NEW PERSPECTIVES

U.S. COMMISSION ON CIVIL RIGHTS SUMMER 1984

Editorial

Welcome to New Perspectives

by Linda Chavez

This is the first issue of *New Perspectives,* the quarterly of the United States Commission on Civil Rights. The magazine will be a forum for the expression of all points of view in the ongoing debate over how best to eliminate discrimination and its pernicious effects from our society.

Clearly we have made great progress in the thirty years since the revolutionary *Brown* v. *Board of Education* decision. Yet the Civil Rights debate continues. Some of the debate centers on whether or not civil rights laws are being adequately enforced, some on the definition of discrimination and how best to remedy it. New issues in civil rights also emerge as new groups of persons' rights are defined.

New Perspectives will explore the past, present and future of Civil Rights in America. We welcome you to the magazine and invite your comments. ◆

Linda Chavez is Staff Director of the U.S. Commission on Civil Rights and Editor of New Perspectives.

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NEW PERSPECTIVES

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The New Commission

The U.S. Commission on Civil Rights was refashioned on November 30, 1983 when President Reagan signed legislation extending the Commission for six years. President Reagan and the Congress each appointed four persons to the newly constituted Commission. They include:

Chairman Clarence M. Pendleton, Jr.

Appointed by President Reagan, Mr. Pendleton was chairman of the old Civil Rights Commission. He is president of Pendleton and Associates, a business development and investment firm in San Diego and chairman and president of the San Diego County Local Development Corporation. He was president of the San Diego Urban League from 1975 to 1982.

Prior to 1975, he was Director of the Model Cities Department of the city of San Diego; Director of Urban Affairs for the National Recreation and Park Association, Washington, D.C. from 1970–72; Recreation Coordinator for the City of Baltimore Model Cities Agency from 1968–70; and Instructor in Physical Education and Recreation and swimming coach at Howard University, 1958–68.

Mr. Pendleton is a trustee of the Scripps Clinic and Research Foundation; serves on the boards of the Greater American Federal Savings and Loan Association; and the San Diego Coalition for Economic and Environmental Balance. He is also involved in a variety of civic, community and governmental affairs. He is a member of the Committee for Areawide Involvement and Redevelopment; Center City Development Corporation; serves on the San Diego Holiday Bowl Charity Committee and is a member of the Alpha Phi Alpha Fraternity.

Born in Louisville, Kentucky on November 10, 1930, Mr. Pendleton was raised in Washington, D.C., where he graduated from Dunbar High School. He attended Howard University in Washington, D.C. and earned a bachelor of science degree in 1954 and a master of arts degree in 1962.

Mr. Pendleton resides in La Jolla, California with his wife, Margrit and daughter Paula. He has two children from a previous marriage, George and Susan, who reside in Washington, D.C.

A Republican, he was appointed to a six-year term.

Vice Chairman Morris B. Abram

Appointed by President Reagan, Mr. Abram has been a partner with the law firm of Paul, Weiss, Rifkind, Wharton, and Garrison in New York since 1962 except for two years (1968–70) when he served as president of Brandeis University in Massachusetts. He served as chairman of the United Negro College Fund (1970–79) and, since 1961, he has served as a member of the Executive Committee of the Lawyers' Committee for Civil Rights Under Law. He argued the "one man-one vote" case before the Supreme Court.

In 1946 Mr. Abram was a member of the American Prosecutorial staff at the International Military Tribunal in Nuremburg, Germany. In 1948 he served as assistant to the Director of the Commission for the Marshall Plan, and served as the General Counsel for the Peace Corps in 1961.

During 1962–64, he was a member of the United Nations Subcommittee on the Prevention of Discrimination and Protection of Minorities; was co-chairman of the Planning Conference for the White House Conference on Civil Rights in 1965; served as the U.S. Representative to the United Nations Commission on Human Rights from 1965–68; was President of the American Jewish Committee from 1963–68; and served on the Board of Directors of Morehouse College, Atlanta, Georgia, since 1966.

Mr. Abram earned his undergraduate degree (B.A., summa cum laude) in 1938 from the University of Georgia, and the juris doctor degree from the University of Chicago in 1940. He attended Oxford University as a Rhodes Scholar and received two degrees (B.A., 1948 and M.A., 1953).

Born in Fitzgerald, Georgia on June 19, 1918, Mr. Abram resides in New York with his wife, Carlyn. He has five children,

Ruth, Ann, Morris Berthold, Jonathan Adam, and Joshua Anthony.

A Democrat, he was appointed to a six-year term.

Commissioner Mary Frances Berry

Appointed by House Majority Leader James C. Wright, Jr., D-Texas, Dr. Berry is professor of history and law and senior fellow at the Institute for the Study of Educational Policy at Howard University. She was first appointed to the Civil Rights Commission in 1980 by President Carter and served as vice chair until 1982. She served as the last Assistant Secretary for Education in the Department of Health, Education and Welfare from 1977 until January, 1980. Prior to that, she was chancellor of the University of Colorado at Boulder.

As Assistant Secretary for Education, Dr. Berry headed the Education Division of HEW. In this role, she coordinated and gave general supervision to the National Institute of Education, the Office of Education, the Fund for the Improvement of Postsecondary Education, the Institute of Museum Services, and the National Center for Education Statistics.

She was Provost of the Division of Behavioral and Social Sciences at the University of Maryland, College Park, prior to her selection as Chancellor of the University of Colorado at Boulder.

Dr. Berry was born in Nashville, Tennessee on February 17, 1938. She earned a bachelor's and a master's degree at Howard University, a doctorate in History from the University of Michigan, and the juris doctor degree from the University of Michigan Law School. She has held faculty appointments at Central Michigan University, Eastern Michigan University, the University of Maryland, College Park, and the University of Michigan. Dr. Berry is also a member of the Bar of the District of Columbia.

Dr. Berry's scholarly work in constitutional history and civil rights law includes *Black Resistance/White Law: A History of Constitutional Racism in America; Military Necessity and Civil Rights Policy: Black Citizenship and the Constitution, 1861–1868; Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court, 1945–1958.*

An Independent, she was appointed to a three-year term.

Commissioner Esther Gonzalez-Arroyo Buckley

Appointed by President Reagan, Mrs. Buckley is chairperson of the Webb County (Texas) Republican Party and is a science and math teacher at Cigarroa High School in Laredo. She is chairperson of the Accreditation Committee for the Southern Association of Schools and Colleges and previously served on the Texas Teacher's Professional Practices and Ethics Commission.

Mrs. Buckley has been a charter member, secretary and vice president of the Webb County Republican Women's Club; Republican precinct chairperson; vice chairperson, Webb County Republican Party; delegate to the Webb County and State Republican conventions, and chairperson of the Senatorial District 21 Republican Caucus.

She is currently chairperson of the Superintendent's Advisory Committee for the Laredo Independent School District.

Mrs. Buckley is a charter member of the local chapter of Kappa Delta Pi, an honors fraternity in education and Phi Delta Kappa, a professional fraternity in education; is a member of the Science Teachers Association of Texas, National Science Teachers Association, National Education Association and Association for Supervision and Curriculum Development. During 1974–77, she was a teacher with the Migrant Compensatory Education Project and the Migrant Youth Corps. She has also taught English as a second language for adults at Laredo Junior College during 1972–76.

Mrs. Buckley earned her undergraduate degree (B.A., magna cum laude) from the University of Texas in 1967, and a graduate degree in Education and Spanish (M.S., with honors) from Laredo State University in 1975.

Born in Laredo, Texas March 29, 1948, Mrs. Buckley resides in Laredo with her husband Elmer, and five children, Trina Elaine, James Joseph, Catherine Elizabeth, Christopher Edmund, and Rebecca Annette.

She was appointed to a three-year term.

Commissioner John H. Bunzel

Appointed by President Reagan, Dr. Bunzel is a Senior Research Fellow at the Hoover Institute at Stanford University in Palo Alto, California. He is formerly President of San Jose State University in San Jose, California. He received a Certificate of Honor from the Board of Supervisors of the City and County of San Francisco for "unswerving devotion to the highest ideals of brotherhood and service to mankind and dedicated efforts looking to the elimination of racial and religious bigotry and discrimination."

An educator by profession, Dr. Bunzel began teaching at San Francisco State College where he was also a departmental chairman. He has also taught at Michigan State University and Stanford University.

Dr. Bunzel is the author of several books, monographs and articles and is a frequent lecturer on political and educational affairs. He is the recipient of research grants from the Ford Foundation, Rabinowitz Foundation and Rockefeller Foundation. He has also received the Presidential Award for outstanding service in the field of political science from the Northern California Political Science Association; and an Honorary Doctor of Laws degree from the University of Santa Clara, Santa Clara, California.

Dr. Bunzel has served as Director of the Northern California Citizenship Clearing House; as President of the Northern California Political Science Association; and is a member of the American Political Science Association.

He earned his undergraduate degree (A.B., magna cum laude) from Princeton University in 1948, a master's degree (M.A.) from Columbia University in 1949, and a doctorate degree (Ph.D.) from the University of California at Berkeley in 1954.

Born in New York City, New York on April 15, 1924, Dr. Bunzel resides in Belmont, California.

A Democrat, he was appointed to a three-year term.

Commissioner Robert A. Destro

Appointed by House Minority Leader Robert H. Michel, R-Ill., Mr. Destro is assistant professor of law at Catholic University in Washington, D.C. He is former general counsel for the Catholic League for Religious and Civil Rights (1977–82). At 33, he is the youngest Commissioner ever appointed and the first Italian American.

He has served as an adjunct associate professor of law at Marquette University School of Law (1978–82); an associate attorney with the Cleveland, Ohio law offices of Squire, Sanders, and Dempsey (1975–77); and as a research assistant at the University of California's Boalt Hall School of Law (1974–75).

Mr. Destro is a member of the American Bar Association, State Bar of California, Ohio State Bar Association, and the St. Thomas More Lawyers' Society of Wisconsin. He has authored several publications and manuscripts that have appeared in major law journals and publications.

Mr. Destro earned an undergraduate degree (A.B.) from Miami University, Oxford, Ohio in 1972, and the juris doctor degree (J.D.) from the University of California at Berkeley, Boalt Hall School of Law in 1975 where he was associate editor of the *California Law Review.*

Born in Akron, Ohio on September 6, 1950, Mr. Destro resides in Arlington, Virginia with his wife, Brenda.

A Democrat, he was appointed to a six-year term.

Commissioner Francis S. Guess

Appointed by Senate Majority Leader Howard H. Baker, Jr., R-Tenn., Mr. Guess is Commissioner of the Tennessee Department of Labor. He is also vice chairman of the Minority Purchasing Council for Middle Tennessee. He has served on the Tennessee Human Rights Commission since 1973.

Prior to serving as the Commissioner of Labor, Mr. Guess was Commissioner of the Tennessee Department of General Services from 1980 to 1983. He has served as Assistant Commissioner of the Tennessee Department of Personnel (1979–80); was an instructor and practice manager at Meharry Medical College in Nashville (1978–79); and was Chief of Information Services at the Tennessee Housing Development Agency (1974–78).

He is currently chairman of the Tennessee Cooperative Development Energy Project Steering Committee at Tennessee State University; vice chairman of the Minority Purchasing Council for Middle Tennessee; and secretary-treasurer of the National Association of Governmental Labor Officials. He also serves on the Minority Business Committee of the Tennessee Advisory Committee for the U.S. Small Business Administration.

Mr. Guess is a member of the Executive Committee of the Vietnam Veterans Leadership Program; Nashville Urban League and the Nashville Branch of the NAACP. He has served on the Council of Urban League Board of Presidents of the National Urban League and on the National Coalition of Human Rights Commissioners. He is the recipient of several awards and recognitions for public and civic service and is currently listed in various "who's who" publications.

Mr. Guess earned his undergraduate degree (B.S.) from Tennessee State University in 1972, a master's of business administration degree (M.B.A.) from Vanderbilt University in 1974, and completed a program for Senior Executives in State and Local Government at Harvard University's John F. Kennedy School of Government in 1980.

