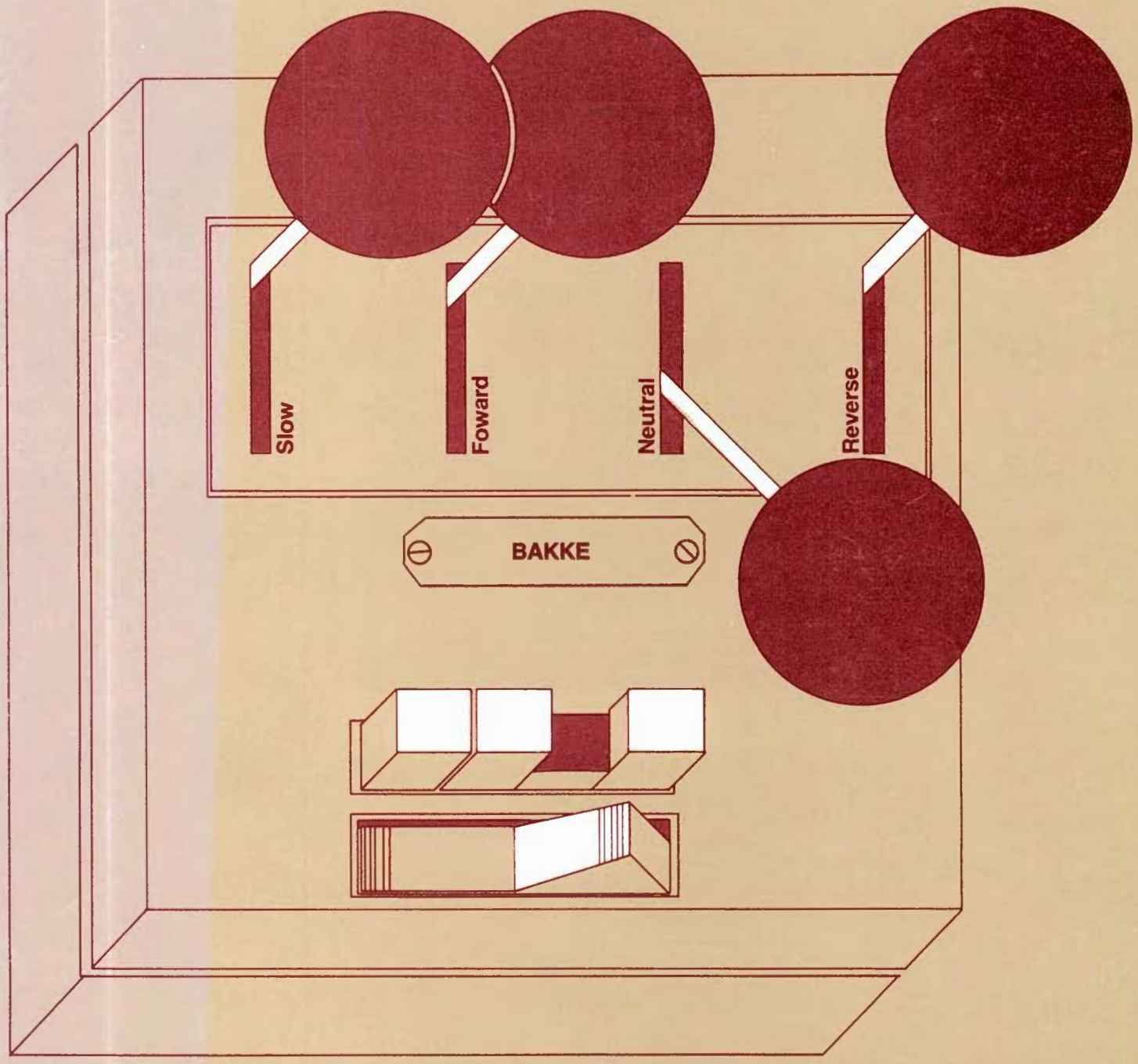
civil rights digest

SUMMER 1978



IN THIS ISSUE . . . we take another look at affirmative action. A section on Bakke and an essay on long-term needs both examine aspects of the current debate. An article on set-asides and one on a local affirmative action monitoring project describe practical applications of affirmative action.

First, Brenda Wilson recounts the development, successes, and failures of the set-aside concept. Set-aside refers to the percentage of Federal contract money for construction that is reserved for minority firms.

Our Bakke section includes the views of five people who closely monitor civil rights law. All seem to agree the case proved inconclusive in many respects; whether the glass is half-full or half-empty remains to be seen.

Leslie Freeman describes an affirmative action monitoring project, conducted by the Legal Aid Society of Alameda County. The project uses private and government employment data to pinpoint Federal contractors and other employees whose hiring of minorities and females appears weak. Its innovative work in encouraging compliance had influenced similar groups in other cities.

Finally, Gregory Squires speculates on the long-term solutions or lack of them for civil rights problems, particularly the unequal economic status of minorities and women. Squires sees little hope of significant progress until systemic flaws are remedied.

Also in this issue is an author/title index to volumes 7, 8, and 9.

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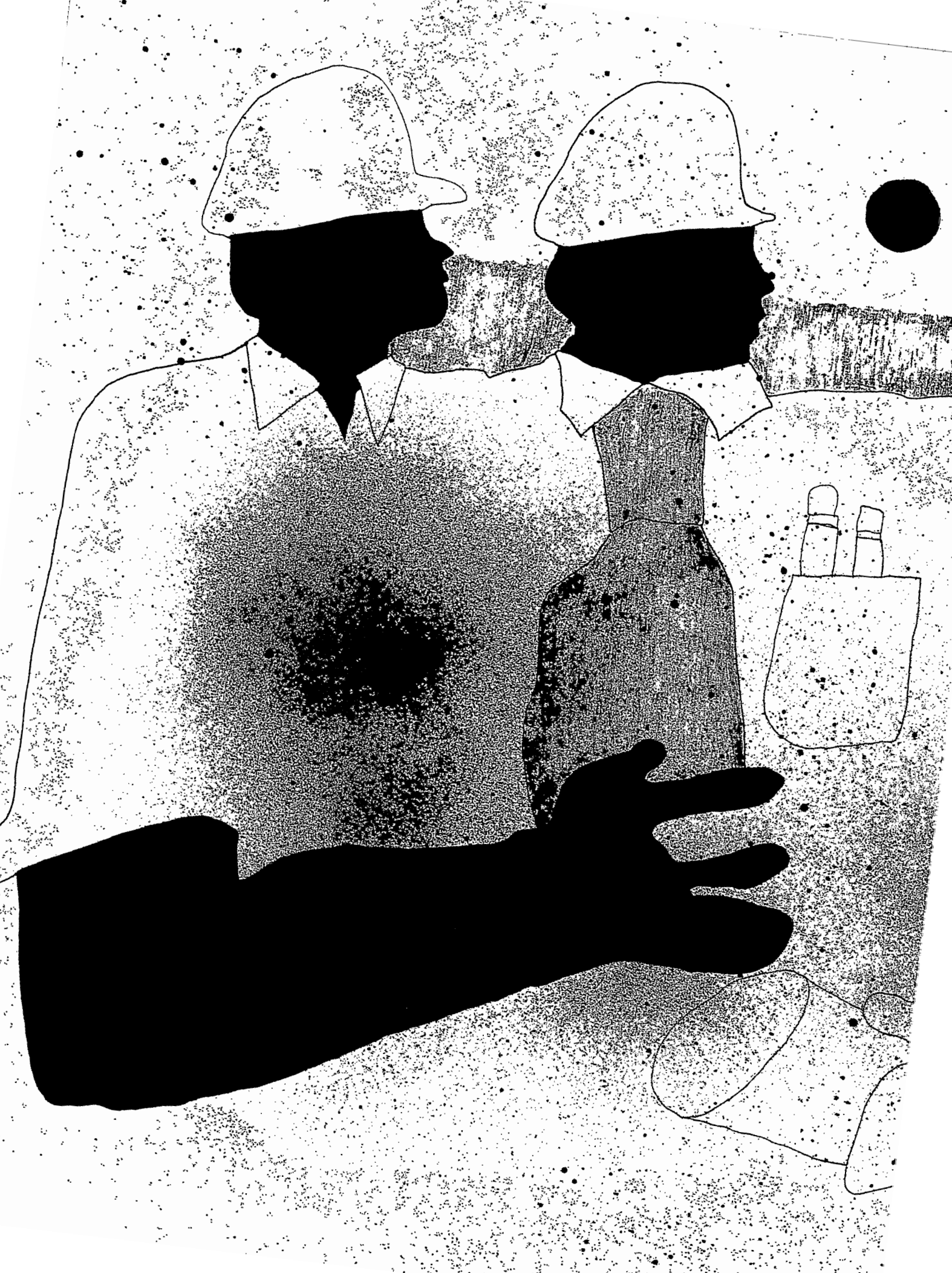
The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 to:
Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;
Study and collect information 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 the 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 Congress.



SET-ASIDES

NEW LAWS AID MINORITY FIRMS

By Brenda Wilson

The economic condition of American minorities has always been deplorable, but the sense of urgency spurred by the riots of the late sixties brought new social programs. President Lyndon Johnson's Great Society pushed the economic plight of minorities irrevocably into the public arena. Each succeeding administration at least put a public face on bringing minorities into greater parity with the majority population.

Appealing to what was widely considered the most conservative element in the minority communities—businessmen—the Nixon Administration made the first serious, though limited, commitment to minority enterprises. The Office of Minority Business Enterprise was established to promote minority enterprise through public, private, and volunteer monies, and the "8(a) set-aside" program, requiring each Federal agency to reserve a certain number of government contracts for minority business, was developed.

Beset with problems administering the program and with abuses by majority firms, 8(a) managed to channel only a limited amount of Federal money into the hands of minority firms. According to the 1976 *Minority Business Opportunity Handbook*, minority firms received less than 1 percent of all government contracts.

President Jimmy Carter inherited the much-criticized SBA program after winning a campaign heavily supported by minorities. His platform included government reorganization, revitalization of the Nation's economy, and rehabilitation of urban areas. More recently, the President, under heavy criticism from minorities who suffered the worst effects of a severe economic recession and who accuse him of having reneged on his campaign commitments, has stepped up efforts to increase significantly the proportion of minority participation in Federal procurement contracts.

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Last fall, the President instructed the Office of Federal Procurement Policy (OMBE) "to review and revise procurement regulations to assure adequate involvement of minority subcontractors by requiring submissions by prospective contractors of preaward plans detailing the planned use of minority firms as subcontractors."

Local public works

The administration-wide affirmative action policy, designed to provide a means of "remedying the lingering effects of past public or private discrimination," was inspired in part by the success of Representative Parren Mitchell's amendment to the Local Public Works (LPW) Program—Round II. Mitchell proposed that 10 percent of the dollar value of all contracts awarded under the act be targeted to minority contractors. Defending the amendment before Congress, he pointed out "how ridiculous it is not to target for minority enterprises.

"We spend a great deal of Federal money under the SBA program creating, strengthening, and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss."

On May 13, Congress passed the Local Public Works Act with the stipulation that $4 million of the $4 billion awarded to States and localities "except to the extent that the Secretary of Commerce determines otherwise . . . shall be expended for minority business enterprises." With 15 percent of the act's Federal funds awarded to minorities to date and 89 percent of the $4 billion accounted for, the public works program may be tentatively termed a success. But it is difficult to predict what the sustained impact of the legislation will be—whether, over a long period, it will generate more opportunities for minority contractors and enhance their entry into a historically closed industry or simply create dependence.

