SPRING 1979

civil rights digest

THE CONDITION OF CIVIL RIGHTS ADVOCACY

IN THIS ISSUE . . . We bring news of recent legislative victories, court defeats, and thoughts on solving civil rights problems.

First, Louise Woerner notes the plight of the Hispanic elderly and describes a model program of assistance that obtained help and a newfound sense of community for residents of Natalia, Texas.

A legislative victory for women—the Pregnancy Disability Amendments to the 1964 Civil Rights Act—is examined by Peg Simpson. Simpson finds the law does far more than help pregnant workers—it protects all women against discrimination based on the capacity to bear children.

A second civil rights victory came last year with passage of the 1978 amendments to the 1973 Rehabilitation Act. Roger Jacobs describes the amendments, along with the procedures available to victims of discrimination against the handicapped.

Leo Pfeffer takes on the task of recounting the positions taken by the Supreme Court regarding Sabbatarians and Sunday closing laws, finding that the Court is not necessarily 100 percent consistent.

Finally, Commission staffer Larry Riedman offers unofficial thoughts on reversing the sense of frustration that seems to afflict many engaged in civil rights activities of late. Riedman offers some unorthodox perspectives on our current troubles.

For more copies of the *Digest* or inclusion on our free mailing list, please write to the Editor, *Civil Rights Digest*, U. S. Commission on Civil Rights, Washington, D.C. 20425.

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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.

By Louise Woerner

THE HISPANIC ELDERLY

MEETING THE NEEDS OF A SPECIAL POPULATION

The problems of the minority elderly in America are infrequently documented. They are not only the silent, but the forgotten—alienated from society, often separated from their families. Most are poor but they seldom participate in Federal, State, and local programs designed to assist them.

According to 1976 census figures, the number of elderly Hispanics in the U.S. has tripled in the past two decades and has increased 23 percent since 1970 alone. Their percentage of the total Hispanic population remains small because of the high birthrate among Hispanics in the United States and because of continuing migration by young Hispanics to the U.S. In a country where most citizens are becoming older, it is easy to forget the Hispanic elderly because of the many young Hispanics who are so visible.

Thus, the Hispanic elderly receive little attention, although they have special problems. In a 1977 study for the Community Services Administration to determine the problems of older, rural, poverty-level Hispanics, J. A. Reyes Associates, Inc., a Washington, D.C.-based consulting firm, confirmed that despite their needs the elderly Spanish speaking do not utilize social services that are available to them at the rate that might be expeced.

The Reyes study and other research have shown that elderly Hispanics

- are likely to live with a spouse or alone.
- often have incomes well below the poverty level.
- are often ineligible for social security or are not aware of its availability.
- visit hospitals and physicians far less frequently than do their Anglo counterparts, particularly in rural areas, although they are often in poor health.
- speak English poorly or not at all.

Explanations for underutilization of available services by minority elderly are often based on the belief that they "take care of their own." But close examination of census data reveals that the stereotypical image of Hispanic families with three generations in the same household is no longer valid. Today about 60 percent of the Hispanic elderly live with a spouse; only about 10 percent live with their children. This shift in living patterns has been accompanied by a concurrent shift in attitudes among young Hispanic Americans. As an example, one witness testified before the U.S. Senate Special Committee on Aging in Los Angeles that "the social

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distance between generations of Mexican immigrants and Mexican Americans is even greater than the social distance between some Mexican Americans and Anglo Americans."

The number of elderly Spanish speaking with incomes below the poverty level is higher than one in three (37.5 percent). Only the Native American elderly have a lower average income than their Hispanic American counterparts. In rural areas, the numbers are much higher. In South Texas, for example, the proportion of Mexican Americans 60 years and above with incomes below the poverty level is as high as 64.2 percent.

It is clear that income support programs are of primary importance to the Hispanic elderly. The two principal available programs are social security and old age assistance. The Spanish-speaking elderly have often been ineligible for the former because of lack of citizenship or because the work they did was not covered by social security. Old age assistance is utilized more frequently by Hispanics, but offers lower benefits. Many older Hispanics who qualify for social security payments receive only small benefits owing to a generally low occupational status during their working years. For this reason, many remain in the labor force beyond retirement age—they need the income, small as it usually is.

Why do the poor Hispanic elderly not make better use of available programs that might help them? Social services are generally underutilized by groups with low socioeconomic status regardless of race or ethnicity. But the Spanish speaking are faced with special barriers, foremost of which are language and culture. The traditional system of social service delivery requires that this group of proud working people come for assistance with hat in hand. It is not enough that programs be available—they must attract clients. To date, few programs have been geared to the Spanish-speaking elderly.

The medical problems of the Hispanic elderly are also different from those of other groups. Many have worked at hard jobs all their lives and have never received adequate medical care. It has been shown that Hispanics in general, and migrant and seasonal farmworkers in particular, age more quickly than do Anglos. A 1973 study concluded that "at 48 years a Spanish heritage migrant worker approximates the health of the 65-year-old Anglo." If the definition of "elderly" were adjusted accordingly, and not based solely on age, the number of Hispanic elderly would be much larger.

Therefore, the failure of Hispanics to make use of available health care services is significant because it exacerbates long-neglected health problems. The reasons for this failure are, again, low income, language and cultural differences, and, particularly for the rural Hispanic elderly, a geographic isolation from the source of the services.

Research for CSA by Reyes Associates on the Hispanic elderly was followed by the development and testing of a model program through which poor, elderly, Spanish-speaking Americans could receive the services they needed in order to maintain an acceptable quality of life in their homes.

Reyes designed the model program—called Project EXITO, meaning "success" in English—based on the assumptions that

- to be effective, services must be demand based. This is contrary to most programs, which schedule services and therefore require clients to schedule needs.
- Hispanics would prefer to participate in a program to which they could also contribute, thus maintaining their dignity as elders of their communities.
- an intergenerational model would be most acceptable to Hispanics, as it most nearly replicates a family model.

The demonstration component of the program was conducted in Natalia, Texas, a town of 1,200 located 30 miles west of San Antonio. All members of the community were canvassed to see what their needs were and in what ways they might be able to assist their neighbors. Based on that canvass, an exchange of services was developed where persons with needs were matched with individuals who could assist. That is, a person requiring babysitting services might exchange transportation and assistance with grocery shopping with an older person, who would then provide needed babysitting. Exchanges were not on a one-for-one basis only, and shortly into the demonstration most members of the community were calling the EXITO office to offer assistance and ask for help.

Martin and Roberta Aguinaga

Martin and Roberta Aguinaga participated in more exchanges in the EXITO program than any other residents of Natalia. Mr. Aguinaga was a frequent provider of services, offering transportation between Natalia and Devine, the nearest city of size, to anyone who needed it. All of the Hispanics in Natalia

know the Aguinagas. Aged 76 and 72, they have lived there for 70 years and refer to themselves as "los únicos constantes del pueblo" (the only constants of the town). As stalwarts of the Hispanic community, they drew many people into Project EXITO with them.

Mr. Aguinaga came to Natalia from Mexico in 1907, at age 6. He has always earned his living as a farmworker. The Aguinagas live in a one-room house on the edge of town. Their four children are married and live in Texas, three within 30 miles of Natalia. Supplemental security payments are the only income the Aguinagas have; their children are poor as well and are unable to offer their parents financial assistance.

Neither Martin nor Roberta Aguinaga speak English, and they are hampered in speaking Spanish by their lack of teeth. They are functionally illiterate in both languages and need interpreters in contacts with Anglos. Poor health is another major problem. Mrs. Aguinaga is often bedridden with continuing colds and other minor but debilitating ailments. Mr. Aguinaga has periodic back trouble, particularly severe during inclement weather, although he never requested anything for himself.

The Aguinagas were anxious to participate in Project EXITO when the demonstration started in Natalia. They told the project staff that the concept of exchanging services reminded them of life in Natalia when they were much younger. According to the Aguinagas, helping one another was a very common thing years ago, and such actions fostered togetherness. They regarded EXITO as a way to revive an attitude that had long seemed forgotten. The Aguinagas had known the project coordinator, Mrs. Saenz, for many years. Therefore, Mrs. Aguinaga was not the least bit embarrased to call Mrs. Saenz to ask for companionship. Their close relationship had similarities to that of a mother and daughter. In addition to requests for home visits, Mrs. Aguinaga would also ask for assistance in buying medicine and doing household chores.

The involvement of the Aguinagas in Project EXITO was not without problems. There was a period of about 2 weeks during which Mrs. Aguinaga dropped out of the project. About one month into the program, she was upset that Mrs. Saenz had not stopped regularly at her house to pay her a visit and check on her health. Mrs. Saenz explained that it was her responsibility to identify and meet all of the elderly persons in the town; she had assumed that Mrs. Aguinaga would contact her if there were any problems. This answer was unacceptable to Mrs. Aguinaga, who was resentful that she needed to have a problem and was responsible for initiating contact before receiving services through EXITO.

This renewed the awareness of the EXITO staff that the need of older persons for companionship is a continuing one and should not be provided on special request only. Mrs. Aguinaga said that she would feel more comfortable if she could be visited without having to make a special request. As a result the project staff scheduled more group functions as well as regular individual visits.

The Aguinagas were on the EXITO Advisory Committee and cut the ribbon that marked the opening of the Community Center. They remained on the Advisory Board to the Community Center after the demonstration ceased to function.

Pedro and Feliz Martinez

Pedro Martinez, now 77, moved to the United States from Mexico in 1907. He has lived in Natalia since 1939. Mr. Martinez has been a farmworker all of his life and continues to work in the fields surrounding Natalia. He and his 67-year-old wife, Feliz, speak little English. They now receive social security and medicare, but did not become eligible for benefits until about 5 years ago. Both are in poor health. They have seven children, all married, scattered around Texas. Only one of their offspring remains in Natalia. He and his family provide transportation to and from the doctor's office for his parents, as well as other services that they might need. The Martinezes, however, have gotten a great deal of satisfaction from Project EXITO by being able to contribute more to their community.

When visited by an outreach worker early in Project EXITO, Feliz Martinez wanted nothing to do with the project. Her son was nearby; she discussed her needs only with him. Mr. Martinez said he was too tired after a long day of field work to participate in the project.

Nevertheless, the renovation of the American Legion Hall for the Community Center was of great interest to the Martinezes because their three-room house is next to the hall. As soon as the work began Mr. Martinez offered his ladder, which was used during the entire renovation. Mrs. Martinez, who rarely ventures outside her home, delivered refreshments to the young workers on several occasions.

When asked about their sudden involvement, Mrs. Martinez commended the efforts of EXITO in securing the Legion Hall. She said she was happy to have people nearby whom she could visit when she was lonely, or on whom she could rely if her son or husband were not around. This sense of security was heightened by the knowledge that the entire community had supported the endeavor. She still felt, however, that most of her needs could best be met by their son.

Francisco Pedroza

Francisco Pedroza, 93, is one of Natalia's most distinguished and respected citizens. He was the Secretary Commissioner of Political Jurisdiction of Mexico, and he fought in the Mexican Revolution in 1910. In 1911 he left the life of a lawyer in Mexico to become a farmworker in the United States. In 1920 he was appointed to the Department of Protection for Defense of Mexican Citizens by the Mexican

government, but he returned to the United States, although he was never able to get a better job than farmwork.

Mr. Pedroza has 15 children, all of whom are married; four daughters remain in Natalia. He receives social security and supplemental security income and relies on his family for added financial support when needed.

Mr. Pedroza was one of the original community organizers for Project EXITO despite the fact that he is going blind and seldom leaves his home. He was one of the first people contacted after Natalia was selected as the Project EXITO site, and it was with his consultation and advice that the project's outreach efforts began.

His support was crucial, since the history of Natalia over the past 40 years is inextricably related to the involvement of Mr. Pedroza. He was the first Mexican American to be elected to either the water or school boards, which distinguished him in the Hispanic community. Moreover, over 30 years ago, he led the successful drive to raise the funds to build the Catholic Church in Natalia. Since that time Mr. Pedroza has been recognized as the leading resource mobilizer in Natalia.

