans, Native Americans, and, as you know, there's been a large argument in Congress and in the administration concerning the eligibility of Asian Americans to be in that protected category because there are Asian Americans and Asian Americans, and you look at many indices, and Chinese Americans and Japanese Americans in certain job categories are way ahead of the achievements of the white male if the white male is to be the standard for judgment as to disparity and progress.

Yet I think the attitude has been, and I can understand this, this is a political judgment; it is very human to say, "If you are a group which has something, terrific, we're going to keep it and let's try to keep the others out" or "If we let them in, don't let them affect the benefits our group is getting," which is far from making a judgment on the individual characteristics.

Now that's the premise to get to this question and suggestion. In the discussion this morning the issue was raised, "Should we have a test of relative disadvantage, a scale, if you will, of relative disadvantage?"

The question comes up, what are the elements of such a test? How would one make that judgment? Could it be administered fairly?

Well, we can sit here and speculate all afternoon, but two matters we've got on this table this morning—the degree of poverty of the individual.

One could be degree of race worked in. One could be, as suggested this morning, was English spoken in the home or not to judge the relative disadvantage. It covers now class, race, and you could add gender, and we could add the bilingual aspect. We could add others.

If you took such an index or scale or test of relative disadvantage, at that point it is conceivable that participants in other groups would also become eligible. Let me name one of them, and this is one we have discussed with Vice Chair Leach of the EEOC in the Commission consultation we held on problems of Euro-ethnics, Eastern Europeans and Southern Europeans, in this country.

This group has been disadvantaged historically in this country by problems of religious discrimination intertwined with emigre status, not being northwestern Europeans, etc., which is part of our history.

The question would come up, if you had such a test—let's assume you are Euro-ethnic; let's assume other recent emigre groups might be included in that test. Could such a test be fairly administered? Would we be better off to go to such a test as a matter of government policy rather than simply say if you are black, if you are Asian American, if you are Hispanic American, if you are American Indian, you've got an advantage regardless of whether you are on Park Avenue or you are in a slum, as opposed to a white or a Euro-ethnic who might be, on an objective scale, way behind the particular protected category members and thus suffer because they are being judged on a group basis, not because they are being judged as an individual where indeed their disparity might be much greater than many others but not all, not even a majority perhaps, but at least some of them?

I would like to get the feel of this panel for that approach, a point system, if you will, to determine disparity, disadvantage, to make affirmative action decisions.

MR. ROUGEAU. I am categorically against it because the institution of slavery was not something that was meted to individuals; it was done to a group of people. The problem that we have in understanding the problems of blacks, of Hispanics, particularly Hispanics in southwest Texas, Puerto Ricans in New York who share the ghetto life with blacks, is that somehow we believe that this group process has not affected the entire group and the way the group can function in society—and it has!

No one would dispute that the institution of slavery has had devastating effects on generations of people and continues to have those effects. Now we turn to the new stages of how to mete out equality in America. They say everyone should be judged on the basis of individual worth. I think to embrace that kind of notion would be contrary to history and historical fact, and would merely overlook the real problem that racial minorities, certainly in this country, face and continue to face.

Supreme Court Justice Thurgood Marshall could go in some communities today and try to buy a house, and there are some real estate agents who would not know he is a Supreme Court Justice. They would make that determination to not sell to him based on his skin color, the texture of his hair, or his "blackness."

Now, that happens daily, Dr. Horn, and now is not the time to begin substituting a test of individual harm to determine who should get what. This is a time for people to address themselves to age-old problems of group discrimination. Black people were discriminated against as a group; women were discriminated against as a group; so I'm really opposed to the test because I think it really is—if you start doing that, it is just going to make the problem this country faces in race and sex more severe than ever.

COMMISSIONER HORN. Well, granted the slavery argument, then, do you give 10, 20 points for slavery, and that includes only the blacks as a protected class?

MR. ROUGEAU. Personally, I'm in favor of reparations, but I don't think they would ever go over.

COMMISSIONER HORN. I'm sure as a great, great grandchild there is something that would be—something I can see people pursuing but——

MR. ROUGEAU. The question is being raised now with regard to Japanese Americans.

COMMISSIONER HORN. Right.

MR. ROUGEAU. In reparations, certainly we have dealt with that to a certain extent with American Indians, and, who knows, it could very well be that this country at some point will make a determination that there is a need for some other way to redress the wrong against blacks, Hispanics, and women, certainly, but I would hate to see us begin administering tests to determine relative harm.

COMMISSIONER HORN. Well, you've left out Asian Americans in your example. They have not been subjected to slavery.

MR. ROUGEAU. I mentioned the Japanese Americans. Certainly, they were subjected to concentration camps.

COMMISSIONER HORN. That particular problem is being dealt with.

MR. ROUGEAU. That is a group problem.

COMMISSIONER HORN. Chinese Americans were not subjected to concentration camps, as you put it. I'm trying to get at how do you justify only four protected categories when we haven't looked at religious discrimination in this country with which we have also had a problem. You haven't looked at the problems of Euro-ethnics, etc., and so forth.

You know, what the observer landing from Mars would see is, four groups have made it, and like every immigrant group coming to this country, whether in chains or elsewhere, they say, "Pull up the gangplank. Don't let anybody else in the protected categories."

I'm saying, doesn't government have an obligation to look at other groups in society in which some members or all members might be discriminated against and to apply a fair standard to get at that discrimination, be it religious discrimination or whatever?

MR. ROUGEAU. Yes. The answer to that is yes, all forms of discrimination should be dealt with. There is no question that during the time I was director of OFCCP I was visited by some Euro-ethnic groups. Italians and Poles, for instance, came from New York and Chicago, complaining of executive suite discrimination in those two cities. But that is minor compared to what blacks and Hispanics and women as groups have had to face over the years because the first thing—and even Jews had the same problem—and the first thing that one company did was to bring a senior vice president who was Jewish to meet with all the people who had complained about executive suite discrimination and said, "You see, it is not a problem," but the government should certainly reckon with that and understand it and know how to get at it.

Government—however, if there is one lesson for us to learn over this—is that once we begin doing a job to overcome the effects of previous conditions of servitude, we should finish it, and clearly we did not do that after the passage of the 13th amendment.

COMMISSIONER HORN. Well, you've met with these groups and I take it you are sympathetic to the argument that their consideration should be reviewed but I, as I hear you answer—you do not think it has impacted enough of them to really make it worth the government's concern.

MR. ROUGEAU. I don't think it is as much a problem as is discrimination against black people, against Hispanics, and against women in this country.

COMMISSIONER HORN. But isn't it important that, if it is a problem to several thousand of them, or several hundred thousand of them—shouldn't the government care about them?

MR. ROUGEAU. I think I indicated that, if it is a problem, then the government should certainly address it.

COMMISSIONER HORN. But it doesn't.

MR. ROUGEAU. The question is how do you allocate resources for it? Yes, it does. Certainly, when I was at OFCCP we investigated complaints of ethnic discrimination.

. COMMISSIONER HORN. Was one complaint ever favorably given to the person that complained on an ethnic discrimination basis?

MR. ROUGEAU. The one I know of was not. We found no cause, and that was one area where one of the senior vice presidents of this particular company happened to be Jewish, and there was no basis on which we could find that this particular individual had been discriminated against, not solely because of that.

MS. NORTON. I don't think it is appropriate to assume as, I must say, your last question did that, if such a complaint was brought, discrimination would not be found.

COMMISSIONER HORN. I just asked. No complaint was decided in favor of ethnic discrimination.

MS. NORTON. Let me indicate to you as someone who enforced discrimination laws in New York City as well as here nationally that, although other groups have had extraordinary success in the American workplace, there do remain pockets of discrimination which the agencies are quite intent on ferreting out.

In New York, for example, with the greatest of difficulty we initiated complaints against corporations for executive suite discrimination involving Jews and Catholics. It was the greatest difficulty, because, very frankly, of the difficulty of identifying people who were the discriminatee, and yet it seemed to us important to pursue that pocket of discrimination.

At the EEOC there were several complaints outstanding which involved both Jews and Catho-

lics, but I am saying that in any attempt today to decide where resources would go, we would have a hard time justifying putting a great many of the resources in those directions, and let me explain why.

First, the framework of your question betrays an understanding that belongs with benefits theory rather than discrimination theory. God save us from somebody who would go around giving us all points on disadvantage. If Larry is worried about paperwork now, we will be jumping from the frying pan into the fire. Indeed, that has not been the intent of the statutes.

These are not benefits to be handed out; these are remedies that arose from a framework of Constitution and law. First, it is important to understand that only with great difficulty can one overcome the neutral constitutional presumption. One cannot simply go around because there has been discrimination saying, "We'll overcome that by being race conscious, sex conscious, ethnic conscious."

Disadvantage alone does not overcome neutral constitutional barriers. It took decades to convince the courts and the Congress that these barriers should be overcome with respect to certain groups. Why certain groups and not other groups? I'll tell you why certain groups and not others.

This is the greatest country in the world. This is a country that attracted millions of people, especially the immigrants in the late 19th and 20th century who got off boats as ignorant peasants, who could not speak the language, and within one or two generations this country made almost all of them whole, many of them middle class. It was not unusual to have—it is not unusual today—a parent or grandparent who could not speak the language, to be the mayor of a city or to be in a craft union, making $50,000 a year.

There was, indeed, something, if I may use a pejorative term, akin to a white-skinned privilege in an all-white country that had a history not only of discrimination against people who were black, but against people who were different racially in other ways.

As to Asians, let me assure you that in affirmative action programs where you can show you're using Asians according to availability, you don't set goals for Asians, but the fact is in many areas of the country Asians have experienced the kind of discrimnation that Hispanics have in some parts and blacks have in other parts.

I would like to invite you to go to Chinatown where people live in many ways worse than they do in Harlem. There are other parts of the country where one indeed would not choose out such classes, and in a consent decree at EEOC, every consent decree does not include Asians; every consent decree does not include Hispanics or blacks. One must show they are not being used in accordance with their availability.

The reason that, despite some discrimination against people of European origin, they are not denoted for statutory and regulatory discrimination purposes in a consistent manner is their success in the American workplace. Their lack of success goes to basically when they came to this country; thus you will find that the longer an ethnic group has been in this country, the greater mobility it has.

This has been documented in study after study after study. It is quite amazing. You're in this country and you're white, one generation, you get this far. If you are in this country and you're white, two generations, you get this far. It's really marvelous and wonderful. Because it has been so wonderful for almost all Americans, it really stands out that some Americans have not experienced what amounts to almost magic mobility. You didn't have to be very talented. You didn't have to be much better than the next fellow, in fact, in order to do better than your grandfather did. The fact is, if, like me, you can trace your people back 10 generations in this country, you have to ask yourself in this generation, how come we are not, as among the oldest Americans, like white people who are among the oldest Americans, given what generational mobility has done to other people.

You cannot ignore that question in assessing why some groups flick out of the pot the way others do not; it is not because they are not deserving of benefits; it is because a status has not been overcome that for other groups has been overcome.

In this country every group that came expected one generation, maybe two, of poverty, but they didn't expect four and they didn't expect eight. And they didn't deserve four and they didn't deserve eight. And I don't know how many generations you need before you finally say these groups have indeed not experienced what all the rest of us experienced. We must be doing something wrong with respect to these groups. Perhaps we need some remedies that go to what has kept these groups from experiencing what other groups have experienced.

As we look at other groups, different white groups, we will also see always different kinds of progress. The question is, is there an explanation for that progress? The studies tell us that the major explanation for the differences among white groups is indeed the time they have spent in this country. Where that is not the case, where the explanation is the person is a Catholic or that the person is Jew, the law must proceed on behalf of those people the way it proceeds on behalf of other people.

COMMISSIONER HORN. I am well aware of that, but one can ask that, if we had pursued these policies for a decade, perhaps two decades, and we are still arguing over the gap of not closing on unemployment and on retention in education from elementary to secondary to higher education and professional schools, then maybe we ought to look at a few other ways to solve the problem, which is getting down to the educational level, the problem of family structure, etc., which might be one of the reasons some of the other groups have also succeeded.

I would suggest that usually we approach these tasks—as I listen to this discussion for 12 years and 10 years before that—usually we approach them with blinders on even though we are trying to be colorblind. And all I'm searching for is an intellectual discussion of trying to address the problem and not sweep the problem under the rug because it is uncomfortable to address the problems. And that is why I am pursuing these questions.

One last question, Ms. Norton. As I recall, Mr Leach, when he appeared before us, was going to pursue within EEOC, or at least see that some consideration was given to the problems of Euro-ethnics and could a point system be developed. You have answered that.

Mr. Rougeau, you answered that you don't think too much of that approach, but my question is simply a factual one: did the EEOC ever consider this possibility as a Commission or a staff paper? Were there any discussions? We might benefit from that.

MS. NORTON. The point system, in my judgment, would not be legal under Title VII.

COMMISSIONER HORN. You are saying because it isn't a race within the concept of Title VII or what?

MS. NORTON. I'm saying Title VII and the decisions thereunder outline the way in which one goes after discrimination and in my judgment a point system would not be legal under the statute.

COMMISSIONER HORN. Okay. So it was never explored even at a staff level?

MS. NORTON. I have no idea. Ask Commissioner Leach. Each Commissioner has his own assistant and access to staff.

COMMISSIONER HORN. Thank you.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. I was somewhat disappointed in the testimony we received this morning and even this afternoon in relationship to what the Commission has intended. In drafting this proposed statement, we thought or, at least, I thought, there might be a bridge of understanding past and beyond semantic issues, and it seemed to me this morning we were tied up with those.

Then in terms of definitions, I'm not sure we even agree. I'm not sure we are changing anyone's mind or even changing our own. I would like to get down to some specific areas in the statement to see how you respond specifically to this statement as a statement.

Mr. Rougeau and Ms. Norton liked the statement and I believe in their initial remarks part of what they were saying was people don't understand the statement; therefore, or affirmative action, therefore, and that is the basis of the gap between us, and I found some of those who disliked the statement this morning and, Mr. Lorber, intelligent people, and I want to understand why it is he doesn't understand this statement if that's the case. What are the obstacles to coming to some common agreement?

For example, here on page 5 in our statement we try, at the bottom of the page, last paragraph, going on to page 6, to come to grips with how we are defining affirmative action.

On page 35 again we deal with that. I'm trying to clarify how we can come up with a statement that indeed bridges the gap and speaks to the supposed lack of understanding of those who have reservations. Can we look at some specifics where you object and where you favor this particular statement?

On page 5 and 35 we try to come to grips with defining affirmative action as a process. Is there a problem in those definitions that we are providing?

Mr. Lorber, do you want to start?

MR. LORBER. Well, the problem I have with your statement was that you define affirmative action as a remedy for discrimination. Title VII provides that it is a remedy for discrimination. Your analysis is predicated on a finding of discrimination. To the

extent to which you view it simply as a remedy, as the catchall phrase, the umbrella under which any action might be taken to undo a specific discriminatory act which can be proven against the employer, call it what you will, it is not a problem. I suppose that might be too strong a statement. My concern is that I always thought that affirmative action, as distinguished from nondiscrimination, connotated some sort of extra step, further obligation of the employer.

Executive Order 11246 is the law which seemed to understand that to be the basis for the Executive order; otherwise, it would simply be redundant, it would have been redundant.

COMMISSIONER SALTZMAN. Am I understanding here that it is not necessarily a situation in terms of law that is discriminatory? We are going beyond that. We are saying there are systemic problems that, under the law, may not be discrimination and in the court not be so judged. We are addressing the broadest systemic issue in these definitions. Maybe I don't understand what you're saying. Maybe I'm simple minded or something.

MR. LORBER. Well, I guess the second question is how do we define discrimination. I am a lawyer and I view things rather narrowly. There is a law that prohibits discrimination and it is Title VII among others—several other laws as well. Those laws have definitions, court definitions or statutory definitions. It says what you cannot do.

If you do what you cannot do, the law has a response to it. You have a problem, you have a remedy to that action, rather discrete acts. I think, as I tried to indicate before—and I guess I will try one more time—as I understand, as I read and understand the Commission's paper, what you have here is a defense of affirmative action as a remedy for discrimination, a citation of all the titles——

COMMISSIONER SALTZMAN. In the largest sense.

MR. LORBER. But I don't believe—I frankly don't see where this paper does that. I think it is a very accurate reflection of one state of the law.

My question to you, Commissioner, is what would you envision affirmative action to be in a case where we cannot find employer *X* to be guilty of violating some proscription of prohibition under Title VII? Employer *X* did not violate the uniform guidelines, did not use an examination which will show to have adverse impact, but not to be validated. Does that mean that employer *X* does not have to do anything else? Maybe it does. Maybe legally it does.

I think the law at least is sustainable insofar as government contractors are concerned, that the government might require that employer, regardless of whether or not it violated Title VII, EEOC's law, to do something else, to ensure that when it gets government contracts, some cause and effect relationship government contracts would cause, the effect is bringing in persons to participate in the government largess, if you will.

I think to the extent to which that is a meaning of affirmative action, maybe we should focus some activity upon it. What you have done here, at least as I read this, and maybe it is my understanding, is predicate the action upon the finding of discrimination, the statistical analysis of, that you discuss very appropriately in your report, that we all know exists, as a means of determining a prima facie case of discrimination; that then becomes the trigger which results in a certain defined series of actions. If you are going to deal with it on that level, if that's what you call affirmative action, we are talking about code words, if that's what you call it.

COMMISSIONER SALTZMAN. I'm not trying to deal with code words, really. I'm trying to deal with specifics. Affirmative action is a broad spectrum as we defined it, all kinds of specific measures, and those measures may be triggered by different things. In the extreme, they may be triggered by a finding of discrimination. But there are others in the whole spectrum that do not have to be triggered by findings——

MR. LORBER. I don't think—when we're dealing with this in the theoretical sense, you're probably right. I can think of a case in the D.C. circuit called *Page v. Bolger* involving the Postal Service. It was determined that the Postal Service, which had adopted an affirmative action plan, did not follow that plan in the selection of the supervisor, an individual supervisor, and it was determined on three separate hearings that there was no discrimination as might be defined by the law that the supervisor was denied the opportunity because he was black, but it was determined that the affirmative action plan was not followed.

And the circuit court of appeals said that became a violation of Title VII and a violation of law, because an affirmative action plan was not followed. Where it was not shown that the individual was not discriminated against, quite the contrary, it was shown that the selection process chose the best

qualified person without regard and absent any consideration of the race of any of the applicants.

The simple point is that I don't think it is possible to ignore reality. I don't think it is possible to ignore the reality that Dr. Horn apparently experienced under affirmative action compliance review. I don't think it is possible to ignore the reality of the fact that as it is presently constituted, with 1,400 compliance officers out there, it has been transposed into something which might have some salutary basis to it, which might be an appropriate governmental function, but in my view does not mean affirmative action as the courts might have stated it.

Maybe we're all talking in the ephemeral; maybe it is not possible to make these distinctions. Simply put, I don't think the distinction was made here. I think the problem with afirmative action, why it has the bad name that it has (maybe not as bad as CETA but close to it), is simply that those distinctions have not been made. Those abuses have been viewed not as abuses but as a code word for somebody saying "I don't want to do it," and I don't think that's the case.

I think, if you don't examine those very practical problems, the Commission will issue another report and the debate that now has a lot of heat and will probably abate for a while and rise up again, just go back and forth. And we all and our progeny will be here the next several generations debating the issue.

That, I think, is the problem to talk about other than in bureaucratic terms—after all, we are all former, has-been bureaucrats—just cannot be ignored.

COMMISSIONER SALTZMAN. I think it is the intention of the Commission to look at specific models and to look at where the most constructive forum for affirmative action, can be structured in a successful pattern and perhaps then to provide a national model that avoids the abuses, and becomes—let me ask Mr. Rougeau and Ms. Norton whether they feel positive to this. A reason why we are not able to entice Mr. Lorber to see it as we see it or others.

MR. ROUGEAU. What appealed to me about this statement—and I thought following my reading of it that you were not trying to track the law—you were looking for something that would have more common acceptance among the American public.

You did not want to—as a matter of fact, I read language there that you did not want to tie yourselves to legal concepts and the very narrow areas that any lawyer would be concerned with, which I think probably worries Mr. Lorber.

I thought that was good because I see a great need for groups like the Civil Rights Commission to explain to the American public that this concept of affirmative action they've heard so much about—and many of them are not aware it has been around since 1961; they think that it started in California with the case of Alan Bakke—but that it is really something other than reserving 16 places in a medical school, that it has any number of concepts that can be used.

As I indicated, it is an expansive, elastic concept. I found that appealing, that you were going to try to do that. Certainly, you need a lot of examples. You need to indicate success stories, how it has been done, what it means in the context of a construction company, as opposed to a nonconstruction company, a university, a medical school.

There are various ways that it could be charted out so that the average John and Mary who are reading that report, and we ought to be trying to find the people, the blue-collar people, for want of a better expression, but those people who really, surveys indicate to us, are saying affirmative action is nothing but preferential treatment.

I happen to know it is more than that; it is a whole lot more than that.

COMMISSIONER SALTZMAN. Let me ask you how would you go about redoing this—that's going to be our challenge—to achieve what you see in here and what you see it ought to be doing. Hopefully, if it can do it for blue collar, whatever, it ought to be able to do it for Mr. Lorber or some of the earlier panelists, or Mr. Abram, who was here this morning. How would you alter this or redo it and what would you include or what would you exclude?

MR. ROUGEAU. Maybe affirmative action ought to be described as a process that is used in various companies.

COMMISSIONER SALTZMAN. Isn't that what we've said?

MR. ROUGEAU. Yes, I'm with you. I've read that in there. It is obviously in here. The format that you use, as Larry indicated in his remarks, closely tracks what's done in the contract compliance program. You talk about faulty implementation, a major problem of many affirmative action programs. Although the government has said don't discriminate against anybody, you find that middle manager who says, "I'm hiring this woman because I've got a goal to meet, and the people upstairs have told me to meet the goal."

The next thing you know the person comes on board; they don't provide anything for her. The person is immediately ostracised and what happens is that affirmative action suffers because the other workers say she would not have been hired had it not been for that affirmative action program, "because middle management Joe told me that he was told by the front office to hire a woman to meet a goal."

Well, I think you ought to try to put it in a business context. How can it be used to enhance the operation of an organization, be it a college or a university or a business firm? How does a management team unite around an affirmative action program? How is it merged with the nonaffirmative action aspects of that business, and then, how do the various managerial levels interact with those goals and objectives?

That's really what we're talking about. We're talking about a process which, when it is viewed in a corporate context, is going to have equal weight with a marketing process or any of the other processes in a given organization.

I think you can reorganize this a little bit and make it more of a case study, or how-to approach, giving examples along the way. That's just off the top of my head, but there is high possibility for confusion in just going through it, and I understood it because I think that the problem-remedy approach that you chart out is a very good one.

I saw that you were going beyond what the law requires and you were saying, "Look, the Civil Rights Commission, and a lot of similar commissions have been dealing with this question of discrimination for a long, long time. We've seen laws passed. We've had court decisions and we've had administrative rulings. We have had just about everything. But discrimination has a dimension which goes beyond that, and in order to embrace affirmative action in its most creative form, you really need to look at discrimination as a global problem in our society."

That's my understanding of what you tried to do.

COMMISSIONER SALTZMAN. Ms. Norton, do you want to add anything to that?

MS. NORTON. Just a word. While I think I can understand your frustration, Commissioner Saltzman, in trying to get something of a consensus on this, it is my considered judgment that remedies of this kind will always have some fair degree of controversy attached to them. This is a country in which the experience of most people has been that, if you stick around and have mediocre ability for a generation or two, things get very much better for you.

We have produced a middle-class country where the only poor people are black people and brown people and some old people, so most people look around and they see nothing in the experience of these minorities and women that comports with their own or that of their ancestors, so it is genuinely difficult for people to understand how such remedies come to be.

I must say that the Commission has made a very laudable effort here. Instead of simply doing an advocacy document for affirmative action—it is clear that you are for affirmative action—throughout the document you are in pains to try to take on the shibboleths and try to explain what you mean.

I cite just as an example, one of the most troublesome ones that one hears all the time. On page 36 where you say, "One such misunderstanding has been to confuse statistical underrepresentation of minorities and women with discrimination itself, rather than seeing such data as the best available warning signal," etc., and then you go on at the end of that paragraph and state that statistics "call for further investigation into the factors that produce the statistical profile."

You said it there and yet Mr. Lorber, who is a fine managing lawyer, cannot possibly bring to this discussion the same perspective that Weldon and I who have just come out of the agency as enforcers. Maybe the longer you've been away, the better off you are, Larry.

One of the things I think we have to make people understand is that there is built into this process something of an adversarial relationship with the rest of society because we have relatively very few people who now require fairly extraordinary remedies to get what everybody else has gotten painlessly or relatively painlessly, and it is hard for people to accept and understand that.

That is why I think leadership—that is, not go at people as if they are racist or foolish for not understanding these remedies but tries to take people where they are. I think the goal of the Commission is not so much to convince us all affirmative action is something we ought to have a consensus about.

I think Larry's job is to be out trying to make sure that the agencies are rational, perhaps pulling the agencies back somehow. I think the goal of the

Commission and the goal of leadership in this country is to take out of the discussion some of the polarized vexatiousness that one sees in some of the debate, some of the pejorative qualities of the debate that tend to stand black against black and brown and female against white, because even that degree of consensus which we could achieve has not been attempted, and I think your document goes some considerable distance toward bringing us that way.

I think it will be read especially by leadership types, who, I must say, often, on both sides, show the same kind of misunderstanding and polarization you would expect of people who are not at their level, so if this is read by people who are black, for example, and are leaders and have to answer the question of whether quotas are what affirmative action is all about and whether they are for it, I must tell you you would find many of them saying, "Yes, quotas are what affirmative action is all about, and I'm all for it."

And the reason they say that is not because they aren't intelligent, but it is because they believe they have heard the folks on the other side say there is something wrong with quotas, and if you say there is something wrong with quotas, they reason, then I must be for them. It is that that we have to get out of the debate.

CHAIRMAN FLEMMING. Commissioner Ramirez?

COMMISSIONER RAMIREZ. I have thoroughly appreciated your comments, all three of you, and I was particularly intrigued, Ms. Norton, with your comments about if we could present—I think they were your comments–if we could present the history of all the things that have been attempted and have not succeeded, it would be useful to the general public.

I am also very pleased to get a sense of your sense of progress in the area of equal employment and your vision that we may see marked success by the turn of the century. I am assuming that you see that success with all of the current enforcement mechanisms in place. Is that correct?

MS. NORTON. Yes, that is correct. And I must say only it is a most optimistic view of the enforcement process, since it assumes that the enforcement process will get strong, remain strong, and get stronger; that the society will tolerate for short periods of time increasingly stronger remedies for the tradeoff; that there will be no remedies necessary if they do tolerate them that period of time.

COMMISSIONER RAMIREZ. But assume for a moment that we were to see 50 percent weakening of the structure, both conceptually and in terms of the resources to continue this enforcement process. Do you think we could hold our ground or do you think we would backslide and how much would we backslide? What is your sense of that?

MS. NORTON. I can understand the concern of minorities and women who have never seen permanent progress that if the remedies fall away at some point that there will be reversion to type. I do not believe that that is necessarily the case.

The experience is that when the workplace becomes integrated, that those decisionmakers who have been—if minority and female decisonmakers have been integrated into the workplace, that they then allow the system to revert to natural selection, if I can use that word, that the only reason we need these remedies is because of artificial barriers, such as, for example, totally white male decisionmakers, and in point of fact the experience has been good with employers who have achieved compliance of various units.

I would very much warn against conveying any sense to the American public that the only way minorities and women can get equality in this country is to erect an antidiscrimination structure as refined and as elaborate as it is today. I think there would be some cause to question a democratic society that believed that people were so committed to discrimination that the strongest enforcement mechanisms would be perpetually and always necessary.

I do not share that cynicism. What I do believe is that it will take a period of such concentrated use of remedies in order to achieve compliance, that many must face that that is the only way to achieve it, and that the alternative is something that I think people perhaps prefer even less, and that is the institutionalization of these remedies.

COMMISSIONER RAMIREZ. Right.

MS. NORTON. I think today there would be backsliding because today you have not reached a very high level of compliance across the workplace, but I'm assuming that, if the remedies were allowed to work strongly for periods of decades, that one would see reform in the workplace with validated tests, with the presence of minorities and women throughout the workforce, with job-related credentials, that it would be difficult to backslide, and you would build in compliance even as we appear to have built in noncompliance and have to root it out now.

MR. ROUGEAU. May I add something in the context of your question? I think that this report can be a very useful document for the President because he has indicated at several press conferences that he is not opposed to affirmative action. What he is opposed to are quotas, and I think the discussion that we have had today—and I believe there are a lot of management people here in this country who would offer examples of how affirmative action efforts have helped them get a more diverse work force at all levels of their company.

If those kinds of things could be delineated in a report that you will make available to the Congress and to the President, then I think the President we have today, like many Americans, will see that affirmative action goes way beyond just quotas, that there are any number of things that can be done to facilitate the entrance into a movement through the work force in America.

Many of those things, such as recruiting, doing concentrated recruiting, and a lot of other things need to be spelled out, and Americans need to be told this is also affirmative action, and it is a way of trying to repair some damage that was done.

MR. LORBER. I think it is important to note that certainly I am not aware of any employer group—that is not to say there are not some deep philosophical discussions about it, but the major employer groups in this country, perhaps in this city, have not, to my knowledge, come out against goals and timetables. Many employers are used to it. I think it is a valuable tool.

I attempted to say that in the testimony. The problem is again—perhaps as my two colleagues get greater perspective away from the head of the agency and having to deal with more mundane aspects of it. Those examples on page 36 that the Commission spoke about, the misuse of statistics, saying that's not what we mean by the use of statistics. We don't equate underrepresentation with discrimination. Well, Mr. Rougeau's agency just recently lost a court case in which they attempted to deal with that problem as well.

Having been the head of an agency, I know very well—certainly not the head of the agency who might tell a compliance officer, "You equate underutilization with discrimination, but you do all these things." You go down, Commissioner Saltzman, page 36, you find a lot of statements with which I would agree. I would simply submit that as a practical reality in area offices or district offices the reality is quite different from what your statement states. And what I think in a question I raised to you, and something I raised obliquely in my testimony: is it possible when you are dealing with a bureaucracy to do that finetuning that the Commission seems to want to do?

I personally at this point, having viewed it from one perspective and now another, have grave questions as to whether it can be done, and, raising those questions, I think it might be appropriate for the Commission to devote some resources to see is there not another way to do it, so that we don't have to deal and continuously undo the bureaucratic abuses we face. That's my problem. It is a very practical problem. It is not a problem of philosophy; it is a problem of practicality and the problem is that once the philosophical underpinning gets transposed into a bureaucratic reality, this Commission, as I pointed out, took great pains to say it is against invidious quotas.

Does that mean, Ms. Norton, that this Commission is against affirmative action because minority leaders equate affirmative action with quotas? Of course not. The problem is, as I said, everybody is now saying we're against quotas; we're for equal opportunity. Perhaps it is impossible, as life in this city, the bureaucracy, the regulatory structure is currently constituted, to transform great thoughts from up high into practical reality down below. That's my problem.

COMMISSIONER RAMIREZ. Just before you get off of that, do you have any alternatives, given your double vision?

MR. LORBER. Clouded vision, someone said.

COMMISSIONER RAMIREZ. Your vision from both places and, I think, you are very sincere. Can you see any other ways?

MR. LORBER. Well, yes. Maybe Mr. Rougeau could comment on it. The Labor Department did engage in something, as I understood it, to be called the linkage program. They looked at job training. They looked at the efforts, the resources the government was then putting into job training, and tried to make, for the first time perhaps—and it is unfortunate that we've had two great developments in the world of the workplace: we had the government involvement in training and government involvement in nondiscrimination, and unfortunately the twain never met.

Maybe that's a commentary on a lot of people, but it is true, it is simply true, all the money under

MDTA and CETA had very little to do with all the enforcement effort under OFCCP and EEOC and the Justice Department and all the other agencies. Maybe that's a commentary that the Commission might want to address.

Maybe to the extent there still will be Federal involvement in job training it will be tied to it. Executive Order 11246 has a provision whereby the Secretary of Labor literally would give a gold star, if you will, to an employer who has engaged in affirmataive action, which can show that it has engaged in job training efforts. What that commendation would do is to exempt that employer from day-to-day compliance reviews.

If you meet standard criteria of job creation, job involvement, you have met your obligation as an affirmative action employer. You would still have a nondiscrimination obligation. You wouldn't be exempted from Title VII, but the great, the mass, the plan, all of that—you would have met your obligation. It has never been utilized; it has never been utilized in 16 years. Maybe it should have been, and maybe it should have been when I was the director, but the simple fact is it has never been utilized.

The Executive order was promulgated and one aspect of it was focused on it. I don't have the answers. I am not an economist. I am not a labor market specialist. I simply would submit to this Commission, which might have access to those people, that there might indeed be some creative method that can be used.

I think it is necessary to create tradeoffs. I think we would be blinding ourselves to tell employers, "You must engage in job training but you still must do everything else."

I think an employer cannot be allowed to discriminate but some effort should be made. Back in 1976 when I was at the OFCCP we proposed some regulations, offered an alternative to the methodology of determining underutilization, the age factor analysis, all these thoughts. It was greeted with a great deal of hostility, I might say, by all segments. Ms. Norton, then head of the New York City Commission, had some staff write in opposition because we were raising the possibility of allowing employers to substitute their own job training and creation efforts for the mandatory regulatory and schematic that the OFCCP then was requiring.

The employers said we were engaged in fantasy because we were expecting employers themselves to bear that burden, that cost, the funding. Well, I don't have a great deal of sympathy for employers who complain about the funding. I think if they want to trade off, they should engage in activity and action.

The point remains that we really haven't had any new review by people who have been in the bureaucracy or the Commission as to is there another way. I think there must be, because everybody here today has said that the way that has been done over the last 15 years has not worked very well.

Well, I accept the premise. I am simply saying, if it hasn't worked, if we still have problems, if we still have black unemployment twice that of white unemployment, then maybe there are other ways to deal with the problem and maybe we should [spend] some time reviewing that possibility as well as justifying what's been done today.

MS. NORTON. Could I suggest one point that is important to me and that is to urge the Commission to beware of suggestions that would deflect the discrimination of, or the antidiscrimination efforts, to other efforts served elsewhere in the society such as training efforts.

If, in fact, somehow the OFCCP were requiring training, then Mr. Lorber would be here arguing that it is quite unfair to place on employers who can find already-trained workers the expense of training workers. Believe me, that would be his position.

The fact is linkage is fine as far as it goes, but there's a reason why it has not gone much further than what it has, and that is that there is only the most imprecise hookup between discrimination and job creation. Most of the job creation that the government has anything to do with or can have anything to do with, given the numbers of poor and unskilled people in this country, has to do with lower-level jobs.

Most of affirmative action has to do with jobs a little further up the scale. In any case, the antidiscrimination remedies were established to deal with discrimination. It would be an error, in my judgment, of the first order to blur them into training remedies. In effect, you would be saying that the reason that minorities and women are not hired and promoted is because of training.

I would be the very first to accept that for many kinds of jobs in the society, but it is demonstrably false for many other jobs, and you ought to keep these two concepts, discrimination and training, separate lest we create, perhaps benevolently, a real monster for ourselves.

The bottom line, I think, is to remember how most people got trained; most people got trained by having access to the job. They learned to do that in the workplace. For example, in the construction trades while minorities and women have access to the construction trades almost exclusively through apprenticeship programs—just don't go to medical school, spend 5 or 6 years in an apprenticeship program—the fact is that almost all white males have been trained to do construction on the job.

When you take jobs that are much less complicated than that and recognize the average person has a high school diploma, sometimes a college degree, with no specific training except the wherewithal to get a job, on that job they get training. As a result of the training they get on that job, they get promoted; as a result of the training they get being promoted, they get promoted again. That is the problem that the discrimination laws are meant to address.