Success in getting the 10 percent minority requirement through Congress was probably due to several factors. These include the timing of the proposed amendment (it was passed by a voice vote without a hearing), the nature of the legislation itself, and tangentially, the irrefutable argument that minority contractors lag far behind their majority counterparts—a circumstance compounded by the impact of the recession in the construction industry during the last few years.

The subsequent and rather volatile opposition from white contractor associations was expected and came as no surprise to minority businessmen or to Representative Mitchell. In fact, more than one businessman thought that the white contractors' anger may have been fueled simply by the fact that "one had been slipped over on them. They weren't watching. There's no way they would've let it go through without a fight."

Several suits—22, according to the Economic Development Administration's (EDA) litigation office, and "almost 30" by count of the Associated General Contractors (AGC)—have been filed against the legislation. Five test the constitutionality of the 10 percent requirement. Most were brought by local chapters of AGC (a largely white contractor association representing more than 8,000 general construction companies, of which 50 are minority firms) around the country.

U.S. Attorney General Griffin Bell, in a memo to agency chiefs, warned that "certain aspects of the legislation made it more difficult to defend than might otherwise have been the case." Although only one unfavorable ruling (enjoining future authorization of funds) was handed down, there is much speculation, especially in light of the Supreme Court's recent ruling in the Bakke case, as to whether the 10 percent requirement could survive a Supreme Court test.

The law's uncertain future rests basically on the absence of specific language on the books upholding the purpose of the provision, compounded by what may be considered an unlawful racial quota in reserving 10 percent of government contracts for minority business enterprises (MBEs). Attorney General Bell advised each agency that "legislative history and departmental justifications should reflect information as to the need for the [affirmative action] program, its objectives, and alternatives to it."

Justifying set-asides

Thomas Brown, vice president of the Minority Contractors Assistance Project (MCAP), believes that majority contractors have reacted too quickly, without giving full consideration to the benefits of the program or looking at the basis of its formation. The LPW program was designed to assist the minority community in creating jobs and financial vitality for communities most affected by the recession and joblessness of the last few years.

Further, Brown insists, "the secret of a good general construction operation is good subcontractors. If the LPW can generate the opportunity for a minority MBE to become a good subcontractor or allow him to generate the kind of income in his

operation needed to sustain himself as a good subcontractor, it has to be good for those majority firms who are so opposed to the legislation and beneficial to the economy as a whole."

Anticipating many of the arguments against set-asides, Representative Mitchell pointed out that not only had previous legislation set such a precedent and survived 30 court cases (specifically the 8(a) SBA set-aside), but also the legislation itself already focused on special groups or areas. Assistant Secretary of Commerce Robert Hall, appearing before the House Public Works and Transportation Committee, affirmed the Administration's major objective in formulating guidelines for the program as the targeting of funds to areas of highest unemployment—pockets of poverty and States that were passed over in the first round, as well as $100 million specifically for Indian tribes and lands.

Opposition to the minority requirement and the overall thrust of the affirmative action program may be directed at its inclusion in the competitive Federal procurement process at all levels (including State and local), as much as at its targeting of racial and ethnic groups. Earlier 8(a) set-asides under SBA called only for reserving directed negotiable contracts between the government and small businesses that had been certified "disadvantaged."

AGC also objects to review language in the Small Business Procurement Expansion and Simplification Act and a Federal procurement policy that will ascertain whether a bidder provides "maximum practicable opportunity" before awarding contracts. AGC says that it reduces the competitive bidding system to competitive negotiations, and that the 10 percent requirement is a "form of racial discrimination" that cannot be tolerated.

James Sprouse, executive vice president of the AGC, insists that, "There has been not even a hint of proof of a history of past racial discrimination in the public construction business." His statement does not take into account the fact that successful bidding and performance in the public sector are contingent upon a contractor's status in the private sector.

Any form of "racism," including the 10 percent requirement, Sprouse concludes, works against an "[assurance] that the work be done by a responsible, capable contractor at the most economical price. The [general contractor] must discriminate, but on the basis of price and responsibility only."

Representative Mitchell could only respond to that by saying, "AGC and organizations like it had done more to undercut competitive bidding than anyone else by operating . . . so as to exclude minority contractors. We were never really competitors. This enhances the chance for us to become competitors."

Frank Kent, a former director of the National Association of Minority Contractors and head of the Minority Business Resource Center/FRA, observed that, "Competition is a good thing when it's run right, but I think that AGC knows—particularly in some contracts—there's very little competitive bidding."

He added:

> Normally a prime contractor, if he likes the work a subcontractor has done on a previous job, will call the sub and request a bid, the sub's best price. If the person comes in reasonably around what the prime thinks the job should be, the job is his. . . .
>
> The LPW legislation has had basically a good effect on minority contractors. Those who were prepared and who were willing to put some time into bidding actively have been successful. It has caused white contractors to look for minority subs actively which they have not previously done. The construction field has always been rather tight-knit. For the most part, the construction companies would get subcontractors who were their friends or who they'd known for years and years, or played golf with, etc., which obviously excluded minorities.

Because of its large support industry, its share of government contracts, and the percentage of its work provided through Federal assistance, the construction industry provides an excellent opportunity for the government to exercise some leverage in improving the status of minority businessmen in both the private and public sector. (This is not to minimize the influence of the private construction market, which is a very powerful force.)

But there's a pervasive belief that this sort of thing won't happen again, the setting-aside of percentages of government work for minorities. "White contractors," according to Kent, "have not only the money, but the power and the relationships with Congress. NAMC and minority associations haven't got that sophistication, nor the power or the numbers —yet." Often their interests have differed from those of the black population in general, and the focus of most of the attention has been upon the latter.

Pulling minorities in

The problems of most minority contractors are the problems of all small businesses, exacerbated. "Con-

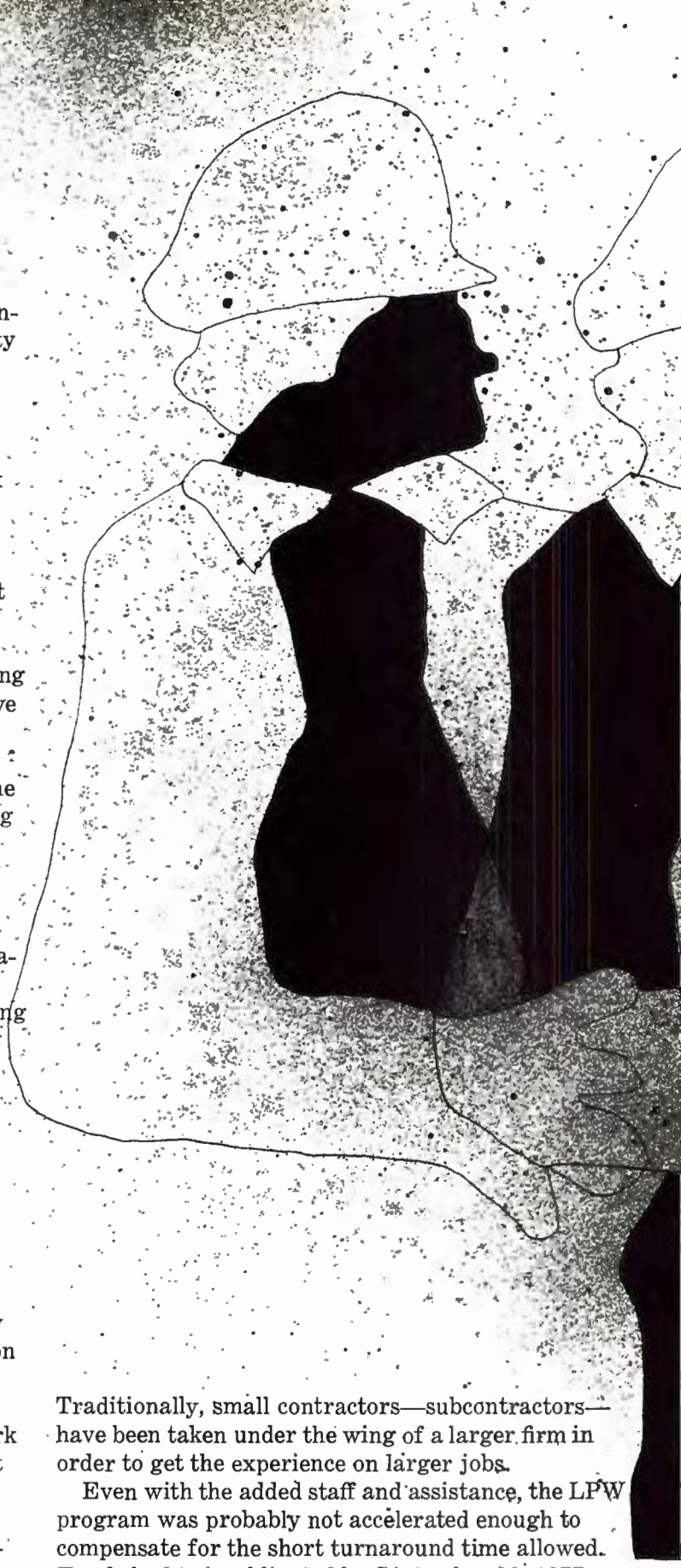
struction claims to be the last domain of the entrepreneur, the fellow who can buy a truck and bid a job and in a generation or two develop a multimillion-dollar contracting business." (*Engineering News Report*, Nov. 24, 1977.)

Althought a few isolated examples of minority contractors fit this description, their growth and stability have always been more susceptible to fluctuation in the economy. Minority construction has historically been heavily concentrated in the housing and maintenance industry and largely dependent upon the resources of minority communities. Efforts to break into new markets have been hampered by a lack of business contacts, access to working capital, and bonding.

Not fully understanding the Federal procurement process, nor often possessing the requisite management, bookkeeping, and estimating skills, minority contractors have been kept from bidding or obtaining government contracts that majority contractors have traditionally used to hedge against slumps in the industry. President Carter has simply asked (and required) majority businessmen to share more of the responsibility, assisted by the government, for pulling minority businessmen into the mainstream of the economy.

Anticipating many of the difficulties that might keep MBEs from bidding and completing contracts successfully, the Economic Development Administration funded SBA and OMBE and contracted with several private and nonprofit organizations (including the National Association of Minority Contractors, Minority Contractors Assistance Project, Inc. (MCAP), Urban Development and Management Corporation, minority firms, and others) to assist grantees and contractors in identifying *bona fide* (qualified firms with 51 percent of the controlling interest held by minorities) and to help in obtaining working capital loans, bonding, and management assistance.

Bonding increasingly becomes a problem as minority firms expand and take on larger jobs. A study published in 1974 noted that, although discrimination on the basis of race could not be proven, "the surety bonding industry with its power to screen government contractors from performing government work stands in the way of using government procurement as an instrument to upgrade minority contractors, providing them with a 'track record' on larger projects." That is, without bonding a contractor cannot get the larger jobs and without the larger jobs—a "track record"—it is impossible to get bonding.



Traditionally, small contractors—subcontractors—have been taken under the wing of a larger firm in order to get the experience on larger jobs.

Even with the added staff and assistance, the LPW program was probably not accelerated enough to compensate for the short turnaround time allowed. Funds had to be obligated by September 30, 1977, and projects underway by December 30, 1977. For

many minority contractors, Thomas Brown (MCAP) said, "It was the age-old story, working capital and bonding."