Born in Nashville, Tennessee on June 14, 1946, Mr. Guess resides in Nashville.

A Republican, he was appointed to a six-year term.

Commissioner Blandina Cardenas Ramirez

Appointed by Senate Minority Leader Robert C. Byrd, D-W.V., Dr. Cardenas Ramirez is director of development at the InterCultural Development Association in San Antonio, Texas. She was first appointed to the Civil Rights Commission in 1980 by President Carter.

She has held successive posts as a teacher with the San Felipe Independent School District in Del Rio, Texas; executive assistant for the Texas Migrant Educational Development Center in Austin; assistant to the superintendent of the Edgewood Independent School District in San Antonio; and directed various education programs for that school district.

During 1974–75, Dr. Cardenas Ramirez was a Rockefeller Fellow assigned to Senator Mondale's staff. She was subsequently assigned to the InterCultural Development Research Association (IDRA) in San Antonio. She was also an assistant dean of the National Teacher Corps Institute at the University of Virginia in Richmond, and was director of the Center for the Management of Innovation in Multicultural Education, IDRA 1975–77.

Dr. Cardenas Ramirez was the Commissioner of the Administration of Children, Youth and Families, and Chief of the Children's Bureau at the Department of Health, Education and Welfare during 1977–79. In this role, Dr. Cardenas Ramirez administered six programs including Head Start, Runaway Youth, Domestic Violence, the National Center for Child Abuse and Neglect, the Child Welfare Services and the Adoption Opportunities Program.

Dr. Cardenas Ramirez has been a consultant to numerous organizations and educational institutions. She was a member of the U.S. Commission on Civil Rights Texas Advisory Committee from 1974 to 1977; Chairperson of the Federal Interagency Committee on the International Year of the Child (1977–79); and a delegate to the Early Childhood Education Committee of the Organization for Economic and Cultural Development, Paris, France (1978–79). She has served as a member of the Board of Directors of the Mexican American Legal Defense and Education Fund.

She serves on the board of directors of the International Union for Child Welfare in Geneva, Switzerland; is a member of the national advisory panel to the Center for Research in Teacher Education at the University of Texas, and the Institute for Educational Leadership at George Washington University in Washington, D.C. She has been a member of the Texas State Teachers Association, the National Education Association and the Urban Coalition of Metropolitan San Antonio.

Born in Del Rio, Texas on October 25, 1944, Dr. Cardenas Ramirez received a bachelor of journalism degree in 1967 from the University of Texas, Austin, and a doctorate in education in 1974 from the University of Massachusetts, Amherst. She also attended Texas Women's University, Denton, in 1961–62, and St. Mary's University in San Antonio, 1969–71.

Dr. Cardenas Ramirez has authored several articles. She is married to Andrew Ramirez. They have one child, Alexandro Rodolfo.

A Democrat, she was appointed to a three-year term.

Staff Director Linda Chavez

Appointed by President Reagan, Ms. Chavez had been serving as Staff Director of the Commission since August 16, 1983, and was reappointed by him to the newly constituted Commission. She was the first woman to head it.

Before being appointed to the post, Chavez served as assistant to the president of the American Federation of Teachers (AFT), AFL-CIO, and as editor of its quarterly magazine, *American Educator,* during 1982–83. She was editor of all AFT publications from 1977 to 1982.

During 1981, she also served as a consultant to ACTION. During the Carter Administration, Chavez was a consultant to the President's Reorganization Project of the Office of Management and Budget and was also special assistant to the deputy assistant secretary for legislation (education), Department of Health, Education and Welfare in 1977. From 1975 to 1977, she was assistant director of legislation for AFT.

Chavez was previously a member of the professional staff of the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee and taught at the University of California at Los Angeles and the University of Colorado.

Born in Albuquerque, New Mexico on June 17, 1947, Chavez graduated from the University of Colorado where she received a bachelor of arts degree in 1970. She has also done graduate work at the University of California at Los Angeles and at the University of Maryland.

Chavez is chairman of the American Catholic Conference. Awards received include the Writers Conference of the Rockies, Colorado Scholar in 1967, and National Woodrow Wilson Fellowship honorable mention in 1969.

Chavez resides in Washington, D.C. with her husband Christopher Gersten and their three children. ◆

The Ambiguous LEGACY of Brown vs. Board of Education

by Diane Ravitch

In 1954, the Supreme Court declared in the *Brown* decision that state-imposed school segregation was unconstitutional and invalidated state laws which classified and assigned children to schools on the basis of their race. Today, the *Brown* decision is cited as authority for a network of judicial decisions, laws, and administrative regulations that specifically require institutions to classify people on the basis of their group identity and to deal with them accordingly. How the civil rights movement, the judiciary, and the government moved from the goal of equal treatment for all, regardless of group affiliation, to present practices is one of the most significant trends of the past quarter century.

By removing from the states the power to use race to differentiate among their citizens, the *Brown* decision provided a strong precedent to bar racial discrimination in every realm of civic and public activity. Its coverage was strengthened and extended by the Civil Rights Act of 1964, which prohibited discrimination based on race, color, religion, sex, or national origin. The Civil Rights Act embodied the fundamental principle that everyone should be considered as an individual without regard to social origin. This ideal attracted the support of a broad alliance composed of blacks, liberals, organized labor, Catholics, Jews, and others who perceived that the black cause was the common cause of everyone who wanted to eliminate group bias from American life. The particular genius of the civil rights movement was its successful forging of a coalition led by blacks but far more numerous than blacks alone; at the height of its power, in 1964–65, the coalition was potent enough to win passage of the Civil Rights Act, Federal aid to education, the Voting Rights Act, and the anti-poverty program.

The relatively recent shift in focus from anti-discrimination to group preferences has splintered the civil rights coalition of the 1960s and has changed the nature of civil rights issues. The issues of the 1980s are far more complex than were those of the 1950s and 1960s, when the public could readily understand the denial of the civil and political rights of black people. In 1984, the issues are not capable of generating folk-heroes like Rosa Parks, James Meredith, and Autherine Lucy, or charismatic leaders like Martin Luther King, Jr., or villains like Eugene "Bull" Connor. Police brutality and racially closed primaries were powerful emotional symbols precisely because they presented so little ambiguity; to those concerned about the realization of American democratic ideals, there was only one side to be on. Today, it is by no means simple to sort out the right side and the wrong side of such issues as racial balancing, busing, affirmative action, and quotas, and people of good will of all races and sexes are to be found on different sides of these questions.

If one-time allies in the struggle for universalism and equal rights now disagree, it is not simply because the issues today are complicated, but also because there is an essential dilemma, which is all too rarely recognized as judicial decisions and bureaucratic regulations reinforce one another: the group-based concepts of the present are in conflict with the historic efforts of the civil rights movement to remove group classifications from public policy. And at the heart of this dilemma is the *Brown* decision, which exemplified in its history the ideals of the civil rights movement and the transition from "color-blind" to "color-conscious" policies.

The *Brown* case was one of several school segregation suits brought before the United States Supreme Court in the early 1950s by the NAACP Legal Defense Fund. The cases were the

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Illustrations by Salvador Bru

culmination of a deliberate strategy to challenge the "separate but equal" doctrine that had sheltered statutory racial segregation in the courts. A string of legal victories against segregated graduate education in the years just before and following World War II set the stage for the onslaught against state segregation in public elementary and secondary schools.

The "separate but equal" doctrine had been the law of the land since the *Plessy v. Ferguson* decision in 1896. The Supreme Court then held that a state law requiring the separation of the races in railway coaches was no violation of the Constitution so long as the races had equal facilities. The decision of the majority put the approval of the highest court on legal segregation, not just in railway travel, but in any other aspect of life which the state chose to regulate, and it gave legal reinforcement to social customs based on the presumption of black inferiority. The effect of the *Plessy* decision was to validate the "Black Codes" which many Southern states had adopted to maintain social and political inequality between the races. Bowing to custom and racism, the Court flatly contradicted the section of the Fourteenth Amendment which said that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Justice Harlan's dissent in* Plessy *was for many decades a foundation-stone of the civil rights movement.

Only Justice John Marshall Harlan dissented from the *Plessy* decision, and his dissent was for many decades a foundation-stone of the civil rights movement. Harlan denied that the states had the power to regulate their citizens solely on the basis of race. "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." Harlan argued that the Thirteenth, Fourteenth, and Fifteenth Amendments "removed the race line from our governmental systems." He reminded his colleagues that the Supreme Court had previously held that, as a result of these amendments, "the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

In what was destined to be the most famous passage of his dissent, Harlan protested that the regulation of citizens solely on the basis of race was repugnant to the Constitution:

> ...[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

The personal liberty of black parents was at issue in Topeka, Kansas, where the *Brown* case originated. The city of Topeka maintained racially segregated schools for the first six grades. The Topeka School District contained eighteen elementary schools for white students and four elementary schools for black students; white children attended their neighborhood school, while many black children were required to travel long distances by school bus to attend a designated "colored" school. Early in 1951, a suit was initiated to seek a judgment declaring the state law permitting segregation to be unconstitutional.

The arguments against racial segregation were of two kinds: those derived from constitutional objections, and those derived from social science. The constitutional arguments explicitly rejected the power of the state to recognize racial differences; the social science arguments were essentially ambivalent, asserting both that color was irrelevant and that interracial experiences were valuable.

In building the case, the NAACP lawyers stressed the fact that blacks were denied the right to send their children to the nearest school; segregation imposed on black children the handicap of spending extra time traveling to and from school, which was detrimental to the children's development. One social science expert testified, "...when you take an hour a day from a child, you are taking away something very precious to his total education." Oliver Brown, the named plaintiff, testified about the inconvenience and lack of safety which resulted from busing his daughter, Linda Carol Brown, to a "colored school" some twenty-one blocks away, instead of the neighborhood school only seven blocks from his home.

The social scientists who testified were unequivocally opposed to state-imposed segregation, recognizing that the separation of children solely on the basis of color might produce a sense of stigma. But among the social scientists contradictory themes emerged. Some held that blacks were deprived by lack of contact with whites (e.g., "...if the colored children are denied the experience in school of associating with white children, who represent 90 percent of our national society in which these colored children must live, then the colored child's curriculum is being greatly curtailed."). But others held that segregation was wrong because it accorded different treatment to children on the basis of their ancestry. One social scientist, for example, argued that segregation was based not just on skin color, but on "who the parents were, and my understanding and various sociologists and psychologists analysis of the American tradition, religious tradition as well as set of values and ethos, determining much of our most valued and significant behavior, hinges upon a belief in treating people upon their own merits and we are inclined to

oppose a view which states that we should respect people or reject them on the basis of who their parents were." Thus, the social scientists' testimony left unresolved a major dilemma: should policy be color-blind or color-conscious? Were black parents suing for the right to gain admission to their neighborhood school or for the right to an integrated education? Was the constitutional wrong to blacks the denial of liberty or the denial of integration?

While the testimony of the social scientists could be interpreted as a plea either for color-blind or color-conscious policy, depending on the speaker, the constitutional argument contained no such ambivalence. Robert Carter, chief counsel for Topeka's black plaintiffs, rested the case against school segregation on two grounds: first, that "the state has no authority and no power to make any distinction or any classification among its citizenry based upon race and color alone"; and second, that "the rights under the Fourteenth Amendment are individual rights," and not group rights. Carter argued that the Supreme Court had repeatedly held that "race and ancestry and color are irrelevant differences and cannot form the basis for any legislative action." The clear trend in the law, he insisted, was that race was not a valid classification because it "is not a real and substantial difference."

In August 1951, the District Court in Kansas ruled against the plaintiffs because the *Plessy* doctrine of "separate but equal" was still the ruling precedent. The court found that the Topeka schools met the requirement of being both separate and equal, since there was "no material difference" between the white and black schools in their educational provisions and facilities. Thus, the NAACP's essential argument—that statutory racial segregation was itself unconstitutional—was left for the Supreme Court to decide.