We welcome all of the training one wants to put on top of that, but I would think it would be a great error to confuse these two functions, both of which are legitimate for the government.

CHAIRMAN FLEMMING. Commissioner Ruckelshaus?

COMMISSIONER RUCKELSHAUS. Ms. Norton has said that voluntary enforcement is the way of the future so long as all the heavy sanctions remain there as kind of a deterrent. And I am happy to hear you say that because that is essentially some of the evidence we are hoping to expand in our paper.

I am wondering if you have any guidance that you can give us on how you can stimulate industry, corporations, to step out in front more.

My experience with those in corporations who have responsibility for affirmative action programs is that they are pretty much trying to keep their heads down; they are trying very hard to have a plan that will keep their company out of court, unembarrassed, and not blotch their own career path, but anything that might jeopardize that is considered pretty high-risk stuff.

We are hoping to explore some possibilities that aren't risky and that really address systemic, institutionalized kinds of discrimination, not just the illegal kind of discrimination. I am wondering if any of you might have some guidance for us on other ways we can encourage through your best experience in the corporations—encourage that kind of leadership.

I mean, the literature is replete with sad stories about middle managers who have had to take people they didn't really feel were qualified for the job in order to meet some number figure which will satisfy some plan which will satisfy their boss, and they don't feel very good about the person they hire, either.

That seems to me not necessarily their fault. That's a perfectly natural human response, but perhaps the fault is higher up of somebody saying, "I don't care how you do it. Let's keep the company clean."

How do we go about helping to educate? What can we do in this paper to help expand the understanding of it—maybe the fellow a little higher up the management level, maybe even the CEO about what he could do, not just to stay out of court, but to be more innovative with what's available in the job force and to really talk about institutionalized discrimination, not just a legal affirmative action program?

MR. LORBER. Well, obviously, involvement of higher management is critical to that. Obviously, the involvement of the vice president of personnel or industrial relations rather than affirmative action manager or equal employment coordinator becomes critical.

COMMISSIONER RUCKELSHAUS. Excuse me, could I interrupt you just a second? Is there something we can do? Is there something the government can do? Part of the anxiety I feel when I have talked to some of these people is that though they think they have done a good job—they have a pretty good idea they have one of every kind on board the ark—or is it two—they are not so sure that when the compliance officer comes around he will not find something. There is a high level of anxiety about that.

MR. LORBER. That becomes rather self-defeating. Then the view is you can never comply and therefore you do the minimum and keep your head down and fight it. I think certainly flexibility—giving this thing that as we heard today, good-faith compliance, give it real meaning. I simply don't think as a practical matter that is accepted now. And trying to point to employers, making it clear that underutilization in fact does not mean discrimination.

I would submit that as a practical matter out there in the world of compliance and the world of investigation or charge processing, that distinction is observed very rarely if at all, that once you make that determination, you say, "Bingo, we move

quickly from affirmation action to nondiscrimination."

One of the agencies here would rarely leave a workplace where there is so-called underutilization without at least demanding backpay and transposing it into a finding of discrimination. The simple point is that it is in fact difficult if not impossible to comply, the way it is now being enforced.

If affirmative action has the meaning that this document sets out, plans, systemizing good employment practices, which then the assumption would be that that would break down institutional structural barriers to inclusion, then the agencies which enforce the good employment practices, the affirmative action plans, have to deal with those not as rigid, finite, discrete regulatory obligations, "You must do *X, Y* and *Z* and nothing else," because if that happens then the poor middle manager is faced with the problem and then has to go trembling up to the vice president or the general counsel and say, "We've got big problems; we're about to be in a newspaper." There's no percentage in it. It becomes a dead end job. There's no percentage in it.

It might be helpful if it did not become a job for minorities and women, either. That might be one way to break it all apart and channel those people into marketing or other places. I mean, there are several aspects, but I just happen to believe, as nondramatic as it is, that that becomes almost critical. It becomes almost a driving wedge because most corporations that I've had experience with—that's what they care about. If they can get people and also stay out of trouble, they'll do it, but if they don't think they can stay out of trouble, if they think it is an impossibility, they simply say, "Why risk anything? Take a low profile. The chances of getting reviewed are not very great anyway. The chances of getting a thorough review are less than that." And, therefore, things will go away and somebody will spend their time as EEO manager for 2 or 3 years, mercifully get out without a show cause notice, and move on up the corporate ladder.

If that is the way it is perceived, I think that is what the response will be. That's why I had a problem with designating the problem, and I don't see the distinction between discrimination as talked about here and the legal discrimination.

I simply see a fudging of the two. The methodology you use is that which you would use in a court of law to prove the prima facie case of discrimination, and to the extent to which that is the response and that is the definition of affirmative action, I think in a practical, real world basis, some place out in the hinterland they will simply say, "If we can keep them away, we are doing our job. And if they perceive that if we do good, we'll be recognized as doing good, or if we include persons or make changes and that will be recognized, then maybe we'll do that."

Some courts now are begining to accept that, use that as a defense for Title VII claims. Maybe that should be encouraged.

COMMISSIONER RUCKELSHAUS. Mr. Rougeau?

MR. ROUGEAU. I think it is very important to have top management and middle management committed to the overall goals of an affirmative action program. I guess we all know chief executive officers, chairmen of boards of directors who are very committed to equality of opportunity and many of whom have experienced personal sacrifices in demonstrating that commitment, but yet many of them, or maybe all of them, have people within their own companies who don't do them proud, so to speak, when it comes to the implementation of certain aspects of affirmative action. So it becomes very important, I think, as I indicated earlier, to exercise management control over the implementation of an affirmative action program and to give it just as much priority as other nonaffirmative action aspects of that company's operation.

It is also important that the people who have the responsibility for managing that program, that they be given adequate resources and authority to oversee and monitor a program. During the time I was with the government, I ran into many EEO officers, and I think all three of us here probably have at one time or another, who complained about the lack of adequate staff to do their jobs as EEO coordinators or affirmative action coordinators in their companies.

I had one gentleman with a company based on the east coast that had 34 establishments around the country. That individual was responsible for all affirmative action coordination, and yet he was sharing a secretary with another white executive. I told him that he would probably have reviews, contemporaneous reviews in more than one region of the country, and he would have to find a way to be there for all of them, and he said that would simply not be possible.

I said, "Well, you need to go and talk to your CEO or somebody in position of authority in your

company and tell them they need to beef up your staff. You simply cannot do the job of managing this company's affirmative action program without adequate resources." I think that's a problem in many, many companies. It would be one way of a company showing its commitment to a realization of its EEO and affirmative action goals.

Much has been said about these bureaucratic excesses and I know Larry has talked, about it, and I don't doubt for a minute that he has encountered them. Let me put them in a much more realistic context, though.

I defy anyone who has dealt with Washington over the last 10, 15, 20 years (maybe longer than that, but I can't go beyond that) to tell me that there are not agencies of this government that are inconsistent in their application of rules and regulations, often make extreme demands on people out in the hinterland, and do many things which the officials in Washington would disavow upon learning of them.

You know it happens with the IRS. You are subject to go to an auditor for an audit and that individual will fail to interpret a Commissioner's bulletin the way that person's superior will. There is a process in a chain of command of review of subordinates' work. The same thing has been happening and I believe is still in place at the two agencies that are represented here.

Eleanor and I on numerous occasions had to talk to each other about inconsistencies within our own ranks. She would call me and say, "So and so from your staff is doing this in the Midwest. We are certain that this is not the position of OFCCP. Can you check into it?"

We did. We were able to exercise management control over the process. There have been repeated instances of equal opportunity specialists giving their own interpretation of regulations, of manual chapters, of provisions in the manual, and what I have always said to business is don't take that individual's word as the final agency word—your problem Dr. Horn—and repeatedly where individuals failed to state the law or interpret regulations accurately, they were overruled if they were acting out of step with applicable policies and procedures. So I think it is important that when you look at the work of enforcement agencies, you recognize that we make mistakes; our subordinates make mistakes; they misinterpret policies. But the relevant question is, is there a way to stop that from causing harm to an employer?

I submit to you that there is. There is certainly under the system that I left in place, if it has not yet been dismantled, where appeals could go from an area office to a regional office and ultimately to a national office. And I know that Larry knows that because he's availed himself of that process.

MR. LORBER. Not very successfully.

MR. ROUGEAU. Because I overruled you.

COMMISSIONER RUCKELSHAUS. Mr. Rougeau, I was interested in Mr. Lorber's discussion of maybe in addition to having a stick also having a carrot for some of these employers. Do you see any possibility for that?

MR. ROUGEAU. Well, we started that about 2 years ago, what Secretary Marshall at the time called the "linkage program." It was his view that there ought to be a supply and demand, if you will, side in the way that the Labor Department did its work, that we were missing a great opportunity, that Congress was giving us a lot of money for training programs, and yet there were employers who we probably encountered in the course of investigations who had taken good-faith steps to achieve compliance, but maybe for the lack of a resource for available workers could not meet their goals.

We began to do that. That program is still in its infancy. It is on a very small scale. It has not even spilled over into other areas of the Labor Department where we might be able to do things, say, if we were working in the coal mining industry, work perhaps with the Mine Safety and Health Administration.

I believe that ultimately it should be an interdepartmental program that would utilize resources from other departments. It has great promise, but as Eleanor has indicated, it cannot be viewed as a panacea or as a means of supplanting responsibilities on the part of those who have duties to eliminate discrimination from our society.

CHAIRMAN FLEMMING. Mr. Nunez? Any questions?

MR. NUNEZ. No.

CHAIRMAN FLEMMING. Well, we have gone beyond our time considerably here, but the contributions that have been made have been very, very helpful, I assure you of that.

This is the kind of discussion I personally hoped we would have had. We have had it because you have been willing to come here and give us this time and share with us the experiences that you certainly

have not been in the ivory tower as far as this problem is concerned.

Quite the contrary. That's why we wanted you to react to the statement, to the approach that is reflected in the statement, and I am sure that some of the suggestions that have come to us will prove to be very helpful as we have put this in final form.

When it is put in final form and released, we hope that it will prove to be useful to the President, to the Congress, and to those who are in positions of leadership in this country, and that is very, very important.

Thank you so much.

March 11, 1981

Designing and Implementing Affirmative Action Plans

CHAIRMAN FLEMMING. I will ask the witnesses to come forward. May I say that we are very happy to have you with us. We appreciate your spending this time with us. Jack will give us an overall introduction and then introduce the first person.

MR. HARTOG. Thank you, Mr. Chairman. This morning we'll have three panels as indicated on the agenda. The first panelists will be Dr. Rodolfo Alvarez, Dr. Martha Glenn Cox, Dr. George Neely, and Dr. Mark Chesler.

The speakers will talk about the practical issues of designing and implementing affirmative action plans. They have been asked here to assist the Commission in drafting some additional material to be added to its proposed statement on the practical how-to issues of designing and implementing affirmative action plans.

Subsequent panelists this morning and this afternoon will be asked to address the issues of monitoring and evaluating affirmative action plans, and the final panel will be on some executive firsthand experiences with affirmative action plans. We will go in the order in which the speaker is on the agenda and our first speaker will be Rodolfo Alvarez.

Dr. Alvarez is professor of sociology at the University of California at Los Angeles. Dr. Alvarez has written and lectured extensively on the subjects of racial discrimination and affirmative action. He is coeditor of two books, *Discrimination in Organization: Using Social Indicators to Manage Social Change and Racism, Elitism, Professionalism: Barriers to Community Mental Health.* Dr. Alvarez was the founding director of the Spanish Speaking Mental Health Research Center at UCLA. He was also director of the Chicano Studies Center at UCLA for several years. Dr. Alvarez holds a bachelor of arts in sociology from San Francisco State University, a master of arts and a doctorate in sociology from the University of Washington.

Dr. Alvarez, it is a pleasure to have you with us, and I will just state for the record, it is standard Commission procedure for each panelist to have up to a total of 15 minutes to make his or her presentation, and then there will be questions from the Commission. All of our panelists have prepared or are preparing comments on the proposed statement, and these written products will be made a part of the record of these proceedings. Dr. Alvarez, good morning.

Statment of Rodolfo Alvarez, Professor of Sociology, University of California at Los Angeles

DR. ALVAREZ. Good morning. Thank you.

The paper that I have prepared will be coming as soon as I get back to Los Angeles. The title of that paper will be "Enlightened Managerial Self-Interests: Affirmative Action in the 1980s," and I mention that to emphasize that my approach to this subject is from the managerial point of view and from the point of view of someone whose particular approach in sociological research is the analysis of formal organization.

I also say, in advance, that I see affirmative action not as something special or distinct, but as part and parcel of the normal managerial process. With that precursor, I would like to say to the Commission that I am very deeply grateful to have the opportunity to be with you today and to have some input into this enormously important process for our country.

The task before this consultation, as I see it at least, is to assess the adequacy of the proposed Commissions 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 well-reasoned, 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 to date.

The Commission staff, no doubt, has worked heroically to understand and carefully discount the ways in which particular political perspectives and motivations might produce particular, shall we say, extreme actions in the political arena or extreme reactions to the document. Instead, their focus appears to have been on the, in a sense, mechanical ways in which affirmative action, as a remedy, has been legally sanctioned to operate in our society to deal with highly specific problems. Those problems constitute some, but by no means all of the elements of which the processes of personal and institutional discrimination are composed.

I will later suggest a working definition of institutional discrimination that I think is more precise than those included in the document—not that those included in the document are not workable. 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 or organizational discrimination. Even so, we do know much about the very gross elements of it and how they interrelate to create processes of discrimination in general. As I see it, in the past, affirmative action is a set of very specific legally sanctioned remedies that have been aimed at these very gross aspects of the process of discrimination. I will later suggest how I believe these should evolve into more manageable, more precise or refined aspects. It is, as yet, unclear, in any demonstrable evidentiary sense, what past affirmative action programs and plans have accomplished. This is so as much because government appears to have been slow and uncertain in the pursuit of affirmative action, as well as because resistance to its effective implementation has been so widespread, subtle, and increasingly well organized.

While the progress toward equality of opportunity that has been made by women, and by, particularly, national origin groups, has been substantial in some few organizations and even in some regions of the country, moderate progress has been achieved overall. National statistical evidence for the last decade suggests that we have a long, long way to go before we achieve convincing results. Indeed, the evidence suggests that the gap between the white—especially the white male population—and the disadvantaged protected groups in question increased rather than decreased in the 1960s.

Preliminary evidence suggests that, proportionately, that overall gap will have increased again in the decade of the 1970s. In short, although some progress has been made by minorities, the progress by the white male population has been even more substantial. Therefore, the relative gap has increased rather than decreased. 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. Perhaps this increased gap of which I speak would have been larger had affirmative action been absent. It has certainly sensitized—and this is my main point—virtually the entire population to endemic inequalities that exist in our society. It has helped to provide documentation for this inequality. It has also provided a forum for the debate between extremes in the political spectrum, those who believe that all differences in the accomplishments of different groups can be eliminated and those who believe that these differences will remain to a substantial degree regardless of how much help any group will get.

In an era of apparent economic abundance, the sixties, generalized mass media announcements of educational and occupational opportunities for previously excluded populations were only mildly objectionable to favored constituencies, since they perceived no real substantial threat to their own interests. In the ensuing era of increasing economic stringency, the seventies, such announcements in the mass media were like matches on kindling because, correctly or not, favored constituencies in our society now began to perceive their interests to be threatened. It now appears that virtually all programmatic efforts to increase opportunities for populations sufficiently designated as needful of assistance will come under reactionary counterattack. We can predict that many such programs will be undone or severely curtailed.

This, what I call reactionary trends, is born out of fear and narrowly conceived self-interest rather than the overall interest of the entire enterprise. It is based on popular misconceptions rather than empirically demonstrable evidence. 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.

Regardless of the rhetoric of the extreme proponents and the extreme opponents of affirmative action during the decade of the seventies, it seems clear that affirmative action has never—and probably will never—substantially intruded upon the well-established, well-protected advantages of the white male center 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 sixties and seventies, what shall those of us who want to go for real substantive change in the eighties stake out as our ground? The arena that I see emerging for public debate in the eighties is that of enlightened managerial self-interest.

I stated earlier that affirmative action has left virtually no sector of our society unsensitized to the endemic inequalities that persist and which affect our capacity to live in 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.

Among the vast majority of our population are middle and higher level managers that hold responsibilities for the day-to-day operations of thousands, perhaps millions, of public and private organizations through which the very life of our society—of our pluralistic society—is conducted. When major organizations set their policies, they impose the pattern of activity in smaller organizations through several orders of magnitude and then throughout the rest of society. I, for one, am therefore delighted that the Commission has now begun to focus its attention on organizational, that is, institutional discrimination, per se. My remarks are designed to suggest to the Commission that among all of the many things it must do to pursue its own mandate, it must surely focus sharply upon ways by which to enlighten the middle and upper levels of management in all kinds of private and public organizations.

My own particular bias as a professor and a researcher is that research is, at least, a very important avenue by which to reach managers. To do so, it has to be research, the results of which allow managers to realistically see that change toward the elimination of discriminatory practices will increase, rather than lessen, their control over the success and economic well-being of the organizations over which they hold stewardship.

The message, the appeal, must not be characterized by lumping managers as part of the much larger category of "white males," which is very threatening to them. I might add that managers that hold significant leadership and decisionmaking authority are only a fraction of the white male population, even though white males are a significant proportion of the managerial population.

I have misjudged the length of time available. Let me just, very quickly, skip a number of things and go directly to a working research definition that I propose that gets at institutional discrimination much more directly.

Institutional discrimination is a set of social processes through which organizational decisionmaking, either implicitly or explicitly, results in a clearly identified population receiving fewer economic, social, and material rewards for quantitative or qualitative units of performance than a clearly identifiable comparison population within the same organizational constraints. And the question of constraints then becomes terribly important, because you thereby get at comparability of demands for a particular job or a particular educational requirement.

So much has been made of the issue of merit—when merit is described as kind of a universal category—when, in fact, for example, in the case of entering into law school or medical school, academic ability is only one criterion for success in that enterprise. And yet merit—it is defined as merit—whereas merit might reasonably be assessed in a whole number of other criteria as well as academic ability.

Another issue that I want to raise—and maybe I will raise it in the discussion if I have that opportunity—is the difference between representation and representativeness. In the decades that have just passed, we have had tremendous emphasis on representation; that is, the distribution of minorities and women in various organizations—various sectors of organizations—that is, are women distributed in engineering, as well as in clerical positions or bilevel vice-presidential positions, as well as the clerical position? It is a distribution, a representative distribution, that has been the focus by which to determine whether or not discrimination exists.

What I am suggesting, through the definition that I propose, is that we also look at something that might better be labeled "representation"; that is, do the interests of particular populations have represen-

tation in the policies that an organization pursues? You see that, in effect, you might have representativeness; you might have a black or woman vice president of a bank, and you might say, "Well, everything's fine, we have achieved representation." But you haven't. All you have achieved is representativeness of that individual. But that individual might, in fact, continue to pursue the prior established policies of that institution in redlining against a particular population or credit policies that impact on women.

So the fact that you have achieved representativeness of a population within an organization does not necessarily mean that the interests of that population have achieved representation in the work of the organization. And, I remind you, that it is through organizations that the bulk of the work of our modern industrial society is accomplished, so when policies themselves have discriminatory impact, it matters little that you have achieved representativeness of people throughout the organization.

Well, I apologize for not having focused the presentation well.

MR. HARTOG. Thank you, Dr. Alvarez.

Martha Glenn Cox is assistant professor of organization and management at Yale University, and a senior associate with the consulting firm of Goodmeasure, Inc., in Cambridge, Massachusetts. Dr. Cox has written and published several professional articles on communication between culturally diverse groups. She is currently collaborating with Rosabeth Moss Kanter in the preparation of training programs of tokenism and other topics related to the elimination of racism and sexism in organizations and the improvement of the quality of worklife. Organizations to which she has been consultant include the General Electic Company, Hewlett-Packard, the Royal Bank of Canada, Honeywell, Inc., Digital Equipment Co., and Conoco. Dr. Cox holds a bachelor's degree from Indiana University and a doctorate in psychology and social relations from Harvard University.

Good morning, Dr. Cox.

Statement of Martha Glenn Cox, Assistant Professor of Organization and Management, Yale University

DR. COX. What I would like to do before I begin is, first, thank the Commission for bringing together its consultation. I, necessarily, cannot know what you are getting out of it, but I know I have learned a great deal in the past day, and whoever organized it deserves a strong commendation because they have accomplished a great deal in a short time, I think, which is not always true of such meetings. Secondly, I wanted to mention that I thought the Commission's paper was extremely evenhanded and thoughtful. I was happy to see it.

I think affirmative action is a complex issue and I think the statement does justice to that. It doesn't try to seek resolution of the issues, but, rather, lays clearly out what the dimensions are. And I especially appreciated the discussion of unintentional discrimination, which, I think, you will see plays a key role in my analysis of what the problems are and what sort of programs are really needed within corporate America to make affirmative action viable.

With that, I would like to say there are three basic points that I would like to make this morning. One of them is to explain to you my general orientation—the way I understand discrimination and how it operates in the corporate world. Secondly, I would like to present the elements that I think are important for effective implementation. And, finally, I would like to end with what may be a slightly more philosophical, but, I think, nonetheless, important point.

First then, does discrimination occur in corporate America? Yes, indeed, it does.

Are white male managers to blame? No, I don't think so.

Are women or minorities to blame? No, I don't think they are to blame, either.

What I think, in fact, occurs within the corporate world is a pattern of structural discrimination, by which I mean that jobs are structured within those settings in ways that they either create opportunity for the individuals in them or inhibit opportunity. They do so in a variety of ways, by creating differential access to information resources, support, contact with a large organization, and a possibility for advancement—both formal promotional advancement and also for growth in the job—intellectual growth, creative growth, links with the community one is serving, and so on.

Those are the ways in which organizations structure their jobs. And in the analysis of how those jobs are structured you can see that some of them have a great deal more room for growth than others do. I think that, in turn, the way the job is structured has a very big impact on the effectiveness of the occupant

of that job. It is my feeling that, in general—not intentionally, but in general—women have been placed in lower opportunity positions, and their behaviors then become rather predictable and similar to behaviors of white males who are placed in similar positions. Such things as a lowering of aspiration, a higher degree of self-doubt (doubt of one's own abilities), a more intense peer group orientation rather than a task orientation since, if the actual content of your job is not challenging, people will often turn to other aspects of worklife to gain satisfaction.

Women also are talked about as being more outside oriented—oriented to the family, oriented to committee work and so on—and, finally, people who tend to be in low-opportunity positions, when problems do occur, tend to engage in griping or even active sabotage—if you're talking about some line workers in some of our production facilities and so on—which I see as a response to the situation, the sense that the large organization doesn't particularly care what they have to say, and if they were to take a more active problem-solving approach, it would not really be heard.

So I think what's realy going on with the organization is not so much a pattern of individual discrimination—a decisionmaking process that we are going to keep women or we are going to keep minorities out; rather, I think, it is a more systemic and structural problem. I should add that I have a great deal of sympathy for middle management. I've been working with middle and upper management in a consulting capacity for several years now, and I think middle-managers are really caught in the middle. They have tremendous pressures from below, demands from employees, and they are under a great deal of pressure in a bottom-line sense—that's what their head is going to remain on or be taken off on—and at the same time they are under pressure from above, so that, I think, that when we are looking at the affirmative action programs and trying to understand what will make them effective and what will hinder them, we have to have in mind the pragmatic and political realities of management's job.

I also agree with Eleanor Holmes-Norton when she was saying that in most of our institutions people who are the dominant group within those institutions have a genuinely difficult time understanding what kinds of discrimination occur for people who are not like themselves.

I have become convinced over time that white male managers, if you will, have a hard time really seeing—they have not encountered some of the subtle slights and the more overt channelings of energy and so on that women and minorities experience daily on the job. So I think that one of the things that is incumbent on those of us interested in social changes is to help them see what the patterns are, but I will elaborate on that shortly.

Now, what do I think is needed for effective implementation? First, is there a role for government legislation? Absolutely. Not because I think that people, necessarily, have to be coerced—that every step of the way there has to be a whip held over them, if you will; rather, I have seen affirmative action legislation used in a rather different way. By making it a bottom-line issue that is—it becomes an issue in which the company could be saddled with a suit. It has bottom-line implications. And when that is true, then people who are sympathetic toward affirmative action goals—who would like to see it for social reasons and so on—have a much stronger position to come ahead with a program or begin their own individual initiative to try to deal with the situation. So I have seen it used in an internal political sense to validate and give validity to the efforts. So I think it allows people of good will to have more impetus behind their own initiative.

As the program is implemented, I think it needs several things if it is going to be successful. The first thing it needs is top level management support. That is absolutely crucial. It makes clear that the action is important and that it is acceptable within the company. It is demonstrated by commitment of funds. I mean, if you talk to middle managers and you say, "Okay, how do you know when top management is committed to something?" One way they know is because of formal contact. They know of official letters coming from top management, and they also know from their face-to-face contact with that individual CEO, whoever, and they also look to see whether funds have been committed, because they say, "Well, unfortunately, there are a lot of good ideas around here. Some of them get followed up and some of them don't."

The way you can tell when something is happening, however, is if there is a real commitment of funds. These are signals that are looked for by people in the larger organization of what is happening within the corporation and what they should pay attention to.

Secondly, I think that an effective program must hold out carrots to managers as well as sticks. In that sense, doing well in affirmative action programs should result in helping managers. It can become the basis for promotion or recognition within the larger system. It may be that people who do a good job developing the women or minorities receive more trainees in the next go-round.

There are a variety of ways. There are ways of rewarding behavior within organizations currently—not just a promotion, but other kinds of ways of recognizing a contribution—and those need to be hooked to people development as well.

A third thing that programs need to have is to allow managers leeway in designing their own program. I think this is absolutely critical. I don't think that you can march in with a prepackaged program and expect people to become committed to it. This makes a great deal of sense if you think about what I'm arguing, that women and minorities need more opportunities, more flexibility in their jobs, more central jobs, more visible jobs, and so on. I think that that aspect of flexibility—and so that one can use one's own discretion and imagination and creativity on the job is precisely what managers also respond to and, therefore, when they are trying to resolve, to create a new kind of program, they will have more commitment to the program if they have assisted in its development. It's just that simple.

People tend to be more motivated by something where they feel they are part of the action, not simply being coerced or forced into the action. In the paper which I prepared for you, I have laid out a little more concretely exactly how one would go about that.

Fourth, I think that managers need help in perceiving and knowing how to act on discriminatory processes. I can't overstress how much I think that a concrete analysis of patterns of discrimination needs to go on in organizations before you design a program. Specifically, in the study that I was talking about, what we did within the company was to look at what it takes to make a successful sales representative. That was the function of the concern and it has have long-term implications because that's where they draw out top managers and so on. So the first step was to analyze a broad sample of sales representatives, posing the question—not what causes women and minorities difficulties in this environment, but, rather, saying, what is it that makes anybody successful in this job? And to define concretely the kinds of support resources—contacts, visibility, and so on—that are important.

Then we pose the following question: what is it that operates differently if a person on the job is a woman? I might add that minorities in this particular company had had a much better track record at moving into the function, for reasons I don't fully understand.

It seems that some companies have a more difficult time integrating women; others have a more difficult time integrating minorities. In this case it was women. There were differences in how territories were assigned, the amount of contact with the peers which, it turns out, is where a lot of on-the-job learning occurs and so on. So there were a broad range of concrete aspects of the job which were different for women who were in that position and which made it more difficult for them to actually accomplish their work.

Having gathered that information, then, the managers within the system could be exposed to the information which gave them an alternative view of why women had failed in the past. One of the problems in the company was that women had been brought in, they had not done well, they had been moved back out. So there was a very strong feeling of helplessness and a real sense that women couldn't cut the mustard. And one of the things that had to happen within the company, in my view, was for people to see that perhaps there was a chance that women could perform effectively in that function, given the same kind of resources and support that males routinely received.

As this information was laid out to managers in a language they could understand—after all, all of them had in fact been sales representatives at one point or another, and, in fact, it was sometimes humorous. There was often laughter as we laid out some of the things that it takes to make a successful rep and some of the under-the-table ways of rewarding success which it turned out were differentially allocated to males and females. But they were surprised that kind of information had been picked up. So it was very much entering in their culture, in a world that they knew. And in that way we could map out what it takes to make success in general, and then state it to them very clearly and let them think about it and knock on, push against ways in which it was different for women. And, by and large, the male managers to whom this information was given, from the top executive levels on down to

the operating line managers in the field, found it genuinely surprising to see the ways in which they had unintentionally been inhibiting women's effective performance. They could see if they were placed in the same situation and had the same kinds of access to resources within that system that they, too, would have had a difficult time: less on-the-job learning, less attention from district manager, harder time getting special favors from him, and so on. So that they had a new sense. They didn't, necessarily, say, "Oh, well, I totally changed my mind. Of course, women can do it." That's not what I'm saying. I'm saying they had a new understanding of what might have been inhibiting women in the past, and hence it was one way of breaking into the cycle of the self-fulfilling prophecy, the negative attitude toward women.

Finally, I think that a feature that affirmative action programs have to have if they are to be effective is they must ensure that all employees are getting access to the new kind of innovations and so on that are being introduced within the company. Again, this is one of the strengths, in my view, of a structural analysis of an organization because you are saying that it is aspects of the structure which are constraining behavior and, if you need to change things about hiring practices, training practices, on-the-job training, networking, that kind of thing, management-employee relationships, those are things which will benefit white males on the job as well. So that you do not need to advocate special programs for women.

In fact, one of the strongest points of this is that people discovered for themselves, as they were working through the different kinds of information that were presented—was, my goodness, what you're talking about isn't just special help for women; it has broader implications. You're talking about good management, human resource development. I think that, given their understanding of how the processes were working and how to make them work better for all of their employees—realizing that women may have to be especially careful—but they were building, then, a system which could help their company as a whole and help everyone in it. And the women like that, as well.

There was a great deal of fear in the beginning that if the perception was that gender was what enabled people to get ahead, then they would undermine their own attempt to establish credibility within the organization. So that the emphasis here is on making sure that every person in that organization got equal access to the systems of support which are necessary for effective performance, and then may the best person win. I think that both males and females, in my view—and I've worked with all male managers and so on—have a real sense of fair play. I don't think the backlash, for example, is an issue when the program is perceived as being fair. What annoys people is when they feel that new people are getting ahead unfairly, and I think that this system has something in it for everyone.

The final point, the one I said was a little more philosophical, is that it's been my honor to have one of my former students from Harvard here, and yesterday, when I was asking her about her reactions to the day, she raised a point I was ashamed to say had not occurred to me, and that was, there was such a tremendous emphasis in all of our discussions about how to bring women and minorities into the corporate world, the world which is valued in our society, in general, but there was really no discussion about raising the value placed in worlds which were traditionally female, and particularly the raising of families. I think that, in my own view, there is an increasing need within our society for people to be able to have time and energy to invest in their home life—in their family life—as well as in the world of work.

I think things like job sharing, like flexitime, like maternal leave, like paternal leave as well, transfer policies—these are some of the aspects of structures which need to be examined to make it possible for men and women to participate in their family life as well as in the world of work. And, in that sense, I think affirmative action efforts can be a real opportunity for all of us to evaluate systems in which we live and work and to see whether they are really operating the way we want them to and to ask some broader questions about what a more ideal role might look like. Thank you.

MR. HARTOG. Dr. Neely?

George Neely is assistant professor of health administration at the University of North Carolina, and a partner in the consulting firm of Neely, Campbell, Gibb and Associates in Ann Arbor, Michigan. He has published several articles on organizational consulting and affirmative action. He currently is principal investigator under a National Institute of Mental Health grant, studying institutional racism and sexism in North Carolina State government. Organizations to which he has been a

consultant include the Chief of Chaplains of the U.S. Army; UNESCO; U.S. Department of State; the City of Grand Rapids, Michigan; Wisconsin Power and Light Company; Proctor and Gamble, Inc.; the Legal Services Corporation of North Carolina; the Chrysler Corporation; and the Bendix Corporation. Dr. Neely holds a bachelor's degree from the University of Puget Sound and a doctorate in organization psychology from the University of Michigan.

Statement of George Neely, Assistant Professor of Health Administration, University of North Carolina

DR. NEELY. Thank you. I, too, appreciate the opportunity to address this question and to function in a legal fashion here with people who have been struggling with this issue for quite a while. I wanted to try to answer three major questions, and I think that my comments will follow pretty much Dr. Alvarez and Dr. Cox in anticipation of remarks (comments) that probably will be tied in there too.

The three questions that I want to address myself to are: how can an understanding of the problem of discrimination be translated into the design of effective affirmative action plans? The second question is: what has proved effective in gaining meaningful organizational support for affirmative action plans? And the third question has to do with what types of resistance are encountered in implementing affirmative action plans, and how can such resistance be overcome.

I think it is really important—coming out of a high emphasis on regulations to be considered—the issue of affirmative action right now. I anticipate—along with maybe most of you—that the Federal regulatory role will be decreasing in this and other areas and that one of the ways that has potential for keeping energy behind the issue is to attach it to issues of productivity and quality of worklife.

That is, in an educational setting, as a part of the mission of providing a quality education, there should be some components of pluralism and exposure of the whole society to everyone there, the faculty, the students—and that's a mission of an educational system as part of service organization, public sector. That mission should be expressed in terms of providing a pluralistic set of services and benefits to the varied group population as part of its target.

In a production organization it will be tying the quality of worklife to emphasis on increasing productivity, decreasing turnover, decreasing absenteeism, hopefully decreasing sabotage as a result of increasing persons' commitment and understanding of why they are involved as an organization in issues of affirmative action.

If we were able to devote those self-interest arguments and articulate them to the extent they are part of the mission statements of all our organizations, I think we have a better chance of making progress in the area of affirmative action and not have to rely solely upon negative sanctions expressed in a regulatory sense.

In a conceptual framework, first of all there may be three areas. We need a conceptual framework for organizational change, that is, understanding how organizations function and the interaction between organizations in their external environment and how the internal environment sends different messages to different organizational members.

We also need to understand conceptually what affirmative action means and that discrimination is merely an outcome of institutionalized racism and sexism and that our targets, growing out of our conceptual framework, will, more than likely, predict our ability to succeed and make an impact in the area. For example, one thinks that the reason minorities are not in decisionmaking roles in organizations is because of their lack of managerial training. Then, I think, you will go one way in trying to solve the problem. But, if you think that there are institutional barriers or artificial barriers to recruitment or criteria that are applied for recruitment that may disproportionately discriminate against minorities and women, then you go in a different direction.

I think, historically, we have focused, as a country, an awful lot on victim blame—the victims of discrimination—trying to bring them up to speed. The contribution the present statement makes is that it shifts us a little from that victim orientation toward an institutional framework that makes us analyze all the policies, practices, procedures of organizations to determine disparate effects. And, on the basis of that disparate effect, it directs us in some ways of dismantling those discriminatory causes which, hopefully, as a result of some longitudinal analysis, which show us some different results down the road. And I will talk about the role of research briefly as I move through this.

The literature, as you look at it, has very little longitudinal research. There is none that I am aware of. We tried in North Carolina to work for 3 years gathering two sets of data on issues of quality of worklife to see the different perceptions that people held in the workplace about that.

We also asked about components of the affirmative action plan, both from the standpoint of perceptions of individual importance and the perceptions which they thought organizations placed on these components, and in most cases the individual placed the components much higher than they thought the organization placed these components, and we were left with the interesting question, telling the executives on one hand there is not the resistance to affirmative action attitudinally expressed on the part of your members: why do you perceive that there is much more resistance than these data tell us are there? And we get into political considerations and kinds of cost-benefit analysis that do not, for me, indicate an awful lot of enlightened self-interest on the part of most managers. So there is an education role that needs to be played and expansion of ideas of self-interest to include indicators of productivity.

