CIVIL RIGHTS DIGEST

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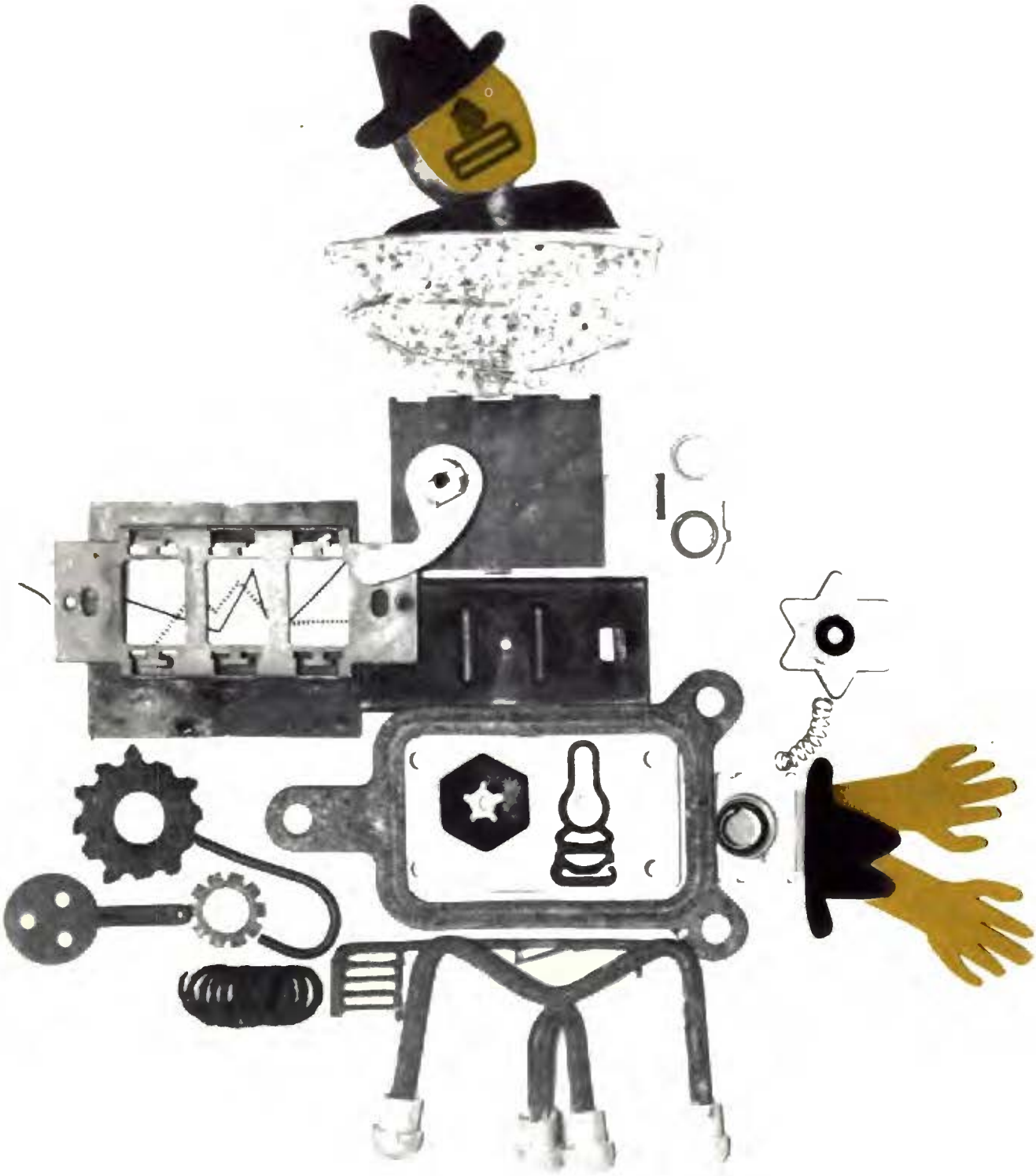

JOB DISCRIMINATION AND AFFIRMATIVE ACTION

IN THIS ISSUE . . . we present articles on employment discrimination and affirmative action. These are hardly new topics, but several issues have lately been raised concerning them that we think need further exploration.

First, the matter of quotas vs. goals in higher education employment is taken up by Miro Todorovich and Howard Glickstein. Their lively exchange of letters provides a great deal of insight into the problems perceived by both sides in this debate. These issues are hardly resolved, but they are clarified and readers will obtain a fairly accurate idea of the problems involved by the time the last round is fired. (For the USCCR position on affirmative action, see the free pamphlet *Statement on Affirmative Action.*)

Second, we include here a treatise on the responsibilities of unions with regard to Title VII and equal employment opportunity generally. The authors, Herbert Hammerman and Marvin Rogoff, analyze the legal liability of unions and suggest ways in which unions should combat discrimination in collective bargaining agreements, on the job, and within their own organizational structure.

Third, Alfred and Ruth Blumrosen take on the legality of last hired-first fired in view of the discriminatory effect that principle has on newly-hired minorities and women. The Blumrosens have been in the forefront of the debate on this issue.

Finally, we take up the issue of testing and affirmative action. The use and abuse of tests administered to qualify persons for employment is explored by Willo White with an eye to their effect on equal opportunity. What test standards should be and what tests actually mean are only two of the questions White addresses.

The *Digest* is interested in publishing substantive comments and letters from readers on any article we print. Correspondence should be addressed to the Editor, *Civil Rights Digest,* U.S. Commission on Civil Rights, Washington, D.C. 20425. More copies of this issue are available from the same source.

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

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

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Discrimination In Higher Education

A DEBATE ON FACULTY EMPLOYMENT

The exchange of letters which follows is published here because it illuminates, in an interesting as well as informative fashion, the controversy surrounding affirmative action in higher education. The first letter was written by Miro Todorovich, coordinator of the Committee on Academic Nondiscrimination and Integrity. The Committee is a nontaxexempt organization closely related to the University Center for Rational alternatives. Mr. Todorovich addressed his letter to Dr. Richard A. Lamanna, Department of Sociology, University of Notre Dame, who turned it over to Howard Glickstein, Director of the Center for Civil Rights at the same university. Mr. Glickstein, formerly staff director of the U.S. Commission on Civil Rights, then responded to Mr. Todorovich—Editor.

December 11, 1973

Dear Dr. Lamanna:

The recent contacts of our Committee with members of Congress indicate that there is a growing interest on Capitol Hill in matters of affirmative action in general and discrimination in reverse in particular. We found, however, that there is regrettably little hard information presently in the hands of our elected representatives.

As a first corrective step, I would suggest the writing of letters expressing our concern to Senators and Congressmen of your local area.

The letters could reflect (depending on the situation in any one particular area) concern that the goal-setting time tables containing affirmative action plans demanded by Federal agencies are introducing *de facto* quotas in educational hiring; concern about administrative interference in educational matters, difficulties in finding employment for well qualified graduating candidates who do not fit a particular description of "affected minorities" and women, diversion of educational resources and structures into noneducational endeavors, and invasion of privacy and of confidential data; concern about the promotion of color- and sex-related criteria in hiring, student admission, and the like, erosion of institutional and departmental autonomies, and the undermining of the peer-judgment principle.

In addition, one should point out that all these activities have been generated by the Office of Federal Contract Compliance, HEW, Equal Employment Opportunity Commission, and other Federal agencies without the proof of need, any hard data, any adequate analysis, without any hearings, and any consultation with the affected institutions and professors.

You may wish to cite the following provisions of Title VII of the Civil Rights Act of 1964:

> Sec. 703 (a) It should be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.
>
> (j) Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.

You may also find useful the quotes from the Executive Order 11246 [issued] by President Johnson. This order, which is allegedly the basis for the various departmental orders and guidelines demanding the establishment of affirmative action programs, has quite an unambiguous language:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.
>
> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation, and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
>
> (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

All these clear provisions have been in one way or another violated by the various affirmative action programs, which treat Americans *with* regard to race, color, and sex.

We feel that congressional action is needed to stop rampant violation by the nonelected and nonaccountable Federal bureaucrats of antidiscrimination statutes and orders. I hope that you and many of your colleagues will bring to the attention of your elected representatives the magnitude of the problem and your views on the matter.

Sincerely yours,

Miro M. Todorovich
Coordinator
Committee on Academic
Nondiscrimination and
Integrity

May 29, 1974

Dear Mr. Todorovich:

A copy of your December 11, 1973 letter to Dr. Richard A. Lamanna of this University has come to my attention. The letter lists certain alleged abuses of affirmative action programs and cites a provision of the Civil Rights Act of 1964 which prohibits preferential treatment because of race, color, religion, sex, or national origin, and a provision of Executive Order 11246 requiring affirmative action which provides that employees be treated during employment "without regard to their race, color, religion, sex, or national origin." The letter goes on to claim that "these clear provisions have been in one way or another violated by the various affirmative action programs, which treat Americans with regard to race, color, and sex," and concludes by urging action to influence legislation.

I find your letter shockingly misleading and deceptive. The language from Title VII and Executive Order 11246 which is cited has been interpreted consistently by the courts to permit affirmative action plans and policies which are designed to remedy the present effects of past discrimination. Merely citing the language of a statute or executive order tells only part of the story; it is essential that the purpose and judicial interpretations of the language in question also be considered. I presume that you are not a lawyer—if you are, God help the legal profession—but there are lawyers on your steering committee who must bear responsibility for such a disingenuous letter.

Let me first turn to Section 703(j) of the Civil Rights Act of 1964—the so-called ban against "preferential treatment" in employment. The meaning of that provision was considered by the Court of Appeals for the Sixth Circuit in *United States v. IBEW Local 38*, where the court said:

> When the stated purposes of the act and the broad affirmative relief authorization (42 U.S.C. §2000e-6) are read in context with §2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices. Any other interpretation would allow

complete nullification of the stated purposes of the Civil Rights Act of 1964.

A similar result was reached by the Court of Appeals for Ninth Circuit. In *United States v. Ironworkers Local 86,* the court ordered the union to offer immediate job referrals to previous discriminatees, and ordered the union's apprenticeship and training committee to select and indenture sufficient black applicants to overcome past discrimination. The order also included judicially imposed ceiling requirements for apprenticeship program participation of minorities. On appeal, the union argued that this order was in violation of §703(j). The union condemned the order as "racial quotas" and "racial preferences." The court rejected this argument, stating:

> There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the nonexistence of future barriers to the full enjoyment of equal job opportunities by qualified black workers.

The court went on to say that:

> Without such powers, the district court would be unable to effectuate the desire of Congress to eliminate all forms of discrimination.

(See also *United States v. Wood, Wire and Metal Lathers International Union No. 46:* "While quotas merely to attain racial balance in employment are forbidden by the Civil Rights Act of 1964, quotas to correct past discriminatory practices are not"; *Carter v. Gallagher:* "(T)he antipreference treatment section of the new Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices"; *Stamps v. Detroit Edison:* "Having found a pattern of discriminatory exclusion in hiring and assignments, this court has wide discretion in ordering such affirmative action, including the accelerated hiring and assignment of blacks in an effort to meet goals established for the purpose of overcoming the past patterns of racial exclusion"; *Heat and Frost Workers, Local 53 v. Volger;* and *United States v. Sheet Metal Workers International Association.*)

At the time Congress amended Title VII in 1972, it considered various amendments which would have modified the judicial construction of Section 703(j). The fate of these amendments was described by the Court of Appeals for the Sixth Circuit in *United States v. Local Union No. 212, International Brotherhood of Electrical Workers:*

> It also appears from the legislative history of certain proposed amendments to 42 U.S.C. §2000e-2(j) that it is not the intent of Congress to forbid remedies of the kind used in this case (a black membership quota was imposed on the union).

Plainly, as recently as 1972, Congress was fully appraised of what you call "rampant violation by the nonelected and nonaccountable Federal bureaucrats of antidiscrimination statutes and orders." Yet Congress chose to take no action and, in fact, rejected efforts to curb the practices about which you complain. Congress, fortunately, has the good sense to recognize that it is necessary to be "color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination."

You are equally misinformed about the meaning of the affirmative action provisions of Executive Order 11246 which prohibit all contractors or subcontractors on federally financed projects from discriminating in their employment practices. Cases arising under that order have upheld plans which take race into account and which establish racial quotas.

For example, the Court of Appeals for the Third Circuit upheld the Philadelphia Plan which required that contractors obligate themselves to achievement of minority manpower goals or quotas if they wished to participate in Federal construction projects of federally assisted construction of $500,000 or more (*Contractors Association of Eastern Pennsylvania v. Secretary of Labor).* That plan, promulgated under the authority of Executive Order No. 11246, provided for annually increased manpower utilization goals to raise minority employment in selected construction trades.

In *Southern Illinois Builders Association v. Ogilvie,* the court recognized that quotas are a logical part of an affirmative action plan formulated pursuant to Executive Order No. 11246, and said:

> Basic self-interests of the individual must be balanced with social interests, and in circumstances where blacks have been discriminated against for years, there is no alternative but to require that certain minorities be taken into consideration with respect to the specific minority percentage of the population in a given area in order to provide a starting point for equal employment opportunities. In this regard, it is the feeling of this Court that minimum ratios, where, *de jure*

or *de facto*, based upon race are constitutional and valid when adopted for the purpose of implementing affirmative action to achieve equal employment opportunities.

Most recently, in *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, the court upheld a State "affirmative action plan" which was more stringent than the Federal plan which was formulated pursuant to Executive Order No. 11246. The "Boston Plan" case involved an action by construction contractors, each a prospective bidder for State contracts, challenging contract provisions requiring contractors to employ a stated percentage of minority workers.

The court upheld the use of these racial criteria and stated:

> It is by now well understood, however, that our society cannot be completely color-blind in the short term if we are to have a color-blind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

In addition to my complete disagreement with your statement of the law, I also believe you grossly exaggerate the nature and extent of abuses connected with affirmative action programs. Perhaps there has been overzealousness on some occasions, but that problem pales into insignificance when compared to the shameful injustices toward which affirmative action programs are directed.

I can, nevertheless, understand and respect sincere differences of opinion over the implementation and consequences of affirmative action programs. But I cannot understand an organization presumably dedicated to academic integrity sending out a letter which displays such complete ignorance of the subject with which it purports to deal.

Very truly yours,

Howard A. Glickstein
Director
Center for Civil Rights
University of Notre Dame

July 18, 1974

Dear Dr. Glickstein,

Thank you for your lengthy communication of May 29. Serious dialogue on a topic shrouded by fear and passion is sorely needed. It is thus unfortunate that your missive is composed chiefly of misapplied and irrelevant judicial citations, garnished with gratuitous insult.

You choose, I note, to focus on the fact that in my December 11 letter I cited the clear language of the Civil Rights Act of 1964 and Executive Order 11246 as amended, both of which explicitly forbid preferential treatment on the grounds of race or sex. You then quote certain lower court decisions which interpret this to mean that where previous discrimination had been proved, race may be taken into account in establishing nondiscrimination.

However, you disregard entirely the sentence in my letter which points out that no proof of need or statistical data was presented to justify instituting these programs in the field of higher education, with which the Committee on Academic Nondiscrimination and Integrity concerns itself. In other words, there was no showing of prior discrimination. This fact is undisputed and of decisive importance. There was no sizable pool of unemployed minority Ph.D. holders when the affirmative action programs were set loose on the colleges. The great upswing of minority undergraduate admissions preceded the institution of affirmative action programs. In fact, the HEW guidelines do not even presume to speak of the correction of discrimination through "numerical goals" and "precise timetables." As you no doubt know well, the guidelines seek to alleviate "underutilization." In that light, all your citations which depend on a showing of previous discrimination are simply irrelevant. What is more, one of them points clearly to the impermissibility of the programs you defend. "While quotas merely to attain racial balance in employment are forbidden by the Civil Rights Act of 1964, quotas to correct past discriminatory practices are not," says the decision (*United States v. Wood, Wire, and Metal Lathers International Union No. 46.*). One wonders what possibly could be meant by a quota "merely to attain racial balance," if it did not include in its meaning a correction of statistical imbalance without a showing of discrimination.

Yet it is not enough to say that your citations miss

the point. They also tend to obscure it by implying that the law, as interpreted by the courts, uniformly justifies preferential treatment for social ends. For a man who is as ready as you to hurl charges of ignorance, deception, and disingenuousness, it seems downright imprudent not to have mentioned in your letter that Justice Douglas' seminal comments on the *DeFunis* case fundamentally support the principle that equal treatment under the law means equal treatment for individuals and not groups. Thus, he wrote, "the consideration of race as a measure of an applicant's qualifications normally introduces a capricious and irrevelant factor working an invidious discrimination. . . ." According to the Justice, the States "may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

While you quote from lower court decisions that do not even lie in the field of higher education, you fail to cite the words of a Supreme Court Justice on the one case that does lie in the higher education area. Shall we take a leaf from your rhetorical book and attribute this to either ignorance or disingenuousness? And if you feel that a dissent in a moot case is unworthy of your attention, why did you neglect Chief Justice Burger's clear formulation in the *Griggs* case: "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"?

Were the law as clear as you seem, somewhat contemptuously, to think, there would have been no need for the *DeFunis* case and for the Court's action in vacating the Washington State decision while declaring the case moot. Nor, more importantly, would there be any reason for the HEW guidelines to deny, as vigorously as they do, that they involve any preferential treatment whatever. Nor would HEW officials have found it necessary to disguise their quota requirements with the sophistry and euphemism of calling them "goals." Your frankness is useful in laying bare of the real issue; your shamelessness in avowing your love of preferential treatment is, however, not shared by most government officials.

Yet even if the courts could be understood as interpreting "without regard to race" to mean "with regard to race," your indignation at CANI's presumption in questioning this miracle of dialectic would still be out of place. Though I am indeed not a lawyer, (and it seems to me that the Deity has his hands quite full enough with the legal profession today), I do believe that there are precedents in American history for attempts to change the understanding of certain laws and constitutional provisions. I wonder if you had quite the same awe for the sanctity of *Plessy v. Ferguson* in 1953 as you have today for certain lower court decisions. Perhaps you did. If so, let me remind you that Abraham Lincoln did not share this reverential view and spoke openly in his debates with Stephen A. Douglas of his total opposition to the *Dred Scott* decision and his determination to reverse it by legal means. No doubt there was some antebellum Glickstein on hand to accuse him of ignorance and disingenuousness.

You say, in your letter, that the language of a statute tells only part of the story and that one needs to consult the purpose as well. Had you taken the advice you so graciously proferred me, you might have discovered, by consulting the *Congressional Record* of the debates on the Civil Rights Act of 1964, that the proponents of the bill laughed off as imaginary horribles the very interpretations you so piously defend. I refer you in particular to Dr. Paul Seabury's article in *Commentary* of February 1972, page 38. Nor does the 1972 Equal Employment Opportunity Act in any way, either by language or intent, justify discriminatory racial quotas.

Perhaps the most disturbing aspect of your letter is the facility with which you skate over the substantive questions. You "believe" that I grossly exaggerate the nature and extent of abuses connected with affirmative action programs. You will go so far as to concede that "perhaps" there has been overzealousness on some occasions, but you cheerfully maintain that the problem "pales into insignificance when compared to the shameful injustices towards which affirmative action programs are directed." Might I ask on what you base your belief that I grossly exaggerate?