When the unfavorable decision in Kansas was appealed to the Supreme Court in 1952, the chief argument in the appellants' brief was the unconstitutionality of racial classification by the state. "The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizens." The brief demonstrated that the Supreme Court had ruled against racial distinctions in jury service, in property occupancy, in voting, in employment, and in graduate education. The NAACP contended that the state may "confer benefits or impose disabilities upon selected groups of citizens," but the selection of such groups must be reasonable and related to real differences; the civil rights lawyers contended that distinctions based upon race and color alone were "patently the epitome of that arbitrariness and capriciousness constitutionally impermissive under our system of government. A racial criterion is a constitutional irrelevance...."

In 1953, the *Brown* case was consolidated for argument before the Supreme Court with similar appeals from South Carolina, Virginia, and Delaware. Once again, the NAACP brief stated clearly and forcefully its belief that the Fourteenth Amendment "prevents states from according differential treatment to American children on the basis of their color or race.... The importance to our American democracy of the substantive question can hardly be overstated. The question is whether a nation founded on the proposition that 'all men are created equal' is honoring its commitments to grant 'due process of law' and 'the equal protection of the laws' to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race."

There was no suggestion in the NAACP brief that racial distinctions might, in some circumstances, be tolerable.

Black organizations have maintained in the 1970s that the Fourteenth Amendment banned legislation that discriminated against blacks but did not ban legislation intended to confer benefits on blacks; this, however, was not the position of the NAACP in its *Brown* brief. On the contrary, the appellants' brief is a cogent, tightly reasoned documentation of the view that the Fourteenth Amendment was written specifically to ensure that all state action would henceforth be color-blind. There was no suggestion in the brief that racial distinctions might, in some circumstances, be tolerable. The NAACP brief set forward the closely-documented contention that the historic tradition of equal justice required the total exclusion of race and color from legislative enactments. For example:

- "The Fourteenth Amendment was actually the culmination of the determined efforts of the Radical Republican majority in Congress to incorporate into our fundamental law the well-defined equalitarian principle of complete equality for all without regard to race or color."
- "The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated upon race or color."
- When the Supreme Court unanimously invalidated racial restrictions on the right to own property, "the sole basis for the decision...was that the Fourteenth Amendment compels the States to be color-blind in exercising their power and authority."
- In its rulings on graduate education, "this Court has uniformly ruled that the Fourteenth Amendment prohibits a state from using race or color as the determinant of the quantum, quality or type of education and the place at which education is to be afforded."
- Racial distinctions are "an irrational basis for governmental action under our Constitution." In previous decisions, the Court has described racial differentiation as "odious to a free people," "immediately suspect," "constitutionally an irrelevance," and "beyond the pale."
- "In sum, the statutes and constitutional provisions assailed in these cases must fall because they are contrary to this Court's basic premise that, as a matter of law, race is not an allowable basis of differentiation in governmental action."
- In its earliest interpretations of the Fourteenth Amendment, the Supreme Court found that "any distinction based upon race was understood as constituting a badge of inferiority.... That law

must not distinguish between colored and white persons was the thesis of all the early cases."

The NAACP brief traced the history of the color-blind principle, which it called "the American equalitarian ideal," from its application by Quakers and Puritans, its espousal by Jefferson, its enshrinement in the Declaration of Independence, and its centrality to the men who wrote the Fourteenth Amendment. The principle of the equality of man "was an absolute, not a relative, concept which comprehended that no legal recognition be given to racial distinctions of any kind." There was no ambiguity in the NAACP's commitment to color-blind principles. The brief quoted extensively from Justice Harlan's famous *Plessy* dissent, concluding with the oft-cited statement: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens," to which the brief added, "It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy v. Ferguson,* that is in keeping with the scope and meaning of the Fourteenth Amendment...." Elsewhere, the brief reiterated, "That the Constitution is color-blind is our dedicated belief."

Accompanying the appellants' brief was a document signed by thirty-two of the nation's leading social scientists. Called "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," it summarized what was known about the deleterious effects of statutory racial segregation on the social and psychological development of minority children. What has been forgotten in the years since 1954 is that the statement of the social scientists was not an appeal for racial balancing. The social scientists explicitly defined *segregation* as "that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic origin, or linguistic group and those of other groups, which results from or is supported by the action of any official body or agency representing some branch of government. We are not here concerned with such segregation as arises from the free movements of individuals which are neither enforced nor supported by official bodies...."

In the oral arguments before the Supreme Court, Thurgood Marshall kept up a steady attack on racial distinctions in the law as "invidious," "odious," "suspect," and "irrational." In one colloquy with Justice Felix Frankfurter, Marshall described the kind of remedy that he sought, and he was clear that race should play no part in school assignment:

> JUSTICE FRANKFURTER: It would be more important information in my mind, to have you spell out in concrete what would happen if this Court reverses and the case goes back to the district court for the entry of a decree.
>
> MR. MARSHALL: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

It was Thurgood Marshall who made the most conclusive and unambiguous statements about the constitutional issues before the Court. Said Marshall, "I think so far as our argument on the constitutional debates is concerned, and these two cases, that the state is deprived of any power to make any racial classification in any governmental field." More clear-cut than that on the issue of race and public policy it was not possible to be. Marshall's sense of the Court's duty was equally certain.

> Specifically, I am a firm believer that especially in so far as the federal courts are concerned, their duty and responsibility ends with telling the state, in this field at least, what you can't do.... And for the life of me, you can't read the debates [from the Thirty Ninth Congress after the Civil War] even the sections that they [the opposing attorneys] rely on, without an understanding that the Fourteenth Amendment took away from the states the power to use race.

When the *Brown* decision was announced on May 17, 1954, it was a unanimous victory for the civil rights forces. It struck down the *Plessy v. Ferguson* doctrine of "separate but equal"; it declared that are inherently unequal"; and it ruled that segregation in public education was unconstitutional. It appeared that the grounds for the decision were more sociological than constitutional, which in retrospect seems surprising in light of the solidity of the constitutional argument and the controvertible nature of the sociological evidence. The Court did not, in its *Brown* decision, declare the Constitution to be color-blind, which explains some of the present-day confusion about the meaning of the decision. The decision can be read, as it was then, as removing from the states the power to use race as a factor in assigning children to public schools; and it can be read, as it is now, as a mandate to bring about racial integration in the public schools by taking race into account in making assignments.

The Brown decision can be read as a mandate to bring about racial integration in the public schools by taking race into account in making assignments.

But it was the former interpretation that the NAACP lawyers used at the time. In 1955, Robert Carter asked for a decree from the Supreme Court that would order the Topeka School Board "to cease and desist at once from basing school attendance and admission on the basis of race or color." The Topeka school system should be reorganized, he held, "to the extent that there is no question of race or color involved in school attendance in its rules." James M. Nabrit, Jr., argued in the same vein for a Supreme Court decree for the District of Columbia public schools: "...do not deny any child the right to go to the school of his choice on the grounds of race or color within the normal

limits of your districting system....do not assign them on the basis of race or color, and we have no complaint. If you have some other basis, all boys, all girls, sixteen or fourteen, any other basis, we have no objection. But just do not put in race or color as a factor. And on that basis we do not complain."

Today the *Brown* decision is considered the progenitor of a host of color-conscious and group-specific policies. The concept of group rights, as distinct from individual rights, has become a commonplace. The decision that was supported to remove from the states the power to assign children to school on the basis of race has become the authority for assigning children to school solely on the basis of race, even where official segregation never existed. One Western school district, which contains 19 variants of the HEW-designated minority groups (Blacks, Hispanics, Native Americans, and Asian Americans), has voluntarily undertaken to maintain a racial and ethnic balance in its schools for both students and teachers. How such efforts grew out of a decision that was sought in order to eliminate group labels from public policy is one of the fascinating paradoxes of our time.

For at least the first ten years after the *Brown* decision was rendered, belief in color-blind policy was the animating force behind the civil rights movement. In the hearings on the Civil Rights Act in 1963, Roy Wilkins denounced employment quotas as "evil" and predicted that they would be used to restrict the opportunities of black workers. The Secretary of Health, Education, and Welfare, Anthony Celebrezze, when pressed to explain what the Kennedy Administration meant by the term "racial imbalance" in the language of the proposed law, said that he was opposed to any statistical racial balancing: "If you start drawing the line of demarcation that you should have 80 percent white, and 20 percent Negroes or 20 percent white, and 80 percent Negroes, then you are promoting as much segregation as we are trying to get rid of. What I am saying is that these students ought to be able to go to classes without taking into consideration whether they are white or black." In the same hearings, both Joseph Rauh and William Kunstler testified that the Harlan dissent of 1896 was now the law of the land. Attorney General Robert Kennedy, in a heated sparring match with Senator Sam Ervin, forced the senator to agree with him that the *Brown* decision established the right of the individual to attend his neighborhood school. And since no one, neither Senators nor administration officials, seemed to know what "racial imbalance" meant (some suggested that the phrase was a prohibition of gerrymandering, others thought that it meant that schools should reflect their surrounding communities), the Civil Rights Act ultimately included the following unequivocal definition of desegregation:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Not long after Congress passed into law the color-blind principle embodied in the Civil Rights Act of 1964, several trends converged to undermine it.

First, white Southern intransigence had effectively preserved the status quo despite the *Brown* decision. The dismantling of state-segregated school systems was occurring at a snail's pace; by 1964, only two percent of the black students in the Deep South attended schools with white students. Southern politicians boasted of their success in frustrating the implementation of the *Brown* mandate, and Southern legislatures devised ingenious schemes to protect the dual school systems. In some cities, white students were allowed to transfer away from their neighborhood school to avoid desegregation; some districts were gerrymandered to conform to the racial composition of the neighborhoods; in some districts, blacks who applied to attend white schools were required to pass special tests to prove their fitness; some states threatened to close their public schools, to suspend compulsory education laws, and to subsidize private education rather than comply with the Supreme Court's edict. Even "freedom of choice" became a mockery in Southern communities where blacks were too intimidated to choose freely. Thus, the nearly complete failure of the white South to comply with the *Brown* decision or to make any good faith efforts to desegregate created pressures to find some mechanism to bring an end to their resistance to the law of the land.

Second, the Civil Rights Act of 1964 authorized Federal officials to cut off Federal funds from districts that failed to desegregate their schools. This meant little in 1964, when Federal funds for elementary and secondary schools were limited, but it became a powerful weapon to compel desegregation after 1965, when Federal aid to education was passed by the Congress. The United States Office of Education moved swiftly to establish guidelines by which it might determine whether a district was in compliance with the mandate of the Civil Rights Act. For a year, the guidelines required the provision of free-choice plans; by 1966, unhappy with the slow pace of the first year, education officials promulgated new guidelines which set out in detail the numerical range of proportions of each race that had to be in integrated schools in each district in order to assure the flow of Federal funds. Using the Federal funds as a carrot, the Federal officials interpreted the *Brown* decision to require not just freedom of choice, not just an end to discrimination, but measurable integration. The Fifth Circuit Court of Appeals rejected challenges to the HEW guidelines, holding that freedom of choice was permissible only so long as it brought about integration. By 1968, the Supreme Court invalidated a free-choice plan that did not produce substantial integration; and by 1971, the high court directed the schools of Charlotte-Mecklenburg, North Carolina, to do whatever was necessary—including busing children away from their neighborhood schools, gerrymandering of districts, and creation of noncontiguous attendance zones—in order to bring about "truly non-discriminatory assignments."

Third, just as the Federal bureaucracy and the Federal judiciary began to abandon the color-blind principle, the black power movement emerged. Black power spokesmen ridiculed the leaders of the civil rights movement as Uncle Toms and accommodationists. It was not their rejection of integration that gave them mass appeal, however, but rather their open advocacy of black self-interest. While civil rights leaders championed policies of non-discrimination, the black advocacy movement demanded black principals, black teachers, specific jobs, here and now,

period. How could the civil rights movement, so long as it stood by the color-blind principle, hope to compete with organizations that sought tangible black gains? While the more flamboyant of the black activists passed from the national scene, many of their ideas and goals were quietly absorbed into the programs of the traditional organizations of the civil rights movement.

