WINTER 1979

civil rights digest

THE FIGHT TO END THE SEGREGATION OF DISABLED PEOPLE

IN THIS ISSUE . . . We explore the latest developments in affirmative action, aspects of our new mandate to study discrimination on account of age and handicap, and the ongoing debate over urban policy.

Rick Harris and Jack Hartog address *Kaiser v. Weber*—the case that may be the *Bakke* of employment law. They note many peculiarities surrounding the lawsuit that may well skew the result unfairly with disastrous consequences for enforcing laws against employment discrimination.

Children are the subject of the next essay—more precisely, the rights of children. While no coherent theory of the legal rights attached to childhood has been developed, several cases have expanded the ability of children to make decisions and their entitlement to due process, according to the Congressional Research Service.

Edward Roberts' article outlines the fight to end the segregation of disabled people and to facilitate their social and economic integration. This fight has won important legislative victories that await full implementation.

Similarly, age discrimination has been the target of recent laws. But, as Michael Batten points out, enforcement may be somewhat problematic. The difference between legal age distinctions and illegal discrimination is bound to keep lawyers and policymakers busy.

Finally, urban policy with regard to neighborhoods is examined by Jennifer Douglas, who writes that the continuing decline of the cities has yet to be seriously addressed. The need to incorporate the interests of the poor and minorities remains urgent.

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.

The *Civil Rights Digest* is published quarterly by the U.S. Commission on Civil Rights as part of its clearinghouse responsibilities. Funds for printing the *Digest* were approved by the Director of Bureau of the Budget on January 29, 1963. Correspondence related to the *Digest* should be addressed to Editor, *Civil Rights Digest*, U.S. Commission on Civil Rights, Washington, D.C. 20425.

The articles in the *Digest* do not necessarily represent Commission policy but are offered to stimulate ideas and interest on various issues concerning civil rights.

civil rights digest
Volume 11 Number 2
WINTER 1979

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

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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.

THE CATCH-22 CASE

IS KAISER v. WEBER RIGGED AGAINST AFFIRMATIVE ACTION?

By Rick Harris and Jack Hartog

Picture a lawsuit involving allegations of employment discrimination. Imagine further that minorities and women are not represented in the case. Suppose that the interest of both the plaintiffs and defendants to the suit is to suppress rather than to produce evidence that discrimination against minorities and women ever existed. If the existence or lack of past discrimination was *the* determining issue in the case, would you expect the court to make a correct finding?

Unfortunately, that rigged situation may become a landmark of American civil rights jurisprudence. It is *Kaiser Aluminum and Chemical Corp. v. Weber*, a case that is to affirmative action in employment what *Bakke* is to affirmative action in education. It is a case that clearly shows the error of conditioning judicial approval of affirmative action on the existence of past discrimination. *Weber* may determine whether this country's civil rights laws will encourage or, in effect, make illegal voluntary acts designed to end our national patterns of inequality and underrepresentation among minorities and women. A decision by the U.S. Supreme Court is expected in *Weber* before the Supreme Court's current term ends in June 1979.

The case grew out of affirmative action provisions negotiated in a national collective bargaining agreement by the United Steelworkers and Kaiser Aluminum Company in 1974. The plan was designed to end the virtual exclusion of minorities and women from Kaiser's skilled jobs in its 15 aluminum plants around the country. The agreement, which has been adopted throughout the aluminum and can industries, is modeled after a similar plan adopted by the steel industry as a result of civil rights enforcement efforts by the Federal government.

One plant covered by the agreement is in Gramercy, Louisiana. Brian Weber is a young blue-collar worker employed as a lab analyst at that plant. His position is considered semiskilled, one requiring less training and experience than a skilled job, such as carpenter or instrument repairer. Weber wants a skilled job.

The Kaiser Gramercy plant had hired into skilled jobs those people who formerly held similar jobs in the building trades industry. Access to those jobs was effectively controlled by various building trades unions. Kaiser argued that these unions had consistently excluded minorities and women (a charge which the U.S. Commission on Civil Rights documented and explained in its 1976 report, *The Challenge Ahead: Equal Opportunity in Referral Unions*).

At Gramercy, only 5 of 290 skilled workers—less than 2 percent—were black, although blacks area's workforce and 46 percent of the population. Attributing the virtual exclusion of minorities and women in its operations to the practices of these unions, Kaiser concluded that only by training minorities and women itself would it be able to increase their participation in crafts jobs.

Kaiser had for years resisted demands by the Steelworkers to institute an on-the-job training program for its higher-paying and more desirable crafts jobs. The reason was simple: such a training program was too expensive. But in 1974, faced with the threat of costly civil rights litigation and denial of lucrative Federal contracts due to the underrepresentation of women and minorities in the crafts, Kaiser agreed with the Steelworkers to set up the long sought-after training program.

Rick Harris is a law student at the University of Pennsylvania Law School. Jack Hartog is an attorney with the U.S. Commission on Civil Rights. The views expressed in this article are those of the authors and not necessarily those of the Commission.

Because the program was designed to increase nonwhite and female participation in formerly all-white, all-male preserves, one-half of its slots were reserved for minorities and women. This admissions system would continue until goals for minority and female participation in craft jobs set in each plant were met.

At Gramercy, this meant that the most senior qualified white employee and the most senior qualified black employee were alternately admitted as openings occurred. According to the trial record, there were only two women employees eligible to bid for the training positions, and neither did.

This ratio method of apportioning openings was necessary because Kaiser had only recently begun to hire very many nonwhites and women. In 1974, despite a 40 percent black workforce, less than 15 percent of the Gramercy workers were black, and many of those black workers had been hired only since the inception in 1968 of a one black to one white hiring ratio for openings in unskilled positions. Using strict seniority would have been tantamount to reserving virtually all the training slots for white male workers, thus defeating the program's most important aim.

Weber's case

When the affirmative action program for craft jobs was implemented at the Gramercy plant, Brian Weber discovered that he was senior by 3 months to two of the black workers selected for training. Overall, however, he was 44th in seniority among the workers who bid for the five openings in the category for which those two black workers were selected.

Although Weber would have had virtually no chance of being selected for training had strict seniority been the basis for entering the training program, and although without the initiation of the training program Weber never could have become a Kaiser skilled worker since he never had the requisite prior experience, he sued in Federal district court. He charged that his rights under the Civil Rights Act of 1964 had been violated by the program's use of race to select trainees out of strict order of seniority, and asked that an injunction be granted against Kaiser's taking race into account when selecting crafts trainees.

The lower courts ruled in Weber's favor. They held that because there was no proof of prior illegal acts by Kaiser against employees at Kaiser's Gramercy plant, black employees at that plant were in their "rightful place" and any affirmative use of race, no matter how reasonable or necessary it might be, was an unlawful racial preference.

Evidence of past unlawful acts by Kaiser was readily available in this case, however, and could easily have been marshalled. Indeed, there was a "smoking gun" that never found its way into the record of the case. The absence of this evidence from the litigation was quite predictable: neither the employer nor the union had any interest in exposing themselves to multimillion dollar civil rights lawsuits by proving that they had violated the law. As lawyers for the United Steelworkers candidly admitted in one of their legal briefs:

> [E]ven if employers and unions were quite convinced that they had violated Title VII, they would be unlikely to want to proclaim their own guilt. It is one thing to take prospective corrective action; it is quite another to make an admission which automatically entitles employees to recover backpay for past sins.

The failure of the adversary system to produce such evidence in this case can be traced directly to the nature of "reverse discrimination" cases. *Weber* and *Bakke* have inherent flaws that should deprive them of any jurisprudential credibility: the most direct beneficiaries of the plan being challenged, those with an unequivocal interest in its continuation, do not get their day in court. To add irony to injury, the law—at least according to the lower courts in *Weber*—makes the evidence that only the excluded parties are likely to produce controlling of the outcome of the case.

This article will present some evidence—all of it at the fingertips of the parties in *Weber*—that should have been part of the record in this case. Much of this evidence was presented to the Supreme Court by the U.S. Department of Justice in a brief it filed urging the Court to hear the case. It is likely that others interested in the litigation will try to supplement the record by filing "amicus curiae" (friend of the court) briefs containing additional evidence of past discrimination.

Various legal rules, however, inhibit the Court from using such evidence in its ruling. Similar evidence was presented in *Bakke;* it was virtually ignored.

But an additional point is of even greater importance than that of the breakdown of the adversarial process in "reverse discrimination" lawsuits. Often lost in the revelation of facts indicating past discrimination in cases such as *Weber* is the question of whether the existence of those facts should govern

the outcome of the case. If evidence of past discrimination is not likely to be presented in "reverse discrimination" cases such as *Weber* or *Bakke*, isn't a decision to condition the legality of affirmative action on the presentation of such evidence in effect a decision to end voluntary affirmative action?

As *Weber* dramatically demonstrates, employers who implement affirmative action plans are in no way prepared to develop evidence that they may have violated the law. Despite both overwhelming inferences and hard evidence to the contrary, all of which was available to Kaiser, the company vigorously insisted on its innocence throughout the *Weber* litigation. Is there any basis for the belief that others who are subject to civil rights laws will be more forthright than Kaiser?

If the Supreme Court should require as a precondition to taking affirmative action that employers and unions compile and present evidence that they did violate or even may have violated the law, precious few affirmative action plans will be implemented voluntarily. The Equal Employment Opportunity Commission has addressed this problem in its recently issued "Guidelines on Affirmative Action." It reached a conclusion that differs sharply from that reached by the lower courts in *Weber*.

These guidelines also underscore another reality: if Kaiser's position were correct—that is, if its massive underrepresentation of minorities was caused by illegal acts in the building trades industry for which Kaiser may not be held responsible—then Kaiser was in violation of no civil rights law. Kaiser would then have no evidence to present indicating that it could be found to have violated the law, as we shall see.

The Gramercy situation

The Kaiser Gramercy plant is located in a rural area about midway between Baton Rouge and New Orleans, Louisiana. The plant opened in 1958, shortly after the governor of Arkansas called out the National Guard to prevent nine black children from entering Central High School in Little Rock.

Only a few statistics are needed to recall the state of race relations prevailing at the time in Louisiana. As late as 1966 only 3.4 percent of the State's black children attended school with white children, according to U.S. Civil Rights Commission figures. Official census statistics show that, in 1960, unemployment among minority persons in Louisiana was twice as great as among white persons (9.5 percent versus 4.7 percent). In the two parishes in which Kaiser Gramercy hired its workers, 1960 unemployment figures for minority workers were more than three times as great as those for white workers (17.4 percent versus 5.4 percent).

Officials of the Kaiser Gramercy plant testified at Weber's trial that the company had "never discriminated" against minority persons. If so, the company pursued an unusually progressive hiring policy during the fifties and early sixties. The Kaiser definition of what constitutes discrimination may differ from conventional definitions. In 1965, only 4.7 percent of the Kaiser workforce was black, although nearly 40 percent of the labor pool where Kaiser hired its workers was black.

In 1965, Title VII of the Civil Rights Act of 1964 became effective, making race, sex, and national origin discrimination in employment unlawful. At about the same time, President Johnson signed Executive Order 11246, which soon required that companies doing business with the Federal government either take affirmative steps to overcome the effects of past discrimination or face disqualification from lucrative government contracts.

Kaiser's status as a large corporation, employing thousands and engaged in a business affecting interstate commerce, brought it under the requirements of Title VII. The company's government contracts made it subject to Executive Order 11246. This order is now enforced by the Office of Federal Contract Compliance Programs, a division of the Department of Labor. Prior to 1978, however, various government agencies were assigned the responsibility of ensuring compliance with Executive Order 11246. What was then the Atomic Energy Commission was charged with assuring Kaiser's compliance.

In 1970, 1973, and 1975, investigators from the Atomic Energy Commission visited the Kaiser Gramercy plant to conduct reviews of the company's progress in meeting Federal standards regarding employment discrimination.

The 1970 investigation uncovered numerous violations of Federal laws or regulations. A January 25, 1971, letter from Guy W. McCarty, chief of the AEC's contract compliance office, to J. W. Melancon, manager of the Kaiser Gramercy plant, listed seven:

(1) Although the plant had a written affirmative action plan, as required by Federal regulations, it was incorrectly drawn.

(2) Of 49 male professional employees at the plant, none were black [a 50th professional em-

ployee was a white woman].

(3) No affirmative action had been taken by Kaiser to attract and identify minority job applicants, although such action is required by the Office of Federal Contract Compliance.

(4) Although minority recruitment sources were available to Kaiser, they had not been used.

(5) As of August 1970, only one of 132 supervisors was a minority. No plan existed to ensure that minority employees would have equal access to supervisory positions.

(6) The AEC reviewer had uncovered evidence that "white members of the union had actively discouraged Negroes from bidding on certain jobs and that white union members were responsible for various other forms of intimidation at the plant."

(7) Of 246 maintenance crafts workers, none were black [and none were women].