After his initial advisory efforts, however, Mr. Pedroza did not participate. Because his four daughters see to it that his immediate needs are met, he did not request any services. He is so well-known and active that he does not require companionship or need a way to contribute.

He continually praised the project, however, as it reminded him of the way community life used to be in Natalia. The opening of the Community Center proved to be a very heartfelt moment for Mr. Pedroza,

so he wrote the following poem, which has been translated into English, to express his feelings:

THE EXITO PROGRAM

It deserves all our consideration, enthusiasm, and cooperation; it is a good deed, from all perspectives.

Let's take a look at the world around us,
and we'll see
that those that have been blessed by fortune
sit down to enjoy life as a banquet
to enjoy all that they desire.

On the other hand
there are the shadows of families that ask
for bread,
stretching out their hands in anguish
demanding help,
energy depleted by hard work, that now demand
rest.

But now rises a new fountain of promises and
hopes
Program EXITO like a new sun
that brings a new life
that comes to feed our poor.

The eyes of Providence will bestow gifts
on those that work in the vineyards of the Lord.

Francisco Pedroza, 93,
A resident of Natalia

The need for new approaches

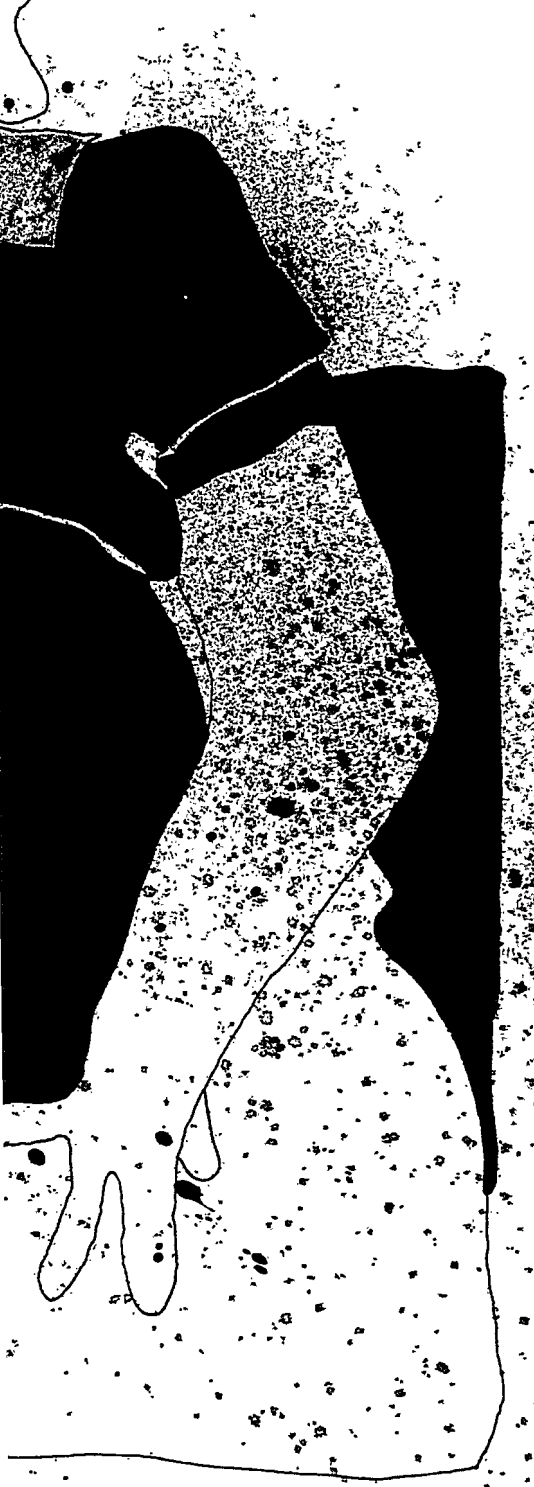
The success of the EXITO model is indicative of the desperate need for the development of new and innovative approaches to caring for the poor minority elderly, especially those living in rural areas of the U.S. It is evident from the extremely low socioeconomic status of the older Hispanic population that their needs are considerable. Existing services have failed to meet these needs, and it is therefore essential that special attention be paid to them.

It is, of course, necessary to avoid establishing any policy or instituting any practices that would help perpetuate the rural isolation of or promote urban ghettos for Hispanic Americans as a group. The problems of the elderly of this group, however, need to be addressed in the short term, while the graver social questions raised by segregated living patterns of Hispanics have to be addressed by long-range policy.

Services must be delivered in a setting that recognizes the differences between Anglo and Hispanic culture and language. The resources of the Hispanic community provide the best alternative to institutional care for the aged. New approaches to delivery of services that incorporate these concepts stand the best chance of reaching the Spanish-speaking elderly, where traditional measures have failed. It is with this philosophy that Project EXITO was conceived. It is also with this philosophy that other innovative solutions must be developed. The needs of this population can no longer go unmet.

THE NEW PREGNANCY DISABILITY LAW REVERSES THE SUPREME COURT

A Victory for Women



By Peg Simpson

The millions of women who increasingly combine careers with marriage and children have won important new support from a law that bans discrimination based on pregnancy or childbirth.

The new law, passed in the closing hours of the 1978 congressional session, says pregnant workers may not be treated differently from other workers just because they are going to have a baby.

Congress' action constitutes a rebuff to the Supreme Court, which had said in effect that pregnancy was not a gender-related condition and had given employers a green light to continue to deny sick leave and disability pay or equal medical benefits to pregnant workers.

A coalition of women, civil rights, church, and organized labor groups pushed hard to persuade Congress to override the Supreme Court, fearing a further erosion of the 1964 Civil Rights Act guarantees of equality to women workers.

It was the first time such a broad-based coalition had been brought together for a woman's issue. Bonds were formed that could be significant in future fights—especially since all groups are aware of the social service cutbacks likely to come in the wake of Proposition 13 unless a strong united front opposes them.

The Pregnancy Disability Amendments to the 1964 Civil Rights Act took effect October 31, 1978, after being passed by Congress only days before. They make it illegal to refuse to hire or promote a worker because she is pregnant—or might be in the future.

The law also makes it illegal for employers to force her to take early maternity leaves, as hundreds of schools routinely had required of teachers when their pregnancy began to "show." The law also precludes employers from setting arbitrary time limits on when the new mothers can return to work.

The decision must be left up to the worker: a pregnant employee must be permitted to work as long

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as she feels fit and her doctor certifies she is able to work safely. The same standard applies to her return to work after childbirth.

Congress said pregnant workers must be given the final say—with their doctors, in some cases—over their work schedules, as would a worker recuperating from a heart attack or a broken leg.

Congress did not require companies to start new medical or sick leave plans. But where these exist or are offered in the future, Congress said the rules of eligibility must apply equally to women and men. Pregnant women cannot be held to a different standard of benefits.

The second part of the law, applying to the fringe benefit plans, took effect April 30. The plans promise to be both more costly and more controversial. And they also provide the broadest improvement of health care for women in decades.

Ruth Weyand, now an attorney with the Equal Employment Opportunity Commission, was co-chair of the coalition that lobbied Congress for the pregnancy disability bill. She predicts a vast improvement in health benefits for women.

In the 1930s, she noted, European countries restructured their health systems and offered new, centralized health and retirement plans for all workers. In most countries, the state paid for the health costs, with employees contributing part of the expenses.

In the United States, private employers convinced the Federal Government that they could do the best job of providing health and disability plans for their workers—and that these, in effect, were incentives to stay with a particular company. The government ultimately launched social security as a national retirement plan but left health and disability plans to private employers.

Weyand said the major health cost left out of these private plans, as they evolved in the subsequent decades, was coverage of pregnancy and childbirth. These expenses were covered, in contrast, under European plans.

In the United States, the average health plan offered by an employer provided reimbursement for 80 percent of most health expenses—but only 20 percent for pregnancy and often nothing at all for the frequent office visits, X-rays, or prenatal tests associated with pregnancy.

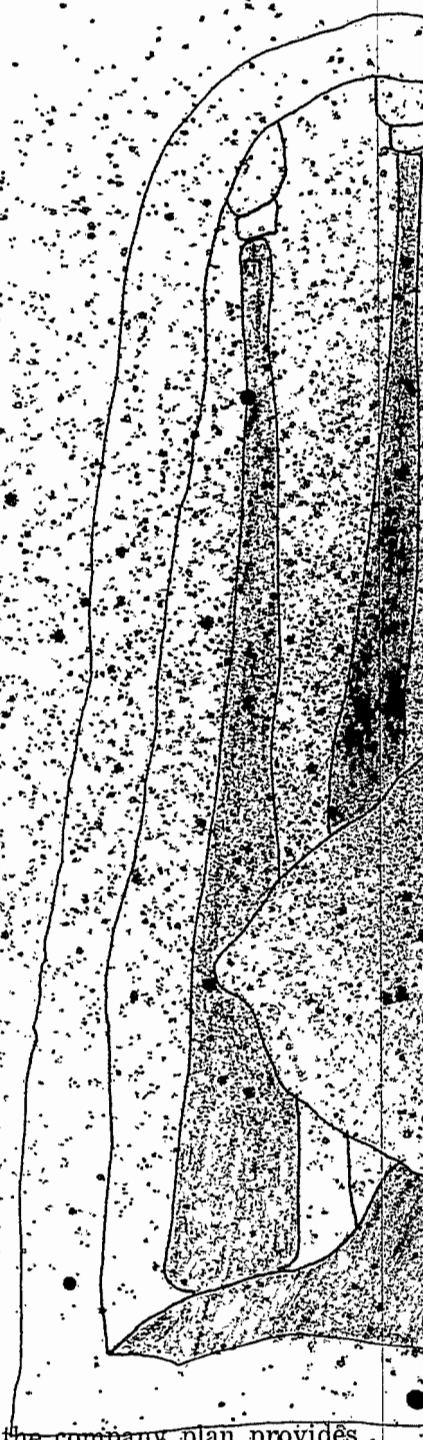
It has been common for plans to pay only a flat $250 for childbirth. The current average cost is $1,200 for a normal childbirth.

This has led to the United States having one of the highest rates of infant mortality and health complications for infants and poor mothers of any industrialized country, Weyand said. She said the new bill will go far to remedy these problems:

—if a health plan covers 80 percent of the costs of most medical expenses, that same percentage must be paid out for pregnancy and related medical costs.

—if a doctor certifies that a woman must be bedridden to avoid a miscarriage at any time during the pregnancy, her incapacity must be covered under a sick leave policy just as time off for any other disabling illness would be granted.

—if the company has a policy of transferring workers with temporary disabilities, such as weakness due to an operation, to lighter jobs, then this policy should apply to pregnant workers if they or their doctors believe it advisable.



—if the company plan provides 4 weeks' paid sick leave, that is the time a pregnant worker can apply toward disabilities of pregnancy or childbirth. If the plan provides 25 weeks, that same time could be applied toward a pregnant woman's absence. But actual disability must be proven and a company can request a doctor's certification—if such a request is made as well of male workers on extended disability leaves.

Employers had regularly denied paid sick leave or disability leaves to pregnant workers although their benefit packages provided payments for virtually all other disability conditions.

The disability pay issue

The law now says pregnancy, childbirth, and related conditions must be considered "disabling" under the definitions of these company plans—but it gives employers

leeway to attach conditions to granting such leave. It would be legal for a company to grant paid disability benefits to a woman recovering from childbirth in exchange for a pledge that she will return to the job—just as long as the company requires the same commitment in advance from other workers who apply for disability pay.

It was the disability pay controversy that provided the legal catalyst for the current rethinking of "women's role" and Congress' reaffirmation that working women deserve full protection of the law, including the right to equal fringe benefits.

Seven women on General Electric assembly lines filed suit in 1972 protesting the company's refusal to pay them sick leave or disability benefits when they were pregnant or recovering from childbirth. They also protested what was then GE's policy of requiring pregnant workers to take unpaid leaves after their third month of pregnancy—even when the doctors certified the women could work and when the women desperately neded those monthly paychecks.

Across the country, other challenges were surfacing to the network of company policies that excluded pregnant women from many fringe medical and sick leave benefits and that treated them arbitrarily as a class rather than as individual workers who had differing medical conditions with their pregnancies.