At CANI we can and have documented the charge that there is widespread discriminatory recruitment in academia, brought on by the demand of Federal agencies for "proper representation." We can and have documented the charge that the majority of the male and female staff professors of sociology engaged in hiring, when polled, avowed the belief that affirmative action requires discrimination on the basis of sex and race and not of merit. We can and have

documented the charge that there is underway a thoroughgoing exclusion of qualified white teachers of Afro-American History and Black Studies. We can and have documented the charge that Federal officials have sought to intimidate universities and even to enter into the sphere of the disposition of the curriculum in order to attain what they conceive to be the ends of affirmative action. Yet you "believe" that I exaggerate.

I refer you, for example, to the April 1973 issue of *Measure*, a publication of the University Center for Rational Alternatives, of which our Committee is an offshoot. It gives the detailed factual account of the travails of one Martin Goldman, a qualified professor of Afro-American history, who had, in the year before the advent of the affirmative action programs, received several offers of academic employment. Because of his race he now cannot find academic work. I can assure you that his case is not an exception. Paul Lammermeier, another specialist in Afro-American history, now works as a short order cook in Mentor, Ohio, because his skin is the wrong color for a professor of his specialty today. Yet you "believe" that I exaggerate.

If you are unwilling to lend credence to evidence that comes from me, perhaps you might listen to Dr. Richard Lester of Princeton University, formerly vice chairman of President Kennedy's Commission on the Status of Women. In his book, *Anti-Bias Regulation in Universities: Faculty Problems and Their Solutions*, Dr. Lester offers a powerful array of factual evidence which proves that the affirmative action programs you defend not only commit injustice through preferential treatment—which apparently causes you no concern—and destroy academic standards and autonomy—which may not disturb you in the slightest—but also are wholly ineffective in obtaining their own intended purposes of increasing the number of women and minority group members in faculty positions.

Professor Lester shows that the need to fulfill utterly unrealistic quotas, under the threat of loss of Federal funds, leads to an undignified and essentially pointless game of musical chairs in which blacks and women are lured from one place to the next by offers of higher salary and greater prestige, but which does not markedly increase the actual numbers in circulation. Thus quotas and timetables merely distract from the problem which is mainly one of supply by making the fallacious assumption that it is essentially one of demand, hampered by discrimination. Thus, Dr. Clark Kerr, in his introduction to the book, points out that Dr. Lester "stresses the fact that current faculty members favor such an increase [in minority members and women] but warns that many of the action programs prescribed to achieve it fail to take into consideration either the inadequate supply of qualified people among these groups currently underrepresented on our faculties or the characteristics of academic employment that distinguish it from employment in industry." Speaking for himself, Dr. Kerr continues: "At stake is not only an equitable system of academic employment, but also loss of financial support as governments apply economic sanctions to achieve numerical hiring goals that often have little relevance to the character and mission of universities." Yet you "believe" that I "grossly exaggerate" the abuses of affirmative action.

Under the circumstances, is it really too much to ask of a man who accuses others of deception and ignorance that he substantiate his allegations with more than his "belief," or, one might uncharitably say, his gall? I cannot, however, merely leave the question at this point. You should consider the logical form of your argument. You say that existing abuses pale by comparison with the injustices that affirmative action programs are directed toward. Apparently then, because the program's aims are noble, their evils are insignificant. I trust I need not remind you of the kind of politician and demagogue who uses this sophism to justify misdeeds by good intentions. Why then do you make such an argument?

In fact, whether you are willing to believe it or not, nondiscrimination is CANI's most cherished goal. Our members have shown a lifelong commitment to equality and fairness and have been in the forefront of actions fought for the disadvantaged. However, we do not see how you can possibly hope to create color-blindness out of color consciousness, and nondiscrimination out of preferential treatment. Those who suffer discrimination today in order to "compensate" the children of those who suffered it yesterday will someday have children who will in turn have a claim to "compensation." How shall it all end except in a policy of true nondiscrimination which looks to individual merit and not to race, class, sex, or religion?

I do not deny that you and many others have shown a remarkable ingenuity in discovering ways in which "without regard" can be interpreted to mean "with regard." Such ingenuity would be laudable if it were applied to making real nondiscrimination a

working reality. You delude yourself if you believe that "preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." In fact, preferential treatment is a wholly adequate prescription for the perpetuation of preferential treatment, which is, you may recall, what caused those intransigent and deeply rooted inequalities in the first place.

Sincerely,

Miro M. Todorovich

November 13, 1974

Dear Professor Todorovich:

I appreciated receiving your letter of July 18, 1974 and read it with great interest. Please forgive my delay in responding.

I have spent most of my professional career in activities seeking to achieve racial justice in this country, and frequently feel a deep sense of frustration about the limited progress we have achieved. I acknowledge, nevertheless, the appropriateness of your suggestion that "serious dialogue on a topic shrouded by fear and passion is sorely needed." Accordingly, let me attempt to define our points of difference in as dispassionate a way as possible.

Perhaps we differ most fundamentally over the extent of discrimination in employment in higher education. You believe that institutions of higher learning are being subjected to a burden without "proof of need or statistical data." I believe that there is ample proof. It is for that reason that I relied on cases that assumed the existence of discrimination. What is that proof?

As you know, educational institutions were not covered by Title VII, the fair employment title of the Civil Rights Act of 1964. The 1972 amendments to Title VII, however, extended coverage to educational institutions. Congress acted only after extensive proof that there was a severe problem which required that educational institutions be subjected to the provisions of Title VII. The House Committee Report underscored the scope of the problem:

> Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge.
>
> Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.
>
> . . . The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the [Equal Employment Opportunity Commission] and should be subject to the provisions of the Act. (House Committee on Education and Labor, *Equal Employment Opportunities Enforcement Act of 1971*).

Similar views were expressed in the Senate Committee Report:

> The presence of discrimination in the Nation's educational institutions is no secret. Many of the most famous and best remembered civil rights cases have involved discrimination in education. This discrimination, however, is not limited to the students alone. Discriminatory practices against faculty, staff, and other employees are also common. The practices complained of parallel the same kinds of illegal actions which are encountered in other sectors of business, and include illegal hiring policies, testing provisions which tend to perpetuate racial imbalances, and discriminatory promotion and certification techniques.
>
> As in other areas of employment, statistics for educational institutions indicate that minorities and women are precluded from the most prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs.
>
> . . . The Committee believes that it is essential that these employees be given the same oppor-

tunity to redress their grievances as are available to other employees in the other sectors of business. . . . There is nothing in the legislative background of Title VII, nor does any national policy suggest itself, to support the present exemption.

In fact, the Committee believes that the existence of discrimination in educational institutions is particularly critical. It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination. (Senate Committee on Labor and Public Welfare, *Equal Employment Opportunities Enforcement Act of 1971*).

The need for the inclusion of institutions of higher education within the coverage of Title VII is illustrated further by the extent to which charges of discrimination have been filed with the Equal Employment Opportunity Commission. Since 1972, 1,600 charges of job discrimination by post secondary institutions have been filed. In 1973, approximately one out of four EEOC charges involved higher education. Seventy-nine percent were against public institutions, 21 percent against private. Forty-four percent of the charges involved sex discrimination; 39 percent race or ethnic discrimination; 4 percent religious discrimination, and 13 percent of the charges constitute multiple allegations.

While a charge is not proof or an adjudication, I believe that the large number of charges filed against educational institutions in the short time they have been covered by the act is indicative of a widespread and pervasive problem.

The extensive number of charges of discrimination that continue to be filed by members of minority groups and women also argues strongly against your assertion that affirmative action programs are being abused and that there is "widespread discriminatory recruitment in academia." This certainly could not be proven by the results. The increase in blacks and women on the faculties of previously white and male schools has been infinitesimal.

If we were doing so well in implementing goals and timetables—or giving preferences or imposing quotas—the EEOC would be inundated with charges from white males, not minorities and women. It is difficult for me to accept the argument that affirmative action programs have been abused, i.e., have discriminated against white males, when I see so little evidence of increased numbers of minorities and women on university faculties. John H. Powell, Jr., as Chairman of the Equal Employment Opportunity Commission, stated:

> We must look beyond the rhetoric . . . and look at the facts. Any sort of preliminary analysis of the facts will show that blacks are not displacing white males, that women are not displacing males, and I think that it is terribly important in this area, an area subject to so much misunderstanding, for us to tell it like it is and not necessarily respond to the rhetoric.

Nor do I find in Richard Lester's recent book any proof that affirmative action programs have been abused. The book differs sharply from its press releases and the exaggerated newspaper stories that preceded its release. Contrary to your claim, it does not offer a "powerful array of factual evidence" of anything. It only suggests, without proving, that affirmative action programs are ill suited to university faculty hiring practices. Lester's book is more a theoretical analysis of why "affirmative action" plans for the recruitment and hiring of women and minority group members by major government contractors, while possibly effective in the construction and manufacturing industries, are not well suited to the professional recruitment and hiring of university faculty members.

The basic tenet of this thesis is that faculty hiring practices are a delicate and sensitive matter among high level professional scholars which cannot be understood by those outside the academic community and therefore should not be interfered with. Lester's book does not purport to be a comprehensive study of "abuses" that have occurred in requiring affirmative action in the hiring of university faculty. He cites some examples of such abuses but what he has undertaken is an academic analysis of a program, and not a field study of its application.

My understanding of the situation convinces me that discrimination in higher education is more the rule than the exception. Accordingly, I felt that your December 11, 1973 letter was misleading because it concentrated almost entirely on a simple recitation of the language of laws prohibiting "preferential

treatment" without also warning that those provisions were not applicable if there were a showing of past discrimination. To be sure, you mentioned that affirmative action programs were instituted in higher education without proof of need—an assertion which I am convinced is inaccurate—but you failed to point out that the general language of Title VII and Executive Order 11246 had to be interpreted in the light of a particular institution's past practices.

In other words, I felt your letter left the impression that in all cases involving institutions of higher education "preferential treatment" was prohibited. I think it would have been more accurate to advise your constituency that if there were no past record of discrimination, if an adequate affirmative action program were being made toward increasing the representation of minorities and women on faculties, it probably would be possible to avoid a governmentally imposed hiring program.

While I take you to task for assuming there has been no discrimination, you fault the cases I cite on the ground they apply only where previous discrimination has been proven. As I already indicated, my letter proceeded on the assumption that discrimination does exist. In addition to the evidence of discrimination relied on by Congress in extending Title VII to institutions of higher education, it is now well accepted that a statistical showing of under representation is sufficient to establish a prima facie case of discrimination. (See *United States v. Ironworkers Local 86; United States v. Hayes International Corp.; United States v. United Brotherhood of Carpenters and Joiners.*) It then becomes the burden of the person or institution accused of discrimination to convince the court that minorities or women are underrepresented for reasons other than discrimination (*U.S. v. Ironworkers Local 86*).

My own experience with the recruiting and hiring procedures of institutions of higher education convinces me that this would be a burden that few institutions could sustain. Nor is it enough that a university demonstrate that it has not itself engaged in overt discrimination. A university's compliance with the law is not adequate unless it takes into account "broader patterns of exclusion and discrimination practiced by third parties and fostered by the whole environment in which most minorities must live" (*Johnson v. Pike Corporation of America*). Yes, Professor Todorovich, it is appropriate to ask universities to examine "external problems" and not at all unreasonable to require a public university, such as the University of Connecticut, to study the feasi-

bility of "improving transportation between Hartford and Storrs."

But whatever the necessity under Title VII to prove past discrimination before a race conscious remedy will be required, such a necessity does not exist under Executive Order 11246. In *Contractor's Association of Eastern Pennsylvania v. Secretary of Labor*, the Court upheld the Philadelphia Plan and said:

> The absence of a judicial finding of past discrimination is also legally irrelevant. The Assistant Secretary (of Labor) acted not pursuant to Title VII but pursuant to the Executive Order. Regardless of the cause, exclusion from the available labor pool of minority tradesmen is likely to have an adverse effect upon the cost and completion of construction projects in which the Federal Government is interested.
>
> Even absent a finding that the situation found to exist in the five-county area was the result of deliberate past discrimination, the Federal interest in improving the availability of key tradesmen in the labor pool would be the same. While a court must find intentional past discrimination before it can require affirmative action under 42 U.S. 2000 e-5 (g), that section imposes no restraint upon the measures which the President may require of the beneficiaries of Federal assistance. The decision of his designees as to the specific affirmative action which would satisfy the local situation did not violate the National Labor Relations Act and was not prohibited by 42 U.S. 2000 e-5 (g).

Since most of our major colleges and universities are government contractors, there is no need to prove an actual case of discrimination before requiring that such institutions adopt and implement affirmative action plans.

Unfortunately, I am not sure that my efforts to cite precedent or to distinguish the cases you rely on, or your efforts similarly directed at me, really will get us very far in bridging the differences that separate us.* Those differences are bottomed on our respective notions of what must be done to eradicate and overcome the generations of discrimination suffered by blacks, Chicanos, and women. Similar differences also accounted for the sides taken by the many parties who filed *amicus* briefs in the DeFunis case. On both sides of that case there were well intentioned individuals and organizations all equally committed to our constitutional principles and the concept of equal opportunity. Yet one group regarded the treatment of Mr. DeFunis as a violation of the Constitution and the other group discerned no such violation. To my mind, the basic question separating these groups—and us—is the question of whether our Nation is prepared to tolerate some short-range, temporary disadvantages for white males in order to overcome our racist and sexist past.

I have enormous empathy for Martin Goldman (and I am glad to see that he has been compensated for the discrimination he believes he has suffered) and Paul Lammermeier, whose cases you cite in your letter, but at the same time I realize that the process of correcting past injustices cannot be totally painless. In the past, many Martin Goldmans and Paul Lammermeiers were able to obtain prestigious positions because they were protected from the competition

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* *For example, you fault me for relying on decisions that do not even lie in the field of higher education while overlooking the one case—the* DeFunis *case—that does lie in the higher education area. But your objection seems misplaced to me.* DeFunis *dealt with the student admission process and not with employment. Almost without exception, the cases I cited dealt with employment discrimination—the matter at issue between us.*

Your criticism, however, is very revealing. It suggests a belief that there is something special about higher education. This seems to be a common problem among those working in higher education. As Chairman Powell has stated: "The concept that institutions of higher education are 'above,' or at least not in the same relationship to the rest of society, is shared by a large segment of the population, and by most institutions of higher learning as well. This view is frequently held, notwithstanding glaring realities to the contrary."

It is not readily perceived that the same principles of nondiscrimination that apply to plumbers, policemen, and sheet metal workers also apply to professors. It is with a sense of deja vu that I listen to fellow faculty members tell me about the delicate, complicated issues involved in making decisions about academic competence. This was the same rationalization used by officials of plumbers unions to explain to the U.S. Commission on Civil Rights why there were so few black plumbers.

of blacks and women. For every Paul Lammermeier working as a short order cook today there probably were 1,000 blacks with college degrees or better who worked at the post office or as Pullman porters in the past.

It would be nice if we could make up for the disadvantages that some groups have suffered without any inconveniences to the advantaged group. I doubt whether this is possible, however. Undoubtedly, there are many individuals who feel that they have been disadvantaged because of the preferences we give to our veterans. But the sacrifices made by veterans, as a group, justify according them preferences, as a group. Similarly, our laws contain numerous examples of preferences for Indians, including preferences in employment, but because of the cruelty this group has suffered such preferences have been allowed.

When a society has committed past injustices or when historically disadvantaged groups exist side by side with more advantaged groups, it simply is not possible to achieve equality and fairness by applying neutral principles.* This has been recognized by India whose laws accord many preferences to "scheduled castes." This has been recognized by Israel, where so called "colored Jews" receive preferred treatment. It is not pure fantasy, therefore, to believe that it is possible to "create color blindness out of color consciousness, and nondiscrimination out of preferential treatment."

Just a few months ago, the Court of Appeals for the Fifth Circuit upheld a lower court order which required the Alabama Department of Public Safety to hire one qualified black trooper or support person for each white so hired until approximately 25 percent of both the state troopers and support personnel force was comprised of blacks. Judge Coleman's reasoning is equally applicable to the situation we are discussing.

> . . . the affirmative hiring relief instituted . . . [here] fails to transgress either the letter or the spirit of the Fourteenth Amendment. . . . No one is denied any right conferred by the Constitution. It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils.
>
> By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit. For once an environment where merit can prevail exists, equality of access satisfies the demand of the Constitution. (*NAACP v. Allen.*)

In addition to our differences over what must be done to overcome the effects of past discrimination, I imagine we differ on what constitutes "merit" and "competence." Many of those who oppose affirmative action efforts argue that such efforts will upset systems that have been run strictly on the basis of merit and competence. They suggest that in the past the rule has been "may the best man (and I use the word intentionally) win" and that advocates of affirmative action are intent on destroying this principle.

Aside from the fact that in so many instances the only ones allowed to demonstrate their "merit" were

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* *I confess my love for preferential treatment and believe such policies are supported by the law. I do not believe, however, that it is because HEW officials are less frank than I am or less shameless than I am that they deny that their policies involve preferential treatment. I believe there is a vast difference between the "goals and timetables" program and a program that directly embraces quotas or preferential treatment. A demonstration of "good faith" is sufficient to excuse meeting a goal. If university officials sincerely believe they have undertaken good faith efforts to hire minorities, let them stand up to HEW and demonstrate their good faith—in court, if necessary.*

As the Attorney General said in upholding the legality of the Philadelphia Plan, "If unfairness in the administration of the Plan should develop, it cannot be doubted that judicial remedies are available." The problem is that the self righteousness of so many academic people completely blinds their ability to engage in good faith efforts. If the energy expended attacking HEW was instead devoted to implementing affirmative action programs vigorously, I am sure there would be few difficulties in demonstrating good faith.

white males, I do not believe that even within that limited category merit and competence were generally the decisive factors. We paid lip service to merit and competence, but so many hiring decisions are made on the basis of extraneous factors. If there were some foolproof litmus test for determining merit, perhaps I would be fearful of tampering with the system. But the rules have been so rubbery in the past that I become a bit suspicious when a new rigidity is demanded as women and minorities appear at the gates.

Nor, I suspect, do we agree on who is "competent" to be a teacher. I have known all too many persons, as I am sure you have, with a string of degrees who did not have the vaguest idea of what he or she was doing in the classroom. The conventional badges of accomplishment in terms of certificates, diplomas, and degrees are not necessarily what we should be looking for to provide the best teachers for young Americans. Perhaps our efforts to insure that women and minorities have greater access to academic positions will force us to revaluate our standards for determining competence.

We still have a long road to travel to achieve "an environment where merit can prevail." It is plain to me that we cannot achieve such an environment merely by requiring nondiscrimination. Such a policy was first imposed on government contractors in 1941, yet today—over 30 years later—we see daily examples of extensive patterns of discrimination. It is not mere whim that motivates those who advocate strong affirmative action programs. Rather it, is a realization that other approaches to equal opportunity—approaches that have been given fair chances to prove themselves—have not worked.

The programs currently being pursued by HEW—not nearly as vigorously or effectively as I would like—were developed slowly and carefully over a period of years to meet a proven need. It is not that the type of "affirmative efforts" advocated by CANI never have been tried. They have been tried and been found wanting. After years of frustrating efforts to desegregate the schools in the South, the Supreme Court finally ordered the adoption of plans that "promise(s) realistically to work, and promise(s) realistically to work now." It is precisely such programs that we need in higher education.