On the basis of interim reports, however, EDA does not feel that these problems have been devastating. According to the statistics, of 152 applications for bonds, only 4 were denied, although many contractors did not know about the loan and bonding programs. In some regions the arrangement with OMBE and SBA worked well; in others, it didn't.

In assessing the progress of the program, the EDA office responsible for administering the LPW program concluded that more administrative money must be allocated for outreach and the technical assistance much needed by minority businessmen who just don't have the sophistication to compete on a large scale.

At a recent AGC conference on minority business enterprise, representatives from the various agencies were asked whether the Federal government would increase funding for technical assistance and provide 100 percent bonding guarantees for minority contractors. They could not respond with any certainty. White contractors complain that the government is not willing to assume the risks for its social objectives.

A minority contractor who was present retorted that he'd been in business 30 years and never had a government contract, that risks were the name of the game and those not willing to take those risks should not be in the business. He'd felt committed to assume certain risks in assisting minorities because he was a minority himself, only to have larger firms steal men he'd trained.

"It is simply a question," he said, "of white contractors making up their minds to accept some of the responsibility for certain benefits that the government has provided them." He concurred with the necessity of government providing 100 percent bonding.

Outreach and assistance

Recently, Minority Contractors Assistance Project, Inc. (MCAP), which provided some of the supplemental technical assistance under the LPW, announced that it is establishing a bonding and insurance agency to help minority contractors obtain the bid payment and performance bonds needed to undertake construction contracts. Since its inception in 1971 with funding from private and public groups, MCAP has been able to help over 320 minority contractors, guarantee $5.2 million in working capital, and, since 1976, secure about 60 surety bonds totalling $24 million.

MCAP operates from a central point in the industry, working closely with established lending and bonding institutions, government agencies, majority contractors, minority firms, and subs to create a solid and ongoing base for minority enterprise. A major part of its effort goes into making sure that base is not eroded. MCAP enters the process early on and monitors a project to its conclusion while providing financial and construction management assistance that will enhance its profitability.

Outreach—both finding minority firms and letting them know what assistance is available—has thrown a cog into most government efforts. In a interview in *Constructor*, an organ of the AGC, Lewis R. Smoot, a minority contractor, proclaimed that "if you laid all of the government work they say is minority on the table today, you'll find there aren't enough minority contractors in the United States to take advantage of that work."

It is difficult to measure, however, how many minority persons, laboring as supervisors and contractors with large construction firms, have the capability (craft and managerial skills) but can't get the working capital—loans or lines of credit—that would get them started. Many, like Charles Peay who in 1969 started Micon Construction and Development Corporation (now one of the largest black building companies) with the help of the Urban Development Corporation, must wait until a combination of public monies and private assistance gives them a break. As a part of its affirmative action program, UDC sought out Peay, then supervising $90 million worth of construction for a large New York firm, to participate in the building of a Harlem housing project.

Despite lists developed by OMBE, SBA, minority contractor associations, and others, and despite recent counts yielding nearly 29,000 minority contractors in the country, majority contractors contend that they have difficulty finding qualified minority contractors. This problem, they insist, gave rise to the most serious abuses under the program—frauds, fronts, and shams: minority contractors who were basically controlled by majority firms and who served merely as middlemen, did not provide any real, ongoing, continuous service, and were not a necessary entity.

Late in the program, through analysis of computer printouts and onsite visits, a disproportionate number of suppliers was detected. (Suppliers sell materials, subcontractors do the work.) The suppliers were often bogus companies without inventories, engaged on several projects at once.

Once prime contractors realized that EDA was seriously policing projects and strictly enforcing the 10 percent requirement, many dropped out voluntarily to avoid Federal investigations.

The EDA office explained that it had not foreseen or understood the role of the supplier in the initial phases of the program and judged that the one-shot nature of the supplier-contractor relationship is primarily the reason. Prime contractors as a whole believe that it is easier to deal with suppliers than subcontractors, whom they must relate to on a one-to-one, continuous basis. EDA also cited an instance where an individual, having worked for a company over 40 years, was made a partner overnight simply to take advantage of the 10 percent requirement.

Waivers of the set-aside requirement are granted by the Secretary of Commerce upon proof that no qualified minority firm can be located to do the job. The number of waviers doubled when EDA began investigating the supplier angle. Most of the partial waivers—144 altogether—are attributable to the supplier problem. Suppliers are not being kicked out, however, because of a lack of outreach on the part of EDA. Grantees and contractors will simply be credited only for the MBEs percentage of the commission as part of the overall 10 percent. The remaining percentage has to be made up; if that is not possible, a waiver must be requested.

The Northeast Corridor

Critics of the LPW program think that these problems support their claim that the 10 percent requirement represented an arbitrary goal not based on a known availability of minority contractors. The Federal Railway Administration, which reported a 35 percent utilization of minorities in the first phase of its Northeast Corridor Improvement Project, has been able so far to avoid this pitfall. While aiming for an overall 15 percent MBE utilization, goals for each type of work are being determined by minority capability in a given area. For example, only a few firms in the country have signalling and communications capabilities, so minority participation would be low and limited to certain phases.

The Northeast project, begun while William Coleman was Secretary of Transportation and now under the direction of Brock Adams, had a strong commitment to minority firms from its inception and is employing several mechanisms for achieving its affirmative action objectives, including set-asides, directed subcontracting, and the small business 8(a) program. Staff in the Washington NECIP office believe that the project will provide an unprecedented opportunity for minority firms to expand their potential and develop more expertise in highly technical areas.

Some skeptics already see signs of Secretary Adams backing off from the original commitment, however. Several large contracts for manufacturing concrete ties and supplying reinforcement rods during the construction phase of the project were expected to be set aside for minority firms but went to white firms instead.

Long run success

Despite complaints and resistance from certain quarters, the Local Public Works Program—Round II has been even more successful than many had anticipated. According to EDA, only one default by a minority firm has been reported while over 14,000 minority contractors have been given work. If the success of the program depended simply upon its full implementation, then LPW would be safely home. What the 15 percent utilization figure does not reveal, however, is what will happen once the projects have been completed. Will it, as it is hoped and projected by the optimistic, foster new relationships that will result in future joint ventures between minority firms and white firms?

On both sides of the fence, the 10 percent requirement is recognized as a rather radical move. As Thomas Brown observed, "Any time you legislate social change, there are going to be problems and resistance, especially from those who are satisfied with the status quo." But it may, as U.S. District Court Judge Snyder ruled, be the only "effective way to crack the competitive barriers and end the cycle which continually excludes minority businesses from proportionate participation."

The 10 percent requirement helps sustain minority enterprises. It encourages collaboration and provides entry into an industry that has obviously been exclusive. In the end, however, the government can only provide incentives for an ongoing effort that must be assumed by the private business community. The affirmative action program's major accomplishment must be to illustrate to white firms that joint efforts and working relationships with minority businesses can be profitable, and that it is neither right nor beneficial to the economy as a whole for them to continue syphoning off profits from the minority sector while depriving it of participation in the means of production.

By Denise Carty-Bennia

Bakke: Some Views

Extraordinary Split

The lawsuit filed by Allan Paul Bakke against the University of California at Davis Medical School was publicized for months as the most important case on race to reach the U.S. Supreme Court in recent American history. Bakke charged that the Davis special admissions program, which reserved 16 of the 100 first year class places for certain racial minority students, violated the equal protection clause of the 14th amendment and Title VI of the 1964 Civil Rights Act. (Title VI prohibits racial discrimination in federally assisted programs.)

Justice Lewis F. Powell, Jr., the only member of the Court to vote with the majority on all of the 5-4 rulings, announced the decision. The lower court order admitting Allan Bakke to the University of California at Davis Medical School and declaring the special admissions program of the school unlawful was affirmed, but that portion of the order prohibiting the school from taking race into account in future admissions decisions was reversed.

The six separate opinions filed in the case reveal an extraordinary 4-1-4 split among the Justices in their perceptions, reasoning, and conclusions about almost every issue raised. A combination of reasoning from at least two opinions is required to support any one part of the decision.

Justices John Paul Stevens, William Rehnquist, Potter Stewart, and Chief Justice Warren Burger found that reliance on Title VI was sufficient to resolve the case. An interpretation of the 14th amendment was unnecessary, they held. Their review of the legislative history and plain language of Title VI led them to conclude that it was intended to prohibit any racially preferential treatment. These Justices voted to affirm the entire lower court judgment, which they believed did not raise the issue of whether Davis could consider race in future admissions decisions.

Justices William J. Brennan, Jr., Thurgood Marshall, Harry A. Blackmun, and Byron White found that the requirements of Title VI are basically the same as those of the 14th amendment. They contended that, in light of history, both provisions permit a university to grant an exclusive, numerically-fixed racial preference in an affirmative action program, such as the one at Davis, when the program is designed to redress the effects of its own or past societal discrimination. These Justices voted to reverse the entire lower court judgment.

Justice Powell, who cast the critical and decisive vote, stood alone in reasoning that benign racial factors could be considered, but that strict judicial review applied to all racial classifications whether they were designed to exclude or to include a specific minority group. He distinguished previous court cases where racial classifications had been upheld.

First, he found that in such cases the classification had not abridged anyone's rights nor had it excluded them from meaningful participation. Second, in the alternative, the classification was imposed only after a specific prior judicial, legislative, or administrative finding of past racial discrimination in violation of a statute or the Constitution.

A racial classification that has neither redemptive feature, such as the Davis special admissions program, Powell reasoned, must present an independent compelling state interest to justify it. Powell rejected three of the four interests offered by Davis in defense of its program, but

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accepted the fourth, the attainment of a diverse student body, as sufficiently compelling.

However, Powell reasoned, since race or ethnicity was only one measure of diversity, a university claiming a compelling state interest in ensuring diversity among its students could use race or ethnicity only as "simply one element—to be weighed fairly against other elements—in the selection process" where all applicants are considered as individuals and compared to one another. He cited as an example the Harvard University admissions program.

Noting that the Davis special admissions program totally excluded nonminority applicants from 16 places and failed to evaluate special admission minority applicants against regular nonminority applicants, Powell held the program violated Title VI and the 14th amendment.

The result of the complexities of the opinions is that **Bakke** has legally changed little at all. There is no majority opinion. Four justices would prohibit all racial preferences of any kind under Title VI, while four would permit any racial preference, including numerically-fixed quotas reasonably designed to remedy racial discrimination. It is extremely important to remember that while much attention has been focused upon the Powell opinion because of Powell's decisive vote, the Powell opinion is not a majority opinion in this case. It should be read as significant in only the narrowest terms for what it says and in the broadest terms for what it does not say.

For example, Powell does say that voluntary racial affirmative action programs that are justified as an effort to achieve diversity in the student body must consider race only as part of a broader effort to seek diversity using a unitary admissions procedure.

Powell does not say diversity in a student body is the only compelling state interest that may justify a voluntary racial affirmative admissions program. Nor does he say that the unitary model is the only permissible design for such program. In fact, Justice Powell suggested that a compelling state interest exists in improving health care in underserved communities, and, but for the inadequacy of the record presented in the **Bakke** case, such an interest may justify a racially exclusive, numerically-fixed quota system such as Davis had.

Bakke does not affect the design of involuntary affirmative action admissions programs—that is, those instituted pursuant to a "competent" finding of past discrimination.