I think there are a number of potential areas of support for affirmative action. Some arguments begin by noting the financial settlements in discrimination cases and employers try to cut their losses and conciliate agreements only to retrench attitudinally and to settle on a case-by-case basis. They try to avoid the embarrassment of protracted legal involvement, and that's one basis for motivation in the affirmative action area.

However, the issue of top management commitment needs to really be considered. I think that in these days we find pretty enlightened folks who can express rhetorical support for affirmative action. But when we ask them, "What are the goodies that are attached to achievement in these areas and what are the negative sanctions attached to nonachievement." We don't see any. We often see affirmative action as a staff function. And, I will submit to you, it should be considered as a line function. Staff people lay things on the line people who resist it, and the line people come back sometimes within the context of some guidelines provided them and play all kinds of games with it, because they don't understand if it is something that is going to be rewarded or held against them as they think about their career in an individual organization. Not only must organizational leadership endorse and support affirmative action; they must stand willing and convincingly so to expect and get results in the area.

A set of principles which you may want to keep in mind that I try to think of as I look at the issue: until self-interest arguments are developed and articulated and believed, we will not see much progress. Looking for new recruitment sources and implementing an aggressive career development plan, consistent with future minority and female utilization needs, is important. Identifying organizational individual barriers to utilization at regular intervals through surveys, interviews, and analysis of work force data is important. The operation of a grievance review, which is perceived as fair by organizational members, is important. The absence of victim blame is an important element.

There is a need for participation of minorities and women—and, perhaps, in a leadership role—in the development of affirmative action plans. Plans drawn up and laid by staff on the line are usually resisted—and other times asking the line to develop a plan, based on guidelines provided by staff, does not result in a plan. Sometimes line managers ignore the request. They complete it halfheartedly, generally do not expect to produce results in the area, and, if they do, they consider themselves lucky—sometimes.

If a person worries about losing their job, we might see some results. If a person sees it as an area where they can advance their job, we might see some results. The resistance in the form of business as usual is a very important one that I think, again, your draft statement brings to people's consciousness and says that doing business as usual does not do anything consciously to eliminate the impact of discrimination; therefore, the need for affirmative action plans. Let me give you a definition that I think operates.

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 acknowledgment that institutionalized racism and sexism are the basis for discrimination and are not in the long-term self-interest of the organization productivity-wise. Racism and sexism are problems which 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/racist overhostility toward women and minorities, 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 basic racism and sexism which are part of our society.

Going against this racism and sexism has to be a conscious activity motivated by enlightened self-interest and organizational self-interest and motivated by enlightened individual and organizational self-interest.

I think that those organizations and individuals which have had good past experience with affirmative action will continue their plans. Those which have not begun affirmative action will not likely undertake the effort in the absence of pressure from these external or internal environments to do so. The pressure may come in the form of employee union activity, customer boycotts, litigation growing out of treatment and not in the welfare of clients served, or people employed who are affected by organizational policies or practices.

I think also there is a positive motivation that comes out of removal of barriers. I have not seen any cases where affirmative action has been undertaken and barriers removed solely for minorities and women, so we need to expand our idea about who benefits from a successful affirmative action plan. And, if that includes white males, then I think we're better ahead. I don't want to say that we have to wait for that. We may have to do some things—educate white males to their self-interest in the area—while we are waiting for that to come together with organizational self-interest.

When one thinks of affirmative action, we assume the rewards and benefits of the program are intended for and realized solely by minorities and women. This has not been the case. The risk-taking behavior of minorities and women who have raised questions of equity and justice usually result in redress which benefits all. Women's questions about benefits and leave, pregnancy, 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.

Finally, I think we have an expectation even though it is frustrated that hard work can be rewarded and that we have an opportunity toward a more meritocractic system. As long as there are examples of underutilization, sexism, overt, covert, racist behavior, denial of opportunity out of ignorance, and the denial of the impact of institutional racism, we as a country and people face serious challenges which could be the basis for new revolution of renewal or calamity. I think it is in our own self-interest to choose the renewal option, and through efforts like these and trying to clearly articulate those productivity and self-interest arguments at the individual and organizational levels, we will have an opportunity to make better progress.

MR. HARTOG. Thank you Dr. Neely.

Dr. Mark Chesler is associate professor of sociology at the University of Michigan. He has written and done extensive research on race relations, racism, education, school desegregation, and affirmative action. His major consulting work has been within school systems in the areas of school desegregation, affirmative action, and organizational change. In addition to numerous publications in these areas, he has coauthored a book entitled *The Sociology of Education.*

Dr. Chesler holds a bachelor of arts degree from Cornell University, a master's degree from Hofstra University, and a doctorate from the University of Michigan.

Statement of Mark Chesler, Associate Professor of Sociology, University of Michigan

DR. CHESLER. Thank you. Let me express my pleasure at being a part of this inquiry. I apologize to the Commission for not having a formal paper in your hands. On the other hand, one of the advantages of that is I can shift with the tide as the series of questions that are the focus of this inquiry become clear over yesterday and today.

Can I assume, Mr. Hartog, that the two-page series of excerpts that we shared last night has been distributed?

I want to try to focus on some of that material today because what I would like to hone in on is the experience of the affirmative action unit and the affirmative action officer as those people begin to try

to respond to the kinds of dilemmas that we've heard spoken to yesterday and this morning. Let me share this with you.

What we have here is a series of excerpts from interviews of affirmative action officers collected by my colleague, and I think they illustrate some of the kinds of dilemmas that we've been discussing today and yesterday, but they illustrate them in the language and experience of people who are caught on the line and put in the kinds of issues we've been talking about in practice. I will try to refer to some of these excerpts as we go.

My hope is not that they are in any sense conclusive or finally convincing to any of us, but they are illustrative of the kinds of issues and dilemmas that people are up against. Where we can begin focusing is on the nature of the document that the Commission has in front of it, namely—I see this panel beginning to discuss part C of the document, and while the document itself, the draft statement, stands in my mind as a beacon for where we might be headed, it is important to say that the weakest part of the document, from my point of view, is part C, which is focused on what are the organizational problems in trying to do with affirmative action; what are the dilemmas, where are the resistances, and how do you go about doing it.

To all of us for whom affirmative action is more than a question of hiring—but questions of promotion, mobility, satisfaction, and finally of the quality of worklife and its relationship to productive efficiency in all parts of American worklife, the challenge of trying to put affirmative action into place over the long haul needs to, I think, be spoken to more clearly, and the document in its final form should reflect some of the extensions on the argument and tactics that this entire panel has begun to discuss. One of the key dilemmas is, that on clarity about the meaning of affirmative action, on the clarity about its relationship to profit and productive efficiency, on clarity about where to locate it as a staff or line function in the organization.

One of the problems all of these issues create is the dilemma of dual loyalty and accountability for the affirmative action officer. If you look at, particularly, excerpts 9 and 10 on the very first page under I, we have a couple of statements by affirmative action officers that indicate that they are caught within the organization on a dual-accountability, dual-loyalty problem with concern and loyalty to a constituency of oppressed groups of minorities and women within the organization, or without the organization who are attempting to be within, and a dilemma of loyalty and accountability to the ruling hierarchy or power in control within the organization, and to the extent, as it often happens, that management concentrated in the hands of white males does not fully share the same sense of social reality, the same commitment to affirmative action, the same experience in the world that oppressed groups do inside or outside of an organization, there is often conflict and difference between these groups. Affirmative action officers are often caught in the middle with his or her viability, efficiency, overtime, being partly dependent on an ability to satisfy the needs of female and minority constituencies—at the same time with that person's future being in the hands of ruling groups in the organization and thereby placing on that person a need to look good and satisfy managerial concerns.

You may argue this dilemma of dual loyalty leads to a series of role conflicts for affirmative action officers, and some of these role conflicts take shape in the series of excerpts under II, on the second and part of the third page of the excerpts you have. It looks something like a series of questions arise for the affirmative action officer, such as, who do I serve? Who am I working for in this organization? Am I an agent of management? Am I an agent of oppressed constituencies? If I think I'm both at once, how do I make sense out of that? Conceivably, it could be both at once, if we're able to build an organization on a consensus framework. The reality is that's not where it is at this point in history. The reality inside many organizations, whether it needs to be this way or not, there is a minor war going on with different notions of how the organization ought to be structured on issues of race and sex equity.

The dual loyalty problem, the question of who do I serve, the statement by one person, that it is a schizy role, and that's not just rhetoric. As we will see later, it is in fact a schizy role and probably leads to all of the psycophysical reactions that personally pathological schizophrenia leads to, a very dangerous role to be in, a very troublesome one.

The second question that flows from that is, "How hard do I push? How do I do my job? How do I solve the tactical problem of being an advocate for minorities and female groups and at the same time being an agent of management?"

Excerpts three and four deal with—reflect part of that tactical confusion. There are—sometimes you

take a harder advocacy line, but you do it privately. If you take a hard advocacy line in public, in excerpt number four, that would prevent you from doing the administrative stuff, that would make you look abrassive and as if you're solely a race advocate or solely a sex advocate, and no one would want to deal with you on any other basis. What that leads to, as has been referred to by my colleagues here, is for some a dead end career; for others a career that is in jeopardy; for others a career as a professional affirmative action officer who never has the opportunity to move elsewhere and up in the managerial chain because they are tagged, labeled, identified, stigmatized, and blocked as a race or sex advocate and, therefore, while they may be effective in that role, they are not good managerial timber.

So for many people, many affirmative action officers, they operate very delicately in order to keep their personal options open on being able to move upward and onward in the structure of the organization. That clearly may solve the personal career mobility dilemma. It clearly doesn't effectively solve how you advocate for the interests of minorities and women in the organization. It needs to be said as well, as several of our panelists said yesterday, that with such a small pie to share, there are conflicts among the oppressed groups, and the affirmative action officer is flung in a dilemma of how to be serving simultaneously the interests of multiple minority, women, multiple female constituencies with different agendas, and those constituencies are often in conflict with one another.

Well, at this point we can look at some of the ways in which affirmative action officers try to resolve these dilemmas. One is—and we look at some of the excerpts under III—one is to see no conflict at all, to move immediately to the kind of consensus image that we are all here together, and it is in the organization's interest to do this. And as both Professor Cox and Dr. Alvarez and Professor Neely said, it would be nice to think that's the way it is. And certainly we are going to have a better shot at getting many people to ally with the social justice agenda if we construct affirmative action so that it is in the best interest of "the organization."

At the same time, no organization exists as a single consensus entity all by itself. All organizations are made up of competing groups, not just women and men, not just white people and black people and brown people, but staff people and line people, and vice presidents, secretarial staff, janitorial staff. And all organizations are made up of people from different kinds of groupings who have different kinds of interests. So conflict and contest among a variety of groups within an organization is the name of the game. At that point it may be premature to look for the total interest of the entire organization if we are not able first to identify the different kinds of interests that different kinds of groups have.

The second way of responding to these kinds of conflicts is to do nothing, to go slow. Excerpts number three, four, and five speak to that agenda. "I am just going to do my job. I am not going to lose my sleep about it. Have them fill in the form and have them look fairly intelligent"—unfortunately "intelligent" is spelled wrong—"fill out the form so it looks half-intelligent and then get it done."

"My expectations would not be so high. It helps me keep my sanity." "One needs patience. Certainly we all need patience. Patience may be a copout for just going slowly."

The third option, to ally with management—because we are employed by the organization we have to be proadministration. I work for the organization. If I turned on the organization, I'd be out of a job. In the midst of the dual-loyalty dilemma of serving management and serving female and minority groups, resolution of that dilemma by saying, "I am an agent totally of management," leads people into being flak catchers for management, into buffering management against challenge from minority groups, into helping to cool out and control minorities, labeling them as trouble-makers and otherwise delegitimatizing the minority and female agenda on race and sex equity.

The fourth major option is to ally with oppressed groups. This is very hard to do from the inside. I only have one short quote that suggests that. It is very hard to find people who have chosen to live their lives out in an organization as open advocates of minority and female agendas on race and sex equity. We are more likely to find those people playing a quiet game and forming a coalition with people on the outside. We are more likely to find those people in good touch with EEO people from Washington, OFCCP people from Washington, people in their community, people in other organizations, people—protect us—in the university with whom they will form an inside-outside team as a coalition to move that agenda inside. It is very hard from the inside.

Those people who do elect to ally with oppressed groups can do it through open advocacy, through subtle forms of advocacy, through the formation of support networks, or through informing to the government, to the OFCCP, EEO officers by turning over materials to them in a kind of subtle coalition.

Finally, the final option on top of page four as numbers 10 and 11, where we see the cost of being in a schizy role, which is indeed a high rate of burnout among affirmative action officers. The cost is high. People burn out with rage, with frustration, with ulcers, and they have times when they go home at night and throw things because they are sick of it. I suspect some of us may do some of the same things. But as a daily component of one's job, it is under great strain. Let me try to conclude by suggesting there are three principles that I think could help us move more clearly on this kind of agenda.

I have listed them under number IV. These are nobody's quotes but mine at this point, but let me say first that I think it is important for me to echo some of the remarks of my colleagues in suggesting that the way to do affirmative action is different for every organization in which we do it. The agenda is pluralistic. The tactics are multiple, and one needs to design affirmative action programs differently for every organization that we work with. At the same time there are some general guidelines, and it would be incumbent upon the Commission, I think, in a revised statement to elaborate some guidelines and suggestions that, frankly, take us further than the seven quick notes on the lower right-hand side of page 36.

Those seven are all true. There is no argument about them. They are indeed too true; they are so true that they are not helpful. What would be fruitful, I think, is for each of those to be followed by five or six examples, so that instead of us continuing to talk about managerial good will as important—and we agree it is—but, how do you get managerial good will? How do you know it if you see it? If you get managerial good will with an olive branch or a 2 by 4 or both at once or both in one and an olive branch and keep the 2 by 4 behind you, or hold out the 2 by 4, okay?

It is not enough to say we need managerial good will. We need to have discussion on how do we try to get it. How have you seen it? What do you do when you don't get it? From my point of view, we need both managerial good will and substantial local pressure supported by a variety of coalitional possibilities from the government. So principle number one is: we do need clear organizational leadership. We do need managerial good will to lead us out of goal conflicts, to resolve problems of structural confusion, and to design better programs. How do you get it is an important and, as yet, unclear question. You get it differently in different places.

Secondly, we must have pressure from oppressed constituencies at the local level. This is not a problem that the Commission can solve. This is not a problem that all the eloquence of the Commission statement can solve. The Commission has limits. Delighted to hear that, right?

The point of the matter is that the Commission does have a very clear role and its statement is critical. At the same time, the implementation of affirmative action is not in the hands of the Commission and its documents. The implementation of affirmative action is in the hands of local people at local organizational levels. There must be pressure built from an organized constituency in the local organization and community. They may be internal in an organization. They may be external to an organization in the community.

There are many examples of people outside of an organization who have mobilized on a community level to put pressure on an organization. There must be that kind of local pressure, at the very least, to keep managerial good will honest. At best, to help discover managerial good will where it may not have existed previously.

The government is an external coalition partner, in my view. And we have plenty of examples of affirmative action officers making a coalition with clear-minded and helpful government compliance officers to work that local agenda.

And, third, the series of quotes, if nothing else, as well as the recommendations of Dr. Feagin and Dr. Bunzel, suggest we need to develop some support and survival training programs for affirmative action officers. We need to understand their role better, not just because their role is critical, but because in understanding their role we lay bare the set of internal conditions that promise an opportunity and resistance to affirmative action. Those people need to learn better how to work in an adversarial arena, the lowest cost measures of coercion, how to find every cooperative option that's available, and how to survive being relatavely whole people at the local level.

MR. HARTOG. Thank you.
Mr. Chairman?

Discussion

CHAIRMAN FLEMMING. We now have about 44 minutes—if we stay on schedule—for some dialogue between the members of the Commission and the panel. I recognize Vice Chair Berry.

VICE CHAIRMAN BERRY. Thank you very much, Mr. Chairman. I was very much interested in the statements of all the panelists and the papers which were submitted that I read, and also I am very pleased to have on the panel two persons from that small university out there in Ann Arbor. (Even though there are some of us who love her; it's a small university out there.)

First of all, it struck me—while listening to Professor Neely and Professor Cox, in particular—as I thought about what we might add to our statement as a result of this discussion on how you implement and design an affirmative action plan, that you seem to be positing a situation in which, once you persuade the organization it was in its best interests to have an affirmative action plan, that then what you need to do is be able to fit minorities and women into the organization and make them successful. And a plan ought to be designed to give them the best opportunity to have success fit within the needs of the organization.

That was an inference that I drew and, as I thought about that and thought about Dr. Alvarez' statement when he said that what you need within an organization are people who are representative of the constituency concerns and interests, and that ought to be the emphasis on affirmative action; then I thought about Dr. Chesler's last statement in which he talked about the affirmative action officer who very often is trying to do both of those things, fit within the organization and make progress there and at the same time represent some constituency interests. I thought about how difficult that all was and, if I could just make one other comment and see what responses you might give, it occurred to me that one of the major problems that women and minorities have in organizations at the highest level, middle-management levels, in organizations where I have experience, is getting feedback from those at the top, and I wonder when you design a plan how do you provide for that?

To be more explicit, quickly, you are quite right that if people feel they are not important parts of the organization, they are not challenged, their interests are different, that they very often may sabotage the organization, or try to, even with the help of the constituency groups outside, if it is possible. But it is one thing to say that ways must be found for women, for example, in organizations to make recommendations, to be heard by people at the top. But one of the major problems is when decisions are made in organizations, it has been my experience, women often don't get feedback from those at the top. It is as if you send recommendations into a tunnel somewhere and you never see them again and they never come back, so there is a sense of not taking seriously what women and very often minorities have to say unless what they have to say seems to fit in with whatever everybody else is saying, which means that is contrary to Dr. Alvarez' notion that very often they may be saying things that are different, and very often women, I notice, have to end up screaming whatever it is they are complaining about, and then they're simply told that the only way women know how to be heard is scream, which is improper organizational behavior, and I wonder if you could comment, when you design a plan and implement a plan, how do you address all these problems?

CHAIRMAN FLEMMING. I suggest this is an invitation to all members of the panel to comment on Commissioner Berry's comments. May I urge that the response be very brief in each instance.

DR. NEELY. I want to clear up one point: I think an organization will be different in that minorities and women will not change in order to be part of a white male organization, that the organizations themselves will change as a result of being more pluralistic.

The other thing is, if you make a career development responsibility clear for everybody in the leadership or supervisory role and have their career tied to their results of that area, we have a better chance of planning for that eventuality. I think that as long as we see the ratios the way they are, we have to superimpose minorities and female leadership on affirmative action areas and maybe some others until such time as promotion takes care of it in normal fashion.

I have taken a couple of organizations that have taken my advice and say, "You don't have minorities in decisionmaking positions and until such time they get there, we are going to create a staff and line position to the top of the organization where

everything is funneled through and veto power exists." Folks in the research come up with these crazy things. Folks in the traditional organization have to hear it differently, but what we are talking about is the imposition in some artificial ways of minorities and females into decisionmaking roles, and we may have to do it on content-by-content area until such time as they are represented in the line organization. I feel strongly it should not be a staff function. It needs to be a line function, and we do some artificial superimpositions, and we channel and track the impact of that over some longitudinal, some 5-, 10-, 15-year period of time, to see what those careers have developed.

VICE CHAIRMAN BERRY. Dr. Cox, do you have a comment?

DR. COX. I must admit, it has opened up quite a big area. I was trying to think what to include in the brief response. I think one of the key points in my experience has been that as you are designing the program it is absolutely critical for top level managers to be brought together face to face with the women who have the most credibility in the system already, the women and minorities. I have seen tremendously, I would say moving, things occur in that context by creating lines of dialog which do not exist in the organization's day-to-day functioning, so that as people are being exposed to some of these new ideas about how the organizations are operating, there are points at which women and minorities can make clear to those folks in a business context, because the task is to analyze what is happening and come up with actual options, and I have seen women and minorities both do a beautiful job of analysis that clearly shows their analytical abilities, sensitivity, and so on, and also come up with action plans on the spot, and, frankly, I have seen several people now promoted on the basis of the contact that was established in designing a program which I think is the kind of intervention, effective and important, so I think it is important, absolutely essential, that there be some mechanism set up for contact and feedback.

I also thought I understood in your question an underlying theme perhaps of, can organizations in part be responding to the diversity and so on, and I think that for myself that's an absolutely critical issue. My own conception of how to move on that front is in part to win credibility and access for women and minorities, and to create contexts where some of the broader issues can be raised, so that I do have an image of working from inside, and I think some of the points that have been raised about how to design that need to be taken into consideration, but it is something that I feel people are beginning to realize, especially because executives and top management right now are reeling. There are a number of demographic and economic pressures on organizations, and I have seen an active searching for new alternatives, new insights and inputs, and there is more of a value placed on diversity now than there was 10 years ago, so I think it is an added impetus that makes this time particularly ripe for diversity, more of a willingness to listen.

DR. ALVAREZ. I think the question is really critical and that's why, in my emphasis on looking at an analysis and definition by which to identify more precisely the components of institutional discrimination rather than on the remedies, I focus on how do you define the problem very specifically and, therefore, the remedy will follow.

Now, let me address the specific problem. If in identifying the various internal and external constituencies that compose the organization—notice I say external constituencies also compose the organization—if you have an organization and you don't have consumers out there, you don't have an organization. If you don't have suppliers, you don't have an organization. So that those constituencies are literally interlocked with a basic function of the organization, so when you identify the processes of institutional discrimination, you've got to find out with a scalpel very precisely what are the relevant constituencies to a particular process, and then look at what their interests are and see whether you not only have representatives of that constituency, but that you also have representation of their interests as well.

Now, those interests frequently come into conflict; the conflict of suppliers, the conflict of workers, the conflict of management, and so on as Dr. Chesler pointed out.

Now, the sine qua non of the effective manager is that the person who is able to juggle multiple pressures—now the conflict that Dr. Chesler pointed out for the affirmative action officer is that that person has come into the organization as having only one function, to bring in minorities or women, and that conflicts with all the other pressures. He does not have the experience of juggling other pressures. That's why I suggest that we put the remedies in the hands of real managers; that is, people who by experience, training, or by whatever

other source have learned how to juggle these multiple pressures and to balance them off one against the other.

Nevertheless, you've got to have input into those people, those positions in the organizations. How do you aquire that input and how do you have managers give feedback to those confirmations?

One solution—not the only one, by any means—is to form advisory groups that have representatives of those various constituencies, including suppliers, including consumers, but also including minorities and women, also including people at different levels of the organization and have those advisory groups meet periodically with the chief executive and through the chief executive have impact on other parts of management and periodically feedback goes back to—you advised us of such and such and we didn't take your advice on that in exactly the way your group advised. We did it this way and we think it is going to have this impact.

The impact of that kind of two-way street between an advisory group and a line executive is that those members of such an advisory group will go back to their respective constituencies and in effect say, "We didn't have 100 percent impact. We had 20 percent impact, but we had some impact." Therefore, they have an incentive to come back and put more input into the organization.

The benefit to the organization is that it acquires a greater sense of control in its turbulent environment, if you will. It begins to have a sense of making progress, of settling some issues that might threaten the productivity, the well-being of the organization, but in an advisory capacity that two-way relationship helps the manager feel that he or she is in charge of the process, in charge of the organization over which they hold stewardship, not relinquishing, not merely doing the bidding of any particular constituency, but balancing off the various pressures and letting them know how that balance occurs.

I think that is beneficial to both the executive as well as to the various constituencies. Now, it also improves effectiveness of the organization because the organization in a sense has advance warning as to what are the problems that are cooking up and can deal with them in advance before they really fester and become explosive, and that is an advantage for the executive.

VICE CHAIRMAN BERRY. Perhaps Dr. Chesler could wait until another question, since the answer will take a bit long.

CHAIRMAN FLEMMING. Commissioner Horn?

COMMISSIONER HORN. I appreciate the context in which each of you have placed this situation, and I particularly am grateful for the two papers that I read, which I thought were immensely thoughtful and well done. I just have one question I want to direct to Dr. Neely. You are all welcome to get into it.

As I heard you, Dr. Neely, you said that you thought affirmative action should be a line rather than a staff function. This Commission has argued with reference to the enforcement of Federal affirmative action policies within the Federal establishment that line program managers should obviously bear the responsibility for effective enforcement, involvement, success, etc., of the affirmative action plans and that it should not simply be left to a staff officer that is somewhere off away where all the action is going on.

If that is what you mean, I can understand that. I think that makes sense, and I think the staff officer would still exist, would be facilitated, would be supportive of line program managers, and it is, as all of you suggest, it is the line program manager which has to do with allocation of resources, positions, and so forth.

What I am curious about, though—did you mean more than that and, if so, what did you mean when you said that you thought affirmative action should be a line function? Let me give you one example where I have seen a lack of success in organizations. That is when the affirmative action officer as a staff officer does become a line officer and really a second program officer in terms of personal judgements, and begins to second-guess everybody around the establishment and almost becomes the chief executive officer.

Personally I found that very unproductive because the affirmative action officer is not qualified to make all those judgments or is not taking the total picture into consideration. I would just like a more precise view of what you do mean.

DR. NEELY. Okay. I think that from the internal point of view, interpreting the bottom-line responsibility for achieving results in the area, it is a line function.

In terms of the external interface with regulatory agencies, compliance reviews, it is both a line and staff function. I recommend to the staff people to take some of these line people with them for some of those desk heartaches. When people come from the

outside to ask about the results, have some line people as a part of that process, so they appreciate the struggle of the staff person, and the staff person appreciates the struggle of the line person. But where it gets tied together is when the chief executive of the organization, president of the university says, "I expect some results from you following line people in the following ways, and I expect facilitation from your staff people in the following ways, and I am clear about the distinction as chief executive in terms of how I am going to hold both sets of you accountable for your distinct and collaborative results."

I also think that it is important to have those staff functions of affirmative action be time limited to say, "You are on the job for 4 years and after that you are transfering back to the line or to a different staff function" and that the career development process be taken seriously for those isolated, burntout, wornout staff affirmative action people. There is a staff function that's performed by any minority person and any female person regardless of whether they are in the staff or line and it takes the following form: because you are there and you are probably the only one there, black students come to you, black athletes come to you who want to be black athletes, the secretaries come to you and say, "I'm getting screwed." People who work in State governments come to you. You are doing a study and you might be able to do something about it.

You have to take care of yourself at the same time. What I mean is you have an overload contribution to the organization, depending on the ways in which you do it. It may not be totally appreciated, so you have to take an internal motivation that lies outside of the organization for those dual roles and an appreciation of the ambiguity, the boundary nature, and some motivation in terms of support to persevere under all of that.

COMMISSIONER HORN. I thought those points were well made in that context. I think you are precisely correct that there is a real problem of burnout. There is too often a stereotyping of who ought to be the affirmative action officer, a female or minority member, and I think sometimes that's counterproductive because it's getting slotted in there with all the—I think in a way that means they are carrying stereotypes within the organization they shouldn't have to carry automatically.

Just to pin it down a little more to ask what is your view as to whether the affirmative action officer as a staff officer should be able to block the appointment of an individual—or do you feel that is simply advisory to the apropriate executive who can then block the appointment of an individual?

DR. NEELY. I think it is advisory and I think there are other alternatives to that advisory function once that doesn't work if it doesn't, and I look for a chief executive officer to be a person with an overview and at least be clear enough about explaining the reasons why something is not going to work and to be ready with an alternative that has at least part of the options brought by the constituency to them.

I think it is putting the staff person in a place where they can't really follow up. If they block that, they don't really have the alternative to go back and do something else about it, so I think it is a schizoid kind of role to make.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. Dr. Neely, you indicated, I think, that good affirmative action plans advance the meritocracy. Is that your statement?

DR. NEELY. I don't think we have a meritocracy at present, but the things required by an affirmative action plan can make that more possible once we catch up. Until we catch up, we're going to have to do some different things. We don't have a meritocracy now. Affirmative action provides potential for that and maybe should be utilized.

COMMISSIONER SALTZMAN. Can you specify in what way?

DR. NEELY. I think in job analysis. There are a number of things that we assume as prerequisite skills. For example, pencil-picking up. If we're going to hire a person as a pencil-picker upper one, and we think that it is really important to have a master's degree in advance pencil-picking up, we need to test the relevance of that degree requirement to picking up pencils, so we come up with a test and the person who can pick that pencil up gets the job. Whereas before this requirement of affirmative action to look at the exact components of the job we didn't have before, we had myths, we had ideas, we had some formal studies that showed but not across-the-board that we really considered the relevance of the criteria we imposed on candidates for jobs, so it has blown that up and made us be more sensitive to really what goes into pencil-picking up as opposed to attitudes about pencil-picking up.

DR. ALVAREZ. May I give you a little short story, something that happened to me on one of these trips to Washington last year. I happened to sit on the seat

next to the owner of a Toyota dealership in California as I flew to Washington, and I asked him about affirmative action in his dealership. He said, "I have no problems. I have one of the most successful dealerships in California. All of my sales people are graduates of Princeton." I said, "Why is that?" "Well, I graduated from Princeton. I think somebody who has that kind of verbal skill, presentation of self, then he is able to sell Toyotas better." And I said, "Well, is that really needed?" "Well," he said, "You don't need it, but it helps keep out the wrong kind of people that way."

Now, a degree from Princeton University for selling Toyotas, I suggest to you is—sure, it has high merit, doesn't it, but it is a level of merit so far beyond the minimal requirements for a successful performance of the job that it now becomes an exclusionary rule.

Now, let's go to the *Bakke* decision to entrance into medical school. We don't know what makes a good doctor. There are many things, many dimensions of what goes into making a good doctor. That is the practicing physician. We don't even know what makes a good medical student.

There are many things that go into the making of a successful medical student, that is, somebody who meets all of the academic requirements of getting through to the degree in medical school. Academic ability demonstrated in courses or tests of whatever kind before entering medical school is only one dimension of merit, a dimension of merit that is as distant as the minimal requirements for selling Toyotas and having a Princeton degree, you see. You have a situation where you can demand too much academic performance, way beyond what is normally required, in that way excluding people from admission. I can give you an example of what another country has done with that at some point if you want to ask about that.

CHAIRMAN FLEMMING. Do any of the other members want to comment on that particular issue that has been raised?

Commissioner Ramirez?

COMMISSIONER RAMIREZ. I have appreciated the discussion immensely. I am particularly interested, Dr. Cox, in your statement that nobody is to blame for discrimination. I don't particularly agree with that. I am wondering, however, whether there are organizational characteristics, a particular management style, more democratic versus less democratic, that are necessary in order to bring about the kind of successful structural analysis and movement to action which you have described for us, first; and, next, because we have talked a lot about training affirmative action officers, I wonder whether there aren't necessary trainees for chief executive officers in order to accomplish what Dr. Neely has suggested, and finally, I am curious about what is the size and nature of an organization that is most feasible to work with in order to achieve what you have achieved, and I know the Chairman is going to say that you should be brief, and I am sorry if the question is too extensive.

DR. COX. I think I should try a bit of that anyway. First of all, let me just point out that part of the reason I said no one is to blame—I did say discrimination occurs and the structures are to blame. Part of the reason I make that statement is having been through many, many training programs and walking into rooms and seeing a group of white males sitting absolutely at attention and absolutely scared to death they were going to receive yet another harangue, and as far as I have been able to ascertain, it is very difficult to get them to explore other options and so on if you start with the blame. That's part of the motivation for the way in which I contextualize what I talk about. It seems to be effective.

Secondly, is there a particular management style that is efficacious? Absolutely. I think that if you look at managers in the world now, the ones who have skill of creating opportunities for their employees are sharing some power, delegation, finding someone and developing their talent in a variety of ways, not promoting them outright in the beginning but giving them a piece of the action here and there and really let them test and develop their own skills, develop their own self-confidence, and so on. Those are people who are known as people developers in organizations.

The same techniques that they are using—and some of them use them quite successfully with women and minorities as well, but those general people-developing skills are the kind of management style that is needed to enable women and minorities to really perform well in the organization. Now, can that be trained?

I think that there are several kinds of training that chief executive officers in top management need. I think exposure to some of those aspects of management style, exposure to what it is, in fact, that women and minorities are experiencing in their

organization, where it is located, what is really causing the problems and, as I mentioned earlier, in a face-to-face contact so they have opportunity to see competence that in ordinary interactions they will never see.

They simply do not—people at that level do not come into contact with women and minorities regularly. That has been my experience. So if you create a context where there is exposure to competent women and minorities, that can go a long way to helping them understand what the issues are and what, in fact, potential there is, what needs to be developed. So I don't know if that responds to your question or not.

DR. NEELY. Training the chief executive officers, the one, two, or three times I've been able to do that have been the most exciting and most productive things I've been able to do in this area, where people have sat and said, "Tell me what you think I should do," and to listen to that and be open to some conversation about it and be willing to state the reasons why and why not, and in cases where 80 percent of those recommendations have been adopted, it just blew my mind. I was sitting in a guy's office one day. He was fortunate in that he had the title of chief executive, president, and chairman of the board. He asked me on Monday whether—I knew I was going to see him on Monday and as we were talking I noticed the helicopters landing and taking off and ferrying people in, and then I asked who those people were that were coming. He said, "Those are my vice presidents and my group executives coming to hear what we are going to do on affirmative action." I said, "When are you going to talk to them?" And he said, "As soon as I finish talking with you."

I said, "That's exciting. That's really exciting. I would really like to hear how they respond." He said, "There's not going to be any problem with that. They understand what I expect." Okay, another situation where a senior vice president has been told in 5 years he will be president of the company, he is moving. He calls and says, "I'm going to be president and I want to think how I am going to be president and I want to think about what the climate of this organization is going to be."

"As a utility we need rate relief and part of that rate relief is going to have to come from our customers and from the legislature, and I need to have a good relationship with these people. And part of the problem is our lack of results in the area of affirmative action. I need to clear that up before I'm president."

DR. CHESLER. I wonder if I could respond to part of that. I think part of that question takes me back to something that Commissioner Berry and Commissioner Horn asked about before. It seems to me one of the advantages of thinking clearly about the kinds of retraining that chief executive officers need, want, and require is that for those of us who enter the world of ruling white power—and the chief executive officers—we understand that's not a very comfortable place for the people who are there. All the methodology that we can develop about how that power is exercised, the disadvantage of minorities and women can't hide the fact that that is a very lonely power, and there is a great price to be paid by those people who are in that position, and part of that price is being in an oppressive seat and part of it is the way we structure the dynamics of power and control in American life.

It seems to me one of the reasons why pluralizing the system will occur is because an effective affirmative action program will take us into the executive suite and have us help chief executive officers who are white males understand the price they've paid over their years of growing up and living in an oppressive society, for learning a narrow set of white male behaviors, and for them to have an opportunity to resocialize themselves and learn ways of operating as executives that are less constraining and debilitating in their own lives.

I think the issue, then, is not just pluralism and not just pluralism throughout the organization, but pluralism at the level of power itself. I think this is what Professor Alvarez means when he talks about representativeness as well as representation. To talk about pluralism throughout the organization, we have to talk about pluralism of power, most importantly, and it seems to me that that's part of Dr. Horn's question. I'm sorry that he's gone. I don't know.

The question he raised for Dr. Neely was, should the affirmative action officer have the right to block a person out of an appointment? I don't know the answer to that in terms of staff line, but the answer to that is yes, whether the affirmative action officer blocks it as a person, or the affirmative action officer mobilizes power within the organization to block it. The question is, will there be power placed in the role of affirmative action unit? The answer has to be yes, whether it is power to block by saying, no to

oversee, whether it is power to get the word out and mobilize forces who care about it—the tactics are multiple; but that's part of what I think we must mean by pluralizing the power base in the organization and not just pluralizing the membership base.

It doesn't avail us much down the road if we've got pluralism of race and sex at the lower levels of the organization unless we've got pluralism at the top. And pluralism, as Dr. Alvarez says, is just not demographic characteristics. Pluralism is part of the policy and behavior as well.