In the late '50s and early '60s, those who advocated the enfranchisement of black citizens and the desegregation of schools and public accommodations were told by Southerners that they were embarked on a program that would destroy the fabric of Southern society and would result in chaos or disorder. Governor Wallace, in fact, warned that any effort to desegregate places of public accommodation would require the use of all the troops the country had—including our forces in Europe and Asia. These dire warnings did not come true and the society is a lot better for the dramatic changes that have taken place in the South.

Similarly, I do not think our present programs to open up academic positions to women and minorities threaten academic integrity. Rather, if you accept the definition of "integrity" as "the state of being whole, entire or undiminished," I do not see how we can claim to have academic integrity, how we can claim to be "whole," until all segments of our population are fairly represented in a profession that has such a basic and fundamental impact on the lives of young Americans.

Sincerely,

Howard A. Glickstein

April 18, 1975

Dear Dr. Glickstein,

Please forgive the delay in responding to your letter of November 13, 1974. I feel that certain of the points you raise are well worth pursuing a bit farther. But I would first like to remark that I respect and applaud your lifelong efforts on behalf of racial justice in this country.

Most of my own professional career has been spent, here and abroad, seeking to advance the content of higher learning as well as improving the means of disseminating that content. It is thus quite natural that I am highly sensitive to actions which I find detrimental to the activity of higher learning or to the fairness of the procedures by which it operates and which determine its quality. My commitment, needless to say, is rooted in my belief that learning is one of the best tools for the betterment of the lot of individuals, as well as of entire societies.

While, as I say, I respect your commitment, I must question both the choice of your targets and the selection of weapons for hitting the set mark. Let us begin by looking more closely at the actual figures behind the rhetorical use of statistics, since only

then can the issues that divide us appear in their proper factual proportions.

At the end of the last decade about 1 percent of the Ph.D.s in this country were black. This was at a time when many Federal officials engaged in vigorous arm-twisting in order to force colleges and universities to incorporate goals for hiring black faculty far in excess of the 1 percent availability level into their affirmative action plans. The result of such pressures could have been predicted and was. The continuous threat of loss of Federal funds led to bidding wars and a musical chairs game for existing black faculty; extraordinarily high salaries for black appointees; and even a few cases of one professor holding several jobs, sometimes illegally, to satisfy the unappeasable demand.

But did this effort lead to its desired end of increasing black participation in higher education? According to just published data for the 1972-73 academic year, only about 4,000 of 33,000 American doctorates went to members of minority groups. Of those 4,000 only 975 were black, and only 37 percent were U.S. citizens. Thus, approximately 330 American black citizens received the doctorate. Once more, 1 percent, and therefore 1 percent of the newly available supply.

This is the factual basis on which our discussion must take place. We at CANI share with you a deep sense of frustration about these facts. But we feel they must be recognized if we are to find a way to change them. Comforting oneself with the thought that it is all the fault of evildoers merely disguises the real problems and makes them harder to solve. This, I feel, is one of our fundamental differences. We would wish to try a variety of approaches both to increase the supply and see justice done speedily for all individuals who may have suffered from discrimination. You, and several other groups and institutions whose views you so ably and eloquently present, seem to desire to stick doggedly to plans and programs which have not produced positive results but have created much ill will, cynicism, and no little injustice of their own.

In turning to the main argument, you distinguish properly between the quotas imposed by courts in cases where specific acts of discrimination have been proved, and the affirmative action programs required of higher education institutions under Executive Order 11246 in their role as Federal contractors. In making this distinction, you direct our discussion away from the general question of the justice, prudence, and propriety of preferential treatment to the more specific question of whether, as you and HEW officials claim, there is a "vast difference" between "numerical goals and precise timetables" and preferential treatment through quotas. This area is foggy and deceptive rhetoric and undocumented assumptions. Only after dealing with those can we return to the basic issue which divides us: whether racial or sexual discrimination is always or only sometimes wrong.

You argue that goals are not quotas because they only involve a "demonstration of 'good faith'." Here it is necessary to clear up an ambiguity. If by "good faith" you mean good faith in filling the goal, come what else may, such good faith could only be measured by numbers of positions offered and could not be distinguished from good faith efforts to achieve a quota. Under this reading then, goals would be indistinguishable from quotas since they would require good faith efforts to achieve quotas.

If, on the other hand, by "good faith" you mean good faith efforts to hire the best qualified candidate, then an admission that such good faith can be measured aside from the fulfillment of goals is also a tacit admission that the goals are not necessary, since affirmative action can both be pursued and judged without reference to their existence. HEW continues to say publicly that this latter kind of good faith is the sort it requires, but contradicts itself by demanding goals. In fact, of course, what this amounts to is requiring quotas, but using the words "good faith" to present a respectable public face which denies their existence. Everyone knows that numerical goals are set for a reason and that reason is that they be met.

You also seek to deny the existence of reverse discrimination by arguing that if it did occur, " 'it cannot be doubted that judicial remedies are available.' " In the abstract of course, it cannot be doubted. In reality, however, the possible complainant who would make use of the judicial remedy would have to be the university itself. And the university is precisely in the position of having to placate Federal officials who can cut off Federal contracts usually vital to a university's quality, if not its very survival, with a single telephone call. The bureaucracy's power as judge, jury, accuser, and patron combined make it downright impossible for universities to avail themselves of such judicial remedies.

This has led, as we all know, to university administrators complaining in private about the folly and

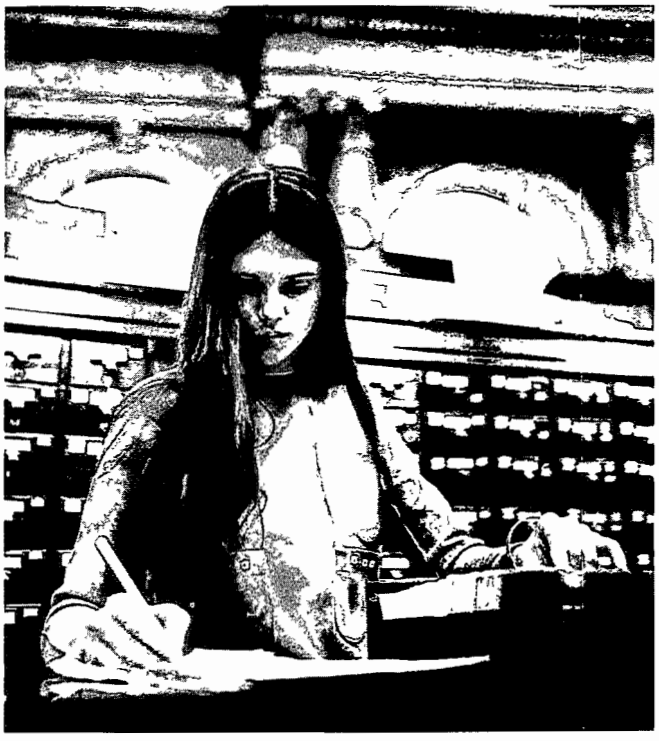
unfairness of affirmative action plans, while speaking in public only of their eagerness to comply with whatever the government wants. Testimony before this past fall's hearings of the House Special Subcommittee on Education gave evidence of the real attitudes of university administrators. Thus, President Hester of New York University agreed under questioning that if many aspects of the regulations are meant to be taken at face value and their 5 or 10 year deadlines enforced, "it will be disastrous."

If, on the other hand, a particular individual who has suffered reverse discrimination seeks to use a judicial remedy, he or she finds that though one may get some redress from the university, one cannot get at the real culprit who encouraged and incited the university to commit discrimination. The Federal Government washes its hands of the university and proclaims the usual pieties about how reverse discrimination is not its policy. It is thus in the advantageous position of an individual who tells another to leap out of a fifteenth story window, but sternly forbids incurring any injury on landing. I agree wholly with former Congresswoman Edith Green, who like you has spent most of her professional career in activities seeking to achieve justice for minorities and women in this country. In a recent speech she said: "I consider the rhetoric of some in saying, 'we don't require quotas, we require goals,' as nothing more than a game of semantics."

You seek furthermore to deny the seriousness of reverse discrimination by citing the number of complaints of discrimination brought before EEOC by women and members of minorities, while contrasting them to the lack of complaints of reverse discrimination brought before that body. You thus give the often cited figure of 1600 discrimination complaints in the field of higher education. One should note that these are but a small part of the overall EEOC backlog of about 100,000 cases. What is more, not all—perhaps only 900 cases—relate directly to instructional personnel (others may involve clerical, janitorial, or other staff).

Also, as you note, charges are not proof of the truth of charges. It is thus interesting that, according to President Hester's Congressional testimony, of 43 charges against N.Y.U. on grounds of discrimination, at the time of his statement 34 had been dismissed, withdrawn, or settled in favor of the university, while nine were still pending. Furthermore, those 900 cases should be contrasted with the number of 2,686 institutions of higher learning in the United States. That is, the order of magnitude is one complaint for every three institutions.

Now I would like very much to see the adjudication



of this backlog. It would not only give us some real insight into the nature of the problem (as it stands now the EEOC figures may reasonably represent or hopelessly distort the reality of discrimination in higher education), but it would enable justice to be done which I am sure we would both applaud.

For this reason, in my testimony in the name of CANI before the O'Hara subcommittee, I proposed a number of steps that, contrary to your letter, have not been tried before in higher education, and that would use the expertise residing in those 2,686 schools in the form of arbitration panels, both within particular schools and drawn, at the appellate level, from pools established by the professional associations, in order to deal expeditiously with complaints, whatever their origin, and in order, by resolving cases, to set examples and broadcast warnings.

Given the woeful record of the EEOC in dealing with individual complaints, it is hard to see why anyone would object to an effort to provide justice speedily for those deprived of it. Yet, in a paradoxical manner I have alluded to before, our critics seem so enamored of group proportionality which is to be achieved by bureaucratic compulsion, that they seem willing to see individual complaints go unresolved for years to come. Achieving such proportionality may make the bureaucrats happy whose task it was to achieve it, but it is not justice, which, as I understand it, is expected ultimately to bend to the level of concern for individual citizens and their rights.

As for the few complaints of reverse discrimination before the EEOC: this is hardly surprising, in view both of the EEOC's well documented weakness in dealing with anybody's complaints, and of comments by the former chairman, one of which you cite, which deny the reality of reverse discrimination itself. One could imagine more sympathetic forums.

But there are other reasons as well. First, many victims of reverse discrimination feel disinclined to make a fight of it precisely because they do not want to seem to be standing in the way of women and blacks. Second, and most important, practitioners of reserve discrimination have gotten much better at it since those naive early days when messages were sent out informing candidates that they were the wrong color. Reverse discriminators have now learned the use of code words long known to previous practitioners of the more genteel forms of discrimination. "Women and minority candidates especially welcome to apply," seems to be a current favorite. Thus, most victims of reverse discrimination never find out what happened. In a market where there are often 200 applicants for a single job, excellent candidates are often rejected and can thus not conclude from that fact that something might be amiss.

Finally, you cite former EEOC Chairman Powell to the effect that since women and blacks are not displacing whites and men, there can be no reverse discrimination. As I argued above, one would think that the failure of supposedly "result-oriented" programs would give their supporters some pause. Apparently, however, just as in certain military adventures, failure seems to be merely an argument for more of the same thing that has failed. But there is more to it than that and distinctions must be made. The facts about black employment have been cited already; it is clearly and preeminently a problem of supply. What figures we have, such as in the field of political science, show that hiring rates for black Ph.D.s far outstrip those for whites.

With women, the supply is increasing and the percentage of those hired as compared with men is more than keeping pace. Again in political science, the percentage of women hired is significantly greater than that of men in recent years, most clearly in the ranks of those who have yet to finish their doctoral dissertations. Scattered indications in the field of history show the same phenomenon. The reason blacks and women are not pushing whites out of faculty positions in dramatic numbers is that there is little new hiring going on. Still, if you compare the chances of a new Ph.D., just entering the job market, you will see that it is good to be black, valuable to be a woman, and bad luck to be both white and male.

Goals and timetables are an engine which creates preferential treatment on grounds of race and sex. There is not much fuel in the engine now, due to the economic situation, but to the extent that it works, it works to produce discrimination. I am willing to concede that the harm goals and timetables do in the form of cynicism about the meaning of equal opportunity, selfishness for one's own interest, willingness to obtain advantage through doing injustice rather than suffering it, far outweigh their actual numerical results. Even so, enough cases of individuals who, through the incaution of potential employers, learned of their victimization and made complaints of reverse discrimination now exist and have been accepted as valid by government officials reluctant enough to do so, that we can safely claim that widespread patterns

of reverse discrimination do exist today and that they are caused by Federal requirements to fill "numerical goals and precise timetables."

We now must return to the general question. In conceding, and at the same time seeking to justify or extenuate the existence of reverse discrimination, you state: "The basic question (is) . . . whether our Nation is prepared to tolerate some short-range, temporary disadvantages for white males in order to overcome our racist and sexist past." I would interpret this to mean that whereas we believe that all discrimination is equally bad, you do not.

Actually, I would suggest that the question is not whether our nation will tolerate discrimination, but whether it should. I would also suggest that it is not the "Nation" which tolerates disadvantages to individuals, but the individuals who suffer them. I would suggest that what may be a temporary and short-range disadvantage when viewed from the comfortably Olympian perspective of the "Nation" is a permanent and long-range disadvantage to the individual whose career is closed to him or her because of having the wrong skin color or sex.

I would suggest that I can see no principled difference between the question you ask and another question which is asked: whether the Nation is willing to tolerate temporary and short-range disadvantages to black citizens in order to calm social turmoil. Different policies, same argument. I cannot bring myself to believe, and find it hard to comprehend that you believe, that fundamental constitutional rights may be made to yield to social policies, however fervently maintained.

But even from the perspective of the Nation I believe you err. The example of India which you yourself cite indicates that group privileges are not, once allotted, a temporary and short-range matter. All that is temporary is their limitation to the original beneficiaries. Special privileges, granted either by custom or law, are tenaciously defended. As I pointed out before, why do you think it is so hard to create nondiscrimination where discrimination was once the rule? It is extremely hazardous to take one's chances on an equal basis with strangers in civil society, and we tend, therefore, to be reluctant to do it. Thus, the desire for special breaks or preferential treatment is perpetual and must always be kept in check.

The belief that discrimination can be administered to the body politic in judicious doses in order to create nondiscrimination is akin to the medical wisdom of curing an alcoholic with whiskey. Discrimination is addictive. To think that its use can be precisely controlled reveals the same naive belief in the perfect wisdom and manipulative abilities of social engineers that has characterized much of the worst (and most disastrous) in our recent foreign and domestic policy.

It should be understood that men and women in this nation are not mere passive recipients of the decisions of others; they have minds of their own and an ability to reason from principle and precedent. They are also, like most of us, biased in their own favor. Justifying discrimination in favor of those who have been historically wronged may not mean in principle to you discrimination in favor of everyone who claims to have suffered historical wrongs. But it will to those who claim it; that is, it will to almost all of us. Already Italian, Jewish, Japanese, and other groups are beginning, for reasons that seem good and sufficient to them, to claim the same "right" to favored treatment that women and blacks seem to them already to have won.

You err as well, I believe, in imagining that one discrimination can compensate for another. Discrimination causes individuals to suffer. If they can be individually compensated, well and good. But compensating their grandchildren at the cost of discriminating against someone else does not compensate them in the slightest. It does replace private discrimination (or at least supplement it) with public, government discrimination, sanctioned by the laws. It also sets up another imaginary debt for the social engineer whose successors will one day have to compensate the grandchild of the one victimized today, at the expense of the grandchild of the one benefitted today—that is, if moral consistency can be expected.

Put it this way. We object to discrimination against a class of people because it unjustly hurts individual members of that class. If now we argue that it is all right to discriminate against members of other classes in order to compensate the first group, we shall have destroyed the basis of our objection to the very discrimination we sought thereby to eliminate. Justifying group discrimination depends on the notion of historical guilt which is to be borne by individuals of the stigmatized group. It is a notion far from the spirit of our laws, of our Constitution, and of the Declaration of Independence, which argues that governments are created to assure individuals (not groups) the retention of their inalienable natural rights, one of which is the pursuit of happiness.

Please understand: this is not an abstract or academic argument. Legal principles do have political results. The lesson you wish to teach is that discrimination against blacks and women is so bad that any means, even discrimination, is permissible to eradicate it. The lesson you actually teach though, is that discrimination against others is a permissible tool to remedy or avenge wrongs you believe you have suffered.

Two other points. You seek to justify preferential treatment in academic hiring on the ground that considerations were never based on merit in the past. It is true that judging standards of merit in higher education is difficult (a fact that you seem to wish to deny in your comparisons to sheet metal workers and policemen), precisely because the standards of merit in every academic field change in accordance with advances in scholarship, while there is usually not universal agreement at any moment on what the advances are and what the false trails. This fact does not, however, justify putting a rigid fix into the system which would guarantee that hiring would be carried on without regard to merit.

If anything, this flexibility has always been the greatest asset in the quest for knowledge. Einstein's chair at Princeton is today surely occupied by someone whose attainments would suffer if brutally measured by the yardstick of Einstein's genius. Yet we can legitimately hope that someday another Einstein will be able to find his way to Princeton, unimpeded by its affirmative action requirements.

Likewise, you are of course correct in assuming the existence of bad teachers with many credentials. How this leads to justifying the use of race or sex as a criterion in hiring (or in credentialling) is beyond me. All that that can possibly accomplish, as such scholars as Thomas Sowell and Walter E. Williams have pointed out, is to guarantee that there will be more bad teachers, doctors, and lawyers inflicted on minority communities.

As one black professor said in refusing the request of a black student that he be given a B in a course he had earned a D for, on the grounds that he wanted to teach in Watts: "You want to be one more p---poor teacher in Watts. If you'd said the San Fernando Valley, I'd have given you the B." The problem is to increase the role that merit plays in hiring; not to find excuses for dispensing with merit altogether.

Finally, I would like to clarify once more the point on which this dialogue originated. For your belief that there is "ample proof" of widespread discrimination in higher education, you cite general statements from House and Senate Committee reports. We share Professor Eugene Rostow's view, imparted to you in a letter a copy of which he sent us, of the relative reliability of such general comments.

In fact, widespread programs were instituted without the least statistical knowledge of the actual size of disproportions which were, however, assumed to be immense. The fact that such data were simply not available, has not, to my knowledge, been questioned. Now, as the facts come gradually to light, it has become clear that the disproportions, where they existed at all, were small. The new Berkeley plan graphically shows the triviality of the disproportions.

But even were the disproportions greater, such general evidence would still not satisfy the conditions justifying imposing quota programs on an individual college. As Congressman James G. O'Hara remarked in a speech made shortly after the conclusion of hearings on this issue over which he presided:

> We have developed over the centuries a few principles related to law enforcement that may be of some value to us. . . . One of them is the proposition—constitutionally of equal importance with the principle of nondiscrimination—that we don't expect a person suspected of a crime to prove that he has not committed it.

I objected, and still object, to the practice of moving from general assumptions to the affixing of the burden of proof of innocence on an individual person or institution. When the assumptions are not based on much general statistical knowledge, it is all the worse; however, the assumption of individual participation in group guilt is particularly obnoxious.

We shall have to agree to disagree. But I greatly fear that you will be among those most chagrined and disappointed in the final results, if you succeed in prescribing the nostrum of discrimination as an alleged cure for itself. Like the heroin cure for morphine addiction once popular among medical specialists, the discrimination cure for discrimination will undo much of the good work that has been done and will create much fresh evil of its own.