After listing the seven items, the letter made several recommendations. One recommendation was that Kaiser establish a training program for craft jobs. Another was that 40 percent of those hired into the crafts be minorities.

Two years later, another AEC compliance officer visited the Kaiser Gramercy plant. Among his findings, which were communicated to Kaiser as well as described in a January 31, 1973, internal AEC memorandum, was this "serious item": Kaiser had allowed several whites with *no* prior craft experience to transfer into craft positions. No black workers had ever been transferred in that fashion; indeed, blacks were required to possess 5 years prior craft experience before transfer.

In 1975, another review was completed. And again, Kaiser was found to be deficient in its compliance with Federal antidiscrimination laws and guidelines. Of about 290 persons working in the crafts, only 5, or 2.2 percent, were minority workers [none were women]. Operating in an area with a labor market that was 39 percent minority workers, the Kaiser Gramercy plant's workforce included only 13.3 percent minority workers. Only in the lowest paying jobs at the plant was the percentage of minority workers similar to that of the outside labor market. In the unskilled laborer position, 12 of 34, or 35.5 percent of the workers were minority. Of the 72 professional employees at the plant, there were only 5 black persons and one woman. Of 11 draftspersons none were minority or female.

The pressures mount

By 1974, Kaiser was being pressured by many sources, in addition to the Atomic Energy Commission, to increase the number of minority persons and women employed in the crafts positions. As Dennis English, industrial relations superintendent at Kaiser Gramercy, testified at Weber's trial:

> [T]he company . . . looked around and read the court decisions being made. We looked at the settlement that had just been made with the steel industry and the steel companies. We looked at the large sums of money that companies were being forced to pay, and we looked at our problem, which was that we had no blacks in the crafts, to speak of.

Adding to Kaiser's discomfort, the United Steelworkers Union had long disagreed with Kaiser's policy of hiring only experienced crafts workers and of hiring those workers off the street. The union wanted Kaiser to train its own employees, union members, in the crafts. But Kaiser had consistently rejected the idea as too expensive.

Finally, during the 1974 contract negotiations between the United Steelworkers and Kaiser, the company succumbed to a combination of government pressure to increase the number of minority and women workers employed in the crafts and union pressure for a crafts training program. An on-the-job training program was made part of the national collective bargaining agreement. The national agreement, to be implemented through local agreements in each of Kaiser's 15 plants, was created to benefit minority and women workers who had been historically excluded from crafts training, but provided training opportunities for white workers as well. Half the places in the program were set aside for white workers, creating an important new opportunity for all workers at Kaiser plants. The cost: $15–20,000 per year per worker trained, all borne by Kaiser.

Weber's suit charged Kaiser and the United Steelworkers with agreeing to a contract provision that discriminated against white and male workers on the basis of race and sex. The Federal district court held that race-conscious affirmative action applied to training programs is unlawful under Title VII of the Civil Rights Act of 1964, unless it is court-imposed and fashioned as a response to specific discrimination by the employer who institutes the program. Since Kaiser's plan was voluntary and not court-imposed, it was unlawful. The court also made this factual determination:

The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.

The Fifth Circuit Court of Appeals, in affirming the judgment of the district court, agreed that the legality of race-conscious affirmative action depends on the existence of past discrimination by the employer whose affirmative action is challenged. Since this issue was controlling, it decided not to address the question of whether race-conscious affirmative action may be taken without a court order. Thus, the existence or absence of past discrimination by Kaiser was what determined the legality of its on-the-job training program.

The appeals court agreed with the district court that Kaiser had not been guilty of past discrimination:

> The district court found and [Kaiser and the Steelworkers] all but concede that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant.

The court ruled that the plan was based on unlawful racial preference because it was not enacted to restore employees at the Gramercy plant to their "rightful places"—the positions they would have occupied but for the discriminatory conduct.

The sole basis of the courts' findings of no past discrimination was testimony at Weber's trial by Kaiser officials. When asked by Weber's lawyer whether discrimination had occurred at Kaiser Gramercy in the past, company officials testified that it had not. This testimony was not controverted by the United Steelworkers of America. The AEC documents that contained substantial if rebuttable evidence of past discrimination by Kaiser were not introduced. No inquiry was made into the reasons why Kaiser had hired an almost lily-white workforce from the time it opened until the mid-sixties.

Neither the trial court nor the appeals court made a sustained inquiry into the existence or absence of past discrimination by Kaiser, despite the fact that the issue was dispositive of the case, despite being presented with employment figures for Kaiser that indicated, on their face, that the company had violated Title VII, and despite the easy availability of government materials documenting alleged violations of Executive Order 11246.

The lesson from *Weber* is clear: the practical, predictable result of predicating the lawfulness of a voluntary affirmative action program on the existence of evidence of past illegal acts when the only parties to "reverse discrimination" cases are disgruntled white or male employees, their companies, and their union, is in effect to ensure that voluntary affirmative action will not be found lawful.

The EEOC guidelines

Whatever rule of law may emerge in *Weber*, the case itself illustrates that voluntary affirmative action will disappear if it depends on whether the party taking affirmative steps is willing to acknowledge that it may have discriminated against minorities

and women. The Equal Employment Opportunity Commission (EEOC) has recognized this practical reality, as well as other more theoretical concerns, in its recently issued guidelines on voluntary affirmative action.

Effective as of February 20, 1979, these guidelines are intended "to encourage voluntary action to eliminate employment discrimination" and "to clarify the kinds of voluntary actions that are appropriate under Federal law." Their significance should not be underestimated. In 1978 the President, pursuant to his power to reorganize the executive branch, made the EEOC "the principal Federal agency in fair employment enforcement." He charged the EEOC in a presidential decree (Executive Order 12067) with leading as well as coordinating Federal equal employment opportunity efforts. As a result, the EEOC may speak for the entire executive branch. The voluntary affirmative action guidelines are the agency's first action under its new powers.

The guidelines forthrightly address the legal contradiction contained in *Weber*. If past discrimination is a precondition for affirmative action, then the implementation of a voluntary affirmative action program is tantamount to an admission at worst of past illegal behavior and at best of the existence of evidence indicating past illegal acts. In either case such an admission would, as the guidelines state:

> expose those who comply with [Title VII] to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities or women without litigation . . . .

EEOC's analysis of the legislative history of Title VII convinced it that Congress did not intend to put employers between a rock and a hard place: to await a lawsuit by minorities or women for past discrimination or to invite such lawsuits by taking affirmative action. It concluded that the general prohibition against discrimination in employment in Title VII must be read against this reality.

This practical conclusion was reinforced by the purposes behind the enactment of Title VII. Thus, sec. 1608.1(b) of the guidelines states the fundamental impetus behind Title VII and other civil rights laws:

> Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. The legislative histories of Title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.

That section also relates the emphasis in the statute on voluntary action:

> Congress strongly encouraged employers, labor organizations, and other persons subject to Title VII . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed.

Section 1608.1(c) sums up the interpretation of Title VII governing the guidelines:

> The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.

The guidelines then spell out standards designed to encourage voluntary action to change the inferior socioeconomic conditions of minorities and women that inspired the enactment of Title VII. In brief, when a self-analysis discloses a "reasonable basis to conclude that action is appropriate," the party taking affirmative action may implement measures that are

"reasonable in relation to the problems disclosed by the self-analysis." Such "reasonable action" is defined as including "goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."

If affirmative action programs are "adopted in good faith, in conformity with and in reliance upon" the standards set forth in the guidelines, the guidelines provide for EEOC certification of the legality of the program. Compliance with the program will effectively insulate an affirmative action plan from legal attacks like *Weber*.

Will Title VII survive?

If EEOC's affirmative action guidelines had been in effect when Kaiser and the Steelworkers implemented their nationwide agreement, their plan almost certainly would have been approved. The reality behind its inception underscores the impracticality and outright hostility to the elimination of discriminatory conditions that pervades the lower court opinions in *Weber*.

Kaiser made no plant-by-plant investigation to pinpoint particular practices that contributed to the data it well knew showed massive underutilization of minorities and women in its craft jobs. It didn't have to. Kaiser realized that if it didn't act voluntarily to change these conditions it would be forced, potentially at great expense, to take affirmative measures.

The handwriting was on the wall. The major steel companies had been sued by various Federal agencies for similar problems, and had settled for a judicially approved "consent decree" costing millions of dollars and establishing virtually identical eligibility mechanisms for their training programs. Private litigation was pending against Kaiser for discrimination in its craft hiring policies, and the Office of Federal Contract Compliance investigations were continuing. Coupled with these incentives were the steelworker demands to open up the higher paying craft jobs.

Instead of encouraging parties to focus on offensive discriminatory conditions and the creation of effective and fair remedies, the lower courts in *Weber* would instruct employers and unions to seek out the villains in their midst. Which company officials were not properly following Kaiser's fair employment policy? Which of Kaiser's business practices were so ungrounded in good business sense that Kaiser should believe itself responsible for discriminating against minorities and women? Who are the victims of Kaiser's practices?

Clearly, very few employers or unions are about to undertake such a search. Even if they did and then remedied their practices, they would not only be subjecting themselves to civil liability but also inviting public condemnation for conduct most Americans oppose.

While EEOC's affirmative action guidelines encourage a "self-analysis" to uncover those persons and practices that perpetrate undesirable results, they do not make affirmative action dependent on the finding of fault in a particular entity, the pinpointing of cause to a particular practice, or the identification of specific victimized individuals.

Instead, they focus on the conditions that exist and the reasonableness of action to correct them. The guidelines recognize that despite limited progress in a few areas, national employment patterns still mirror our all too recent past of officially sanctioned or ignored discrimination based on race, sex, and national origin.

Such discrimination is not ancient history. The future society where one's race, color, or sex has no bearing on social or economic judgments has not arrived. Far from being routed, past discrimination is now so engrained in the institutions of our Nation that privileges and preferences for whites and men and penalties on nonwhites and women seem almost automatic.

In Gramercy, Louisiana, discrimination was and is real, just as it was and is in thousands of workplaces around the country. But to make affirmative action lawful only when evidence exists of specific unlawful acts against known victims is to guarantee that affirmative action will occur only under court order and on a very limited basis.

Title VII was not meant merely to redress such discrete and identifiable instances of discriminatory behavior. It was intended to address national patterns of inequality and underrepresentation that are the legacy of our country's history of race, national origin, and sex discrimination. It was not the result of abstract notions of natural justice, but of a struggle for equality waged against systematic, pervasive, and unabashed discrimination in virtually all aspects of American life.

The ultimate question in *Weber* is whether the Supreme Court will read Title VII in the context of its history, current conditions, and practical reality, or will divorce, as did the lower courts, Title VII's important principles from the Nation's past practice. EEOC has comprehensively answered this question. The Supreme Court should endorse its approach.

NOT FOR ADULTS ALONE

CHILDREN BEGIN PRESSING FOR EXPANSION OF THEIR CONSTITUTIONAL RIGHTS

By Congressional Research Service

During the 1960s there developed in the United States a variety of social trends that, taken together, constituted a rejection of settled and traditional ways of viewing social relationships. These trends have had wide ramifications, including the altering of constitutional doctrine. Beginning with *Brown v. Board of Education* in 1954, the Supreme Court moved—at first haltingly, and then in impressively sweeping terms—to implement a substantive view of the equal protection clause of the 14th amendment.

While the *Brown* decision represented but a modest extension of the intent of the framers and ratifiers of the amendment, and little if any extension of the constitutional language itself, subsequent decisions are more problematic in these respects. Substantive equal protection was developed by the Court into the suspect classification-fundamental interest branch of the equal protection doctrine.

Through this doctrine the Justices required reapportionment of legislative bodies at every level and opened up the political arena to many hitherto excluded persons, both as voters and as candidates. Wealth classifications in the criminal law field, which were largely *de facto*, were voided. A vaguely defined but potent "right to travel" doctrine upset numerous restrictions on newly-arrived citizens.

Moreover, members of groups that had traditionally been disfavored in legal classifications began to assert claimed rights. In decision after decision, doctrinal protection was extended by including new groups under the suspect classification designation. This meant governmental restrictions had to be justified by compelling interests, which in practice meant they could not be justified at all.

Race was the foremost suspect classification but nationality and alienage soon followed. Gender and illegitimacy classifications have more recently been granted positions requiring somewhat less strict judicial scrutiny but nonetheless entitled to substantial judicial protection.

Simultaneously, the Supreme Court utilized the due process clauses of the 5th and 14th amendments to require the government to observe a fairly high

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This article is based on testimony developed by the Congressional Research Service, Library of Congress, Washington, D.C.

standard of procedural regularity before individuals may be disadvantaged. Here again, traditionally disfavored groups—prisoners, involuntary inmates of institutions, welfare recipients, for example—were the beneficiaries of a judicial move to expand the circumstances in which due process had to be observed. Welfare recipients were thus to be accorded hearings before they were deprived of assistance, and prisoners were afforded a somewhat truncated hearing before the imposition of disciplinary penalties.