The reality of the decision is starkly simple. The vast majority, if not all, the existing university racial affirmative admissions programs are clearly defensible within the broad latitude of purpose and design provided by the decision. A tremendous responsibility has been placed upon the conscience of university admissions officials. Absent an applicable finding of past racial discrimination, a university is legally, if not morally or politically, free to abstain from a racial affirmative admissions program.

Bakke: Some Views

Both Sides Won

By Bertram H. Gold

The American Jewish Committee welcomes the U.S. Supreme Court's **Bakke** decision banning racial quotas in college and university admissions. We are equally pleased that the Court has upheld the legitimacy of nonquota affirmative action programs to promote the integration of racial and ethnic minorities into the mainstream of American life.

By affirming the concept of individual rights rather than group rights and, at the same time, underscoring the legality of affirmative action programs that do **not** rely on race as the sole determining factor, the Court has adopted a broad middle ground that should enable those on both sides of the **Bakke** case to renew the inspiring civil rights coalition of the early sixties.

How effective such a revived coalition can be will depend, in large measure, on how wholeheartedly both sides respond to the challenge. Bakke supporters must now back, with concern and conviction, the nonrigid, nonquota affirmative action programs the Court has sanctioned. University of California at Davis supporters must refrain from efforts to introduce covert quotas institutionalizing racial and ethnic preferences.

To be sure, much careful analysis will be necessary before the full implications of the complex **Bakke** ruling are completely understood. It is evident already that the Court has left open a number of issues that will have to be dealt with by Federal regulations, legislation, and further judicial review. The task of those who want to see affirmative action succeed is to concentrate on furthering the kinds of admission programs the Court has sanctioned, and on a variety of special programs, beginning at the preschool level, that will help prepare disadvantaged children of all backgrounds more adequately for higher education.

Throughout its history—and perhaps because of its history—the American Jewish Committee has opposed quotas based on race, religion, or national origin, because they undermine the concept of individual merit and do not permit people to be judged on their own qualifications. Our **amicus** brief on

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behalf of Allan Bakke argued strongly for admissions procedures that recognized—and made allowance for—economic, educational, and social disadvantages that prevented some students from presenting as strong an academic record as their more fortunate peers. In citing the Harvard admissions program, the Supreme Court has clearly endorsed this concept.

The decision in the **Bakke** case, though it deals only with college admissions, will undoubtedly be used as a yardstick for affirmative action programs in employment as well. Indeed, within days of the **Bakke** decision the Court, in its ruling on the AT&T case, underscored that more specific programs, directed by the courts or by government agencies, are permissible to correct discriminatory practices than are permissible to promote affirmative action. But in both instances, a variety of fair and rational affirmative action programs, without quotas, should be supported and encouraged.

In programs designed to overcome clear patterns of discrimination, the American Jewish Committee supports the use of goals and timetables, provided that they are not permitted to disguise a quota. (Unfortunately, over the last several years, Federal guidelines and regulations in the area of employment have not always distinguished adequately between goals and quotas.)

Our objective in all of our efforts must be to adhere to the spirit as well as to the letter of the law. Goals must be sensitively drawn and administered, and they must be viewed by admissions officers, personnel managers, and regulatory agencies alike as tools for measuring the effectiveness of corrective affirmative action rather than as rigid standards of performance or as devices for affording an absolute preference for any race or ethnic group. To do otherwise would be to undermine the commitment to justice and equality.

The question of who should be admitted to colleges and universities and how, and of who should be hired and promoted and how, has been one of the most divisive issues of our decade. Those on both sides of the **Bakke** case have escalated far beyond reason the rhetoric and the dire predictions of gloom and doom if the Court failed to support their particular view. Now that the Court has spoken—and spoken in a way that upholds the finest tradition of the American promise—both sides must come together to make that promise a reality.

Two Rulings

Bakke: Some Views

By Janet Kohn

Contrary to widespread expectations, the Supreme Court's decision in **Bakke** was not a far-reaching pronouncement on constitutional issues. The Court did not, like the California court below it, rule that the Constitution bars consideration of race as a factor in admissions decisions of a public institution of higher education. And it refused to hold permissible a program that made benign use of race to overcome disadvantages resulting from past societal discrimination by absolutely excluding a nonminority person from consideration for designated openings, although four Justices would have so ruled. What the Court did do was demonstrate that, like the society around it, it is deeply split on the issues presented and unable to formulate a clear approach to the affirmative redress of our heritage of racial discrimination.

Bakke's actual rulings are two—one vague, one precise and narrow. A majority—the only majority for any proposition—affirms that race may constitutionally be considered in the admissions decisions of public colleges and universities, and therefore reverses the contrary judgment of the lower court. This is surely the most important outcome of the case, but it can hardly be said to provide a great deal of clarification (except perhaps to Harvard College, whose admissions program is given a kind of advisory approval).

The second ruling of the case orders Allan Bakke admitted to the Davis Medical School—but there is no majority for any reason why. One Justice finds the Davis special admissions program violative of the 14th amendent because, though he finds the objective of student-body diversity compelling, he concludes that the absolute set-aside would inhibit rather than achieve that end. In contrast, four Justices would hold that Bakke's exclusion "because of his race" was in violation of the plain language of Title VI, and these four also aver that there is no other issue to be decided.

(The splintering of the Court reaches even subsidiary issues: on the question whether there is a private right of action to enforce Title VI, four Justices say yes, one says no, and four find that this case does not require an answer.)

Where does affirmative action now stand? In our view, very much where it stood before **Bakke.** The remedial use of race and ethnicity, including numbers, previously often approved, is reaffirmed by the five Justices who address issues beyond Title VI. Certainly the reiteration by Justice Powell of the permissibility of such remedies based on the findings of judicial or legislative or administrative bodies competent to make findings of discrimination strongly suggests that congressional set-aside programs as well as most Title VII affirmative action efforts are not vulnerable.

The big question, of course, is the question of which **Bakke** itself was a subtype: what may an institution with no history of discrimination do affirmatively to increase the participation of minorities and women in its activities? As for admissions to college and universities, **Bakke** establishes the legal rule; future problems here are likely to be those of good faith and the institution's will to persevere.

In employment, there appears no reason to doubt the continuing validity of the most usual approach; i.e., something short of the flat set-aside. In short, **Bakke** has not worsened the legal position of those seeking to eliminate discrimination from American life.

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Bakke: Some Views

A Feminist Perspective

By Phyllis N. Segal

The clearest result of the Supreme Court's recent decision in **Regents v. Bakke** is that five white male Justices agreed that one white male should be admitted to the Medical School of the University of California at Davis.

But while Allan Bakke "won" his challenge, so did proponents of affirmative action. A majority of five Justices expressly endorsed the concept of race-conscious university admissions policies. Four members of this majority agreed that even firm quotas are a constitutional form of affirmative action; the fifth, Justice Powell, left the door open to numerical measures where there is a judicial or governmental finding of past discrimination to be remedied. Thus, although the "two-track system" established at Davis—a school too young to have its own record of past discrimination—was disallowed, considerable leeway unquestionably has been left for universities to take affirmative action measures.

The solid foundation for affirmative action laid in **Bakke** should apply to sex as well as race discrimination, and to employment as well as university admissions policies, although the case did not directly involve either sex-based classifications or employment discrimination. Justice Powell has confirmed the "legitimate and substantial" government interest in "ameliorating or eliminating" the effects of past discrimination.

Moreover, although the number system at Davis was rejected by the Court, there was no sweeping ban on numerical measures to redress such discrimination on the basis of sex or race. In fact, less than one week after **Bakke,** the Court declined to review **Communications Workers of America v. EEOC,** and thus let stand the challenged A.T.&T. settlement that established numerical goals for women and minority workers as a remedy for past emloyment discrimination.

However, while the prospects for affirmative action programs generally are encouraging after **Bakke,** the decision must be viewed as a disappointment in at least two respects that were not central to **Bakke,** but are important to the development of sex-based discrimination law.

First, unfortunate dicta in Justice Powell's opinion "for the Court" make clear that the equal protection

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guarantees of the 5th and 14th amendments will not be extended fully to women by this high court. In explaining why the Supreme Court "has never viewed [gender-based classifications] as inherently suspect or comparable to racial or ethnic classifications for the purpose of equal-protection analysis," Justice Powell has confirmed the Court's failure to perceive the full dimension of sex discrimination. Discrimination against women, he states in **Bakke,** is not "inherently odious" when compared to the "lengthy and tragic history" of racial bias.

Comparing victims of discrimination on a tragedy scale surely is neither required nor appropriate, and Powell himself recognizes elsewhere in his **Bakke** opinion that "the kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within judicial competence. . . ." Moreover, Powell's view of sex-based classifications totally fails to recognize and understand the history and invidious nature of sex discrimination in this country. The lengthy struggle of women to achieve full citizenship and to overcome obstacles to equality cannot be so lightly dismissed.

Powell's comments must finally put to rest the long-standing argument that the proposed Federal Equal Rights Amendment is not needed because women already are protected under existing constitutional guarantees. The Court's uneven record in responding to sex-equality claims—including the fact that even the sharpest gender lines survived constitutional review up to the current decade—should be answer enough to this claim. Now, however, the root of Supreme Court hesitancy in this area has been further exposed as a failure to comprehend the tenacity and invidiousness of sex discrimination based on stereotypes and sex-role allocations about the way women—and men—should be.

A second point raised in **Bakke** but left unresolved also is of particular concern to equal rights advocates: whether private parties (like Allan Bakke) have a right to go to court and seek enforcement of civil rights statutes such as Title VI of the 1964 Civil Rights Act. A similar threshold issue has been raised under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally financed education programs and was expressly patterned after Title VI.

While the **Bakke** decision ostensibly relies on Title VI, the Court stopped short of holding that private parties could go to court for relief under this statute. Four Justices merely assumed such a right for purposes of **Bakke;** four others agreed the right should be implied; and one, Justice White, expressed the strong view that it should not.

This issue will be squarely presented to the Supreme Court next term in **Cannon v. University of Chicago,** a Title IX case in which plaintiff Geraldine Cannon challenges the admissions policies of two medical schools as being sex-biased. Judicial recognition of an implied private right of action under Title IX is particularly critical because of the weak and ineffective record of governmental enforcement of this statute.

Had the issue of a private right of action under Title VI been decided in **Bakke, Cannon** would be a relatively easy case. Instead, it may be expected to determine finally whether private parties can enforce Title VI as well as Title IX. If the answer is in the negative, and victims of discrimination are left to rely solely on governmental enforcement, an important means to secure Congress' promise of equal rights and opportunities in federally financed programs will prove empty.

Bakke: Some Views

Expansion or Destruction?

By Peter D. Roos

The Supreme Court's decision in the **Bakke** case contains both the seeds for expansion and destruction of affirmative action admissions. Optimism for the continuation and expansion of affirmative action efforts flows from the fact that this was the first Supreme Court decision expressly recognizing the propriety of racial criteria in admissions. Contrasted with this positive note is the ruling by the Court that quotas or set-asides are not permissible except under certain circumstances. The latter part of the ruling has the potential of destroying the tool that has been most successful in overcoming minority underrepresentation in higher education.