Sincerely,

Miro M. Todorovich

The Union Role In Title VII Enforcement

LIABILITY AND OPPORTUNITY

By Herbert Hammerman and Marvin Rogoff

Labor organizations are in an anomalous and somewhat perilous position with respect to Federal law on equal employment opportunity. The AFL-CIO strongly and effectively supported the enactment of the Civil Rights Act of 1964, and has taken credit for the inclusion of Title VII in the act. It also supported the Equal Employment Opportunity Act of 1972, which amended Title VII by extending its coverage and empowering the Equal Employment Opportunity Commission to bring civil suit in Federal court, a power previously restricted to private parties and the Department of Justice. It continues to support equal opportunity as well as other forms of civil rights through the Leadership Conference on Civil Rights and its own civil rights department.

Among international unions and local unions, in and outside the AFL-CIO, there is much variation in policy ranging from enthusiastic support to outright hostility on the part of a few, with relative indifference on the part of most. Most industrial unions feel that they should not be held responsible for discrimination since they are not responsible for hiring, nor for management policies and decisions that have historically restricted the upward mobility of minority groups and women in their work force.

However, the responsibility of unions for fair representation has been established as long ago as 1944 in the Supreme Court decision in *Steele v. Louisville and Nashville Railroad Co.* Moreover, the EEOC and the courts have held that unions are responsible, both for inclusions and omissions in contract provisions negotiated by them as sole bargaining agent, and for fair representation of all members of the bargaining units under those agreements. Because of the prevalence of discrimination in most industries and areas of the country, and its continuing effects even where efforts are made to eliminate it, the problem of union responsibility continues to face most unions today.

The peril to unions is in the developing concept and impact of financial liability. Two forms of liability are specified in the 1964 act, either of which may be

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severely detrimental. One is the payment of attorneys' fees and costs to the prevailing party. The other is the accrual of back pay "payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice. . . ." Where such payments are required to be made to a substantial number of persons who constitute an affected class, the amounts can be staggering. Whether or not unions may also be required to pay damages has not yet been settled in litigation.

The extent of the impact of the act upon labor unions, and other respondents as well, when it comes to financial liability, may not have been intended by its Congressional sponsors and almost certainly not by its labor supporters. The law in section 703(c) and (d) declares it unlawful for any labor organization covered by the act, and almost all are covered, to perform any of the following activities:

> (c)(1) to exclude or to expel from its membership or applicants for membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
>
> (d) [or] . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703 also contains a number of exemptions which apply to unions as well as to other types of organizations covered by the act. There are four that are particularly well known and relevant to unions. These are the exemptions applying to: "a bona fide occupational qualification"; "a bona fide seniority or merit system"; "any professionally developed ability test . . . not designed, intended or used to discriminate"; and prohibition of "preferential treatment to any individual or to any group" in order to rectify a statistical imbalance in the composition of the organization's work force based on geographical comparisons.

Title VII and the Status Quo

It is important to state at this point, however, that company or union lawyers would be serving their clients ill if they limited their advice to a literal reading of the act. The definitions of discrimination in the law have been interpreted by the EEOC and the courts quite broadly, and the exemptions have been interpreted correspondingly narrowly. For example, the verbs used in section 703 are strong and highly active (e.g., to exclude, expel, or otherwise discriminate, to limit, segregate, or classify, to refuse to refer, to cause to discriminate) and therefore would seem to contemplate visible and clearly deliberate acts of discrimination.

Nevertheless, the courts have recognized that employment discrimination often is exercised through negative acts, e.g., failure to hire, failure to promote, failure to change practices that perpetuate the results of discrimination, and that generally these negative acts can be determined mainly by inference from other facts. Such other facts may be: past employment practices which have had a disproportionately adverse impact upon minority groups or women; and current practices which perpetuate or fail to correct the adverse impact. And the courts have recognized repeatedly that such disproportions may best be evidenced by significant statistical disparities.

Employment practices, though they are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." The words were those of Chief Justice Burger, and the Supreme Court was unanimous in the landmark case of *Griggs v. Duke Power Co.* in 1971. In that case, the court struck down testing, employment selection, and promotion procedures that had an adverse impact on black employees and applicants. The only justification for such procedures recognized by the court is "business necessity."

This reasoning has been applied for a number of years to seniority provisions, reflecting narrow interpretations of section 703(h) of the act. As explained by James E. Youngdahl, legal counsel of the International Woodworkers of America, AFL-CIO, all that is needed is the coincidence of two conditions: a history of discriminatory hiring with segregated assignments into race or sex-designated occupations, lines

of progression, or departments, even where the discrimination had occurred before the Civil Rights Act of 1964 became effective; and a seniority system that inhibits movement out of the historically assigned jobs, lines, or departments.

Youngdahl's point is illustrated by the recent decision in *Myers v. Gilman Paper Corp.* The court found the employer and three unions guilty of discrimination against minority employees who suffered losses due to job seniority and failure to post vacancies, and determined that the employer and the unions were equally liable for back pay.

The court stated:

> It is further clear to the Court that the Unions until 1972 acquiesced in the discriminatory practices by Gilman Paper Corporation. . . .
>
> Apparently, they argue that the seniority provisions were bargained for in good faith and that they lacked any intent to discriminate or to perpetuate past discrimination. However, the courts have held that good faith and lack of intent to discriminate do not constitute viable defenses in actions such as this. . . .
>
> In a Title VII case such as this one, it is not necessary to show that the Unions have discriminated in order that liability attach. All that need be shown is that prior to the effective date of the Act, the Company engaged in racial discrimination, and that, after the effective date of the Act, the previous discriminatory policies were carried forward by the racially neutral practices of the Unions. . . .
>
> The mandate of Title VII to right the wrongs of past discrimination places a duty even on International Unions to take reasonable affirmative steps to assure compliance with Title VII. By failing to show that it has taken any steps to assure its Local's compliance with Title VII, IBEW becomes liable for its own unreasonable inaction.

The same reasoning has also been applied to several other long established and, in many instances, socially sanctioned industrial employment procedures. This is especially true of institutionalized sex differentials, including sex-segregated jobs and wage schedules, different retirement ages, different benefits in health and welfare plans, the treatment of maternity leave, and state protective legislation which limits the daily hours of work of women and/or the weights they are permitted to carry or move.

The problems confronted by unions are frequently knotty, even in instances specifically covered in the act such as segregated local unions. Often, the greatest opposition to integration of locals is offered by the minority local which fears a loss of power within the union and a possible loss of job opportunities for its membership. Such opposition has been found in industries as varied as longshoring and papermaking, and skill is required in fashioning a remedy by which the minority worker would benefit through integration.

Perhaps the easiest to recognize, though not the easiest to resolve, are the congeries of issues involving the building trades unions. They cover exclusion from membership, failure to refer for employment, discriminatory classification of membership, and exclusion from apprenticeship and other training programs. In the building trades, unions frequently act in the role of employer, in setting standards for training and assigning persons to training, and in the role of employment agency in referring workers for job assignments. Discrimination is only one facet of the traditional job control methods of these unions, and therefore resistance to change has been strong. Although a number of important court cases have involved the construction industry and unions, the frequency of charges against the unions lodged with the EEOC has been relatively low and the potential financial liability in court cases has not in practice been very onerous because of the difficulty of identifying back pay recipients.

For both employers and unions, there is no necessary concord between culpability, i.e. the extent of discrimination, and financial liability. Often, there is a reverse relationship. For example, where Company A has hired no minorities and Company B has hired minorities in porportion to their participation in the area labor force but only into the lowest paid jobs, the liability of the latter would probably be much larger than that of the former. The reason is the larger number of back pay recipients.

How can a union protect itself against discrimination charges and suits and avoid or minimize the danger of heavy financial liability? There are two methods that can be used concurrently: (1) a wide-ranging affirmative action program that can be initiated with or without employer cooperation, including bringing Title VII issues to the bargaining table and if necessary to the courts; and (2) a grievance-arbitration procedure that probably requires modification

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of the collective bargaining agreement regardless of the nature of the current contractual procedures.

EEO and Grievance Procedures

The concept of adapting grievance-arbitration procedures to Title VII type remedies offers important advantages to unions and at the same time confronts them with serious difficulties. The most notable advantage is that it would absorb the law of the land into the law of the shop. It would tend to control, though not entirely eliminate, the current schizoid character of grievance resolution introduced by Federal law.

For, today, the investigation of a grievance alleging discrimination is generally not carried out by a union steward and a management representative, but by an investigator of the EEOC or of a State or local deferral agency. The ultimate determination of equity in the grievance is made not by an arbitrator but by the Federal courts. The source of that determination is not a collectively bargained labor-management agreement, but Title VII.

The grievant can utilize the grievance procedure, and accept its results, but he is not required to do so. He can ignore the grievance procedure entirely and file a charge with the EEOC or a State or local deferral agency. Or he can utilize the grievance procedure and, if not satisfied with the outcome, still file a charge.

In a few cases decided in Federal court, the courts have ruled that the time for filing a charge with the EEOC starts to toll from the time the grievant files a discrimination grievance with a union representative. Since the act provides a 2-year limitation on liability preceding the time the charge is filed, a case that is resolved 3 years later can result in 5 years of back pay liability if precedent decisions on timeliness are upheld in higher courts. Consequently, it is very much in the interest of unions to limit such liability through quick and effective grievance procedures.

The principal difficulty of absorbing Title VII into the grievance procedure is that the result is not final and binding. In *Alexander v. Gardner Denver Co.*, a unanimous Supreme Court ruled in 1974 that Title VII provides individual rights completely independent of those contained in a collectively bargained agreement. These rights may in no way be preempted, deferred, or otherwise replaced or waived by an arbitrator's decision.

However, the court also ruled that an arbitrator's decision may be admitted as evidence and given whatever weight it deserves under the facts and circumstances. In an important footnote, the court listed the following four factors that the courts should evaluate and weight in considering an arbitrator's decision:

> 1. The existence of provisions in the collective-bargaining agreement that conform substantially with Title VII. . . .
>
> 2. . . . the degree of procedural fairness in the arbitral forum. . . .
>
> 3. . . . adequacy of the record with respect to discrimination. . . .
>
> 4. . . . and the special competence of particular arbitrators.

The court further stated:

> Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. . . .

Model Contract Provisions

The above-listed factors reflect the Supreme Court's judgment of the main weaknesses of the arbitral forum in relationship to Title VII grievances. At the same time, they present unions and employers with a basis for making arbitration decisions more acceptable to the courts. The kinds of changes that would achieve this goal would have to be developed in the course of bargaining over contracts and tested in courts.

The following are three provisions developed by the Office of General Counsel of the International Union of Electrical, Radio, and Machine Workers (IUE) and suggested by them for inclusion in agreements:

> A. The Employer and the Union shall not discriminate against any employee or applicant for employment, nor perpetuate the effects of past discrimination, if any, against any employee in any term or condition of employment, including but not limited to, payment of wages, hours of work, assignment of jobs, seniority, promotions and upgrades, training, layoffs, recall, discipline,

and discharge because of race, color, religion, creed, age, sex, marital status, or national origin.

B. In making an award, the arbitrator shall apply Title VII of the Civil Rights Act of 1964, as amended, and all other Federal, State or local anti-discrimination laws, and all rules and regulations promulgated thereunder and judicial interpretations applicable thereto. The arbitrator shall fashion an award so that it grants any and all relief appropriate to effectuate the provisions of this section, including any remedy which could be granted by a Federal district court acting under Title VII.

If the award requires rewriting any provisions of this Agreement, the arbitrator shall direct the parties to open negotiations to make such changes, but shall retain jurisdiction over the case until such time as the arbitrator is assured that the contract provisions conform to the requirements of the law. If the parties are unable to agree upon contract provisions which the arbitrator determines to be in accord with the law, the arbitrator shall enter an award specifying the changes in this Agreement which are necessary to achieve compliance with Title VII. Such changes shall then be binding upon the parties and become terms and conditions of this Agreement for the duration of this Agreement.

C. In any arbitration of a grievance filed by an employee alleging a violation of Subsection A of this Section, the employee who filed the grievance may appear as a party, present evidence, and be represented by counsel of her own choosing, the counsel fees and expenses of counsel to be paid for by such employee, and without limiting the right of the Union also to participate in said arbitration in the same manner as if the employee had not exercised the rights conferred on him by this subsection.

Except where the contract contains an effective anti-discrimination clause and a contract provision has been clearly breached, management and labor and the arbitrators who resolve labor-management disputes often tend to view charges of employment discrimination as being the function of government. It might also be said that a number of government officials and attorneys agree with this view, but for different reasons. They feel that the parties responsible for discrimination and the collectively bargained machinery set up by them should not be expected to be able to eliminate discrimination.

End Results

Yet, we cannot but conclude that such views are disadvantageous to all participants, i.e. unions, employers, charging parties, and government. Experience has demonstrated that, in most instances, government is not a practical forum for convenient, inexpensive, and expeditious resolution of charges of discrimination. The time lag is too long, the procedural steps too many, and successful resolutions without resort to the courts too few.

To the extent the grievance procedure is credible and effective in handling complaints of discrimination, it should achieve the following results:

1) Institutionalize in union contracts the principles and methods of equal employment opportunity, and thereby reduce resort to government procedures in handling of grievances.

2) Reduce the number of charges filed with the EEOC and its deferral agencies.

3) Minimize government interference in labor-management operations.

4) Minimize financial liability in attorneys' fees and accruing back pay.

5) Minimize resort to the Federal courts.

6) Provide unions with stronger defenses for those cases that reach the courts.

To conclude, the extent of union responsibility and liability for discrimination is still in the process of development in the courts. It is clear, however, that by virtue of their representation and collective bargaining functions, unions are being required to take affirmative steps to eliminate discrimination. While the penalties for inaction in terms of financial liability can be extremely onerous, the current state of the law provides no guarantees of immunity as a reward for positive action.

Nevertheless, a combination of affirmative action in which unions take initiative to discover and change patterns of discrimination and a revised grievance-arbitration procedure adapted to the requirements of Title VII would seem to be the optimum means of minimizing adverse consequences.

More grievances would be settled at early stages and at much lower costs. Fewer charges should be filed under Title VII procedures. Fewer cases should reach the Federal courts. A stronger defense would

have been established in those cases that are tried in court.

Perhaps the strongest defense of all would be that the union has done all that may be reasonably expected of it to eliminate illegal discrimination against the workers whom it represents.

Where to Begin

As frequently happens, we were contacted by a particular department head of a national union (whom we'll call D.H.) for a Title VII evaluation of its negotiated industry retirement plan. We knew this particular international union to have a long history of civil rights involvement; it had adopted a series of civil rights resolutions, and it was one of the earliest to file Title VII charges against a company as an aggrieved party.

D.H. explained that in preparing for contract negotiations with a particular company, they discovered in plant after plant women were concentrated in the lowest paying jobs. Since pension benefits are based on a percentage of individual earnings (not an unusual formula), women received a lesser benefit—certainly through no intentional bias by management or union.

Was this an unlawful pension plan under the act, asked D.H., and what could EEOC advise to bring the plan into conformance?

The naivete of the inquiry staggered us. The fundamental problem is not the difference in pension benefits, we replied, but the employment practice which produced this sexual imbalance between job classifications. You have, we informed D.H., inadvertently taken the essential first step for any industrial union to determine whether it has initiated or been a party to systemic employment discrimination; i.e. a photographic image of the racial, ethnic, and sexual characteristics of each labor grade or job classification.

Now, once you have observed an EEO imbalance (a statistical exercise), analyzed the company's hiring and placement practices (usually solely a management right), and determined how promotion and transfer policies (usually spelled out in the collective bargaining agreement) have affected the mobility of the post-probationary employee, you can then negotiate for an alteration in the bidding procedure to eliminate the discriminatory impact on minorities and women who have been discriminatorily placed at the point of entry, arrange for discriminatees to achieve their rightful place in the job structure, provide pension credits to match the earnings they would have made but for their sex, make sure the employer lives up to the act in future hiring and placement, and leave the pension plan as it is!

We went on to discuss with D.H. the union's legal obligation to recognize that a violation exists; the mounting liabilities it can incur, along with the employer, during the time the violation remains and no effort is made to undo it; and the myriad court decisions defining appropriate remedies. Finally, we reminded D.H. of a union's obligation to fairly represent the workers in its bargaining units, both under the National Labor Relations Act and Title VII.

Then we threw in what we thought was the clincher: What kind of union can you be, we asked, if you negotiate and permit to remain in effect a contract which produces lesser opportunities for promotion, transfer, pay, and other benefits for women than for men, just because they are women, while both sexes pay the same $7.50 a month dues?

"All right," admitted D.H., "you've convinced me. But I don't make policy here, and for my union to do what you say is required under Title VII industry-wide will take a lot of legwork.

"I'll have to find a way to convince the leadership of what's required; then they will have to face up to problems of politics, priorities, and resources. Suppose the leadership does agree the job has to be done, your way, for philosophical reasons, or because of the heavy potential liability—which, by the way, would be paid by the dues of favored groups and discriminatees alike—or, as you put it, because we're not fairly representing all groups right now. The leadership would then have the political problem of getting the International Executive Board and the locals to push for better opportunities for women, blacks, and Latinos, sometimes at the expense of the expectations of the majority white and male workers who, after all, elect local and national officers.

"Then there are the resources. How much can we invest in special staff and attorneys? At the bottom line, if we're lucky, we'll win Title VII concessions at the bargaining table. But you know negotiating is give-and-take. If we get something for women, blacks, and Latinos, chances are it will have to come out of what we could have negotiated for the others.

"And what if a local doesn't cooperate with International policy? You know perfectly well the International won't take the ultimate step under our constitution, putting the local into trusteeship. They might, for theft of union funds or strike-breaking or

maladministration; but not for civil rights reasons, they won't!"

Variations of this dialogue have been taking place since 1965, when EEOC opened its doors. For the first few years, substantive Title VII issues were still before the courts and the definition of industrial union liability as a partner in discrimination was unclear. But almost all the issues have now been dealt with and union liability is clearer. And yet the tragedy is that the above conversation took place not in 1967 but in April 1975.

While awaiting the outcome of D.H.'s strivings, we have set out what we believe to be the goals an ideal E.E.O. program for industrial unions should have, with examples of unions which are meeting part or all these objectives.

A Program for Unions

First, adoption and publication of a firm policy statement, by national convention, spelling out how the union intends to rid its industry of discrimination, including vestiges of past discrimination, and placing full responsibility on the international for providing leadership, resources, and guidance in its implementation.

Second, establish machinery for gathering and evaluating information on employment practices in all companies and bargaining units, on a continuing basis.

Third, require all locals, districts, and conference boards to negotiate contract provisions barring discrimination in employment and making EEO complaints grievable up through arbitration.

Fourth, require all locals to establish special committees to undertake immediate and continuous E.E.O. review of collective bargaining agreements and employer work practices.

Fifth, assign to national full-time staff responsibility for fair practices activities.

Sixth, include a report of EEO progress and future plans on the agenda of every policy-making body and assembly, including international, district, and State conventions, international executive boards, joint boards, conference boards, and local unions.

Seventh, include instruction on Title VII and its implementation in all training programs, courses, seminars, and institutes for officers, members, and staff at all levels.

Eighth, insure that all employee selection procedures (tests) conform to Title VII, including those unilaterally applied by employers as well as those within collective bargaining agreements and joint apprenticeship standards.

Finally, as an employer in its own right, apply the eight listed initiatives to its own operations just as forcefully as it does in the industry with which it bargains.