But, more important in some respects, the Court in more recent years has resurrected the formerly discredited doctrine of substantive due process, in some instances imposing barriers to any governmental action at all. The doctrine was originally developed to protect property rights against government regulation, but it is now employed to protect certain personal rights, such as the right to privacy. Both elements of due process have had their applications to children.

A third strand deserving of mention is the primacy accorded the first amendment guarantees of speech and press by the Supreme Court during the 1960s. No attempt will be made here to characterize the case law, but it must be noted that this line of cases had an inevitable effect upon decisionmaking with respect to children, especially in the educational context.

Any effort to delineate the cause and effect relationship between the social conditions of the decade of the 1960s and the judicial decisions briefly alluded to here would be complex and perhaps frustrating. What is important for our purposes is that, for whatever reason and in whatever context, children began to assert claims of rights and these assertions were largely successful in the courts.

The primacy of parents

The starting point for an assessment of the constitutional rights of children must be, in light of American tradition, with the constitutional rights of parents. A series of Supreme Court decisions prevent the State from intervening in nonabuse situations to reorder or deflect parental choice in child rearing. Exclusion of the State, however, does not, except to the extent that judicial rhetoric is suggestive, dispose of the issue of the conflict between parent and child. Only recently has the Court addressed this conflict, and its efforts at resolution are at best tentative.

In *Meyer v. Nebraska* (1923), the Court struck down a State law forbidding the teaching in any school in the State, public or private, of any modern language other than English to any child who had not successfully finished the eighth grade. The right of parents to have their children instructed in a foreign language, the Court said, was "within the liberty of the Fourteenth Amendment."

Meyer was followed by *Pierce v. Society of Sisters* (1925), where the Court declared unconstitutional a State law that required public school education of children aged 8 to 16. The statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." This followed because "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

While economic due process did not survive the 1930s revolution in constitutional law, *Meyer* and *Pierce* have not only survived but have been extended. Thus, in *West Virginia State Board of Education v. Barnette* (1943), the Court struck down as a free speech violation the compulsion of school children to salute the flag; but insofar as the opinion of the Court permits a judgment, it was the free speech rights of the *parents* that were being protected.

In *Wisconsin v. Yoder* (1972), the Court combined parental rights and religious freedom into a powerful barrier against enforcement of compulsory attendance laws requiring that Amish children be sent to public schools after they graduated from the eighth grade but before they turned 16. For the first time in a parental rights case, someone raised the question of the rights of the children involved. Justice William O. Douglas protested that the desires of the children might not coincide with those of the parents and the rights of the children should be protected.

Chief Justice Warren Burger responded for the Court that nothing in the record indicated a divergence between parents and children and observed that it was the interests of the parents that were being protected because the parents were subject to criminal prosecution under the attendance laws.

Removal of the religious context does not alter the Court's conclusion. Illinois provided that upon the death of the mother illegitimate children became the wards of the State and their father had no right to custody and no say in the State's treatment of the children. The Court struck down the statute and held that before a father of illegitimate children could be deprived of his parental interest, the State would have to give him a fitness hearing, just as would have been required under State law for the father of legitimate children (*Stanley v. Illinois,* 1972).

The reach of the principle may be observed in Justice Lewis F. Powell's plurality opinion for the Court in *Moore v. City of East Cleveland* (1977). There, city zoning regulations defined the size of extended families as one device for limiting the number of persons in a household. The ordinance precluded having the children of more than one child of the head of a household in the house.

When a grandson of Mrs. Moore came to live with her upon the death of his mother, she came in violation of the ordinance because another son and his child were already dwelling in the house. *Meyer, Pierce, Stanley,* and *Yoder* established that State interference with the family required a compelling justification; to the argument that a grandmother could not take advantage of this line of cases Justice Powell was unsympathetic:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children has roots equally venerable and equally deserving of constitutional protection. . . . [T]he choice of relatives in this degree of kinship to live together may not lightly be denied by the State.

While all aspects of marriage and the family are protected from noncompelling governmental interference—frequently in cases with strong rhetorical flourishes—the protection is not absolute. Thus, in *Prince v. Massachusetts* (1944), the Court sustained the conviction of a Jehovah's Witness for violating a law prohibiting street solicitation by minors. She had permitted her 9-year-old niece to help her sell religious literature on the street.

Acknowledging the conflict between the governmental claims and the "sacred private interests" associated with Mrs. Prince's claims, the Justices pointed to the government's duty to limit parental control by requiring school attendance, regulating child labor, and otherwise protecting children against the evils of employment and other activity in public places.

Juvenile delinquency

All the States of the Union and the District of Columbia have separate courts for juveniles, whether they are accused of an offense that if committed by an adult would be criminal, or have become delinquent in a sense not recognizable under laws dealing with adults (such as being truant or disobedient). The reforms of the early part of this century provided not only for segregating juveniles from adult offenders in adjudication, detention, and correctional facilities, but also dispensed with the substantive and procedural rules surrounding criminal trials that were mandated by due process.

This abandonment of constitutional guarantees was justified by describing juvenile courts as civil rather than criminal, designed for correction, not punishment. Also offered was the theory that the State acted as *parens patriae* for the juvenile offender and was in no sense an adversary. Disillusionment with the results of juvenile reforms, coupled with judicial emphasis on constitutional protection of the accused, led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence.

Although constitutional restraints have been imposed upon the juvenile delinquency process in the last 10 years, the Court has been very conscious that it is dealing with an institutional arrangement necessitated by the special status of the young, reflecting both the interests of the young and society. It has not, however, achieved any unified view of what that process is in very concrete terms.

Observing that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," the Court imposed substantial due process observance on delinquency proceedings in its first encounter with the constitutional aspects of the juvenile delinquency process. In a case called *in re Gault* (1967), the Court found that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system, nor diminish the features of the system that were deemed desirable—emphasis upon rehabilitation rather than on punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process. However, the consequences of the absence of due process standards made their application necessary, the Court said, especially in a case where the judgment of wrongdoing was arrived at cavalierly.

Thus the Court required a notice of charges given in time for the juvenile to prepare a defense, a hearing in which he or she could be represented by retained or appointed counsel, observance of the rights of confrontation and cross-examination, and protection against self-incrimination. Subsequently, the Court held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence sufficient to satisfy the reasonable doubt standard when the

offense charged would be a crime if committed by an adult. However, the Court declined to hold that jury trials were constitutionally required in juvenile proceedings.

The most recent decision leaves the field in a state of some confusion. In California, juvenile offenders found to be beyond the benefit of the juvenile court system could be transferred to adult courts of general criminal jurisdiction; the transfers were accomplished after a juvenile hearing at which the children were found to be delinquent.

But the Court, speaking through Chief Justice Burger, held that the subsequent prosecution in criminal court following the juvenile proceeding violated the fifth amendment's double jeopardy clause. Jeopardy, the Court said, denotes risk, a "risk that is traditionally associated with a criminal prosecution."

Further, the Court found little to distinguish the potential consequences involved in juvenile hearings and in criminal proceedings. Given the identity of risks faced in the juvenile court and in subsequent criminal prosecution, the Court ruled that the task of twice marshaling resources and twice being subjected to the heavy personal strain of trial was constitutionally forbidden.

However, since under *Gault* the juvenile must be given a hearing before being transferred to adult proceedings, the Court did observe that "nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding."

There at present the matter rests, presumably awaiting further elaboration. Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is not essentially criminal, such as misbehavior or uncontrollability. Being labeled a PINS, a MINS, or a CHINS (a person, minor, or child in need of supervision) is probably only marginally less stigmatizing than being judged a delinquent, and the disposition of such persons in the system usually involves the same restraints upon liberty.

Reformers have argued that laws permitting courts to enter orders seriously interfering with children's freedom on the basis of noncriminal misbehavior are overbroad, punish a status rather than an act, and deny children the equal protection of the laws. The case law is yet in a very primitive state, and it may be some time before the Supreme Court is ready to

deal with these issues.

First amendment rights

Not surprisingly, speech and press issues involving children have arisen in the educational context. While the Court has recognized legitimate institutional interests in preserving discipline and order, students generally have been accorded wide-ranging protection, certainly at the college level and increasingly in the high schools.

Standards of first amendment expression guarantees by school authorities were first enunciated by the Court in *Tinker v. Des Moines Independent Community School District* (1969), in which high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States actions in Vietnam. Reversing the refusal of lower courts to reinstate students suspended for violating the ban, the Court said that restriction on expression by school authorities is only permissible to prevent disruption of educational discipline.

Tinker was reaffirmed in *Healy v. James* (1972), where the Court held that for a public college to withhold official recognition from a student organization violated the students' right of association. Denial of recognition, the Court held, was impermissible when based on the local organization's affiliation with a national group, on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support.

A college could, however, impose reasonable regulations to maintain order and preserve an atmosphere in which learning may take place. It may impose as a condition of recognition that each organization affirm in advance its willingness to adhere to reasonable campus law. But no matter how tasteless the expression, the mere dissemination of ideas in a college campus newspaper cannot be made the subject of suppression nor the disseminators punished.

As the case law shows, the idea of a wide continuum of student free expression is not an accepted fact among school administrators, but the courts have voided far more restraints than they have accepted. Save for some expectable grotesqueries, the cases show a generally responsible exercise of rights of expression and a fair measure of accommodation between students and school administrators. But significant issues remain. Perhaps the most uncertain involves the extent to which high school students are protected compared to college students, especially in the context of the high school press.

Aside from speech and press rights, students have achieved at most a mixed record in asserting other substantive rights. The most disputed, and still unsettled, issue involves student dress codes. Hair length standards, particularly, have involved an incredible amount of court time, have divided the courts of appeals, and have failed to get the attention of the Supreme Court.

Due process for students

Prior to 1975 lower courts were virtually unanimous in holding that expulsions and lengthy suspensions must be accompanied by procedural due process. *Goss v. Lopez* (1975) both affirmed this case law and extended it, striking down an Ohio statute that authorized school authorities to suspend students for up to 10 days without notice or hearing. Suspension even for such a short period, the Court found, affected "property" and "liberty" interests protected by the 14th amendment. Public school students were protected in the enjoyment of both.

Inasmuch as due process is a flexible concept, the Court, in recognition of the nature of the educational situation, did not require the application of the full panoply of due process rights. It said rather than "rudimentary" procedural protections necessitated "*some* kind of notice" and "*some* kind of hearing."

No delay "between the time 'notice' is given and the time of the hearing" was necessary. The notice need only identify the offending conduct so that the student would have "an opportunity to explain his version of the facts," but need not accord him an opportunity for preparation. The hearing procedure need not be encumbered by the customary accoutrements of a fair hearing; it was rather to be more like a "discussion."

The Court observed that the procedure followed in one of the schools involved in the case was "remarkably similar to that we now require." Under it, a teacher observing misconduct would complete a form describing the occurrence and send the student, with the form, to the principal's office. There, the principal would obtain the student's version of the event and, if it conflicted with the teacher's written description, would send for the teacher to hear the teacher's own version, apparently in the presence of the student. If a discrepancy still existed, "the teacher's version would be believed and the principal would arrive at a disciplinary decision based on it."

In light of such minimal requirements, it is a little difficult to appreciate the forcefulness of Justice Powell's dissent, although the principles generally urged are perfectly understandable. Basically, the

Justice argued that because children lacked the capacity of adults, it was the obligation of school authorities to protect and guide student interests.

Essentially the relationship was a paternalistic and not an adversary one. To impose an adversary relationship through due process would destroy the role and responsibilities of school officials without accomplishing anything constructive. Additionally, the Justice feared that academic decisions would be similarly subject to judicial review.

Moreover, another recent decision raises serious implications for the continuing vitality of *Goss*. In *Ingraham v. Wright* (1977), the Court held that a school system need not afford students any form of hearing prior to administering corporal punishment, not because the students' interest in being free from wrongfully administered corporal punishment was not a liberty interest safeguarded by the due process clause—the Court expressly held that it is—but rather because under State law persons who have been wrongly, erroneously, or excessively punished by teachers and school officials can sue for damages.

The existence of this remedy not only afforded such students relief when they were wronged, but it operated as well to deter the imposition of such punishment—the same purpose a pre-infliction hearing would achieve.

If the Federal due process clause is satisfied by the provision of due process by a State, it may as well be satisfied by remedial guarantees such as damage actions. That would constitute an enormous alteration of civil rights jurisprudence extending far beyond the area of students' rights. In any event, the holding in *Ingraham* is almost unprecedented and has considerable implications for the assertions of Federal constitutional rights in Federal courts. The constitutional standards here must be pronounced unsettled.

Privacy rights of minors

In *Carey v. Population Services International*, the Court struck down a statute that barred anyone from selling or distributing contraceptives to a minor under 16 years of age. The plurality opinion found that the right to privacy in decisions affecting procreation extended to minors as well as adults. Nevertheless, the Court declined to apply the compelling state interest test as used for adults to intrusions upon the privacy of minors.