Fourth, the color-blind principle lost much of its luster for the civil rights organizations as soon as it was established in law. Once it was a fact, it ceased to be a goal; organizations either generate new goals or become defunct. A new agenda was required, one which was tailored to the pressing economic needs of the black masses. One cannot keep a mass movement excited about goals that have already been attained. Nor can a revolution of rising expectations be satisfied by non-discrimination policies alone. Too much was expected, too much was demanded, too much was owed, to let the matter rest with the guarantee that discrimination would no longer be permitted. The black rights organizations came to believe that equal opportunity on a color-blind basis was not enough because blacks were too far behind whites and too far removed from the mainstream. The corporations, the professions, the major centers of social and economic power had excluded blacks for years, and the promise to stop excluding them in the future was not enough to placate the demands for redress and parity.

Fifth, some of those who had led the fight against segregation came to the view that color-blindness is an abstract principle with no power to alter the status quo and no possibility of making up for the effects of past discrimination, either in institutional or in personal terms. One of the champions of color-blind policy, Robert Carter, now a Federal District Judge, believes that group preference will in time cause the nation's institutions, professions and work force to reflect the racial, ethnic, religious, and gender composition of the population. In his view, the color-conscious policy brings about by compulsion what the color-blind policy should have brought about if implemented in good faith.

Thus it was that the idea of a color-blind society fell out of fashion almost as soon as it was enacted into law and well before it became part of custom. Those who continue to defend the belief that individuals should not be judged in relation to their race, religion, sex, or national origin sense that they are fighting, at least for the time, a losing battle. Those in Washington who write the regulations have apparently decided that social origin and group identity are appropriate grounds by which to determine a citizen's eligibility to participate in governmental programs.

This is a turn of events that is not without consequence for American society. We do not today have a universalistic civil rights movement in the United States precisely because the only common purpose that could bind dozens of minorities together is the goal of preventing discrimination against *all* minorities. The fight to ban discrimination, which gathered to its banners a powerful coalition of diverse groups, has been replaced for now by group-ism, or every interest group for itself. Blacks demand more for blacks, Hispanics more for Hispanics, women more for women, and so on. Competition, all against all, takes the place of cooperation. In the present atmosphere, the idea of universalism is in retreat, an idea whose time came and went with amazing rapidity.

America has always had a healthy cacophony of interest groups; their striving is productive to the extent that all have a sense of the ties that bind us all, a recognition of the common humanity that is deeper still than our particularistic interests. Martin Luther King, Jr., in his famous oration at the Washington Monument in 1963, asserted black equality while appealing to the universalist spirit: "I have a dream," he said, "that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." It is the universalistic spirit that makes each of us

grieve for the suffering of our fellow humans, regardless of the group they belong to. Without this spirit, pluralism may degenerate into the parochialism of selfish group interests. A tendency of the group is to look out for its own—and only its own. The concern of responsible citizens ought to be the welfare of all Americans, not just those who happen to have the same color or sexual attributes or ethnic heritage. A renewal of dedication to the well-being of the American community would be a powerful counter to the current sense of listlessness and drift in the political climate.

Black civil rights leaders fear that color-blindness today means a willful refusal to recognize exclusionary practices that operate under the guise of racial neutrality. Opponents of group-conscious policies fear that to replace racism with racialism is divisive and wrong. Somewhere between the Scylla of color-blindness and the Carybdis of color-consciousness must be a reconciliation of democratic values. Strict neutrality in admissions and hiring, with no effort to remedy the effects of past discrimination, will leave many blacks right where they are, at the bottom. The alternative to racial quotas is the kind of program that prepares blacks to succeed without racial preferences, such as special tutoring for college admission or for union apprenticeship tests. A remarkable example was the Recruitment and Training Program (RTP), a New York based national organization, which from 1965 to 1983 recruited and trained more than 15,000 blacks for well-paid apprenticeships in construction trade-unions. RTP prepared its trainees to take apprenticeship examinations by teaching them the needed skills and self-discipline. As a result of RTP's efforts, minority membership in the affected unions has grown from three percent to 19 percent. RTP graduates today are working in 18 different crafts, in such jobs as plumbers, carpenters, painters, and electricians. Similarly, educational programs that upgrade academic skills have enabled black students not only to gain admission to colleges and graduate schools, but to complete their studies successfully. It is ironic that this effective program is quietly closing its doors, the victim of budget cuts, a sluggish economy, and a political constituency more engaged with symbolic victories than RTP's workmanlike approach. One noteworthy example is the ABC (A Better Chance) program, now in its twentieth year. ABC identifies promising minority youngsters from economically disadvantaged backgrounds and assists them in getting high quality college preparation, either in their own communities or in boarding schools. Several thousand students have received financial aid from ABC for their secondary schooling, and more than 90 percent have entered college; most ABC students are accepted in the most selective colleges, where their preparation enables them to compete as equals.

Such creative interweaving of color-conscious and racially neutral approaches recognizes the necessity of overcoming the effect of past discrimination by supplying the skills and motivation to achieve without regard to race or social origins. In the long run, the ability of minorities to sustain the occupational and educational gains of the past 20 years depends not only on those who enter higher education but on those who can hold their own academically, and not only on those who win union jobs but on those who have the skills to perform the job.

Whether it is possible to treat people as individuals rather than as group members is as uncertain today as it was in 1954. And whether it is possible to achieve an integrated society without distributing jobs and school places on the basis of group identity is equally uncertain. What does seem likely, though, is that the trend towards formalizing group distinctions in public policy has contributed to a sharpening of group consciousness and group conflict. As a people, we are still far from that sense of common humanity to which the civil rights movement appealed; still not a community in which everyone feels responsibility for the well-being of his fellow citizen; still unpersuaded that our many separate islands are part of the same mainland. We may yet find that just such a spirit is required to advance a generous and broad sense of the needs and purposes of American society as a whole. ◆

The Need For MORAL Leadership in the Black Community

by Glenn C. Loury

It is politically, socially and morally necessary at this time that the black community begin to develop and expand upon activities aimed directly at mitigating the worst conditions of lower class black life. A long tradition of philanthropy and internally directed action aimed at self-improvement exists among black Americans, pre-dating the emancipation. One of the major civil rights organizations today, the Urban League, was founded early in this century to assist new black migrants from the rural South in adjusting to life in the cities of the North. Black fraternal and professional organizations, through a wide array of programs and activities, have been "giving something back to the community" for decades. But the nature of problems facing the black community today, the significant recent expansion of opportunities for blacks in American society, and the changing political environment in which black leaders now operate, all dictate that greater stress should be placed upon strategies which might appropriately be called "self-help."

This noble tradition of mutual concern notwithstanding, the dominant theme among those who speak publicly on behalf of black interests today emphasizes the responsibility of government to deal with the problems of blacks. Policies of the local, state and Federal governments impact significantly on the welfare of black Americans who, therefore, have the right and responsibility to enter the political arena and participate in shaping those policies. But it is now virtually beyond dispute that many of the problems of contemporary Afro-American life lie beyond the reach of effective government action, and require for their successful resolution actions which can only be undertaken by the black community itself. These problems involve at their core the values, attitudes and behaviors of individual blacks. They are exemplified by the staggering statistics on early unwed pregnancies among black women, and criminal participation and incarceration among black men. These problems are part cause, part effect of the economic hardship readily observed in the ghettos of America, but in their complexity defy simplistic explanations. These problems will not go away with the return of economic prosperity, with the election of a liberal Democrat to the presidency, or with the doubling in size of the Congressional Black Caucus.

I will not pretend here that there exist any easy solutions for these difficulties. My only contentions are that: (1) any effective response will necessarily require the intimate involvement of black institutions, politicians, educators, and other concerned individuals; and (2) the nature and extent of the problem is such as to demand greater attention than is now received from these quarters. My concern is that too much of the political energy, talent and imagination abundant in the emerging black middle class is being channelled into struggle against the "enemy without," while the "enemy within" goes relatively unchecked.

It is now nearly two decades since the passage of the Civil Rights and Voting Rights Acts of the 1960s. May 17 of this year marks the thirtieth anniversary of the Supreme Court's landmark *Brown* decision. A generation of black and white Americans has come into existence for whom these monumental events are the stuff of history books, and who have no personal recollection of the struggles from which they emerged. While litigation and legislation in the field of civil rights continues to evolve, it is fair to say that, for blacks, these historic accomplishments dwarf in importance anything likely to occur henceforth.

Yet, if one were to poll that community of activists, lawyers, politicians and concerned citizens whose effort made "the movement" a reality, a sizable majority would, I believe, say that the

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Illustrations by Dean Williams

work they began remains seriously incomplete. They would point to the significant economic inequality which remains between the races in the United States: A growing fraction of black children are being raised in households living below the poverty line. The prisons of the country are disproportionately populated by black men. Black families are more often dependent on public assistance than the population as a whole. Residential segregation by race is commonplace in our central cities, as is the racial segregation of public schools which so often accompanies it. Moreover, it would be observed that overt expressions of racism have not yet vanished from the American scene. Thus, it would be argued much on the civil rights front remains to be done.

Yet, it is clear that in the last few years the civil rights leadership and organizations have entered a critical period. The social and political landscape has been dramatically and irrevocably altered since the height of the Movement. With the expansion of voting rights has come a new and growing cadre of elected officials providing direct representation for blacks at all levels of government. With the opening of educational opportunities at the elite universities and professional schools, a new class of young black men and women has emerged, with positions of responsibility and influence in the leading institutions of this society. Blacks are thus no longer dependent solely upon the "protest" route for a voice in American affairs. Much of what is accomplished by blacks today no longer issues from current lobbying and litigating activities of the traditional civil rights organizations. It is becoming increasingly obvious that, in order to continue making a contribution to the improvement of the black condition, these organizations must redefine their mission.

In short, many veterans of the struggle would point to the great social disparity between blacks and whites and the continued existence of racism as a factor in American life as evidence that the work of the Civil Rights Movement remains unfinished. Yet it is much easier to assert that something must be done than it is to set out an agenda for action. Today the civil rights leadership is very much in the position of sensing how crucial it is that action be taken, and yet not quite knowing what to do. I want to suggest that the next frontier for the movement should be sought through a concerted effort to grapple directly with the difficult internal problems which lower class blacks now face.

The formulation of such an alternative advocacy requires an objective examination of the resources at the disposal of the black community, and of the conditions which continue to inhibit further social and economic advancement for the group. Black leaders and intellectuals have too often failed to properly identify these resources and conditions. There has been a distinct tendency to understate the possibilities for use of resources internal to the group to bring about improvement in the condition of blacks. There has also been a proclivity to avoid discussion of values, norms and behaviors in the low income black community which are inconsistent both with achievement in American society, and with the ethos characteristic of much of the black middle class itself. A curious situation has thus arisen in which black people of considerable accomplishment recognize their success neither as evidence of the new possibilities open to blacks in this post-civil rights era, nor as an indication of those personal qualities, exemplified in their own lives, which enable one to best take advantage of these opportunities. As a result, the possibility that their lives might stand as examples of what can be done, and as models for how it is to be done, for the lower class of the black community is insufficiently exploited.

There has been a proclivity to avoid discussion of values, norms and behaviors in the low income black community which are inconsistent with achievement in American society and with the ethos characteristic of much of the black middle class.

This circumstance is exemplified by the belated and qualified recognition of the role which values and social norms characteristic of lower class black life play in retarding economic advancement for the group. One clear illustration of this is to be found in the response of black leaders to the change in black family structure which has occurred in the last quarter century. In the recent publication, *A Policy Framework for Racial Justice,* issued by the Joint Center for Political Studies, a group of 30 prominent black leaders and intellectuals stated:

> No strategy designed to improve the status of black Americans can ignore the central position of the black family as the natural transmitter of the care, *values,* and *opportunities* necessary for individuals (emphasis added).