Federal district courts and appeals courts unanimously were ruling in favor of the women. A favorable ruling also was expected when the landmark test case made it to the Supreme Court —that of Martha Gilbert and the six other GE assembly line workers.

But instead the Court told GE and all other employers they could legally exclude pregnant women from benefits reserved for disabled employees without violating the 1964 Civil Rights Act or the 1972 amendments to it.

A company has the right to restrict its benefits, the Court said, as long as the exclusion did not discriminate against one sex. The GE plan covered virtually every disabling condition: vasectomies, facelifts, and hair transplants as well as the more traditional broken legs and arms.

The only exclusion was for pregnancy or childbirth. That was permissible, the Supreme Court said in a decision written by Justice William H. Rehnquist, because pregnancy is a "gender neutral" condition.

The December 7, 1976, ruling was met with incredulity in many quarters, including the congressional sponsors of the 1964 and the 1972 civil rights legislation who said the ban on sex discrimination clearly was written to encompass bias against pregnant workers.

As Rep. Pat Schroeder of Colorado noted caustically, the Court apparently rationalized its ruling against the GE women by saying the company could deny vital disability pay to pregnant women because if men got pregnant they, too, would be denied these benefits.

Sen. Harrison Williams of New Jersey, chairman of the Senate Human Resources Committee, said the Supreme Court obviously was out of touch with what has been happening in U.S. society in recent decades, where women by the millions have been taking full-time jobs—and rearing a family as well.

"Lurking between the lines of the Gilbert decision is the outdated notion that women are only supplemental or temporary workers —earning 'pin money' or waiting to return home to raise children full time," Williams said.

The Court ruling galvanized women's rights activists into immediate action on a strategy to overturn the ruling. The outcome was a coalition with civil rights groups, labor, church, and even some antiabortion groups who saw clearly that many low-wage women would have abortions if their company policies denied them medical and sick leave support for carrying a pregnancy to term.

Within a week of the Court's ruling, the Campaign to End Discrimination Against Pregnant Workers had been formed and was working with congressional supporters on a strategy to overturn the Court's decision and shore up legal protections for women workers.

This worked—but only because the pressure was kept on by the coalition, which ultimately grew to more than 200 groups.

The changing work force

The 22-month congressional debate on the discrimination encountered by pregnant workers provided a national forum for examining the dramatic changes in the work force that have taken place in recent decades, where women have taken full-time jobs and kept them in far greater numbers than any of the experts had predicted.

Five times as many mothers are working today as in 1950. More than 60 percent of the women in the prime years of 25–54 are working, triple the percentage of postwar years.

And—confounding most economists—the trend has been steadily toward more women working. This is partly because some women are making their way gradually into more interesting, better-paying jobs. Another force probably is the spiraling inflation that puts pressure on families for both husband and wife to work, even if one of them is stuck in a low-wage job.

Society's laws and attitudes have been slow to adjust to the reality of women as full-time, permanent fixtures in the labor force, however.

During World War II, millions of women poured into the jobs held almost exclusively by men who had left them for the war: carpenters, steelworkers, shipbuilders, doctors, and editors. "Rosie the Riveter" was a popular song used to cheer the women on as they enabled the economy to keep up production needed for the war.

But when the men came home, virtually all the women who had become veteran riveters or steelworkers were laid off. It was partly because the government had promised the men they would get their jobs back after they served military duty. It was partly because production patterns changed and fewer ships were built. But it was also because business, government, and the influential leaders in society decreed women should then go home and have babies.

Books, research articles, and films are only now being produced documenting the expulsion of many single or widowed women with children from these high-paying, better "riveting" jobs—expulsion because they were women and expulsion into the oblivion and lower living standard of minimum-wage jobs.

Many women wanted to marry and stay at home and rear

children—and the baby boom bore out the fact that millions did just that. But what has been eclipsed and is now being brought forth with research is the change in working circumstances forced on millions of women when society decided "their place" was at home, not in the factory.

The actual employment of women dipped sharply after World War II—as the baby boom began—and it took years for the statistical profile of women working to reach wartime levels again.

But that steady climb of women working never stopped once it began again, in the early 1950s.

Statisticians and labor economists didn't pay that much heed, however, and neither did business as it perpetuated the myth that women were only marginal workers, waiting to marry and lead a life dependent on a man.

In many cases, businesses would not hire a young single woman because they contended she would marry and quit. If the woman already was married, it was believed she would get pregnant and quit.

As late as the mid-1970s, banks and savings and loan institutions were found demanding that a wife be sterilized or prove she was taking birth controls pills before agreeing to include her income along with her husband's in their application for a home loan.

It was commonplace for department stores to deny credit to a newly divorced woman—even though she may have had credit at that store both during her marriage or before it. The assumption was that since the charge card was listed in her husband's name (at the store's insistence), only he earned the income and paid the bills. When there was a divorce, the credit record followed the

husband, leaving the wife with virtually no credit history.

Congress took action several years ago to ban credit discrimination based on sex, race, or national origin—although the Justice Department has been notably disinterested in hiring statisticians and other researchers to develop cases against the many businesses that still discriminate against women, in violation of the Fair Credit Act.

And some Labor Department economists have been working to get across the idea that the government's constant reliance on "the average family of four" is not a benchmark of much at all in today's world. That statistic assumes a working husband, a wife at home, and two young children. By the 1970s, only 6 percent of American families fit that description.

In the courts, unbroken strings of decisions upheld women's right to try for whatever jobs they wanted—invalidating the myriad of restrictive labor laws that had limited the hours women could work or the weights they could lift. These laws—which were mostly ignored during World War II when business wanted women to work—had been used to isolate women into dead-end, low-wage jobs.

By the late 1970s, many elements of society had come around to recognizing barriers that had been raised against women workers.

That's why the Rehnquist decision on the pregnancy disability case came as such a shock. It went counter to the trend—indeed, counter to what many members of Congress thought they had done.

During the months of Senate and House hearings on the legislation to overturn the Supreme Court ruling, the focus became the

outdated view business still holds of women workers.

Business treats women as marginal laborers who drop in and out of low-paying jobs between pregnancies, with no allegiance to any company, let alone to a career, some witnesses said.

This is traceable to the continued perception of women as—first and foremost—childbearers and only afterwards as potentially useful workers, they said.

Drew Days III, Assistant Attorney General in charge of the Civil Rights Division, told the hearings that discrimination based on pregnancy dramatically hampers the job options of women, keeping them clustered in low-paying, low-status jobs. Policies that prevent them getting medical and sick leave benefits when they are pregnant exacerbate their problems, he said.

"Uncovered medical expenses, loss of income and employment opportunities, and limitations on reinstatement rights all operate to make women—whether pregnant, potentially pregnant, or formerly pregnant—second-class citizens in the employment sphere," Days said.

"The fundamental purpose of Title VII (of the Civil Rights Act) as it prohibits discrimination on account of sex is to make men and women equals in the marketplace. To the extent that women employees are required to absorb economic costs and disadvantages because of pregnancy, this goal cannot be met," Days added.

Sue Deller Ross, formerly an attorney with the American Civil Liberties Union, who with Weyand headed the campaign to overturn the court ruling, said that "employers routinely fire pregnant workers, refuse to hire them, strip them of seniority rights, and deny them sick leave and medical benefits given other workers.

"Such policies have a lifetime impact on women's careers," said Ross, now a law professor at George Washington University. "Together, they add up to one basic fact: employers use women's role as childbearer as the central justification of and support for discrimination against women workers. Discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated.

The bill passes

The coalition's steady pressure paid off. Less than 2 years after the Gilbert-GE ruling, Congress overturned it with greatly strengthened protections against bias aimed at pregnant women—and, ultimately, all women.

Rep. Augustus F. Hawkins of California, chairman of the employment opportunities subcommittee that handled the bill, told the House that the bill would "go a long way toward ensuring the equal treatment of women in the workplace with respect to fringe benefit programs."

Despite overwhelming support for the concept, however, the bill was almost killed when House members on the Education and Labor Committee added provisions letting employers veto payments for abortions under company plans. The full Senate voted down a similar amendment.

After a summer-long impasse that continued until the final hours of Congress' session, a compromise was reached: employers can veto medical payments for abortion procedures but must cover the cost of any complications through the health and disability benefits.

What does the law mean to working women?

Weyand, who defended the GE women in their ultimately unsuccessful Supreme Court battle and then helped convince Congress to override the Court, said the law puts working women on a more equitable footing than before with their male colleagues. She predicted that all women would gain, not just those who might actually use the pregnancy benefits.

"The employer can't say, even subtly, 'We can't hire you for this job because you might get pregnant' or 'We'd have to put you through 15 months' training and what good would that do because you'd quit to have babies,' " she said.

Blue-collar women such as those who dominate the GE assembly lines probably will benefit most from the legislation.

"There has been more lenience about 'allowing' white-collar women to work after they become pregnant. But this has been slow in coming for blue-collar women. The men around them thought that women should go home when they began to 'show,' " Weyand said.

And the hearings also dramatized the economic vulnerability of many of these women.

One of the GE workers who testified was Sherrie O'Steen, who said she was thrown off the GE payroll and onto welfare with no food or heat for herself or her 2-year-old daughter as she waited out her pregnancy. At that time, in 1972, GE had a policy of requiring workers to take unpaid leaves after their third month of pregnancy. O'Steen, newly separated from her husband, pleaded for the company to let her work and was permitted to stay on a little longer. But then she was out in the cold—literally. During the months before

her son was born, she and the daughter walked twice a week to a neighbor's house a mile away for a hot meal. In between, they lived on water and cold sandwiches in an unheated house. Her first welfare check arrived after her son was born.

The O'Steens since have reunited and both the husband and the son born that winter came with Sherrie O'Steen to the House hearing to testify—with the famous feminist lawyers—for the pregnancy disability amendments.

There is evidence that many unions are using the new law as a minimum bargaining chip for greater gains for both women and men employees.

The Communication Workers of America recently negotiated a pact with the Bell System, for instance, that goes far beyond the new law's mandate to provide disability payments for pregnancies where an existing plan provides payments for other disabilities.

Employees with at least 6 months' service will be eligible for disability pay during absences for pregnancy-related conditions. All employees, no matter how long they are with the company, are eligible for an unpaid leave of absence to accommodate what the CWA calls "an anticipated disability" such as pregnancy.

Veteran workers can take extended disability leaves, with pay. For instance, a worker with 5 to 15 years' experience can get full pay for 13 weeks' disability leave and half pay for another 39 weeks; those with 20 to 25 years' experience can get full pay for 39 weeks' disability and half pay for 13 weeks' disability leave.

In addition, parents of either sex would be eligible under the CWA-Bell System plan to take unpaid leaves of absence to care for newborn children. This would include mothers who have just finished a period of disability leave that did not extend more than 6 months after delivery and parents of both sexes "in direct association with newborn children." This translates to mean parents of infants under 6 months of age before the unpaid leave begins.

In all these instances, the employees are guaranteed their job back—if not the identical one, then one of similar status and pay.

The trend in industrial jobs covered by union contracts has been toward more time off for new mothers and, increasingly, for new fathers.

Scandinavian countries have pioneered in these provisions, as in many other social programs. In Sweden, mothers or fathers receive 8 months' vacation and 90 percent of their earnings when a baby is born.

A similar policy in the United States appears nowhere on the horizon, especially with the cutback in social services due from the protests over high prices.

But the Pregnancy Disability Amendments do broaden the protection for millions of working women—especially the majority of women who do not have either wealthy husbands or strong unions to support them.

"This is an issue women won by fighting hard since the early 1970s," says Sue Ross. "It is extremely important that, when the Supreme Court turned out not to take Title VII seriously, we were able to overturn them.

"The pregnancy question is central to what has kept women in lower-paid jobs," she adds. "Employers still perceive women as childbearers. The point of this legislation is to say you have to treat them as individual people."

New Rights for the Handicapped

THE REHABILITATION ACT AND THE 1978 AMENDMENTS

By Roger B. Jacobs

The Civil Rights Act of 1964 prohibits discrimination based on race, sex, national origin, or religion. Originally, a large group of our population—the physically handicapped—was not covered by the provisions of Title VII. To remedy this omission, Congress passed the Rehabilitation Act on September 26, 1973, to redress some of the problems facing the handicapped.