Instead, Justice William Brennan reasoned, the government's "greater latitude to regulate the conduct of children" and the minor's "lesser capability for making important decisions" led to the conclusion that "any significant state interest . . . not present in the case of an adult" would justify narrowly drawn infringements on the minor's right to privacy.

But none of the goals advanced by the State met this test. The State interest in the physical and mental health of the minor was only slightly implicated by a decision to use a nonhazardous contraceptive. Deterring teenage sexual activity was probably a legitimate governmental interest, but it was not served by a State policy that, in effect, prescribed a venereal disease or an unwanted pregnancy or abortion as punishment for fornication.

The three concurring Justices took varying tacks. Justice Byron R. White argued that the significant State interest in prohibiting extramarital sexual relationships of both minors and adults was not measurably furthered by the statute. Justice John Paul Stevens thought it a legitimate governmental interest to deter sexual conduct by minors, but it was "irrational and perverse" to seek to accomplish that interest through denial of contraceptives. Justice Powell's concurrence was much more narrow, faulting the statute because it denied contraceptives to married minors and because it prohibited parents from giving contraceptives to their minor children.

Whatever the doctrinal shortcomings in the foregoing cases, perhaps the issues involved in a case currently before the Supreme Court will enable the Justices to agree upon a reasonable constitutional standard for children seeking rights that would undeniably be theirs if only they were adults. *J.L. v. Parham* concerns the due process standards to be applied to State procedures by which parents or guardians may commit minor children to institutions. Entering a mental or other facility through affirmative action of the patient or by one empowered by law to act in the patient's behalf is called "voluntary admission."

In the case of an unemancipated minor, application may be made only by a parent, guardian, or individual standing *in loco parentis* to the potential patient; no child acting on his own may initiate the admission for himself. In most States children can be admitted without any form of judicial involvement. Typically, a legal hearing is not required and representation for the child is not provided.

There is virtually no opportunity for judicial review once the child is institutionalized. Moreover, the child seeking his own release will quickly discover that he cannot be discharged without the authorization of the parent who originally admitted him. A parent's suc-

cess in institutionalizing the minor hinges solely on being able to convince an admitting physician that the child is in need of treatment. In many States the physician may not be a psychiatrist.

In its appeal, the State of Georgia argues that to impose due process requirements upon the decision of parents, concurred in by a physician, to have their child treated in a State institution and to subject that decision to the adversarial proceeding would narrow the scope of the parents' responsibilities and authority in a fashion that is inconsistent with the Court's prior decisions. The State also argues that such a process would be inconsistent with the deference owed to the judgment of physicians. The district court rejected this argument and declared the statute unconstitutional.

The district court judge relied on a constitutional recognition of the State's responsibility to safeguard children from neglect and abuse. That responsibility is activated when the State furnishes additional authority and the facilities by which, in some cases, abuse and neglect may be accomplished.

The future of children's rights

The Court has said, then, that minors as well as adults are protected by the Constitution and possess constitutional rights and that "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."

Recognition of this principle, however, is but the beginning of analysis. In a vast number of ways, government distinguishes between the adult and the minor.

Nothing in the case law suggests that the dreams of the "children's liberation" proponents are likely to be realized through constitutional jurisprudence. Even the cases that strongly support the independent constitutional status of minors expressly recognize that they have less capacity for making decisions than adults have. Consequently, the State has much greater latitude to regulate their conduct. Minors can be denied access to books, magazines, and motion pictures that may not be obscene under constitutional standards and that are accessible to adults, without a showing that children would necessarily be harmed by such exposure.

Whatever the Court eventually holds regarding the privacy of adult sex lives, it seems clear that minors may be legitimately barred from extramarital sexual activity.

Suffice it to say that the Court has recognized it is legitimate to consider minors less capable than adults of engaging freely in adult life. Therefore, the question becomes one, really, of the permissibility of the lines that are drawn. Two issues are involved in this question.

First, the case law we have reviewed has approached the question in terms of particular rights and interests rather than in general terms. Necessarily, this is the result of the way our system resolves these problems. Such particularized assertions of rights tends to focus the case law upon a narrow consideration of the interest asserted by the minor versus the governmental interests asserted to sustain the restriction. That kind of analysis is pervasive in the contraceptive cases reviewed and is a substantial part of the other cases reviewed. This makes, of course, for highly particularistic decisionmaking and very few broad generalizations.

Second, if the linedrawing process is itself legitimate, two approaches may be taken in asserting the invalidity of the place any line is drawn—an equal protection attack and a due process attack, using what is known as the irrebutable presumption doctrine.

The 14th amendment guarantee of equal protection is a particularly troublesome provision. It does not state an intelligible principle on its face. Thus, a demand for equal protection cannot be a demand that laws apply universally to all persons. All laws classify, make distinctions. The legislature, if it is to act at all, must impose burdens upon or grant benefits to groups or classes of individuals. The demand for equality confronts the right to classify.

The Court has said, "It is the essence of classification that upon the class are cast . . . burdens different from those resting upon the general public. . . . Indeed, the very idea of classification is that of inequality. . . ."

This dilemma is resolved through the doctrine of reasonable classification. The Constitution does not require that things different in fact be treated in law as though they were the same, only that those who are similarly situated be similarly treated. What is therefore barred is "arbitrary" classification or discrimination.

Determination of "arbitrariness" is primarily a two-step process: (1) the identity of the discrimination is determined by the criterion upon which it is based, and (2) the discrimination is arbitrary if the criterion upon which it is based is unrelated to the state purpose. But the question is not whether criterion and end are related or unrelated, but rather how well they are related or how poorly.

This briefly describes the "traditional" doctrine of equal protection analysis. It is the analysis used to review most classifications made by government and it is unusually easy to pass. So long as some reasonable basis for the classification exists, the equal protection clause is not offended simply because the classes do not exactly fit the criterion used or because some inequality results.

The Supreme Court has said, "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

Inasmuch as minors are universally recognized as having less capacity than adults have, a governmental decision to draw a line for particular purposes at 17 or 18 or 21 may well have little difficulty in passing this traditional test.

Suspect classes

In recent years, the Court has developed a doctrine of "suspect classifications." A suspect class is a group of people "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Blacks and aliens are suspect classes, for example. If age classifications were suspect, government would be required to draw age lines more finely, to evaluate with care and diligence the determination of minority status, and to refrain from broad and general classifications affecting all minors.

But it does not appear that age will be "suspect." In a case dealing with the mandatory retirement of police officers at age 50, the Court held that the aged or older persons did not qualify as a "discrete and insular" group and indicated rather strongly that age classifications were not suspect.

It does not seem likely, either, given the context of judicial cognizance of the incapacity of minors, that children will be held to constitute either a suspect class or a group entitled to intermediate scrutiny. Applying equal protection standards vigorously, either through strict scrutiny or an intermediate one, would lead toward a "child-blind" society that would not only cause the removal of some undoubted injustices but would also deny the undoubted distinctiveness of children.

The "irrebutable presumption" doctrine of due process that sprang to life almost entirely during the early 1970s was sharply reined in within a quite short time. As appled to minors, the doctrine would insist that if age distinctions were premised on the assumption of incapacity of minors, then some minors of a certain age will not be so lacking in capacity as others, and government is required to give each person so affected the opportunity to rebut the presumption of incapacity. To presume that a particular 17-year-old is unfit to vote, to work, or to choose his own school because most persons of like age have certain characteristics is to class by statistical stereotype.

In curtailing this doctrine, the Court warned that its extension to all governmental classifications would "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments." The Court limited its application to those areas that involve fundamental rights or suspect classifications.

As a practical matter, the burden of ascertaining—in what would undoubtedly be millions of instances—who has the characteristics generally associated with a particular age and who does not would be overwhelming. Further, to tailor all determinations to the individual case would be to encourage arbitrary choices—choices that depart from the goal of treating similar cases similarly and that could well conceal substantively impermissible grounds of decision. To an uncertain degree, the privacy of many would necessarily be surrendered if the government sought information on which to base its decisions. Little doubt exists that extending the doctrine very far could make substantial inroads on the rule of law itself.

We have seen that the Supreme Court has been groping for a standard doctrine to resolve children's rights cases. For the most part, however, its decisions are still best analyzed in terms of the underlying right claimed rather than as a separate children's issue.

It may well be that this is the most we can hope for. Childhood is a separate and unique status and the place of children in this society perhaps does not admit of an overall synthesizing theory.

But if the Court continues to decide cases involving substantial claims, most especially those of speech and the guarantees of procedural regularity, by balancing the interests claimed against the government's assertions of justification in restricting them, a fairly high standard of justice and fairness can be attained even in the absence of a unifying theory.

INTO THE MAINSTREAM

THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES

By Edward V. Roberts

In 1976 the TV evening news dramatically introduced millions of Americans to the new civil rights movement of people with disabilities. The news reported simultaneous demonstrations in San Francisco, New York City, Washington, D.C., and elsewhere to urge the signing of regulations for Section 504 of the 1973 Rehabilitation Act, the "civil rights act for people with disabilities." People with a wide range of disabilities—deafness, blindness, cerebral palsy, spinal cord injury, mental retardation, mental illness, multiple disabilities, and others—moved into Federal buildings across the country and refused to leave.

These demonstrations culminated in one of the most significant victories in the history of the civil rights movement in the United States. On that date, Secretary of Health, Education, and Welfare, Joseph Califano signed the regulations to implement Section 504 of the Rehabilitation Act of 1973. He summarized the importance of this law as follows:

> Section 504 . . . represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of Section 504 is almost identical to the comparable nondiscrimination provisions of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life. The Secretary intends vigorously to implement and enforce that mandate.

The 504 regulations, along with other Federal laws (Section 503 of the Rehabilitation Act and the Education of All Handicapped Children Act), set forth a comprehensive scheme of Federal civil rights legislation. These laws mandate the end of the decades of segregation of people with disabilities and open vast new opportunities for social and economic integration into the mainstream.

Before turning to a more detailed look at this legislation, we should answer the question, "If disabled people are not in the mainstream, where are they?"

Significant numbers are warehoused in institutions. Millions are on public assistance or unemployment. Children are segregated in special schools or completely denied an education.

The statistics are grim. The 1970 census shows that only 4 out of every 10 disabled persons in California were employed. The median income according to the census was $2,119 or less than $200 per month.

For decades this society has perpetuated a demeaning view of people with disabilities as weak and frail and as much more limited than we really are. Unfortunately, a great many people with disabilities accepted this view. After all, it is hard to have a positive self-image when the dominant culture dictates otherwise.

504 was an important legal and psychological victory for people with disabilities. At that time the administration in Washington was being pressured into promulgating watered-down regulations. There was serious consideration of adopting regulations that were to be premised on separate but equal treatment of persons with disabilities.

To counter this pressure, a coalition was created of people represent-

Mr. Roberts is director of the department of rehabilitation, State of California, and a post-polio quadriplegic.

ing a wide range of disabilities, their families, and people in the helping professions. This coalition coordinated a sophisticated political strategy that emphasized the strengths and capabilities of persons with severe disabilities. We demonstrated to ourselves and to the Nation that people with disabilities are capable of achieving political victories against a well-organized opposition that was determined to keep us segregated. As a result, we gained regulations that spell out equal right to the opportunity to live, learn, and grow as part of the mainstream in this country.

The victory achieved 2 years ago will not, however, be completed until the Federal civil rights laws are fully implemented. These laws, sections 503 and 504 of the 1973 Rehabilitation Act and the Education of All Handicapped Children Act, provide a broad plan of integration.

Employment

Persons with disabilities have been effectively excluded from meaningful employment opportunities. These laws, when fully implemented, will open up thousands, if not hundreds of thousands, of employment opportunities for persons with disabilities.

The cornerstone of the laws is the concept of reasonable accommodation. These laws recognize that work sites and equipment have been historically designed by and for a population without disabilities, thus excluding disabled persons from employment opportunities.

These laws require all recipients of Federal financial assistance (e.g., State and local governmental agencies) and Federal contractors to make reasonable accommodations to enable disabled persons to fill all jobs for which they are otherwise qualified.

The specific type of accommodation will be determined by the facts of each situation. In the case of a deaf employee, it may mean the purchase of a TTY device. It is like a standard teletype such as those used by Western Union or airline reservation systems. These devices can be leased from the phone company (in California) for less than $35.00 per month.

In the case of a partially blind employee, reasonable accommodation might mean the purchase of a reading device. Again the cost is low when amortized over a reasonable period of time. If an employee is in a wheelchair, the employer may have to widen the doors to accommodate the wheelchair.

The economic implications of 503 and 504 are unlimited. Over the next decade, welfare costs should be reduced substantially as disabled persons enter the job market. New industries will be developed to meet the needs of disabled persons who will have greater purchasing power. Traditional industries will have new markets. By way of example, a stockbroker in Florida found that he could increase his business significantly by installing a TTY device to communicate with persons with hearing disabilities. Employers can now gain substantial tax credits that will more than compensate for the costs of adapting work environments for disabled employees.