The negative consequences need not happen. In the first instance, a minority set-aside still can be a viable approach under certain circumstances. Probably more important, the use of race along with other socially responsive criteria can, if implemented forcefully and honestly, assure the continuing participation of minority students in higher education. In the end, however, it must be remembered that the continued existence of these programs depends not so much on the interpretations of lawyers but upon the ability of supporters to mobilize both policy arguments and their backers to convince policy makers of the necessity for affirmative action admissions.

There are at least two questions to answer regarding **Bakke.** First, does the decision really say race "yes", quotas "no"?

The common perception conveyed by the press is that the decision holds that quotas, or specific minority set-asides, are not legal, but that the consideration of race as one of multiple criteria is permissible. This oversimplifies the decision. The Powell opinion states that while race or ethnicity can be used as one of multiple admissions criteria upon a mere determination by university officials that such is useful to ensure a diverse student body, a quota can be established only if certain preconditions are met. What

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is useful to remember is that specific minority set-asides can be justified and, indeed, must be established if those preconditions exist.

It is also important not to be lulled into the position that a "quota" and a "goal" are the same and are equally bothersome to Justice Powell. Some will no doubt argue this position, basing their argument on his statement that this is a "semantic distinction." What he clearly meant was that no matter what one called the Davis program, it clearly set aside a specific, relatively inflexible number of places for minority students; that practice was offensive to him.

The second question to ask after **Bakke** is what criteria, in addition to race, may be used in an admissions program that will advance the cause of minority participation in higher education?

It has frequently been suggested that a university has the right, if not the obligation, to evaluate an applicant's qualifications in light of the disadvantages he or she has overcome, and in light of the needs of society. If anything, the **Bakke** decision underscores the importance of these considerations. The Harvard and Princeton programs that Justice Powell found so attractive each recognize the legitimacy of these concerns in sculpting an admissions program.

In setting forth the criteria below (which are not meant to be exhaustive), it can be quickly seen that some are racially related though not racially specific. If race itself is a proper variable, certainly these race-related criteria are proper. Each stands on its own pragmatic rationale.

Finally, the opinion of Justice Powell does recognize specifically the propriety of the consideration of race-related considerations that can stand alone. His discussion of the **Lau** bilingual decision recognizes that although bilingual education has a national origin or ethnic emphasis, it is designed to serve an end, e.g., bilingualism and English language proficiency, which is a proper goal itself. Likewise, Justice Powell distinguished a racially specific employment criterion for employment of Indians in the Bureau of Indian Affairs on the ground that such a preference advanced the cause of Indian self-government and BIA responsiveness to groups whose lives are governed by the BIA.

Several elements are frequently cited as proper criteria of disadvantage.

- Poverty: Applicants who come from poverty backgrounds bring with them socioeconomic factors that would preclude them from doing well on the traditional measures, but that may not reflect true ability correctly.
- Having had to support family: Closely allied with, but separate from the poverty element, is the necessity of an applicant to provide support for his or her family.
- Prior education in a segregated barrior or ghetto school: The lack of "equal opportunity" flowing from such a background is well documented.
- Having English as a second language: Experience tells us that many students never completely lose the "handicap" of having English as a second language. Clearly, this interferes with test score validity.
- Whether parents have completed college: In some sense this factor, like many of the others, not only is a measure of disadvantage but is also a measure of the determination of the applicant. The applicant who is applying for a graduate school position whose parents are not college graduates usually has had to be a little

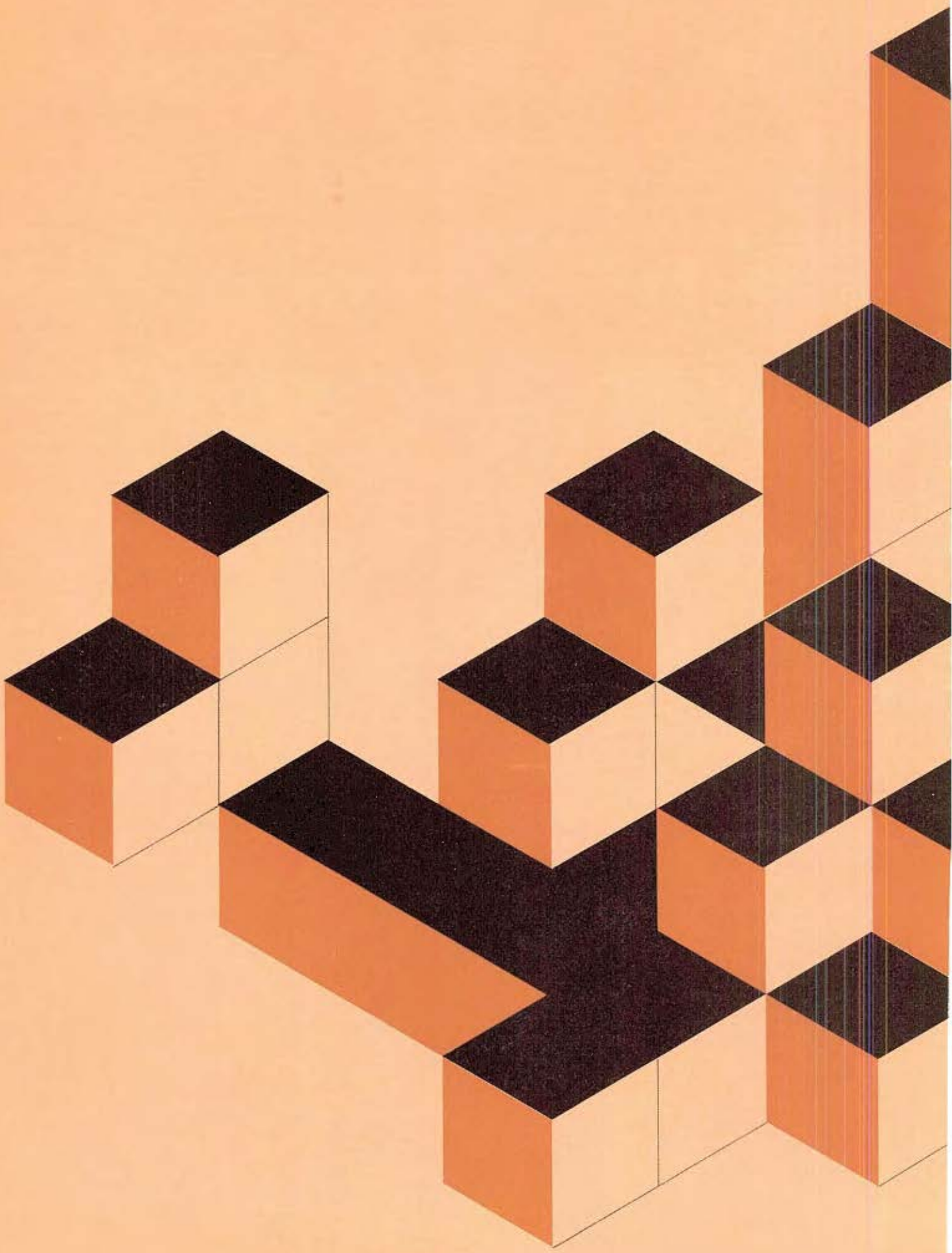
hungrier and a little more creative in getting where he or she is.

- Product of a broken home: Like the above, this may reflect ability to overcome obstacles and determination. These are certainly factors that would point to success as a professional.
- Member of a racial or ethnic minority group.

Criteria for recruitment that would help meet service area needs include:

- The ability to speak a language other than English: In California, for example, large numbers of people speak only Spanish. With a lack of Spanish speaking doctors or lawyers, it can properly be presumed that these persons are receiving second-rate service. Thus, to upgrade service to this portion of the population, special consideration based upon the ability to speak Spanish would be proper.
- Commitment to practice in underserved communities: While one should not denigrate the importance of having minority doctors and lawyers or others practicing in all segments of the profession, the lack of adequate service in minority communities is a proper consideration of an admissions policy. While admission persons may properly be skeptical of naked statements of interest in returning to one's community, an examination of prior commitment to the community should give a good, if not foolproof, guide to the strength of this commitment.
- Understanding of the folkways and culture of minority communities: Different groups clearly have different folkways and culture that affect substantially their interaction with professionals. Like the inclusion of race or ethnicity as a disadvantage, this consideration must not serve as a controlling criterion for it is, of course, directly linked to the racial or ethnic background of the applicant. Yet, if used as one element of a special admission program, it would seem to be proper.

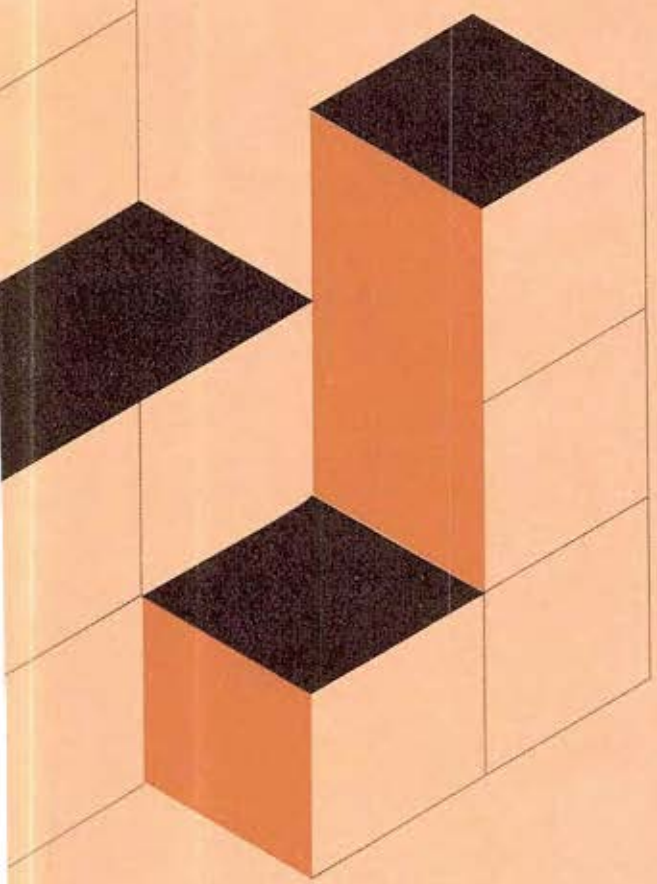
In sum, a willing university, even when the preconditions for a racially specific set-aside are not present, can go far under the **Bakke** decision to ensure minority access. If minority involvement declines, it will not be because of the decision; it will happen because it was desired by university officials or because they failed to utilize the legally permissible tools at their disposal.



Innovations in Compliance

THE LEGAL AID SOCIETY OF ALAMEDA COUNTY MONITORS AFFIRMATIVE ACTION

By Leslie Freeman



The employment practices of government contractors—indeed, most employers across the country—still result in the widespread underutilization of female and minority workers. The reasons are many and complex. A major one is the lack of enforcement of existing affirmative action regulations. Some of the problems of enforcement have been tackled in new and innovative ways by the Legal Aid Society of Alameda County (LASAC). The efforts of this organization have had nationwide impact on affirmative action compliance.

Affirmative action is required of Federal government contractors under Presidential Executive Order 11246 (as amended by Executive Order 11375), signed by President Lyndon Johnson in 1965. Revised Order No. 4, issued by the Office of Federal Contract

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Compliance (OFCC) in 1971, provided specific requirements for "result oriented" programs of affirmative action.

[OFCC is now called the Office for Federal Contract Compliance Programs (OFCCP). On October 1, 1978, President Carter intends to consolidate under OFCCP the enforcement duties now spread among 11 other agencies. OFCCP currently coordinates these efforts. By 1981, the President is expected to decide whether to shift all OFCCP responsibilities to the Equal Employment Opportunity Commission.—ed.]