CHAIRMAN FLEMMING. Thank you.

Commissioner Ruckelshaus?

COMMISSIONER RUCKELSHAUS. I wanted to thank all of you for your presentations. They were particularly interesting to me because of your hands-on contact with people who are putting the affirmative action programs into practice because I think it is in the corporation, the academic world, or the governmental institutions where the programs are administered either sensitively or insensitively that the public perception becomes a national perception that will probably influence national policy developments, and it is the successful affirmative action program that we're all trying to shape, not the one that results in perceptions of unfairness and special advantage.

I have a question that has to do with, now that we are on the subject of chief executive officers, presidents, or chairmen of the board. Of course, the task is much easier if it is very clear that those folks are very committed and they want to see results.

I noticed that in almost everyone's statement, Dr. Alvarez talked about the necessity for showing that the economic well-being of the corporation over which these people have stewardship will actually benefit, and Dr. Cox talked about how to get top-level management support, and Dr. Neely also talked about how you raise the issue of it being in the self-interest of the corporation itself, but you rule out what you call the kind of soft issue of making the argument on the basis of social responsibility.

I wonder, are there measurements? You say there are no measurements of productivity as a result of good affirmative action programs. Are there really good, hard measurements of any kind—increase or decrease in turnover, less absenteeism? Is there any way to measure if you are making a bottom-line argument to a chief executive officer about his self-interest? Are there specific ways that we can prove that argument apart from talking about corporate responsibility and human resources to development and that sort of thing?

CHAIRMAN FLEMMING. You are addressing that to all the members of the panel?

COMMISSIONER RUCKELSHAUS. Yes, I am.

CHAIRMAN FLEMMING. Okay. Here again we've got about 12 minutes so let's keep that in mind.

DR. NEELY. I've seen some situations.

CHAIRMAN FLEMMING. I would like all the members of the panel to have the opportunity.

COMMISSIONER RUCKELSHAUS. I'll tell you why I asked you this specifically. You are all in consulting businesses in a variety of ways, and my friends who are in that business tell me that their experiences, the commitment to go outside of the corporation, to continue to develop that kind of sensitivity in management has decreased in the last 5 or 6 years. In their perception there was a lot of interest in it at one time and now it is much less for spending money for that kind of a broadening awareness and refining and really being creative about affirmative action programs, and it is much closer now to what's legal and what will keep me out of trouble.

DR. ALVAREZ. May I briefly——

COMMISSIONER RUCKELSHAUS. I'm not asking you about your bottom line.

DR. ALVAREZ. I want to say yes, those external consituencies have receded in vehemency in the terms of the pressure they bring on the corporation, and, therefore, executives inside the corporation are less concerned about responding to those constituencies on that moral social responsibility basis as you correctly perceived because chief executives are people who juggle pressures. When that pressure isn't there, it doesn't have to be juggled; it doesn't have to enter into the calculus.

On the other hand, as Dr. Neely pointed out, when their pressure includes a rate change, that's going to have to have public support or something of that kind, then corporate self-interest to get that rate change for the organization and, therefore, my personal self-interest as vice president about to become president dictates on that kind of self-interest basis that you go out and do something that would fall under the social responsibility category. But you were not doing it because of the moral pressure coming from the outside; you are doing it because of corporate self-interest pressure coming from the inside in that case. And I think it is just a question of which constituency is mobilized to put

pressure on the executive at any given moment in historical time.

DR. NEELY. I think it is a little bit easier in a manufacturing organization than in some other types of organizations, but the general rule is that we've seen some tremendous impact from survey feedback, that is, deciding on and identifying some regular organizational dimensions of productivity, how many widgets produced, cost per widget, people per hour in widget production, absenteeism, turnover, scrap, training cost, litigation costs—and to the extent that individual managers have been sued, not by going to EEOC but by saying, "Dr. Cox, welcome to court for your discriminatory action in blocking my promotional opportunities."

We have seen some changes. I think as people try to experiment, the area of change is new. We don't have very much research in talking about it. As we try to increase people's sensitivity about documenting the impact of change, we need to document in a parallel fashion the impact of these technologies on productivity, outcome measures for whatever types of organization they were in, and once we decide on those measures, we decide how they are indicated in the organization. We decide on the intervals at which we are going to gather the data and we are going to see all the way down to the work group level at those intervals and problem solving in the areas, the blips on the screen. That's the way you do it.

DR. COX. I don't have the same feeling that there's less responsiveness now. If anything, I think over the past 5 years I've seen it growing and growing in some directions that I am happy about in the sense of taking more internal responsibility and not purely reacting to external forces. I think there are some internal forces that militate in the direction of affirmative action. One of them is the good image, the social responsibility.

Companies are—the Fortune 500 companies in particular with whom I have dealt—are concerned about how they look to the general public in terms of their effort in the affirmative action area. They want to be known as socially responsible groups. That's important to them in general. It is important in particular because they need to attract and retain talent, and there is a lot of competition now for talented people. There is a recognition that minorities and women represent relatively untapped pools of talent, and, if they want to have people come into their system and stay there, they've got to get their house in order, so that they're both interested in having a good image to the public in general and within their own institutions.

I think those are two avenues of pressure that I see working within the organizations. Third, I absolutely agree with Dr. Neely's point about general productivity. I think that the kinds of things that all of us are talking about are seeing affirmative action within the general context of human resources development, of having people feel productive and responsible on the job. There are in fact studies that show as people gain more flexibility and control over their functions, sabotage, absenteeism, and so on goes down.

COMMISSIONER RUCKELSHAUS. Is there any way to tie that to affirmative action, or is there a function of better productivity study inside a company so there is better quality?

DR. COX. Well, basically the kind of affirmative action program that I have been involved with is looking at ways to get individuals on-the-job access to more opportunities, more engagement with their work, and so on. I think that is the key to ultimately allowing women and minorities to demonstrate their competence on the job, so that, for me, affirmative action is a part of a larger question of how do you make people effective and productive on the job. That's the sense in which they are directly linked in my own understanding and the way it is presented to them.

Finally, I have seen several companies now and divisions of companies who perceive that the affirmative action area is an area of concern, so that some of the divisions I've worked with perceive that, if they move ahead and establish an effective action program, it is a way for them to gain visibility or recognition from headquarters. So they see themselves as being in the vanguard and taking this on has direct relevance to their own performance within the larger organization. So that's another form of internal self-interest which can motivate some very effective programs.

CHAIRMAN FLEMMING. Dr. Chesler?

DR. CHESLER. I just was going to say I think that there are answers to questions at two levels: one, can it be, the answer is yes; has it been? I don't think so. I don't think we have good studies. I don't think we have a good line of research out in print and published that we can put our hands on and put in people's hands and make a convincing case, but if your question was, can we tie it, can we measure it, I

think my colleagues said yes. Clearly, I think it can be, but I think part of the issue that we're talking about throughout the morning is that we also must tie it to a larger or different or other series of agendas. And to argue affirmative action narrowly relates to productivity, gets us into a series of tight little boxes, and we tie the race equity question to a variety of other issues, around work group organization and organizational openness and communication. Then I think, yes, there are measures and, yes, I think the evidence will be in the spirit, although I don't think it's been done, marshalled, and published yet.

COMMISSIONER RUCKELSHAUS. What we may be trying to do is redefine institutional and what bottom line means.

DR. CHESLER. To the extent that more and more people inside organizations, inside unions are now focusing on quality of worklife issues as well as wage benefit issues, to the extent those quality of worklife issues can be dealt with more economically than can wage benefit issues, that is clearly a harbinger of the future.

CHAIRMAN FLEMMING. May I express to all of the members of the panel our appreciation for your sharing with us your insights, and they have been very, very helpful, growing out of some very practical relationships that you have to this very important issue. We like the emphasis of the discussion. It is going to be very helpful to us as we work on the revision of this document. Thank you very much.

I will ask counsel to call the members of the next panel so we can start promptly at 10:30 a.m.

Monitoring and Evaluating Affirmative Action Plans

MR. HARTOG. Our next panel is Ms. Elsie Cross, Dr. Raymond Hunt, Dr. Alice Sargent, and Dr. Peter Nordlie, who will talk on monitoring and evaluating affirmative action plans.

CHAIRMAN FLEMMING. I will ask the consultation to be in order, please.

Mr. Hartog will introduce the panel to us and introduce the first participant.

MR. HARTOG. Elsie Y. Cross is a consultant to business and industrial organizations in the areas of organization development, male/female awareness issues, racism and sexism, and leadership development. Her clientele includes organizations in Europe, the Caribbean, and the United States. Her consulting practice has been with governmental agencies, international organizations, educational institutions, and community cooperatives, as well as with major business and industrial organizations.

Ms. Cross received the bachelor of science degree in business education, a master of education degree in business education, and a master of education degree in psychoeducational processes from Temple University. She is presently completing the requirements for a doctoral degree at the University of Pennsylvania.

Statement of Elsie Y. Cross, Consultant, Elsie Y. Cross Associates

MS. CROSS. I thank you very much, and I very much appreciate the opportunity to be here. I have revised rather drastically the statement that I have, so I am talking from a different paper with some of the same inputs. One of the things I want to say from the very beginning is that I feel as though I work in the trenches in the implementation process of affirmative action. By that I mean I work, in addition to top management consulting, with the development of affirmative action plans. I also work with line managers who have, for the first time in their organizational experience, women and minorities to supervise and to manage interaction.

I also want to make the point, because I think it has been overlooked here, that in my experience there is a vast difference between the existence of an affirmative action plan and the implementation of affirmative action principles, and there are organizations, the major Fortune 500 organizations, which exist today which have only the plan on paper, the plan and the external ways of implementing the plan without internal processes and procedures for making the advent of women and minorities a comfortable reality.

In my view affirmative action has been a major intervention and a major successful 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.

I want to underscore that statement by saying that I believe there existed in the past and continues to exist a massive individual and organizational discrimination against all minorities and women in the corporate world today, 1981.

Affirmative action, therefore, has provided us a process for organizational renewal which has re-

sulted in increased productivity and a more creative and diverse work force, improved organizational climate, and more efficient personnel practices in general. It has also provided minorities and women—I think this is important—the point has not been made here—some belief that the system can work for them to remove barriers which have prevented their access.

I believe that the Commission's report is an important and much needed approach to understanding the background, rationale, and the direction needed to correct past as well as continuing discrimination. The reason for that is I believe that most managers, or most managers of the managers I interact with—and I am called on as a consultant to organizations where there is some belief in the process and in the meaning of affirmative action.

I still think there is a massive misinformation and misunderstanding of what affirmative action is all about, what it is supposed to accomplish, so I think the report does lay that out very clearly in a way that takes us away from the victim mentality of the 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, who work in or consult as organizational company 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, obviously. There is clear agreement that organizations and their agents would continue to discriminate against minorities and women in the absence of EEO and affirmative action. These are from people charged with implementing affirmative action plans. There are people who in private conversations with me have said that without affirmative action and EEO, we would be where we were 20 years ago. There would not be the level of success in recruiting, hiring, and promoting of women and minorities that has been achieved 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, even though it has been inadequate, in America's work force. Blacks, women, and other minorities have been hired into technical, line, or staff positions in major organizations, and there are minority men and white women—and I differentiate between minority women and white women because I think that indicates some key problems which exist there—those people exist in key policy and managerial positions in major United States corporations. This is true despite resistance to change and despite the fact that in many places, little change has occurred up until now. For the first time in United States history there are black men and white women at all or several levels of major companies, and nearly every corporation has at least an affirmative action plan on paper.

There have also been unanticipated benefits, which other panel members have alluded to, such as improved recuriting 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 point I am making here is that the unintended benefits have worked to the advantage of everybody, and I believe that those benefits would not have started, would not have been institutionalized, had we not started the affirmative action process.

Now, I have also thought that it might be important to share with you some of the day-to-day work that I do in consulting and working with major organizations as a way of indicating the possibilities which exist in affirmative action and also the obvious lags which don't happen when there is a commitment.

The following processes and programs have been used successfully as organizational strategies to, one, increase the representation of minorities and women, to overcome resistance among white men, to change behaviors, and to create a more positive climate.

Those are the kinds of general things I think need to happen once the plan is agreed to and accepted as being meaningful. Other things have to happen within the organization.

The most significant intervention that I am aware of and have participated in is a total organizational change effort which includes the following steps: entry at a high enough level in the organization to have top management commitment, which is often

lacking, and diagnosis of a system's readiness for change in these particular areas.

Next there needs to be planning and presentation to a significant part of the organization so that it doesn't come as a surprise, so there can be some buy-in by people involved later on in the implementation of the process.

There also has to be some critical mass development into education of resource persons, women, minorities, white men who are sympathetic or who understand the problem. There has to be top-level group and operating education and needs assessment. Some research and study of what the organization is now, where it wants to go, and goal setting, and then the implementation, monitoring, and evaluation process in my experience is almost nonexistent except for the statistical analysis of what's happening, the numbers. This approach ties responsibility 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 focus of work is the organization rather than the victims of discrimination.

Another strategy that is most often employed is a single intervention, and one given the most attention is awareness training which is often directed at managers in order to increase their awareness of the problems created by the organization and white men as minorities and women enter the work environment. I know a number of companies where awareness training has been the only intervention for 7, 8, 10 years, the focus being on the individual rather than on the organizational structure.

Other strategies include management development of minorities and women, which has proven useful; information-gathering procedures are also used as major planning tools for organizational components to incorporate into their regular process. I think the discussion earlier about line management versus staff management is critical here. Managers of major corporations plan things all the time. A major part of their responsibility is to plan, and my contention is that the process of planning for the implementation of affirmative action ought to be integrated into the regular planning process, and the responsibility for that should be in those people who implement other policies, practices, procedures of the organization.

Working with administrative and management groups around solving problems of sexual harassment, which is hidden and growing, very disturbing, threats to women and minorities, withholding of critical information necessary for doing work, making prejudicial job assignments, failing to give attention to the need to change work climates, sabotage, and other things like that have often produced a willingness to grapple with pervasive forms of discrimination. It is true that many managers are not aware of the extent of the subtle and insidious and ubiquitous forms of discrimination that still exist at the personal and individual level.

There are problems in the ways affirmative action is implemented. Affirmative action departments are, for the most part, positions fairly low down 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 evaluation.

There is a need for accurate and full information from authoritative sources, such as this Commission, about the current state of discrimination and oppression in employment, in housing, in education, in the criminal justice system, and wherever else it exists. There is little agreement among whites and white men that institutions and organizations have discriminated. These numbers of years since 1960—there is little agreement. There is ignorance about the relative benefits black women versus black men derive, for instance, from affirmative action; also white women and women of color are set in competition for the crumbs. There is little agreement about the level of competence minorities and women bring to their positions, and there is little agreement and understanding about the function of affirmative action goals.

I also need to add, because I haven't heard too much focus on this point, that 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. I am sure this will also happen among other minority groups. It is also 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. The retention rate is becom-

ing a major problem. We don't know what's happened there.

Finally, we need to recognize in advance the benefits to be derived from a multicultural work force. This was alluded to earlier. The existence of different kinds of people in the work force, I believe, is indicating a tendency toward higher creativity and higher productivity, but I would urge that there be some study and research of that tendency.

The existence of differences can mean a more creative and productive group than a monolithic one. We need to develop more skills and appreciation for managing differences and the positive aspects of the conflicts which result.

MR. HARTOG. Thank you.

Our next speaker is Raymond G. Hunt.

Raymond G. Hunt is professor and chairman of organization and human resources in the School of Management, State University of New York at Buffalo. He is also adjunct professor of psychology and of sociology at Buffalo, and senior fellow and director of research for the Institute for the Study of Contemporary Social Problems in Seattle, Washington. Dr. Hunt has conducted research and consulted with a variety of organizations, mostly in the public sector. His principal research interests are in the fields of organizational behavior and public policy. The author of numerous articles and papers, Dr. Hunt is also author, coauthor, or coeditor of five books, including a forthcoming volume entitled *The Impact of Racism on White Americans.*

Dr. Hunt holds a bachelor of arts degree and a doctorate from the University of Buffalo.

Statement of Raymond G. Hunt, Professor of Organization and Human Resources, State University of New York at Buffalo

DR. HUNT. As everyone else, I thank the Commission for inviting me. I must confess, however, that between the time I got here yesterday morning and this moment I have accumulated an increasing sense of uneasiness, essentially about two points that I would like to note and pass on.

The first is what seems to me the hugely intimidating task of accomplishing national purposes on an organization-by-organization basis, which seems to be the implicit strategy in the discussion so far.

The second thing—and I am interested to hear Elsie's comments about being in the trenches—the second thing that caused me, some, frankly, profound unease is what strikes me as the degree of remove between the level of discussion in this session and in particular my own remarks, as you will see, and the quality of the experiences that I have shared with people in the trenches.

The intensity and drama and the threats, literally, at least in our case, the literal threats to our personal safety which were involved so far have received very little acknowledgment in this discussion. In any case, I will go on from there as if I didn't say anything, and say what I was going to say. I wish to be brief, but I also, in the light of the discussions yesterday morning, would like to preface my generally friendly remarks by saying that I believe it axiomatic that in the real world of institutional discrimination it is a technicolor world. The special problems we face here are primarily matters of race and gender and not class. In a white supermacist environment, color is ipso facto disadvantaging, and the same can be said of being female in a male-dominated society. I have great sympathy as I hope you will see for the lessons presented by Ms. Cross, but my purpose in the consultation is to comment on the Commission's proposed statement of strategy for dismantling the process of discrimination in America. Specifically, I shall briefly describe a research project undertaken by the Institute for the Study of Contemporary Social Problems, which is an interesting thing to answer the telephone by saying, but in any case we will henceforth refer to it as ISCSP.

The project illustrates, I think, the problem-remedy approach to affirmative action which is featured in the Commission's proposed statement. I confess, of course, that it was an unwitting implementation of the problem-remedy strategy, because I hadn't heard that expression at the time we designed the project. After I describe it, however, I will summarize some lessons that may be learned from this project.

Both the exemplary project and the commentary are discussed more fully in the paper I filed with the Commission. In 1976 the Institute for the Study of Contemporary Social Problems, with support from the NIMH Center for Minority Group Mental Health Problems (or Programs—I have never figured out which one it was) undertook to devise means of amerliorating institutional racism—or discrimination, if you prefer—in five cooperating police departments. In the problem-solving spirit, the project was implemented in three phases in joint enterprise with the five police departments. Phase one consisted of organizing the activity in factfinding; phase two then consisted of developing pre-

scriptive packages for change based upon the facts that were found and planning for the implementation of those prescriptive packages.

Phase three involved us in monitoring change tactics—we, by the way, at the institute—monitoring a change tactic, and providing technical assistance to the police departments, and on another front disseminating findings and recommendations to the police, the scholarly, and other interested communities. Responsibility for diagnosing problems of institutional racism and developing remedies for them rested with the chief of each department and with a project task force from each department.

The project task forces were intended to function as the primary agent of planning and action in each police department. They consisted of a minority representative who was appointed from the department's ranks by its chief and a varied number of minority and nonminority command and noncommand personnel. The role of the ISCSP in the project was effectively that of a consultant, a consultant equally to the chief and the task force, and also a provider of services.

The project was oriented not so much toward the production of specific preidentified changes in departmental policies or practices as it was to the initiation of a general affirmatave action program planning process. The affirmative action plans, as you well know, under which the five police departments were operating at the beginning of the project were consistently vague and platitudinous: they uniformly lacked implementation or evaluation provisions. They were almost never more than loosely integrated with city, county, or affirmative action or general manpower plans, and, as one consequence, cynicism about affirmative action was widespread among the rank and file police officers in the project. As practiced in their departments, they thought affirmative action was both ineffective and phony. We sought, therefore, as a first priority to foster development of the mechanism within each department that would continuously and effectively address the tasks of identifying and solving problems of institutional discrimination.

We were especially concerned with the development of departmental mechanisms which were committed to bridging the gap between administrative planning, programming, and action. Factfinding in the department not surprisingly revealed numerous, although varied, problems of institutional racism in each one. Remedies were devised for some of them. Specifics of the problems and remedy can be found in my paper. I prefer to speak here of some of the problems we encountered as we implemented a problem-remedy strategy. These are probably of more general interest anyway to others who may contemplate such approaches in other settings.

I begin by noting impediments to organizational change are endemic and are exacerbated in the implicitly, if not explicitly, superheated environment of dismantling institutional discrimination. This is both a moral and a political struggle. It is easy to deal unemotionally with it only in the abstract, if indeed that is true. We were not surprised to encounter denials of institutional discrimination together with quibbling about evidence of it; professions of helplessness to affect even acknowledged problems because of financial exigencies or external constraints like unions or city government; displacements of responsibility for actions from whites to blacks and vice-versa; simple but powerful organizational inertia that arose from both structural and political sources; tendencies to avoid risks of coming to terms with the ambiguous realities of racism and the uncertain consequences of seeking remedies for it, at the same time from other quarters, excessive and inappropriate expectation for change programs that eventually led to frustration, disappointment, and in some cases disaffection. Now, in addition to these quite general barriers to change, one may also expect to encounter, as we did, impediments that are peculiar to organizations or institutions where change is sought.

I refer to the feudal nature of police organizations, police professionalization, militant unionism, and the basic nature of the police role itself as having this kind of barrier effect. It is important, therefore, it seems to me, that a fully formed problem-remedy approach to institutional discrimination must include in its panoply of measures provisions for identifying and solving problems of implementation as well as design; otherwise change will be inordinately slow if it occurs at all.

As a first condition of success, then, agencies of organizational change must be well institutionalized—that they are to ensure program followthrough and provide an instrument for ad hoc problem solving. We expected the project task forces to play this institutional role. A couple of them did, but generally I fear we underestimated the difficulty of establishing and maintaining these structural actors.

In a rational problem-solving approach to change involving a collection of data, it is also easy to fall into technical traps. There are two kinds of them. One is where the factfinders become bemused by the data, lose sight of the forest, and transform their remedial mission into an abstruse social science or legalistic exercise. The other trap is where a wealth of facts, all subject to interpretation, allows opportunities for enemies of change to nitpick fledgling programs to an early death.

Rationalist solutions to moral problems like institutional racism have their own special perils built in too. They encourage a view of emotional conflict as irrational, as dysfunctional, and certainly as counterproductive. Yet the blunt fact is that dismantling institutional discrimination requires confrontation with the emotional substances of racism. Not only must conflict be tolerated and expected; it must be recognized as functional. Georg Simmel was one of the very few sociologists to make plain the role of conflict in supporting the effective management of social systems, and that was some time ago. Finally, it is almost inevitable, surely in any long-term change effort, that external leverage is essential to initiate, help direct sustained efforts to reverse historic racial inequities in organizations and institutions. This can come from the courts. It can come from external agents like the Commission, like the ISCSP under appropriate circumstances. But in the end, it is a primary responsibility of government to shoulder the responsibility for imbuing society with a moral tone and for holding individuals and organizations accountable to a public interest in achieving social justice.

I will conclude my remarks with two points. First, procedurally, programs that dismantle institutional discrimination need to translate their goals into specific tasks, the performance of which can be allocated to particular agents who then can be held accountable for them. They need, moreover, to select and rank these tasks with due respect for the resources available to perform them and not try to do everything at once no matter how urgent everything seems. In addition to performing task by task, we believe phasing is a helpful strategy for structuring programmatic change. I don't really think there is anything shocking or startling in those discoveries.

The second point I wish to make is more philisophical and in a way critical of the Commission's proposed statement. It is this: rationalist approaches to institutional change, like the problem-remedy approach, risk missing or papering over a fundamental feature of institutional discrimination, that is, its fundamental grounding in cultural and ideological soil. Values and ideology sustain discrimination. As George Fredrickson recently reminded us and I quote, "Equality and fraternity do not result automatically from elimination of Jim Crow laws and practices."

Racially invidious institutional systems in America are rooted in white European values that mostly subconsciously lead to a devaluing by western whites of third world cultures and consequent disadvantages for their people.

We obviously need to move aggressively to devise and set in place administrative remedies for institutional discrimination. But affirmative action is a moral as well as an administrative remedy. This dimension seems largely missing in explicit form from the Commission's proposed statement. Yet, if we are to use administrative remedies well, America must at least become self-conscious about the difficult ideological and value premises of discriminatory social systems, especially the white supremacist canard that necessarily subverts administrative efforts to achieve a truly just society.

I would like to add one final remark if I may. I've been troubled by another phenomenon, and that is one we were talking briefly a little while ago about, the deja vu experience that is associated with hearing the same kinds of issues and problems and phenomena discussed for the last 15 years or so and the same discoveries made on an annual basis about what the problems are and what the difficulties of doing anything about them might be, and it has struck me, if you had an opportunity to look at my paper you may recognize why this is. It had struck me that the Commission's focus at this stage on institutional discrimination, while understandable and commendable, suggested to me the possibility that the Commission is following rather than leading events. If that is the case, it seems to me it is an unfortunate role for it to play.

MR. HARTOG. Thank you, Doctor.

Dr. Sargent?

Alice Sargent is an organizational consultant specializing in affirmative action in the public and private sectors. She is the author of two books, *Beyond Sex Roles* and *The Androgynous Manager*, as well as many articles. She has also been the director of the master's in business administration program

for Trinity College in Washington, D.C., and is currently on the faculty of American University. Organizations to which she has been a consultant include the U.S. Department of Commerce, the Federal Executive Institute, the National Institutes of Health, the National Training Laboratories, the Office of Personnel Management, the General Accounting Office, Action, the Department of the Army, the Celanese Corporation, and Proctor and Gamble, Inc. Dr. Sargent holds a bachelor's degree from Oberlin College, master's degrees from Brandeis and Temple Universities, and a doctorate from the University of Massachusetts.

Statement of Alice Sargent, Affirmative Action Consultant

DR. SARGENT. Thank you very much. I guess this is a real treat, the chance to act like a consultant here, and probably the way I thought about what I wanted to say is that of being a consultant to you.

It seems very simple to me to identify several areas that I would like to recommend as next steps. I think the report is an outstanding report in terms of its pinpointing the issue of discrimination. It is one of the best-written government reports that I've ever read, and I feel very enthusiastic about that.

The issue of how, which is what we've been talking about today, is the critical one, and what I addressed in my paper was really what you tried to take on on page 36. I was trying to amplify the management practices, the how-to, and what strikes me is that 4 years ago I set out to try to find an agency in Washington that would have a convening of this kind of corporate people and government people who wanted to talk about the how, and I went first to the Department of Commerce, and said, "Why don't you bring together 25 business leaders of major corporations and agencies and let them share war stories, what works and what doesn't work. We're all out there reinventing the wheel."

There are probably 85,100 affirmative action consultants like us who are out there working alone. We have no journal. We have no book that talks about effective interventions. We share our knowledge with each other in airports about what's effective. You are bringing together papers of success experiences that nobody else has, because this sort of convening of consultants to share what works and what doesn't work doesn't take place, and so the affirmative action consultant is in a very lonely position. Pulling us together with corporate people, with the government people, would be much more cost effective than the way I go about it. I get called in by a new agency, a head, a new appointee; just as people are talking about new CEOs, new appointees into organizations who say, "What works? Tell me some examples. Where have you been that they tried something that's effective, you know? What do I have to spend? What will I get for my money in affirmative action? What is it going to take to make it happen?"

You do that on an individual-by-individual basis. When I went to Commerce, they said, "Well, that's not our department," and it amazed me. There is no Office of Women in Business, Office of Minorities in Business. There is a concern about small businesses owned by women and minorities, but that's not what I'm talking about. I'm talking about the work force of women and minorities who are joining large corporations. There is no place that represents these concerns or pulls together the issues.

People at the Department of Commerce said, "You ought to go to the Department of Labor. They are concerned with employees." I said, "No, I want the leaders of the organizations who are having to solve those problems."

Now, it occurs to me that maybe you can play that brokering, convening role of bringing together the decisionmakers who could learn from each other. Now, there is certainly the competitive edge that there are those who don't want to tell, but in this area particularly, the struggle is so hard to say what should it look like that I think we could come up with some outline, an outline of an effective plan, an outline of what works in training, how you make bottom-line assessments.

I mean, I have my own opinion. When people say, "What's it going to take?" I say the first 3 to 5 years will be getting the key management team together that's going to work on this, creating enough awareness and team building that team so they can talk to each other without competing the way they usually do and getting the resources, the women, and the minorities in the organizations to begin to identify the problem so that this top management task force can go to work.

So maybe at the end of 3 to 5 years they will have a plan and they will have taken a look at some of the systems that are not in effect, and I mean organizations are not well managed by and large. Management is just becoming a field. We have a couple of master's in management degrees around the country,

but one of the things I learned very quickly about an MBA degree is an MBA is not a management degree; it is a degree in economics, finance, and marketing, but we have no programs in this country at this moment that turn out practitioner managers, and the accredited group for the MBA program, as you probably are familiar with, said that the Harvard case study method for turning out managers does not turn out practitioner managers who have to make decisions every 6 minutes based on incomplete information without all the resources there and the telephone ringing. So we have not defined the way that turns out managers with the kinds of competencies that managers need.

So the first 3 to 5 years are gearing up the management group. The next 15 to 20 years are probably dealing with getting the systems in the organization ready and the attitudes—and that's the second part of what I would say—it is that I think you can play a critical role in defining the major client of what we're doing at this moment as the white male and that my impression is that we are stuck to the degree that we are stuck because we have not brought white males on board. We have not found a self-interest.

I used to ask white males to come up with 10 reasons to respond positively to affirmative action. There were always only two, that was the law and, perhaps, the morality issue, the corporate social responsibility. Beyond that there were no reasons, and I think the issue—it seems to me to be that we have another scarce resource in our country: meaningful work is a scarce resource, and the sort of power realignment we are talking about, this massive restructuring of shifting meaningful work around to an increased population, is that we are taking a major way that people validate their identities away from them.

Women wanted to leave home and go to work because it made them feel better about themselves—besides the economic factors, that our culture validates and rewards and makes you feel good about yourself right now because of work. We have too narrow a base and we have to find a whole lot of other ways to feel good about ourselves because meaningful work is a scarce resource, but we appear to white males to be taking away from them and not putting anything in its place.

Looking for a rationale for something that is in it for white males, those who are experiencing stress, those who have read the type A literature and have decided they don't want to shave 8 to 10 years off their lives for the good of the corporation by getting a heart attack actually prove very interested in affirmative action, and in my experience, if you offer a stress workshop and you talk about spreading the workload out and dual-career families, you get a lot of interest because they are reappraising their values toward work as the be-all, end-all of validation.

At any rate, when I'm asked how to spend limited dollars, my experience is, if I were to do one thing, I would spend 1 day team building the interface between the supervisor and the women, or the supervisor and the minority. In my experience the critical factor to women and minorities getting ahead in organizations and to the retention of women and minorities is the supervisory relationship. That speaks very strongly to me to issues of attitudes towards race and sex and to the discrimination issue. We know from psychological research the importance of the expectation effect. If you expect people to perform well, they perform better, an if you have low expectations, then the self-fulfilling prophecy is put into place.

If that supervisor, who in my experience was white male, is very culturally deprived in terms of women and minorities—the typical profile of a white male middle manager in a corporation, or in the government, is that he married a high school or college sweetheart, did not know a lot of professional women, went off to Vietnam, and came back at a level of midmanagement where there may not be a lot of professional women, particularly if you are not living in a major urban area, but if you are where plants are in Bay City, Texas, or Jackson, Tennessee, wherein some of the corporate world is, professional women are very unfamiliar people.

At the same time, chances are there just can't have been for a lot of people contact with minorities. I have the experience with working with both Hispanic-white issues in California and black-white issues in Tennessee and Washington, New York, and around the country, and the opportunity to have contact, that is, in an unstructured way, to feel comfortable with minorities, is very unique in the experience of whites.

I did a boss-secretary workshop the other day for an agency here in town. The most revealing fact was that we asked people to come in pairs because we were going to team build the boss-secretary relationship, and you know because it was Washington what the racial composition was: the bosses were white

males, scientists, engineers; the secretaries were black females. I had instances of managers who did not know the name of their secretary. She had been the secretary for 2 years. Possibly her name was Mary Jackson or Williams—were not sure what her last name was. People who wrote messages to the secretary said, "to the typist"; they had not called her by name.

All the stuff that is coming out on secretaries, that your secretary is supposed to be your time manager, that your secretary is part of the management team because she prepares the agenda for staff meetings—that had not crept in there. Your secretary plugged into some machine and pushed buttons and the material came out, and as a secretary said, "You know, I put my initials on the paper each time, hoping somebody will know it was me and come back and say thank you for the report, but I don't really get feedback very often about it having been a good report."

So that notion about women having lower aspirations when we know about expectation effect, when we know that aspiration level is a transactional experience—I mean, that aspiration level comes from your sense of the other person that you are interacting with, and it can't be taken as a trait or a quality of one person.

In support of the issue that race and sex matter a great deal, there was a Department of the Navy study that I thought was more serious than we've had, the issue of two people wanting to work for a woman boss which is the same as do they want a minority boss. The Navy study looked at preferred coworkers.

The same facts were there, that the preferred coworker was a white male; the sense is that the white male still has access to the power, access to know how things are done, the organizational way of doing things, so if you are working with a woman, you will not have the same guarantee of success as if you were working with a white male. So, of course, there are perceptions that are quite racist and sexist along those lines.

I guess the last thing I would like to say is that we have not taken on the issue of how much organizations are going to change and we know—I mean, and I feel that affirmative action—how much organizations have to change as a response to affirmative action. There are a lot of implications in the issue about productivity being down. A lot of people think productivity is down because of this new work force. The snake has to swallow an elephant so it is slowed down while we integrate the new work force. Well, productivity was declining long before that, but we have to look at the practices that are keeping productivity down. Some of this has to do with the lack of any model of managerial effectiveness.

I think we are moving into an era of competency-based management. We are beginning to define the managerial competencies, the knowledge competency, personal competency, analytical competency, entrepreneurial competency, which is a new skill that a lot of managers didn't think they had to have, just do a good job and you don't have to sell it to anybody. Compliance-producing skills, alliance-producing skills, team effectiveness—we are starting to say what the effective manager might look like. I think inherent in this is that it is critical to say, if we've got to put them into the work force, what are the values of women and minorities coming in that are different from the mainstream white male dominant organizational and literal organizational problems which haven't been. That's what led me to write *The Androgynous Manager.*

If they would be willing to publish *The Androgynous Manager,* I would have been shocked, but they are and they are willing to say that masculine and feminine behaviors are critical to managerial effectiveness, and there is a new model of management that is going to come out there and we just don't want to socialize women and minorities, into the dominant white male managers. We want to change the way white male managers do business. There is a lot of energy out there in the trenches and a lot of enthusiasm for what's been unleashed, and I would like to see us bring it together and hear about it.

MR. HARTOG. Thank you.

Dr. Nordlie?

Peter Nordlie is president of Human Sciences Research, Inc., a consulting firm in McLean, Virginia. The firm specializes in racism and race relations training and research, the investigation of social change processes, individual and social system response to stress, and methods of evaluating change efforts. He is the author of numerous publications on institutional change. Dr. Nordlie has established a program of research and operations in race relations as one of Human Sciences Research's major areas of work. His most recent research has been in the development of objective measures of institutional racial discrimination and in the assessment of race

relations/equal opportunity training programs. He has for more than a decade been involved in the design, implementation, monitoring, and evaluation of race relations programs for the U.S. Army. Dr. Nordlie holds bachelor's and master's degees in psychology from the University of Maryland and a doctorate in social psychology from the University of Michigan.

Statement of Peter Nordlie, President, Human Sciences Research

DR. NORDLIE. Thank you very much. I'm going to speak on monitoring and evaluating equal opportunity programs in the Army. 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 December of 1969 major violent racial confrontation erupted at almost every major Army installation in the United States and overseas.