Some Examples

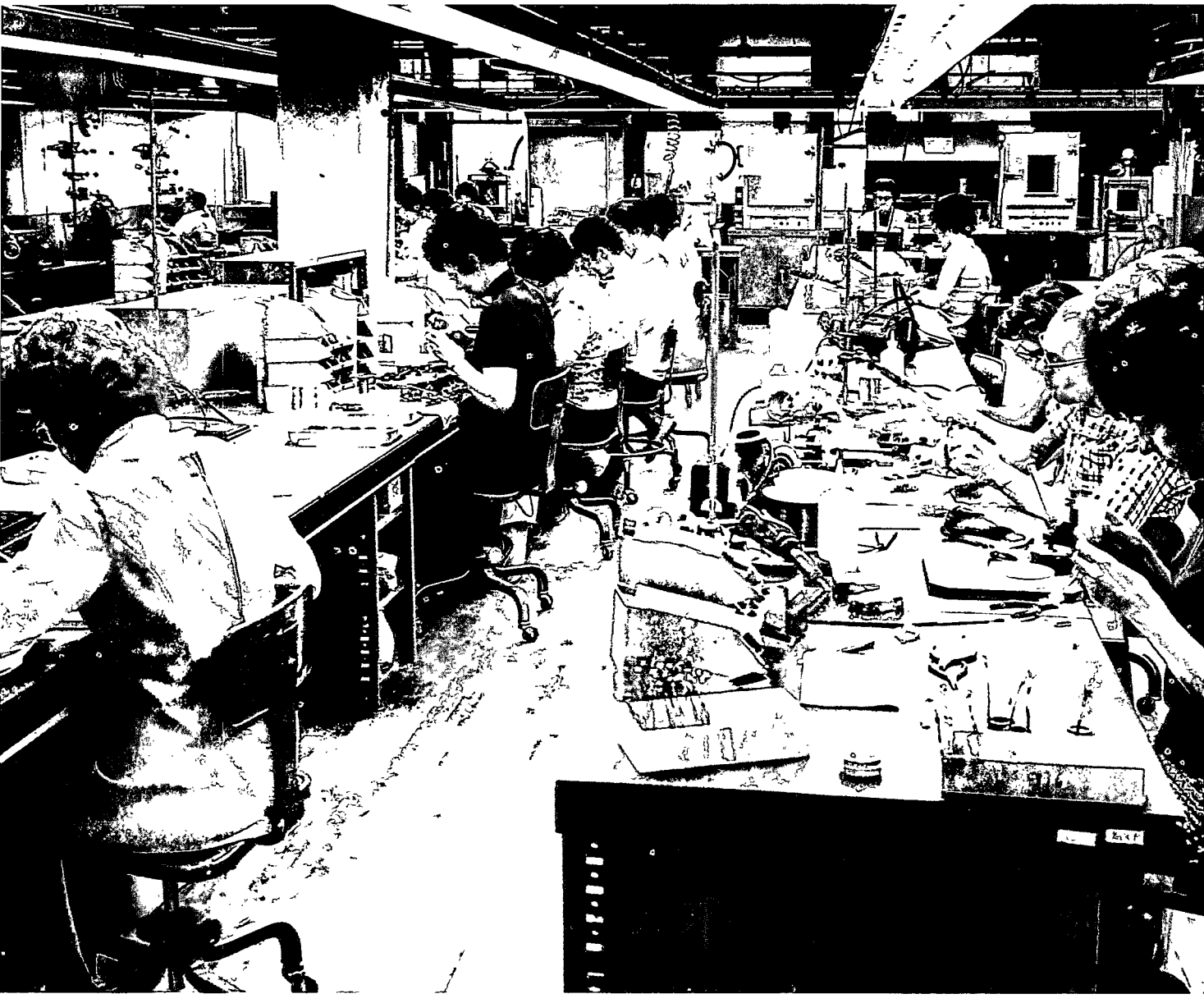
For the industrial union, the task of keeping up with Title VII legal developments, devising and utilizing techniques for effectively getting at violations, and setting a step-by-step course for resolving inequities is far too vast and complex an undertaking for local unions, most of which lack even a single full-time officer. While many internationals have adopted civil rights resolutions, few are programmatically specific, and fewer yet make headquarters commitments such as designation of a full-time staff person.

One union which is moving on most of these points is the International Union of Electrical, Radio, and Machine Workers, AFL-CIO (IUE). They have repeatedly adopted updated convention resolutions, keeping the issue alive and dynamic, followed up with implementation programs by the International Executive Board. They have also retained full-time social action and women's activities directors and involved substantial resources of their legal department.

The IUE program calls for local unions, with assistance of field staff and districts, to conduct mid-contract reviews of collective bargaining agreements and employer work practices to ascertain discriminatory provisions or purposes; a checklist helps dig out the more obvious forms of racial and sexual discrimination. The International adds clout to the information retrieval effort by formally requesting of major companies data on sexual, racial, and national origin characteristics of new hires, incumbents, and applicants for posted jobs.

If Title VII violations are detected, the local is to write the employer to "request a meeting to bargain over the elimination of contractual provisions and noncontractual practices which are discriminatory, as well as substitution of nondiscriminatory provisions and practices." As an example, the International provides suggested contract language applying EEOC guidelines to retention of seniority, payment of sickness and accident benefits, and taking of leave in connection with pregnancy disability, together with the legal backup for their position.

Employers who do not provide the requested data



may be charged with violating the good faith bargaining requirement, Section 8(a)(5) of the National Labor Relations Act, or IUE may file Title VII charges and follow up with suits in Federal court. IUE's right to such data from Bendix has been upheld by an NLRB administrative law judge. The judge ruled that the IUE needed the job-bidding data, to see if Bendix was living up to the contract's nondiscrimination clause; the affirmative action program as it relates to bargaining unit employees, to know what the company is planning to do that would affect employees, and when; and the hiring data, because while a union doesn't represent people before hire, the hiring policies and practices do affect terms and conditions of employment.

Following intensive study of management's rate-setting formulas in several plants, IUE successfully negotiated raising the labor grades of a large number of classifications inhabited primarily by women, producing hourly increases of up to 75¢, and in far less time than is normally involved in Title VII's charge/litigation process. And where a minority/female overload is found in undesirable line of progression, the union's policy calls for automatic conversion to plant-wide posting and bidding for purposes of promotions, transfer and layoff. During the current economic downturn, the new procedure has permitted many women previously boxed-in to bump upward instead of being laid-off.

IUE's litigation docket lists dozens of ongoing suits where negotiations have failed, and against some of the giants of the industry. Against General Electric, IUE filed a lawsuit (under the Equal Pay Act) challenging discriminatory pay rates and lack of advancement opportunities for women in Fort Wayne, Ind. Settlement brought $300,000 in backpay for 350 female employees, higher wage rates totaling $250,000 a year, payment for work gloves ($100,000 a year), plus comprehensive job posting and upgrading procedures to benefit all employees including women and blacks.

IUE's suit against GE challenging discriminatory denial of sickness and accident benefits during absence because of pregnancy disability is the pivotal case on this issue for all private employers in the Nation. Their suit challenging a 5 foot 7 hiring rule resulted in its removal with subsequent benefits to both men and women. Some of these same issues of pregnancy disability, equal pay, and promotional opportunities are found in suits against Westinghouse, General Motors, and other electrical manufacturers.

The Newspaper Guild, AFL-CIO (TNG) has likewise introduced EEO into the mainstream of everyday bargaining. "There are laws," noted a TNG official recently, "and laws can play their part in the job that we have to perform. But collective bargaining is what the Newspaper Guild is set up to perform."

The Guild, which generally represents editorial, advertising, business, and other nonmechanical departments of newspapers. magazines, and wire services, has adopted a basically decentralized EEO approach. Certain EEO requirements must be met for locally negotiated agreements to receive TNG approval, such as equal pay for equal work among reporters, proper recognition of pregnancy disability, and hiring goals for minorities and women.

Local unions are committed to uncovering violations, but the Guild does provide training and conferences to equip officers and committee persons to do their work. TNG has, in fact, sent local negotiators back to the bargaining table to achieve wage parity for women's page and society reporters, all of whom are usually women, with general assignment reporters, mostly male. Local committees are likewise to review hiring standards for conformance to the *Griggs* formula.

TNG locals are encouraged to support and utilize the Jobs Referral Service, described as "the most effective industry-wide clearing-house for minority persons." The Guild issues open reports on the roster of successes and failures in its collective bargaining-EEO push and on follow-up charges and litigation. They are utterly convinced of the legal requirement for aggressive union EEO initiatives because, as their Executive Board recently stated, "No local can afford to leave itself open to charges of substantive laxity in this area."

Finally, after several successive convention rejections, TNG has created its first national-level position to coordinate activities in human rights, with, however, other responsibilities added on.

The International Woodworkers of America, AFL-CIO (IWA), whose general counsel James Youngdahl is quoted earlier in this article, has embarked on a modest program of seeking out cases of discrimination and negotiating settlements with employers. IWA is undoubtedly largely motivated, as are IUE, TNG, and other unions, by their awareness of the increasing threat of huge financial liability and the certainty that if liability is found, the international union cannot

escape partnership responsibility with its offending locals.

EEO Arbitration

Perhaps the most important development in IWA's program is the special EEO grievance process negotiated with Weyerhaeuser Co. in its Oklahoma and Arkansas facilities. The process, embraced in an overall settlement agreement covering seniority and other issues, permits a grievant a choice of routes. He or she can choose the regular contractual process, or the special procedure which allows the union only a bystander's role.

In the special process the grievant deals directly with two strata of corporate management; then the issue goes right to an arbitrator. The grievant can select any representative, including outside attorneys or organizations. The arbitrator, one of a specially prepared panel of EEO experts, determines responsibility for the discriminatory act and assesses financial costs including representation fees.

Thus, the union itself has proposed and negotiated a procedure which may take from it the responsibility and opportunity to handle employment problems and give it instead to a rival apparatus.

The assumption here is by retaining options, the worker will have more faith in the system, be more amenable to using it and to relying on the arbitrators' decision, while at the same time the union will gear up its own EEO grievance capabilities, and by doing so recapture the allegiance of its membership, and resume its traditional position as representative of *all* workers in *all* contract-related matters. This innovative process bears close watching for the quality of its operation and its decisions and for its ultimate acceptability under the *Alexander* formula.

In a somewhat similar vein, the United Auto Workers (UAW) recently negotiated for special local union fair practices committees to fact-find EEO grievances before they resume normal processing. Since the UAW-trained committees will reflect the ethnic, racial, and sexual make-up of the plant, it is assumed such grievances will benefit from extra care and savvy. Here, too, it is too early to assess the impact of this system.

Seniority and Equality

The single unlawful work practice whose remedying would affect both the present and future work outlook for the largest number of workers is the one in which promotions, transfers, and layoffs are determined by a worker's seniority within a given line of progression (or department or seniority unit), where minority group persons and women find themselves overpopulating the worst of such lines, and where the employer was solely responsible for the original act of hiring and placement. In a sense, unfair seniority is also a relatively easy practice to uncover through statistical analysis, as compared to the ofttimes burdensome trail of an individual discriminatory act.

But, it is the single most complicated and politically dangerous issue to deal with, for both employer and labor union alike, since its resolution has the effect of rearranging the job and earnings expectations of a high percentage of a facility's workforce. And it is the one problem which must be detected and resolved if any meaningful legal-practical balance is to be achieved in the current emotional issue of seniority-layoff during economic downturn.

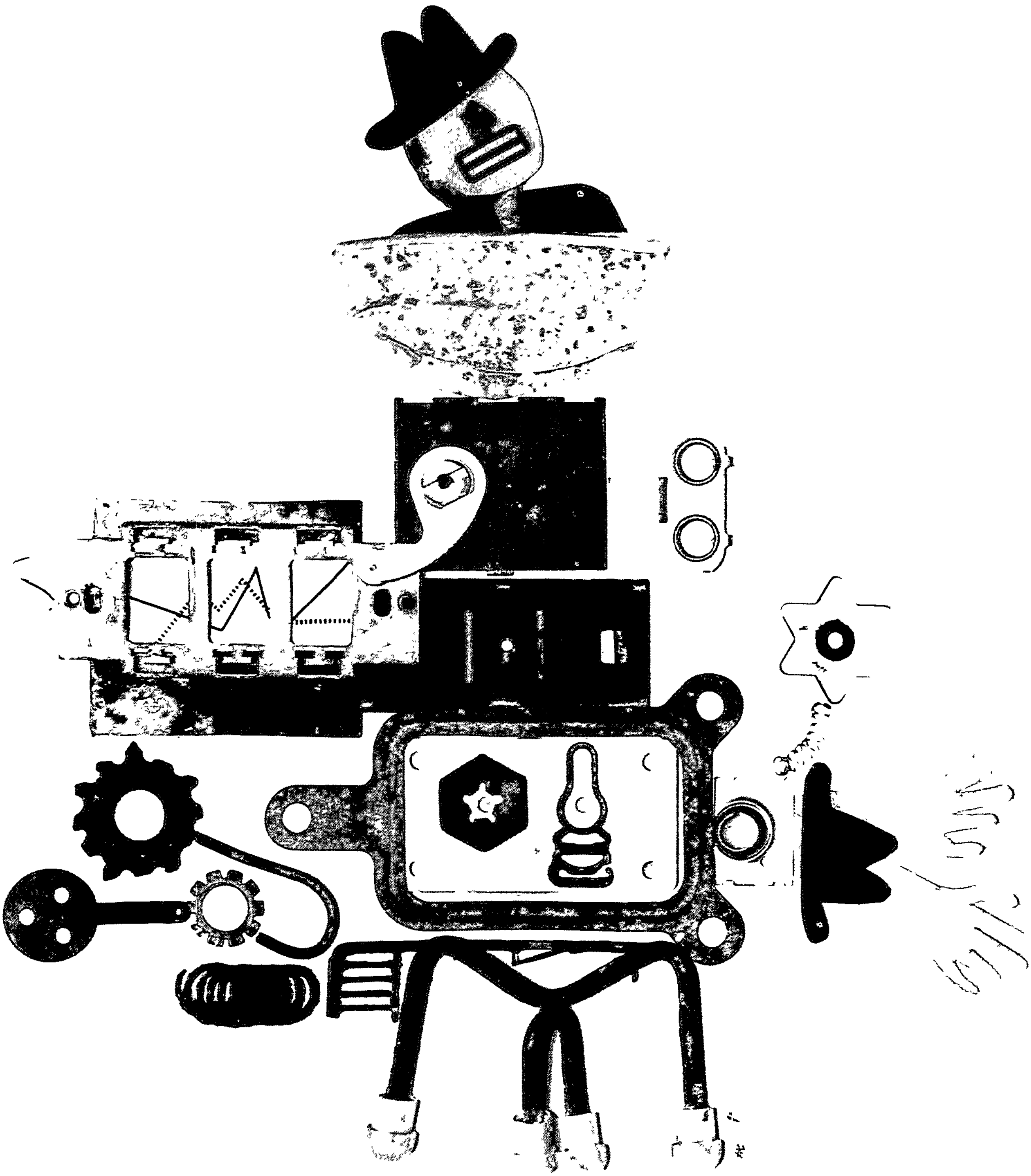
Yet this aspect of seniority is the one problem which is drawing the least attention from either side of the bargaining table—and from government as well. Only a handful of unions have given the matter public attention. To the IUE, Woodworkers, and UAW, we would add the Brotherhood of Railway and Airline Clerks; Cement, Lime and Gypsum Workers; United Electrical Workers; and the Textile Workers Union.

Even special interest groups have been known to miss the point. At its recent national conference, a leading black unionists' group declared that "seniority lines should be held;" opposed "preferential treatment in hiring and promotion;" and said that "equality must be achieved by means that do not threaten other people." But somehow, this particular group never dealt with the one work practice adversely affecting hundreds of thousands of their number, whose detection can be approached by scientific methods, and where the courts have spoken repeatedly to appropriate remedies whose application, in fact, yield fallout benefits to whites and males who also become free to use total plant service for job bidding.

And Yet . . .

The unions mentioned here were selected for analysis not because they stand alone but because combined their EEO programs embrace all the eight listed criteria for an ideal effort. The UAW offers much more than its latest grievance resolution approach, as does the United Steelworkers of America, and to some extent the Communications Workers.

Sadly, however, D.H. and his union are overwhelmingly typical.



Layoff Or Work Sharing

THE CIVIL RIGHTS ACT OF 1964 IN THE RECESSION OF 1975

By Alfred W. Blumrosen and Ruth G. Blumrosen

The employment opportunity provisions of the Civil Rights Act of 1964 began to have a measurable influence on hiring and promotion practices around 1968. Between 1968 and 1973, minority and female employment expanded. By 1974, the issues began to change: we entered a recession, and employers, both public and private, began to layoff. Often they used the long-accepted principle of "last in—first out." However, this practice eroded the improvements in minority and female employment of the preceding years which had been achieved with great difficulty.

Those with an historical perspective recalled that just about 100 years ago, the legal gains for blacks won through the Civil War were sharply curtailed by the "compromise of 1877" and that black and female employment opportunities opened during World War II quickly disappeared at the war's end.

Thus there was a deep concern that in our time, too, rights won in the '60s would be eroded away in the '70s. Minorities and women might now once again be used as a reserve labor pool, called upon only to fill the slack during emergency or prosperity. This pattern would produce a special kind of bitterness among those who had but recently achieved the social, economic, and dignitary advantages of new work opportunities, only to be thrown back to unemployment and ultimately to welfare.

But strong conflicting equities argue for "last in—first out." Protection of senior employees against layoffs had traditionally been a central objective of American unionism. The principle of seniority has helped to humanize the work place, and allows the worker, to a limited extent, to capitalize his labor, to obtain something more than the day's bread in ex-

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change for his humanly limited capacity to produce. Thus "last in—first out" is a reflection of the fundamental equities of workers who devote their life energies to an employer.

Because equities were compelling on both sides of the issue, the level of feeling would be intense and righteous. The stage was set for serious confrontation among workers which could but worsen race and human relations in the workplace and elsewhere.

The result of the conflicting equities was indecision. By February 1975, while the President was predicting an unemployment rate close to 8 percent through 1977, Federal, State and local agencies were seriously considering guidelines to shape a resolution of the problem. Employers were caught in the middle: subject to possible liability under equal opportunity laws if they followed "last in—first out," and to possible liability under collective contracts if they did not.

A few employers, unions, and minorities turned to the courts, which in turn gave varying and conflicting answers. But the imperatives of the economic situation would not await the stately pace of legal resolution. 1975 began with massive layoffs by employers. For the most part they followed the "last in—first out" principle.

With inaction by administrative agencies, and conflict among the courts, it became imperative to seek a solution which comported with the fundamental principles of equal employment opportunities law and the legal and human realities of labor relations. The authors have concluded that where employers have recently hired minorities or women into jobs from which they were historically excluded, and are then required to reduce the total labor costs, they must do so, if possible, in ways which will not destroy the gains for minorities and women in job opportunities.

This means that reductions in hours worked by all employees are preferable to any layoffs. The "four day week," job sharing, or "volunteer layoffs" are preferable first options for such employers.

Where layoffs are necessary the employer must layoff on an alternating or rotating basis if feasible so that the burden of the lesser amount of work is spread among all employees rather than concentrated among minorities and women.