Order No. 4 applied to contractors employing 50 or more workers, with contracts of $50,000 and up. It also established a 120-day deadline for plan development from the commencement of the Federal contract. Sanctions against noncomplying companies are enumerated and include suspensions or cancellation of contracts and Federal payments. They extend to the possibility of debarment.

Yet the political and economic battles over the enforcement of affirmative action continue. The discriminatory practices of many government contractors have not significantly altered. The problem has been summed up by LASAC staffer Russell Galloway:

> The performance of the Federal monitoring system can best be described as a very bad joke, a joke being played against minority persons and women by those interests in our society which oppose the achievement of full equal employment opportunity. For the most part, the OFCC and the compliance agencies have failed miserably to enforce the requirements of Executive Order 11246, with the result that the actual employment practices of many Federal contractors bear almost no resemblance to the employment practices required by Revised Order No. 4.

The Alameda County Legal Aid Society, under the leadership of Galloway and Steve Ronfeldt, recognized the failure of Federal compliance agencies to monitor affirmative action. In 1971 LASAC was asked to investigate equal employment opportunity problems using funds from Oakland's Model Cities Project. It undertook the investigation hoping to find ways to remedy the widespread discrimination it believed to be present in Alameda County.

The study resulted in a model for a community-based monitoring system centered in a local office to monitor the affirmative action efforts of Alameda County Federal contractors. A local, community-based organization would have many advantages, they reasoned. The staff could become familiar with local employment conditions and could focus attention on the immediate problems of noncompliance in the area. The relatively small number of companies involved would allow more intensive coverage than Federal compliance agencies could possibly provide. The organization would be free of the political conflicts of interest plaguing Federal agencies who monitor their own contractors. Additional and specifically local pressure for compliance, with the ultimate threat of legal action as a weapon, could be created.

Galloway authored a handbook for the system that notes, "The fundamental concept is to develop systems within the local minority and female communities which will allow the intended beneficiaries of the affirmative action requirement to monitor the performance of the companies."

The LASAC model provides several approaches to noncompliance. One is to offer help to victims of discrimination, including legal advice on filing administrative complaints. Staff members have on hand the appropriate administrative forms and are familiar with their use. They can help the individual through the maze of legal documentation and followup. By contacting the accused employer they are also able to apply pressure that can result in settlement short of legal action.

In dealing with government contractors, LASAC has other tactics at its disposal. Each reported incident is carefully documented and incorporated into the company's file. The compliance unit keeps close track of such compliants and notifies the appropriate Federal agency of the existing problem. LASAC is thus able to influence both the employer and the compliance agency involved. Their work in such cases has resulted in Federal reviews and ultimately in changed practices in employment.

Moving in the courts

In addition to advising complainants, monitoring cases, and bringing pressure, LASAC has pioneered in the field of legal techniques to force affirmative action compliance and enforcement. Its system was made possible by two innovative legal suits brought and won by LASAC attorneys.

At the time the Model Cities project began in 1971, LASAC attorneys made formal requests of each Federal compliance agency for work force statistics of Alameda contractors under the Freedom of

Information Act. They also asked for release of the affirmative action programs and for a list of all contractors.

The Federal government refused to release the information, claiming exemption under several exceptions contained in the act. The government also claimed the need for confidentiality of such statistics and the right of the contractors to expect it. In a bold move, LASAC targeted the Department of the Treasury (just one of the agencies that had refused to release information) and filed suit to gain the data. George Schultz, then Secretary of the Treasury, was named defendant.

In 1972, U.S. District Court Judge Zirpoli found in favor of LASAC and ordered disclosure of all the information requested, subject to restrictions spelled out in the act and interpreted by him in the written decision. LASAC promptly reissued requests to each of the compliance agencies for the data and received it shortly thereafter. Included were lists of Alameda County contractors, copies of the affirmative action programs in effect, copies of all compliance reviews since 1969, and work force statistics dating back to 1969.

Armed with work force data and affirmative action programs, LASAC staff began their own analysis of the efforts being made by Alameda County contractors. What they found was widespread avoidance of affirmative action. Many companies had produced written plans and the agencies had approved them. These "paper efforts" were, for the most part, superficial treatments of the problems of discriminatory employment, lip service to the ideal of affirmative action. They bore little resemblance to the requirements set forth in Revised Order No. 4. The work force statistics clearly illustrated the problem—the changes in minority and female utilization were negligible. Yet these programs had been accepted as demonstrations of a "good faith" effort to institute affirmative action.

LASAC attorneys made another aggressive and strategic move. A legal suit was filed against the Secretary of Labor, Peter Brennan, charging non-enforcement of Executive Order 11246. The suit asked that Brennan ensure the administration and enforcement of affirmative action requirements through the OFCC and asked for disapproval of those plans not in accordance with the law. The suit focused on the Department of Agriculture and referred to 29 affirmative action programs approved by that agency.

Again, Judge Zirpoli found in favor of LASAC. He ruled that:

> Defendants . . . will be restrained from approving affirmative action programs which do not contain adequate utilization analyses, goals, and timetables, and action-oriented programs. These defendants will be further ordered to rescind their approval of those affirmative action programs to contractors that plaintiffs have shown to contain serious and demonstrably inadequate elements required by Revised Order No. 4 and to institute enforcement proceedings against those companies.

The *Brennan* case, closely following the information suit, established precedents that are still sending shock waves through OFCC. The immediate effects included re-reviews by the Department of Agriculture of the 29 programs mentioned. This resulted in the issuance of eight "show cause" letters before the case had even concluded. Other government compliance agencies became quickly aware of implications of the suit in their own enforcement work. Affirmative action compliance became a real expectation and no longer just a bad joke.

Long range effects have also occurred. The compliance agencies have tightened up their enforcement practices. Attempts have been made to revise some of the agencies' tactics to increase consistency. Some structural change has occurred within OFCC. Several agencies have been consolidated in an apparent attempt to cut down on duplicated efforts and to develop more efficient enforcement techniques. Of course it is difficult to attribute these changes all to LASAC influence. But it is clear that these two important legal cases had enormous influence on OFCC and its role as an enforcement agency.

The LASAC method

From the strong legal bases established, Russell Galloway developed the LASAC manual for community-based monitoring. The system focuses on gathering and processing the data made available by the *Schultz* case. The LASAC staff compares the companies' work force data to the latest Standard Metropolitan Statistical Area (SMSA) figures for the San Francisco/Oakland are and the Alameda County population. The Alameda County figures usually yield higher underutilization figures, and LASAC encourages local employers to use them.

The analysis done, the companies are classified according to the findings. "A" companies are those that employ a large work force and show a high degree of underutilization. "B" companies are large or

medium sized and show substantial underutilization. "C" companies are either small companies or ones that, regardless of size, do not have a high degree of underutilization.

The classification system enables LASAC compliance officers to "target" companies where their efforts might be most effective. Besides the categorization, the officers also analyze any special vulnerability in choosing target companies and mapping strategy. Factors they consider include poor representation of minorities and females in certain job categories, failure to make progress toward parity, large wage differentials between minority and female employees and others, an impending compliance review by a Federal agency, Federal licensing renewals, proposed rate increases, or new Federal contracts coming up.

In short, LASAC makes use of any appropriate opportunity to create additional pressure for a company that is not in compliance. By targeting the most vulnerable companies LASAC hopes to have more impact on the employment picture of Alameda County.

Monitoring efforts are maintained with all known contractors regardless of the classification they have been assigned. The compliance officers are in contact with "A" companies at least monthly, with "B" companies at least once in 3 months, and with "C" companies once in 3 to 6 months. Angel Luevano, one of LASAC's compliance officers, explained that they operate on the theory of "constant presence." They keep in regular communication with the companies and let them know they are being monitored.

Initial contact is made with a company when a preliminary analysis of its affirmative action program has been done by LASAC. The compliance officer sends an introductory letter notifying the contractor of the presence and purpose of the community-based monitoring system. The officer offers the LASAC analysis of the company's affirmative action efforts and help in developing a more effective program. The employer is given a list of local job developers and is urged to take advantage of the training and referral services they offer in recruiting minority and female workers.

The employer responses are carefully collected as part of LASAC's files on each company. Copies of all communications between the compliance unit and the company and of any responses received are compiled for future reference. Carbon copies of LASAC's appeals to the company can be sent to the Federal agency responsible for its compliance, to the president of the company (for impact), or to local community leaders to create public pressure. LASAC staff have found it useful and effective to keep other sources informed about the kind of cooperation they meet. It also helps to keep the company informed about who is receiving copies of LASAC's communication attempts. The pressure of public scrutiny is a vital tool in the process.

Depending upon the employer's response to the initial contact, tactics differ:

> The beauty of EEO monitoring, however, is that you can take advantage of the companies' reactions regardless of whether they are positive or negative. If the company reacts positively, you can enjoy the process of being directly involved in the creation of immediate jobs for your clientele. If the company reacts negatively, you can develop a long-term fact file that will make it virtually certain that subsequent litigation against the company will succeed.

A followup letter can be sent inquiring about the employer's use of job developers. LASAC maintains contact with them, keeping tabs on the companies' efforts and helping the developers to pinpoint deficiencies in the companies. For example, LASAC can relate the need for female welders at Company X to the East Bay Skills Center, which may train them.

This cooperative relationship includes documenting of applicant flow data. The job developer can provide LSAC with legal ammunition by documenting the results of referrals they make. If Company X rejects female welders, yet hires several males, legal proceedings could ensue in which evidence from the East Bay Skills Center would be vital.

When LASAC receives a positive response from a contractor, it takes full advantage of the opportunity. The compliance officer visits the company and obtains firsthand knowledge of company employment practices. With this information and that available through the Federal compliance agency, the officer conducts periodic reviews and makes suggestions. The officer takes the time to become familiar with the company and its EEO officials and tries to push achieving parity as soon as is realistically possible. The company is encouraged to adopt an action-oriented program with a minimum timetable. If the company is willing, the LASAC staff will help develop training programs, effective recruiting techniques, and career counseling facilities on site. At the least, LASAC can put the company in touch with job development agencies that work in these areas.

In the case of an uncooperative contractor, many tactics are possible. LASAC is persistent in trying to establish contact and will follow negative responses with letters of graduating intensity. The LASAC officer tries to reach the company by pinpointing its deficiencies and by spelling out the employer's affirmative action obligation under the law. Notifying officials and community leaders, mentioned above, is also effective.

Additional tactics

In addition, tactics suggested in the LASAC manual include creating publicity by carefully placed news releases or leaflets; organizing minority and female employees of the company to protest the company's employment practices; filing official administrative complaints; and, ultimately, filing a legal suit.

Community based monitoring stems from legal victories. Taking advantage of a company's fear of legal action is important. The ultimate threat to an employer is a class action suit. The publicity that could result from such a suit, along with the probable order for back pay and quota relief hiring are unpleasant prospects, to say the least, for any employer. Pointing out the legal ramifications of noncompliance can be just as effective as actual litigation and less costly. The LASAC system emphasizes the value of communication and documentation as methods to achieve change. The goal, after all, is not litigation but equal employment opportunity.