Recently Congress provided additional rights in the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. The amendments, adopted November 6, 1978, include many significant changes and clarifications to the 1973 act.

The Rehabilitation Act of 1973

The 1973 law purports to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." Congress recognized the obvious underemployment of the more than 28 million adult Americans suffering from physical or mental handicaps and their potential contributions to the economy.

The act defines a handicapped individual as any person who has a physical or mental disability that constitutes or results in a substantial handicap to employment and who can reasonably be expected to benefit in employability from vocational rehabilitation services. A handicap is any physical or mental impairment that substantially limits a person's major life activities. The regulations promulgated in conjunction with Section 504 of the Rehabilitation Act define physical or mental impairment as:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs, respiratory, including speech organs, cardiovascular; reproductive; digestive, genitourinary, hemic and lymphatic; skin; and endocrine or
> (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Individuals covered under the act include those who, due to a physical or mental impairment, are likely to experience difficulty in securing, retaining, or advancing in employment. Also included are those who have recovered from previous disabilities, e.g., a heart attack, but may encounter problems in employment whether or not they are still handicapped. The act considers a qualified handicapped individual anyone who is capable of performing a particular job with reasonable accommodation to his or her handicap.

The act has a dual enforcement structure. Grants are provided to the States "so individuals can prepare for and engage in gainful employment," and Section 504 of the act prohibits handicap discrimination in federally-funded programs. Section 504 provides:

> No otherwise qualified handicapped individual . . . shall solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 503 requires all government contractors with Federal contracts in excess of $2,500 to "take affirmative action to employ and advance in employment qualified handicapped individuals." The provisions apply to subcontracts in excess of $2,500 also. Every agency and contractor and subcontractor must include an affirmative action clause in each of its covered government contracts.

The act provides for administrative enforcement of individual claims. Complaints are filed with the Department of Labor where appropriate action will be taken. The requirements of Section 503 may be waived with regard to a particular contract or subcontract, when the President determines (in writing) that it is in the national interest to do so.

The regulations under Section 503 require Federal

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contractors to make reasonable accommodations to the physical and mental limitations of an employee or applicant unless it would cause undue hardship on the contractor's business. Undue hardship is determined by factors including, but not limited to, business necessity and financial costs. Unfortunately, however, the government has placed major reliance on the contractor's good faith to use affirmative action to hire and promote handicapped workers.

The regulations provide that contractors and subcontractors holding a contract of $50,000 or more and with 50 or more employees shall prepare and maintain an affirmative action program within 120 days of the commencement of the contract, setting forth the contractor's policies, practices, and procedures. Contractors must review and update their affirmative action programs annually. In addition, contractors must invite those who believe they are "handicapped" under the act and who wish to benefit by the affirmative action program to identify themselves. Information must be voluntarily provided and it will be kept confidential. The contractor should also seek the advice of the applicant or employee regarding his employment.

Affirmative action must be taken to:

> employ and advance in employment qualified handicapped individuals at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeships.

Contractors must review their job requirements to ensure that they are job related and consistent with business necessity and safe performance on the job. The regulations also provide that contractors must take positive steps to employ handicapped individuals, such as engage in recruitment at educational institutions that train the handicapped and make these opportunities known.

The enforcement procedure

Any individual may file a written complaint within 180 days from the date of the alleged violation. The Department of Labor processes these complaints through an investigation stage. If action is contemplated by the Department, a complainant may request review within the agency. Where noncompliance is indicated, conciliation is utilized to secure compliance. If conciliation is unsuccessful, the contractor may request a hearing before the Director of the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor. To enforce such affirmative action, the Director may seek judicial enforcement, withhold payments due on the contract, terminate the contract, or disqualify the contractor from future government contracts.

Since enforcement responsibilities have been delegated to OFCCP, hearings and procedures are governed by OFCCP regulations issued under Executive Order 11246. Enforcement for recipients of financial assistance from HEW under Section 504 is within the Office for Civil Rights at HEW.

The OFCCP reported in June 1977 that it had awarded $300,000 in back pay in 70 cases since October 1975, for handicap complaints. Also, in 1977 OFCCP issued administrative complaints, following conciliation attempts, against five government contractors—Trans World Airlines; United Airlines; E.E. Black, Ltd.; General Dynamics Corporation; and Hercules, Inc.—for failure to take reasonable measures to employ qualified handicapped individuals. In addition, the Labor Department has recently reported an intensified effort of processing and prosecuting handicap job claims.

Private cause of action

The most important issue to be settled is whether an individually aggrieved handicapped person has a "private cause of action." In other words, may he or she sue in Federal court to enforce rights under the Rehabilitation Act?

Section 505(a) of the 1978 amendments provides individuals with the same relief as is currently available under Title VI of the 1964 Civil Rights Act. In *Lau v. Nichols* (1974), the U.S. Supreme Court found a private cause of action for individual complainants under Section 601. (Section 601 bans discrimination based on race, color, or national origin in any program or activity receiving Federal financial assistance.)

The leading preamendment decision comes from the court of appeals in Chicago. In *Lloyd v. Regional Transportation Authority* (1977), the Seventh Circuit Court of Appeals declared that "it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action." *Lloyd* involved a class action suit on behalf of all mobility disabled persons

in northeastern Illinois who were denied meaningful usage of federally-financed mass transit. The plaintiffs relied on Section 504 of the Rehabilitation Act of 1973 to assert an implied private cause of action.

The court based its analysis of Section 504 on its similarity to Section 601 of the Civil Rights Act of 1964. Section 601 was construed by the Supreme Court, in *Lau v. Nichols,* to provide a private cause of action. The Seventh Circuit held *Lau* to be dispositive "because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964. . . ."

The circuit court ruled that Section 504 created a "Federal right" (to sue) in favor of the plaintiff. The court also said that the report of the Senate Labor and Public Welfare Committee indicates a legislative intent to infer such a remedy. The court stated:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of the Civil Rights Act of 1964, and . . . [the] Education Amendments of 1972. . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on basis of handicap. . . .

The court of appeals found the implementation of a compliance program like that under the 1964 Civil Rights Act, "would ensure administrative due process, provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*" (Emphasis added.) Thus, the court concluded that a legislative intent to create such a remedy must be inferred.

The Seventh Circuit further ruled that a private cause of action was consistent with the purpose of barrier-free transportation, and that a suit under Section 504 would not be traditionally relegated to the States. Thus, the court held Section 504 implicitly provides a private remedy since all four tests prescribed in a previous Supreme Court case are satisfied.

Recently, in *Regents of University of California v. Bakke* (1978) Justice Byron R. White wrote a separate opinion specifically concerning the question of whether Title VI of the Civil Rights Act of 1964 provides for a private cause of action. He concluded that the failure of Congress to *expressly* include such a provision clearly indicated legislative intent. Justice

White declared that, indeed, "it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles of the Act, intended silently to create a private cause of action to enforce Title VI."

Since the other opinions in *Bakke* did not particularly address a private right of action, Justice White's opinion may suggest the majority thinking of the Supreme Court regarding Title VI. If the Court rejects its prior ruling in *Lau v. Nichols*, the provision for a private right of action in the 1978 amendmay be seriously jeopardized.

Section 505 provides:

> (a) (1) The remedies, procedures, and rights set forth in . . . the Civil Rights Act of 1964 . . . shall be available, with respect to any complaint under section 501 of this act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.
>
> (2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this act.
>
> (b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In addition, the nondiscrimination provisions of Section 504 are applicable to the Federal Government and the U.S. Postal Service. The definition of handicapped person, as amended, states that a "handicapped individual" is any person who

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(ii) has a record of such an impairment, or

(iii) is regarded as having such an impairment.

For the purposes of Sections 503 and 504, a handicapped individual does *not* include any individual who is to permit reasonable attorneys' fees to be recovered alcohol or drugs prevents such individual from per-

forming the duties of the job in question or whose employment, by reason of such current alcohol or drug usage, would constitute a direct threat to property or the safety of others."

The substance of the additional remedy provisions is to permit reasonable attorneys' fees to be recovered under Title VI of the Rehabilitation Act; Title VI remedies, procedures, and provisions of the 1964 Civil Rights Act are available to persons aggrieved under Section 504 of the Rehabilitation Act; and Title VII relief may be granted to employees and applicants for Federal employment. However, the 1978 amendments specifically permit a court to take into account the reasonableness of the cost of any necessary workplace accommodation and any appropriate alternatives available.

The 1978 amendments should provide additional relief for the handicapped and a much-needed vehicle for Federal court relief. One must be cognizant of the potential quicksand in the Title VI approach in light of Justice White's opinion in *Bakke*. Also, individual discriminatees have been successful urging several other bases of jurisdiction, e.g., violation of due process and equal protection of the 14th amendment.

The courts have stated that conclusive or irrebuttable presumptions may not be employed to deny jobs to the handicapped. That is, the handicapped may not be disregarded as a group. Individual testing, based on job-related criteria, is the rule. Employees, also, may not be discriminated against on an anticipation of future incapacity or disability benefits. Employment decisions must be based on present abilities of an individual to perform a specific job. Whether or not employers may properly consider promotability is not the subject of this article but raises a critical question to be resolved by future study and litigation.

States have been according greater protection to handicapped people than ever before. Whether or not an aggrieved handicapped individual should seek State court relief involves a case-by-case determination based on the relevant facts and circumstances and specific State law. A general trend suggests more State protection, but individual State predispositions are too varied and lengthy to detail in this discussion.

It is likely that the 1978 amendments will be liberally construed and provide comprehensive, remedial, and rehabilitative programs for the handicapped. A lesser result will simply be inadequate. The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 added much needed vitality to the Rehabilitation Act, hitherto a legislative "paper tiger."

By Leo Pfeffer

In June of 1977 the Supreme Court handed down its decision in the case of **Trans World Airlines v. Hardison,** involving the employment rights of Sabbatarians. Over the dissents of Justices William J. Brennan and Thurgood Marshall, the Court held that TWA had not violated the legal rights of an employee by discharging him for refusing, because of his religious conscience, to work on Saturdays.

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SABBATARIANS AND THE COURTS

COURT DECISIONS OVER THE YEARS LEAVE RELIGIOUS QUESTIONS UNRESOLVED

The decision was obviously a disappointment to Jews and to members of those Christian denominations, such as Seventh Day Adventists and Seventh Day Baptists, who, like Jews, observe the Sabbath on the seventh rather than on the first day of the week. (Hardison himself was a recent convert to the Worldwide Church of God, a young but rapidly rising Christian denomination that follows the Jewish practice of observing the Sabbath from sundown on Friday to sundown on Saturday.) But it was also a disappointment to many Americans concerned with the cause of religious freedom.

The **Hardison** case was the latest but will certainly not be the last case to present the Court with the difficult task of reconciling the claim of Sabbatarians that subjecting them to discrimination for engaging in business or labor on the first day of the week violates their constitutional rights, with the conflicting claim that not to do so would violate the constitutional rights of others who have no religious convictions forbidding business or labor either on the first or the seventh day of the week.

We will return to the **Hardison** case later and consider it in detail, but a full understanding of its meaning and effect requires an examination of previous efforts on the part not only of the Supreme Court but also of Congress and State legislatures to reconcile the conflicting claim of the individual's conscience on the one hand and the community's interest in a uniform day of rest on the other.

Sunday closing laws

The conflict first reached the Supreme Court in 1951 in the case of **People v. Friedman.** Sam Friedman was an Orthodox Jew who owned a small kosher meat retail store in the Lower East Side of New York City, then an almost completely Jewish neighborhood. He kept his store closed from sundown on Friday until Sunday morning, when he opened for business for a few hours. He was summoned to court for violating the State's Sunday closing law, and at the trial his attorney challenged the constitutionality of the law on the ground that it violated the first amendment, which forbids laws respecting an establishment of religion or prohibiting its free exercise, as well as the 14th amendment, which forbids denial of the equal protection of the laws.