Education

One of the most significant aspects of these laws will affect the Nation's schools.

In past years, disabled children were often segregated into so-called special schools (e.g. schools for the deaf, the blind, the physically disabled, and the "mentally retarded").

As this country has learned over and over again, a segregated education has profound negative effects on a child's self-image as well as on his or her ability to learn. This applies to the child with a disability as well as to the black, Hispanic, or Asian child.

As does other civil rights legislation, the new civil rights laws for children with disabilities reject the concept of a segregated education. These laws require that disabled children must be educated in an integrated educational setting unless the school can show (which is most unlikely) that the disabled child cannot learn in an integrated environment.

The premise and promise of these laws is that the disabled child can and will succeed in the public school system. These laws will thus offer enormous hope to the parent of the disabled child who has found the school door closed. Integrated schools can remove what is one of the greatest obstacles facing children with disabilities—the absence of opportunities for socialization. It will enable them to work and play with their nondisabled peers and to gain social skills and behavior patterns that are critical to their personal fulfillment as adults.

Public transportation

It is well recognized that access to public transportation is essential to full integration for many people with disabilities. As one person put it, "You can't get to work or to school if you can't get on the bus."

In recent months, the transportation industry has mounted a massive attack against removing the mobility barriers in our transportation system.

They have trundled out economists and other hired guns who have attempted to show that people with disabilities will not use public transportation systems. So-called cost-efficiency computations have been undertaken, all of which are designed to "prove" that a segregated system would be less expensive.

These arguments cannot, however, stand close scrutiny. They fail to take into account the savings in public assistance costs that will flow from new employment opportunities; they cannot place a dollar figure on the increase in self-esteem that will result from mobility; they do not plot the increased labor costs that are inherent in the segregated systems proposed for disabled persons.

Most importantly, they have underestimated the resolve of people with

disabilities who will not accept a segragated system even if it can be shown to be cheaper.

Rehabilitation

504 is not the only section of the Rehabilitation Act that asserts the civil and human rights of people with disabilities. The entire 1973 Rehabilitation Act set a historic precedent when it mandated, for the first time, that the people with the greatest need for rehabilitation services (such as the severely disabled) should receive priority.

This act recognizes that in the past people with severe disabilities have been underserved and that many have been denied the opportunity to gain the skills and services they need to become employed.

The 1978 Rehabilitation Act amendments have gone a giant step further. Title VII of this act clearly states the right of people with severe disabilities to rehabilitation services that lead to greater independence and participation in society, regardless of the person's potential for employability. It will enable rehabilitation agencies to help people move away from dependency situations and to develop their potential for meaningful lives as active and responsible members of their communities.

The obstacle standing in the way of implementing Title VII of the new act is the threat of no or token funding in the appropriations bill now in Congress. It's a situation similar to 504. In 1973 people with disabilities gained their civil rights law and had to fight for the regulations to enforce it. In 1979 they have gained their right to services that allow them to be independent and they will have to fight for the funding that will make such services a reality.

Some observations

While it is not within the scope of this article to cover all the provisions of the new civil rights laws for persons with disabilities, a few additional observations are appropriate.

In years past it was literally impossible for many disabled persons to participate effectively in the political process.

Voting booths were inaccessible to persons with mobility impairments. Ballots in braille were not available for persons with impaired sight.

Government was conducted in rooms that were inaccessible to wheelchairs, and no sign language interpreters were available for persons with hearing impairments.

The new civil rights laws will change this. In the coming decade, disabled persons will become more and more involved in the political processes of this country.

Much remains to be done. The disabled movement must ensure that the new laws are enforced. It must also ensure that new laws are passed. For example, few, if any, laws address the question of adequate housing for persons with disabilities. Most building codes permit the construction of houses with narrow doors that will not accommodate persons with mobility impairments.

The television industry and Federal regulatory agencies have failed to utilize technologies that can create "captioned" television for persons with hearing impairments.

The disabled movement has developed strong support in the Congress, within the labor movement, and from various corporations.

The 504 experience taught the disabled community and its allies an important lesson: no goal is beyond our reach.

Pressure is growing in this country today to cut back government spending, "to live within our means." A great danger exists that those people in our society with the greatest needs will be forgotten. Warehousing a poor or old or severely disabled person is undeniably cheaper than helping that person create a life of meaning and self-sufficiency. But who among us will not one day be old, poor, or disabled?

ENDING AGE DISCRIMINATION

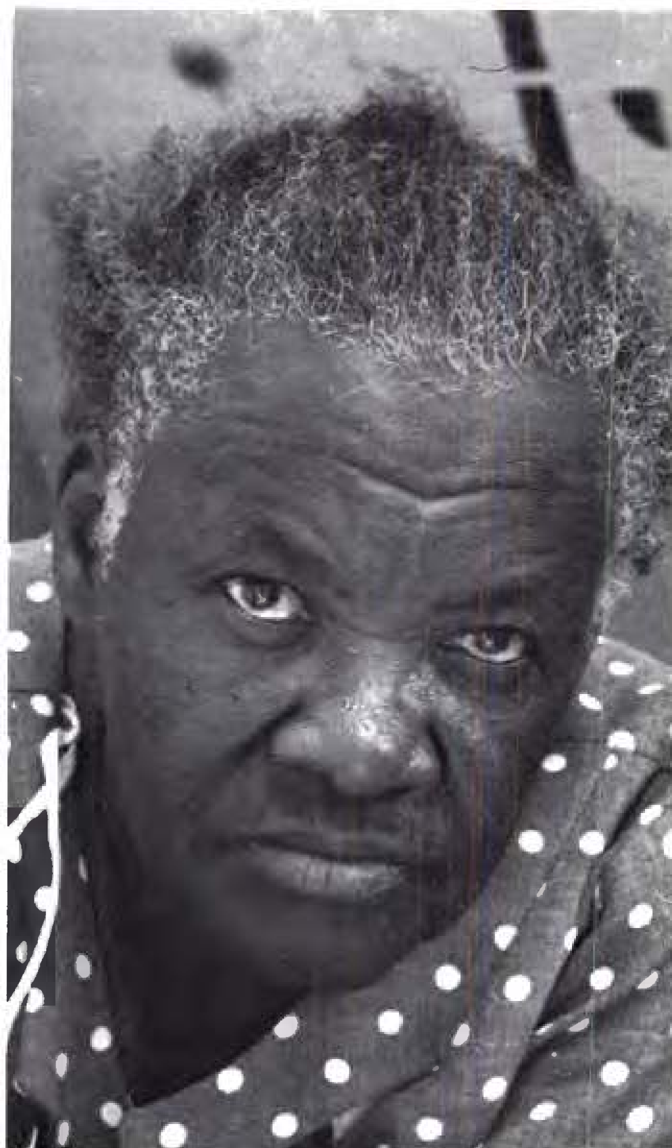
By Michael D. Batten

The Age Discrimination Act passed by Congress in 1975 had as its original purpose the prohibition of "unreasonable discrimination" based on age in certain federally administered programs. Its key provision states, "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any Federal activity receiving Federal financial assistance."

The effective date of the act was set as January 1, 1979, and a special study—to be conducted by the U.S. Commission on Civil Rights—was mandated in order to determine the existence and document the scope of "unreasonable" age discrimination within federally funded programs. The study was to "identify with particularity" any such programs or activities in which evidence of age discrimination against otherwise qualified individuals is found.

As is the case with most Federal regulatory laws, certain exceptions were written into the statute. Thus, it would not be a violation of the act if a covered agency or a recipient of Federal money from that agency takes an action that takes into account age "as a factor necessary to the normal operation" of a Federal program or the "achievement of any statutory objective of a specific program." Nor would it be wrong for an agency to differentiate by age so long as "such action is based on reasonable factors other than age."

Furthermore, the provisions of the act don't apply to any program or activity *established under authority of any law* (emphasis added) that:



Michael Batten is a senior staff associate at the National Manpower Institute in Washington, D.C.

THE AGE DISCRIMINATION ACT OF 1975 PRESENTS UNIQUE ENFORCEMENT PROBLEMS

1) provides any benefits or assistance to persons based on the age of such persons, or
2) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms.

Regarding employment and age, ADA defers to the Age Discrimination in Employment Act of 1968, as amended. The only Federal employment program to be covered by the ADA is the Comprehensive Employment and Training Act of 1974.

The enforcement of the Age Discrimination Act rests with the Federal agencies covered by the law. The agencies are to supervise and monitor all recipients of grants and contracts to assure compliance. The Department of Health, Education, and Welfare is to act as the "lead" agency in the overall compliance effort by taking responsibility for issuing general regulations and guidelines under the act. The covered agencies are then to develop specific regulations pertaining to their own programs and operations. HEW is responsible for coordinating reports and assessing progress under the ADA and making annual reports to the President and Congress.

The study that was to identify age discrimination and the scope of such discrimination within federally funded programs was submitted to the President and Congress in January of 1978. Its key recommendation was to delete the word "unreasonable" from the term "unreasonable discrimination" in the ADA. Thus *all* age discrimination within the Federal agencies, programs, and activities covered would be prohibited. The exceptions noted above, however, would still stand.

The study did not document or illustrate systematic age discrimination in federally funded programs or within any particular program sponsored by a Federal agency. Rather, it found that program administrators "follow policies and practices that effectively deny individuals access to needed services and benefits because of their age." The study identified barriers to participation but not a "pattern and practice" of age discrimination within the programs described.

Unfortunately, in the authors view, the report did not address the complexity of the law itself or possible enforcement procedures. Nor did it report on the extensive enforcement and litigation experience that the government has gained under the Age Discrimination in Employment Act. While the ADA does not relate directly to employment, there are useful lessons to be learned by examining the history and implementation of the ADEA.

(Editor's note: This article was written prior to the release of Volume II of the Commission's study.)

In any case, Congress amended the ADA by deleting the term "unreasonable" from the statement of purpose noted above. However, the major exceptions that would permit age distinctions based on existing laws and distinctions based on reasonable factors other than age were retained. Regarding enforcement, Congress added a provision that would allow individuals access to sue under the ADA when all other administrative remedies fail. A final change in the law deferred the effective date of the ADA from January 1, 1979, to July 1, 1979.

The proposed regulations

In December 1978, HEW issued a proposed set of *general* regulations for the ADA. After appropriate public hearings on these proposals, the Department will issue a final set of general regulations to be published in the *Federal Register*. After a subsequent time period, each Federal agency covered by the act will develop and publish its own set of *specific* regulations.

It should be noted at the outset that the proposed general regulations are broad in scope, fair, and reasonable in every sense of these terms. First, the proposed regulations take into account the complexity of age discrimination. They distinguish clearly between discrimination based on age stereotypes and what might appear to be appropriate age distinctions within the exceptions noted in the ADA. Thus, it is one thing to develop educational programs for young children, e.g., a Head Start program, and target Federal funds for that group. It is another thing to ignore, discourage, or fail to enroll persons over age 40 in major job training and employment programs sponsored by the Comprehensive Employment and Training Act.

Furthermore, if States and local jurisdictions receive funds under revenue sharing legislation, they may not make arbitrary and discriminatory rules regarding the age of individuals who benefit from these grants.

In sum, the proposed regulations raise the problem of explicitly defining age discrimination and age distinctions and the difficulties involved enforcing

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the statute on recipients of Federal funds covered by the act. The regulations also note the difficulties in both analyzing and reporting on age factors within such subagencies and the programs they administer.

The proposed regulations then move on to the most difficult and, perhaps, contradictory dilemmas presented by the ADA. What Federal programs are covered by the law, and how does an agency reconcile the controlling purpose of the statute (to eliminate *all* age discrimination) with the exceptions that allow age-based distinctions?