There is thus the clear recognition that values and opportunities available only within families, and insufficiently available to too many blacks, play a crucial role in determining individual achievement. This is an important acknowledgement, quite rare in the public discourse of black leaders. But, in the very next sentence, responsibility for this state of affairs is laid at the feet of American society:

> The present black family crisis, characterized chiefly by the precipitous growth of poor female-headed households, can be traced almost directly to American racism.... As large numbers of blacks migrated to large cities from rural areas, black males have often been unable to find work, and government policies and other social forces further sapped family strength. These trends proceed apace today, aided by the widespread failure even to recognize the pressures on the black family as central to other problems and by the failure to devise both preventive and healing strategies.

The "failure" being discussed is clearly that of "racist American society," not of the political, intellectual, and religious leadership of the black community itself, which might more appropriately be regarded as responsible for the normative

health of the group. My point here is not that one cannot trace some of these family difficulties to American racism. What is crucial is that, having recognized that these difficulties have to do with the behavior of black youngsters, we begin to confront the question of how that behavior may be changed. Whatever *fault* may be placed upon "racist American society," the *responsibility* for the behavior of black youngsters lies squarely on the shoulders of the black community itself. Moreover, it is self-evident that the behavior at issue is wholely inconsistent with the values held by, and passed on to the children of, the authors of this statement. Is there no way, then, for these values to be diffused across social class lines within the black community?

In his last published work, *Where Do We Go from Here* (Beacon Press, Boston, 1968), Martin Luther King, Jr. recognized the crucial role which the emerging black middle class would have to play in the process of improving conditions for the group as a whole. He counselled that:

> It is time for the Negro haves to join hands with the Negro have-nots and, with compassion, journey into that other country of hurt and denial. It is time for the Negro middle class to rise up from its stool of indifference, to retreat from its flight into unreality and to bring its full resources—its heart, its mind and its checkbook—to the aid of the less fortunate brother.

King also recognized that this assistance must reach beyond the transfer of resources within the group, to involve moral leadership:

> It is not a sign of weakness, but a sign of high maturity, to rise to the level of self-criticism. Through group unity we must convey to one another that our women must be respected, and that life is too precious to be destroyed in a Saturday night brawl, or a gang execution. Through community agencies and religious institutions we must develop a positive program through which Negro youth can become adjusted to urban living and improve their general level of behavior.

I believe that, were King at the helm of the civil rights movement today, this is the direction in which he would be taking us.

A moment's reflection on the history of black Americans may provide some insight as to why the discussion of values and norms has been such a limited part of the group's struggle for social advance. Of fundamental importance in this regard is the atmosphere of racist ideology within which blacks have had to function. From the early days of slavery and the need to fashion some justification for its practice in a democratic Christian society, but continuing into recent times, blacks have had in various ways to defend our basic claim to an equal humanity before the general American public. The presumed inferiority of the African was the primary rationalization of his enslavement. The social Darwinists of the last century and this one had, by finding the explanation of blacks' poverty in our culture or genes, posed basic challenges to the integrity and self-respect of the group. The "retrogressionists," who well into this century argued that the black population was, after emancipation, doomed to slip back into its natural state of depravity without the civilizing influence of paternalistic masters, created an environment for thoughtful blacks virtually unique among American ethnic groups.

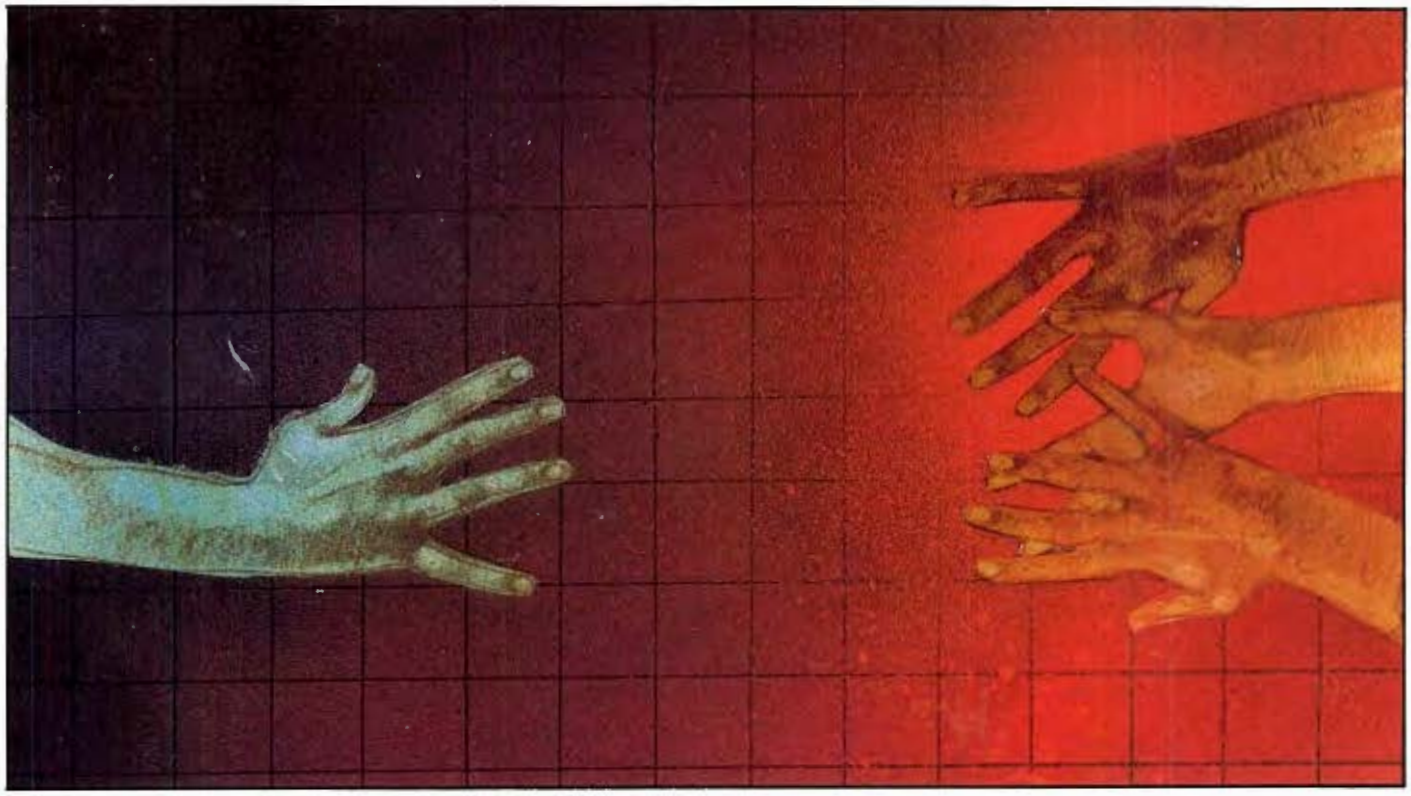
Among the major consequences of this ideological environment, one basic result has been the stifling effect which the need to refute these racist beliefs has had on the internal intellectual life and critical discourse of the black community itself. Objective assessment and discussion of the condition of the community has been made difficult for blacks because any critical discussion within the group (about problems of early unwed pregnancy, or low academic performance, for example) must be guarded by conscious concern for how such discussion might be appropriated by external critics, all too happy to find black spokesmen willing to provide support for their base hypotheses.

It is hard to overstate the significance of this constraint on discourse among blacks. Its consequences have not gone unnoticed by outside observers. One finds (now Senator) Daniel P. Moynihan (D-N.Y.) writing in 1973 regarding his earlier study of the Negro family:

> It is now about a decade since my policy paper and its analysis. As forecasting goes, it would seem to have held up.... This has been accompanied by a psychological reaction which I did not foresee, and for which I may in part be to blame.... I did not know I would prove to be so correct. Had I known, I might have said nothing, realizing that the subject would become unbearable and rational discussion close to impossible. I accept that in the social sciences some things are better not said.

Moynihan, of course, had argued that the growth of single parent families posed an emerging and fundamental problem for blacks, which would impede the ability of some to advance in the post-civil rights era. That he had been right about this is now beyond dispute. The problem he identified nearly twenty years ago is today twice as severe, with no solution in sight. And yet, when he released his study he was savagely attacked for "blaming the victim," and for failing to see the inner strengths of these families whose form represented a necessary adaptation in the face of American racism.

A similar scenario could be offered to describe reaction to discussions in the social science community of racial difference in performance on intelligence tests, or in reported arrest rates for various criminal offenses. These problems have the common features that: (1) they are critically important to an accurate characterization of the condition of the black population; (2) their resolution is fundamental to the progress of blacks; but (3) they are used by those outside the black community who subscribe to racist propositions about black inferiority as evidence in support of their views. As a result, many blacks have imposed on themselves a kind of censorship, wherein they agree not to discuss these matters frankly in public, and to ostracize those blacks who do. So, while the behavioral problems described here are by no means unique to the black community, the ability to openly analyze and resolve them is, for blacks, limited by this



truncation of critical discourse within the group. This is the primary reason, I believe, that the possibilities of moral leadership within the black community, in which the middle class would necessarily play a dominant role, have remained relatively unexplored.

Yet, the Black Power-Black Pride revolution of the sixties was supposed to have freed blacks of the necessity to use the judgment of whites as a benchmark for black self-esteem. Evidently that revolution in consciousness remains seriously incomplete. For a people to be unable to critically appraise and *accept responsibility* for their own failings, owing to fear that the negative views of "the other" will be given support thereby, is to evidence a considerable lack of confidence. One of the principal sources of "social capital" available to any community is the ability of mutually concerned individuals to exchange critical judgements of their fellows, without thereby appearing to be disloyal. At present the black community is much in need of investment in this asset. The public prominence, moral authority, and institutional capabilities of the civil rights organizations make them the natural actors within the black community to begin this task.

I fear, however, that the effects of a hostile environment cannot fully account for the absence of leadership of the sort I advocate here. For there has also been a tendency to deny the increasing class differentiation taking place in the black community. It is this growing stratification which creates both the economic possibility and the moral necessity of a more widespread program of self-help among blacks.

Many in the black community have fiercely resisted the observation of widening differences in economic status among blacks. Numerous tracts have been written "proving" that things have been getting worse for blacks as a whole, denouncing the "myth of black progress," showing that talk of an emerging black middle class is premature, and insisting that the role of racism as a fundamental cause of the problems of blacks has not diminished one bit. The concept suggested by such argument is that there is one racial experience in this country, endured by all blacks though some are less damaged than others by it. Dissenting from the view that class differences among blacks have become increasingly pronounced, noted psychologist Kenneth Clark asserts:

> American racism...remains "democratic" in that all blacks [are] perceived and treated alike. American whites [tend] to react to a person of color as if he were automatically lower class. This...continues to be generally true without regard to distinctions among individual blacks in terms of education, economic status, and other generally accepted class symbols.

This is a seriously flawed description of contemporary Afro-American life which obviates the raising of certain questions central to the dilemma of blacks today. From the perspective conveyed in this passage, the question "what responsibility has the black middle class in alleviating the conditions of poor blacks?" hardly arises. Nor is one likely to inquire as to the role played by conditions and behaviors characteristic of the low income black population (but which, almost by definition, middle class blacks strive assiduously to avoid) in perpetuating the improverished circumstances of these communities. Indeed, from this perspective it hardly occurs to one to ask how a genuine sense of shared experience, reaching across class lines and

evoking the active participation of the black middle class in the process of uplifting the poor, is to be forged.

But we must ask these questions, lest the great moral legacy of Dr. King's movement be squandered. For it is the case today that those who advocate the interest of blacks, in whatever arena but especially at the Federal level, draw upon that legacy, and upon the tragic conditions so prevalent in the low income black community. As American history of the past three decades clearly reveals, the public's accommodation to the claims of blacks is bound up with the general sense of our government doing the right thing. Since the height of the Civil Rights Movement most Americans have accepted the notion that the state should respond to the problems of blacks because that was the proper and decent thing to do.