In respect to the establishment claim, Friedman's argument was that by compelling merchants to keep their stores closed on the Christian Sabbath New York breached the principle of separation of church and state, and that accordingly the law was unconstitutional in its entirety. As for the free exercise claim, he asserted that by requiring Sabbatarians to keep their stores closed on Sunday the State was in practical effect coercing them to keep them open on Saturday, since as a realistic matter they could not stay in business if their stores were closed two days a week while non-Sabbatarian competitors kept theirs closed only one day a week.

In respect to the equal protection clause of the 14th amendment, the argument was twofold: neither the statute's crazy-quilt pattern of inclusions and exclusions (e.g., it was permissible to sell bread and magazines but not meat or books on Sundays) nor the notorious unequal enforcement of the law even among merchants to whom it was applicable constituted equal protection.

None of these arguments persuaded the State courts or the U.S. Supreme Court when an appeal was taken in 1951. The Court simply dismissed the appeal without even bothering to write an opinion setting forth its reasons for rejecting it. Ten years later, in the Sunday Law Cases **(McGowan v. Maryland, Two Guys from Harrison-Allentown, Inc. v. McGinley, Gallagher v. Crown Kosher Super Market,** and **Braunfeld v. Brown)** the Court again considered the same constitutional claims asserted in the Friedman case, but this time it did write opinions discussing and passing upon them. The net result, however, was the same: neither the Sunday closing laws nor their enforcement contravenes the establishment clause, the free exercise clause, or the equal protection clause.

With respect to the establishment contention, only Justice William O. Douglas felt that it had merit. The other Justices recognized that when originally enacted Sunday closing laws were in a real sense religious laws, and thus incompatible with a constitutional prohibition of laws respecting an establishment of religion. Constitutionality, however, must be judged by present and not past realities. Today Sunday laws have lost their religious essence and are justifiable as health or welfare measures, to assure that people enjoy one day of rest in seven.

There can be little doubt that there is substantial validity to this argument. If the government can constitutionally require employers to provide their employees with a safe and sanitary place in which to work, and can impose laws restricting the hours during which they can be required to work, it can similarly require that they be allowed one day off in every seven.

The fact that Sunday, rather than Tuesday or Friday, is chosen for that purpose does not render the law unconstitutional, since Americans have long been accustomed to accept Sunday as the day of rest and thus would be least inconvenienced by translating that preference into the uniform day of rest. If one asks why a uniform day of rest is required and suggests that as far as one's health and welfare is concerned it does not matter whether he rests on Wednesday rather than Sunday, the answer, said the Court, lies in the fact that to ensure enforceability a uniform day is necessary; if every employer could choose whichever day he wished to close his business, it would as a practicable matter be impossible to enforce store or shop

closing laws.

It is because of this practical necessity that it is constitutional to enforce the closing law even against Sabbatarians. Policemen patrolling the streets cannot be expected to know which storekeeper is truly a Sabbatarian and which keeps his business closed on Saturday because he has less competition and can make more money if he keeps his store open on Sunday. If a Sabbatarian should be allowed to keep his store open on Sunday, that judgment, the Court said, should be made by the legislature, not the courts.

After the decision in these cases was handed down, the legislatures in a number of States accepted the invitation and did enact amendments to their Sunday closing laws to exempt Sabbatarians. This time the non-Sabbatarians, or at least some of them, felt aggrieved, sufficiently so to bring lawsuits challenging the constitutionality of Sabbatarian exemptions. One of these, **Arlan's Department Store v. Kentucky,** reached the Supreme Court in 1962.

Interestingly enough, counsel for the department store presented the principal argument that had unsuccessfully been urged on the other side in the Sunday Law Cases of the previous year. The exemption, he argued, violates the establishment clause ban on laws preferring some religions or religionists over others. By allowing Sabbatarians to engage in business or labor on Sunday while denying that privilege to non-Sabbatarians, Kentucky had preferred the religions (Judaism and seventh-day-observing Christianity) over those that observe Sunday as the divinely ordained day of rest.

Arlan's department store was accorded the same treatment that Friedman's butcher shop received 11 years earlier—the Court dismissed its appeal without bothering to write an opinion explaining the reasons for the dismissal. In sum, what the Court held in the various cases involving Sunday closing laws was that the laws themselves were constitutional, even with respect to Sabbatarians, but that legislatures could, if they wished, provide exemption for Sabbatarians.

The Court's decision in the **Braunfeld v. Brown** case was a split one. Three of the nine Justices were of the view that Braunfeld, an Orthodox Jew, had a constitutional right to keep his business open on Sundays, if he did not disturb the rest and repose of those who observed Sunday as their day of rest. The other six were of the contrary view but could not agree exactly on the reasons for their disagreement; the opinion of Chief Justice Earl Warren setting forth reasons for rejecting Braunfeld's claim that he had been denied his rights under the free exercise clause was joined in by only three other members of the Court and thus could not be designated a majority opinion. However, split decisions are as legally binding as unanimous ones, at least until they are overruled by the Court in a later decision, and up to the present time the Braunfeld decision has not been overruled.

As noted, in the years after the Braunfeld and Crown Kosher decisions were handed down, a number of States, including New York (in which the Friedman case arose), Massachusetts (which gave rise to the Crown Kosher case) and Pennsylvania (where Braunfeld's store was situated), amended their Sunday closing laws so as to permit owners of small retail stores to remain open on Sunday if their religious conscience forbade them to do business on Saturday (or, in some statutes, any day of the week other than Sunday) and if operation of their businesses on Sunday did not disturb the rest and repose of the neighborhoods in which their stores were situated.

In later decisions some States went even further. As of the present writing the State courts in 13 States, including New York and Pennsylvania (but not Massachusetts), have ruled their respective Sunday closing laws to be unconstitutional, and in doing so accepted the validity of one or more of the arguments that had been rejected by the Supreme Court in the Friedman case of 1951 and the four Sunday Law Cases of 1961.

These facts should not be taken to mean that the problems of Sabbatarian storekeepers have completely disappeared. There are still some States, such as New Jersey, in which Sunday closing laws have not been held unconstitutional as violations of the equal protection clause. As recently as January 23 of this year the United States Supreme Court, in the case of **Vornado, Inc. v. Degnan,** has rejected an appeal from a decision upholding constitutionality.

Moreover, there are also States in which Sabbatarians do not have the benefit of a statutory exemption, even one as narrow as the New York exemption, which is limited to small so-called "mom and pop" stores, that is, stores operated by the owner and his family without outside help. It is by reason of that fact, among others, that Congress felt it necessary to enact the amendment to the Civil Rights Act of 1964 that came to the Supreme Court in the **TWA v. Hardison** case. However, before we return to that case we will first examine another instance in which the Supreme Court passed upon a claim by Sabbatarians that they were subjected to religious discrimination.

Sabbatarians and unemployment compensation

Sunday closing laws are not the only arena in which some States have refused to grant religious exemptions. Unemployment compensation laws present another instance in which courts are called upon to decide between the competing claims of social welfare and religious liberty. Under these laws an unemployed applicant for insurance benefits must be willing to accept suitable employment; if he refuses, he forfeits his right to benefits. The problem has arisen whether a

seventh-day observer—Christian or Jew—who refuses to accept a proffered position that entails work on Saturday thereby forfeits his right to unemployment benefits.

Fortunately the unemployment insurance boards and courts in the overwhelming majority of States have construed their laws not to require forfeiture in cases where the applicant has for religious reasons always abstained from work on Saturday, and is applying for benefits in a locality where it is generally feasible to obtain a suitable position not requiring work on Saturday—though at the particular time no such position is available. In a few States, however, the boards took a contrary position, and disqualified conscientious seventh-day observers.

The issue reached the supreme court of Ohio in 1946. In that year the court affirmed a lower court decision that had refused to direct the board to grant benefits to an Orthodox Jewish applicant who had refused to accept a job requiring Saturday work. The lower court disposed of the religious liberty issue in the following statement:

> Nothing in the refusal to grant compensation to the plaintiff can be considered in any way an interference with his right to worship in any manner he sees fit or any interference with his rights of conscience. If he wishes to attend his church on Saturday that is his right. No one is attempting to interfere with that constitutional privilege. But what the plaintiff is saying is that, "although my conscience will not permit me to work on Saturday, I should receive the same compensation as if it did not, and that if you refuse to give me such employment compensation, you are discriminating against me." In passing it will be noted that the section of the [Ohio] Constitution referred to also provides "and no preference shall be given by law to any religious society." Only by the employment of inverse logic can the plaintiff claim discrimination in the refusal to grant him unemployment compensation.
>
> If the [plaintiff's contention] be sustained, certainly, there would be discrimination, but in favor of the plaintiff. All other persons except those holding conscientious scruples would be required to accept employment and be barred from such compensation if they did not. Certainly, this could be nothing less than discrimination against them.
>
> The predicament of the plaintiff is not overlooked. He is bound by his conscience to refuse work on Saturday. If work on that day is offered, he feels he must refuse it. If he accepts the work, he, of course, will not be entitled to unemployment compensation. If he refuses the work, then he has denied his availability for it and disqualified himself for compensation.
>
> His solution is to refuse the work and still claim unemployment compensation. This he cannot do, for he has rendered himself not available.
>
> Nothing in section 1, Art. XIV of the Constitution of the United States requires that unemployment compensation be given to one who refuses for any reason to work upon any given day of the week, not excluded by law as a day of labor.

Six years later, in the case of **Heisler v. Board of Review,** an appeal was sought to be taken to the United States Supreme Court from a similar decision, but the Court dismissed the appeal for want of a substantial Federal question, thus indicating its opinion of the complete lack of merit in the contention that the statute so applied violated the 1st or 14th amendments. However, the Sabbatarians persisted, and ultimately in the 1963 case of **Sherbert v. Verner** their persistence was rewarded.

This case involved a Seventh Day Adventist who was discharged by her employer because, when the plant changed from a 5-day to a 6-day week, she would not work on Saturday. When she was unable to obtain other employment because of her unwillingness to work Saturdays, she filed a claim for unemployment compensation benefits under the compensation law of the State (South Carolina). The law disqualified from benefits a person who "without good cause" refused to take a suitable position offered him. The State unemployment compensation commission ruled the claimant's refusal to accept a position requiring Saturday work was "without good cause" and therefore she was not entitled to unemployment benefits. The ruling was affirmed by the State courts, and the claimant appealed to the United States Supreme Court.

With two Justices dissenting the Supreme Court reversed the decision and ruled that the denial of benefits to the claimant constituted an infringement of her constitutional rights under the first amendment. The disqualification for benefits, the Court held, imposed a burden on the free exercise of religion. The consequence of such a disqualification to religious principles and practices, it continued, may be only an indirect result of the State's action, but this fact does not necessarily render it immune from invalidation under the first amendment.

Here not only was the claimant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forego that practice was unmistakable. The ruling forced her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against the claimant for her Saturday worship, and both are equally unconstitutional.

The Hardison decision

With this background we can now return to the **Hardison** case. At issue was the serious constitutional question of whether the government can forbid employers from refusing to hire or from firing persons who will not work on their Sabbath because of religious conviction. Rather than deciding this question, however, the Court chose to base its ruling on nonconstitutional grounds. This marked the third time in less than 7 years that the Court avoided confronting directly the conflicts that arise when an employee's religious beliefs interfere with the demands of an employer or the restrictions of a union seniority system.

As noted, Hardison was a recent convert to the Worldwide Church of God, a Christian denomination that follows the Jewish practice of observing the Sabbath from sundown on Friday to sundown on Saturday. He worked as a clerk in TWA's Store Department in Kansas City, which operates 24 hours a day, 365 days a year. Like other employees, he was subject to the seniority system contained in the company's collective bargaining agreement with its union.

Upon his conversion to the Worldwide Church of God, Hardison informed the manager of his department and was transferred to an 11 p.m. to 7 a.m. shift that did not include the Friday night-Saturday morning hours. Some months later, however, there was an opening in the day shift in another building, which had an entirely separate seniority list, and Hardison bid for and received a transfer to that building. While Hardison had sufficient seniority to observe his Sabbath in the first building, he was second from the bottom on the seniority list in the second building and could not receive an assignment excluding Saturdays unless the union consented.