Both the shorter work week and rotating layoff options mean that senior whites and/or males share in the lesser amount of work, but are not subordinated to the claims of minorities and women. We conclude that the sharing of this burden by senior whites and/or males is appropriate under the law, while subordinating them to minorities and women would be unlawful.

Interpreting Discrimination

Prior to 1965, discrimination was understood as an individual act based on a purpose or motive to subordinate all members of a class, defined by race, color, religion, sex, or national origin. Blacks belong in their place; therefore, any black seeking employment will be assigned only to "black" jobs or not hired at all. Women belong "in the home," and will be given "women's work" or nothing. This "evil motive" test of discrimination made proof of violation virtually impossible.

A second test of discrimination —equal treatment—was also used. If similarly situated blacks and whites or men and women applied, and the white or male was preferred by the employer, such preference would be, or be evidence of, discrimination. This second test led to permitting the employer to rely on the subordination of minorities or women in other areas of life as a reason for denying them employment opportunities. Under this test, an employer could impose an educational level requirement, although minorities as a class had less education; a test requirement although minorities fared less well on written tests; a "no arrest" requirement, although minorities in metropolitan areas are more frequently arrested than whites; or a work experience requirement which ignored forms of experience which many women have had.

Early in the administration of Title VII, the Equal Employment Opportunity Commission adopted a third test of discrimination—one based on effect rather than on the motive of the employer. This was first done in connection with the question of employment tests. The EEOC ruled that a test which had an adverse effect on minority employment was illegal unless justified by business necessity.

The "effect test" was thereafter used by the agency and the lower courts to invalidate "word of mouth" recruiting; to set aside departmental or other seniority units; and to upset traditional hiring hall arrangements in the construction industry when they perpetuated racial discrimination.

In 1971, the Supreme Court, in

the keystone opinion in *Griggs v. Duke Power Co.* upheld the use of the effect test. In that opinion, Chief Justice Burger wrote:

> . . . [T]he Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. [P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.
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> . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in head winds" for minority groups and are unrelated to measuring job capability. . . .
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> The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds of the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.

The underlying rationale of Griggs was explained in 1973 in the case of *McDonnell Douglas Corp. v. Green,* in which Mr. Justice Powell said:

> *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 remainder of their lives.

The effect test was applied to recruitment, hiring and promotion practices. In 1968 one of us asserted that there existed under the law a "duty of fair recruitment," and the hearing examiner in the *Allen Bradley* case held that such a duty existed under Executive Order 11246, which prohibits discrimination by government contractors.

In 1969, the concept was endorsed by the Equal Employment Opportunity Commission and the Secretary of Labor. In 1971 it was adopted by the Court of Appeals for the Seventh Circuit in *Parham v. Southwestern Bell Telephone Co.* The Labor Department ordered the construction industry in Philadelphia to use goals and timetables for minority hiring, and ordered all government contractors to develop goals and timetables to correct "deficiencies" and "underutilization" of minorities. By 1973 several courts had approved the use of numerical standards or "goals and timetables" as an appropriate method of correcting discrimination in recruitment and hiring.

This, in brief, is the story of how the law first encouraged and finally compelled increased minority and female hiring during the period of 1968-1973.

The evidence demonstrating this improvement is impressive. Studies concluded in 1973 illuminate the era, and while one may draw different conclusions as to whether the improvement had been sufficient to correct the history of discrimination, their basic thrust reflects improvement based on both statistical evidence and the "situation sense" of those concerned with the problem.

Before Layoffs

As employers—both public and private—considered cutting output and labor costs by reducing total hours worked in response to the recession of 1974-75, it became obvious that layoffs on a "last in—first out" basis would undermine the equal opportunity effort of the previous 5 years. They would have an adverse effect on recently hired minorities and women, which would be illegal under *Griggs.* At the same time, legislative history of Title VII suggested that this precise situation had been considered by Congress, and that Congress had determined that senior whites or males were not to be subordinated to junior minorities or women.

However, the analysis of this problem should begin not with the question of whom to layoff, but with the prior question of whether to layoff anyone. This threshold decision concerning the method to be used to reduce wage costs and hours is subject to the *Griggs* principle.

The employer has a duty to plan his activities so as to provide for fair employment opportunity. If there is a choice of methods available to the employer to reduce labor costs or hours worked—either by a layoff, which will have the "adverse effect" proscribed by *Griggs,* or a pro rata reduction in hours worked by all employees, which would not—he is required by *Griggs* to adopt that practice which will accomplish his business purpose with the least adverse impact on minorities and women.

The "minimum adverse impact principle is outlined in *Head v. Timken Roller Bearing Co.* (1973), as follows:

> If an employment practice, though facially neutral, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity—*Griggs* v. *Duke Power Co.*

The court then quoted *Robinson* v. *Lorillard Co.*:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In conclusion, the court stated:

> The first prong of the test was correctly applied by the court below but there was no finding or holding that the limited bid system could not be replaced by another plan that would be just as efficacious for Timken's business purpose with a lesser racial impact.

The Fourth Circuit, in *Robinson*, added:

> It goes without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective, but is less discriminatory.
>
> Under these principles, the employer is required to reduce hours for all employees if it is practical for him to do so rather than layoff where to layoff would have an adverse effect on minorities or women.

There are various methods of reducing hours of work. They include encouragement of voluntary leaves of absence, encouragement of optional early retirement, a shift to the 4-day week, suspending operations for a limited period of time, or terminating a shift. The precise method chosen by the employer will relate to the productive process involved in his own operation. In addition, the employer must determine if there are other costs, aside from wages, which could be cut without interfering with his operation or having an adverse effect on minorities or women.

Some collective contracts contain guarantees of a minimum work week, if there is any work to be done. These clauses might be violated by a shift to work-sharing. However, if such a clause were to stand in the way of an employer action required to comply with Title VII, the clause itself would be invalid. This principle has been established in a great number of cases involving the operation of discriminatory seniority systems under Title VII.

We believe that most situations can be handled by work sharing rather than layoff. There may be circumstances where, for operational reasons, reduction in the hours of all employes will not be feasible, and where the only option open to the employer if he wishes to continue operation is to layoff some employees. Such cases might include an operation which is dependent on the presence of a few highly skilled personnel. It may not be possible to reduce their hours and continue to operate. In such a case, the employer may continue them at full time and reduce hours for others, rather than layoff.

The Legislative History

If the employer can demonstrate that it is not feasible to reduce hours, he will have established a "business necessity" for a layoff. May he conduct it in accordance with "last in—first out" if the collective bargaining contract so provides? If the *Griggs* analysis were the only test, the answer would be "no" because the adverse effect is obvious.

However, the legislative history must be considered. Congress, in 1964, addressed this problem, and appears to have intended that senior whites and/or males not be subordinated to the claims of later hired minorities or women, even when the employer had a history of exclusion of such persons and began to bring them into the work force only under the pressure of the law. The exact extent of this congressional intention is uncertain. The entire legislative history, with comments, is on page 40. The legislative history suggests one of two possibilities

(a) *Grandfathering:* "Last in—first out" may be used to protect the rights of whites and/or male employees hired before the effective date of Title VII, nearly 10 years ago. However, employees hired since that time are not protected, and, as to them, "last in—first out" may be illegal.

(b) *No subordination:* The legislative history expresses a gen-

eral concern that senior whites and/or males not be subordinated to junior minorities or women, but it goes no further. The accommodation of this principle with the "adverse effect" principle is left to the courts and agencies. We believe this interpretation will prevail rather than the "grandfathering" approach. The discussion in the legislative history which suggests "grandfathering" is focused on the effect of the adoption of Title VII on rights existing then (in 1964).

This may be no more than the natural tendency to focus on immediate events, rather than any conscious desire to protect only those rights. On this point, the language of the seniority proviso, which was intended to capture the concept expressed in the legislative history, seems relevant. It does speak to the future, not to "grandfathering." For this reason we put aside that possible construction of the legislative history.

We are left with some combination of the "future effect" concept, which would protect "last in—first out," regardless of when the senior whites or males were hired, and the principle that such protection does not apply if there has been a history of discrimination. The accommodation of these two propositions can be achieved if we reject the notion that a job must be awarded in toto to either person A or B. By requiring that, where practical, A and B must share the job in the event of a layoff, we can assure that earlier hired whites will not be subordinated to later hired minorities or women and that recently hired minorities and women not be required to suffer the adverse effects of "last in—first out."

Thus the legislative history will be harmonized with the *Griggs* principle as follows:

> "Last in—first out" as applied against a history of exclusion of minorities or women is illegal in accordance with the "effect test" of *Griggs*. However, in fashioning a remedy, the courts may not subordinate senior whites or males to junior minorities or women. A remedy which requires that the two groups *share* in the reduction of hours on some equitable basis would be appropriate. Such a remedy might include rotating or alternating layoffs, or other forms of reduction of work for all of the employees. The combined meaning of *Griggs* and the legislative history is that neither group may be required to bear the entire burden of loss of work opportunities.

This conclusion is contrary to that reached in *Waters v. Wisconsin Steel Works* and *Jersey Central Power and Light Co. v. IBEW*. The court in *Waters* was aware of the difficulty in squaring the "last in—first out" principle with *Griggs:*

> We recognize that it is a fine line we draw between plaintiff's claim of discrimination and defendant's countercharge of reverse discrimination. On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past.
>
> We disagree with *Waters* and *Jersey Central.*

Watkins v. Steel Workers Local 2396 supports our ultimate conclusion concerning the effect of *Griggs*, for the court allowed the company to reduce the work for all employees, once the later hired minorities had been reinstated.

Affirmative Action Plans, Etc.

Most large employers in the country are government contractors and are required under Executive Order 11246 to execute affirmative action plans which identify the underutilization of minorities and women and outline steps to increase the proportion of minority and female employment. These plans are communicated to the unions involved. Many of these companies and unions also have collective bargaining agreements prohibiting discrimination based on race, color, religion, sex, and national origin.

The existence and operation of these plans may have a profound effect on the legality of "last in—first out." Such plans, by implication at least, suggest that the employer will not reduce the proportion of minorities or females incident to a layoff. Explicitly, the employer promises to try to increase these proportions where deficiencies are found.

In such a case, it is quite possible that one of two things may have occurred.

- The employer has entered into inconsistent agreements; one with the union and one with the government. In that event, he will be obligated to honor his agreement with the government. This was established in the Third Circuit Court of Appeals decision upholding the Philadelphia Plan.
- The affirmative action plan of which the union was notified, coupled with a nondiscrimination clause in the collective contract, may be held to have modified the

"last in—first out" provisions of the contract so that it cannot be applied where it would have an adverse effect. Where the union has acquiesced in an affirmative action plan which implicitly prevents reduction in the proportions of minorities, it can be argued that the rest of the collective contract must be harmonized with this obligation; particularly since entry into the affirmative action plan was the condition precedent to receipt of work orders benefiting all employees.

Finally, there may be a few cases, such as *Jersey Central Power and Light Co. v. IBEW*, in which both company and union entered into an agreement or consent order to increase minority and female employment. In this case, the signatories to the collective contract which contains "last in—first out" are also both signatories to the affirmative action agreement.

When called upon to resolve the possible conflict in interpretation between the contract and the affirmative action plan, the district court upheld the plan, and ordered proportional layoffs. While we disagree the proportional layoffs are appropriate (because they involve the subordination of senior whites and males), we do agree with the judgment that public policy considerations expressed earlier would lead to a modification of "last in—first out" where there is an existing affirmative action plan which includes layoffs. In *Jersey Central,* however, the Court of appeals reversed on the grounds that the agreement related only to new hires and was not inconsistent with the layoff provisions of the contract.

Beyond Collective Agreements

Some two-thirds of the work force works for private or public employers not subject to collective contracts. Does the preceding discussion apply to them at all?

First, these employers rarely have a clear-cut "last in—first out" policy. Private employers seek to preserve management prerogative to layoff the least productive regardless of seniority, and public employers are wrapped in the mysteries of civil service. If an employer has not previously used a "last in—first out" concept, he may not now introduce one if the effect will be to disadvantage minorities and women.

But what of those public or private employers without collective contracts who can demonstrate that historically they have used "last in—first out"? Literally, the legislative history does not speak to their situation. The equities of the senior employees appear to be similar to those employees whose rights arise from collective bargaining, and the resulting remedies of work sharing or alternating layoffs appear to be appropriate.

The *Griggs* principle will control the employer's response to the need to reduce labor costs. If he can reduce hours without having an adverse effect on minorities or women, he must do so. Where, for reasons rooted in the productive process, he cannot reduce hours, but must layoff, then he must adopt the form of a layoff which will share the burden among all or a substantial group of his employees, and he may not operate so as to concentrate this burden on the recently hired minorities/women. Faced with this situation, the employer may seek volunteers for layoff, try to reduce hours, or provide for rotating or alternating layoffs.

LEGISLATIVE HISTORY

First, we will define again the three concepts which are pertinent to a discussion of Title VII.

Grandfathering: The legislative history is directed to the existing seniority rights as of the time the law is adopted. It suggests that employees who have rights at that time should not lose them. This concept would lead to "grandfathering" those senior whites or males in employment on July 2, 1965, and protecting only them against being bumped by later hired minorities or women.

Future application: Senior whites are to be protected against junior minorities and women regardless of when either were hired.

Last in, first out (L.I.F.O.)—illegal if based on discrimination: Senior whites or males are not protected against junior minorities or females where there is a history of discriminatory exclusion of minorities or women. The exemption in 703 (h) for "bona fide" seniority systems was developed some

time after these exchanges. Senator Humphrey explained that:

"This provision makes clear that it is only discrimination on account of race, color, religion, sex or national origin that is forbidden by the title. The change does not narrow application of the title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12.723

The three items of legislative history reproduced below constitute the discussion on the issue of layoffs which may adversely affect minorities/women during the debates on Title VII. The various ideas expressed in the discussion can be classified as noted in brackets.

I. Senator Clark's Responses to Questions put by Senator Dirksen:

Question: . . . Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?

Answer: Seniority rights are in no way affected by the bill [grandfathering]. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" [future application] and not because of his race [L.I.F.O.—illegal if based on discrimination].

Question: If an employer is directed to abolish his employment list because of discrimination, what happens to seniority?

Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists [grandfathering].

II. The "Clark-Case Memorandum" on Title VII:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective [grandfathering]. Thus, for example, if a business has been discriminating in the past and, as a result, has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis [grandfathering].

He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier [grandfathering].

However, where waiting lists for employment or training are, prior to the effective date of the Title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held as unlawful subterfuge to accomplish discrimination [L.I.F.O.—illegal if based on discrimination].

III. A statement by the Department of Justice was introduced into the record in the debates by Senator Clark:

First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect [grandfathering].

If, for example, a collective bargaining contract provides that in the event of layoffs those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII [future application]. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes [grandfathering].

Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole," he is not being discriminated against because of his race [future application].

Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title [L.I.F.O.—illegal if based on discrimination].

. . . But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would be set aside by the *taking effect* of Title VII [grandfathering]. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race [grandfathering]. Any differences in treatment based on established seniority rights would not be forbidden by the title [grandfathering].

Testing And Equal Opportunity

GETTING A FAIR CHANCE

By Willo P. White

The 1964 Civil Rights Act was passed at the onset of the War on Poverty, when belief was widespread that outlawing discrimination would usher in a new era of social justice and equality. The front line regiments in this war were provided by the Office of Economic Opportunity with a limited budget, and by the Equal Employment Opportunity Commission with no enforcement powers.

In six of its eleven titles the '64 Civil Rights Act addressed broad categories of discrimination. Titles I, II, IV, and VI referred to voting rights, public accommodations, and programs or activities receiving Federal financial assistance. Compliance was forthcoming after initial resistance. Title VI, public education, and Title VII, employment discrimination, have proved more resistant to redress, perhaps because the latter two provisions involve a more direct threat to the majority which will be required to share power, money, and status with the minority.

A basic tenet of fair employment practices, as set forth in Title VII, is to provide for equal competition among applicants for a particular job so that the person judged to have the most merit or be the most qualified will be hired. Passage of a law does not, as we have found, wipe out the cumulative effects of generations of racism and sexism. It is necessary not simply to remove discriminatory practices, but to take affirmative action to meet the objective of fair employment practice.

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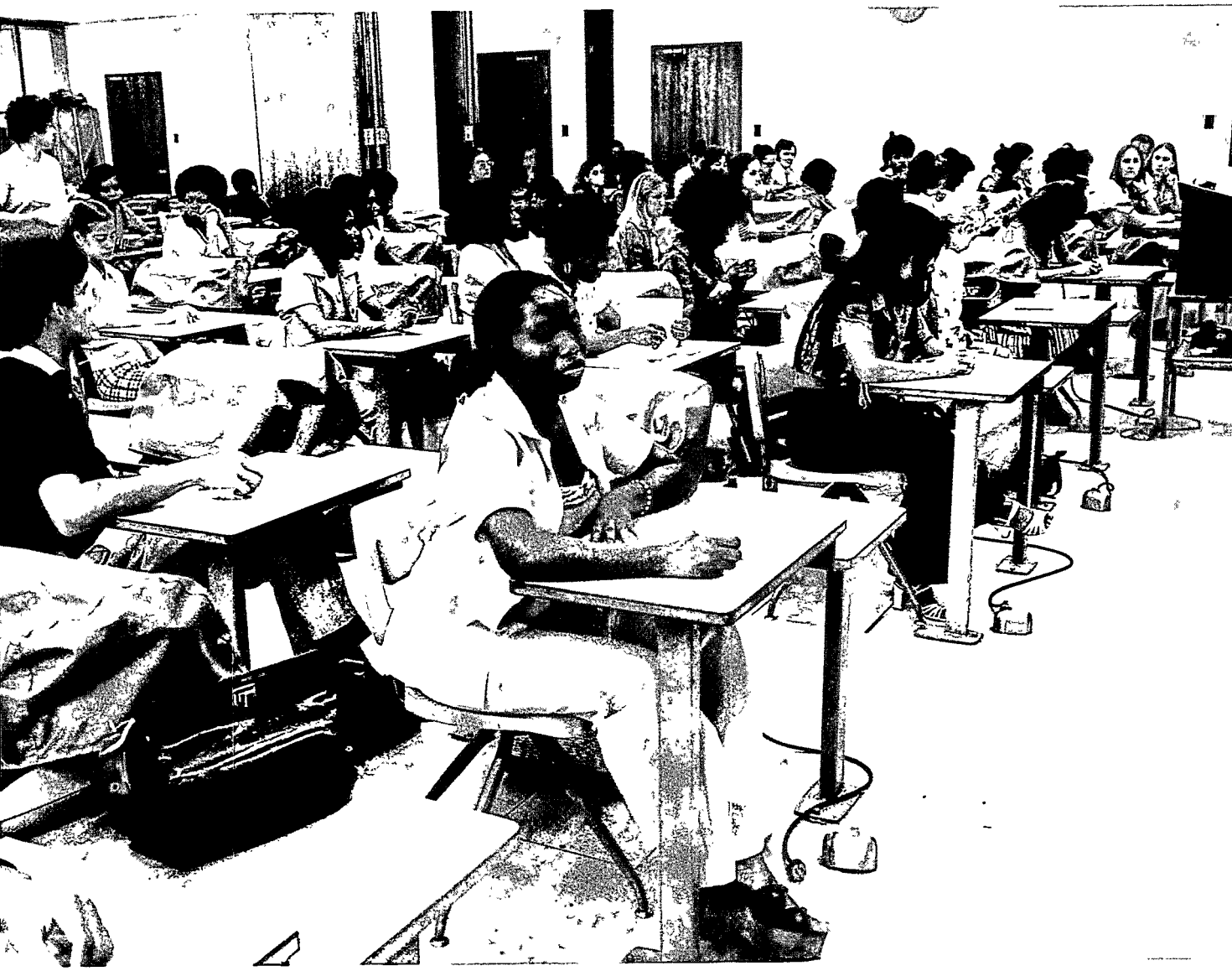
Initially the implementation of new social policy is often awkward. Many blocks to change are real—persons locked into dead end jobs with low skills; persons coming out of inferior educational systems; persons lacking skills to qualify for higher paying jobs—and will take years to overcome. Other blocks are artificial—passing tests which are not job-related; requiring unnecessary credentials; not allowing for individual life styles. These can be removed quickly once they are identified.