There are few things more valuable in the struggle among competing claimants for government largess than the clearly perceived status of victim. Blacks "enjoy" that status by brunt of many years of systematic exclusion from our just place in American life. The political muscle of the new black urban majorities notwithstanding, blacks exercise a substantial amount of political influence by virtue of the fact that we are perceived as having been unjustly wronged and thus worthy of consideration. *The single most important symbol of this injustice is the large inner city ghetto,* with its population of poor blacks. Thus, it is not only the case that these urban black masses provide the margin of victory at the polls to one black politician after another, but, and I argue equally if not more important, these masses and their miserable condition sustain the *political capital* that all blacks enjoy because of our historical status as victims.

The growing black "underclass" has become the constant reminder to many Americans of an historic debt owed to the black community. I suggest that, were it not for this continued presence among us of those worst off of all Americans, blacks' ability to sustain public support for affirmative action, minority business set-asides and the like would be vastly reduced. That is, the suffering of the poorest blacks creates a fund of political capital upon which all members of the group can draw in the pressing of racially based claims.

It is thus not surprising to find that whenever any black leader argues for special assistance to some members of his community, whether that assistance flows directly to the poorest blacks or not, one can hear invoked the black teenage unemployment rate, or the increasing percentage of blacks living below the poverty line. The fact that the median black family income has not increased much relative to white family income over the period 1960–1980 has been frequently cited by black spokesmen and others to support the general claim that "nothing has changed." No major government purchasing effort at the local, state or Federal level can proceed now without the question being raised "What is in this for minority business?" Inevitably, the low economic status of the black poor will be referred to as justification for the claim.

I would like to clearly state that I am saying nothing here about the motives of black leaders, businessmen or professionals. I intend only to observe that, in the nature of the case, their advocacy for policies of benefits to blacks not necessarily themselves poor is most effective when couched in terms which remind the American polity of its historic debt, and this is most readily done by reference to the condition of the poorest blacks.

The suffering of the poorest blacks creates a fund of political capital upon which all members of the group can draw in the pressing of racially based claims.

The question should be raised though, as to how the black poor are to be benefitted by the policy actions extracted from the system in their name? The evidence of which I am aware suggests that, for many of the most hotly contested public policies advocated by black spokesmen, not much of the benefit "trickles down" to the black poor. There is no study of which I am aware supporting the claim that set-asides for minority business have led to a significant increase in the level of employment among lower class blacks. It is clear from extensive empirical research on the effect of affirmative action standards for Federal contractors that the positive impact on blacks which this program has had accrues mainly to those in the higher occupations. If one examines the figures on relative earnings of young black and white men by educational class, by far the greater progress has been made among those blacks with the most education. If one looks at relative earnings of black and white workers by occupation going back to 1950, one finds that the most dramatic earnings gains for blacks have taken place in the professional, technical, and managerial occupations, while the least significant gains have come in the lowest occupations, like laborer and service worker. Thus, a broad array of evidence suggests, at least to this observer, that better placed blacks have simply been able to take more advantage of the opportunities created in the last twenty years than have those mired in the underclass.

Thus, as things stand today, poor blacks are gaining less from the political process than their votes and misery contribute to the effectiveness of black advocacy. It is sadly the case that this circumstance may continue for some time. This is, to my mind, the most compelling moral reason why ways must be sought in which those blacks who have achieved a modicum of security and success can be appealed to, that they may assist in the decades-long task of eradicating black poverty, which continues to lie ahead of us.

In summary then, the nature of the problems besetting poor blacks, and the character of political advocacy for black interest in the post-civil rights era require that any morally defensible and factually based program of action for the black community must have primary among its objectives the goal of improving the personal efficacy of members of the black underclass. While it is certain that the Federal government can play a useful role in this process, it is equally clear that the black business, academic and political elites have the obligation to press for improvement in their own peoples' lives, through constructive internal institution building, whether government participates or not. ◆

AFFIRMATIVE ACTION
TWO VIEWS

The Historical Case For Goals and Timetables

The necessity to use numerically based affirmative action to end employment discrimination was recognized by each administration from President Johnson through President Carter and by several Congresses.

by Barry L. Goldstein

The current debate on affirmative action is often undertaken without any recognition that numerically based affirmative action developed gradually over a 15-year period in response to the attempts of Republican and Democratic administrations to end entrenched discrimination. On several occasions, Congress reviewed and approved the affirmative action programs. To fail to recognize the historical context of the development of affirmative action and its historical justification is to ignore the lessons learned by successive administrations' attempts to undo the tragic history of discrimination.

The first executive order barring employment by government contractors was issued by President Roosevelt in 1941. Presidents Truman and Eisenhower issued executive orders which expanded the non-discriminatory provisions. However, by the late 1950s it became obvious that a neutral, non-affirmative action standard was inadequate. President Eisenhower's Contract Compliance Committee, which was chaired by Vice President Nixon, issued a Final Report in 1959 which stated that the primary hindrance to the development of equal employment opportunity was "the indifference of employers to establish a *positive* policy of non-discrimination" (emphasis added). In issuing his 1961 executive order, President Kennedy followed the direction provided in the Nixon Committee report by requiring that "it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons...."

Since 1961 Federal contractors have been obligated to use "affirmative action." Initially, the Office of Federal Contract Compliance Programs (OFCCP) did not define affirmative action precisely. In 1967, Edward C. Sylvester, Jr., Director of the OFCCP, attempted to define affirmative action in terms of results:

> There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results.... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation.

Although not a precise definition, the direction of the OFCCP was to require "results" and to leave the development of the means to the "ingenuity" of the contractor.

To coordinate construction industry compliance activities, the OFCCP established a series of special area programs in 1965. The programs were intended to "assure minority group representation in all trades and in all phases of the work." The process required the low bidder prior to the award of the contract to submit an affirmative action plan to meet that standard. In order to meet this general requirement a contractor under the Cleveland area program set forth a specific proposal in which he detailed the total number of employees he would use in each trade and indicated how many of that number would constitute his "goal" of minority employment. Soon the decision was made to require similar manning tables for all Federal construction in the Cleveland area.

In 1967 and 1968 the pre-award Philadelphia Plan was similar to the Cleveland Plan. The contractor who submitted the low bid had to present a satisfactory affirmative action plan during pre-award negotiations. The "manning" table procedure and the pre-award negotiation scheme created considerable controversy.

Continued on page 22

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AFFIRMATIVE ACTION
TWO VIEWS

Affirmative Action vs. the Declaration of Independence

by Walter Berns

During their televised debate at Dartmouth College last January, the Democratic presidential candidates—eight of them at the time—were asked by Phil Donahue to raise their hands if they favored affirmative action. As anyone familiar with the Democratic party could have predicted, the response was swift, unanimous, and automatic: eight hands shot up. To have hesitated in that setting would have aroused suspicions of an insufficient commitment to equal justice; to have offered qualifications or reservations would probably have provoked hoots of derision from at least a portion of the audience; and, in the current climate of what passes for advanced opinion on the subject, to have expressed outright opposition would, almost certainly, have put the nomination beyond reach.

Republicans are under no such constraints, in part because of the character of their electoral support, in part because it is widely assumed—and in some cases not wrongly—that they are heartless to begin with. They may be attacked in the press—for, when it comes to opposition to what is called affirmative action, not even Republicans can act with impunity—but they are not likely to be deprived of office or place in the party. Donahue's question would have provoked a mixed response at best from a group of eight Republican candidates; indeed, had they been asked whether they favored reverse discrimination—same question but reformulated to emphasize the negative aspect of today's affirmative action—not a single hand would have been raised. By the same token, had Donahue followed up his initial Dartmouth question with this reformulated version, most (if not all) of those Democratic hands would have come down at least as quickly as they had gone up, not without some muttering to the effect that the question was unfair insofar as it was tendentious and tendentious because it was designed to expose what they would prefer to remain hidden.

There is less partisan difference on this general subject than would appear from the press accounts. No fair-minded person, of whatever party, can deny that discrimination is unjust, in principle as well as in its consequences. Nor will he fail to acknowledge a collective or public obligation not only to put an end to present discriminatory practices, and, where appropriate, to punish its present practitioners, but somehow to repair the damage caused by past discrimination. Republicans begin to differ with Democrats only when the remedies are defined or, better, described. Their quarrel begins with the descriptions. Is the remedy described as a goal or as a quota? Even Democrats shy away from quotas. Is the purpose of a particular busing order to desegregate or to integrate? It would seem to matter because the Constitution forbids segregation but does not require integration. Is comparable worth really indistinguishable from equal pay for equal work? That is to say, in point of constitutional principle, is there no difference between them? Or, to comprehend all these questions in one, is affirmative action (group entitlement, compensatory minority preference) merely a euphemism for reverse discrimination? The answer surely turns on the program in question, but one thing, at least, is clear: by employing the euphemism, the Democrats can avoid a direct confrontation with what they, as well as the Republicans, acknowledge as the fundamental principle of American democracy: the natural equality of all men. With respect to this principle, there is no disagreement between the two parties.

In his famous book, *An American Dilemma,* first published in 1944, Gunnar Myrdal spoke of this fundamental principle as the

Continued on page 27

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The Historical Case For Goals and Timetables

Continued from page 20

In response to a request from Congressman William Cramer of Florida, Comptroller General Elmer B. Staats issued an opinion that the Philadelphia Pre-Award Plan did not meet the requirements for competitive bidding. Staats did not suggest that the affirmative action provisions were unlawful under Title VII but rather relied upon the fact that the plan lacked standards. This deficiency could be remedied by "informing prospective bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged."

In early 1969, the Labor Department moved to re-establish the Philadelphia Plan, which had been suspended after Staats' opinion. The Department sought the informal advice of the Justice Department in establishing a plan which would be permissible under the procurement laws, Title VII and the Constitution.

The major provision in the revised Philadelphia Plan required the contractors bidding on Federal or federally assisted construction to submit goals for minority employee utilization which were within a range established by the government, and commit themselves to make "good faith" efforts to achieve such goals. The plan was issued to the heads of all Federal agencies in June 1969, and an implementing order was issued three months later.

The purpose and use of the numerical goals are spelled out by Professor James Jones, who was an Associate Solicitor of Labor and head of the division which provided legal services to the OFCCP during the period of the development of the Philadelphia Plan:

> The numerical elements of the Philadelphia Plan are expressed in terms of ranges, related to labor market factors, within which a contractor is required to use minority manpower goals and commit himself to make good faith efforts to achieve the goals. The ranges, and the goals set within the ranges, serve three legal functions: (1) they provide the requisite amount of certainty prior to bidding as required by procurement law; (2) they provide a target, which if met, is a presumption of compliance with the affirmative action obligation; (3) if the goals are not achieved, they serve as a measuring device to trigger an investigation of the overall compliance status of the contractor.
>
> All that a contractor has to do to be eligible for a contract is make a *commitment* to seek in good faith to meet his self-imposed goal. There is neither *per se* compliance nor *per se* violation associated with the goals or the ranges. Minority utilization above or below the goals, or above or below the ranges, at most is *presumptive evidence of compliance* on the positive side, and on the negative side, evidence of *probable cause to believe that a review* of a contractor's overall compliance posture is warranted.

The Philadelphia Plan was found lawful in *Contractors' Ass'n. of Eastern Pennsylvania v. Secretary of Labor,* and supported by *Southern Illinois Builders Association v. Ogilvie* where the court affirmed a similar plan stating that "[i]n this case, we believe that 'numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of Federal contractors to move employment practices in the direction of true neutrality.'"

The dispute over goals and timetables in the compliance program then moved to Congress. Senator John L. McClellan, D-Ark., requested an opinion from Staats regarding the legality of the method of implementation of the compliance program; the Senator in his letter charged that the Labor Secretary was requiring the use of illegal preference schemes. Staats stated that the Philadelphia Plan was illegal because it established quotas in violation of Title VII. On September 22, one day before the implementation order for the Philadelphia Plan was issued, Attorney General John N. Mitchell issued an opinion stating unequivocally that the Executive Order program in general and the Philadelphia Plan in particular were lawful: "I...conclude that the revised Philadelphia Plan is not in conflict with any provision of the Civil Rights Act [of 1964], that it is a lawful implementation of the provisions of Executive Order 11246, and that it may be enforced in accordance with its terms in the award of Government contracts."