The union was unwilling to violate the seniority provisions in its contract; in the meantime, the position from which Hardison transferred had been filled. Hardison offered to work only four days a week for four days' pay rather than violate his religious obligations, but the offer was rejected by the company. Upon his refusal to report for work on Saturday, he was discharged for insubordination.

Hardison sued in a Federal district court on the basis of the Civil Rights Act of 1964 which, while aimed principally at securing equality for blacks and other racial minorities, included in its zone of protection persons discriminated against because of their religion. The act provided for administration by the Equal Employment Opportunity Commission (EEOC), which issued a regulation in 1967 imposing upon employers the obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business."

In 1971 the case of **Dewey v. Reynolds Metals Company** reached the Supreme Court, requiring it to decide whether the company could discharge an employee who for religious reasons refused to work on Sunday. The company argued that the EEOC had no authority to adopt its 1967 regulation and that, in any event, the regulation was unconstitutional since it constituted State and to religion in violation of the first amendment. Only eight Justices heard the case, and they split 4 to 4. In such a deadlock, the rule is that the decision appealed from below—which in this case favored the employer—is affirmed, but no opinion is written and therefore no reasons given for the ruling.

However, because of the **Dewey** decision, Congress, in 1972, amended Title VII of the Civil Rights Act expressly to adopt the EEOC's 1967 regulation, making it part of the law.

In 1976 the same question again came to the Supreme Court in **Parker Seal Company v. Cummins,** this time from a different circuit. In this case the lower court decided in favor of the employee and ruled that the amended law did not violate the first amendment. Once again the Court split 4 to 4 and no opinion was written.

Since a law cannot be constitutional in one part of the country and unconstitutional in another, it was inevitable that the question should again come to the Court, as it did rather quickly in the **Hardison** case. Now, however, a full complement of Justices sat on the bench. There was another added factor in the **Hardison** case as well; not only the employer but also the unions, who had a collective bargaining agreement with TWA, opposed what they deemed to be preferential treatment demanded by Hardison.

Hardison lost before the district court, which held that TWA had sought to make "reasonable accommodations" to Hardison's religious needs and that any further accommodation would have worked an undue hardship on the company. But at the same time, the court held that the law itself was constitutional and did not violate the first amendment's prohibition against laws respecting an establishment of religion. TWA and the union noted the Supreme Court's definition of a "law respecting an establishment of religion" as one that does not have a secular purpose, or has a primary effect that either advances or inhibits religion, or involves excessive governmental entanglement with religion.

The 1972 amendment to the Civil Rights Act of 1964, they claimed, violated all parts of this three-pronged test; its purpose and primary effect were to advance the religion of those who observed Saturday as the divinely ordained day of rest and its enforcement would result in governmental entanglement with religion. As for the unions, the district court held that while the act was applicable to them, it did not require them to accommodate Hardison's belief

contrary to their seniority systems.

Hardison appealed to the court of appeals, which reversed the district court's decision. It agreed that the law was constitutional both as to the company and as to the unions, but it did not agree that the company had attempted to make a reasonable accommodation to Hardison's need, or that it would have suffered undue hardship if it were required to make further accommodation. It noted, for example, that TWA could have accepted Hardison's offer to work four days a week for four days' pay. Or it could have filled Hardison's Saturday shift from some 200 other available employees competent to do the job. While this alternative would involve some premium overtime pay, that could hardly be considered undue hardship to TWA.

Now it was the turn of TWA and the unions to appeal, this time to the Supreme Court. Over the dissents of Justices Brennan and Marshall, the Supreme Court reversed the decision of the court of appeals and ruled in favor of both TWA and the unions. In an opinion written by Justice Byron R. White, the majority did not reject the holdings of the district court and the court of appeals that the law was constitutional. Nor, on the other hand, did it approve the holding that it was constitutional. The Court simply postponed the question of constitutionality, deciding that TWA and the unions had established that they had made reasonable accommodation to Hardison's religious needs and that further accommodation would have resulted in undue hardship on the conduct of TWA's business and upon the unions' members.

The district court had held that TWA did all that could reasonably be expected of it—including efforts to find Hardison another job—so that he would not be compelled to violate his religious obligations. The Supreme Court agreed with this finding. While neither a union agreement nor a seniority system may be employed to violate a statute, the Court said, the Civil Rights Act did not require TWA to take steps inconsistent with an otherwise valid agreement. Without a clear and express indication from Congress, the Court could not accept the contention that an agreed-upon seniority system must give way to accommodate religious observances. Nor, the Court ruled, did the statute require unions to override seniority rights acquired through collective bargaining in order to accommodate the religious needs of some of its members.

The most critical aspect of the Court's opinion, however, is to be found in its concluding paragraphs. To require TWA to pay extra in overtime costs, the Court held, constituted undue hardship—a hardship that entails more than a **de minimus** (minimal) cost. The fact that Hardison is only one person and the added cost to a corporation as large as TWA would be small is irrelevant; if an exception is made for him, the same claim may be asserted by countless other workers, not only those whose religion forbids them to work on Saturdays but also countless Christians who will not work on Sundays.

In such cases, the resulting added cost, even to a large company like TWA, could well be substantial. Moreover, deciding in favor of Hardison would constitute discrimination against non-Sabbath observers. Unless clearly directed to do so by Congress, the Court will not construe a statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Two concluding comments are appropriate here. First, while the **Dewey, Cummins,** and **Hardison** cases all involved Sabbath observance, the scope of the statute goes far beyond that, including such religious mandates as not to cut one's hair or beard, not to wear sleeveless dresses, or not to salute the flag. The **Hardison** decision does not give sufficient light to predict with assurance how the Court would respond to these situations, although the tenor of the opinion suggests that it would be no more sympathetic to the claims of the employees in such situations than it was in respect to Hardison.

Second, it reasonably can be assumed that the Court will not be able to avoid forever the constitutional questions raised by the **Hardison** case. Senator Jennings Randolph of West Virginia, himself a Seventh Day Baptist, has announced that he will seek amendment of the law so as to make clear that Congress intended to accord protection to Sabbath observers in Hardison's position. Representative Robert F. Drinan of Massachusetts has already introduced in the House a measure seeking the same end. If and when such an amendment is enacted it will be difficult for the Court to rule the law unconstitutional in the light of its prior rulings, such as the decision in **Sherbert v. Verner** or the 1972 decision in **Wisconsin v. Yoder,** where the Court held it unconstitutional to punish Amish parents who refuse to send their children to high school because that would violate the religious conscience of both the pupils and their parents.

Nevertheless, experience has shown that it is a risky venture to predict what the Supreme Court will do on the basis of what it has done in the past. Should Congress amend the 1964 Civil Rights Act to make it clear that it applies to situations such as that presented in the **Hardison** case, and should the Court decide to rule the statute unconstitutional, it will be faced with the necessity of reconciling its decisions with prior decisions upholding the constitutionality of laws exempting conscientious objectors from military service. The plight of the nonobjector who must take the objector's place and as a result risks losing his life in combat would seem to be far more serious than that of the company which has to pay time-and-a-half for a substitute or that of the fellow employee who would prefer not to work on Saturdays.

The Condition of Civil Rights Advocacy

EMERGING FROM DESPAIR WITH NEW STRATEGIES FOR PROGRESS

By Larry Riedman

Many who have worked for the cause of civil rights have voiced a fear akin to panic that the growing social and political restiveness of the American public imperils the civil rights gains of the past few decades.

For example, the 1979 report of the National Urban League cites deteriorating economic conditions and the public's "new negativism" as pressures that have brought black America, in the words of NUL President Vernon E. Jordan, Jr., to "the brink of disaster." In a similar tone, Senior Editor Lerone Bennett of *Ebony* told a March 1979 conference in Philadelphia that the current period is "the most severe crisis for blacks since the Civil War."

Encountering such despairing analyses, one wonders whether the "new negativism" is a white or a black, a conservative or a liberal, malaise. And one wonders whether such leaders, perceiving black America to be alone at the brink, may be falling into an "endgame" strategy for the civil rights struggle—a form of advocacy dulled and truncated by despair.

In contrast, I see the current prospects for the progress of minorities and civil rights as somewhat less than totally bleak—a point of view based on the conviction that the current situation is still largely susceptible to the influence of those of us working in the cause of civil rights.

Our fellow citizens indeed harbor vast measures of fear, resentment, and suspicion, but there is evidence that these emotions may not yet have crystallized as attitudes with clear political implications. The popular "reaction" against civil rights and "protected classes" seems more likely at about the same stage of development as the tentative efforts to reevaluate energy policy, the accountability of public officials, and government regulatory activities. That is to say, the body politic is not very far past the point of having stood upright, rudely awakened, with an impulse to move.

Neoconservatives have been quickest to suggest directions, evoking even a few lurching strides toward what those concerned for the cause of equality have correctly perceived as an abyss. Civil rights leaders have also responded quickly, but their familiar statements based on the tried-and-true, dearly-held attitudes, perspectives, and practices of the last era of civil rights progress have not succeeded in renewing the momentum for the cause.

This early failure has been compounded by being followed by even less apt apocalyptic warnings—less apt because the initiative remains very much ours to seize. Civil rights advocates *can* turn

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this crisis into an opportunity, *can* turn reaction into reform and progress—but we will have to modify or abandon some of our most familiar characterizations of our fellow citizens, our adversaries, ourselves, and our way of work.

Public opinion

Fear and alarm breed stereotyping, and civil rights workers are not exempt. We have responded to such alarming developments as reverse bias suits, Proposition 13, the resurgence of the Klan, the new austerity, and white flight by trying to fit complex motives and attitudes into the simpler framework of historical racism.

For example, Lerone Bennett, in the same address quoted earlier, identified racism and the subjugation of blacks as "still the dominant passion of America." He also asserted that every white American remains transfixed by the blond-haired, blue-eyed ideal. Kenneth Clark told the same meeting that "contemporary sophisticated racism now comes under the guise of nonracism" and spoke acidly of "northern liberal sophisticated racists." For such observers as these, it is merely the mechanisms of deliberate oppression and exploitation that have become subtle and complicated—the underlying public mood remains monolithically hostile to civil rights.

Admittedly, opinion sampling continues to show distressingly high levels of white hostility to many aspects of equality and integration, and such resistance needs not only to be denounced in its practitioners but publicized in those quarters where the myth prevails that discrimination has ended. However, of at least equal importance for those working for civil rights is that during the mid and late 1970s, when many of us assumed that a resurgence of popular racism underlay judicial and legislative setbacks, according to some indicators racial tolerance actually *grew* regarding such volatile, emotional practices as school desegregation, interracial marriage, and affirmative action.

For example, in the period 1973–78, the Gallup poll recorded declines in both the North and South in the proportions of white parents reluctant to send their children to half-black and majority-black schools. For 1972–78, Gallup recorded increases in approval of interracial marriage.

Also, an April 1979 Barnhill-Hayes study of employer attitudes concluded that affirmative action, while often incompetently implemented, "has largely become a 'fact' of corporate life" and "is not simply the cause of activists only." Of particular interest in the post-*Bakke* era are Gallup's findings (reported by conservative columnist Nick Thimmesch) that a majority of college students favors government-sponsored, free remedial courses for minority applicants at the same time that a majority of students opposes "preferential treatment."

Along with these attitudinal developments, Americans may have acquired a greater sophistication about the predicament of minorities. In the crucial area of employment, for example, an October 1978 national opinion survey by Public Research found 30 percent of all respondents listing discrimination as a cause of minority unemployment and 45 percent citing lack of basic skills. Pessimists will surely find evidence of the persistence of sterotyping in the fact that 51 percent of all respondents listed high welfare and unemployment benefits as a cause of minority unemployment—but that figure was *lower* than the 57 percent of respondents who cited that factor as a cause of *overall* unemployment.

These bits of evidence are hardly conclusive, but at the least they suggest the need for looking behind the setbacks that have held our attention. Such shifts in public opinion on racial issues suggest that more widely-reported episodes like the resurgence of the Klan, recent Philadelphia election rhetoric, and the proliferation of reverse discrimination suits may be newsworthy not as representative features of the emerging social and political landscape but as anomalies.