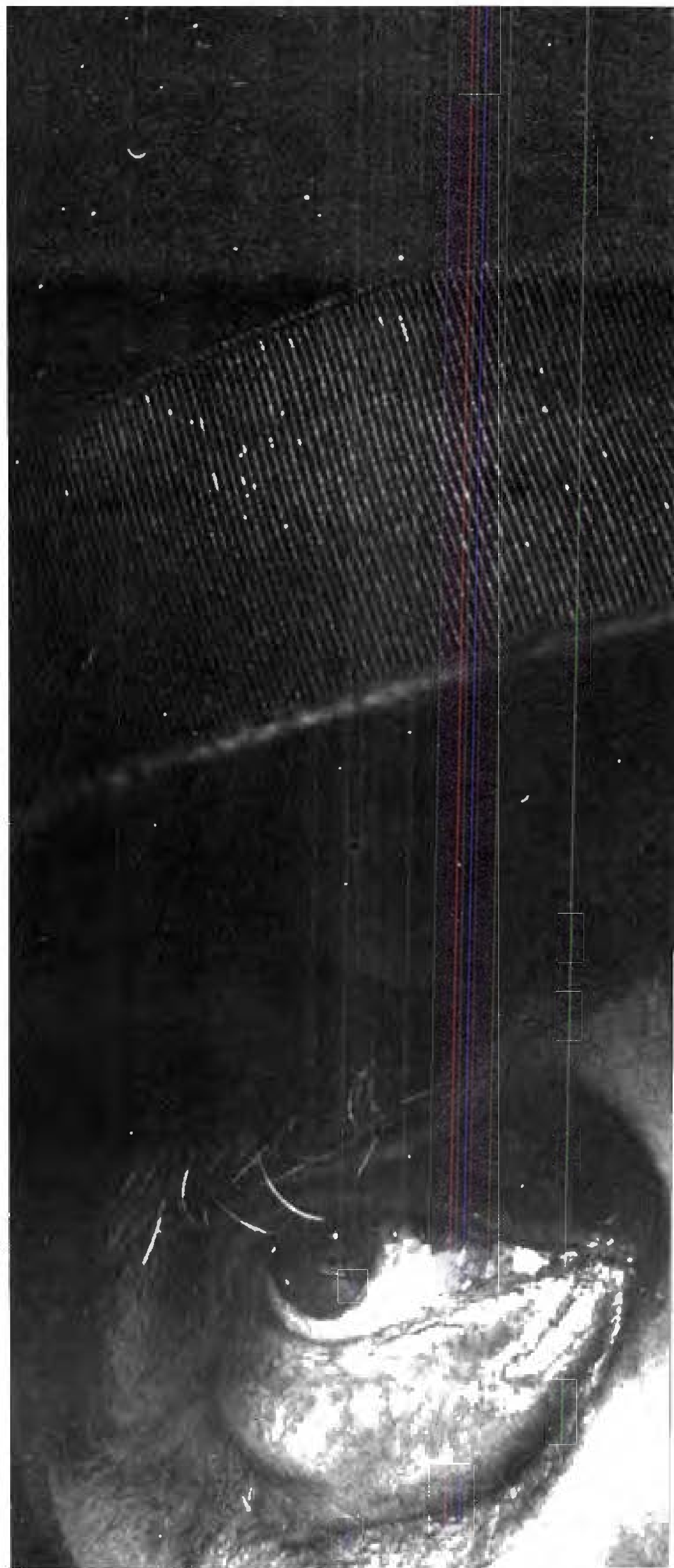
It is somewhat ironic and indicative of the contradictions within the ADA to note that the 1978 amendments to the law were attached to 1978 amendments to the Older Americans Act. The ADA, on its face, protects U.S. citizens aged zero to 100 plus. The Older Americans Act is a categorical program for U.S. citizens over age 55 or 60.

When one totals up the Federal funds allocated to older persons through the Social Security Act, the Older Americans Act, and other mandated age-related programs, the specter of age discrimination and the "pattern and practice" of age discrimination in federally covered programs is considerably diminished. Such overall proportions of the distribution of Federal funds to the upper age groups will not fail to impress Federal judges when younger groups bring suit under the ADA.

Thus, with such big-league programs as social security excluded (since the age of beneficiaries has been clearly established by the authority of other Federal statutes), the number and types of programs covered seems to dwindle.

The proposed regulations then raise several other issues. Consider the following:

1) Nutrition programs under the Older Americans Act provide food for persons over 60 years of age.
2) Certain State laws impose age restrictions on who may qualify for a driver's license.
3) State statutes provide for age differentials in implementation of their respective criminal justice systems.
4) Some local jurisdictions provide certain tax relief and other benefits for the elderly. The age at which one is or is not elderly varies from jurisdiction to jurisdiction.
5) Various transit authorities allow reduced fares for public transportation to various age groups—usually school-age children and the elderly.



Do all these fall within the exception allowing for age distinctions "established under authority of ... law"? Congress provided little or no guidance on this important issue in the House and Senate committee reports, conferences, or floor debate. The potential for legal controversy is great.

Clearly, programs such as health services for infants or special geriatric services for the elderly contain legislated and functional criteria that appear to meet the age distinction exceptions in the ADA. But age distinctions made over a variety of programs for purposes that are less age-specific can, and most likely will, raise serious problems.

For example, the act and proposed regulations indicate that certain employment programs sponsored under CETA are covered, while others are not. Public employment programs are covered; special apprenticeship programs with age cutoffs as early as age 25 are exempt. But why shouldn't a woman, age 28, be eligible for apprenticeship programs? How valid is the age distinction or the so-called legislative age limit in this instance? One of the major flaws in the design of the ADA and a difficulty that will plague its enforcement is that, with the exception of extreme youth and extreme old age, few rational criteria on which to base age distinctions exist, as we shall see.

Reasonable age distinctions

One difficulty facing enforcement and defining reasonable age distinctions is that particular ages are often selected as a matter of convenience. Thus, we allegedly reach the age of reason at 7. At age 18 a U.S. citizen can vote; he or she theoretically reaches social and political maturity. In programs such as Head Start, 3 is usually the age of eligibility for young participants. But why not 2½—or 4, for that matter? Micro-age distinctions must be confronted as well as the larger age distinctions that may seem reasonable to us.

Under Ttitle VII of the 1964 Civil Rights Act, an employer cannot discriminate against a number of groups covered. Thus, the employment rights of black persons, as an entire group, are protected. One cannot discriminate against a black person, or make a reasonable distinction on hiring, etc., on the basis of the person being a "little" black. But the ADA proposes to distinguish between participants in programs who are a "little" young—or a "little" old, for that matter. It may be straining a bit to examine the practical and functional needs of programs in light of eliminating age discrimination. But the law and the proposed

regulations invite these issues.

Other problems touched on by the proposed regulations include the application of physical fitness tests in public employment programs. Many believe these are mechanisms to exclude older applicants.

Colleges, law schools, and medical schools—supported, in part, by Federal grants—often utilize written tests as a means of selecting and rejecting candidates. Oftentimes these tests serve the practical purpose of discouraging and excluding applicants, say, over age 30. Suits brought under Title VII of the 1964 Civil Rights Act should caution those making age distinctions in these areas.

Pragmatic and other assessments on the overall utility and value to be gained through training an over-30 or over-40 doctor may fly in the face of the ADA mandate. They will, at least, invite challenge when the doctrine of reasonable distinctions is invoked to exclude older participants from entering a recipient program funded, in part, by Federal money.

Enforcing the ADA

Most regulatory laws call for a special agency to enforce their provisions. Thus, the Department of Labor currently administers the Age Discrimination in Employment Act, Equal Pay Act, and minimum wage laws. The Equal Employment Opportunity Commission is mandated to enforce Title VII provisions of the Civil Rights Act of 1964. The proposed enforcement structure of the ADA, however, is different.

Basically, each agency covered is responsible for enforcing, monitoring, and reporting on the ADA as it affects individual agency operations. The programs and activities of these agencies would appear to be extramural. ADA apparently does not apply to internal staffing or management systems of the respective agencies. Thus, HEW would supervise and monitor its "clients"—grantees and contractors—regarding the enforcement of the ADA. All other not-excluded agencies would do the same.

Each Federal agency is required to inform its clients or recipient groups about the ADA, publish an individual set of regulations, and educate the recipient organizations as to compliance, procedures and agency expectations. Each client or recipient group will be expected to evaluate how its programs affect different age groups. When age discrimination appears, the recipient is to make appropriate changes.

Should a recipient invoke exceptions to the ADA and choose to make use of reasonable age distinctions made on operational or other criteria, then it must defend its action. If it disagrees, the Federal agency

must try a series of administrative remedies (conciliation, education, and persuasion. If these fail, the Federal agency may withdraw funds from a recipient organization that continues to be in noncompliance.

Actions against a recipient organization can be initiated by the supervising Federal agency or the excluded, would-be beneficiaries of the recipient's services. As is the case with most other civil rights legislation, an individual has the right to initiate a civil action if and when all administrative solutions fail. The proposed regulations set up procedures for such action that are fairly standard.

On its face, the ADA appears to be a logical outgrowth and extension of civil rights activity in the U.S. The Civil Rights Act of 1964 required that a study on age discrimination in employment be made. The Age Discrimination in Employment Act of 1967 and the 1978 amendments to that law protect the employment rights of individuals aged 40 to 70. The Equal Pay Act went a long way toward establishing parity in wages and salary between men and women. The ADA, it seems, is designed to take the next step by trying to eliminate and prevent discrimination based on age—at least in certain federally supported programs. It is the effort to eliminate age discrimination across the total age spectrum that sets up the greatest practical difficulty facing the statute.

The age spectrum

Who gets what when from the Federal government? How does a Federal agency assess equity in distributing public money across the age spectrum when it must take into account the varying needs for specific agency services by different age groups and by the target population of the agency programs? Furthermore, how narrowly should an agency define the age groups to which it renders service? By declaring age discrimination illegal, yet allowing reasonable and therefore legal age discrimination (distinction is discrimination by any other name!), the ADA has charted a course for both administrative and legal conflict. Age may be the only universal variable that applies to beneficiaries and participants in any Federal program—but this fact will not simplify distribution formulas for benefits or services.

The law, the legislative history, and the proposed regulations are uninstructive as to how an agency covered by the statute is to measure and determine what constitutes significant differences or needs between different age groups served, or how, in fact, to define such age groups. Are, for example, young

adults generally discounted by public health programs because they are in generally better health than other segments of the population? If so, what age grouping constitutes "young adults"? Cannot this group charge discrimination by claiming that insufficient preventive health strategies and programs were directed to them as a group?

What would health statistics show on the real needs of this cohort as a group? What about the individual young adult who may suffer health problems but encounters programmatic age discrimination—does he or she have a realistic chance to prove a case, given the reasonable age distinction exception?

The same dilemmas face persons over age 65 who wish to participate in a CETA program. Program managers may point out that the diminishing labor force participation rates and the comparatively low unemployment rates for this age group make a focus on youth reasonable.

In fact, these age distinctions are made at present and account, in part, for low participation of older persons in CETA programs. Would this exclusion be justified under the ADA and its exceptions? Will it take litigation to clarify the matter?

Other problems arise from the competitive interests of different age groups for the available Federal resources. Citizens 18 and under may have one set of needs. Those in every subsequent 10-year or 5-year cohort may make different age-related claims. Will these age groups clash if the distribution of funds and services to various groups is more systematic? The proposed general regulations issued by HEW implicitly recognize these and many other difficulties inherent in the ADA. But without much more specific direction to the agencies covered by the act, the ADA can very easily become a non-law.

Age and the Court:

The U. S. Supreme Court has not taken too kindly to age-related issues brought before it. Two major cases bear this out. The Court recently rejected a claim on the part of the U. S. foreign service officers that forced retirement at age 60 was a violation of their rights under the due process and equal protection provisions of the U. S. Constitution. A mandatory retirement age established by the State is reasonable, the Court said, based in part on the needs and aspirations of younger members of the foreign service to advance to the more senior positions vacated by the litigants, who, regrettably, had arrived at age 60.

Given the all-inclusive age protections mandated by the ADA, the permutations of one age group versus another are almost mind-boggling. The precedent the Court relied on in *Vance* was a case upholding the constitutionality of a State law that forced retirement at age 50. In *Massachusetts Board of Retirement v. Murgia,* the Court denied that the State trooper in question had a legitimate age-related complaint under the 14th amendment.

The elderly as a group, the Court said, were in no way similar to minorities and women, who, as a class, had suffered lengthy and systematic discrimination of many kinds. The Nation, the Court went on to state, has provided for older persons in a special way, notably through social security benefits. Finally, the Court agreed with the State's contention that retirement at age 50 was necessary to uphold the morale and promotion aspirations of younger State troopers—an acceptable and rational means to achieve the State's objective of maintaining public safety.

Litigation under the Age Discrimination in Employment Act (ADEA) is also instructive. This statute has matured over the last 10 years. Cases have reached numerous Federal district and appellate courts, and a growing number are coming up before the U. S. Supreme Court. In addition, many cases have been conciliated short of litigation. This is not the place to recount all the lessons that could be learned from the ADEA. One case, however, should be noted.

Mistretta v. Sandia Laboratories Inc. is the only "pattern and practice" case regarding any type of age discrimination. As such it is relevant to ADA enforcement and litigation strategies. The case involved the termination of a large number of employees for economic reasons. The biggest proportion of workers in that group fell between the ages of 40 and 65—then the upper age limit set by the act. These workers, as a group, filed charges under the ADEA and were joined by the U.S. Department of Labor, which had responsibility for enforcement of the act.

The district court judge ruled that Sandia had engaged in a "pattern and practice" of age discrimination. That is, the decision to terminate had been based on age alone and all other factors were incidental. Department of Labor attorneys introduced a massive array of age-related statistics as evidence that covered every major personnel activity in the company over a 3-year period.

What the Labor Department attorneys did, in effect, was to zero-base age factors in the Sandia personnel system. That is, they examined hiring, promotion, and educational policies within the com-

pany and then, from stated policies and practices, built up the comparable age patterns over time that were related to these functions. No assumptions were made regarding discrimination.