In large measure it has been left to the Federal courts to construe what the ambiguous structures of Title VII mean and specifically to stipulate what is meant by section 703(h), which provides for the use of "professionally developed ability tests" in employment situations. The courts have generally defined tests as any measure upon which an employment or advancement decision is based, including among other things, personal history and background requirements, biographical information, interviewers' rating scales, or demonstrations of manual dexterity.

Testing and the Supreme Court

Real backbone was given to the equal employment opportunity effort in the decision of *Griggs v. Duke Power Company* (1971) when the Supreme Court held that it is the *consequences* of employer practice and not the intent that matters. The Court said that where a test serves disproportionately to disqualify blacks for employment, it must be shown to be job-related before it can be used. Any employment practice or policy that is fairly and impartially administered, but which has a discriminatory effect or



perpetuates the effect of previous discriminatory practices, constitutes unlawful practice. In order to continue to function under such a policy the organization must show that the policy is necessary for the organization's safe and efficient operation.

There is no question that tests have been used in a discriminatory fashion. The question that remains unanswered is whether tests can be developed as an instrument for implementing affirmative action. By and large the courts have taken a wait-and-see attitude about the utility of tests in fashioning remedies and implementing fair employment practices. In many settlements the use of tests is permitted if they do not obstruct the goals of affirmative action.

In other words, if an employer is meeting the stipulated hiring goals within the specified time, the tests are not legally required to be "job-related." This had led Robert Guion, an industrial psychologist, to conclude that "an employer may be fairly stupid as long as he is stupid fairly."

The decision in *Griggs* did not specify what form of evidence of job-relatedness would be acceptable. In its recent decision in *Moody v. Albermarle Paper Co.*, the Supreme Court kept up the momentum of equal employment opportunity by favoring compensatory back pay awards and by specifying the "appropriate standard of proof" in determining whether tests are job related.

In *Moody* the court also broached the question of whether an employer is relieved of affirmative action obligations under Title VII and subsequent executive orders if a test is validated according to the standards of professional practice.

Since the benchmark decision in *Griggs* an explosion of court cases involving employment discrimination has occurred. Psychologists have been drawn outside their traditional professional settings—academe, industry, government—into the courtroom to explain and defend their professional practice. They have been thrust into an adversary setting where the definitions of words, underlying assumptions, and precedents are vastly different from their world.

Various lawsuits have poignantly pointed up many of the problems in test use which in other times might have been resolved through a lengthy process of research and evaluation until there was consensus. But, prodded by its own priorities, the legal system is putting extreme pressure on psychology to resolve these problems now; otherwise, the courts—by handing down opinions—may remove this option.

Most debates on fair test use revolve around a conflict in value systems—those which emphasize merit versus those which emphasize equality. The proponents of the merit system believe that there are ample opportunities afforded to persons with initiative who wish to overcome past disadvantages and to learn the requisite skills in order to seek employment. Under a merit system companies would hire or promote the most qualified candidate available because giving the job to a lesser qualified person would be "unfair."

A company opting for a merit policy tries to minimize errors of selection. The priority is to select persons who will perform successfully on the job and to avoid selecting those who would perform badly. There is less concern about failing to select those who might have been successful, if hired.

By contrast, a proponent of equality would argue that prejudice, discrimination, and segregation have profoundly affected the motivations of many people by prematurely closing off opportunities, thwarting aspirations, and restricting education. Unless remedial action is taken to overcome these past effects of discrimination, its effects will be unfairly perpetuated into the future.

History of Test Use

Philip Dubois has documented that rigorous competitive examinations were used as early as 2200 B.C. by an emperor in China to select government officials. In fact, the stability of the Chinese system is credited to the largely uninterrupted use of tests for centuries. In 1905 the Chinese civil service examination system was abolished. The exams were literary in character and were not compatible with China's goal to become an important 20th century military power, which required the brightest students to pursue studies in science and technology.

It is interesting to note that the civil service examination systems ultimately introduced in the Western world were based on the Chinese model. A system was adopted in France during the reform movement in 1791, although it was later abolished by Napoleon. Around 1833 the English introduced a system of competitive exams to select trainees for the civil service in India.

The widespread use of tests in personnel selection and placement in this country is a recent development, although competitive exams were used as early as 1872 in some departments of the Federal Government.

Around 1900 Hugo Munsterberg is given credit for developing the first test in this country specifically for selecting persons for a job—as motorperson on the Boston Elevated Railroad. He analyzed the job, enumerating the abilities and traits required, and prepared a test to measure those basic requirements. He rigorously related the scores achieved by workers to their actual level of performance.

Test use received important impetus in 1917 when the United States entered World War I (WWI). The American Psychological Association appointed a subcommittee to determine how psychology might contribute to the war effort. A small group of psychologists developed the Army Alpha (verbal test) and the Army Beta (nonverbal) tests which could be used rapidly and inexpensively to classify large numbers of recruits so that they could be assigned to the most appropriate military service.

The techniques growing out of the WWI experience were introduced in the regular Federal civil service examination program in 1922. It was the widespread belief in tests as an impartial selection tool that did much at that time to restore faith in the civil service system by removing it from the realm of political patronage. Tests were thought to eliminate the possibility that interviewers, supervisory prejudice, or subjective opinion would be the basis of a selection decision.

During the rapid and vigorous economic expansion of the 1920s the use of tests in private industry burgeoned. Tests were felt to be a tool of scientific management and employers scrupulously attempted to validate them. During the depression, tests were used in an effort to place unemployed persons rapidly and cheaply.

Millions of persons were tested during World War II in order to assign them to military or industrial jobs. Because of the time constraint, most of these tests were never validated. By the 1950s the efficacy of tests in all phases of American life was generally accepted, especially in predicting occupational success in a wide variety of jobs.

Originally, tests were developed within companies for internal use in an effort to develop better job placement techniques. However, beleaguered personnel managers increasingly used tests they could buy off the shelf to select and place personnel at all levels.

From their rudimentary beginnings in the laboratory as research tools, tests have grown into big business in this country. In the seventh edition of the *Mental Measurement Yearbook*, Oscar Buros reports that approximately 1157 different kinds of tests are available from test publishers. Today millions of tests are sold annually and Americans may well be the most tested, analyzed, and researched people on earth.

Whether in employment, education, or mental health clinics, tests are on the front line in screening and diagnosis, or as tools in selection and decisionmaking processes. The incredible growth in the use of tests has been due to their close tie to data. Unlike many other assessment procedures, tests are open to scientific scrutiny, review, and reevaluation.

Thus, despite the fact that they are only one part of the selection process, paper and pencil tests have become synonymous with that process itself.

History of Title VII

In order to understand the relationship between testing and affirmative action, it is helpful first to review the history of Title VII.

During debate on the 1964 Civil Rights Act, some expressed concern that the act would rule out all use of paper and pencil tests and compel employers to hire unqualified persons simply because the latter had been subject to past discrimination. It was argued that fair employment legislation would encroach on management's right to hire the most qualified persons.

This argument was brought to a head by the order and decision handed down in *Myart v. Motorola* (1964), which arose under the Illinois Fair Employment Practices Act. The pivotal question in this case was whether Leon Myart, a black man who sought employment with Motorola, Inc., as a television phaser and analyzer, had originally passed the preemployment test. The company claimed that he had failed it but was never able to produce his test as corroborating evidence. The plaintiff, however, could show proof that he had subsequently taken the test and passed it.

Robert Bryant, the hearing examiner, indicated in his decision of February 24, 1964, that the evidence established that the plaintiff probably passed the test. Further, he said, "the test does not lend itself to equal employment opportunity," because "its norm was derived from standardization on advantaged groups." Bryant directed Motorola to abandon use of that test and to replace it with a more appropriate one that "shall reflect and equate any inequalities and environmental factors among the disadvantaged and

culturally deprived groups." This decision was later reversed on appeal.

But the issue had been raised, and in the ensuing congressional debate over Title VII the issue of discriminatory testing became critical. When queried about provisions for the use of tests to assess qualifications for a particular job, Senators Joseph Clark and Clifford Case, co-managers of the 1964 Civil Rights Act in the Senate, asserted that an employer had the right to establish qualifications at any level and use test performance as the basis for decisions to select, evaluate, and place employees.

Senator John Tower was not reassured. On April 13, 1964, quoting extensively from the decision in the *Motorola* case, Tower introduced an amendment to Title VII specifically authorizing use of "professionally developed tests." After his original amendment was defeated, he introduced a substitute amendment which passed. The so-called Tower Amendment (present section 703(h)) reads as follows:

> Nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

Despite this testing amendment, passage of the 1964 Civil Rights Act raised the issue of the prerogative of the company to assess the general aptitude or potential of a person versus his or her specific job skills as a prerequisite for hiring.

Testing and Unfair Employment Practices

Unfair employment practices may be institutionalized at any stage of the selection and placement process. A recruitment campaign may reach only certain areas of the city or groups of persons by choosing one newspaper, a certain radio station, or by relying on word of mouth of current employees. A receptionist may give an applicant the impression that filling out the application blank is an exercise in futility. The application blank may contain questions that on their face seem valid for predicting success on the job but that are actually irrelevant or an invasion of privacy. The interviewer may make judgments about the applicant's motivation, competence, or stability, using

a model of the white, middle class male as the ideal. Subtle cues in choice of words, tone of voice, or other nonverbal behavior may be used to confirm the original subjective opinion of the interviewer.

The tests given to applicants may not accurately

predict how well a person will perform on the job. Although some tests are called intelligence, aptitude, ability, or achievement tests, they are basically all a variation of the achievement test. Minorities may not perform as well on these tests for reasons that involve a complex interplay between social, cultural, educational, and economic factors.

Relying on such tests puts a heavy emphasis on academically related aptitudes. Human characteristics such as common sense, persistence, honesty, friendliness, and leadership ability, which are critical to performing well on the job, are not measured.

A broader criticism can be made: permeating the system is an infatuation with the notion that "intelligence" as measured by tests should lead to better performance on all jobs. The assumption has been that a quick learning, alert person can perform any job better than a less bright person. Intelligence tests have even been used to screen janitors and laborers for dead-end jobs where no line of promotion existed.

Recently, in oral argument before the Supreme Court in the *Moody v. Albemarle* case, the lawyer for the company defended the use of a test designed to screen for white-collar jobs in selecting for blue-collar jobs by declaring that it was company policy that anyone entering at the bottom as a laborer should have a chance to rise to the top.

Edwin E. Ghiselli, an industrial psychologist, writing in *Explorations of Managerial Talent*, reported that:

> Studies of the relationship between scores on measures of intelligence and job success have shown that with those in managerial positions there is a moderate relationship between the two, with those in line supervisory positions a somewhat lower relationship, and with those in industrial jobs an even lower relationship.

While minority members often are adversely affected by bias in IQ or achievement tests, women experience test bias most when using career interest "inventories." The purpose of interest inventories is to help individuals evaluate their interests and to use this information in planning careers. The assumption in many career interest inventories is that having personal traits similar to people already on the job is a good predictor of job satisfaction. In constructing the scales for interest inventories, a set of items is developed and administered to those already placed. These responses are used in preparing the scales. Because many jobs are filled predominantly by men, these empirically validated procedures may be unduly prejudicial against women.

It is clear that many people still believe that jobs are divided into two categories—women's work and men's work. Certainly, many career interest inventories are built on this assumption. Even within the occupations that both men and women enter, the belief that they do different things is widespread. Male social workers may be viewed as administrators and leaders actively setting policy and standards, while the women, in their traditional nurturing role, only see clients.

In 1974, the National Institute of Education issued a set of "Guidelines for Assessing Sex Bias and Sex Fairness in Career Interest Inventories." The guidelines are a valuable tool for test developers, publishers, and users of career interest inventories who wish to combat problems of sex bias and sex fairness.

Fair Test Development and Use

In 1954, the American Psychological Association issued *Technical Recommendations for Psychological Tests and Diagnostic Techniques*, endorsed by the American Educational Research Association (AERA) and the National Council on Measurements in Education (NCME). In 1955 they published *Technical Recommendations for Achievement Tests*. In 1966 the three organizations formed a joint committee which developed *Standards for Educational and Psychological Tests and Manuals*, which was based on the previous two reports. The test *Standards* were directed primarily toward test developers and publishers with only incidental references to test users or test takers. The implication was clear—if a test was constructed properly it would meet the needs of its ultimate user.

However, bias can be built into a test in many ways. For instance, the items selected for the test may reflect knowledge that is not equally available to all groups. The norms may be established on the majority group and used to measure the minority. A test may involve extraneous factors, so that a math test giving complicated directions may actually be measuring reading ability and not math achievement.

When the *Standards for Educational and Psychological Tests* were revised in 1974, the document was almost doubled in length to include a section specifically addressed to test use. Ray Katzell has outlined four general positions toward test use. The first,

the die-hard or conservative position, poses the truism that test scores are test scores. Selection is based on merit and is from the top down, and subgroups are not rated differentially.

The second position maintains that tests should fit the population they are intended to measure. This has long been the recommended psychometric practice.

Pending development of a better psychometric rationale, the third or compromise position settles for selection from the top down within various subgroups, thus assuring "the most qualified applicants" from each group for the work force. It is exemplified by the agreement reached by the EEOC and AT&T: tests may be used as long as they are used in ways that do not interfere with affirmative action goals.

The fourth or drastic position holds that tests should not be used at all because they are inherently unfair. The weakness of this position is that its proponents have no recruitment strategy that is any more fair than the use of tests.

In most instances unfair test use does not constitute anything as blatant as testing blacks and not whites; requiring higher scores for blacks; or failing blacks on tests no matter what their performance actually was. An example of how a test may be applied unfairly would be to establish the same score as passing for both the majority and minority where it has been shown by differential validation that the majority excels on the test. but the minority performs just as well on the job. The EEOC "Guidelines on Employee Selection Procedures" require that where it is technically feasible, a test should be validated for each group with which it will be used.

Aside from theoretical issues surrounding differential validation, merit systems as presently mandated often cannot put into operation the concept of differential prediction. To do so would involve alternative measurements of merit, which is now defined as the highest obtained test score. In many instances that would involve amending the laws.

Test Validity

A test, as a measuring device, may not have the precision of a ruler but its error can be brought within a predictably small range. Reliability and validity are two powerful concepts used in evaluating a test's utility. Reliability refers to the consistency of the test scores when the test is administered using standardized procedures; i.e., adequate testing situation, sharp pencil, correct timing.

The test *Standards* indicate that the numerous types of validity questions can be distilled to two major ones: 1) What can be inferred about what is being measured by the test? 2) What can be inferred about other behavior?

The first question addresses the issue of whether the test is actually measuring the skill, knowledge, or trait that it purports to measure. The name on a test may or may not specify the intrinsic nature of the test. A test said to be measuring manual dexterity, ability to solve arithmetic problems, or anxiety may actually be measuring ability to read instructions, to follow oral directions, or to guess.

The second question asks about "the usefulness of the measurement [test] as an indicator of some other variable." For instance, if a person achieves a high score on a simple arithmetic test, will that correlate with successful performance as a cashier, for instance, in correctly giving out change?

The two questions are often interdependent and may require a knowledge of the interrelationships between test scores and other variables. The process of marshalling data to answer these questions is called validation. Four related kinds of interpretations are commonly used, depending on the kinds of inferences that one wishes to make from test scores; criterion-related validity (predictive and concurrent); content validity; and construct validity.

Criterion-related validity applies to inferences that can be made from a test score about an individual's probable standing on some other variable; for example, a test score and a job performance measure. There are two types of criterion-related validity In *predictive* validity a test is given and then some time is allowed to elapse during which the individual is being trained or gaining experience on the job, and then the second variable is measured.

In investigating for *concurrent* validity, the test score and data on the second variable are collected simultaneously. In other words, employees already on the job are given the test and evaluated for successful job performance at the same time. The latter is obviously a faster and less expensive procedure but may not yield as useful information for use with inexperienced job applicants.

In a static, perfect world a person receiving a score of 100 on a valid test would also receive a high rating on job performance, and, conversely, a person receiving a low test score would receive a low rating on job

performance. However, there is wide variation among conditions on the job and among individuals. The sample, that is, the few individuals selected for the validation study, may not be representative of the population for which later inferences may be made. Individuals may successfully perform jobs in many

different ways and a new supervisor may radically change the character of a given job.

Content validity involves showing that the skills and qualities demonstrated in the testing situation do explicitly sample skills and qualities that will be required in performing the job. The most common example is the achievement test given by a classroom teacher after completion of a specific unit. Obviously the test cannot ask a question on everything covered. Instead, the test items sample the content of the unit. From a high score on the test a teacher can infer that the student understood what was taught.

The methodology for demonstrating content validity has been skimpy. However, S. J. Mussio and M. K. Smith recently published a procedural manual to conduct and document it. The test user must adequately define what the job requires, perhaps limited to the most frequently required skills for satisfactory work performance. For example, a significant number of civil service examinations are designed to measure subject-matter knowledge, such as typing or stenography. Another example of this kind of test is the test for a driver's license, which includes a practical test—left turns, parallel parking, etc.—and a paper and pencil test on rules of the road.

It is appropriate here to differentiate between content validity and face validity. The latter involves a superficial judgment that the test appears to be relevant and reasonable. Content validity is established by a systematic, deductive analysis of a job and development of an adequate content analysis covering almost all parts of a job. From that analysis items are selected to develop a test.

Construct validity is a "theoretical idea that is used to explain and organize some aspects of existing knowledge." An example of an attribute or quality to be measured might be "clerical aptitude," "achievement motivation," "critical thinking," "prejudice," or "self-disclosure" (openness). Some research studies have shown that men working in isolation, such as aboard a submarine, perform better on the job if they are paired with someone of a similar level of self-disclosure. Establishing the level of self-disclosure would therefore be an important part of the selection procedure in that kind of situation.

Evidence of construct validity may not be adequately shown in a single study, but may require several. To establish construct validity one must develop a hypothesis about the characteristics of a person achieving a high test score versus one achieving a low score. In a test to measure self-disclosure, for instance, one would predict that a person achieving a high score on the test would subsequently discuss a wide variety of topics in some depth either in an interview, on a self-rating scale, or when observed in a group. If a particular test item does not discriminate between persons as high or low self-disclosures, it would be eliminated.

It should be noted here that the test *Standards* give parity to the several validation strategies. The EEOC guidelines, given great deference in the *Griggs* and *Moody* decisions, clearly elevate criterion-related validity. Content and construct validity may be appropriate when criterion-related validity is not feasible.

The manual accompanying a test should contain as much information on the validity and reliability of a test as possible. However, the test *Standards* states that that does not relieve the test giver "from marshalling the evidence in support of his/her claims of validity and reliability. The use of test scores in decision rules should be supported by evidence."