The ability of the Army to perform its prime mission was suddenly jeopardized. Racial strife was perhaps more immediately critical to the Army than to other large organizations, especially civilian, because the Army is composed of teams or units which 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, therefore, 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 tension, and this I think is important in the history of affirmative action because the Army's commitment involved substantial resources, considerable support for 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 nearly over a decade. I don't intend to review the Army equal opportunity program as it evolved over this 10-year time span because my focus would be directed more specifically at monitoring and assessment efforts.

In the paper I do provide a thumbnail sketch to provide some background for those not familiar with Army programs. The Army policy describes their equal opportunity program as consisting of a single program with two equal but separate components: the affirmative action component and the education and training component.

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 there has been substantial R&D effort in the Army in this area. Most of those methods the Army has utilized in monitoring and assessing its equal opportunity program resulted from the R&D effort.

In 15 minutes I can only skim the top, but my paper does provide some detail on the systems mentioned. Those methods fall into five categories: first, surveys of racial climate in the Army. The results in detailed findings from those attitudinal perception surveys and their comparison over time are voluminous and cannot, of course, be presented here.

At approximately 2-year intervals beginning in 1972, the Army conducted comprehensive, detailed, armywide surveys on racial and equal opportunity attitudes and perceptions and from them was able to assess the racial climate and whatever changes were occurring.

Second were surveys of attitude 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 which is largely lacking from 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 results public. This is contrasted sharply with the more frequently encountered approach of papering over deficiency in such programs, publicizing how much effort goes into the program, and steadfastly proclaiming that the program was achieving what it was intended to achieve although offering no hard evidence in support of that claim.

The major conclusions from the study are noted in my paper. There is not time for us to review them here.

Third, method. It is called the difference indicator system. Ever since affirmative action 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 which result in racial or sex discrimination. Any successful effort to change such practices needs to begin with a demonstration that they exist and end with a documentation that they have been eliminated.

My discussion will focus on a management tool designed for the Army to diagnose the presence of possible institutional discrimination and to monitor the success with which such discrimination was being reduced within the organization. The core of the system of indicators was the calculation of what was called the "difference indicator." This indicator was so constructed that it immediately reflected the direction and magnitude of any difference occuring 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 that 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. In the study, the suitable data could be obtained on 58 of these personnel actions, which could be grouped into the following categories: promotions, training and education, awards, command assignment, nonjudicial punishment, unprogrammed discharges, and reenlistment.

Difference indicators were calculated 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.

A few selected examples of various presentations are represented in this paper. One example shows an array of all the indicators for the total Army for the year 1973. By reviewing this array one can immediately see 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 blacks and whites.

Another example shows how the indicators are used to plot changes over time. Still another example shows the racial representativeness of the rank and grade structure for officers and enlisted personnel. It shows that the racial representativeness improves steadily between 1962 and 1977. It has worsened since then.

Another presentation in the paper looks at the relative speed of promotion of whites and blacks. It shows clearly that whites are promoted faster than blacks at every grade level. It further shows—and this finding was so surprising that we first thought we had reversed the scales and initially reported the data incorrectly—showed that higher aptitude whites as measured by Army tests were promoted faster than lower aptitude whites as one would reasonably expect; for blacks, however, the reverse was true: lower aptitude blacks were promoted faster than higher aptitude blacks. This is certainly a finding that deserves further study—especially, it seems to me, in the light of the discussion yesterday of the virtues and sanctity of the merit system.

The difference indicator 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 Army research institute-sponsored study undertook this task, and a system was developed that was applicable at lower levels of command.

Fourth method, the annual assessments. The fourth annual assessment completed in May 1980 has just 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 change over time.

The annual assessment is a valuable compendium of detailed quantitative information reflecting minority participation in all aspects of Army life. There are eight major topics covered in the annual assessment. They closely parallel the categories that I mentioned for the difference indicator system.

The fifth category, the equal opportunity diagnostic 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 the unit and using that

diagnosis for the basis for training programs or other actions tailored to the particular needs of that unit, and assessing the success of the training program or other actions aimed at reducing the problems found.

A philosophy underlying the system is totally consistent with the Commission's emphasis on tailoring the remedy to fit the problem. This system was called the diagnostic and assessments system. It consisted of a paper and pencil questionnaire to be administered to all personnel of the unit; "op-scan" answer sheets compatible with equipment found on Army posts designed to provide rapid scoring, the computer program for analyzing the questionnaire data, the feedback report format which specifies the form in which the data would be provided to the commander, a user's manual which describes every step of the procedure, and lesson plans for a 4-hour course of instruction for the commander and whoever 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 aid for carrying out their equal opportunity responsibilities, using only the resources available to him in his own unit.

The final questionnaire which evolved consisted of 120 items. These items yielded 21 scaled scores, each of which indicated the presence or absence of a particular problem area. The next problem was how best to present this considerable array of information to the commander. The objective of the feedback report was to provide as thorough an analysis of the survey data as possible in as much a predigested fashion as possible so as to minimize the commander's task. The concept of the computer-generated feedback report was to present the results in such a way as to lead the commander from very general to progressively more and more specific levels of detail.

The final step in the development of this package was never undertaken because further research in the Army ended. 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 that is a vitally important step in the group process.

These then are some of the major needs for monitoring and assessing various aspects of equal opportunity and affirmative action that the Army has developed and employed over the last decade. All involve the collection and presentation of statistical data. Generally, two kinds of data are involved: first, objective facts, aggregated for subpopulation and the total Army population; and second, 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 it concerns these levels of overall policy and program planning. At the lower levels the reverse is true: at the company commander level, his concerns are with the attitudes, perceptions, and behavior of personnel because they relate to his ability to mold a high-performance unit, and he can do little to directly affect aggregate statistics.

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. Affirmative action is a commitment to change the status quo. No organization which claims commitment to affirmative action can be credible without being accountable to itself by documenting the change they claim to have furthered. Thank you.

MR. HARTOG. Dr. Nordlie, thank you very much.

Discussion

CHAIRMAN FLEMMING. Thank you. We appreciate these presentations very much. I will now recognize various members of the Commission to engage in dialog with you.

Vice Chair Berry.

VICE CHAIRMAN BERRY. Thank you very much, Mr. Chairman. I have two or three reactions to the presentations for which I thank you very much. I learned a great deal from them.

I thought I would share those three reactions and see if we can open the panel up to comments on them. The first one was, really, a query as to whether you thought in the evaluation of an affirmative action plan increased productivity ought to be the standard that one is looking at in an organization where productivity is an issue, and I suppose it is an

issue in most organizations, whether that is an appropriate standard, whether having more women and minorities has somehow increased the productivity of the organization as a standard.

The other reaction I had was in particular to the presentation of Professor Hunt. We have been told by a number of panelists that we've done a service by focusing on institutional discrimination or organizational discrimination and for not blaming white males for discrimination; then we come to your presentation and you seem to believe that we ought to say more about such issues as morality, values, and purposes. I am just wondering if that's the case, and if it is some appropriate measure of how effective affirmative action is, just what would you have us say about values and morality and such things in this climate.

Finally, my reaction to your paper, Professor Nordlie, was that I was interested in the point you made about the blacks with lower aptitude getting promoted faster. I wondered what you meant by aptitude and also whether you have any speculation about it as to whether it might be that those who had higher aptitudes, if you meant by that some kind of awareness—I didn't know what you meant by if—might have a perspective of how they fit into the organization and what is possible that may result in behaviors on their part which would not be desired by their supervisors and, therefore, they would be unlikely to be promoted.

I just am wondering whether anyone would care to comment on any or all of those points which were my reactions.

DR. HUNT. Well, I'm happy to comment on at least one of them, since it has to do with me. But let me address the productivity question, if I may, first.

I don't know, frankly, whether productivity is appropriately included as a criterion for the effectiveness of affirmative action programs or not. It seems to me it is a question having to do with the purpose of particular programs, and it may or may not be an appropriate criterion. Furthermore, I think the matter of productivity is clearly subject to definition, and it has to be some kind of determination based upon the input of effort, whatever it may be, and the consequences of that effort.

It strikes me that's a matter that isn't necessarily confined to definition solely in customary terms we've heard in the usual bottom-line formulations. There are other factors that may be entered into the question in determining desirability of a program.

In fact, I can imagine situations where I would be prepared to trade some productivity for other values, so that the concern I have with regard to the whole productivity ethos, frankly, is that it has a tendency to displace considerations of any other values for economic values, simple economic values, short-term economic values, and for that reason I think, frankly, it is a dangerous concept and needs to be treated carefully, rather than clasped to one's bosom, as the answer to all difficult questions.

The question of what one should say about morality--I suppose that comes down to whatever you think is appropriate to say about the moral question. My concern is that I have no problem whatever with attempts to remedy institutional racism or discrimination, whatever term is preferred. I don't, however, believe that the problems of institutional discrimination are accidental. I don't think they are simply habits that people have fallen into over a period of time. I think they are premised upon a set of ideas, some of which we have a glimmering of understanding about, and it strikes me that glimmer ought to show through in the Commission's statement on the subject. I guess my fundamental view is that it ought to be the role—I'm sorry for advising you on your role——

VICE CHAIRMAN BERRY. I asked you.

DR. HUNT. It ought to be your role and yours in particular, yours and the White House, to strike this stance in the society that provides the moral leverage that makes it possible for workers in the trenches, in fact, to do that work, to be making a dent, and to devise organizational changes.

I can't imagine, as I said before in my preface to my comments, how one is going to accomplish national purposes on an organization-by-organization basis unless somebody is up there very clearly and very aggressively stating what that national purpose is, so that I don't have any specific moral injuctions that I would lend you for the purpose. But I think we all have a reasonable idea about what they are, so I'm not criticizing the Commission's concern with institutional discrimination when I make my remark about the problem of following rather than leading events.

I think the fact of the matter is that our experience over the past, literally the past decade, indicates that there are people who are concentrating some considerable effort and energy and other resources on remediation of problems of institutional discrimination, and, if so, we have enough experience with it

by this time that we understand something about the barriers to its accomplishments.

I suppose that what it comes to is—my message is we ought to be concentrating rather more attention on those barriers and looking forward to developing remedies for those as well as tackling remedies for organizational changes which we've been featuring.

VICE CHAIRMAN BERRY. Thank you. Anyone else?

MS. CROSS. I would like to address both questions because I think they are the same question. I do not think that productivity should be a criterion for evaluation of the success of affirmative action programs. I think that increased productively is one of those unintended benefits, if you will, and that as a black person and as a woman I think that government as represented by this Commission, the President, has an absolute responsibility to ensure the likes of me access to employment at whatever level I am capable, and from my perspective that has been denied me and other people who are like me or who are different from white men, and so I think that is the moral issue as well as the very practical issue that, if we don't do this in a society, we are headed very quickly towards a time or a place in this society which is untenable. So that I think the moral imperative is exactly the same issue, and I don't see affirmative action as being outside the regular business of how we live together in this country.

DR. NORDLIE. The question on this aptitude measure—the measure was used—was the armed forces qualification test, which is a test used by the Army at that time to assign people to military occuptional specialities. I am not defending the particular test in any way; I am merely pointing out differences in the relationship between whites and blacks.

As to the question of productivity as a criterion, there is a little bit of research in the Army which shows a correlation between mission readiness performance and good race relations within the unit. There is not a lot of it now. It shows also that or suggests the relationship may be such that getting a good performing unit comes first and that leads to good race relations rather than the other way around.

CHAIRMAN FLEMMING. Commissioner Horn?

COMMSSIONER HORN. Pardon me for persuing the question of that aptitude test, but when comments are made about merit, I get my adrenalin up because I think the question is, what do we mean by merit in a given circumstance, and there are too many people, I find, in our society who want to be mediocre and just brush off questions of merit.

Yesterday we were talking about intellecutal merit in a university, intellectual achievement in a university. No one has ever said that guarantees success in a particular job that is to be done, so I was just curious in that study as to the degree to which the Army has had other measures and analysis of success on the job. And you might describe a little more just to which jobs, positions—which branches the blacks in this example that you noted that had a lower aptitude were promoted ahead of blacks that had a higher aptitude. Are we talking about enlisted grades, officer grades? Are we talking about infantry, talking about supply, talking about staff, line positions, etc.?

DR. NORDLIE. We're talking about enlisted personnel only, and we're talking about all career fields and all MOSs, that relationship stood out. We don't have an independent measure of the other characteristics of the individuals involved. That relationship stood up for a 5-year period and it is a very large and solid relationship, but in the particular study there is no other data on actual performance—on-the-job kind of measures I think you're asking about.

COMMISSIONER HORN. Because it is a fascinating conclusion, it seems to me at least, to a lot of interesting studies as to what type of characteristics are necessary for success. One could argue personal leadership qualities, ability to work with other people, etc., none of which are measured on an aptitude test as opposed to if one would say a supply sergeant, or working where you had to deal with papers and numbers and words and verbiage and this sort of thing, which might be measured on an aptitude test, might not—I just wondered if anybody is pursuing this.

DR. NORDLIE. Whatever it measures, it is still a question of why the relationship is reversed with whites and blacks.

COMMISSIONER HORN. I could give you one hypothesis, and that is that the blacks might not have had the educational advantages that the whites did, and those whites that had a, say, minimum level of education at grade and secondary school might then also have a correlation, and again I understand some sensitivity on using the word "socioeconomic class" on this panel, but I still think it is very important. There could be a closer correlation between educa-

tional aptitude and socioeconomic class than there is in blacks.

DR. NORDLIE. It is also true with respect to education; lower educated blacks on the average were promoted faster than higher educated blacks. It wasn't as clear cut a relationship.

COMMISSIONER HORN. Did they analyze educated—where? I mean I am thinking of rural versus urban, big city schools, etc.? I would think that study worth pursuing.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. I just want to focus a little for the moment, Ms. Cross, if I may, on a morality issue that you raised. You indicated that you believe that it is the government's responsibility to assure opportunity in employment for its citizens. Is that indeed what——

MS. CROSS. Yes.

COMMISISONER SALTZMAN. I think I recall the new President recently saying that social reform is not the business of government. I guess you differ with that.

MS. CROSS. Yes.

COMMISSIONER SALTZMAN. Why?

MS. CROSS. I wasn't even referring to social reform. As a citizen of the United States, having done my part to educate myself and to learn as much as I can, I see no reason why there should be barriers to my ability to find employment or education or anything else. Now, I understand how simplistic that sounds in light of the history of the United States, but I don't think that is in the realm of social reform. I think that is in the realm of providing equal opportunity to all citizens.

COMMISSIONER SALTZMAN. So you are not saying the government has the responsibility to provide you a job but, rather, to make sure there are no obstacles.

MS. CROSS. To remove the obstacles, yes.

DR. HUNT. I think there are supremacies in this society, which are engraved in the enabling documents that produced it, which warrant attention on the part of the Federal Government and any other units of government in society, not only attention but plans to act on, procedures to do that.

I believe furthermore that over time historically there have been some errors. I am prepared to consider them as errors and attach no blame to them, which is also the responsibility of the government to redress. For those reasons I used deliberately the word "reform" rather than change with respect to——

COMMISSIONER SALTZMAN. Can you pinpoint exactly, precisely what you are talking about?

DR. HUNT. I think, for example, one would find assertions to the effect that all men are created equal, which are simplistic, I suppose, but basically powerful moral concepts. With respect to the errors, we talk about the legacy of slavery that is still with us, and that is a reason why it is a color issue rather than a class issue, it seems to me. The process of dismantling that systematic program of discrimination has not been finished.

I think we furthermore—and this is sufficently documented, I believe, to be beyond serious argument—we operate under a system of white supremacist ideology, that is an implicit system thereof. Frederickson's recent book comparing the United States and South Africa is a case in point of the documentation. I think these are issues that need to be addressed, and my argument is that fundamentally it is the governent and only the government which has the responsibility for preserving and protecting the public interest. It is, therefore, the urgent task of the government, and again particularly the Federal Government, to act on that responsibility in an aggressive and affirmative way. If reform is necessary, reform is necessary.

MS. CROSS. I would like to add to Dr. Hunt's statement although I think that was eloquent. As I entered this particular field of consulting 8 years ago, one of the things I noticed most acutely was that white men had an a priori sense that access to employment in major organizations in this country belonged to white men and the rest of us are interlopers. That has not changed; that is, I believe, still the predominant feeling and belief among white men in major organizations, not just major business corporations, so the rest of us come in at their pleasure and are treated as outsiders, and I think it is part of the reason we are also seen as not as competent as they, and I think that is another issue that needs more exploration.

COMMISSIONER SALTZMAN. In your judgment in both points of view this particular document does not speak adequately to that?

MS. CROSS. I think in a general way it does speak adequately to that. There are statements about institutional and systemic arrangements which have created discrimination in the first place and that attention has to be given to removing those systemic barriers.

I would not ask the Commission to do necessarily more in that arena, in describing the process of discrimination. My sense is that the people of the United States for the most part have not learned the lessons I thought we learned by having gone through the sixties and the seventies in this country. There are still people in this country who are not clear about the relationship between slavery and the aftermath of slavery and what happens today.

There are people who still call me colored, which I happened to feel was gone. I thought there was enough sensitivity to those issues that would not exist. There is not information about the existence of discrimination that would help make it easier for people to understand why affirmative action is an important intervention.

COMMISSIONER SALTZMAN. One final question. Dr. Nordlie, I think on page 3, on the second side of your paper, you indicated that there is a shift in language in the program of the Army, from emphasis on black-white relations to emphasis on equal opportunity, and down the line there are nine examples. Can you explain motivation for the shift in language?

DR. NORDLIE. The race problem in the Army initially was defined largely as being one of racial violence. I think the initial program was created in that atmosphere and with that understanding of what the Army was trying to deal with. It was trying to reduce or eliminate the racial violence. It did not initially define the problem as one of discrimination. That evolved over time.

As we look at the early Army training, it all dealt with increasing interracial communication, creating racial harmony. It didn't mention discrimination. There has been an evolution such that there is more and more understanding of what the real problem is, and that the real task is that of eliminating discrimination, and I think that's reflected in the vocabulary that I reported there. Unfortunately, it is also reflected in the priority of the program, which was very high and now is very low.

CHAIRMAN FLEMMING. Commissioner Ramirez?

COMMISSIONER RAMIREZ. I, too, was very interested in your finding and would offer an explanation. When I, at some point in my development, took the Army aptitude test and I had the highest score in mechanical aptitude of any of the people who took the test with me, and nothing could be further from reality, so—but I think very seriously, Ms. Cross, as I understand it, you have told us first of all that there are plans and that's where a lot of people are, and after the plans you may have some implementation, but even with some of the implementation of the plans—and I think you would go as far as to say substantial implementation of plans—there is still a lot of behaviors (you call it subtle disciminatory practices) which make life difficult and which continue to present obstacles.

Do you believe that the Commission's statement goes all the way through that process?

MS. CROSS. No, I don't. As I have sat through these 2 days, I have not heard what I call reality perception of what's really going on in the trenches. That was the effect of my saying I work in the trenches. Affirmative action is not a number one concern of managers in major American corporations. I wouldn't know how to rank it. It certainly is not near the top, and it does not take up a lot of time and attention; therefore, a climate is created within an organization despite the fact that the numbers may have been met—the minimum numbers may have been met.

The climate is such that there is a sense of defeat of the objectives in the first place. I think that in part the business of minorities, in particular—not so such women—leading a large number of minorities from one place to another is in part responsible for a negative climate, a lack of acceptance and willingness.

The fact of sabotage, literal sabotage of important work that is being done—which is another indication to me that the climate issues have not been resolved and have not been dealt with.

CHAIRMAN FLEMMING. Could I just follow that? I mean, I will just ask the question and other members of the panel may want to come in either in connection with your discussion or later on.

You made the point, or the point has been made in other ways, that the managers of major organizations do not have a concern or are not involved in affirmative action time and time again. Dr. Sargent commented on the desirability of bringing together. She went to the Department of Commerce and the desirability of bringing together the heads of some of the major corporations to discuss affirmative action.

All of you have had experience consulting with the public sector, with the Federal Government, and I assume—well, I know with other levels of government. Can the same thing be said about the public sector that you've said about the private sector?

Ms. Cross. I would say that the situation in the public sector is worse.

Dr. Hunt. I agree wholeheartedly. In fact, an exercise of reviewing the affirmative action plans in the police departments from which we've heard, and in the counties and cities which were the jurisdictions of those departments, demonstrates that they were perfunctory; they were pro forma; no thought had been given even to the question of what would happen if the goals stated in the plan were achieved.

We calculated in one case, for example, that given evenhanded recruitment and hiring—that's color-blind recruitment and hiring, sex-blind recruitment and hiring—such that the quotas, if I may, were fulfilled annually, the question was how long would you estimate it would take to achieve parity to some standard associated with the work force—the line extended to infinity. There was no way ever of achieving parity, that is the presumed objective of the overall affirmative action effort, given the plans in existence.

Dr. Sargent. My experience in Washington certainly has been—I mean, there is none of the concern for the stick or the economic sanctions that exist in the corporate world. I've been spending some time in the Department of Energy where there was the $12 million decision. That money is our money; it is our taxpayers' money; it is not their money, and it just doesn't exist the way, you know, AT&T spent $49 million, and Bank of America did, and Merrill Lynch—that worried the corporations we were consulting to, and there was some leverage, and I think the issue of sanctions in the Federal Goverment—I think there is some now that is tied to the senior executive service bonus system, and that the critical element has to exist around affirmative action—is the first beginning of clout, but that if one were going to evaluate a Federal agency's affirmative action program, not by what's put out on paper but by taking SES critical elements and saying what does that add up to, if each SES acts on this cricital element, and he doesn't get a bonus if he doesn't act on it, you would have a more real measure of the affirmative action plan within a particular agency.

Coupled with that, the defeatism, the low morale, the hopelessness, and futility that is present among our bureaucrats, our public servants at this moment, there is much more likelihood of throwing up your hands. In many job categories they are not competitve—engineers, attorneys—or attorneys come to the government for 3 or 4 years and use it as a training ground and move out—but to break down the requirements and to take a look at classifying jobs other ways—is an engineering degree really critical for a job?—to think of getting that through OMB, there is a defeatism about it.

Chairman Flemming. Pardon me, I just wanted to get the public sector into the picture.

Commissioner Ramirez. I also had questions about the public sector. I'm trying to grapple with the problem and even with a question, and maybe I will just present my problem and ask Ms. Cross or Dr. Hunt to comment.

I can identify a number of public institutions in this case and in my own State which have systematically done what I think might have occurred at least in some situations in the Army, in which the selection of minorities has been—the result has been that not the best people have been identified. It has often resulted in great detriment to my community, and it poses a very serious morale problem for those of us who advocate affirmative action.

If tomorrow I were to be named the head of one of those agencies, particularly given an ever-shrinking support for that kind of public bureaucracy, I would find myself in a very difficult situation. It goes beyond the question of merit; it goes to the question of a history of sabotage and how you deal with it.

It goes beyond the merit of the individual and service to the community. Can you, first of all, tell me whether that problem has any relevance to the broader world, or whether it is just my own and, secondly, how would you react to it?

Ms. Cross. Until you mentioned sabotage, I thought I was clear. I need to see whether I hear this question. Are you saying that because of our efforts in trying to bring into public agencies and other places women and minorities, some of those people have not been as competent as we have hoped and that there is a terrible cost to the individual as well as to other individuals coming in?

Commissioner Ramirez. I am saying for a variety of reasons, a lack of knowledge and understanding on the part of the hiring officials, or premeditated sabotage and intentions, that those decisions have not always been the best ones.

Ms. Cross. Yes, I absolutely agree with that, and I believe we have not spent enough time and energy looking at the cost, the cost both to the individual and to the organization of that kind of behavior, but I think that's a double-edged sword because, on the

other side of that edge or the other side of the coin, if you will, there are those of us who are overqualified and are denied opportunities despite the fact of our overqualification, so that I don't think that is the issue. I believe the other part of the problem is that we have made assumptions about the persons who are in positions already, i.e., the white male, that there is some kind of mystical uniform measure of their competence which has always been, and that is not true. (Alice was referring to that and others were too.) So I think we have to have more information about what merit is, what competence is, how that is measured, where it has existed in the past and so forth, as well as the cost of putting people in positions in a somewhat cynical vein—I think, "I am going to hire this person because she is a woman, because I have this goal to meet." That is difficult to pinpoint. It is difficult to live with. I personally have a point of view; that's my own personal point. I would rather have the opportunity to get in even under those evil circumstances than not have the opportunity at all.

DR. HUNT. May I comment? I think the fact of the matter is there are incompetents who are recruited irrespective of race. The further point, however, is that we have indeed witnessed cases—in one instance in one police department where an entire recruit class of black officers was clearly chosen deliberately with the expectation that they would fail. And the expectation, I might say, was fulfilled; they did fail. It isn't clear they did fail just because of their aptitudes. It also may have been that some of the field training processes helped in the process of failing them, but in any case it was a clear and explicit case of sabotage.

VICE CHAIRMAN BERRY. Commissioner Ruckelshaus?

COMMISSIONER RUCKELSHAUS. I am glad we got around to however brief a discussion of the kinds of uphill struggle of the affirmative action officers in the EEO effort inside the government structure because my experience there will describe some of the conditions we find of hopelessness and a sense of futility. But what's more important is what has induced that—and almost always it comes from an isolation of that officer in the sense that their goal isn't objectively related to the mission of the agency, it isn't considered important, and it is not only physically isolated but ideologically isolated in the agency and that's a terrible problem.

I want to be a little more pragmatic and ask you—and let me start with Ms. Cross, but I would like to ask Dr. Hunt and anyone else to respond to this: what is the ideal positioning—let's take a corporation or an institution that doesn't have an enlightened chief executive officer who thinks it is his responsibility and also to the gain of his company to do a good job, so the affirmative action officer, the EEO enforcement device in the corporation, has to function by wit. Where should they be ideally? What is the ideal placement? Ms. Cross, you mentioned they are generally placed fairly low in the organizational hierarchy and that the people who are really responsible for making decisions that discriminate turn that responsibility of undiscriminating over to somebody else; they don't get actively involved in that. What is the ideal location in your experience for an affirmative action officer? And since this may be the only question I get in, can I put a little coda on that. You mentioned later that not only the efforts of that action officer but also an evaluation of the plan itself should involve itself with something more than mere numbers. If that's the case, what else should we involve?

MS. CROSS. I am consulting with a major insurance company that is just beginning to get its feet into the water and so forth. Ideally, I think the higher up in the organization, as close to the CEO as possible, is where I would place affirmative action because what has typically happened is that a person will come in from a very low rank in the company, very often a woman or a person of color, will come in with no power, no visibility, no access to the top management, no credibility, and this person then is charged with somehow mobilizing all those people above her or above him to do something that is different.

Therefore, I would position affirmative action high up as close to the CEO as possible with clear and easy access, reporting access to that person, but also I would see the CEO person.

COMMISSIONER RUCKELSHAUS. Not in the personnel office?

MS. CROSS. And not in the personnel office, because the effect of having a personnel office is that the very problems in the organization are very often located in personnel, and the affirmative action person then has to evaluate and judge the activities of his or her superiors in personnel.

I think it needs power; it needs a sense of commitment; it needs visibility, and as close to the

regular planning process that is ongoing in the organization as possible, and with some way of fitting into performance appraisal systems some direct accountability for both successes and failure of affirmative action, rewards and punishments, money.

DR. SARGENT. I think it would be very useful to have some success stories here that you could offer—I mean that we could come up with for you in terms of how the function is carried out. I mean, in my experience EEO and affirmative action people see their jobs as staff or resource people to a key decisionmaker, and that decisionmaker should be part of the management team that meets regularly to talk about the most important management issues that the business deals with so that this can constantly be brought up.

In the government—it means to me that an assistant secretary for administration was the appropriate person—or an agency head. I have had very good success at the Federal Energy Regulatory Commission working with the Executive Director. At the National Cancer Institute, we are trying. We set up a visiting committee to look at utilization with women and minorities, and we report only to the Director and saw that as the only place to be.

In manufacturing, a vice president for operations, not the vice president for industrial relations. Most organizations set up a line and staff team for any sort of task force—at Proctor and Gamble you always had a line and staff paired together. The EEO people have to be seen as staff to the line manager, but just so that person sits in the regular management meetings, so they can always bring this up.

COMMISSIONER HORN. Can I just—I think that's a very important observation. I think this too often—in this Commission we have tried to link the office directly with the CEO, etc. The reality is to link it with someone who has key access on a regular basis as part of the management team, who is at home and can provide the support.

Often your CEOs are so busy, drawn from this to that crisis, not around to man the store, that it is essential that you have ongoing management of the program and delivery of resources to support the program.

MS. CROSS. The other person I'd like to bring in is the general counsel, because that's where they'll turn and say, "How seriously do we have to take this? What shall we do?" I think you could exert influence there.

VICE CHAIRMAN BERRY. You had another part of your question. I'm not sure you've got an answer.

COMMISSIONER RUCKELSHAUS. I was spreading it all out. It's the evaluation component apart from numbers.

MS. CROSS. It is pretty well nonexistent in my view, except for some informal evaluation or some informal assessment of what's going on. I don't see that as a major tool, yet that is across the board. I don't see that as a way of saying, "Now we've managed to do this, that, and the other, and we need to do something else."

I want to make one other point because we have talked about the situation at the college and university level where I think it is dismal. I have seen, and this is the same question you asked before, affirmative action officers brought in with no status at all on the campus. Very often recent graduates of that college come in to be this affirmative action officer with absolutely no tools at all, of power, prestige, visibility, access, or anything else, and I just wanted to have that stated, too, so that it is in the record.

DR. SARGENT. The evalation component, I think right now, is probably the retention issue. That first generation affirmative action was numbers and second generation affirmative action is retention. As we consult—I was at a major coporation meeting with the women. There were three black women engineers, five Asian women engineers, and in the course of the day each one independently spoke to me about other organizations that might have a more positive climate to work in. Now, the amount of money that went into recruting black and Asian women engineers is astonishing, and all they have to do is start talking about leaving and climate issues are going to surface.

VICE CHAIRMAN BERRY. Thank you very much. Does any member of the Commission have another question? If not, we thank you very much for your presentation. It is very useful to us as we work on this document. Thank you very much.

We will recess until 2:00 o'clock this afternoon.

Executive Experiences with Affirmative Action Plans

CHAIRMAN FLEMMING. I will ask the consultion to to come to order, please.

MR. ALEXANDER. Our panel this afternoon consists of Diane Graham, Winn Newman, Ray Graham, and William McCaffrey.

Under the rules for consultations, each participant will be asked to summarize their statement in a period of time not to exceed 15 minutes.

MR. HARTOG. Our first speaker will be Ms. A. Diane Graham. A. Diane Graham is Associate Director, U.S. Office of Personnel Management, for Affirmative Employment Programs. Previously, she was the Director of the Office of Federal Equal Employment Opportunity at the U.S. Civil Service Commission (now the Office of Personnel Management), where she was responsible for implementing equal employment opportunity throughout the Federal personnel system. Ms. Graham has also served in civil rights enforcement capacities with the National Aeronautics and Space Administration. With the U.S. Commission on Civil Rights, she was a major author of the 1974 report on the Federal civil rights enforcement effort.

Ms. Graham has received a bachelor's degree from Rosemont College and a master of science degree in administration from George Washington University.

It is a pleasure to have you with us.

Statement of A. Diane Graham, Associate Director for Affirmative Employment Programs, Office of Personnel Management

MS. GRAHAM. Thank you. It is a pleasure to be here. As you know, I am Diane Graham, and I am pleased to be here this afternoon. I think the consideration of this very vital subject is timely for us. I would say that we've come to a point of needing to look very closely at where our efforts are going to in the 1980s.

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 which, 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 and 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 that the group represents within the civilian labor force of the United States, based on the Bureau of Census data. Since implementation of the CSRA in 1979, both women and minority employees have shown both numerical and percent increases in spite of decreases in the total Federal full-time work force.

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 this 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 technical assistance which will enable them to fulfill their affirmative action commitments.

We frequently hear from managers that they would love to do wonderful things that the goals of this country had committed them to if only they had the tools; so it is important that we focus on what those particular tools are for the particular work force. 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 new results.

Affirmative action and employment practitioners in the Federal sector can point to numerous programs and strategies which have yielded positive, tangible results. Among them are the following: the cooperative education program has been a fertile source for minority and women employees, in particular in shortage occupations, such as engineering, accountanting, and other scientific-type occupations. It is a well-established agency staffing method which 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 baccalaureate curricula in qualified educational institutions.

One of the important aspects of the cooperative program, when we start talking about affirmative action and the Federal Government, we come face to face with conflicts or discussion about the relationship between affirmative action and merit, and are those things in conflict; are they compatible with each other?

I maintain that they are, and in both instances we are frequently considering the appropriate measurement of merit and the appropriate measurement of affirmative action. I have often maintained that the psychometricians are the alchemists of the 1980s, and we are frequently told that what is being produced in a test or by a test is gold and it may very well be. I don't know that yet.

The cooperative education program is a form of selection; it is a form of measuring merit. I would argue that it is a more valid form in many respects than for a person to come into a room, sit down with pencil and paper, and spend 3 hours taking a test. The cooperative education program means that the employer and in particular the supervisor has had several years to observe this person's work performance and to make a decision as to whether that performance is acceptable or not, and it has been a very effective tool for meeting shortage occupational requirements and for bringing minorities and women into the government.

The worker-training opportunity program is directed at a different set of skills. The worker-training opportunity program is directed at the lower grade employees and it is focused at the disadvantaged persons. Federal worker-trainees are placed into either regular jobs which provide basic training and general career guidance service or developmental jobs which require more specific types of training and developmental experiences. These people come in at grades 1, 2, or 3, or equivalent wage grade levels. OPM allocates a 1-year ceiling exemption so that the agency does not have to count this person against their ceiling for a year. During that time, again the agency and particularly the manager is able to determine whether this person measures up, so again we're talking about what I think may be an effective measurement system.

The next kind of program that we deal with are upward mobility programs. One of the things that we as the Federal Government are facing is the idea of achieving affirmative action and affirmative employment goals and changes and objectives during a time when many agencies will not be hiring at all. Those that are hiring will be hiring to a very limited extent. The upward mobility program is a systematic management effort to match a person who may be dead ended in a particular job that they are in with an agency need. And I frequently tell Federal managers that one of the advantages of looking toward the person who is already in the work force and putting that person into another capacity is that the person knows the lanaguage, they know the players, and they frequently and usually know what the processes are that go with that organization.

The upward mobility program is a systematic effort and a systematic encouragement by both Title VII and the Office of Personnel Management to get the agencies involved in more kinds of efforts that will deal with the minorities and women who are concentrated by and large in grades 1 through 8. So while our empirical evidence shows that we are making—we are increasing the numbers of minorities and women in the Federal Government and we are making strides in terms of the representation of minorities and women throughout the spectrum, the fact is that right now minorities and women are concentrated in grades 1 through 8. So to the extent that the Federal employer looks at that fertile pool and develops their upward mobility programs, they will be able to meet their needs as well as comply with the cutback management efforts that we have underway.

Some agencies have already engaged in alternative testing procedures. We will be seeing more of that if the consent decree on the PACE examination is entered and final, but so far we have had the Social Security Administration undertake an assumption of examining authority which they apply to their social insurance claim representatives and their claim representative examination. What the Social Security found that it was able to do was not only to increase the representation of minorities and women on its register, but it was also able to identify people to meet the specific needs that the Social Security Administration has. Again, going back to my point about the appropriate measurement of merit, a very important aspect of a number of jobs in the Federal Government is the ability to meet and deal with people.

As of this date I am not aware of a pencil and paper test that can measure that. The Social Security Administration with its alternative measurement

system was able to get at that skill as well as being able to increase the representation of minorities and women. They believe that, as a result of hiring from that pool, they will have more minorities and women, and they will also have people who meet their needs in a much better way than they had on the previous efforts.

Other effective external and internal recruitment activities have to do with special outreach programs, campus recruitment, the development of skills banks, the development of internal intern programs within agencies, career counseling, and employee referrals, and they have contributed to the successful implementation of affirmative action Federal equal opportunity recruitment programs and other kinds of efforts that agencies have engaged in.