The statistics told the story. The Court found that no age discrimination occurred in hiring, promotion, or education, but noted that the data were relevant to the charges of discrimination in termination procedures.

The next level of investigation examined salary administration, retirement policies, and termination procedures. The same type of age analysis was applied. Here the Court ruled that systemic age discrimination occurred in the areas of salary administration and in the termination procedures. The statistical evidence presented showed, beyond a reasonable doubt, that the termination of so many older workers could not have happened by chance or by any other means but conscious deselection.

Lessons for compliance

The lessons for ADA compliance procedures are clear. Federal agencies covered by the ADA should:

- Review and clarify major program functions within the agency mandate as these apply or might apply to different age groups served.
- Examine these functions by past and current distribution of services and funds to different age groups. Five-year age intervals are suggested for the initial overview.
- Examine the recipient providers of services under the agency mandate and the major agency functions they administer to different age groups. Use criteria such as size, location, and program variation for the first overview.
- Analyze all age-imbalances that occur within the range of services provided through recipient groups studied. Reconcile the age imbalances with:
  - —Overall agency mandate
  - —Primary purpose of the ADA
  - —Allowable age distinctions under the ADA exceptions
  - —Possible/probable violations of the statute.
- Zero in on the above process and data gathered to detect the more serious "pattern and practice" trends of age discrimination that emerge (as distinct from annual variations in the age characteristics of groups served).
- Set up corrective measures to achieve requisite age distributions that will eliminate the serious age imbalances in the agency service program.
- Record and document the above procedures and utilize as a technical assistance guide to other recipient organizations not within the initial age-study group.

The advantage of a Federal agency taking such steps is that it will obtain firsthand information and experience in dealing with age discrimination problems. Repeating the process several times—with a view towards developing a compliance model—will sharpen agency awareness on age matters and the requirements of the ADA. This, in turn, will help achieve compliance among recipient organizations at a minimal cost and with agency-wide controls over the compliance program.

The inherent dilemmas

The ADA faces the dilemmas inherent in the aspirations of a democratic society. We must strive to achieve justice for all citizens under the laws, but must remain aware that under any one statute, justice for all can become minimal justice—or worse, justice for none. If the purpose of the ADA is to eliminate all age discrimination in a blind and automatic manner—so that all beneficiaries under Federal programs receive an equally rationed amount of services or funds in terms of service—then all age groups will suffer. If solid age-related criteria for different types and amounts of services for different age groups can be developed and tested over the coming year by Federal agencies responsible for enforcing the ADA, then a slavish conformity to the act can be avoided.

The problem seems to be that such criteria do not exist. They must be developed before the general ADA regulations are finalized and the specific sets of regulations are developed by the appropriate Federal agencies. The history of the age cases and the lessons to be learned through the summary age-audit technique described above offer one positive approach for Federal agencies. But like it or not, this or similar methods to achieve compliance to what must be regarded as not the most specific of civil rights law will take time and effort.

It is noble and grand to attempt to abolish discrimination—age or any other kind—by statute. We have learned some hard lessons over the past and we should make every effort to apply them to the ADA. Time, careful work on the part of Federal agencies, some very complicated litigation, and perfecting amendments down the line will tell the story.

NATIONAL URBAN POLICY, NEIGHBORHOODS, AND CIVIL RIGHTS

A Program for the Cities

By Jennifer J. Douglas

The quality of life in many of America's cities has declined drastically within the last 20 years. This decline is due in part to the exodus of the more affluent city dwellers, jobs, and businesses to suburban and rural communities. As a result of this migration, the cities' tax bases have shrunk to a point where cities are less able to provide adequate municipal services to their remaining populations. Those who suffer most from this subsequent decline in the quality of life in cities are poor, minority, and elderly city dwellers who could not escape to suburbia.

Federal and State policies and programs have also contributed to the decline of cities. Federal policies and programs have nurtured urban sprawl and suburban development, while the States, for the most part, have been insensitive to the needs of cities and their remaining inhabitants—the poor, minorities, and the elderly.

Few States have made serious attempts to address the problems of cities. States, on the whole, have not even bothered to examine the

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Jennifer J. Douglas is Assistant Director for Government Relations of the National Urban League, Inc.

antiquated and inefficient budgetary and accounting systems that they require local units of government to use in attempts to manage their resources.

The financial crisis of New York City did more to publicize the plight and probable future of America's cities than any other single phenomenon. Americans began to understand that New York City's experiences might be replicated in other cities.

Americans have reacted to the New York City experience and the decline in the quality of life in American cities in a number of ways. Those who espouse the philosophy of Roger Starr, former commissioner of New York City's Department of Housing Preservation and Development, blame the city's ills on the poor, minority, and elderly residents of urban centers. For these critics, the fact that the cities must provide "special" services to these residents negates the possibility that these areas can be viable places to live and do business. The Roger Starrs of America would relocate the urban poor, minorities, and the elderly, and revitalize the cities for a middle and upper income population. They believe that the interests of the poor, the elderly, and minorities cannot realistically play a role in the development and implementation of revitalization strategies. Race, class, and age prejudices permeate this view.

In direct contrast to this philosophy, civil rights advocates and organizations believe that past and present governmental policies and racial discrimination have and do contribute to the decline of cities. The service needs of the present city dwellers are often neglected or haphazardly addressed by the Federal and State governments and are not the cause but rather the

effect of urban decay. The blame for the plight of cities has been mistakenly laid at the feet of the victims (the urban poor, minorities, and the elderly) and not at those of the culprits.

Civil rights organizations stress that revitalization must include the interests of *current* as well as potential city dwellers. The rights of minorities, the poor, and the elderly to choose where they want to live must be maintained in revitalization strategies. Strong measures must be included in those strategies to protect the poor and minorities from being displaced. Montesquieu, de Tocqueville, Thomas Paine, and President Thomas Jefferson urged that Americans take great care to ensure that the rights of the minority equal those of the majority. Civil rights advocates cling to their view that omitting the rights and privileges of the minority also limits the rights and privileges of the majority.

Mayors and other local elected officials often cite the Federal and State governments' insensitivity to local urban problems and the shrinking tax bases that limit the cities' ability to provide basic services, such as education, fire and police protection, and social services, as major causes of the urban crisis. They want their communities to be revitalized, and they desire a stronger voice in determining the revitalization process and the allocation of community resources.

On a more decentralized level, Americans involved in the "neighborhood movement" blame the decay of cities on big government. They claim that governments at all levels have become too centralized politically and administratively to provide the services that are truly needed by the average citizen. If urban revitalization is to occur, those involved with the neighborhood movement would like to see the residents of neighborhoods determine how their neighborhood should be revitalized and implement such strategies themselves.

Most urban Americans live in neighborhoods, regardless of their race, religion, national origin, or sex. Yet the neighborhood movement is strongest among ethnic organizations of European background, and is devoid of any substantial participation by racial minority populations. Unfortunately, the interests of blacks, Hispanics, American Indians, and Asian Americans—who also live in neighborhoods—seem a low prior-

ity of the neighborhood movement. Some neighborhood movement supporters advocate the decentralization of political and administrative power for themselves because their neighborhoods, they say, are capable of self-government. They cite the 1960s to infer that other neighborhoods (black, Hispanic, American Indian, and Asian) are incapable of competently accepting such power and responsibilities.

The business community, too, is concerned with the plight of cities. It blames the decline of urban areas on efficiency and mismanagement in government at all levels. Its participation in urban revitalization is essential, but will only come if the incentives outweigh the risks, and profits are assured.

These cursory reviews of the major philosophies and themes surrounding the revitalization movement in our cities depict the environment within which President Carter's national urban policy was developed.

What is the National Urban Policy?

A policy is a goal. The national urban policy (NUP) represents the Carter Administration's goal(s) and corresponding strategies (methods) for revitalizing "America's communities."

The variety of initiatives and the levels of funding contained in the policy can be considered together as the plan that will determine who will benefit from urban and community reinvestment. As originally proposed, the NUP contained a fiscal package totaling $8.3 billion for FY 79. This total included tax credits to industries and loan guarantees costing $3.9 billion. The funding level for the NUP, as originally proposed, was $2.7 billion less than the $11 billion the National Conference of Mayors had determined was needed to implement an adequate urban policy.

Ronald H. Brown, vice president of the National Urban League, has stated that, "while we are encouraged by the Carter Administration's vision in seeing the need for a national urban policy and by its insight in providing the channels through which organizations like the National Urban League can have input, we are nonetheless disappointed by the final version of the policy. Further, we are deeply distressed by the Congress' attempt to dilute even that modest version."

The NUP is based on the concept of a "new partnership" between Federal, State, and local governments and the private sector and neighborhood organizations to foster urban and community reinvestment. The 56 proposals contained in the administration's package seek to:

- Improve local planning and management capabilities as well as the Federal government's ability to coordinate its efforts on the local level.
- Encourage States to become more responsive to the needs of urban areas.
- "Stimulate greater involvement of neighborhood organizations and voluntary associations in urban and community revitalization."
- Provide fiscal relief to the most hard-pressed communities.
- Encourage the private sector to join the partnership and provide inducements to private sector reinvestment in distressed communities.
- Provide employment opportunities, (mostly in the private sector) to the long-term

unemployed.

- "Increase access to opportunity for those disadvantaged by a history of discrimination."
- Expand and improve social and health services to the disadvantaged in cities and communities.
- Improve the physical, cultural, and aesthetic qualities of life in urban areas.

A number of programs and proposals to stimulate the new partnership were submitted to the 95th Congress. Reaction was mixed and few important measures were passed. Major initiatives included the following:

—a labor-intensive Public Works program that would provide for the rehabilitation of public facilities and employment opportunities for 60,000 hard-core unemployed referrals from CETA;

—tax credits that would encourage employers to hire CETA referrals and relocate in central cities;

—a National Development Bank to provide loans and grants to creditworthy firms to encourage such businesses to locate, remain, or relocate in distressed communities;

—a program to rehabilitate urban recreational facilities;

—financial assistance to local governments who are experiencing financial difficulties because of the "welfare costs of local governments";

—a promise to strengthen equal opportunity laws and guidelines, enforce existing laws, and provide strong leadership (at the White House level) in the area of equal opportunity; and

—the creation of a battery of new programs administered at the neighborhood level.

The major resources of the NUP are directed at solidifying the partnership with the private sector, neighborhoods, and cities. Only the NUP's minor resources are targeted at servicing the needs of the cities' present inhabitants—the poor, the elderly, and minorities—and inducing States to join in the partnership. While some may argue that the employment and financial reinvestment initiatives will increase employment opportunities for the urban poor and minority populations, the benefits of these opportunities are far outweighed by the fact that the policy contains weak and uncoordinated nondiscrimination criteria and inadequate safeguards to ensure that the urban poor and minority are not displaced as a result of urban revitalization. Because strong nondiscrimination and nondisplacement criteria are not included in the policy, the short-term benefits from increases in employment opportunities for the long-term unemployed will be negated by the economic, emotional, and social costs of displacement.

The neighborhood subpolicy

The lack of strong nondiscrimination and nondisplacement criteria in the NUP may well signal a Federal retreat from fair housing goals. The inclusion of neighborhoods in the "New Partnership to Conserve America's Communities" is one of the most controversial aspects of the policy and is considered by many a blatant signal that the Federal government's commitment to fair housing, a major concern of the civil rights movement, is weakening or at best ambivalent. The neighborhood subpolicy and possible implications for the civil rights movement and the cities are the foci of the remainder of this essay.

There are approximately 5 million neighborhood organizations and voluntary associations in the United States. It is estimated that 35 to 40 million people belong to these organizations and associations. The neighborhood subpolicy is directed at this segment of the population. Fewer than 10,000 neighborhood organizations and voluntary associations, however, will receive financial and technical assistance through this neighborhood subpolicy.

Local elected officials have expressed concern over the fact that such a small number of financial and technical assistance grants will be made available annually. They fear that while the neighborhood subpolicy has elevated the status and expectations of neighborhoods in urban revitalization attempts, the scarcity of resources directed at this policy will cause bitter conflicts to occur between various disenfranchised and enfranchised groups within their political jurisdictions.

Local leaders are also concerned because the technical and financial assistance, for the most part, will go directly to the neighborhoods and voluntary organizations. The mayor's office is bypassed in the transfer of funds.

This subpolicy contains no mechanism to ensure that neighborhood-developed strategies are coordinated with the larger community's redevelopment and reinvestment strategies. These neighborhood strategies will not be targeted heavily toward those distressed neighborhoods that need the assistance the most, even though it is to these neighborhoods that the local elected officials find

it most difficult to provide adequate services and technical assistance.