In establishing the validity of the test it is crucial to develop the criteria for what "success" on the job actually means, i.e., making 50 "widgets" an hour, completing work schedules on time, or meeting a sales quota. Job names, titles, and job descriptions are not adequate descriptions of the jobs in behavioral and measurable terms. Good rating scales must also be provided in order to obtain unbiased supervisory ratings. Supervisors often observe only a small range of an employee's duties and may use an inconsistent, subjective standard for performance.

Where there is evidence for validity, a test can be used in several different ways. An expectancy table can be developed indicating the probability of success associated with various scores. Depending on the level of risk an employer is willing to take, a single cutoff score can be designated and applicants scoring below can be rejected; or, an acceptable score range can be established and persons scoring within the range will be considered.

The act of selection is not an exact science and the data are based on generalizations. An employment decision, however, involves evaluating one person for a specific job at a given point in time. Although this process involves predicting the future job performance, a test score is primarily used to allow a person to make a decision in a here-and-now situation.

The test *Standards* promote using the principles of decision theory in an employment situation in order

to specify strategies—that is, the process by which an individual arrives at a decision. Selecting a strategy involves identifying the procedures for gathering information and determining which of these alternative procedures has the most utility. Finally, one must develop appropriate procedures for translating the information gathered into a binding decision.

A testing program can be an effective and inexpensive process to gather information on various applicants. However, the utility of an additional test score from a paper and pencil test may be expensive to validate and may not lead to better decisionmaking than would be achieved by information that may be more easily, quickly, and less expensively obtained.

Rather than routinely giving a test battery (a series of tests) to all applicants, it might be more appropriate to use a sequence of tests. After the first test is given a person might be accepted or rejected depending on the results. A borderline person might be given successive examinations until sufficient information has been collected upon which to base a selection decision.

Worker Dissatisfaction

The War on Poverty ended in ignominous defeat, and the Great Society never materialized. Perhaps if it had, a total employment strategy would have been implemented and everyone would now be suitably employed without regard to sex, race, creed, age, or national origin. But a December 1972 report of a Special Task Force to the Secretary of Health, Education, and Welfare, entitled "Work in America," poignantly revealed just how far we are from that ideal. The report substantiates that worker dissatisfaction is a pernicious problem whose symptoms are absenteeism, aggression, alcoholism, alienation, high turnover rates, job-related health problems, and job-related accidents.

The report cited several surveys showing that only 43 percent of a cross-section of white collar workers and only 24 percent of blue collar workers would voluntarily choose the same occupation again. Dissatisfaction was most pronounced, however, among young workers, blacks, and highly trained women in low-level jobs who were frustrated by the static occupational choices open to them.

The implications of this dissatisfaction extend beyond the workplace and pervade every aspect of our society. Work does not simply satisfy the material needs of an individual. Work affords each citizen a deep sense of identity and a feeling of belonging that is vital to the well-being of a democratic state.

The problems in the world of work are many and complex and no single solution will suffice. These problems are compounded by the severe economic decline which under the "last hired, first fired" policy may wipe out the modest gains recently made by women and minorities. As the ranks of the unemployed are swelled by persons who are well-educated and highly experienced, the timetables for meeting affirmative action goals may fall further behind.

Many of the precedent-setting gains in equal opportunity have involved eliminating outrageous test use in selecting for blue collar jobs. However, making inroads against discrimination in professional jobs—which require longer and more expensive preparation and, typically, a qualifying exam—may be more difficult. Of the 19 States in which challenges have been brought over admission to the bar, for example, none have so far found in behalf of the plaintiff.

Much of the current discontent with personal testing is based on the fact that many tests discriminate on a racial basis. However, the majority of studies show that where tests have had to be validated under Executive Order 11246, it has been found that they don't adequately predict job performance for any group.

Affirmative action plans can implement evaluation, selection, and placement programs that foster a better match between all persons' aspirations and abilities and society's needs for goods and services. There are some fledgling attempts to develop better person-job matching techniques by correlating job-task profiles with self-rating task profiles obtained from applicants. A "job element" method attempts to describe the basic job elements such as reliability, ability to supervise, etc., and to use multiple sources of information—application form, references, scores on tests—to evaluate that individual at five levels of adequacy for each job element.

In the past, tests have been developed primarily for use by institutions in ranking individual differences in order to select those who were most likely to succeed. However, under a social policy dedicated to equality of opportunity, tests could also be developed for use by individuals in order to assess their abilities, interests, and values. Instead of being completely competitive, tests could assist individuals in making decisions about the job and institution in which they can make the best contribution and gain the greatest satisfaction.

AFFIRMATIVE ACTION: SOME NOTES

WHEN, WHERE, AND HOW

An affirmative action plan is a way for an organization to demonstrate its commitment to equal employment opportunity by moving to eliminate any possible overt or covert discrimination even though not legally ordered to do so. After a thorough review of the management policies under which the organization or institution has been operating, an affirmative action plan is developed, tailored to the particular institution or organization.

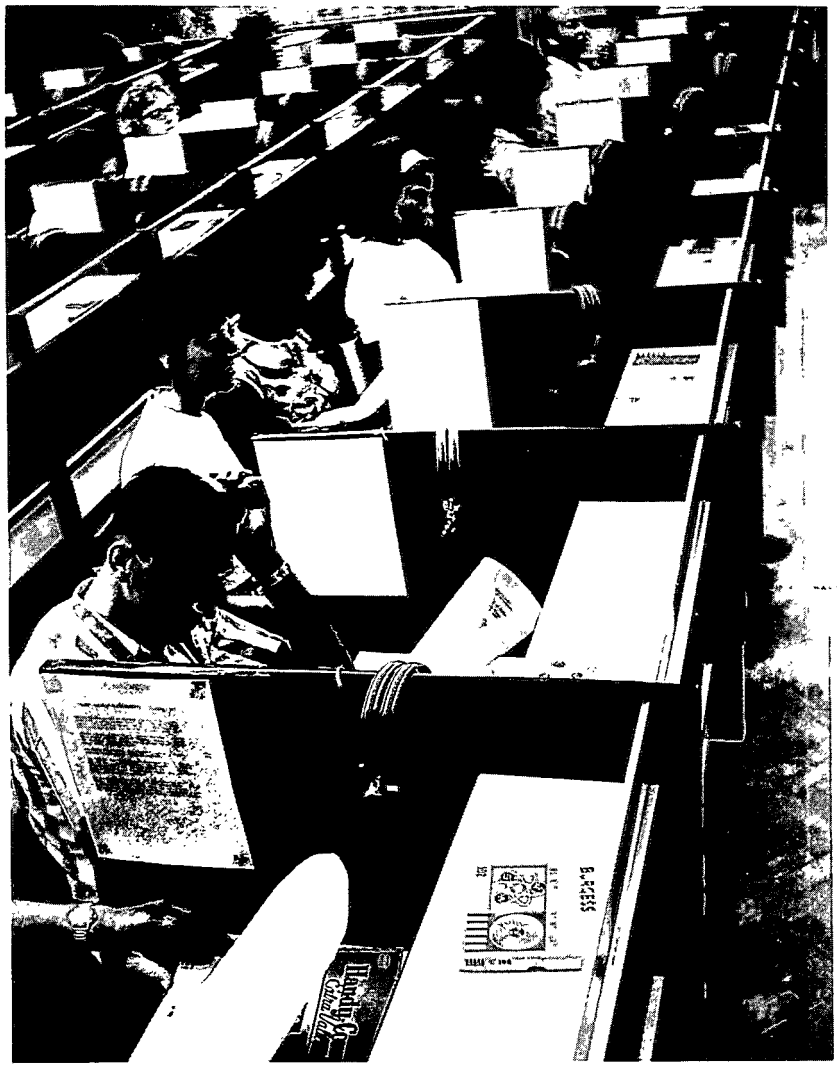
Provision can be made for a review of the goals and objectives of the institution or organization and an analysis of the duties and requirements of the existing jobs. Where necessary, jobs can be redesigned and alternate career ladders provided, so that each person is contributing to the goals and objectives of the institution or the organization.

The incumbent employees can be evaluated in terms of advisability for upgrading, training, or some kind of employment development plan. The procedures used to recruit, select, place, and upgrade can be examined to determine if any artificial barriers exist that could be eliminated. The tests that are used by the organization or institution can be reviewed and, where technically feasible, validated on the particular groups with which the tests are used.

Executive History

Affirmative action plans, including goals and timetables for hiring minorities and women, can be required in three different situations: 1) Under the authority of Executive Order 11246, contract compliance agencies can require them as part of action to end discrimination; 2) under the authority of the 1972 amendments to the '64 Civil Rights Act, the Equal Employment Opportunity Commission can include them in any agreement reached through conciliation with an institution or organization; 3) the courts can impose them as a requirement for remedy under Title VII of the '64 Civil Rights Act.

In 1941 President Franklin D. Roosevelt issued an executive order outlawing racial discrimina-



tion by defense contractors. Every subsequent president has issued one or more orders reaffirming and extending this order to establish conditions for Federal contracts in the name of efficiency. The order now applies to subcontractors as well as prime contractors, to civilian as well as military purchases, and to services as well as goods. The definition of nondiscrimination has been broadened.

In 1965 President Johnson issued Executive Order 11246 requiring Federal contractors "to take affirmative action: to ensure that hiring practices were not discriminatory because of race, color, religion, or national origin." In 1967 the order was amended to include "sex." The Philadelphia Plan, implemented during Nixon's administration (June 1969), for the first time boldly included numerical hiring goals for minorities working in the construction trades in Philadelphia. The plan was upheld by the courts.

In January 1970, Labor Secretary George P. Schultz issued Order No. 4 setting out guidelines for affirmative action plans required under Executive Order 11246. Order No. 4 was revised in December 1971. The revised order required all Federal contractors with more than 50 employees and more than $50,000 in Federal contracts to submit a detailed affirmative action plan to the Office of Federal Contract Compliance (OFCC) as a condition for retaining Federal contracts.

Order No. 4 clearly states that affirmative action is a "results oriented" policy. The affirmative action plan must contain a work force analysis covering all major job classifications and identifying whether women and minorities are being underutilized in any area. For purposes of the plan, appropriate utilization rates are established using eight criteria.

Some of these are area unemployment; area population; availability of minorities and women in areas with requisite skills; existence of training facilities; degree of training and education necessary for employment; degree of training the contractor is reasonably able to undertake as means of making all job classes available to minorities and women; and other pertinent area work force data.

Wherever a contractor finds underutilization, he or she is required to establish goals, by sex and race for each job classification, and timetables, specifying the date by which the situation will be corrected.

These affirmative action plans are monitored by OFCC which delegates specific responsibility to various other agencies and departments. Order No. 14, revised in 1975, sets out the procedures by which compliance with Executive Order 11246 and Order No. 4 is

obtained. It provides for official review of affirmative action plans, including procedures for desk audits, site visits, and confidentiality of information as well as a time schedule for all phases.

Because contract compliance rests on an executive order, the OFCC has been able to insist that Federal contractors develop affirmative action plans based not on formal proof of discrimination but on statistical inferences drawn from the disparity between work force statistics on women and minorities and their population statistics.

Judicial History

Although the termination of contracts under Executive Order 11246 could provide a great deal of clout, it is dissipated because these orders are enforced unevenly by the many Federal regulatory agencies under the aegis of OFCC. The executive branch has provided impetus for consciousness raising, but not the major thrust for improvement. Improvement has come instead as a consequence of enlightened Federal court interpretations and judicial law-making arising from Title VII cases.

Many such cases were originated as class action suits by EEOC and the Department of Justice under authority given by the 1964 Civil Rights Act and the 1972 amendments. Substantial payments for back pay and damages have been awarded to plaintiffs who have successfully prosecuted their cases. This economic penalty has been crucial in convincing companies to revamp their personnel practices in line with Title VII provisions, rather than waiting until they were taken to court on a case-by-case basis.

The courts have maintained that all groups in the labor force are entitled to equal employment opportunity at all levels of an organization. The burden of proof has clearly been placed on the company to justify any exception to the rule of nondiscrimination in its employment practices. The courts have interpreted employment practices broadly to include job specifications, recruiting sources used to attract job applicants, screening and interviewing of job applicants, training and development programs, promotion, demotion, lay-off and discharge policies, and employee compensation and benefit programs.

Particular attention has been paid to the use of psychological tests, which have often been used in a way that screened out minorities. In this process the courts have given great deference to the EEOC "Guidelines on Employment Selection Procedures." The "Guidelines" define tests as any "paper and pencil or performance measure used as a basis for any employment decision." Application forms, biographical data sheets, questionnaires, and even interviews are therefore considered to be "tests."

Minorities, women, or men disproportionately represented in any job category or classification in relation to their numbers in a geographical area has been interpreted by the courts as evidence of discriminatory practice. *Griggs* states that "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Where barriers to equal employment exist, positive and affirmative action is required to reverse an unlawful practice such as unfair test use. Some discretion has usually been given to the employer by the courts in fashioning a remedy that will eliminate unlawful practice so that discrimination is not perpetuated into the future and will redress wrongs done in the past in specific situations. As part of the affirmative action plan the courts may order hiring and promotion quotas, training for promotion, shortened waiting periods for promotion, restructuring of jobs, and plantwide seniority systems instead of job seniority systems.

The legality of preferential selection under the equal protection clause of the Constitution was raised in *Carter v. Gallagher.* A U.S. Court of Appeals indicated that it hesitated "to advocate implementation of one constitutional gurantee by outright denial of another. . . ." However, ". . . for [a] limited time period as remedial action . . . until fair approximation is reached . . . ," the court approved "accelerated hiring of blacks. . . . When fair approximation [is] reached . . . all hiring will be on a racially nondiscriminatory basis."

This is not the first time that differential treatment has been prescribed as a social policy. The Veterans Preference Act, passed by Congress in 1944, stipulates that veterans should be given special consideration when seeking employment with the Federal Government.—*Willo P. White*

READING AND VIEWING

The publications listed below have all been released by the Commission on Civil Rights or its State Advisory Committees within the last few months. Single copies may be obtained free of charge by writing the Office of Information and Publications, U.S. Commission on Civil Rights, 1121 Vermont Avenue N.W., Washington, D.C. 20425.

Commission Reports

A Better Chance to Learn. A description of the need for bilingual-bicultural education, how a program may be set up and evaluated, and of the shortcomings of English as a Second Language (ESL) programs. (Clearinghouse Publication 51) *254 pages.*

Constitutional Aspects of the Right to Limit Childbearing. An analysis of the impact proposed constitutional amendments designed to bar or limit abortion would have on the first, ninth, and 14th amendments. Traces the history of abortion in common and statutory law, and assesses the effect of proposed amendments on torts, property, taxation, and criminal law. Appendices include Supreme Court decisions in *Roe* and *Doe*. Contains findings and recommendations. (Statutory Report) *233 pages.*

Minorities and Women as Government Contractors. An assessment of the Federal Section 8(a), Buy Indian, and minority subcontracting programs, as well as State and local government contracting with minority- and female-owned businesses. Contains findings and recommendations. (Statutory Report) *207 pages.*

SAC Reports

Asian Americans and Pacific Peoples: A Case of Mistaken Identity (California Advisory Committee). Initial report on civil rights of Asian Americans and Pacific peoples in California—Chinese, Japanese, Philipino, Korean, Guamanian, and Samoan. This background study presents a demographic sketch of these six communities and their perceptions of problems in areas such as employment, education, housing, health care, social services (especially for the elderly), and immigration. *73 pages.*

A Dream Unfulfilled: Korean and Philipino Health Professionals in California (California Advisory Committee). This second report on civil rights concerns of Asian and Pacific Americans in California examines State licensure policies in four health fields

as they affect the large number of Korean- and Philippine-born and educated professionals residing in the States: pharmacists, medical doctors, dentists, and nurses. *52 pages.*

Alabama Prisons (Alabama Advisory Committee). Examines the racial conditions and the overall treatment of prisoners, focusing on staff recruitment, medical services, work assignments, rehabilitation programs, and vocational training. *64 pages.*

Route 128: Boston's Road to Segregation (Joint Report of the Massachusetts Advisory Committee and the Massachusetts Commission Against Discrimination). The report details the extent of racial exclusion in Boston's suburbs and examines the policies and practices of Federal, State, and local governments and those of private employers, the housing industry, and private citizens. The focus is on the new suburbs, particularly where housing and industrial parks have been developed since the construction of Route 128. *119 pages.*

Indian Employment in Arizona (Arizona Advisory Committee). Examines the Arizona employment picture for Indians in Federal, State, and local government agencies, the public school system, and private industry as a followup study of the Commission's report on Southwest Indians. *54 pages.*

Indiana Migrants: Blighted Hopes, Slighted Rights (Indiana Advisory Committee). Study of migrant farmworkers in Indiana. The basic issue addressed in this report is that the migrant farmworker suffers unequal protection under the laws of the United States and the State of Indiana. The migrant is among the lowest paid, least educated, worst housed, and most medically impoverished groups in the State. Examines the failure of governmental agencies to protect the rights of migrants where laws do exist and the exclusion of migrants from government-supported programs. *89 pages.*

Minorities and Women in Government: Practice Versus Promise (Rhode Island Advisory Committee). This study examines equal employment in Rhode Island State government and the cities of Providence, East Providence, and Newport. Specific issues addressed include affirmative actions plans and programs; elements of the civil service system such as recruitment, training, testing, and selection; and State and Federal efforts to enforce existing EEO regulations. *151 pages.*

Bridging the Gap: The Twin Cities Native American Community (Minnesota Advisory Committee). Examines the responsiveness of Twin Cities institutions to Native Americans in the areas of employment, education, administration of justice, and health care. The majority of Minnesota's Native Americans are members of the Chippewa and Sioux Nations and the Oneidas and Winnebagos. *112 pages.*

Federal and State Services and the Maine Indian (Maine Advisory Committee). Describes the intricate network of legal problems that hamper Maine Indians in their efforts to achieve self-determination. Of Algonkian stock, the Micmacs, Maliseets, Passamoquoddys, and Penobscots are not "recognized" by Congress and therefore are ineligible for Federal Indian services. Those who live off-reservation are not eligible for State services. The report details broad spectrum of difficulties in areas of health, employment, housing, education, and foster care. *117 pages.*

Warehousing Human Beings (New York Advisory Committee). Examines the New York State correctional system with particular emphasis on the problems of the minority inmate. Specific issues addressed include inmate-correction officer relations, physical conditions at the institutions, work and study programs, health services, and the parole system. *113 pages.*

Credit Availability to Women in Utah (Utah Advisory Committee). Investigates credit availability to women in Utah in three main areas where women encounter discrimination because of sex and/or marital status: credit cards (retail department stores and interbank cards), personal loans, and mortgages. Report finds that arbitrary decisions and ignorance of the law combine to deny credit to women, particularly women who are married, divorced, or widowed. *125 pages.*

Educacion Bilingue/Bicultural—Un Privilegio o Un Derecho? (Comite Estatal Asesor de Illinois). Spanish translation of a report released last year on the denial of equal educational opportunities to the large population of Latino students in Chicago's public schools through lack of bilingual/bicultural programs and insensitivity of the school system to cultural differences. *163 pages.*

Inmate Rights and the Kansas State Prison System (Kansas Advisory Committee). Investigates conditions in the adult institutions of the Kansas prison system, including staff recruitment and training, medical services, disciplinary procedures, and inmate representation. *137 pages.*

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