Staats responded by requesting that a Senate subcommittee include in a pending supplemental appropriations bill a "limitation on the use of funds to finance any contract requiring a contractor or subcontractor to meet, or to make every effort to meet, specified goals of minority group employees." The issue was joined when the Committee attached a rider to continuing resolutions for several departments which provided:

> No part of the funds appropriated or otherwise made available by this or any other Act shall be available to finance either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute.

"The purpose of the rider was clearly to affirm the [supposed] congressional intent in the 1964 Civil Rights Act to outlaw programs like the Philadelphia Plan." Senator Sam Ervin, D-N.C., had held hearings before the Subcommittee on Separation of Powers of the Judiciary Committee for the purpose of examin-

ing whether the Philadelphia Plan violated the separation of powers principle because it was contrary to the intent of Congress in the Civil Rights Act of 1964. Senator Ervin placed the Staats statements into the Congressional Record in support of the rider.

The position of the administration was clear. In August 1969, Arthur Fletcher, Assistant Secretary of Labor, in a speech before an association of contractors articulated the problem which the compliance program confronted:

> Historically, as we all know, those dollars from Federal contracts flowed from the contractors into white workers' hands.... With minor exceptions, the minority communities were left out of this economic cycle which began with the Federal contract. White-owned companies got the contracts, they hired white workers and subcontracted with white companies.
>
> It [OFCCP] stands at the *one* point where the government can affect the use of those dollars, where it can either close its eyes and let those dollars continue to support institutionalized racism or where—if it chooses—it can see that all groups in our society...have full opportunity....

Fletcher stated that OFCCP "just has not been tough enough," and that requests for "voluntarism" and good will had not succeeded. Fletcher stressed that the way to achieve "concrete results" is to set "specific goals."

Despite the firm opposition of the administration, the Senate passed the rider as drafted. Prior to the House vote, the administration expressed its strong commitment to the compliance programs. President Nixon stated, "[T]he House of Representatives now faces an historic and critical civil rights vote." The House rejected the rider. The President then appealed to the House-Senate conferees "to permit the continued implementation of the Philadelphia Plan...." The Senate reconsidered the rider and reversed its position by voting to strike the rider from the appropriations bill.

The use of affirmative action and goals and timetables in the executive order program had survived after an extensive congressional debate.

In 1968 the OFCCP issued specific affirmative action regulations. The regulations required contractors to evaluate the minority representation or utilization in all job categories, to develop an affirmative action program for each facility, and to prepare an annual report of the results of the program. After the development of the Philadelphia Plan, the OFCCP extended the concept of goals and timetables to all nonconstruction contractors. This major modification of the affirmative action regulations was made in 1970 and then revised in 1971; it is commonly known as Revised Order No. 4. Revised Order No. 4 requires Federal contractors to undertake an availability analysis in order to determine if there are fewer women (the first time women were to be included in affirmative action programs by contractors) or minorities than would be expected according to their availability for work. If this analysis shows an underutilization of minorities or women, then the contractor is required to develop measurable targets, goals and timetables to obtain a full utilization of minorities and women as soon as possible. As in the case of the Philadelphia Plan, a contractor is required to make a "good faith" attempt to meet the numerical targets.

Revised Order No. 4 also provides that contractors remedy the effects of their past discrimination and presently provides that relief shall include "back pay where appropriate." While the term "back pay" was not added to the regulation until 1977, the OFCCP at least since 1967 and regularly since the early 1970s has been requesting and obtaining back pay for incumbent workers who have suffered economic loss due to discriminatory practices.

In 1972, Congress got back in the fray when it thoroughly revised Title VII. The Congress considered whether the use of goals in the executive order program or in other contexts should be permitted. Moreover, Congress considered whether the compliance program should be continued or whether Title VII should be made the exclusive remedy for employment discrimination.

Senator Ervin introduced two amendments to the Equal Employment Opportunity Act of 1972 which would have ended the use of goals in the Philadelphia Plan and in Revised Order No. 4. The first amendment provided:

> No department, agency, or officer of the United States shall require any employer to practice discrimination in reverse by employing persons of a particular race...or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges.

In opposition to the amendment, Senator Jacob Javits, R-N.Y., specifically defended the Philadelphia Plan and the Third Circuit's decision upholding the plan in the *Contractors' Ass'n. v. Schultz* case. He pointed out that the breadth of the Ervin amendment could deprive courts of the power to remedy proven cases of discrimination. The amendment was defeated.

Senator Ervin then attempted a more limited approach by adding "Executive Order numbered 11246 or any other statute or executive order." The amendment would have permitted the continued judicial imposition of remedial goals but it would have precluded their institution under the executive order. With the

Contract Compliance Program Executive Orders

Following is a list of executive orders issued from 1941 to 1978 to bar discrimination by government contractors:

E.O. 8802 1941-Roosevelt	Established first national policy supporting equal employment opportunity "regardless of race, creed, color, or national origin." Targeted at wartime defense contractors. Set up Fair Employment Practice Committee (FEPC) to investigate discrimination complaints and redress grievances.
E.O. 9001 1941-Roosevelt	Required that military contractors stipulate that they and their subcontractors shall not discriminate based on "race, creed, color or national origin."
E.O. 9346 1943-Roosevelt	Expanded E.O. 8802 to cover the Federal government and unions and required a nondiscrimination clause in all government contracts that included subcontractors. The powers of the FEPC were enhanced.
E.O. 9664 1945-Truman	Continued the FEPC for a limited time and directed it to report to the President on discrimination in industry and the transition to a peacetime economy. (The FEPC observed that "[d]iscriminatory practices were too ingrained to be wholly carried out even by patriotism and Presidential authority." It reported that wartime gains of "Negro, Mexican-American and Jewish workers are being lost through an unchecked revival of discriminatory practices....[and that] gains made by minority group workers began to disappear as soon as wartime controls were relaxed.") The FEPC was dissolved in 1946.
E.O. 10210 1951-Truman	Transferred the powers in E.O. 9001 to the Defense Department. Five additional executive orders by Truman extended the powers and responsibilities listed in E.O. 10210. One of these, E.O. 10308, created the Committee on Government Contract Compliance.
E.O. 10479 1953-Eisenhower	Dissolved the last Truman order and created the Government Contract Committee (GCC). It substantially broadened the scope of the coverage of the nondiscrimination clause by stressing the nation's interest in manpower needs in both "security" *and* "economy." This was the first executive order not based on a production or defense act. It provided that it was the policy of the U.S. to "promote" equal opportunity "because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds." The GCC was empowered to receive complaints of violations of the nondiscrimination provisions of government contracts, to encourage employer education programs and establish liaisons with state and local governments and other groups to assist in achieving the purposes of the program. Vice President Nixon was named chairman of the GCC.

Contract Compliance Program Executive Orders

E.O. 10557 1954-Eisenhower	Required contractors and subcontractors to post notices of the nondiscrimination clause where employers and applicants could see them.
E.O. 10925 1961-Kennedy	Introduced affirmative action and extended coverage from contractors and subcontractors to Federal grant recipients for construction projects. The executive order said it was Federal policy to encourage equal opportunity by "positive measures," and that contractors will take "affirmative action...." The order also established penalties, including contract terminations for noncompliance. Created the President's Committee on Equal Employment Opportunity.
E.O. 11114 1963-Kennedy	Extended the nondiscrimination and affirmative action requirements from procurement contracts to construction contracts.
E.O. 11246 1965-Johnson	Expanded the scope of the coverage of the contractual provision in E.O. 11114. The responsibility for supervising the implementation by the contracting agencies was transferred to the Labor Department which created the Office of Federal Contract Compliance Programs (OFCCP) to manage the compliance program.
E.O. 11375 1967-Johnson	Added "sex" to the list of prohibited discriminations and changed the word "creed" to "religion."
E.O. 12086 1978-Carter	Transferred the enforcement of the compliance program from the contracting agencies to the Secretary of Labor.

issue focused squarely on the use of goals in the compliance program, the Senate voted not to prevent their continued use and unequivocally approved the affirmative action program of the executive.

Both the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare which reviewed the 1972 equal employment legislation stressed the importance of the compliance programs in the overall fair employment efforts and the failure of the program to live up to its potential:

> The rights of minorities and women are too important to continue this important function in an agency that has not

really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity.

Despite the increasingly strong Presidential commitment to the goals of equal employment opportunity, despite the strength of the sanctions available to secure this goal and despite the potential effectiveness of the Federal monitoring mechanism, the contract compliance program has not been successful.

The committees agreed that this program, which "looks good on paper," needed greater enforcement efforts and use of sanctions in order to be effective. For example, the Senate committee observed that there had been "far too much non-public discussion and negotiation and far too few understandable results" and a failure to invoke "sanctions." The House committee stated that "the Federal contract compliance program has always suffered from the great reluctance of administrators to use debarment and contract termination." The House committee concluded that the "compliance program could be [strengthened] considerably if alternative remedies were made available."

The committee determined that one way to improve the enforcement of the compliance program was to transfer the responsibility for enforcement from the Labor Department to the Equal Employment Opportunity Commission. In large part, the basis for this conclusion was predicated upon the fact that the bills reported out by the committees contained cease-and-desist authority for the EEOC, an authority which was not contained in the final act.

The debate regarding the transfer of the compliance program to the EEOC focused upon the most effective method for enforcing the program. Both sides agreed, as did the committees, that greater enforcement was necessary. Senator William B. Saxbe, R-Ohio, who introduced the amendment opposing the transfer, stated that he "most of all [liked] the affirmative approach" and he opposed any interruption in the program. Saxbe stated that "[i]t has been the 'goals and timetables' approach, which is unique to the OFCCP's efforts...coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility." The Senator traced the affirmative action concept to the report prepared at Vice President Nixon's direction and concluded that the program, which was beginning to show a positive effect, should be retained. After the support of the affirmative action program of the OFCCP by the opponents of the transfer provision, the amendment was passed and the Secretary of Labor retained control of the compliance program.

Congressional support for executive order enforcement independent of Title VII was emphasized when the Senate defeated the Hruska amendment, which would have made Title VII the exclusive Federal remedy in the field of employment discrimination. In opposing the amendment, Senator Harrison Williams, D-N.J., one of the floor managers of the bill, referred to the Philadelphia Plan when he stated:

Furthermore,...this amendment can be read to bar enforcement of the Government contract compliance programs, at least in part. I cannot believe that the Senate would do that after all the votes we have taken in the past two or three years to continue that program in full force and effect.

Finally, Congress recognized and approved within certain limits the debarment of contracts because of a failure to abide by the affirmative action provision of the executive order. Thus, after reviewing the executive order program in detail, Congress recognized that it was "vital," that it needed greater enforcement effort, that the affirmative action effort was central to the program, and that the program should be continued. The Ninth Circuit observed that "there can be no doubt that the essential features of the affirmative action program reflected in the regulations promulgated in Revised Order No. 4 were effectively ratified by Congress in adopting the Equal Employment Opportunity Act of 1972."

In the 1960s prominent politicians opposed the landmark civil rights law not because, they said, they disagreed with the principle of ending racial discrimination but because the civil rights laws improperly, or unconstitutionally, impinged on the rights of individuals to employ, rent housing to, provide public accommodation to, etc., others as they saw fit without government interference. The events of the last twenty years show how fortunate our country is that this counsel was rejected. In the 1980s prominent politicians argue that we should reject positions taken by the previous six administrations and approved by several congresses.