For those working for civil rights, acknowledging that our fellow Americans have some residual better tendencies should both raise hopes and suggest alternatives to endgame tactics. Such an acknowledgement would be a way out of a box we have been busily constructing. The civil rights camp's criticisms of the public emerge more and more often as condemnations, a writing off of the public. They are frank announcements of minimal expectations—and like the stereotyping, despairing teachers of "hopeless" minority children, we are not surprised when these expectations are "confirmed" by subsequent poor performance.

We have, in effect, joined those on the right who proclaim that the low road of self-interest and suspicion of fellow citizens is appropriate for Americans. Instead, civil rights advocates ought to be shaping a positive criticism of the "new negativism"—a criticism that leads persons to the discovery of their latent sympathies and

ideals, rather than merely to the fatiguing task of reining in their fears and hatreds.

Antigovernment sentiment

Cynics might argue that the reported growth of tolerance and understanding is meaningless (and even itself cynical) because it coexists with antigovernment, antiregulation, antispending sentiment that will frustrate remedial efforts. But, as in opinion on race relations, public antipathy toward government may not yet have hardened. Even conservative columnist George Will, citing polls, has acknowledged that:

> the public believes there is nothing inherently wasteful about government spending on education, cities, the environment, health, and other concerns of the "services state." The public supports, overwhelmingly, at least the current level of government activism in many government areas.

This public endorsement of government activism seems likely to be amplified, and the antigovernment drive slowed, by popular outrage over such defaults of regulation as the Three Mile Island nuclear reactor accident, toxic chemical dumping, and oil company profiteering. Front-page events are giving the lie to the editorial-page polemics of the antigovernment agitators.

Thus, indications exist that the "new negativism" is anything but a consistent, deeply-held set of political convictions. The country has probably not crossed an ideological watershed, not yet, despite the assertions of neoconservatives who have presumptuously claimed to express popular discontent and despite the fears of civil rights workers who have

credulously accepted those claims.

The first premise civil rights workers must adopt is that the public is not yet a committed enemy.

To concede that the public's wishes are only to be feared, opposed, and frustrated is to abandon too many ideals central to the cause of civil rights. Even were there not mitigating evidence of the kind discussed above, it would be necessary to temper criticism of the public to preserve the philosophical foundation underlying the basic civil rights tactic of appeal to democratic traditions and principles.

Our fellow citizens, while greatly troubled, may be only fitfully hostile and dangerous to the drive for equality. More of them appear to be questioning the cause's methods and institutions than attacking its goals and values. Bad enough—but recognizing this distinction should ease the sense of crisis in the civil rights community, for the status of civil rights advocates today affords us many resources for the defense of these embattled programs and institutions.

Whether we will utilize or squander those advantages depends very much on our willingness and ability to make the kinds of adaptations described below.

Who are the adversaries?

Once it is accepted that the minds of many average citizens are open, it becomes possible to contemplate a promising new type of challenge to a group that is genuinely dangerous to efforts to promote equality and integration—the self-identified neoconservatives. Voluble neoconservatives have claimed that they speak for the public, and civil rights leaders, too ready to believe the worst about popular sentiment, have conceded this claim.

That concession is premature. After all, the neoconservative political program as it has emerged thus far is not so much an effort to implement popular values and attitudes as it is a groping attempt to define issues, to identify exploitable "buzzwords," and to inform and persuade—all preliminary steps to actually capturing a majority. The seat-of-the-pants nature of this enterprise is symbolized by the recent rift between Howard Jarvis and Paul Gann, authors of Proposition 13, who have parted company, apparently with some acrimony, over the choice of tactics by which to enlarge upon their initial success.

Instead of only challenging neoconservative policy and attempting to discredit neoconservative ideas and proposals, civil rights advocates should be calling into question the indeed questionable authenticity of the neoconservatives' arrogated roles as spokespersons.

A different adaptation is called for to answer the challenges of grassroots groups like those opposing busing, abortion, and the Equal Rights Amendment. These are usually ad hoc, local, or single-issue groups emphasizing an emotional appeal rather than an ideological one. Therefore, civil rights workers first have to recognize that it is inappropriate to lump such opponents with neoconservatives and old-line conservatives just because they all happen to oppose some civil rights and social welfare programs.

Second, veteran civil rights workers dealing with such groups must resist the tendency to construe their actions in terms of the frank racism and smug contempt

characteristic of well-entrenched earlier foes. It is foolhardy to denounce opponents who have an underdog image and a community-based appeal with the strident rhetoric appropriate for those immensely powerful individuals serving as pillars of repressive systems —segregationist Senators, some presidents of national associations, certain State legislative committee chairmen.

Third, some civil rights workers, habituated to thinking of themselves as the insurgent goads of society and government, are simply at a loss over how to respond to adversaries professing the same role and displaying the same intensity of commitment. We must be willing to credit the sincerity and idealism of such adversaries and treat them with respect and interest. At the least, such a response will attest to the depth and earnestness of our own involvement in the matters at issue. Moreover, such a response may set the stage for persuasion and agreement. An example of this approach occurred recently in the abortion controversy when "freedom of choice" leaders successfully drew "right to life" leaders into a dialogue (and, coincidentally, when militant anti-abortion activists interrupted the network-covered meeting, it was *they* who were cast in the role of disruptive, irresponsible extremists).

Self-perceptions

I have already noted that many civil rights proponents view themselves as political outsiders—as gadflies and underdogs. This self-perception is in most instances an anachronism.

While hundreds of storefront or one-room office or livingroom-based civil rights groups still exist, very, very many of the cause's most experienced and dedicated workers are now in positions that afford them substantial resources —stability, prestige, staff and material support, and access to policymakers and the media. For example, the Federal Government's 1978 expenditures for civil rights were almost half a billion dollars—funds not for direct aid to protected groups, but to support the activities of thousands of full-time, professional civil rights workers involved in monitoring, compliance, and enforcement.

More thousands are employed at the State and local levels to carry out the civil rights programs of those levels of government (although some States, particularly in the South, adamantly refuse to institutionalize civil rights enforcement). Outside government, full-time civil rights workers can be found staffing large civil rights organizations with research arms, publications sections, press offices, and the other components of stable, highly developed institutions, or they labor in similar contexts in influential organizations like foundations.

Despite these developments, the pursuit of civil rights has not become as routine or bureaucratic as one might expect, nor has the fervor of civil rights workers been dulled by the passionless life of the bureaucrat. In fact, part of our current difficulty may be that such shifts have *not* occurred.

Civil rights bureaucrats who persist in working as if they were still alienated outsiders may be squandering opportunities inherent in our current level of institutionalization. One wonders about the political realism of, for example, the "activist" who hires on with a civil rights group because he or she can wear blue jeans to work and can issue ringing denunciations of society, but who once hired never considers using that status (and a more presentable wardrobe) to, say, meet with local bankers to develop techniques for easing minority access to mortgages.

Civil rights workers must acknowledge that despite their own feelings of alienation from the centers of power, they are in fact possessed of moderately good access to those centers—and therein lies a substantial opportunity.

Another self-image problem concerns civil rights advocates' high degree of identification with the groups they "protect." Such an orientation is expectable. At one level, it is consistent with the outsider self-image. At another level, it is emotionally sustaining because performing even the old boilerplate rhetoric of accusation and demand before constituent groups is likely to evoke more support and involve more drama than assuming the "neutral" role needed in the low-yield, patience-consuming effort to educate and persuade powerholders and the white public. These motives affect government-employed and privately-employed civil rights advocates alike, as well as elected officials who represent protected groups.

Government-employed civil rights workers seem to express their constituent identification by evolving roles for themselves and their offices as agents for the protected group rather than for the whole citizenry. In effect, they take the protected group as their political constituency, accepting its definition of the issues as their frame of reference. Their goal becomes to satisfy the demands and expectations of the group. They act like politicians in an area

of public life where it may be counterproductive to act in that way. After all, the fundamental principle of minority rights is that certain matters ought not to be subject to the give-and-take of interest group politics, the rights of the weakest groups being too often trampled.

When, for example, a municipal human relations commission comes to be regarded as merely the mouthpiece for the black point of view, it may find that support for its work and goals is based on perceived black political strength or weakness, rather than on the basic human rights and needs expressed in a mandate derived from the polity as a whole. Worse, its staff may lose the reputation of neutral fairness that public servants require to maintain public confidence. Worst, the agency may become a specimen of organization-chart tokenism, regarded by the government as the instrument for satisfying all of its obligations to the black community, while the other institutions of government and politics are preserved for their traditional proprietors.

Government-employed civil rights workers can help to prevent this from occurring by orienting themselves to the principles and mandates that lead them to focus on certain groups, rather than to the agendas and demands of the groups themselves.

For elected officials and for leaders of private civil rights groups, the parallel question concerning group identification is whether they will serve as politicians or as statesmen. Politicians explicitly identify with their constituents and pursue the agendas defined by those constituents. This orientation, when combined with pessimism about the good will of the general public, can foster the habit of addressing almost exclusively the constituent group, or of issuing "public" statements that are really pitched for the constituents' ears. There is an almost total abdication from the crucial work of reaching out to the mainstream population to expand the civil rights constituency into a civil rights majority.

One thinks immediately of Martin Luther King as the leader who most successfully avoided these pitfalls. He was a statesman —an individual whose service to his constituents involved working not only to improve their lot but to secure those improvements by altering the society within which they had to live. This task demands the vision and courage to develop an agenda for the whole country and to turn outward to communicate it to the mainstream, even if this may conflict with the perceptions and short-term goals of the constituent group.

Problems of centralization

Civil rights workers may be ambivalent about their association with large institutions, but there seems to be little such confusion in the public. By increasingly pursuing its goals through litigation, Federal administrative remedies, and Washington-based pressure groups, the civil rights movement has come to be seen as a principal participant in the top-down, centralized, secretive decisionmaking that has alienated and enraged so many Americans.

Our fellow citizens are distressed by the physical remoteness and the apparent insulation from accountability (even such mild accountability as being made to answer questions) of the bureaucrats who regulate children's educations and adults' worklives and of the directors and report writers of the large civil rights organizations who from time to time issue bitter and caustic judgments of the citizenry.

To counter these off-putting features of our current modes of work, civil rights workers should strive to become models of accessible, compassionate, efficient public service. *Any* American—Allan Bakke and Brian Weber included—deserves a respectful hearing from those of us for whom "respect" and "compassion" have become watchwords.

A related problem is that our current programs for equal opportunity in education and employment seem to be thought of by many persons almost exclusively in terms of quantified goals and elaborate, rigid techniques that smack of repugnant social engineering rather than "simple justice." In the public mind, these approaches are seen as arbitrary and depersonalizing rather than as linked to the social vision and ideals—manifestly humane and meaningful—that we seek to implement.

The obvious remedy is to form the habit of setting forth social statistics and numerical goals with contextual information that, first, establishes the value of such measurements and, second, describes more dynamically the social conditions and policy choices at issue. We have to remind ourselves that a statistical disparity raises rather than settles the question of whether discrimination exists and that numerical goals are not self-evidently stepping stones to the just society.

There is yet another problem in our handling of quantitative approaches. We tend to defend our techniques in the absolute terms more suitable to defending our

ideals, and this is understandably labeled as arrogance. Instead, we should candidly admit that numerical remedies entail instances of apparent unfairness, occasional affronts to the individuality of those involved in them, and disruptions in the lives of some whites who view themselves as innocent bystanders. We can admit these flaws because we have available a thoroughly respectable, if humble, defense of numerical remedies—they are less imperfect than any extant alternative program for promoting equal opportunity.

Indeed, raising the matter of alternatives may be the most constructive response we can make to critics of numerical remedies. Challenging critics to devise more equitable, more productive equal opportunity measures shows that we are not arrogantly committed to a single solution, makes the critic feel that he or she is getting a considered rather than a reflexive response, and may even generate some useful ideas.

While it is important that civil rights workers act in their daily worklives to ameliorate the effects of association with remote, impersonal institutions, there is an additional adaptation that we can make to reduce this stigmatization. However, its greater benefit will be to make us more effective in directly influencing policy.