One of the things that we expect and that we hear from agencies—and I might mention one other effective tool in the Federal Government, and that has been the special authority that we have to hire Vietnam veterans. This has been very successful in reaching minorities. The most recent people who have left the veterans or have left military service have been highly representative with respect to minorities and is increasingly representative, but not to the same degree, of women. Under the Vietnam-era veterans appointment authority, 38 percent of those hired were minorities and 10 percent of those were women. One of the things that we point out to both Federal line managers as well as to EEO managers and personnel managers is that no one of the tools that are available to us will resolve all of the problems that face us, but the creative manager will come up with the appropriate combination of tools and will, by use of the different and most appropriate efforts, bring about a change in the Federal work force. Thank you, and I will be ready for any of the questions you might have.

MR. HARTOG. Thank you.

Winn Newman is general counsel of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Washington, D.C., and of the Coalition of Labor Union Women. Mr. Newman has undertaken substantial litigation over a period of many years in furtherance of equal employment opportunity. He is also chairperson of the national executive committee of the Americans for Democratic Action and cochair of the EEOC liaison subcommittee of the American Bar Association.

Mr. Newman has provided legal counsel to several labor organizations in various States and also served as Assistant Executive Director of the EEOC in Washington, D.C., from 1965 to 1966. He is a member of the bar of the State of Wisconsin and of the Supreme Court of the United States.

Pleasure to have with us, Mr. Newman.

Statement of Winn Newman, General Counsel, International Union of Electrical, Radio and Machine Workers

MR. NEWMAN. Thank you. I appreciate the opportunity to be here, and at the outset I would like to associate myself practically in its entirety with the statement of the Commission, the draft statement, and will have some comments and go beyond it in some respects, but I think it is an excellent statement.

Now, I submit again that the term "affirmative action" suffers great distortion. The Commission picked that up partly in its distinguishing between voluntary affirmative action and remedial affirmative action, but in our experience employers and, frequently, government officials have generally failed to make this distinction. Even worse, the overall increase in the employment of minorities and women is frequently submitted as evidence of affirmative action by employers, and it may be in many cases, or at least in some cases. The statistics may also mean, however, only that the employer has violated the law less often, and I would think that any discussion of affirmative action must establish first that compliance with the law is an essential prerequisite to both volunatry affirmative action and remedial affirmative action.

Secondly, our written statement, which is keyed to union involvement, is hardly intended to cover the waterfront of equal employment opportunity and affirmative action. Rather, we have attempted to focus specifically on the role that governemnt and industrial unions—those unions that generally have no control over the hiring processes—can play in promoting EEO.

Now, admittedly it represents only a small part of the concern. I emphasize this corner of the concern, however, because I believe a different approach in this area can make a substantial difference, and I would hope this Commission would be willing to explore the inherent possibilities of such an approach. First, I would like to summarize the IUE compliance program so you can see from where I'm coming, give you a brief look on what we've

accomplished, how we've done it, how much more we think needs to be done, and to suggest ways in which government EEO agencies can take greater advantage of unions in order to correct discirmination and bring about greater EEO.

The IUE program consists of basically three steps: in brief, one, a systemic review of existing contracts and past practices to determine whether specific kinds of discrimination exist. (Usually little is found in terms of specific provisions in the contracts themselves.)

Secondly, a request to employers for detailed information broken down by race, sex, and national origin, relating to hiring of employees, including the job grade and classification given to each new hire, promotion and upgrading policy, wage rates, segregation of job classifications, and seniority.

Affirmative action plans are also requested, work force analyses, and copies of charges and information relating to them that may have been filed by employees against the employer only, so that the union would have no knowledge of them.

That's step one, and step two requires negotiating and filing grievances to handle problems that we uncover if we can settle it at that stage.

Thirdly (and I think to this extent we are relatively unique), I think we are one of the unions who have gone in for filing charges against employers they represent. We have filed charges with the NLRB against employers who refuse to supply the information which is not required under Title VII, but it is under the National Labor Relations Board, and we have also filed charges against employers when they refuse to agree to eliminate illegal provisions or practices.

We have also filed Title VII and State FEP charges and lawsuits under Title VII, the Equal Pay Act, and Executive Order 11246 if the employer refuses to agree to whatever changes we thought were necessary to correct contract language of past practices to eradicate the discimination that we thought existed.

In landmark decisions the NLRB and Court of Appeals for the District of Columbia Circuit upheld the union's right to get such information on the various grounds, but including the fact that it was intrinsic to the core of the employer—union relationship, including the fact also that the Supreme Court had declared the eradication of discrimination a matter of the highest priority, and the basic obligation of an employer to supply information to the union. With such information we have been able to determine that discrimination has been practiced and to seek the remedial action at the bargaining table.

Our actions in terms of litigation commenced roughly 10 years ago. We detail that in our written statment and bascially it covers areas such as pregnancy, pension, discriminatory assignments of newly hired employees, wage and promotion discrimination, and other aspects of discrimination. Cases such as the *Gilbert v. IUE,Gilbert v. General Electric* case, pregnancy disability case, the *IUE v. Westinghouse* case dealing with comparable worth, are just two of the cases we have been involved in.

There are three main areas that in the electrical equipment industry and in most other industries have historically employed women on a sex-segregated basis in the main—and the employer who employed women prior to the passage of the act but many since then as well—three main areas of discrimination that still exist which we would call initial assignment discrimination, that is, the hiring of women, particularly in this industry, and assigning them to certain classifications which always happen to be low-paid classifications, and the kissing cousin of initial assignment discrimination, namely, occupational segregation and wage discrimination, both of which result from the initial assignment discrimination. All of these items represent violations of law and do not require affirmative action to correct those failings. They require simply compliance with the law.

The continued existence of these violations would seem to us to totally refute any assertions that mutual employment practices are prevalent today. We do not see them in these kinds of industries. This occurs, the initial assignment discrimination, particularly for entry-level unskilled jobs, and that we think is at the heart of this whole issue of occupational segregation and wage discrimination and future for promotional opportunities as well. It is an easy area to prove. It is an easy area to prove statistically, particularly when we are dealing with unskilled entry-level jobs.

In making the initial assignment the employer also delivers a not so subtle message, and it doesn't take much imagination, for example, for a woman assigned to a woman's job in an area of the plant occupied by women to understand that the boss prefers to have her stay in the general working area he places her. Hence, in addition to its impact on pay

for the work performed, the initial assignment discrimnation contributes to the social pressures and promotional policies which tend to lock women and minorities into the low-paid jobs and keep them physically located in the segregated work area despite all the notices that may be posted after the opportunity to move.

We believe it would be relatively simple to cause a significant decrease in occupational segregation by dealing more directly with this issue of initial assignment discrimination, not as I mentioned in an affirmative action context, but as a clear and flagrant violation of the law, particularly where we're talking about the entry-level jobs.

Voluntary affirmative action is not the critical element to correct this, but remedial affirmative action is essential to eliminate the blatant sex discrimination which exists today in virtually every industrial plant in the United States and perhaps other establishments which have historically employed women in the past.

Now, in IUE's experience affirmative action is something over and above what is required by law, and this has been treated as secondary to the concept of bringing about complance with the law. We think we have too much compliance to move; not that we have too much compliance, but there is a great deal to do in that noncompliance area, and this where we think we can get the biggest bang for our bucks, and this is where we think the government has been quite derelict in not having joined in this.

Also, we think that remedial affirmative action should not be thought of as a new concept that came about as part of Title VII or as part of the Executive order. I suggest, in the Commission statement, it truly represents no more and frequently less than the traditional administrative law and industrial relations term of "make whole," which means to restore discriminatees to the place they would have been but for the wrongdoing of the employer. The civil rights term of "remedial discrimination" is no more than a standard industrial relations remedy, whether it is imposed by NLRB, by the arbitrator, by other administrative bodies, and so on, together with the establishment of procedures to change the discriminatory system.

Trade unions and employers understood the term "make whole" and have been living with it for many, many years, long before the passage of Title VII, and I think it may well be that had that term been used in the beginning there would have been more acceptance and less controversy over preferenital treatment which "make whole" it is clearly not.

Union efforts to support the enforcement of fair employment laws have also been seriously hampered by various obstacles, legal and nonlegal, including employer refusal to give EEO information to unions on the ground that has frequently been stated, that EEO is not the union's cocern. The industrial employer—the employer in the industrial area does the hiring and therefore does the inital placement and so goes the employer arugment that it is not the union's business. We have had that handed to us. Most important, however, is that we found negative government attitudes and policies as to the role which unions that want to do something about the issue can do in implementating fair employment laws. We found no encouragement here, until recently when EEOC and the Department of Labor adopted strong positions to encourage such actions on the part of unions and adopted policies which state that where one party to a collective-bargaining agreement attempts to correct the discrimination and fails to do so because of the resistance of the other party, then at least that party no longer suffers the liability and the responsibility.

We have also found government agencies urging employees to file charges against the union when charges were filed several years after the union had instituted lawsuits against that same employer to correct the discrimination.

We submit, that hardly encourages a union to engage in EEO activity, and we think it will be well to look at that, for this Commission to look at those kinds of policies, to look at whether in fact those policies which were out to get the union without looking at whether or not a particular union had engaged in affirmative action, had engaged in efforts to correct discrimination, would be where we are wrong.

These policies that I'm talking about, in terms of IUE, are nothing different from basic trade union principles. We have found, for example, that encouraging changes in seniority and adopting plantwide posting and bidding procedures for promotions, both of which are totally consistent with trade union principles, and are not going to be resisted, are certainly less than objectionable to whatever the Commission refers to as the "heated controversy" over particular methods of affirmative action, the goals and quotas of preferential treatment, because those terms frequently can accomplish more, de-

pending on the situation, and certainly do not create the anathema that other approaches sometimes do.

I want to say one or two words about the future for EEO enforcement machinery. I think it important here to look at what the critics of EEOC have called for, namely, the complete freeze on guidelines and lawsuits, an end to affirmative action, writing pay equity or comparable worth out of existing legislation, and the other changes which, in our opinion, would scuttle the effect of enforcement of Title VII as well as the proposals by some key management lawyers to do away with the Executive order.

All of these things came about because of the need for them, and it does seem odd that those who are now advocating in terms of the transition team, or whatever, weakening of affirmative action enforcement efforts, seem to us can do so only out of the mistaken belief that the same people who brought about discriminatory practices and who continue such practices in the face of laws prohibiting them will suddenly see the light, or because they believe the employers and unions should be allowed the freedom to discriminate without government interference.

In sum, there is a great deal out there that requires action, immediate action, in terms of violations that are going on today that need to be dealt with. I would stress to you this area of initial assignment discrimination. I have given you in the written statement a number of figures and data as recent as 1978 and 1979 from leading employers in the Nation, and I think that certainly has to be plugged into any real treatment of affirmative action.

Finally, just one word to clear up something that I think I left hanging a little bit. The concept that seniority may stand in the way of advancement does apply, of course, to employers who have not hired women and minorities. That concept doesn't always apply in an industry like electrical or glass where women have been hired in large numbers, but have been relegated to low-paying jobs on narrow seniority lines.

The best thing that can happen in those cases, far better than those, is frequently to open up bidding and promotion rates on a plantwide seniority basis so that the women who are over here in the low-paid jobs with 20 years of seniority can jump ahead of the white males who were hired yesterday in higher rated jobs, and I think that, too, needs to be looked at in its overall concept in utilizing its seniority where it is a useful device to promote EEO.

Thank you very much.

MR. HARTOG. Thank you, Mr. Newman.

Ray Graham is president of Graham Associates, Inc., a consulting firm in Illinois. For over a decade he was the director of equal employment opportunity and affirmative action for Sears, Roebuck, and Company. While serving in this capacity, Mr. Graham developed and coordinated companywide equal employment opportunity and affirmative action programs and provided overall corporate strategy for program implementation.

Mr. Graham also served as president of Tower Ventures, Sears Minority Enterprise Small Business Investment Company, and represented Sears in various national organizations, including the Equal Employment Advisory Council.

Statement of Ray Graham, President, Graham Associates

MR. GRAHAM. Thank you. I, too, appreciate the opportunity to appear before the Commission and to participate in your consultation on your proposed statement, *Affirmative Action in the 1980s.* While I find myself in substantial agreement with your analysis of the process of discrimination, I was, after reading it, left with the feeling that something was missing.

Then yesterday and earlier today as I listened to the other panelists' presentations and the subsequent dialog, I realized that the missing ingredient, at least from the viewpoint of an affirmative action practitioner, was the answer to that most basic of questions: how do you ensure that an affirmative action program is really effective?

This is not intended as a criticism of earlier presentations. Certainly, analysis and research into the complex issues resulting in what we call discrimination are an ongoing need, but at this point in our history, 16 years after the passage of Title VII of the Civil Rights Act, and faced as we are with imminent cutbacks in enforcement funds, it seems to me that the practical, down-to-earth, how-to of affirmative action is really what is needed.

Your staff tells me that they had the unenviable task of distilling the papers presented here in order to come up with a fourth part, part D of your statement, which I trust will provide that missing ingredient. Therefore, I shall devote most of my allocated time to a review of what I hope are

pertinent observations and experiences resulting from my 13 years as the person in charge on a day-to-day basis of the affirmative action program for one of the country's largest employers. I feel reasonably safe in saying that I have heard all of the objections to affirmative action, all of the reasons it won't work, all of the accusations of unfairness from white men, and all of the charges of footdragging from minorities and women.

Nevertheless, at the risk of being called an incurable optimist, I remain convinced that voluntary affirmative action by a majority of this country's employers is a possibility. The point I am making in my paper to the Commission, however, is that voluntary affirmative action will remain just that, a possibility, unless changes are made in the heavyhanded bureaucratic way in which the agencies today, largely unsuccessfully, are attempting enforcement.

By way of supporting that statement, let me refer to two sentences in my paper: 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 decision in the land.

With further reference to my paper, I concluded it with five recommendations which I indicated I thought this Commission could refer to the new administration with some hope of their being adopted.

I express these as "desirable principles" for which technical implementation procedures could really be developed once the principles are accepted. In the interest of staying within my allotted time, I will elaborate briefly on only three of those desirable principles.

First and foremost among them is one which reads, "Give employers good business reasons to engage in creative efforts to upgrade minorities and women in their work forces." I read with great interest and admiration Mr. McCaffrey's paper about the Equitable Life Assurance success with affirmative action, and I am very familiar, of course, with the success of the program in the company from which I recently retired. And there are some others.

In every case you will find an example of an organization whose chief executive officer took a personal hand in seeing that affirmative action was a major corporate goal, but I must warn you that these are exceptions. These instances were in spite of regulatory excesses.

A few companies have resolutely moved ahead with aggressive, self-imposed, innovative procedures which have produced significant statistical changes in numbers of minorities and women in upgraded positions.

Why do I call these exceptions? Because these corporate leaders are going beyond the normal incentives of our so-called free enterprise system, which basically rewards profits and not good corporate citizenship, and, for reasons sometimes known only to themselves, are pushing their companies into voluntary affirmative action.

You cannot reasonably expect that very many corporate leaders will do this unless they are given economic incentives to do so. I suggest two possible ways: tax credits and reduced reporting requirements.

Certainly, there may be others. To date the government, it seems to me, has worked on the assumption that the threat of legal action alone will provide the necessary incentives. It has not worked and it will not work unless that stick is supplemented with the carrot of potential economic gain if one engages in voluntary affirmative action.

We are going to continue to see massive additions to corporate legal staffs as employers retreat further into their defensive positions, and we will continue to spend more money proving it can't be done rather than in innovative efforts to do it.

Since I think there is little chance of a tax break type of incentive in the particular political climate in which we find ourselves, I am pragmatic—let's go after something that is doable. I urge you to call on the President to either issue a new Executive order or to order a complete rewrite of 11246 and its implementing guidelines. Here you could provide economic incentive by sharply reducing the cost of compliance without sacrificing anything except useless paper.

Please use your influence and call on the Reagan administration to overhaul the enforcement procedures in order to provide these incentives. That leads me logically to my next desirable principle, which reads "Keep it simple" and again I quote from my paper.

In those early days of affirmative action, 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 promoted 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 such a trend was developing and, properly nurtured and encouraged by the agencies, could have provided the impetus for voluntary compliance, but that was not to be.

Never mind that limited resources severely restricted the extent to which ever more stringent regulation 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 fashioning policies to comply.

The agencies, and particularly 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, often conflicting, stream of guidelines, regulations, orders, and interpretive bulletins.

Instead of concentrating their resources initially on 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. It quickly developed an insatiable appetite for employer data, despite an obvious lack of resources to utilize them, and an astonishing absence of a workable retrieval system, and without any demonstration that earlier information had been fully considered.

I can assure this Commission that many in the employer community stand ready to cooperate in fashioning truly workable affirmative action requirements.

My third desirable principle takes me into the realm of implementing techniques. While I had no thought of rewriting the Executive order guidelines in my paper, this one concrete suggestion seemed important enough to me to present as a principle. It reads: "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."

I suggest to you that it makes no sense to spend time and money today in reviews of, for example, the Equitable Life Assurance facilities when there are clearly so many contractors whose performance is unsatisfactory when looked at on any kind of comparable basis, and that comparison could be very simply made if the agencies are finally required to develop a reasonably efficient information retrieval system.

Here again is an idea which will warmly be ebraced by progressive employers. Reward those with good programs and good results by reducing the costs of data collection and reporting, and punish those whose results are inadequate by progressively more detailed data requests as analysis reveals specific problem areas.

I would like to conclude my remarks by sharing with you five key phrases with explanatory remarks which flow from my experiences in developing and managing affirmative action programs, phrases which I found useful in succinctly dealing with various forms of management resistance to the kinds of changes we are discussing here today.

The first phrase is "I do what the boss expects." This is my argument for gaining top management support as the only effective way of dealing with first-level supervisory and midmanagement resistance to affirmative action.

I am not opposed to training programs, awareness seminars, but my experience tells me, if you really intend to get the job done, you build affirmative action requirements, included in the requirement for statistical change, into the boss' expectations.

Number two, "Success feeds on itself." This time-honored notion is nowhere better illustrated than in the affirmative action field. The first black or the first woman in a formerly all-white male activity is cause for much concern and conversation; that is, if he or she demonstrates capability, introducing more nonwhite males becomes progressively easier.

Number three, "We must institutionalize the system for change." I would like to use this phrase in leading into a discussion of the fact that affirmative action cannot be accomplished cost free and that it will take time. I point to the fact that systems which led to the current state of imbalance have been institutionalized over decades and indeed over centuries, and that's why an effective affirmative action program must be a system for change, and it must be

actively pursued over a long span of time until it becomes a habit.

Number four, "We must accept the dual doctrines of inevitability and availability." Here I am defying much of conventional wisdom as I argue against the wasted-time rhetoric of questions like why should you fool around with affirmative action and the contention that so-called qualified minorities and women are not available.

Much time can be saved if we convince management of what I truly believe, and my experience leads me to that belief, of the inevitability of the movement for equality for minorities and women, and further demonstrate that out of a population of only 45 to 50 million minority citizens and only about 120 million women, that somehow we can indeed find those few that we need to staff our supervisory and management positions.

Number five, "We have to force feed the system." Before I became an equal opportunity director I was a pretty nice guy, but I quickly learned that sustained pressure is required to cause long-established personnel systems to behave in what initially appear to be radically different ways, and, repeating finally what others and I have said, you must have the wholehearted support of top management before you can force feed the system and cause it to behave differently. Thank you.

MR. HARTOG. Thank you.

William T. McCaffrey is vice president and personnel director in charge of the human resources department and the medical and personal concerns department of the Equitable Life Assurance Society of the United States. The Equitable Life Assurance Society is one of the largest life and health insurance companies in the United States. He is Equitable's corporate consultant to women and minority rotating advisory panels. He is a former Equitable vice president for career development, equal opportunity, and labor relations.

Mr. McCaffrey holds a bachelor's degree from New York University and a master's degree in business from Columbia University Graduate School of Business.

Mr. McCaffrey, welcome.

Statement of William T. McCaffrey, Vice President, The Equitable Life Assurance Society

MR. MCCAFFREY. Thank you, Jack. I want to say thank you to Ray, even though Ray and I haven't met before. He made some very kind remarks.

MR. GRAHAM. I read your paper.

MR. MCCAFFREY. Let me just say that I do represent a very large life insurance company with 17,000 salaried employees and 8,000 life insurance sales people. Our record is a good one. Seventy percent of our work force is women; the number of women managers in the last 10 years has grown tenfold. We had one woman officer in 1971, and today we have 50 full vice president females in the company.

Blacks account for 17 percent of our population today, and that has doubled in the last 10 years. The number of black managers in the company has grown fivefold in the last 10 years. We now have 18 black vice presidents with a full salaried position to go along with it.

Insurance companies and banks are known to have many, many officers, but when I say full vice presidents I mean it in the true sense of the reward that goes with it.

Our Hispanic population has doubled in the last 10 years to almost 6 percent of the total work force, which I consider an unacceptable percentage at this point but one that is growing on a monthly basis. The total minority percentage of the Equitable population is now 25 percent nationally.

At the end of 1981 we would be looking to just under 30 percent minority population at the Equitable. How did we get there? It was with some hard work and probably, as I look back over the last 10 years, in kind of four stages, the first stage being the establishment of the environment to success; the second stage, the emergence and success of women and minorities at all levels; third stage was an outreach special program stage; and fourth, which is the one we are entering now at the Equitable, sense of maturity in the affirmative action process.

Phase one, setting the environment, because without question, as Ray pointed out and many of the other panelists have pointed out, the necessary top commitment of the company, commitment from your chief executive as well as your top officers—and not just talking about it but doing something about it.

At the Equitable there were town meetings held all over the country with the senior executives presiding, announcing affirmative action commitment and what it meant, answering questions from supervisors and managers, in an auditorium such as this.

The president established rotating advisory panels, panels that came from our rank and file, Hispanic panels, black panels, women panels. He went even further than that; he established counselors, councils that represented black officers, women officers in the company, Hispanic officers of the company.

All of these panels and meetings were set up so that management could listen to the issues and concerns of minorities and women. Career development and career planning sessions were initiated during this first stage all over the country, and finally a job-posting process was set in place that went all the way down to the clerical level of employee.

Phase two was the witnessing of some success. There is nothing better for affirmative action than to show in tangible ways the emergence of minorities and women in the officer ranks and top management positions, and to see them succeed is priceless. That is one of the ways in which you bring about affirmative action and commitment in the company.

Special recognition took place during this phase: Hispanic achievement dinners, women achievement dinners, black achievement dinners, in which supervisors and managers were singled out for praise and for special rewards. So success is very important in those tangible results.

We have, in addition to the 50 women officers that I mentioned, the highest placed woman in the life insurance industry today. She is running one of the most important operations in the company, the service operation. She has about 8,000 employees under her direct supervision. This is the kind of commitment and success that is emerging at the Equitable.

The third phase, the advent of special outreach programs. This is the kind of backfilling that is necessary as you look over your results over a 5- or 6-year period. You decide among management and within management that there aren't enough black actuaries at the Equitable, so we introduced black actuarial training programs. We introduced summer internships for college students, minorities, and women.

Just a couple of years ago we felt that we did not have enough eligible black managers for the officer ranks, so we decided to set a 3-year goal to go out and hire 100 outside the company, 100 qualified blacks at Equitable, earning at least $30,000. In the second year of that program they are up to 45 blacks hired from outside the company, hired specifically to fill what we thought was a vacuum, the impatience that Equitable management has with waiting for some minorities and women to finally come up through the pipeline.

Mentoring is a fact of life at Equitable. All minorities have an opportunity to hook up with a nonminority officer of the Equitable, be put in touch with programs and special consultants to make that mentoring take place and to take place successfully. Networking is a fact of life at the Equitable. We have a woman's network in place with 600 women employees participating.

Phase four of the maturity is something that is just delightful to witness. Performance appraisal at Equitable now includes affirmative action as a discrete performance factor. A supervisor/manager's performance is evaluated every year with several factors in mind. One of them now is the attainment of affirmative action goals.

The last part of the maturity phase is when the personnel director goes to the chief executive officer and says, "Mr. Eckland, the affirmative action goals for 1981 will be set and in place by mid-February."

When that chief executive comes back to you and says, "Bill, that's unacceptable. Affirmative action goals at Equitable are now set in tandem with business goals, with financial goals, and those affirmative action goals are due on January 1 and they are as important to me and to this company as our business goals and as our financial goals," to me that's a sense of maturity.

While the activities that I have described are necessarily brief, illustrative of only a part of the overall Equitable affirmative action commitment, they do serve to demonstrate the type of strategies which flexible, self-generated affirmative action can obtain. It should be emphasized these programs are undertaken in addition to and apart from 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 which should be examined separately.

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 underepresented groups to a more selective process of addresing areas of substantive concern.

Many employers like the Equitable have long since accepted the viability of ongoing affirmative action plans and have moved beyond the formalistic counting exercise. The program is 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 calendar analysis 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 I described, which 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 full sense of the 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 a fully evolved affirmative action plan. Unfortunately, they count for little in the bureaucratic paper shuffle which 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 finely 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 battle-lines between partners and perplexing employee groups generally, squanders opportunities to 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 the Equitable, the cost of day-to-day compliance with regulatory directives and reporting formats is considerable. In our case it exceeds $1 million a 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 structure sometimes engenders 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 part for some employers, those which demonstrate progressive commitment to affirmative action must be free from the rigid, burdensome, and ultimately unavailing constraints currently covering all government contractors.

Such employers must be given the flexibility to fashion programs which are appropriate to their own situations and which will nurture the dynamic interaction of employee systems, which is the basis of the successful affirmative action plan. Employers should be evaluated on the sole criterion which is the 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 which yields 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 be similarly identified. Regulatory activities might then be refocused to a more rational extent, reducing the unnecessary monitoring of already successful programs.

Thank you.

MR. HARTOG. Thank you, Mr. McCaffrey.

Discussion

CHAIRMAN FLEMMING. I will ask Commissioner Ruckelshaus if she has questions that she would like to address to the members of the panel or some comments that she would like to make?

COMMISSIONER RUCKELSHAUS. I am delighted to hear the remarks of Mr. Graham and Mr. McCaffrey because that's the kind of practical experience

rebounding from the place where we hope changes are going to take place under affirmative action that we've been looking for.

I wonder, Mr. Graham, can you respond to Mr. McCaffrey? I want to stimulate a little discussion here. You said in your paper essentially, "We can't go on the way we are; the costs are prohibitive," and you make some suggestions.

Could we have some interaction between the two of you about your experiences—what you feel the government has to do—the five suggestions Mr. Graham has made—Mr. McCaffrey, can you respond to those? Are those the kind of things that you have in mind when you say the government seems to be getting in the way, putting a prohibitive cost for affirmative action without any real progress, generating a negative attitude in the corporate world about affirmative action?

MR. GRAHAM. I leaned over and said to Bill, it sounds like we matched notes ahead of time. We really didn't. I did have a chance to read his paper. I don't know whether you saw mine in advance or not, Bill, but I think coming as we both do from large corporations with successful affirmative action programs, the chances are that there is pretty basic agreement in our experiences and in our points of view.

I think we both start with the observation that, absent the full effective support from the top management of the organization, you really can't get very far with an affirmative action program, and part of the point that I make is that Mr. McCaffrey represents a corporation as I did—who has the unusual advantage of a chief executive officer who is willing to tack on above the profit reward system, for whatever reason, a personal commitment which is then felt throughout the corporation that I don't think we can expect to happen in a majority of American corporations, and, therefore, my appeal was to do something that would cause a good manager who doesn't have, for whatever reason—doesn't have any personal commitment to this objective, to cause him to go to the board of directors and say, "I need to spend some money." I don't care whether it is negative or positive; I would like him to be able to say: "I think we'll do more business and in the long run we'll be a better corporation if we get more minorities in." But if he wants to use the other motivation, "It is going to cost us a lot of money because of lawsuits," that's okay with me too. I'll take whatever hammer works.

But you have got to give him a hammer and an economic reason to go this board and say, "I want to spend this kind of money and devote this kind of corporate resources." Otherwise, I think we're talking about some fairly unique corporate experiences here which you are not likely to see widespread across the country.

Bill, I don't know about you.

MR. MCCAFFREY. I guess in direct response to the question, as a businessman I see the amount of money that is being spent in meeting the requirements of the regulatory body, and I find it personally unacceptable that I can't use that money to directly support and hire additional minorities and women and upgrade them and create additional jobs and what not. And what's happenng is that in spite of our good record—that the compliance agencies are treating us as though we were 15 years ago and pressing us for additional analyses and pressing us for more paperwork or what not. It is seemingly a lack of understanding of how far along our company is in its affirmative action.

COMMISSIONER RUCKELSHAUS. Do you think if there were benchmarks that could be aimed for, which would relieve you then of the cost of some of the compliance, that those would be incentives?

MR. MCCAFFREY. Flexibility I would even consider a tremendous improvement. The flexibility to negotiate with us to conduct a meeting perhaps without all the paperwork supported by paperwork perhaps we already have place, rather than saying, "That's not acceptable. It has to be in this particular format on this kind of paper and must cover this and that and this," and that means for me internalizing a request, changing the systems, programming changes, expensive response time, and in many cases a manual effort to answer questions that are posed to us by compliance agencies.

MR. GRAHAM. I think what they've done is make a very complex process out of what is essentially a very simple procedure. I agree entirely with Bill's bottom-line conclusion that the way you judge the effectiveness and the sincerity of the program is to look at how many women and minorities have been added to the operation and how many upgraded positions they are in.

You give me 10 years of EEO reports for any corporation in the United States and in 10 minutes I will tell you whether they have had an effective program or not. I don't need extensive computer

printouts and a lot of complex requirements. I can tell you very quickly on the surface.

I would have to say the Equitable, and my former company, would be beyond the necessity for a lot of reviews. I'm sure I could find many others who are level or perhaps even have had fewer minorities or women than 5 or 10 years ago, and that is why I call for the sequential type of auditing process.

If you started with the most simple which the agencies have at their disposal, if they could ever find the pieces of paper, look at those first and filter out the obvious recalcitrants, they will stick out like sore thumbs. Then go after those with more detailed requests for information. It is not really a complex proposition that we put before you, but it is very businesslike.

COMMISSIONER RUCKELSHAUS. Thank you.

Mr. McCaffrey, when you instituted this special program, the summer intern programs for minorities and women, and when you went outside the company to hire black actuaries or whatever, specialized people that you needed, and you put together a mentoring system, was there any backlash in your company about preferential treatment and reverse discrimination?

MR. MCCAFFREY. That took place in the early stages of our affirmative action commitment, the one I like to refer to as stage one. There was some initial resentment and misunderstanding and what not, but over the years communication has been so importantly orchestrated at Equitable, so I guess so much of it has been pouring out in terms of our commitment and our achievement of goals, and management and supervisors have come to understand a need. It is a fact of life at Equitable.

You pose an interesting question: while you think you have accomplislhed the acceptance of all of these programs and special programs, there will surface from time to time—and just this past week in fact, at the Equitable, a kind of anonymous letter that has been passed around has surfaced and "Whatever happened to the white male?" is the headline of this letter, and we will address that with additional communications. We will confront the issues publicly and state our position, and it is the only way that I know of continually turning it on other than to make affirmative action a part of our performance appraisal process.

There is a punishment and there is a penalty for not meeting affirmative action goals. That is felt and understood. The cultural shock I believe we are over.

COMMISSIONER RUCKELSHAUS. Some corporations that haven't committed themselves as fully as your two companies seem to have really prolonged that shock period, haven't they? They are ostensibly doing affirmative action programs without the commitment that enables them to get the real success level where they begin to feel some pride of achievement in what they have accomplished.

MR. MCCAFFREY. One of the spinoffs of the special commitment programs, especially going outside and hiring 100 blacks, was not so much from the whites, but the blacks within the company who wanted to know why we were going outside to hire 100 additional blacks when we had blacks already in the pipeline.

Of course, the answer was that we just didn't have enough qualified black managers to promote to officer levels. We needed to put more into that category and that there would certainly be a lot of promotions from within, but we just wanted to be further along in the development of black officers at the Equitable, and black middle managers are now coming to understand that's not all that bad, but it was not well received at the outset by middle managers, black middle managers.

COMMISSIONER RUCKELSHAUS. Thank you.

CHAIRMAN FLEMMING. Commissioner Horn?

COMMISSIONER HORN. I was delighted to hear both of your comments as to corporate success. You mentioned the problem of information systems. Commissioner Ruckelshaus alluded to this.

One of our problems is that in large corporations you have the advantage of having fairly well-developed information systems, but as you deal with smaller corporations and different types of organizations that are not that sophisticated in their fiscal information systems, let alone personnel information systems, I suspect we run into a problem that they have difficulty in personnel as well as fiscal matters, and I wondered what your experience, particularly you, Mr. Graham, has been when a consultant tells you about this in terms of how the Federal Government deals with this variety of sophistication when it makes its statistical demands.

MR. GRAHAM. My experience tells me that the problem is exacerbated with the less sophisticated corporation; not only do they not have the systems in place; they don't have the human resources to

assign the task of manually developing the information.

My answer is as it was for any corporation and that is to take the Mickey Mouse out of it and give us sensible programs and sensible demands on our ability to produce information, first, by using what you have.

Right now the government is, I understand, seriously considering throwing out the EEO-1 and coming out with a much more complicated demand for initial employer information from all employers. It is my very strong recommendation that that not be allowed to happen, because I do not think they have adequately utilized the EEO-1s that they have now.

COMMISSIONER HORN. Let's take the EEO-1s. As I recall, in the Commission's study entitled *Window Dressing on the Set,* which examined the role of minorities and women in the media, primarily the television industry, what we found in examining the reports was that you had a change of title but not necessarily a change of salary or job responsibilities. Secretaries became office managers. Somebody else who was an office manager became the director for external communications or internal communications as the case may be, and I'm wondering when you make that initial swipe at it, when you could tell the difference in 10 minutes from looking at the EEO-1s 10 years ago versus today, if we don't run into some of those subterfuge problems of classification.

MR. GRAHAM. Certainly, that is a problem. Incidentally, Commissioner, I wanted to look at all 10, not just 10 years ago and today, but I wanted to see what happened and whether there was a sudden change in 1 year which might suggest title changes instead of a steady accumulation of new people.

That's a possibility. But I think that it is not one that is too difficult to ferret out if you make that analysis, because the fact is you cannot continue to do that for very long, and at some point progress supported only by job title ceases, and progress that is supported by job title and money I don't object to.

COMMISSIONER HORN. If the money comes with the title——

MR. GRAHAM. Call him the vice president and pay him the vice president's salary. I would accept a black vice president. I think very few business people are going to do that, so I think that is a temporary aberration which does not have long-term significance as a viable way for a recalcitrant employer to hide otherwise discriminatory practices.

COMMISSIONER HORN. One of the comments that was made concerned economic incentives, and I want to pursue that a little. Over the years people have talked about tax incentives, for example, for having a better diversity of the work force, hiring women and minorities. One could argue why should the government give a tax incentive which is technically equivalent to government spending for people to carry out the law of the Constitution, and I wonder what do you mean, any of you, by the use of the term "economic incentives" other than, "Why don't we have rewards for those corporations that are showing compliance to cut their own costs of compliance if they indeed are getting the job done" and not have the paperwork burden.

I can see that, but your figures for Equitable were about $1 million. That doesn't go too far. It will get a few positions, certainly. I wonder what other economic incentives do you see? Do you see tax incentives?

MR. GRAHAM. I'm in the fortunate position of advancing theories here rather than concrete specific ideas, and I must agree with you, Commissioner Horn, that my inclination would be to encourage through the reduction of the current burden. I threw out the idea of tax relief because I am familiar, for example, with the targeted job tax credit program which, incidentally, has not worked well with large corporations, for reasons which would be the subject of another discussion, but because there are examples of government encouragement of hiring people who have been excluded in the past, I included that in my remarks as a suggestion.