In some cases, however, legal action is necessary. Before filing suit, administrative complaints can and should be filed with the appropriate Federal office. Technically, this route must be exhausted before it is possible to pursue litigation. As mentioned earlier, LASAC works with individual victims of discrimination in cases where the employers are not Federal contractors.

If a company employs at least 15 people, it falls under the nondiscrimination requirement of Title VII of the 1964 Civil Rights Act. A complaint against such a company must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the discriminatory act. Information on the EEOC Complaint form can be used as a definitive statement of the complaint. The LASAC staff can advise the victim on the most effective wording and procedure. They can also give the individual an idea of the subsequent action to expect: none. EEOC is drastically understaffed and has a 3-year backlog (although it is undergoing a major revamping that may drastically reduce its problems).

However, the act of filing a complaint can be a useful tactic solely for the effect it can have on the employer. The company is not likely to ignore such a move entirely and may feel pressured into conciliatory action. The complaint is also a necessary prerequisite for filing suit. Upon receipt of the complaint, EEOC issues a "right to sue" letter indicating that administrative remedies have been exhausted.

Administrative complaints against Federal contractors can be filed with OFCC under Executive Order 11246. The regulations are contained in Revised Order No. 4. As under Title VII, exhausting administrative remedies is required before filing suit. Similarly, publicity and pressure can help. Such a complaint compels the appropriate Federal compliance agency to review and investigate the charge. A review could bring about cancellation of a contract or eventual disbarment of the contractor, in addition to awards of back pay and legal costs.

However, this avenue may be unsuccessful because Federal agencies have contrued discrimination cases very narrowly. They have been known to grant individual relief without achieving the kind of change in employment practices that will help all the protected classes.

In the event that all possible tactics have been exhausted, including administrative complaints, litigation can begin under Title VII. The preparations, under LASAC's system, have already begun. The careful documentation process and data collection outlined earlier should provide the necessary information for legal battle. Assuming that the plaintiff can establish a *prima facie* case, the burden of proof shifts to the defense. The employer must then prove himself not guilty of the discriminatory charge.

Under Title VII it is possible to file a class action suit if the plaintiff can establish that he or she represents a class of 25 or more people. The court can award back pay for all members of the class from 2 years before the date of the original charge (or the effective date of Title VII—1964—whichever is shortest). Awards in racial cases brought under Executive Order 11246 also can include back pay for class members from the date of the original order, 1961, or the date of the first government contract, whichever is shortest.

The long term effects of litigation can include substantial increases in job opportunities within the company as a result of court-ordered quota hiring. A victory can also serve as a strong incentive for

other companies to bring their practices into compliance with the law.

Another type of litigation, illustrated in *LASAC v. Brennan,* involves suing the compliance agency for inadequate enforcement of Executive orders regarding affirmative action. In the *Brennan* case, still ongoing, Judge Zirpoli included in his order a requirement that:

> . . . defendants will be required to submit to the court and counsel for the plaintiffs copies of any additional affirmative action programs approved by the USDA for Alameda County contractors along with supporting papers within 15 days of their approval.

The district court is, in effect, monitoring the efforts of the Department of Agriculture in accordance with the ruling. Several points of law are yet to be taken up by the court in this case, and lower court rulings have been appealed to the Ninth Circuit Court of Appeals. Nevertheless, such suits remain a useful option.

Changes in enforcement

An interview with compliance officers Wilfred Lim and Angel Luevano revealed some of the changes in the Federal compliance system in the 5 years since the *Brennan* suit was brought. Although some undecided issues remain, OFCC has tightened up its enforcement and has taken steps to consolidate several of the compliance agencies. These moves should increase efficiency and cut down on the duplication of effort that occurred when each agency used a different method of enforcement. Previously, contractors who happen to do business with several agencies thus fell under at least two separate sets of enforcement regulations.

An important change in the contract cancellation procedure is that progress payments to a contractor may be halted for noncompliance before the investigative hearings are held. (Extensive hearings, of course, are still necessary before debarment can take place). LASAC staffers believe that these changes have come about, in part, because of the pressure brought to bear by their organization through legal proceedings.

Lim and Luevano also listed ways in which LASAC's work has been influential in encouraging equal employment practices in Alameda County. Very effective, they said, is the public pressure created by the "constant presence" of LASAC's compliance unit. The monthly to semiannual contacts with employers do not allow them to forget their affirmative action obligations and remind them that their efforts are being monitored. The ultimate threat of litigation is a powerful incentive for compliance. Court awards of back pay, damages, and legal costs can add up to millions of dollars, particularly in a class action suit. Federal contractors must also be aware of millions of dollars in Federal funds that they risk by noncompliance.

In addition, LASAC serves as a support service to the Federal compliance systems, documenting each contractor's hiring activities and willingness to cooperate with public advocates. The constant flow of information to Federal agencies is intended to affect their analyses and compliance reviews.

The need for community-based monitoring systems is real, the LASAC staff reiterated. The affirmative action laws, regulations, and enforcement agencies were not designed to work. The loopholes and lack of enforcement power built into the Federal compliance system leave little hope of achieving equal employment. Changes and improvements in the Federal system must be forced by political and legal means in order to give affirmative action a fair chance. For example, the Department of Agriculture has had jurisdiction over some 18,000 companies nationally. It employs 15 compliance officers to monitor and review affirmative action by those contractors. At the present rate of 450 reviews per year, DOA will be lucky to finish an initial review of the contractors in its jurisdiction within 40 years.

Steve Ronfeldt, one of the LASAC unit's founders, noted the intense political pressures LASAC has encountered over the last few years. The original budget for compliance has been cut from $220,000 to $150,000. The unit is now funded through community development funds and supplemented by LASAC's county budget. But the organization has survived the pressures and shakeups, and Ronfeldt was confident it would continue to do so.

In the 7 years since the Model Cities Project asked LASAC to investigate equal employment opportunity, the unit has provided a workable model for increasing affirmative action compliance. The community-based monitoring system has been adopted in several cities around the country, including Philadelphia, Seattle, and Chicago. LASAC's bold leadership in strengthening enforcement of existing laws and regulations regarding employment discrimination has set national precedents. The legal suits against Federal enforcement officials have had a major impact on affirmative action at a time when that concept has come under increasing attack.

CIVIL RIGHTS, AFFIRMATIVE ACTION, AND LONG TERM SOLUTIONS

RISING ABOVE THE NUMBERS GAME

By Gregory D. Squires

The case of *The Regents of the University of California v. Allan Bakke* has been hailed as the most important civil rights case to reach the Supreme Court since the *Brown* decision in 1954—one that could set the cause of minorities back several years. The *Bakke* case may be the most important to reach the high court since 1954, but it is doubtful that, no matter how the Court rules, the economic status of minorities will be significantly affected. Once again, the wrong questions are being asked and the wrong issues are being raised.

Debates over whether or not affirmative action goals and timetables are synonymous with illegal quotas and constitute a system of reverse discrimination ignore the structural dynamics of racism and sexism. Such discussions of affirmative action fail to get at the root causes of discrimination and, as a result, prevent civil rights advocates from formulating the kinds of policies that could substantively affect the status of minorities and women.

Over the last 15 years a host of laws, Executive orders, and administrative regulations have been passed that have virtually eliminated any legal basis for race or sex discrimination. Yet, according to key economic indicators, the economic status of racial minorities and women has changed little since the early 1960s. While the median black family income increased from 54 percent to 58 percent of the median white family income between 1964 and 1974, after peaking at 61 percent in 1969 and 1970, the absolute gap between median black and white family income increased from $3,134 to $5,548 during those years.

Black unemployment continues at approximately twice the rate of white unemployment, as it has consistently since at least the end of World War II. And while the proportion of all families living on incomes below the poverty line has declined, blacks constituted a larger proportion of poor families in 1974 than they did in 1959.

Among year-round full-time

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workers, the median income of women declined from 59.6 percent to 57.2 percent of the male median between 1963 and 1974. More striking is the fact that women lost ground to men in almost every occupational category and at each level of educational attainment, except for those with 5 or more years of college, during the 1960s. Between 1960 and 1975 the unemployment rate of women increased faster than that of men, and while the proportion of female headed families who were poor in 1959 was twice that of male headed families, in 1974 female headed families were almost six times as likely to be poor.

Despite the legal gains that have been made, or perhaps because of the expectations they raised, the civil rights community (i.e., public and private civil rights advisory and enforcement agencies) has been frustrated in its efforts to generate significant improvement in the economic status of minorities and women. Given the prevailing posture of most civil rights organizations, that frustration is likely to continue.

The basic strategy of civil rights groups throughout the 1960s and 1970s has been to seek legal remedies for oppressive social, political, and economic conditions. The objective has been to bring minorities and women into the mainstream of the prevailing economic system. The structure and internal dynamics of that system have been accepted as given. The change sought has been to relocate the various groups within the economic hierarchy. The nature of the system itself is rarely subject to critical scrutiny.

In essence, discrimination is treated as a marginal characteristic of what is considered an otherwise sound economy. The possibility that discrimination might be a central characteristic of that system, one that is vital to its very existence, is not considered. The question not yet answered is whether our economy as now organized can afford equal pay and full employment.

One consequence is that a highly complex systemic phenomenon is fragmented into a variety of specific issues, such as employment, housing, and deucation. These are frequently treated in isolation from each other and from their common roots. An investigation of a particular problem (frequently in one community or geographic region) is conducted, recommendations for legal action are made to the appropriate enforcement agency, and some corrective action may or may not follow. At best, however, the proverbial Band-aid is applied while the relationships between the various issues subject to investigation and the larger framework giving rise to these problems remain untouched. Clearly, a more comprehensive response to the multifaceted problem of discrimination is required.

That various specific issues traditionally addressed by civil rights organizations are highly interrelated and are intricately intertwined with the development of the economic system is exemplified by the fiscal crises of New York, Detroit, and other northeastern and midwestern cities. Since the early 1960s, private industry has been moving out of older cities in the northeast and midwest towards the sunbelt, as well as from central cities to suburbs in metropolitan areas throughout the Nation. This migration of industry, and the subsequent migration of jobs, people, and a variety of sources of taxable income, has had a serious negative impact on those locations where minority populations are concentrated.

When private industry moves out of the city, jobs go with it. Municipalities lose taxes formerly paid by those industries and their employees, and remaining revenues must be further stretched to cover additional unemployment and welfare costs. School budgets and other municipal services are cut back. Frequently crime rates, alcoholism, and other social problems rise, taxing those services at a time when revenues are at a minimum.

Specific urban problems such as crime, education, unemployment, etc., cannot be effectively addressed simply by dealing with each one on an individual basis. The fiscal crisis of New York City is not simply the result of a handful of irresponsible spendthrift politicians, as many critics have suggested. The unemployment rate of over 40 percent of Detroit's central city black youths cannot be significantly reduced simply by expanding or improving the educational and training facilities in that city, as many business leaders would like to believe. Those problems can only be understood, and ultimately resolved, by recognizing how they relate to the uneven development of the national economy as a whole.

The call for planning

That a more comprehensive approach to our Nation's problems is required has become evident to leaders of business, labor, politics, academia, and other segments of society. National planning of one sort or another has been endorsed by such luminaries as advertising executive Chester Bowles, former United Auto Workers President Leonard Woodcock, and social psychologist Kenneth Clark. But planning means vastly different things

to different people. To Felix Rohatyn, a partner in the New York investment firm of Lazard Freres & Company, it means the Federal government should become "investor of last resort" to insure the profitability of major industries. To Frank Riessman, editor of *Social Policy,* it means sizeable state ownership or nationalization of the Nation's business activities. For authors E. F. Schumacher (*Small is Beautiful*) and Milton Kotler *(Neighborhood Government),* planning means radical decentralization; the development of small scale "social councils" and local "neighborhood governments" as basic organizational principles in American society.