In the area of civil rights, the outcomes of centralized decision-making have increasingly been ambiguous; executive leadership has been weak and court rulings filled with complicated qualifications. With this trend, the crucial point of influence in the policy process seems to be less at the point of policy enunciation and more at the point of implementation. Policy inputs aimed at the top of the process may be misplaced.

If indeed the locus of influence has shifted from Washington to lower levels of government, then the civil rights community should decentralize its apparatus for commenting on policy—a shift that would be consistent with better grassroots relations.

Productivity and progress

George Will has pointed out that Americans reconcile their calls for budget cuts and their expectation of continued high levels of services with the belief that waste is rampant in government. In a climate of calls for more efficiency, civil rights programs can be better defended in terms of their records of productivity and demonstrated achievement than by broad pictures, however vivid, of the needs they address. And new programs, where needs are necessarily the focus, ought to be portrayed in terms of the larger costs to be incurred by deferring meeting those needs—an ounce of prevention being worth a pound of cure.

We must produce an alternative to what Irving Howe calls "the reactionary calculus that figures the costs but fails to consider the benefits" of social programs. Civil rights workers must acquire the means to defend their activities in the terms in which they will now be judged—the efficiency terms of the budget-cutters rather than the equity terms of the civil rights cause.

This adaptation in our attitude toward the productivity of our activities is frustrated in part by the outsider, gadfly self-image described earlier. That perspective leads civil rights workers habitually to emphasize the *unfinished* portion of our agenda. This in turn means that much policy debate on civil rights and social programs becomes a clash between our assertions of need and competing claims, rather than a review (and defense) of the benefits and advances represented by programs already in place.

Along the same line, establishing that our programs are productive means acknowledging that progress has been made. William Raspberry recently noted the steadfast refusal of many black leaders to admit that much progress has occurred. For example, Vernon Jordan, on the occasion of the 25th anniversary of the *Brown* decision, called black progress "a myth, a lie." These constant references to lack of progress support an emerging white attitude that Irving Howe describes as an "unspoken persuasion that the 'black problem' is beyond solution." A similar despair was apparent in a "realistic" article entitled "America's War on Poverty—Is It a No-Win Struggle?" in a major news weekly this past January. More recently, Irving Kristol, co-editor of *The Public Interest,* was quoted as having declared, "I don't have anything to say anymore. I don't think anyone does. When a problem becomes too difficult, you lose interest."

It seems to me that those civil rights advocates who emphasize the lack of progress while recalling fondly the salad days of the 1960s when government treasure poured into social programs actually serve the neoconservatives who assert that such programs did not and cannot work ("no progress").

Instead, our evaluations of the Great Society programs should assert the reality that such programs made progress toward their goals *despite* their having been, with the onset of Vietnam, "underfinanced to the degree that seeming failure could be ascribed almost to intent," as Daniel Moynihan has put it.

If the civil rights movement is to hold on to its gains, it must first acknowledge and embrace those gains. Civil rights advocates must defend programs that work by trumpeting rather than denying their achievements.

New "protected classes"

Another area of work in which we need to make adaptations is the process of accepting new constituencies to the civil rights/equal rights cause. Federal nondiscrimination protections now guard women, the elderly, the handicapped, and various other classes, in addition to the core of racial and ethnic minorities.

At one level, enrollment of new groups under the civil rights banner has produced a blurring of the legal distinctions and historical considerations surrounding the effort to protect each group. The problem is apparent when even a sophisticated journal like the *Washington Post* prints an article that, by confusing the terms "protected class" and "minority" and by overlooking much of the case law and regulations that carefully distinguish among the needs of and protections afforded to different groups, asserts that "minorities" now form a majority of the population and of the labor force. Such accounts make it sound as though protected status is awarded cavalierly, and leave the reader wondering whether there is some angle by which he or she can get in on the racket.

Civil rights workers must recognize that the extensions of protection have added to our work the necessity for bearing in mind the distinctions among protected groups, and also the need for a sense of proportion about the

relative needs of these groups. Government would seem to bear the greatest responsibility for keeping all this straight, although coalitions and multipurpose civil rights organizations also would seem to have the perspective and experience to address the task.

A closer look at the definitions and origin of protected status may also demand adaptations from civil rights workers when such inquiries disclose distinctions within what had been regarded as monolithic groups. For example, William J. Wilson, in his misleadingly-titled *The Declining Significance of Race*, makes a case for the existence of an expanding class gulf in the black community and the consequent end of a uniform "black experience." He concludes that the policies promoted by the articulate leadership class may not be the remedies best suited to reverse the deepening misery of the "underclass." Such propositions, once fully developed, may entail important adjustments in the way civil rights workers go about their work.

At another level, the extension of protected status has led some civil rights workers to think that the cause has acquired numerous allies that may make possible the formation of powerful coalitions. That may indeed occur. Black and Hispanic leaders have met in the interest of cooperation on national issues, and Jack Anderson recently speculated about the great political potential of an emerging linkup of disabled and aged groups.

However, coalition builders should bear in mind that coalitions of the alienated and powerless have their limitations. The McGovern coalition that was able to gain the interim goal of a presidential nomination found out before too long that it had discounted or ignored the mainstream power centers that held the key to its ultimate goal. Any coalition of the weak, to be successful, must have more than internal solidarity—it must have a program of outreach to mainstream groups and institutions.

Issues and rhetoric

As with the process of enrolling new protected classes, the process by which the civil rights movement adds and characterizes new issues needs reconsideration. Civil rights advocates have evolved the practices of reflexively explaining current behaviors in terms of historical motives, placing racist eruptions within the framework of the vast social pathology called racism, and identifying what some may regard as narrow or localized problems as facets of an intricate, pervasive system.

These practices perhaps serve to express our feelings of solidarity with others working in other areas of civil rights or may meet some personal psychological need to be engaged in activity on a grand scale. Be that as it may, they are in effect announcements that the problems dwarf the actors who have assembled to deal with them —an idea only likely to further discourage those already half-convinced that such problems are insoluble. Civil rights workers may do better to regard the problems they address as discrete, explicating them as the visible or demonstrable dangers they are.

Yet another factor has been an obstacle to the adaptations needed in our work, and it runs as a common thread through many of the conditions and tendencies described thus far. In the last era of civil rights progress, the cause's greatest successes came from its ability to shame, anger, and alarm the public—to confront it vividly with the horrors of racial oppression. That era's characteristic style of discourse—appeal, accusation, exhortation—remains prevalent today.

However, today it seems to be ineffective. In the years since America's entry into Vietnam, Americans have run a gauntlet of disappointments, shocks, and horrors. The country's capacity for outrage seems at the moment to be about exhausted, and so is its capacity to respond to the traditional rhetoric of the civil rights cause. In addition, the complexity of many civil rights problems and solutions today is at contraries with the strident, urgent phrasing so right for the conditions of the last era of civil rights.

Civil rights workers must develop a new rhetorical style appropriate for overcoming fear, polarization, exhaustion—a rhetoric for the tasks of education and persuasion that in our communities, schools, and workplaces have been called "human relations."

Conclusion

I hope that the observations offered above may be useful for mobilizing many elements of the current crisis to the advantage of the cause of civil rights. Threads of hope in the current situation—the attitude of the public toward racial equality and government, the status of our adversaries, our own resources—do exist, and others are acting upon that conviction.

For example, Senator John Culver of Iowa, regarded as a liberal, recently stated the theme of his upcoming election campaign: "I hope to run a campaign that moves us away from the negativism and

cynicism of today . . . I will call upon the best instincts of the American people . . . I'm sure it hasn't gone out of style to help those who need help most."

In another example, James Farmer's Coalition of American Public Employees is trying to transmute tax revolt into tax reform, building on progress already made in that direction in Massachusetts and North Dakota. By similarly "infiltrating" and coopting forces dangerous to the drive for equality, still others may turn adversity into opportunity.

But these positive approaches are too rare as yet. Most who have considered the current prospects for civil rights progress have come to pessimistic conclusions. Oddly, many of those who are most dismayed seem willing to cling, despite their fears, to the familiar brave postures of defiance, accusation, appeal, and demand.

Others, recalling that the riots of the last decade preceded a mushrooming growth of remedial programs, have turned to speculating with grim relish about new mayhem as the spark that may ignite new progress toward equality. They seem conveniently to forget that the riots also preceded the law-and-order reaction that became a serious force in presidential politics. Another spasm of rioting is admittedly a likely product of the onset of despair—but will it be more likely to produce another wave of remedial measures, or more formidable political attacks on civil rights programs?

Perhaps the suggestions here, if they can help us to emerge from the clouded thinking and ineffective activities associated with despair, can make it possible to avoid answering that question.

READING & VIEWING

BOOKS RECEIVED

EEO Law: Impact on Fringe Benefits by Geraldine Leshin (Institute of Industrial Relations, University of California-Los Angeles, 1979). Examines sex-based issues of pregnancy and pensions and the 1978 amendments to the Age Discrimination in Employment Act of 1967. *150 pp.*

Job-Sharing by Gretl S. Meier (W. E. Upjohn Institute for Employment Research, Kalamazoo, Michigan, 1978). Why people want to share jobs, what arrangements they fashion, and how it personally affects the people who try it. Of particular interest to women. *187 pp.*

A Stranger in the House by Robert Hamburger and Susan Fowler-Gallagher (MacMillan Publishing Company, New York; 1978). Twelve black household workers are interviewed about their work; their diversity renders conventional images totally inadequate. *168 pp.*

Mexican Americans in School by Thomas P. Carter and Robert D. Segura (College Entrance Examination Board, Princeton, N.J., 1979). A look at the role of schools and schooling in the lives of Mexican American children in the Southwest. An updated and revised second edition. (For copies write to College Board Publication Orders, Box 2815, Princeton, N.J. 08541) *436 pp.*

PAMPHLETS RECEIVED

Today's Girls: Tomorrow's Women. Proceedings of a national seminar held by Girls Clubs of America on the changing role of women and its implications for girls; covers sexuality, education, employment, and the law. A 9-minute film is also available. (Write Girls Clubs of America, 205 Lexington Ave., New

York, N.Y. 10016) *104 pp.*

NEW PUBLICATIONS

Clearinghouse for Civil Rights Research. Quarterly presenting syntheses of recent social science research with policy implications for minorities and disadvantaged groups. Current issue is on testing. Subscriptions $8.00/year; write Center for National Policy Review, Catholic University Law School, Washington, D.C. 20064.

COMMISSION REPORTS

The Age Discrimination Study Part II. Contains methodology for Part I and chapters on each of 10 federally-assisted programs and selected aspects of higher education; last volume of study to be published. *298 pp.*

Desegregation of the Nation's Public Schools. Reviews developments since August 1976 regarding the Supreme Court, Congress, and the Department of Health, Education, and Welfare, and in 47 school districts across the country. Contains recommendations. *90 pp.*

The Federal Fair Housing Enforcement Effort. A sequel to the December 1974 report on the same subject, covering new laws that substantially increase the government's responsibilities. Contains findings and conclusions. *235 pp.*

CONSULTATIONS

Battered Women: Issues of Public Policy. Proceedings of a consultation held January 30-31, 1978, by the Commission in Washington, D.C. Includes papers and responses by public officials, social scientists, and activists. *706 pp.*

Discrimination Against Minorities and Women in Pensions and Health, Life, and Disability Insurance. Proceedings of a consultation held April 24-26, 1978, by the Commission in Washington, D.C. Volume I includes papers and responses by government and industry officials, experts, and consumer representatives. Volume II contains exhibits. *1,288 pp.*

STATE ADVISORY COMMITTEE REPORTS

Gente que Camina con las Cosechas. Spanish translation of the staff report, **People Who Follow the Crops,** by the Rocky Mountain Regional Office. Mainly photographs. *Unpaged.*

Private Sector Affirmative Action: Omaha (Nebraska Advisory Committee). Examines employment opportunity for minorities and women, with special attention to job location, recruitment, and upward mobility. *40 pp.*

Where Are Women and Blacks? (Alabama Advisory Committee). A study of employment in Alabama's State government that finds underrepresentation and underemployment. *26 pp.*

Insurance Redlining: Fact Not Fiction (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin Advisory Committees). A study of insurance discrimination based on geographic location in Chicago, with solutions offered elsewhere included. *66 pp.*

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