I really am not prepared to develop it any further. Bill?

MR. MCCAFFREY. Yes, I'm only looking for some relief in the procedure. When we talk about economic relief, at least when I talk about it, I would be so pleased to have the governmental agencies ask for certain essential material and be very, very flexible on what they come back and ask for and perhaps even to the point where they might ask the company how much would it cost to provide the kind of material they're asking for. How much will it cost the Equitable to go back now and manually produce or create programs to produce this kind of information. I don't sense that there is that flexibility out there, and that would be an enormous relief in both out-of-pocket expense as well as personnel costs.

COMMISSIONER HORN. Well, I'm very sympathetic to this argument as president of a university and part of probably the largest system of senior campuses in the country. I started 2 years ago putting the cost of every reply for information right on the letter, saying, "This report cost this amount," and ran it like a law office for a while just to get people conscious of the tremendous burden on an organization it takes to prepare data reports, whether it be internal or external, so I know that there is that tremendous cost.

Getting back a minute to the tax incentive, you mentioned the targeted jobs program. In a nutshell, why isn't that approach working? Why doesn't a large corporation take advantage of it? It seems to me it makes a certain amount of sense.

MR. GRAHAM. Large corporations had, I think, two problems with that: one, instead of being a $3,000 credit, because of the income tax bracket, it comes out to about $1,650 as a yearend credit. Most of them found that to stop the machinery—they've got all the payroll systems computerized and mechanized. It was really more expensive to take credit for the minimal relief than to go without attempting taking the credit.

My own company, I think, did receive something in excess of a million dollars, not because we mounted a major program to incorporate it, but simply because the tax people were aware it was there and were aware that the people in the personnel department were involved in various kinds of distributive education programs, for example, in which the participants were qualified for that tax credit.

But the overall result, I know from my involvement with the National Alliance of Business, was that the major users of that were small business people who enjoyed the full $3,000 tax credit, for whom it was an important part of their payroll tax credit and kind of a cash flow.

COMMISSIONER HORN. Both of you have mentioned the role of the chief executive officer, certainly within the corporations. What are your observations as to the role, if any, of your regional vice presidents who might have an area base and the degree to which they can become involved with their peer counterparts throughout the community to really aggressively pursue a jobs program for business in the community, especially the medium-to large-size corporation that is located in the community? Is that a conscious part of your program for affirmative action when you evaluate, let's say, regional vice presidents and what they are doing?

MR. MCCAFFREY. At the Equitable the evaluation of a regional vice president's commitment to social responsibility would include his or her involvement in the local community, but the emphasis, I must tell you, continues to be on the hiring and the promotion of minorities and women. Obviously, a regional vice president who participates actively in community affairs and is encouraging other companies in that region to look at what the Equitable is doing, and some of our accomplishments would be a satisfying individual, but at the moment it would not carry much weight in the overall evaluation.

COMMISSIONER HORN. Obviously, I ask that question because I have a very strong feeling that, if the major corporations of America got their very able people in the field to put some muscle behind local civic community leadership to get perhaps the homegrown corporations in that area, if they aren't doing anything, or branches of smaller State corporations, I think quite a bit of progress could be made by having that kind of an aggressive drive.

MR. MCCAFFREY. I might add that Equitable did in the last 3 or 4 years move some regional service centers to some outlying areas like Fresno, California; Des Moines, Iowa; Columbus; Charlotte; and we merged, after that move, with about twice the labor utilization of minority rates in that area in the work force and other employers are coming to us voluntarily asking how it is that Equitable has 21 percent minorities in the office in Des Moines or in the community itself.

The average percentage is something like 8 percent. Now, some of that was because some of the people moved from New York, but a lot of it was local hiring, progressive affirmative action commitment in hiring, and we just waited it out.

COMMISSIONER HORN. One last area of questioning. Not referring to compliance officers that have reviewed your own agencies, since I realize it would be very difficult to respond to these agencies concerning them since you still have to deal with them in the future, but from the executives that you talk to at a comparable level in other corporations, what is sort of the view of the ability, the capacity, the attitude of the Federal compliance officers when they visit these corporations?

Is there a feeling that they understand how a corporation works, what they are about? Is there a

feeling that they come in with a chip on their shoulder and the idea is to prove that you are all guilty as charged without trial? What do you hear?

MR. GRAHAM. I hear from a great many other corporations whose experience parallels mine that while the caliber and the apparent degree of training of the equal opportunity specialist visiting corporations today has improved somewhat in recent years, that it is still extremely spotty, and I fear I have to characterize it by saying that a majority of them are still—you describe the majority of them as people who work from the assumption that the employer is guilty, who come in with a chip on their shoulder, who assume that all employers are bad guys, and create what we believe to be an unnecessary adversarial relationship. We understand the healthy tension that exists between regulator and regulated, but we think the government has carried this to a high science which is totally unproductive for the most part.

COMMISSIONER HORN. Is that confirmed by you, Mr. McCaffrey?

MR. MCCAFFREY. Yes. My reading is that the tension is there. There is no question about that. The adversary relationship is there, and I think most corporations understand that is part of the procedures that are built in. We don't believe that the personalities always go along with that, but it appears that the marching order is an adversary relationship, but my other reading is that the next level up, the level above the actual onsite visitor, is much, much better than it has been—much, much better.

COMMISSIONER HORN. Well, that's exactly my reading from both my own university's experiences and those of most of my colleagues. You could write a novel about some of the antics of the compliance officers, but the supervisors at least have some common sense.

MR. MCCAFFREY. Yes. There is an ability to negotiate and reason, and I don't fault the people that are coming out. I think they are coming with a set of directives, a list of things that they must do and produce, and must bring back to the agency, and they just do not negotiate; they will not move away from that list of requirements.

COMMISSIONER HORN. My concern gets down to training and competency. Do they know what they are doing and how to do it? Do they understand the organization they are evaluating? Of course, I am coming in from a university perspective, and they are coming in by assuming we are based on the industrial model. There are some differences, and I would think there are differences among different types of corporations as to how they function.

MR. MCCAFFREY. I don't think it is a question of competence. I think, as you say, it is a question of training.

COMMISSIONER HORN. Does any other member of the panel have any comment to make on any of these series of questions I have raised.

MR. NEWMAN. I have a whole list. First, I think that the philosophy espoused, that it is wrong to assume all employers are bad guys, needs to be looked at in the context of who did the hiring in the first place. Clearly, we have had a history of discrimination. It didn't happen accidentally.

Now, to think in terms of giving corporate welfare to people to correct the discrimination which they caused in the first place, I think is something incredible at a time when we are taking it away from poor people. This is remedial. If we are really talking remedial affirmative action, then we are talking about making whole; we are talking about having somebody take care of what they did and remedy that situation. They should not need help to do so where they committed the violation.

I think we have to look at this in this context: the Equal Employment Advisory Council has never, to my knowledge, demonstrated any desire to do anything about equal employment opportunity. I haven't seen one single case in which they have been on the side of equal employment opportunity.

I have seen it opposed. I have seen them publish a book for which they paid academicians to write articles as to why comparable worth is bad, as to why pay equity is bad. I've seen them argue it doesn't violate the law, but I have not seen more than that.

With respect to EEO–1s, I know that in the days I was at the Commission in 1966 we knew that form was inadequate because it showed big bunches of people together. It didn't show occupational segregation; it didn't show whether at the bottom of a whole operatives level you had blacks or you had women. It showed whether they were in that broad category, and it is totally inadequate to give you a picture once you get outside the skilled areas of whether minorities and women are at the bottom of a big broad scale.

I think, further, that, one, with respect to the whole issue of whether you need that yardstick, that

push to get people to do the right thing—I totally agree with Mr. Graham in this respect, and I note that in his writeup he has a phrase "the story begins in 1973." That happened to be shortly before a national charge was filed against Sears. I'm not quarreling with improvement that has been made, but it is a little hard to think, we don't know from the statistics here how much occurred, or too much of what occurred between 1973 and beyond, but I think that must be put in its context: the fact that a law was on the books, the fact that a charge was about to be filed and subsequently was filed alleging discrimination on sexual and racial basis at all of Sears' operations—the litigation is still pending. And the fact that Sears went into court to try to knock out that charge and knock out the whole machinery of Title VII by alleging that it conflicted with all kinds of other laws I think has to be put in that context, and we have to recognize that in the case of Sears there was considerable pressure on that employer to do things.

I am not quarreling with the results that came about, but that pressure was clearly there.

COMMISSIONER HORN. The reasons on those tax incentives that they are raised—I suggested in my question that you could make your argument that why should you be paid to carry out the Constitution.

On the other hand there is a counter to that and that is that the government has spent billions of dollars in CETA programs, in manpower training programs before that, in area redevelopment programs, etc., job-related training activities; one could ask—and they eventually got to this point as they started to phase them out—but one could ask, would not the government have been better off in achieving its purported goals of equal employment opportunity and providing access to the American work force to utilize the corporate structure of the Nation and to provide some incentives so that very real jobs were created that led to long-term job fulfillment, because the experience, the congressional testimony on most government job programs which became public service programs was pretty sad, to say the least.

MR. NEWMAN. That's a different issue than——

COMMISSIONER HORN. But it is an incentive system.

MR. NEWMAN. And I understand it in terms of creating an incentive system to create jobs. I think it is important, however, that we not get into something that I think is quite immoral, to compensate people to bring about corrective actions for things they did. I don't think it is any different in this area from lots of other areas where the wrongdoer may violate the law. I don't think that wrongdoer should then be compensated directly.

You have a conflicting interest and it may well be that you could accomplish the purpose of EEO more simply the other way, but I think you cannot ignore the other aspect.

COMMISSIONER HORN. I only make one last point. The reason sometimes you don't have access for many individuals who happen to be the minorities, or members of the lower socioeconomic classes, whether or not minorities, is that they have inadequate skills and education because the public school systems, that are government supported, have failed, and we're asking the American corporation to reach out and provide the training to make up for a failure of 12 years, so they have some elemental skills and therefore can be in a position to have access to the employment market.

MR. NEWMAN. Commissioner, this is why I have stressed, in terms of action, the entry-level unskilled jobs, because you don't run into that kind of thing. One of the examples in the written statement that we gave you was a plant in Muncie, Indiana, where Westinghouse employed 1,183 people. This is not a small company, and in that particular plant they had 1,183 people, all males.

We have a 40 percent female population. Somehow after they gave us the data and we pointed out there was a little problem here, they were able to find that there were indeed available females to work on an assembly line in a city in Indiana. So, you know, it does cut both ways; this information aspect is important, and it was important that we made that request of Westinghouse because nobody else was doing anything about 1,183 males in Muncie, Indiana.

I think it is a mistake to think the information does not serve a very useful, therapeutic purpose; just the mere idea of compiling it and forcing people to look at that——

COMMISSIONER HORN. May I say, I commend you completely for that effort because it is so unlike many American trade unions who have consciously excluded females, not to mention minorities.

MS. GRAHAM. I think a couple of things that have been said at this table are telling for a number of reasons. Mr. Graham pointed out that both his

experience and that of Mr. McCaffrey are aberrations in the traditional normal system of American business.

I think we need not lose sight of that. I think it important that we not lose sight of the fact that it is an aberration, so we can talk about flexibility, and I as the director of employment efforts within a large employer situation want as much flexibility as possible, but we do, I think, have to keep the stick along with the carrot when we talk about flexibility, when we talk about how much data has to be supplied.

I think we need to deal with the kind of balance between the stick and the carrot and the flexibility to know in broad brush strokes that progress has been made, and to look again at whether that progress means that we have a lot of secretaries who have become office managers or whether in fact something real is going on. So in defense of compliance officers, of which I was once one, I think there needs to be a certain healthy looking askance at what is presented, and I think there is some commitment to working toward the professionalization of that employment specialty, but I don't think we can afford right now to bend too far in the wave, saying let everyone be nice and be wonderful.

I think there is a mythology that abounds, especially among those of us who live in the urban areas, that the problem has been resolved, minorities and women have made it. People don't say things like that anymore; they don't do things like that anymore.

My observation is, as I move out to Federal installations away from the major urban centers, people do say things like that and they do things like that, and I think we need to keep that in mind.

CHAIRMAN FLEMMING. Commissioner Ramirez?

COMMISSIONER RAMIREZ. Thank you, Mr. Chairman.

I wanted to ask Mr. Newman—in the Muncie, Indiana, situation, I would like to know whether your union did anything to prepare those men, your own union members who were suddenly going to be faced with an infusion of women—was there a need to educate them about the employment of females, about affirmative action in general? Did you do anything? Is anything being done across unions, to your knowledge, in terms of maintaining what I think early on was a sense of commitment on the part of union members to the principles of affirmative action and which may be taxed now in these more difficult times? Can you comment on that?

MR. NEWMAN. Firstly, with respect to Muncie, I think there was little that needed to be done because, in terms of adjusting for women, it was going on in other plants at Westinghouse. The leadership of the Muncie local knew this. I don't know precisely what the leadership did at the local union level. I can't answer that, but I would assume that there was no acclimatization needed to be receptive to women being hired when they were coming in at the normal entry-level jobs.

It happens, of course, after they came in, they continued to come in at the bottom of the entry-level job. There were several entry-level jobs, and we now have immediately found we have a segregated class which we then attempted to do something about.

With respect to your question as to other unions, I appreciate Commissioner Horn's comment in terms of what we did in Muncie, but I submit that the real probelm is going to be missed if we let it go on the fact that the IUE is a different kind of a union. I am saying, as I said before, one, government policies have not encouraged unions to take this kind of action, because we have found when we took this kind of action that the government was then interested.

If a lawsuit came about or, as I mentioned before, if a charge was filed—several years after we filed lawsuits we had several of these—we would find government employees encouraging the filing of the suit against the union, and we found ourselves a defendant in a lawsuit 2 years after we were a plaintiff, that kind of thing.

It ultimately got dismissed, but that kind of thing did not appreciate the fact that there are unions that might do something if probably encouraged to do it. This is not to say that the argument is on the other score as well, but with respect to industrial unions—let me distinguish here from the building trades—to some extent, with respect to industrial unions, they have nothing to do with the hiring practice. Whatever discrimination exists in the hiring process, with rare exception, is basically employer responsibility.

Clearly, industrial unions can do something after employees get there, and we attempted to do that with all kinds of lawsuits. We have found, though, in our experience that, if we encourage other unions, if we encourage government to take an encouraging attitude towards unions, which EEOC has just done

with its new policy entitled "task force on collective bargaining," I think that you can get other unions to go along.

We certainly did in the case of General Electric where we found 14 unions joining in our proposals for settlement, including unions you would not normally find in this area, sheetmetal workers, teamsters, all kinds of unions that were involved in that.

COMMISSIONER RAMIREZ. My concern perhaps was a little more general, Mr. Newman. We are aware that there continues to be misunderstandings, misconception, misstatements of affirmative action, and I think they touched the white males at Equitable who were passing around the letter, "Whatever happened to the white male?" and I think they can touch in perhaps a more poignant way the male white blue-collar worker who may be harder up against it than people in the universities and more academic settings. And I guess what I was looking for was a sense of leadership about creating that sense of understanding and support for affirmative action among blue-collar workers.

MR. NEWMAN. This goes on and goes on in the area of educational conferences and various kinds of efforts, a whole educational program, social action committees that we have. We move virtually at every local policy, resolutions, and do whatever education we can do.

I find, however, that as a practical matter, quite frankly, it is important to sell the blue-collar workers on the concept that what we are attempting to do is what unions are all about: unions are all about nondiscrimination. This is what a seniority clause is about, and if we can relate it to that kind of thing, then it can apply.

Where we have a wage discrimination issue—and we've been very heavily involved in the whole pay equity or comparable worth issue—that all that is is not sex discrimination; it is simply a job inequity. And if we can sell—and we try to sell it on that basis and get support of all employees. I would readily admit that where you're talking about one person's right against another person's, it becomes very difficult, and we've had our share of it. And our white males at IUE, I suppose, are not any different than white males in any other blue-collar situation, but selling it on the basis, or presenting it on the basis that this will create a union issue, equal treatment across the board, getting rid of job-rate inequities, and getting rid of pay discrimination, I think, makes it a lot easier to sell.

I will tell you one example: we had a strike of about 12 people for women's jobs that gradually increased in General Electric in Boston. Finally, in support of the strike were 3,500 people. It started out as a woman's strike, but it continued as a major strike to raise one job classification rate. And when I said to the business agent at one point, "Why don't we publicize this as something the union is really doing in terms of sex discrimination," he responded by saying to me, "We can't do that," because he followed the line I was encouraging, which was to treat this as a straight job inequity and a straight trade union issue, and this is how we got 3,500 people out on it. I think that kind of thing can be done. I think it will be done more often if you get government encouragement of those unions. That is not to say every union will pick it up, but of those unions that are beginning to follow up in that area.

COMMISSIONER RAMIREZ. I wanted to ask Mr. McCaffrey how many full vice presidents do you have all told?

MR. MCCAFFREY. We have a total of 360.

COMMISSIONER RAMIREZ. And you currently have about 68 who are nonwhite males? What is your goal?

MR. MCCAFFREY. No, have another half-dozen Hispanics.

COMMISSIONER RAMIREZ. Oh, you do have Hispanics?

MR. MCCAFFREY. I was wondering if you were going to ask that.

COMMISSIONER RAMIREZ. Do you have a goal, that is, to employ more vice presidents than you now have?

MR. MCCAFFREY. We have a goal to increase the representation, but it is not a fixed number on that. The goal, as we describe it to officials and managers, is combined with the upper management branch—those just under the officer level and officers as a bunch or as a group.

COMMISSIONER RAMIREZ. We heard a lot this morning about tying the affirmative action goals to the possibility of increased production or increased profit or better outcomes for the company. How valid, how powerful do you think are you about increased production and increased profits linked to affirmative action? How powerful do you think they are in convincing your own chief executives of pursuing the program they have pursued?

MR. MCCAFFREY. If you were tying it to productivity, it would be difficult. I don't know what arguments you would use. Obviously, the beginning of an affirmative action process in any company is a difficult one. The beginning of Equitable's commitment to affirmative action caused us to terminate many, many minorities and many, many women, and it has been a period now of 10, 15 years where we feel that the process has been in place—we have experience, we have shaken the tree. Those that are performing and were performing statisfactorily survived; those that are not performing satisfactorily are gone, irrespective of their race or origin. I don't know why you would select or single out minorities from any other population or women over any other person for productivity enhancement. It is a question for all.

COMMISSIONER RAMARIZ. Let me ask the question in another way: have you had increases and were you targeting increases in subscribers to the minority populations? Were you looking to women as primary subscribers of insurance and did that have anything to do with your efforts, your justification, let us say, for bringing minorities and women into it?

MR. MCCAFFREY. On the marketing side, there was some interest, of course, in employment of Hispanics to move into the Hispanic life insurance market, to employ blacks in the black insurance market, and for women to get a larger hold of the women's insurance market, so on the sales side, yes, certainly, there is a good business rationale for bringing minorities into the sales force, and many of those people have been very, very successful, and many have failed.

You know, in the insurance industry, 1 agent survives in 10; 1 in 10 survives 4 years of training, so it is a very difficult occupation.

VICE CHAIRMAN BERRY. I have one or two questions. Mr. Graham, I was particularly interested in your statement that what corporations need to have is sort of a bottom-line approach to affirmative action, whereby instead of paper compliance they would simply report how many women and minorities they hired. That was the real standard you were applauding—and a similar statement that Mr. McCaffrey had made. And I wondered about that because many of the executives with whom I am familiar, especially universities and in public sector organizations, oppose vehemently the notion that one ought to look at the bottom line in terms of how many women and minorities, and if you were to call them up every year to say, "We don't care how you did it. Have you increased the number of women. Have you increased the number of minorities," they would oppose that and would much prefer to argue about reasons why they don't have them, goals, filling out forms, arguing about the paper once they fill them out, and providing good-faith effort justifications and the like. The last thing they want to do is make the test of compliance, "How many more do you have this year?" I just wondered if you can comment.

MR. GRAHAM. I have little patience with the argument there is some way other than by quantification to determine what progress is made. Anytime that a management makes a corporate decision that something is important, we put numbers with it. If we fail to put numbers with it, we are saying to our people, "It is not very important."

VICE CHAIRMAN BERRY. To be clear about my point, the argument has been that if you put a bottom-line, number approach, "How many did you get this year?"—you have a tendency to encourage a violation of the merit principle; you would simply focus on how many you hire, as opposed to whether they are good, bad, or indifferent.

MR. GRAHAM. That might be true in a university or government agency where I am told you folks don't have a bottom-line requirement. There is no attendant excuse with the affirmative action program in a major corporation that profits and sales can somehow go down in proportion to the number of minorities and women employed.

You don't have that as an excuse. So I think you are protected. First of all, you simply must have the benchmark. You have to know by the numbers whether you are making any progress or not, but any assumption that accompanying that is a bypass of the normal business requirements to produce sales and profits is simply erroneous; we won't stay in business if we do that.

VICE CHAIRMAN BERRY. The only other question I have for any of you, if you care to answer, how do you design and implement affirmative action plans to take into account differences of the nature and extent of discrimination experienced by various minority groups, for example, blacks, Hispanics, and Euro-ethnics? I mean, how do you decide which groups, what the differences are, in terms of their nature and extent of discrimination, as you fashion affirmative action remedies in your affirmative action plans in your company?

CHAIRMAN FLEMMING. That would, may I suggest—I don't quite see how you can answer that question briefly. We have about 5 minutes. Might I suggest, if you are so inclined, it would be very helpful to the Commission if you could give us a response, just dictate a little memorandum to us in response to that particular question. In order to refresh your memory, I will ask Counsel to see that you get a communication repeating the question.

VICE CHAIRMAN BERRY. Counsel was particularly interested in having that question answered.

CHAIRMAN FLEMMING. It is a very relevant question, but I would like to be fair to the members of the panel on that and also be fair to you as far as time is concerned. I just want to express to each one of you our gratitude to you for your willingness to come here and spend this time with us and to share with us the various experiences that you have had. I was very much interested in listening to Ms. Graham's experience because she comes from an agency in which I spent 9 years, many years ago. I mean, it is kind of ancient history at the present time, but I appreciate some of the issues that confront her as she deals with government functioning in its capacity as an employer.

As I have listened not only at this panel but in other panels, at the emphasis of the chief executive officers making commitments and moving from there, just looking back over a span of 10 years (I won't go back more than that), even Ms. Graham's responsibility and those who preceded her would have been discharged much more effectively if a series of chief executive officers in the Federal Government had made the kinds of commitments that we are talking about.

That's just as needed in the public sector as it is in the private sector when you are dealing with government functioning in its capacity as an employer. But we are very grateful to each one of you for helping us come to grips with what is a difficult, complex, but, we think, an increasingly important issue.

Thank you very, very much.

The consultation is adjourned.

April 7, 1981

CHAIRMAN FLEMMING. The meeting will come to order. And this is a continuation of our consultation—rather, this a draft of the affirmative action statement that is now out for consideration by various persons, and I'll ask Mr. Jack Hartog, who has responsibility in this particular area, to introduce our guest and relate it to our previous considerations in this area.

MR. HARTOG. Thank you, Mr. Chairman.

Additional Comments

As you know, we held a consultation in February and March on the Commission's proposed affirmative action statement. At that time, we heard from a broad range of people, both those in favor and opposed to affirmative action. They addressed affirmative action from a number of perspectives, including the legal perspective, a policy perspective, and a more concrete "how to"—"how to do it" perspective.

Those comments and the statements that were submitted by people are being made into a transcript and a record of those proceedings will be published. Included in that record will be the presentation today of today's guest, Mr. Leonard Walentynowicz.

Mr. Walentynowicz was director of the Polish American Congress from 1977 to 1980 and presently is doing special projects on behalf of that organization. He is a practicing trial attorney and law professor. Mr. Walentynowicz is an activist on behalf of the Polish American community, representing other groups, including the National Advocate Society and National Medical and Dental Association.

Mr. Walentynowicz also, in addition to serving in the Ford administration, has written briefs in the *Bakke* and *Weber* cases and in general is an expert in this area of affirmative action from the perspective of the Polish American community.

And it's a pleasure to have you with us today.

MR. WALENTYNOWICZ. Thank you, Mr. Hartog. May I begin?

CHAIRMAN FLEMMING. Yes, indeed, you may.

Statement of Leonard F. Walentynowicz, Former Executive Director, Polish American Congress

MR. WALENTYNOWICZ. Thank you, Mr. Chairman, members of the Commission, and ladies and gentlemen. I come before this Commission at this time with mixed feelings, and I would like to, as I read my statement, give some additional extemporary remarks to amplify the prepared remarks.

On the one hand, I appreciate this opportunity to present my views on your proposed statement, which views I believe reflect the feeling of many Americans, especially those you have labeled Euro-ethnic. On the other hand, I am sadly disappointed in your continued indifference and patronizing attitude towards ethnic groups such as Polish Americans, and I make that comment not only to you people, Commission, but also to the government, U.S. Government, generally, because that's what we're talking about. Put aside the society for a moment, the general society, but the government, because we're talking about the government right now.

I had hoped that the attitude of the Commission would have changed significantly in light of the enactment of section 104(g) of the Civil Rights Act of 1964, which brought about the consultation sponsored by you on December 3, 1979. Nevertheless, this hope was substantially shattered by subsequent events and particularly by the content of your proposed statement. And more specifically, the only time I see any reference to any national origin group, Euro-ethnic, in the statement is on page 42, which is the last page, and I think it was about the fifth to the last paragraph.

I do not intend to be rude in making this harsh observation, but prior, more polite efforts to make the point that groups such as Polish Americans have a separate existence and identity, and need to be treated accordingly, have been either overlooked, subjected to tokenism, or callously disregarded.

In fact, much of what you state in your proposed statement regarding discrimination, the civil rights law, and affirmative action, and which you apply to certain select groups, should apply with equal force to Polish Americans and other like groups. Unfortunately, you don't care to make any effort to discover or apply those principles, practices, and effects to such groups, but instead conveniently submerge

those groups within the white male and female categories. In many ways this practice by you is a double standard reflecting a course of conduct and attitude you condemn in others but justify for yourself as being righteous.

This statement is not intended to be a comprehensive response to your proposal, nor does it address the issue whether "affirmative action" as you define it is desirable or legal. Parenthetically, much of it already has the force of law. What I attempt to do, however, is to briefly state some general perceptions to your proposed statement. Let me begin by the following observation.

From one perspective, the statement presents a reflection of the Commission's sincere efforts to deal with this difficult problem area fairly. From another perspective, the statement is a perpetuation of the Commission's efforts to treat preferentially certain select groups and undermine such traditional values as hard work, merit, and initiative, notwithstanding the Commission's pious declarations to the contrary.

To put it another way, is the Commission's proposed statement a positive addition on the road to a discrimination-free society, or does it provide reinforcement for new patterns of discrimination? The final answer, of course, is within the power of the Commission, and here are some further observations for your consideration.

In page 35 of your statement you condemn conduct and decisions of employers, bankers, and, quote, "others" that seem to be neutral and may even be motivated by good intentions, but may nonetheless result in unequal opportunity for minorities and women and unequal results based on race, sex, and national origin. How do you reconcile this criticism with your failure to include groups such as Polish Americans as possible beneficiaries of affirmative action programs, and your professed "neutrality" in making America discrimination free?

Who are these "others?" Do the "others" include government? Does it also include the Commission? And if we're trying to get a discrimination-free society, why only for minorities? And remember, when I testified before you in December in Chicago, over a year ago, I never could find out what we meant by minorities. Minority is an amorphous term. It depends on what suits the convenience of the party using it.

Two, in several different portions of your statement you assert that "white males" as a group have significantly more benefits, advantages, and opportunities than the selected groups you have declared to be the beneficiaries of affirmative action. What evidence do you have that all "white males," as you define them, have the same benefits, advantages, and opportunities within their group, and if there is no such evidence, why haven't you made efforts to secure same?

Three, the Census Bureau has indicated that over 90 percent of the group known as Hispanic was formerly identified as white. If your category known as "white males" does not include Hispanics, what is the rationale in not clearly saying so and why are not other white ethnic groups separately identified and their concerns separately considered?

A recent newspaper article in the *Washington Post,* Monday, March 16, 1981, states that the Federal Government is about to conduct another race and ethnic survey of the work force, government work force, and the label there they use is "White, not of Hispanic origin." I think, to avoid confusion—I think we ought to at least be consistent in the labels of categories we use so that when things are publicized people have a better understanding of what the comparisons mean so there's no confusion over these comparisons.

Now, I'll have more to say about that in a moment.

Four, on page 42 of your proposed statement you imply that the Federal Government requires that data be collected only on certain select groups—fail to mention in footnote number 33 that document 15 does not prevent, but in fact authorizes, the collection and analysis of data on other groups not traditionally mentioned; nor do you call for the collection of such data and analysis. How do you reconcile such position with the statement you issued on the civil rights issues of Euro-ethnic Americans in which you state that you cannot fully address the problems of employment discrimination of Euro-ethnic Americans without such data and analysis? That's what you said when you issued the report in January of 1981.

Five, if the prime justification for "affirmative action" is to remedy historic discrimination, what is your rationale for including newly arrived immigrants and refugees in affirmative action programs?

Six, if "affirmative action" is to be justified by current and contemporary patterns of discrimination, what is your rationale in not separately identifying and considering Polish American females and other like groups?

What about the Polish American female? We know what the status—from the way you talk and the way the data is collected by the government—of black females, Hispanic females, other groups, but what about the Polish American female? Maybe she's got a different problem than the Polish American white male.

Similarly, what is the rationale behind your decision as set forth in page 41 of your statement to make "white males" the target group against which the performance of other groups is measured?

And this gets back to a point that I made in the consultation back in December of 1979—and on page 41 of your statement you suggest that perhaps other groups can be included in your problem-remedy discourse or approach to solving the problems of discrimination, but you state that one of the qualifications before another group can be included is where there is statistical data indicating conditions of inequality in numerous areas of society for persons in the group when compared to white males.

Now that's the same Catch-22 situation that I talked to you about when the Small Business Committee of the House considered the section 8 program, where they decided that blacks and Hispanics would automatically get benefits, but then any other group could qualify if they could prove to the Administrator that they were socially or economically disadvantaged.

So then a Polish American comes up to me and he says, "Well, where am I going to get the data? If I want a loan for $50,000, it may cost me $50,000 to get the information to prove that I need the loan." The government doesn't collect any data on these "other" groups that you suggest may be entitled to affirmative action, by conscious decision. And I suggest to you that that conscious decision, reinforced by this Commission's policies and practices, is in itself one of the greatest acts of discrimination that America is engaging in right as of this moment.

Turning attention to other aspects of your proposed statement, I believe the problem-remedy approach you suggest is a sound one, provided it is not dominated by preoccupation with the concerns of selected groups and the parochialism and provincialism that ensues. There is no question that blacks, women, and other selected groups have been and still are in varying degrees subject to discrimination and bigotry, but so are other groups that you have failed to mention or show concern for except in passing.

As I have stated to you before, America is more than black and white, male and female, Hispanic and non-Hispanic. America in the past and now and in the future will continue to organize itself in hundreds of different groups and coalitions, sometimes on ethnic and racial lines, sometimes on economic lines, sometimes on regional lines, and so forth. Thus, an essential part of being an American is the desire and right to participate both as an individual and as a member of a group, where that is felt relevant or necessary, pursuant to the principle of free association.

It occurs not only to assert rights, but also to defend rights. This is why Polish Americans and other like groups are interested in what you are doing.

As you have correctly observed, it is more difficult to share fairly in a receding economy than in an expanding economy. That right of participation and fair sharing includes more than recognition of ethnic food, festivals, and famous heroes—the three Fs. You know, we're entitled to something more as Americans than just to be honored. If we work, we pay taxes, and we do all the other things. Then I say—just like the black community said over the years and I agree with the black community and I agree with the Hispanic community and I agree with the women—that we're entitled to be more than just simply that we exist. We've got a share—participate and share.

It includes the participation by all ethnic groups in the formulation of policy by institutions such as yours and a fair sharing of jobs, Federal funds, and other economic benefits—something that you have failed to recognize in your statement.

Even though you suggest otherwise at page 40 of your statement, I would not equate individual rights with group rights or vice versa. Instead, we should proceed with the understanding that individually we are all Americans and as Americans we should have the same measure of rights, but that in order to achieve that measure we have to be sensitive to group dynamics.

Thus, if we are to have affirmative action that increases the participation of groups previously excluded or suppressed, and yet maintain the other values we cherish, we ought to seriously consider reducing, if not outright eliminating, concepts such as quotas, timetables, and goals. Instead, we ought to consider seriously a point system, which in a sense

may be an advance form of the "plus" scheme you refer to in page 37 of your proposed statement.

Such a system would not exclude persons from job competition because of their race, sex, and national origin as quotas, timetables, and goals do, no matter how much or what we label them and no matter how we try and intellectually color them. In practice, that's what—they all amount to the same thing. Instead, nonfavored persons would have to compete harder, while favored persons still would have to work hard to secure the advantage of their points.

Such a system would also address the growing friction and unfairness of including automatically in affirmative action programs newly arrived immigrants and refugees, the bulk of which for the past few years have been members of the preferred groups.

Such a system would also provide more flexibility to give affirmative action to those actually discriminated and to deny it to those who no longer need it.

Such a system would also provide for an easier and more just termination of affirmative action, and, most significantly, such a system would, if administered properly, reduce the present friction regarding affirmative action and achieve a higher degree of public acceptance.

Much more can be said about your proposed statement. I was told I only had 15 minutes, so forgive me if I didn't elaborate more. I have, however, attempted to briefly respond to the essential questions concerning affirmative action you have asked at page 3, i.e., what kind of measures? For what reasons? For how long? Which groups and why?

I will be pleased to answer any questions you may have and join in any dialog. And finally, for Pete's sake, stop excluding us from your activity and deliberation and accept the reality that we exist. I am not only a white male; I am more than a white male, and I want you to know that. To put it another way, at least try to practice what you preach.

Thank you.

Discussion

CHAIRMAN FLEMMING. Thank you.

Vice Chairman Berry? Do you have a question?

VICE CHAIRMAN BERRY. Thank you very much. I appreciated your statement, sir.

I only had, I guess, one comment—and a question. I don't have any difficulty distinguishing between Polish Americans as a group or whites as a group and blacks, for example, based on historic discrimination. I don't have any problem making a legal argument that affirmative action and the like should be provided for blacks based on the legal inequities that were suffered. So if you disagree with that, then I guess we're in disagreement.

But in any case, if I understand your argument, it's that Polish Americans ought to be included in affirmative action programs, and if I understand you correctly, you're not saying programs should be abolished, you just want——

MR. WALENTYNOWICZ. No, I think——

VICE CHAIRMAN BERRY. —Polish Americans to be included in them. And if that's—if that is what you are saying, then the only question I would have is don't you think that—in the law we have a tradition of making rebuttable presumptions, and rebuttable presumptions sometimes affect how much evidence you have to prove and who has to bear the burden of proof in a case. And we have a tradition of understanding that if a presumption makes sense, it's all right to assume it and permit the person on the other side to rebut it.

So the assumption is, as I understand it, that Polish Americans are indeed white Americans who have white skin privileges and that if they are disadvantaged, then they can prove that they're disadvantaged and that that is a rebuttable presumption, and so long as you're permitted to rebut it, that arguably it makes sense.

I guess—I suppose you don't accept that presumption. Is that your point?

MR. WALENTYNOWICZ. Presumption of what? I mean let me understand——

VICE CHAIRMAN BERRY. Presumption that Polish Americans are——

MR. WALENTYNOWICZ. I understand what you're saying about presumptions.

VICE CHAIRMAN BERRY. —white Americans, that Polish Americans share in whatever it is that white Americans——

MR. WALENTYNOWICZ. Yes, and it is because we're white Americans—therefore, white Americans have been already determined to have all of the advantages, and it's the nonwhite Americans that have the disadvantages and attribute them to——

VICE CHAIRMAN BERRY. No, no, no. That isn't what I said.