Despite conservative protestations, it is generally recognized that the public sector will interact more closely with the private sector in planning future economic development. Whether planning becomes a tool through which our current economic structure and income distribution is preserved, or if planning results in a Swedish-type democratic socialist society, or some other alternative evolves, it is clear the free market will not be as dominating a factor as it may have been in earlier years. As John Kenneth Galbraith argues, planning is already a fact of life. Major corporations now exercise control over the market to assure their profitability. What remains to be seen is the direction planning takes in the future.

Invisible hand or veiled fist?

The belief that human or social problems can best be resolved within the framework of a free enterprise or market system in which each individual pursues his or her own self interest (i.e., profit maximization) has been challenged more frequently in recent years. To many observers, in fact, the profit motive impedes efforts to solve social problems. As Congressman John Conyers, Jr., recently wrote in reference to the high rates of unemployment among black youth:

> . . . Why are such dangerous levels of unemployment countenanced as part and parcel of the American "free enterprise" system which, in reality, translates into a creed of rugged individualism for the poor and social welfare for the rich? Why is the shortage of jobs for the young, with its attendant demoralization, rising crime rates, and degeneration of the quality of life, tolerated with such complacency by our national leaders and so many of our citizens who have jobs? . . . Any analysis of unemployment among Black youth necessarily involves a consideration of the overall unemployment problem. Inescapably, the specific problem can only be resolved within the context of the larger problem.
>
> Exorbitant rates of unemployment are countenanced because of the unconditional opposition of private economic interests to a permanent full employment program, for they are, by definition most interested in the maximization of profits. Inescapably, chronic unemployment results, which has the additional effect of restraining higher wages, mitigating worker demands in general, further curbing the power of an organized work force, and making available a ready-reserve pool of unemployed workers which insures a continuous supply of labor. All of which further serves notice to the workers that they themselves are only one step removed from the lines of the unemployed. The poor and the unemployed, in effect, are treated as the expendable byproducts of the functioning of the American system—the exhaust, as it were, from an economic engine.

The movement of industry to the suburbs and the sunbelt further dramatizes the contradiction between the accumulation of profits and meeting human needs. A survey conducted by *Industry Week* magazine indicated that the major reason companies relocate is lower labor costs in those regions of the country resulting from a relative lack of union activity. A second major reason is the tax advantages available in the South. Basically, companies are simply seeking a favorable business or investment climate. As Nathan Weinberg points out:

> A good "investment climate," from a business standpoint, is one with no taxes, no unemployment insurance, no workman's compensation, and no concern about environmental pollution, or no concern about worker health and safety.

Clearly, the economic interests of corporations are not the same as those of the majority of people who are wage earners, a disproportionate number of whom are minorities. When State and local governments compete with each other to provide a more favorable "investment climate," they often end up subsidizing industry at the expense of taxpayers and workers.

In recent years a number of organizations have been established to challenge the dominance

of private industry and to attempt to establish greater public control of the private sector. Two examples are the Movement for Economic Justice, a coalition of individuals and private organizations; and the National Conference on Alternative State and Local Public Policies, a network of elected and appointed officials, community organizations, political activists, and trained experts in various fields. The activities of groups like these range from locally organized protests against utility companies to the development of legislation requiring local industry to meet certain obligations to workers and the local community, as well as to stockholders. Specific proposals have been offered to deal with the problem of "runaway plants" and the flight of capital to the sunbelt and the suburbs.

While business and industry were never totally independent of government and the local communities in which plants and officers were located, clearly the relationships among the private and public sectors and the citizenry in general are changing. As a result the basic structure of the American economy is undergoing a transformation. That transformation may well prove to be as significant as the shift from an agrarian to an industrial society in the 1800s and from an industrial to a corporate society at the turn of the century culminating in the New Deal.

Perhaps we are witnessing a reemergence of grassroots politics in which local citizens are reasserting control of local communities, or perhaps we are simply reaching the next stage of corporate dominance of public and private life. What is clear is that crucial civil rights implications are involved in the future development of the American economy. The nature of that development itself, not simply the distribution of minorities and women within that evolution, must become a central concern of the civil rights community.

Selected specific issues

The civil rights community must begin a systematic, critical evaluation of the internal dynamics of the "mainstream" from which minorities and women are excluded. It must examine the potential impact of alternative economic structures, as well as the political and social relationships they entail, on protected groups. Questions that some organizations have begun to act on, and about which civil rights organizations should be more actively concerned, include:

- How successful has support of black capitalism been in bringing minorities into the mainstream of American business? Is black capitalism a viable strategy for upgrading the status of minorities?
- In several Western countries the public sector provides more extensive social welfare services than is the case in the United States. These services are often financed through higher taxes.

How do minorities, women, and low income groups fare in terms of access to such services in these countries relative to similar groups in the United States? In those cases where programs appear to be working, how could they be implemented in the United States?

- Many European and some American corporations have experimented with various forms of worker control and even worker

ownership of private businesses. How have such experiments affected the distribution of income in general and how have they affected the status of minorities and women?

- It is frequently argued that the key to higher incomes and to greater equality in the distribution of income is education. Since World War II the education gap between whites and nonwhites (in terms of years of schooling and degrees) has been substantially reduced and the educational attainment of the population in general has become more equal.

Yet no comparable progress has been made in reducing the income gap between whites and nonwhites, and the income distribution for the total population has remained virtually unchanged. What are the structural mechanisms which account for the persistence of the highly unequal income distribution in the United States?

- The National Commission for Manpower Policy and other labor market experts consistently point to the need for better education, job training, counseling, and other tactics directed at preparing individuals for the world of work, without critically examining that world itself.

In other words, the focus is almost entirely on the "supply" side, with little attention given to the "demand" side of the manpower equation. What accounts for the persistence of academic and government analysts in adopting this posture?

- The Governor's Task Force on Redlining in Michigan said, "At the crux of the redlining dilemma, as with many social issues, is the tension between the dictates of the marketplace and private profit on the one hand and the needs of our Nation's urban areas and the residents of those areas on the other." The problem, according to the Task Force, was to find a balance between these two needs.

Given the many ramifications of urban disinvestment, how can we determine the legitimate needs of these groups and how do we determine where one's interests must give way to the other's? Since most banks and other financial institutions are chartered and insured by Federal or State governments, should rigid affirmative mortgage lending practices be required? In general, how much public control should there be over private industry?

Unfortunately, the civil rights community is currently immersed in debates over such issues as whether or not affirmative action goals constitute quotas, whether such goals or quotas amount to "reverse discrimination" and subvert merit principles, and how the mechanics of the Federal government's civil rights enforcement effort can be streamlined. In the short run, the status of minorities and women can be marginally improved if the government implements more effective and efficient enforcement procedures and if more employers can be coaxed into voluntarily implementing affirmative action programs. But in order to realize substantial long term improvements in the life chances of minorities and women and to make equal opportunity a reality, we must look beyond the numbers game of affirmative action and examine the assumptions on which it was founded.

An Author/ Title Index To The Civil Rights Digest

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READING & VIEWING

BOOKS RECEIVED

Must We Bus? by Gary Orfield (Washington, D.C., The Brookings Institution, 1978). A systematic investigation and analysis of the school desegregation issue, including an outline for a constructive program of action to make desegregation work. *470 pp.*

Limits of Justice ed. by Howard I. Kalodner and James J. Fishman (Cambridge, Massachusetts, Ballinger Publications Co., 1978). A study of the role of courts in school desegregation, using case studies. *655 pp.*

The Knights of Labor in the South by Melton A. McLaurin (Westport, Connecticut, Greenwood Press, 1978). A chronicle covering the rise of the Knights of Labor from its beginning in the late 1870s to its demise in the early 1890s, providing a new perspective of the South's industrial laborer. *232 pp.*

The Wheel of Servitude by Daniel A. Novak (Kentucky, The University Press, 1978). A historical

analysis that shows how Federal, State, and local regulations combined in an undisguised effort to keep southern agriculture supplied with black labor. *126 pp.*

PAMPHLETS

U.S. Working Women: A Databook. U.S. Department of Labor. Presents a wide array of information on the characteristics of working women in the United States and changing trends over the past quarter of a century. Copies may be obtained free from the Bureau of Labor Statistics, 441 G Street, N.W., Washington, D.C. 20212. *67 pp.*

FILMS

With Babies and Banners. 44 min. 16 mm. Historical documentary on the role of the Women's Emergency Brigade during the Flint sitdown strike of 1937. Prepared by the Women's History Film Project, 108 Museums Annex, Ann Arbor, Michigan 48109

COMMISSION REPORTS

Improving Hispanic Unemployment Data: The Department of Labor's Continuing Obligation. Evaluates the adequacy of the efforts of the Department of Labor to comply with applicable sections of Public Law 94-311 that mandate improvement and expansion of the collection, analysis, and publication of unemployment data on Hispanics. *31 pp.*

Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools. Reviews the problems that gave rise to the need for affirmative admissions programs and looks at the nature and effect of such programs in comparison to traditional admissions programs. *119 pp.*

ADVISORY COMMITTEE REPORTS

The CETA Program in Des Moines (Iowa Advisory Committee.) Investigates the CETA program in central Iowa and reviews the operation and administration of Titles I, II, and VI programs in the city of Des Moines. *44 pp.*

State Government Affirmative Action in Mid-America (Iowa, Kansas, Missouri, and Nebraska Advisory Committees). Studies affirmative action efforts by State governments and expresses concern about the failure of State and Federal government to use appropriate measures to promote change. *107 pp.*

Affirmative Action in Salt Lake's Criminal Justice Agencies (Utah Advisory Committee). Reports on affirmative action in employment in Salt Lake City's criminal justice agencies. *31 pp.*

The Last Suffrage Frontier: Enfranchising Mental Hospital Residents (Pennsylvania Advisory Committee). Examines the voting rights of persons institutionalized in Pennsylvania for reasons of mental disability. *34 pp.*

HEARINGS

Hearing Before the U.S. Commission on Civil Rights: San Francisco, California, Vol. I: Testimony and Vol. II: Exhibits, June 27–28, 1977. On age discrimination in federally-funded programs.

Hearing Before the U.S. Commission on Civil Rights: Chicago, Illinois Vol. I: Testimony, June 17–19, 1974; Vol. II: Testimony, November 22–23, 1974; Vol. III: Exhibits 1–39; and Vol. IV: Exhibits 40–106, June 17–19, 1974; July 25, 1974; August 22, 1974; and November 22–23, 1974. Covers the economic condition and concerns of women, including employment opportunities, public assistance programs, and child care.

Hearing Before the U.S. Commission on Civil Rights: Denver, Colorado Vol. I: Testimony, July 28–29, 1977, and Vol. II: Exhibits, June 28–29, 1977. On age discrimination in federally-funded programs.

Hearing Before the U.S. Commission on Civil Rights: Boston, Massachusetts June 16–20, 1975. On school desegregation. *740 pp.*

Hearing Before the U.S. Commission on Civil Rights: Miami, Florida Vol. I: Testimony and Vol. II: Exhibits, August 22–23, 1977. On age discrimination in federally-funded programs.

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