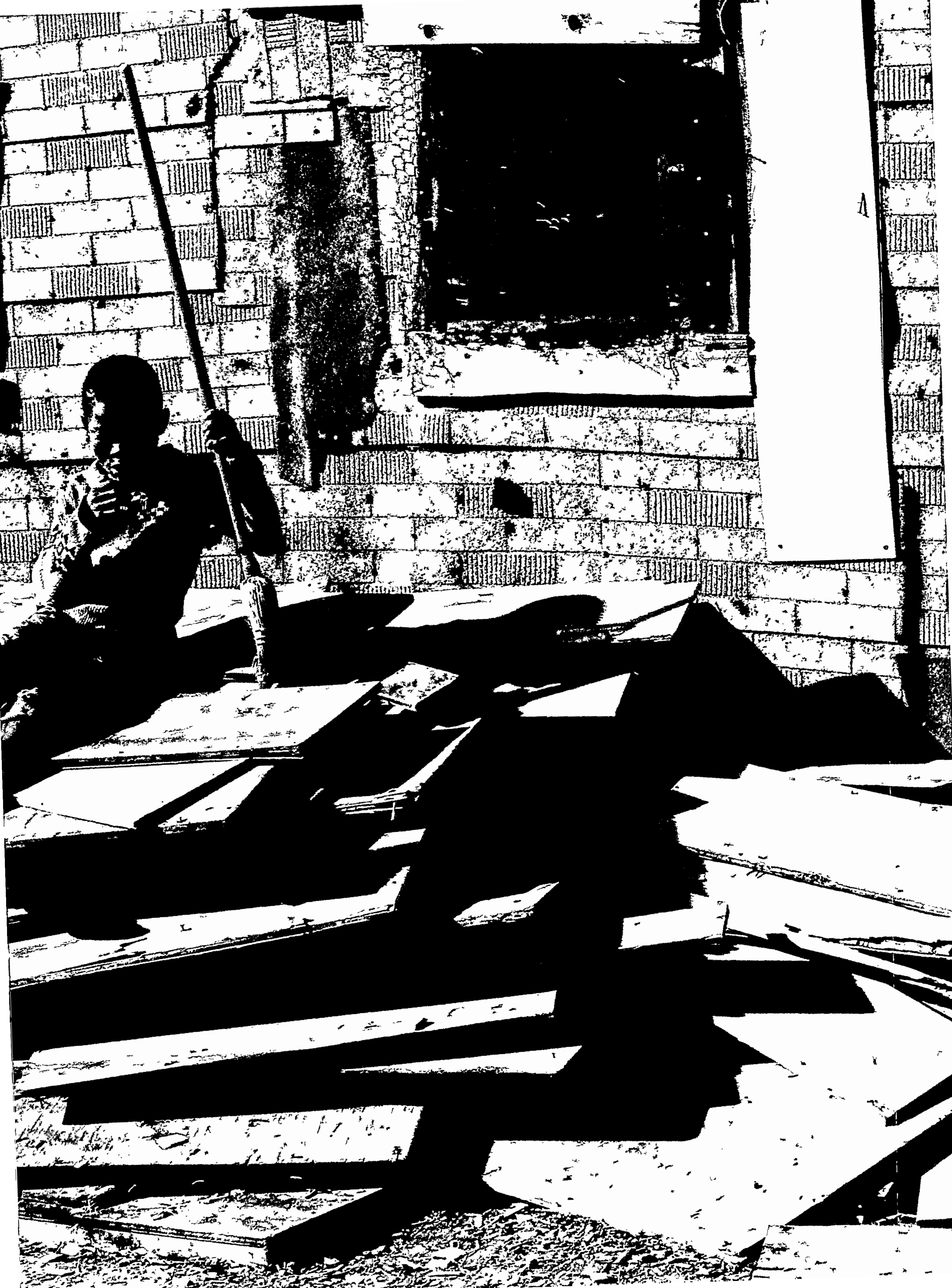
Mayors and other local elected officials are also leery of the neighborhood initiatives because the negative memories of the Model Cities and Community Action Programs of the 1960s are still fresh in their minds. They remember the expectations that were created within their poor and minority neighborhoods; they remember the lack of consistent and serious Federal commitment to fulfilling those federally raised expectations; and they remember the frustrations that resulted from the 1960s experiences.

Treatment of civil rights issues

The Federal commitment to ensure that all Americans possess an equal opportunity to live, work, and participate in the political and governmental processes of this great Nation and its local communities has been taken for granted by many Americans since the passage of the Civil Rights Act of 1964. Racial minorities, many of whom are poor, live in America's decaying cities. They suffer the most from the disinvestment that has occurred within the last two decades. These groups possess the greatest expectations and fears concerning urban reinvestment, and they are the Americans who have come to rely most heavily on the Federal commitment to protect their rights and ensure that equal access and opportunity become the law of the land rather than the exception.

Urban reinvestment will have a dramatic impact (positive or negative) on their lives. The national urban policy, the master plan for urban reinvestment, may well determine how the Federal government will treat its commitment to ensure that all Americans have an equal opportunity to live, work, and participate in the political and governmental processes of this society.

The neighborhood subpolicy reflects the NUP's treatment of civil rights issues and indicates the trend that the Federal government may follow in handling equal opportunity and access in the near future. For example, it does not contain strong nondiscrimination criteria. The absence of these criteria will provide no incentive to encourage those neighborhood organizations to adopt and maintain programs and policies that employ nondiscrimination criteria. The national commitment to ensure equal access to housing opportunities



could be strengthened if strong nondiscrimination criteria were tied to the neighborhood subpolicy.

Civil rights advocates and poor and minority urban residents may well begin to view the absence of such criteria as a signal of the Federal government's retreat from its commitment to equal opportunity and fair housing policies. In fact, that view is reinforced by another section of NUP, which fosters "the dispersion of the poor and minority" through changes in the Community Development Block Grant Program.

It would appear that the NUP has lost sight of the fact that those who have been affected by a history of racial discrimination suffer the most from urban decay. Racial minorities, along with the elderly, are being displaced from their neighborhoods in many cities such as Denver, Washington, D.C., and New York City. Yet, this major problem receives no serious attention in the NUP and is not even mentioned in the neighborhood subpolicy.

Improvement in the neighborhood subpolicy can be made by establishing a framework that includes the interests of all neighborhoods and serves as a support to the Federal commitment to equal opportunity and fair housing. Several recommendations were made by the National Urban League's Washington bureau:

1. The neighborhood subpolicy should be more heavily targeted to distressed neighborhoods in cities experiencing decay and decline;
2. Adequate technical assistance should be given a higher priority and offered to groups with limited experience in developing plans;
3. Volunteerism at the neighborhood level should be coordinated with activities that take place at the city level;
4. Eligibility for receiving funds under the neighborhood subpolicy should be limited to nonprofit organizations and associations that are accountable to the neighborhoods in which they propose to implement their projects;
5. Neighborhood economic, social, and community development strategies should be distinguished from those proposed at the city level, and the Federal government should develop and institute a system to coordinate programs at both levels; and
6. Strong nondiscrimination and nondisplacement criteria and goals should be incorporated into the neighborhood subpolicy.

Prospects for the future

The national urban policy is still being shaped. It is not too late to incorporate the interests of the urban poor and the minority population and a Federal commitment to fair housing and equal opportunity in the NUP.

If displacement and nondiscrimination criteria are incorporated into the NUP, all residents of cities living in neighborhoods will have an opportunity to benefit from urban revitalization. Should these assurances fail to be included, the Federal government will not have fulfilled its moral and lawful responsibilities to protect the rights of all citizens.

Indeed, if the urban policy is to reflect the equitable standards of treatment that the Federal government is mandated to employ, the legitimate interests of all Americans must be addressed.

READING & VIEWING

BOOKS RECEIVED

The Cherokee Freedmen From Emancipation to American Citizenship by Daniel F. Littlefield, Jr., (Westport, Conn., Greenwood Press, 1978). Chronicles the little-known struggle by former slaves and free blacks (who formed a large part of the Cherokee Nation) to establish their rights to Cherokee citizenship, lands, and tribal funds. The Cherokees, who held slaves before the American Civil War, found themselves torn by racial strife and thorny litigation, with blacks worse off as citizens than they were as disenfranchised Indians. *281 pp.*

White Awareness: Handbook for Anti-Racism Training by Judy H. Katz (Norman, Okla., University of Oklahoma Press, 1978). Presents a group training program in which white people work together in a nonthreatening environment to alter deeply ingrained, often unconscious racist attitudes and to change their behavior. *211 pp.*

Chronicles of American Indian Protest by The Council on Interracial Books for Children (New York, 1979). Collection of documents, each prefaced by a brief historical introduction, on the American Indians' struggle for survival from 1622 to 1978. *392 pp.*

The William O. Douglas Inquiry Into the State of Individual Freedom ed. by Harry S. Ashmore (Boulder, Colo., Westview Press, 1979). Papers by legal scholars and practitioners appraising the current state of individual rights, liberties, and immunities as they are affected by changing judicial, executive, legislative, and popular actions and attitudes. *251 pp.*

Black Odyssey—The Afro-American Ordeal in Slavery by Nathan Irvin Huggins (New York, Vintage Paperbacks, 1979). Account of the enslavement of Africans and of their experience as slaves in America. *232 pp.*

Barbara Jordan: A Self-Portrait by Barbara Jordan

and Shelby Hearon (New York, Doubleday & Company, Inc., 1979). Story of the first black woman elected to Congress from the South, of her political beginnings in the all-black wards of Houston, Texas, and her rise to national prominence during the Judiciary Committee's impeachment proceedings. *269 pp.*

Contract Compliance—A Local Government Approach by Kathy Pumphrey (Berkeley, Calif., Institute for Local Self Government, 1978). A manual for local agencies that are establishing or revising local contract compliance or minority business enterprise programs. Appendices. *133 pp.*

FUSANG—The Chinese Who Built America by Stan Steiner (New York, Harper & Row, Publishers, 1979). Describes the long and continuous emigration of Chinese to America, exploring the Chinese contribution to the building of the American railroad system, their significance to the Gold Rush and to the fishing and armaments industries, and their adjustment to a strange culture while American adjustment was equally problematic. *259 pp.*

How Well Are We Housed? 2. Female-Headed Households. and 3. Blacks U.S. Department of Housing and Urban Development. Two of a series on the housing conditions of various groups of Americans. Available from the Office of Policy Development and Research, Room 8124, HUD Building, Washington, D.C. 20410.

A Stranger in the House by Robert Hamburger with photos by Susan Fowler-Gallagher (New York, MacMillan Publishing Co., 1979). The world of the household worker through an oral history that explores American class and cultural interaction through personal narrative and photographs. *168 pp.*

COMMISSION REPORTS

Statement on the Equal Rights Amendment. A discussion of ERA, focusing on the current status of women in selected areas such as family law, education, and women in the labor force, with a look at the effect of State ERAs. (Clearinghouse Publication 56). *32 pp.*

Window Dressing on the Set: an Update. A reconsideration of television's treatment of women and minorities, updating the 1977 Commission report **Window Dressing on the Set: Women and Minorities in Television.** *97 pp.*

Desegregation of the Nation's Public Schools: A Status Report. Focuses on developments since August 1976 when the Commission issued a detailed study of progress and issues involved in the school desegregation effort. Includes brief surveys of school desegregation status in 47 school districts. *90 pp.*

The Age Discrimination Study, Part II. Final publication of the Commission's 18-month study of 10 federally-assisted programs and selected aspects of higher education. Part II covers the methodology for the study, examines each program, and summarizes the record of information. *298 pp.*

Battered Women: Issues of Public Policy. Proceedings of the consultation held January 1978 on law enforcement, support services, causes and treatment of wife abuse, including the Federal role. Includes all papers presented. *706 pp.*

HEARINGS

Hearing Before the U.S. Commission on Civil Rights: Washington, D.C. Vol. II: Exhibits September 26–28, 1977, on age discrimination in federally-assisted programs. *1,129 pp.*

Hearing Before the U.S. Commission on Civil Rights: Seattle, Washington. Vol. II: Exhibits October 19–20, 1977, on American Indian issues in Washington State. *652 pp.*

ADVISORY COMMITTEE REPORTS

Equality in Municipal Services in Mullins, South Carolina (South Carolina Advisory Committee). Examines the disparities in municipal services provided to minority neighborhoods compared to white neighborhoods and discusses the failure of the city government to use revenue sharing funds to correct inequities. *28 pp.*

Corrections in Montana: A Consultation (Montana Advisory Committee). Consultation on corrections in Montana examining standards used for the treatment of inmates and for providing opportunities for their welfare, training, and rehabilitation. *59 pp.*

The Emergence of Civil Rights in Wyoming (Wyoming Advisory Committee). Two-day consultation on civil rights issues in the State covering problems in fair housing enforcement, medical care, education, discrimination against the handicapped, and employment. *48 pp.*

Insurance Redlining: Fact Not Fiction (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin Advisory Committees). Examines the structure of the property-casualty insurance industry, controversies surrounding the issue of insurance redlining, and current practices of insurers within the city of Chicago. *66 pp.*

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