MR. WALENTYNOWICZ. I know, that's why I'm trying to understand you.

VICE CHAIRMAN BERRY. What I said was the presumption is that as white Americans you are presumed to share in whatever else white Americans share in, and if you do not, then you may prove that, and on an individual basis your problem will be taken into account, as, for example, the SBA loan example you gave.

MR. WALENTYNOWICZ. Yes.

VICE CHAIRMAN BERRY. You said that you thought it was unfair—if I understood you correctly—for Polish Americans to have to prove that they were disadvantaged.

The point I'm making is that there's a presumption that black Americans may be disadvantaged based on the history without having to prove so, and that in the case of Polish Americans it seems to be a reasonable presumption that they probably share in whatever white skin privileges white Americans generally do, and that they prove that as individuals—not as a group, but as individuals—which, by the way, does not require the collection of data on the group of Polish Americans. What it requires is that the individual person prove that he or she is disadvantaged.

So that's a rebuttable presumption. That's the example that I was using.

MR. WALENTYNOWICZ. Yes, but I—I understand you now much better, but I find a lot of difficulty both as a Polish American and as an attorney with the line of thought that you express.

Presumptions of law are only sustained, either judicially or legislatively, when there has been a comprehensive effort and an investigation made and a body of facts established that justify that presumption. Okay? And I've argued a lot of presumption cases and I've argued presumption cases dealing with the presumption of possessing a hypodermic needle, dealing with obscenity, and all kinds of things, but there has to be a body of fact established. Okay?

There is no such body of fact of Polish Americans. Nobody has ever studied the status of Polish Americans in society to raise what you say is a reasonable presumption that simply because we're white we share, then, reasonably—it's reasonably assumed we share all the benefits of white America. That presumption isn't based on fact. That's something just came up—about—and it was brought up in the wave of civil rights because of the black-white dichotomy.

Blacks—and I think properly so; I have no quarrel with that—felt that whites are their enemy. Okay? But the point was not all whites were blacks' enemy. It never was that way; it still isn't that way today. Many whites may be blacks' enemy, but not all whites.

So what happened is that feeling, that movement that came out in the civil rights movement in the fifties and sixties just carried over, and then we indulge in thinking such as you've just displayed, that there's a reasonable presumption that since I am white, therefore, all white males—and that it's up to me individually to prove otherwise.

Well, my God! I mean there's a couple of breakdowns in that thinking.

Why is it up to me individually to prove otherwise? Where am I equipped to prove otherwise? When the government comes out with a whole body of statistics, any time a black person wants to prove a case of discrimination—and I've been through it—there's a whole panoply of statistics already. Same thing even now with Hispanics. And even now with females.

And a Polish American, whether he wants to prove discrimination either on a group basis or on an individual basis—he has no statistics. The only thing he can say, he's a white male, and of course those statistics don't help him at all.

So there we really differ, and we differ simply in the operation of what the word "premise" means.

VICE CHAIRMAN BERRY. Well, I don't want to get into a debate with you, and I won't ask any other questions. I'll just make one last comment, which is that the relevant group on which data has been collected in this case is on white males, which is the relevant group that the Commission uses in its social indicators, and the other materials to which you referred, and data has been collected on white males as a group from which rebuttable presumptions have been drawn. So it's not simply a lack of any factual basis, and such rebuttable presumptions have been made in other areas of the law, as you know.

I'll just leave it at that.

MR. WALENTYNOWICZ. No, I disagree. I don't know.

VICE CHAIRMAN BERRY. Mr. Chairman. I don't have any other questions.

CHAIRMAN FLEMMING. Commissioner——

COMMISSIONER HORN. Well, I don't understand the exchange, so I want to, A, pursue that, because I'm not a lawyer and the two people in this dialog

are lawyers, and as a nonlawyer I just want to understand "rebuttable presumption."

As I understand the situation, the census, and thus this Commission in its report of social indicators, and our population surveys collect data on various ethnic groups, and we have published information on blacks, on Hispanics, on Asian Americans, American Indians. We have sought, I believe, and different groups in society have sought from the census broader collection of data, and that might come every 10 years and could be analyzed.

But as I understand it, in the interim of the 10 years, in terms of the monthly population trends, unemployment statistics, we do not really have that breakdown of ethnic data other than for the so-called protected categories which are the four ethnic groups that I've described.

Now, as I understand Mr. Walentynowicz's point, he says, "I can't prove, as an individual Polish American, that my group of Polish Americans are disproportionately worse off in some category than your white male index and base from which we are measuring the other four protected groups, unless you collect data in the field. You, the Federal Government, thus, you, the Civil Rights Commission."

And I guess what I don't see is if those data are not collected, how can you expect the individual to go in and rebut the presumption? I just don't understand that, Mary, as a matter of law.

MR. WALENTYNOWICZ. Or practice. Yes. In reality.

COMMISSIONER HORN. Common sense. And I'd just like to be educated.

VICE CHAIRMAN BERRY. From whom do you collect the data, if you're trying to collect data on Polish Americans?

COMMISSIONER HORN. From, presumably, Polish Americans.

VICE CHAIRMAN BERRY. People with only Polish American names? Or people who call up to say they're Polish? Or——

COMMISSIONER HORN. Well, we do in the census ask people, "Country of origin and father's country of origin." I don't know if they're now asking mother's country of origin.

MR. WALENTYNOWICZ. Not only that, we do—in the census we do something else, and this is what——

COMMISSIONER HORN. Language spoken in the home, so forth.

MR. WALENTYNOWICZ. Self-identification. Remember the young lady that was at the consultation back in December, Naomi—I don't even remember her last name——

COMMISSIONER HORN. No, I——

MR. WALENTYNOWICZ. —but she's from the Census Bureau.

COMMISSIONER HORN. Yes.

MR. WALENTYNOWICZ. And the process was, in the last census, was basically self-identification. How do you perceive yourself?

In fact, that is the system under which the Federal survey's going to be taken in a few months. How does a person identify himself. So he could have a non-Polish name, but if he identifies himself as Polish, he can still be counted as a Polish American. He can have a father two generations away; he can have a father three generations away. He can keep his identity as long as a person keeps his color of skin or his sexuality.

VICE CHAIRMAN BERRY. Since you brought me back into it——

COMMISSIONER HORN. Yes.

VICE CHAIRMAN BERRY. —Commissioner Horn, let me just say that I'm aware that the Commission encouraged the collection of data on Euro-ethnic groups, and that is not the point I was making. My point was that the presumption about white males having certain characteristics and income characteristics, and that including Polish Americans and other Euro-ethnics, for want of a better term, was not simply plucked out of midair. That was my point. And that it was based on some factual data and that it was based on an acknowledgment of the history of discrimination which was demonstrated, and I refer to blacks, and that the historical evidence is that that discrimination was different from those suffered by whites, whatever their ethnicity, even immigrants who suffered various kinds of discrimination at times, that they did not suffer similar discriminations. So my point was that it was not plucked out of midair, as a basis for a determination. You may challenge it and, as I know, the Commission has said that there may—must—should be some data collected. But I didn't want it to seem as if it were something that somebody completely made up.

MR. WALENTYNOWICZ. All right, let me—if I can just make a brief answer.

I have never challenged the fact that the black community hasn't established its case. I never said that. In fact, I think—if you're saying I'm trying to

challenge that blacks have not been discriminated—no. My God, from 19—before ever I was a lawyer I concede that—no, I concede it both factually, my own feelings, and so forth.

But there's been a couple of other developments. First of all, as I said in my prepared remarks, the Hispanic community, 90 percent, more than that. In fact, the Census Bureau in 1970 said they were 98 percent white. Others, they were spun out out of the white male category. Okay? Why? Why were they spun out? And if they were spun out, why shouldn't other groups, white—shouldn't be also spun out? You see what I'm talking about?

COMMISSIONER HORN. All right, that's what I understand to be the basic point. I don't think anyone is going to argue the black situation. That's a historically different situation than any other protected ethnic group. And—but—because that is a matter of slavery and people brought over here involuntarily.

But as I understand your point—just so I'm clear—you're saying, "Look, we don't object to the collection of data on the existing protected categories——

MR. WALENTYNOWICZ. No way.

COMMISSIONER HORN. —we'd just like to have some data collected on us."

MR. WALENTYNOWICZ. Precisely.

COMMISSIONER HORN. And it's as simple as that. And as you said in testimony before this Commission before: one, if such data were collected, and it showed that we were better off than some people think we're better off, that too would be a positive indicator and a reassurance to the Polish American community. But right now we're in never-never land because we can't prove it in terms of group disproportionality either way, and as I understand it, that's the essence of your case.

Now, let me then get to group disproportionality. Based on your experience as executive director of the Polish American Congress, in what cities in America—well, let's go at it this way. Your latest look at the census statistics—take either '70 or '80, if there's some preliminary results—what would you say is the percentage that might be called Polish Americans in America of our total population, and how do you define a Polish American?

MR. WALENTYNOWICZ. Now, let me start the second one first. We define a Polish American as a person who identifies himself as a Polish American. Okay?

COMMISSIONER HORN. Does the Census agree with you on that definition?

MR. WALENTYNOWICZ. Well, we had a debate, because you see, up until the last—until the 1980 census, that's not the way the Census conducted its survey, and that's the reason why I can't give you real accurate answers to your first part of your question, because the Census Bureau traditionally and historically said it would only classify you as a Polish American if one of your parents came from Poland.

I guess—I think they also modified it one time to include the second generation, too. Okay? But that's the only way. And after that, even though you identified yourself as a Polish American, there's no way for you to express that identity in census figures. And even in the 1980 census we again were subject to a double standard.

Ethnicity, at least for Polish Americans and like groups, was in question 14, which was only given out to 20 percent of the people who, under the census—while ethnicity for Koreans and certain other Asiatic types or Hispanics, including Cubans and Puerto Ricans and so forth—that was on every form.

We don't understand it. You now—I mean—you know, we talk about—your statement talks about getting public confidence, that the system is working, that we're—that you are sincere, that you're not trying to create new patterns of discrimination, but you're trying to get at the discrimination process you want to eliminate. That's your problem-remedy approach.

But you're not ever—you're not succeeding in gaining the public confidence, because what you do do, no matter how you piously describe it here as to your motives—it just isn't believed, and that's what you say about other people. You're saying that, yes, employers go in and they say that they don't intend to discriminate, but the effects of their policies are discriminatory, and therefore the preferred groups have a right to go into court and challenge it and get relief and such, but that same rule applies to you people here.

COMMISSIONER HORN. Well, let me ask you, do you have an estimate as to the percent of the American population that are Polish Americans, however defined?

MR. WALENTYNOWICZ. Well, let me—to my knowledge, the figure that was used by President Carter was 10 million, and we've got ranges up to 14

to 16 million. Now, we have gotten no figures from the Census Bureau for the '80 census yet.

COMMISSIONER HORN. Well, that's roughly 4 to 5 percent of the American population——

MR. WALENTYNOWICZ. Right.

COMMISSIONER HORN. —as I understand it.

Now, in what cities in America, using the 4 to 5 percent standard, are Polish Americans concentrated out of proportion to their national average?

MR. WALENTYNOWICZ. Well, I would say obviously Chicago, got Detroit, talking Milwaukee, Buffalo, New York City area, Cleveland, Pittsburgh, Philadelphia. There are concentrations in Connecticut, Hartford; there are concentrations in Massachusetts, Boston and some other smaller areas.

Then more recently, because of the movement of people to the West, Southwest, and also to the South, there are heavy concentrations of Polish Americans in Florida, Fort Lauderdale, that area, and also in Southern California.

COMMISSIONER HORN. Okay, now I'd like you to elaborate on your point system, which, as I recall, you proposed to us when we had our so-called consultation on Euro-ethnic problems, and we put the question to Mr. Leech, the Vice Chair of the EEOC.

He presumably was going to follow up on that. I questioned Chair Norton when she appeared at this affirmative action consultation. She dismissed it out of hand, had no interest in following up on it, and said I could go ask Mr. Leech, who wasn't around to ask.

Have you developed particular areas within your point system in any sort of a model and given a particular number of points to it?

For example, let's start with the simple ones—race, sex. Under your point system I assume it would be somewhat like veterans preference, if you will—that if you served in the military you get *X* number of extra points when you're examined and considered for a job.

I'd like to know, if you have developed such a model point system, does a black, because ancestrally they came over in slavery, get 20 points compared to a Hispanic, who might get 10, or a Puerto Rican or whatever, because they didn't come over in slavery? I mean I'm just curious how your thinking's going on this.

MR. WALENTYNOWICZ. Well, I tell you, I don't have any models, but those are the kinds of policy decisions that would have to be worked out when you use the kind of point system that I'm talking about. And you have to make these allowances because, you know, some people may feel, "Well, my goodness, it's going to be difficult to draw the line." But you've drawn the line now. You've drawn a line now and you have hurt groups such as Polish Americans and Italian Americans and Hungarian Americans and so forth.

And not only that, but you've hurt them in a much more forceful way. You've excluded them. Once there's a determination that a particular agency, a government agency, for example, has "discriminated" in any particular process, then you come in with the timetables and goals and the particular hiring patterns—like in Buffalo, New York. You have a one-for-one hiring pattern. That means another guy who is—could be conceivably significantly more capable—he cannot get the job simply because there's got to be a one-for-one hiring ratio.

Now to me, I just don't see how that helps make America discrimination free, because that—when the issue is put down that way, where another human being, American also, is considerably more qualified than the other person, the other one gets the job simply because there has been past discrimination, you're going to have all kinds of friction.

So my answer to you, Mr. Horn, Commissioner Horn, is that I haven't got the final numbers in my mind, but something along the lines that you talked about could very well be done. Canada, for example, uses a point system to permit people to enter their country, immigrate into their country. The point system was considered in part here by the Select Commission on Immigration Reform here in the United States. It was not pursued, to my knowledge, but I think a point system is, in my mind, a lot more workable and will create a lot less resentment and a lot more confidence than what we're doing right now.

COMMISSIONER HORN. Now, on the Canadian point system, I'm not familiar with that, but I am familiar with our own immigration laws, which in essence you could say reflect a point system, in the sense that they have preference categories. And outside of relationships to those already here, one obviously has to do with technical competence, educational competence, so you're not a burden to society.

Carrying that over to this area, one could argue that maybe, except for the black situation, historically, perhaps the question ought to be to judge relative

disadvantage of how far did your parents get in school, and if they didn't get beyond the fourth or the fifth grade, maybe you get some plus points for growing up in a "disadvantaged" environment, or something like that.

MR. WALENTYNOWICZ. Sure.

COMMISSIONER HORN. Do your ideas get along into socioeconomic class, not simply ethnicity and sex?

MR. WALENTYNOWICZ. Yes, that's—but I think it has to be related to ethnicity and sex, because under the law I don't see how you can have affirmative action without it being related to discrimination because of the five reasons—race, color—or seven reasons, now—race, color, creed, sex, national origin—you could not, in my mind, under the present state of the law, have a point system which simply elevates people simply because they happen to be economically disadvantaged.

COMMISSIONER HORN. Well, yes, I raise this because, as we know, the statistics show that in the United States there are absolutely more poor whites, but proportionately there are a higher number within their total number of poor blacks and poor Hispanics.

MR. WALENTYNOWICZ. Correct.

COMMISSIONER HORN. Not so with Asian Americans, etc. And that's why I'm just curious, when you're trying to work equity and justice in a society, how one as a government can feel they are dealing with people in a comparable way, and it seems to me to get at the traditional model of the West Virginia hillbilly and what do you do to solve their problems, that something like you're talking about might be worthy of consideration.

MR. WALENTYNOWICZ. Precisely. I think that I would agree with you. I mean I don't know where we finally come out in terms of the points, but I agree with you. Because that kind of a system, you would not—you would say it would be available as conditions change over a period of time, and if there is no elimination of discrimination.

The present system, you sort of—you in effect tell people that you're going to perpetuate these kinds of class preferences indefinitely——

COMMISSIONER HORN. Yes, okay.

MR. WALENTYNOWICZ. —because there's nothing in your statement that says when you're going to end affirmative action as you now advocate it.

COMMISSIONER HORN. Well, we——

MR. WALENTYNOWICZ. You say when a society becomes discrimination-free, but when is that? What is your criteria for that?

COMMISSIONER HORN. Okay, the essence of your argument is that you do not object to using certain group characteristics, but you want them applied in—and I cite the black situation or I cite the female situation which you brought up—but you want them applied in the context of the individual so that because one is simply black, even though one might have—be a third generation college graduate, etc., you would not always get the edge on someone whose points could add up because of other "disadvantages" in a society, which then might neutralize it even if they weren't black. And as I understand it, in either case, your system or the existing system, the fact is it still gets down to a political decision as to how you weigh those.

And right now, what you have are four protected groups plus females that have had the political power or the history or whatever to get themselves protected, and you're saying Polish Americans would like to get themselves protected, but when you're concentrated only in 10 cities or so around the country, it's a little difficult.

MR. WALENTYNOWICZ. Yes, except I don't know whether we only want to be protected. I think my point is——

COMMISSIONER HORN. I understand.

MR. WALENTYNOWICZ. You know, we're all Americans. We just want a fair share.

COMMISSIONER HORN. A fair share.

MR. WALENTYNOWICZ. That's all. A fair break. That's all.

CHAIRMAN FLEMMING. Okay,——

MR. WALENTYNOWICCZ. You know, we didn't go around, you know, discriminating against people, you know. And, you know, if we're going to start giving out favors, and so forth, let's have a fair shake. That's all.

CHAIRMAN FLEMMING. Commissioner Ruckelshaus?

COMMISSIONER RUCKELSHAUS. I don't have any questions.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. Mr. Walentynowicz?

MR. WALENTYNOWICZ. Yes?

COMMISSIONER SALTZMAN. In the figure of 10 million, 10 to 15 million, does this include Jews from Polish origin?

MR. WALENTYNOWICZ. To my knowledge, no. No, this—in other words, this—my understanding, traditionally and from the census point of view, the Jewish community has been separately identified and counted. It does not include them.

MR. NUNEZ. That's not true.

MR. WALENTYNOWICZ. But I will say this, that's not always——

CHAIRMAN FLEMMING. What?

MR. NUNEZ. The Jews are not counted.

CHAIRMAN FLEMMING. Mr. Nunez?

COMMISSIONER HORN. Yes, let's get it on the record.

MR. NUNEZ. Yes, the point is, Jews have never been counted by any census, and in fact, when they do count Polish—of Polish origin and Russian origin, they in fact include everyone who was born in Poland, who was born in Russia, or who is first or second generation. So that kind of skews those figures. But it does in fact include a lot of Jews.

COMMISSIONER SALTZMAN. Yes, I think it did include——

MR. WALENTYNOWICZ. Yes, I can't give you an answer. That's what I told you.

COMMISSIONER SALTZMAN. Historically, Poland did not consider Jews citizens and did not consider them Polish people, and that——

MR. NUNEZ. Well, the census doesn't ask that question. They ask——

COMMISSIONER SALTZMAN. But this in America is not true.

MR. NUNEZ. They ask where you were born.

COMMISSIONER SALTZMAN. Yes, so that it would seem to me if they ask where you're born, that that would include a certain number of Jews.

MR. WALENTYNOWICZ. Yes, but let me just amplify.

COMMISSIONER SALTZMAN. I said Jews here in America.

MR. WALENTYNOWICZ. Yes, the 10 million figure is not based scientifically; it's not based on any census figures, etc.

COMMISSIONER SALTZMAN. I understand that.

MR. WALENTYNOWICZ. It's just a guesstimate. That's about all. You know, you might say "from other indicators," like membership in the fraternals, polling, and this kind of thing.

COMMISSIONER SALTZMAN. I was just merely interested in your own figuring that this does not include Jews, but I think that in the Census Bureau it does, reflecting something like——

How would you feel—do you know the Hassidic Jewish community, do you know what it is?

MR. WALENTYNOWICZ. I have some knowledge of it. I don't know——

COMMISSIONER SALTZMAN. How—you brought up the Small Business Administration. How would you feel in terms of them being a special category because of the disabilities relative to their situation, their difficulty in securing a job because of their religious commitments, holding a job, their dress?

MR. WALENTYNOWICZ. You know, I have no difficulty. We set up a certain kind of criteria to give, you know, these benefits, and if they meet the criteria, they're entitled to them.

What I think is a lot more absurd is the small business community talking about section 8 loans, which they did in the incident I was talking about, and they want to make Aleutians the beneficiaries of this program. So I go to the Small Business Council and I say, "Well, what's your data that Aleutians need this program or have in some way been discriminated and therefore should be benefited?" He doesn't know anything. He says President Nixon stuck him into the language and we kept it over the years. That's his answer.

COMMISSIONER SALTZMAN. No further questions.

CHAIRMAN FLEMMING. Commissioner Ramirez?

COMMISSIONER RAMIREZ. I don't have a question, but I would just like to say that I don't agree with a lot of the things that you say. But I did live in Chicago and I had a sense for the suffering, if you would, of Polish Americans because of attitudes on the part of the broader society about Polish Americans, and I'm just beginning to get into this topic and I hope to understand it a lot better.

Any facts, any data that you can provide would be useful, and I appreciate your testimony here today.

MR. WALENTYNOWICZ. Let me just make one observation in response to that, Madam Commissioner, and that's this. You know, the phenomenon of the Polish joke has gone on now for years. You didn't even mention this in your report on the media. You made a report 2 or 3 years ago and this wasn't even mentioned. And yet it's a current phenomenon.

I just got through arguing a case in the New York Court of Appeals—okay—about the Polish joke. The result—the New York Human Rights Law doesn't apply, but I'm not quarreling so much with the law—with the result, because there can be efforts made to correct the law in that case, but the

point is that that particular case shows that it's a contemporary problem.

Now, if the Polish American didn't have a discrimination problem, why the Polish joke? The very premise of a Polish joke, is what? that the Pole is a fool, is ignored. You make fun of him. What difference is it than the discrimination suffered by Hispanics or suffered by any—by blacks or any of the other protected groups?

Now, so that you understand, I agree that the blacks suffered more. There's no question in my mind. But at least with respect to the other preferred groups, there's no difference. It's the same type of discrimination.

Now, we can go through and we can start counting about how many times a Hispanic has been discriminated in the sense that his rights were violated and he's been the victim of police brutality—and, quite frankly, you're not going to have maybe statistically the same amount right now of other groups such as Polish Americans. But you're going to have some cases.

So you know, how are we going to have—how are we going to decide? You've got to be victimized by police brutality or some other way 41 times, then you become preferred, but if it's only 38 you don't?

You know, we can get that kind of thing. The point is that you should set up criteria, and the criteria should be equally applied to all the groups that make up America, not certain select groups. That way your work will receive more public confidence because I think your work is very vital to set the right climate for affirmative action and for discrimination and so forth. But you're not going to get that kind of public confidence if you just automatically indulge in—I beg your pardon, Madam—speculative presumptions about this because you happen to be white, so, therefore, everybody white has got it made.

MR. NUNEZ. I—Mr. Walentynowicz, are you familiar with the statement we issued when we released our consultation proceedings?

MR. WALENTYNOWICZ. You mean on the Euro-American?

MR. NUNEZ. Yes.

MR. WALENTYNOWICZ. Yes, I made reference to the statement.

MR. NUNEZ. Well——

MR. WALENTYNOWICZ. You called for the collection of the data.

MR. NUNEZ. —all right, I think we did call for the collection of the data. We did call for the Equal Employment Opportunity Commission to look at this issue. You have to understand that we are not an original collector of data. We compile data collected by others. We made a commitment that when we established our civil rights data bank we would collect whatever is available in the Euro-ethnic area.

We also indicated that when we do our next edition of our social indicator project, we will use the 1980 census data, which has information—you might say that it's not as adequate as it should be, but it is going to be a lot more accurate and much more voluminous than the data that was compiled in the 1970 census, and we will use that data in making some comparisons among some of the major Euro-ethnic groups, although it was stated—you remember very well, at the consultation—that there might be over 100 identifiable Euro-ethnic groups. So we do have to make a selection. Saying that, I think that we are sensitive to the concerns of this community, as we are to all others, and I think you should give us an opportunity to do these projects.

One other project we committed ourselves to was to complete a monograph on the issues of the evidence available on the extent of discrimination against Euro-ethnics, so that we do have an array of activities that we hope—that hopefully will begin to deal with these issues.

CHAIRMAN FLEMMING. I'd like to ask one or two questions, just to make sure that I am clear as to your position in relation to affirmative action in the area of employment.

Taking an area where admittedly there is a large concentration of Polish Americans—let's say Chicago—as I understand it, it is your contention that if a study of the situation in the Chicago labor market area leads to the conclusion that there is underutilization of Polish Americans in relation to their representation in the total population, then you feel that in the development of goals under an affirmative action plan—that in addition to goals being set for members of the black community and Hispanic community, the Asian American community, the American Indian community, goals should also be set for the Polish American community.

MR. WALENTYNOWICZ. If we're going to have goals.

CHAIRMAN FLEMMING. Okay.

MR. WALENTYNOWICZ. I also am equally strong against goals. What I'm really saying is we want Polish Americans to be treated like anyone else.

CHAIRMAN FLEMMING. Well, all right. Now, assuming that we are going to have an affirmative action plan which is defined in that manner, namely, a plan under which there are goals, there are timetables, and then there's an action plan designed to get results consistent with the goals, assuming that there is going to be that kind of an affirmative action plan—then your contention is that if the evidence in the Chicago labor employment area is that there is underutilization of Polish Americans, then they should be added to that list and that there should be a goal for Polish Americans as well as for members of the black community.

Now, your response indicates, and some comments in your testimony indicate also, that in addition to feeling that there should be that kind of recognition of the Polish American, you also take issue with the concept of an affirmative action plan that is incorporated in our draft statement.

I'm sure you understand that this is a draft statement, that we——

MR. WALENTYNOWICZ. But that's——

CHAIRMAN FLEMMING. We've got it in circulation for the purpose of obtaining comments——

MR. WALENTYNOWICZ. Yes, I understand. Of course.

CHAIRMAN FLEMMING. —and so on. It does not represent the final statement on the part of the Commission.

But you do take issue as a person and also representing the Polish American community, with the concept of affirmative action that includes having goals and timetables for affirmative action.

MR. WALENTYNOWICZ. Yes, not affirmative action. I think affirmative action, as a human being and as a Polish American representative—we think affirmative action—for example, the outreach, the training, and the use of statistics to indicate, you know, problem areas—these are all sound affirmative action practices. On the other hand, when it comes to the actual assignment of jobs and you start using goals and timetables, that's where we part company.

CHAIRMAN FLEMMING. Okay, well then, you favor affirmative measures such as outreach programs, positive recruiting programs, and training programs, and other devices designed to improve the representation in the work force of these minority groups.

MR. WALENTYNOWICZ. For anyone.

CHAIRMAN FLEMMING. But——

MR. WALENTYNOWICZ. Get anybody.

CHAIRMAN FLEMMING. Okay. But, you do not favor having targets, in effect, for the black community, the Hispanic community, the Asian American, the American Indian, and, where relevant, the Polish American community. That you do not favor.

MR. WALENTYNOWICZ. No, I think the point system is much better than that.

CHAIRMAN FLEMMING. Okay.

COMMISSIONER HORN. How would you measure it? Under both your point system and goals, isn't the end result the same if you're going to weigh progress? Somebody's going to have to look—Did you justify? Did you make a just decision?

MR. WALENTYNOWICZ. Well, but there's a big difference, if I might just take a moment to address your question, Comissioner Horn, and that's this.

You—I think in this proposed statement, there is a recognition—and I think that was a positive thought in the statement—that there may be a lot of disparity that comes about not as a result of discrimination.

You talked about disparity about the white male dominating this category and so forth—in the field of basketball, black basketball players dominate the game, but I will be the first to say that the black dominates because he is better skilled. He does a better job. So you know, why am I upset? Why should anybody be upset? If he does a better job, let him dominate. Okay?

And that's the answer I give to you for your question. I don't think we want a ticky-tack-toe society where you've got to have *X* number of Polish Americans in this category, *X* number of Jewish Americans, *X* number of blacks and Hispanics. There would be—you know, you could have disparity, so long as the disparty is the result of nondiscriminatory factors, and that's——

CHAIRMAN FLEMMING. But you do feel that there is discrimination against Polish Americans in certan labor market areas.

MR. WALENTYNOWICZ. Absolutely, and particularly in government.

CHAIRMAN FLEMMING. Okay. How are you going to deal with the discrimination? We recognize, as you say, that some disparities take place that are not traceable to discrimination, but we also recognize that in our society there's a lot of disparity in terms

of the situation that confronts minorities because of discrimination, and we take the position that there's got to be an affirmative action program to combat that discrimination.

Now, to come back to Commissioner Horn's statement, if you launch an affirmative program designed to combat that discrimination, the bottom line is that you have more persons in your work force who are black, Hispanic, Asian American, Indian, or Polish American than before you started. So——

MR. WALENTYNOWICZ. Yes, but there's a difference.

CHAIRMAN FLEMMING. —you've got to measure results somehow or other.

MR. WALENTYNOWICZ. Yes, and I don't quarrel with that, and that same suggestion, but you see the problem is the disparity due to nondiscriminatory factors—or is it due to discrimination? Okay, now you're going to say, well, that's a difficult thing to do.

Okay, so assume now that you now feel that some of the disparity is due to discrimination. Okay? Under the present system you remedy that, you bring up the numbers by quotas, timetables, and goals, and this is where you've had all of this adverse public reaction because by doing that you create a new form of exclusion. You're saying before our *X* group—whoever it may be, I don't care, Polish American, black, whatever it is—was excluded. Now we will exclude this other group to get more blacks in, so you're just substituting one form of exclusion for another, and this is what causes all the public resentment.

I suggest to you a better way is when you get to a case where you feel that some of the disparity is discriminatory, that you do it by a point system, because then the other people don't feel that they're excluded. They can still compete, and if a guy is significantly better, then he still can get the job. On the other hand, the person who felt that he's discriminated, he's got an advantage and if he works hard enough he can still beat the fellow who may, for whatever reasons, have a little bit of an edge for other reasons than him.

I think that's a much fairer system and that is the—to me, the merit of a point system. It does what? Now, down the line, after you use a point system, sure you're going to look and say okay, has the point system worked? Have you brought in more blacks, etc.? And you look at the system as to why, you know, there aren't any more blacks, more Polish Americans, so forth, but you're always measuring.

What you're doing here—and I'd even get into this part of your statement—is you're saying that the ultimate test is if there is as many "of the group that is discriminated as there are in the group in the standard metropolitan statistical area." Well to me, that's going to end up with a ticky-tack-toe society, and not only that, but if that standard metropolitan statistical area has a lot of new refugees and emigres, or what have you, it's going to cause a lot of friction among the people who are already there—witness what happened to Florida.

CHAIRMAN FLEMMING. Okay. Well, I think I do understand your position on it.

Commissioner Ruckelshaus, you have a question.

COMMISSIONER RUCKELSHAUS. Is it your position that you think if we gather the data we would have a case for discrimination against Polish Americans in employment?

MR. WALENTYNOWICZ. I think so, that—I don't know, that's a speculation on my part——

COMMISSIONER RUCKELSHAUS. Okay.

MR. WALENTYNOWICZ. —but I think so. But going back to what Commissioner Horn said, even if you don't have a case, it will help the work of this Commission because it would then increase the public confidence that what you're doing is—you're caring about another group; you're caring about a significant group in our society; and you're willing to take a look at their condition and then this group can say, "Okay, we're so much better off than group *X* and group *Y*, and we should share better." So you've got two reasons to collect data. Not only because we may think we're discriminated against, but also that even if we are proven not to be discriminated against, we can help in the fight against those groups who are discriminated against.

COMMISSIONER RUCKELSHAUS. I understand your point. I think that we perhaps could use some guidance from you in trying to determine exactly how many groups we ought to be gathering data on. We're collecting data for Euro-ethnics. How about Northern Europeans? English——

MR. WALENTYNOWICZ. Harvard just came out with the ethnic studies program, ethnic studies. Harvard just came out with an encyclopedia of ethnic groups. They identified 104 different ethnic groups. I was told by the Census Bureau and I was told by the computer operators in the State Department that, gee, it's an impossible task.

I went back to the Census Bureau and I said, you know, "Why can't you collect data on 104 different ethnic groups?" I mean are the computers that inefficient, etc?

No, they're not. They can compute, they can collect data and statistics on at least 600 different groups, if they want. They're equipped to do that. Six hundred. Not 104, but 600.

COMMISSIONER RUCKELSHAUS. So your position is actually the more information we have on 104 different groups, the better off we are——

MR. WALENTYNOWICZ. Sure!

COMMISSIONER RUCKELSHAUS. —to rebut the charges that we're not——

MR. WALENTYNOWICZ. Sure!

COMMISSIONER RUCKELSHAUS. —responsive to the needs of people?

MR. WALENTYNOWICZ. Exactly. Right.

COMMISSIONER RUCKELSHAUS. Thank you.

MR. WALENTYNOWICZ. Correct.

COMMISSIONER HORN. As a criterion to trigger your point system, do you feel if we can collect data on 600 groups, that every 10 years the census should go by wage category or job category and see which groups are disproportionate—underrepresented in that category and therefore the point system is triggered for the next 10 years until some progress is made?

MR. WALENTYNOWICZ. Let me put it this way. We could go that route, but I will say this, I would hope we don't—that eventually we will—as I believe one Commissioner said at one consultation—that one will dismantle the process, the system of discrimination. I fear, however, that under the way you go about your present system you'll never dismantle discrimination. All you're doing is substituting one form for the old form.

CHAIRMAN FLEMMING. Okay. We appreciate very, very much your being with us, presenting your statement, and responding to our questions.

MR. WALENTYNOWICZ. Thank you very much, Mr. Chairman.

CHAIRMAN FLEMMING. Thank you.

COMMISSIONER RUCKELSHAUS. Thank you.

MR. WALENTYNOWICZ. It was a pleasure.

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

A Proposed Statement
of the United States Commission on Civil Rights

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part A

THE PROBLEM: DISCRIMINATION

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

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

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

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

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

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

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

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

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

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

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

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

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

Individual Discrimination

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

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

[a] See note 4, Introduction.

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

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

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

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

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

[14] Ibid.

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

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

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

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

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

Organizational Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] See note 11.

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

Structural Discrimination

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

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

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

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

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

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

[29] See note 13.

[30] See notes 15 and 16.

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

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

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

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

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

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

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

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

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

The Process of Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

Part B

CIVIL RIGHTS LAW AND AFFIRMATIVE ACTION

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

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

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

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

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

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

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

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

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

Civil Rights Law and the Problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[15] *Id.* at 431.

[16] *Id.* at 432.

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

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

[18] 401 U.S. at 431.

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

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

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

Civil Rights Law and The Remedy

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

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

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

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

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

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

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

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

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

[23] *Id.*

[24] *Id.* at 26.

[25] *Id.* at 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[61] *Id.* at 777.

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

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

Voluntary Affirmative Action

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

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

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[62] *Id.* at 774.

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

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

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

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

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

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

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

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

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

[69] *Id.* at 417.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[85] *Id.* at 369-74.

[86] *Id.* at 269.

[87] *Id.* at 307-10.

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

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

[90] *Id.* at 307.

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

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

[93] *Id.* at 317.

[94] *Id.* at 307.

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

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

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

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

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

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

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

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

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

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

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

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

[98] 443 U.S. at 200.

[99] *Id.* at 204.

[100] *Id.* at 200.

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

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

[103] *Id.* at 204.

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

[105] 443 U.S. at 208.

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

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

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

Affirmative Action Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part C

THE REMEDY: AFFIRMATIVE ACTION

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

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

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

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

Self-Analysis, Statistics, and Affirmative Action Plans

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other Concerns

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

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

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

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

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

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

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

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

[24] Ibid.

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

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

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

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

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

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

"Group Rights"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[35] See note 20 in Part B.

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