Once again it is in the interest of all that we reject the counsel of those who argue that while, in principle, they support actions to remedy racial, national origin and gender discrimination, affirmative action programs go too far by impinging on the interests of white males. As administrations from Kennedy through Carter recognized, and as Congress has determined on several occasions, numerically based affirmative action programs are an important part of a total effort to end the effects of historical discrimination. In the 1980s we should reject the counsel of those who argue that affirmative action goes too far just as in the 1960s we rejected the counsel of those who argued that strong national civil rights legislation was improper. ◆

Affirmative Action vs. the Declaration of Independence

Continued from page 21

"American Creed," which he defined with tolerable accuracy. The dilemma referred to in his title consisted in the difference between the creed professed by Americans and the racial discrimination then pervasive in almost all facets of American life. While acknowledging this tension between principle and practice, the country's harshest critics have nevertheless focused on the practice, and in the process depreciated the authority or weight of the principle. Lincoln, on the other hand, precisely because he knew that the practice could not be condemned, or even seen for what it is, except in the light of the principle, devoted his political career to strengthening the nation's attachment to the Declaration of Independence, our "ancient faith," as he sometimes called it. He said it was, and he intended it always to be, "a stumbling block to those who...might seek to turn a free people into the hateful paths of despotism." Thanks in large part to him, it continues to be a stumbling block not only to those who would discriminate against blacks and other minorities, but to those who would discriminate in their favor.

Today's affirmative action is discriminatory; it has "innocent" victims who are asked to pay the immediate cost involved in binding the nation's wounds even though not responsible for them.

Proof of this can be found in the proliferation of opinions in *United Steelworkers* v. *Weber, Fullilove* v. *Klutznick,* and especially in *University of California Regents* v. *Bakke*; it was only with evident embarrassment that the Supreme Court was able to uphold the principle of racial entitlements challenged in those cases. So, too, with the various organizations comprising the civil rights community, which for years had fought under the banner of a colorblind Constitution. Why, except to apologize, do even their most confident spokesmen find it necessary repeatedly to reassure us that their affirmative action programs are merely temporary expedients, to be abandoned as soon as the emergency is over and the "goal" has been reached? So, finally, with the Democrats who speak only of affirmative action. Embodied in this polite locution is a contemporary version of the American dilemma: the discrepancy between our theory and our practice.

So long as affirmative action meant programs aimed at repairing the damage caused by past discrimination, but doing so in a nondiscriminatory manner, it enjoyed wide, if not unanimous, public support. No reasonable person could object to special education programs (such as Head Start), vigorous recruitment of minority job applicants, and other measures designed to allow members of minority groups to compete on more equal terms. Such programs were not, and were not seen to be, in conflict with the American principle of equality. But such programs are not at issue today. What is at issue today are programs that discriminate against the white person or white male who is not hired by the police department, not promoted by the fire department, and not admitted by the medical school. Perhaps the best example of what affirmative action has come to mean can be found in that Federal court order in the Boston school case. For every black teacher hired and then retained (despite the order reducing the size of the overall teaching force), an otherwise qualified white teacher can be discharged. They numbered in the hundreds. Moreover, they had an average seniority of ten years and were protected—or thought they were protected—by a legal contract recognizing that seniority. Unless he had been paying no attention whatever to what had been going on lately, Phil Donahue surely had such programs in mind when he asked his Dartmouth question.*

Today's affirmative action is discriminatory; it has victims. What is more, it has "innocent" victims, persons not themselves responsible for "the nation's "wounds"—Lincoln's term—but who are asked to pay the immediate cost involved in binding them. That cost is not insignificant. Not only were those tenured Boston teachers deprived of their jobs but, because of the Federal courts' refusal to enforce the *legal* contract they had with the school board, they were deprived of a constitutional right, their equal right to the protection of the laws. On the basis of race, such programs treat persons unequally, according rights to some but denying them to others—in fact, depriving them of rights to which they had been entitled. Because this cannot be done without undermining the very idea of rights, the ultimate cost of affirmative action may be very heavy indeed, and it will have to be paid by all of us, black and white alike.

All our thoughts on this subject derive from the Declaration of Independence, and according to that venerable document one cannot deny the equality or rights without at the same time denying the very idea of rights. It is only in our possession of rights that we are equal to one another. We are not equally white or Anglo-Saxon; we are not equally strong, in-

**Editor's note: The recent Supreme Court decision in the Memphis firefighters case* (Firefighters Local Union No. 1784 *v.* Stotts) *may prevent courts in the future from modifying or dismantling seniority systems.*

telligent, beautiful, or even—except with respect to our rights—deserving. We are equally human, and in the thought that inspired and guided the authors of the Declaration of Independence, the essence of being human, or the quality that defines a human and political being, is the possession of rights. It follows that if particular human beings do not have rights, then no human beings have rights. It also follows that, if some human beings have rights, all human beings have rights.

In the *Dred Scott* case, the Supreme Court was faced with having to choose between these alternatives, but avoided the choice by saying, in effect, that black persons were not human beings. In this way it could hold that they had no rights without at the same time undermining the rights of white persons. No one campaigned harder against the *Dred Scott* decision than Lincoln, because no one better understood its import. Not only did it open the territories to slavery and, in addition, provide the foundation for a future decision opening the states, north as well as south, to slavery, but it implied that whites and blacks alike might properly be enslaved. For, in the eyes of the Declaration, there is no respect in which all men, except black men, are equal; and, whatever the Court might say, black men are men, and if, being men, they have no rights, then no men have rights. Lincoln saw this clearly and warned of it frequently:

> Now, when [by means of the *Dred Scott* decision], you have succeeded in dehumanizing the Negro; when you have put him down and made it forever impossible for him to be but as the beasts of the field; when you have extinguished his soul, and placed him where the ray of hope is blown out in darkness like that which broods over the spirits of the damned; are you quite sure the demon which you have roused *will not turn and rend you?* What constitutes the bulwark of our own liberty and independence?

What, indeed, except our equal possession of rights? As he said in his well-known message to Congress calling for it to vote for emancipation, it is only by "*giving* freedom to the slave, [that we can] *assure* freedom to the *free*."

I said earlier that, thanks largely to Lincoln, the Declaration's principle of equal rights is still respected today, more than 200 years later. I shall now go further to say it is the principle that makes us a nation. It was in order "to secure these rights" that we instituted government and it is by these rights that we define the proper limits of government or measure its performance. But that is not all. In 1776, we made a pledge to recognize and respect the rights of each and all, and it was with that pledge that we became a people. There is, of course, something selfish or self-interested about the idea of rights, but its effect is to cause us to think of others as well as ourselves. As Tocqueville was to point out a generation or two after 1776, Americans "refrain from attacking the rights of others in order that their own may not be violated." That respect for rights, he said, is the bond that holds us together, whatever our class or color, creed or church, party or station. By doing so it makes nondespotic government possible, and, in our day, nondespotic government is the exception not the rule.

If the laws may be used to discriminate against whites, there is no reason why the laws may not once again be used to discriminate against blacks.

We denied that bond implicitly at the beginning when the Constitution's framers, while refusing to sully its text with the words slave or slavery, did not incorporate a provision forthrightly prohibiting slavery or even requiring its eventual abolition. The consequence was a half-century of political turmoil. Yet, as the career of Frederick Douglass serves well to illustrate, the hopes of black people were sustained by the promise of equal rights; it was not by chance that Douglass delivered his greatest oration on the Fourth of July. We denied that bond explicitly when, five years after Douglass spoke, the Supreme Court handed down the decision in *Dred Scott* v. *Sandford*, and the result was the bloodiest of all American wars. After that war, and culminating in the Civil Rights March of 1963, the same hopes were sustained by the same promise, but now strengthened by the postwar constitutional amendments. Again, it was not by chance that Martin Luther King, Jr., delivered his greatest oration on the steps of the Lincoln Memorial. Now, by tolerating racial discrimination under the label of affirmative action, we are once again violating the principle of equal rights and thereby denying that bond. However compelling our reasons or benevolent our purpose, and whatever the labels we attach to our programs, it ought to be clear to Democrats and Republicans alike that we cannot do that without laying the foundation for majority tyranny. If the laws may be used to discriminate against whites, there is no reason why, especially since whites constitute the majority of the nation, the laws may not once again be used to discriminate against blacks. Only our respect for the principle of equal rights stands in the way of it. ◆

Defining Discrimination: Intent vs. Impact

by James F. Blumstein

The recent debate over renewal and amendment of the Voting Rights Act focused attention on two of the most important civil rights questions of the 1980s: what is discrimination and how is it proven? The answer to these questions is politically significant because of the widespread condemnation of race discrimination by our society. The questions are also important as a matter of principle because they require identification of the values underlying our condemnation of race discrimination.

The debate over the amendment of Section 2 of the Voting Rights Act examined whether discriminatory purpose or disproportional racial impact should be the yardstick by which to measure the legality of voting practices or procedures. That question is not unique to the voting rights context but is important throughout the civil rights area. The nondiscrimination principle is central to most civil rights legislation. Our legal system's predominant civil rights strategy has been to prohibit racial discrimination.

The nondiscrimination principle upholds the idea that race-dependent decisions are unacceptable except in the most unusual and compelling circumstances. The principle rests on a number of justifications. First, our society considers decisions based on race irrational and unfair. It rejects the idea that social groups, as groups, have a "differential worth,"[1] even if on average one group has better skills in one area than another group. Use of a racial criterion is so imprecise and wantonly destructive, both individually and socially, that we cannot condone it. Second, because race-based decisions are so imprecise, they unwarrantedly deny opportunities on the basis of a criterion that no individual can control. Third, racial classifications polarize society, stigmatizing those minorities victimized by the racial classification. Fourth, racial discrimination is a "particularized wrong"[2] independent of the adverse consequences that flow from it because race-based decisionmaking violates the societal goal of a fair, individualized, and meritocratic procedural framework for decisionmaking. Finally, the use of racial criteria "encourages racialism, the mental habit of thinking about and dealing with persons of races other than one's own, not as individuals, but as 'blacks,' 'whites,' and so forth. This habit of mind is the soil in which discriminatory practices grow."[3]

The nondiscrimination principle does not, however, insure that individuals or groups will be protected from disadvantage. For example, a nondiscriminatory system of registration and voting does not guarantee that any particular participants in the process will be successful. A race-neutral system may produce an outcome disadvantageous to one group or another. In fact, certain electoral structures (e.g., multimember district plans)

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have been recognized as tending "to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position." Yet the Supreme Court "has repeatedly held that [such structures] are not unconstitutional *per se.*"[4] Despite the disproportionally dilutive impact on a minority's voting power, the Court has held such multimember district plans unconstitutional only if "conceived or operated as purposeful devices to further racial discrimination."[5] The Supreme Court's equal protection decisions therefore draw a fundamental distinction between race discrimination, which is almost always held invalid, and racially disproportional disadvantage, which by itself constitutes no constitutional violation. Race discrimination requires either the "deliberate use by government of race as a criterion of selection..."[6] or proof that a course of conduct was pursued "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [racial] group."[7]

The intent standard offers a "bottom line" for the factfinder: Is the asserted rationale legitimately neutral or merely a pretext?

Many proponents of the nondiscrimination principle support it with the hope that it is the most viable strategy for "secur[ing] a position of equality for the Negro in American society."[8] But a nondiscriminatory society may leave racial minorities in positions of relative political powerlessness. In rejecting the proposition that a racial group is entitled to actual legislative representation as a matter of substantive constitutional principle, the Supreme Court has held that an interest group's lack of legislative seats provides no basis for a remedy unless the group is being denied access to the political system. Even groups historically subjected to discrimination are not immunized in our rough-and-tumble political system from political defeat or from the adverse impacts of governmental action that indirectly stem from that defeat.

Racially disproportional disadvantage cannot, therefore, be equated with proof of racial discrimination. The causal link must be demonstrated empirically.

Because the nondiscrimination notion is a procedural concept assuring evenhanded treatment of similarly situated individuals, it is breached when similarly situated people are treated differently because of their race. Such differential treatment has an essential ingredient of volition, and a finding of unconstitutional discrimination therefore rests on a finding of intent.

Without a requirement of intentional discrimination, the nondiscrimination principle is analytically at sea and cannot serve as an underlying core value to guide courts and enforcement agencies. The intent standard offers a "bottom line" for the factfinder: Is the asserted rationale legitimately neutral or merely a pretext? The effects standard, on the other hand, draws no bottom line. It requires the consideration of a laundry list of factors, but it never orients the inquiry. It demands a balance, but it provides no scale. Separating the nondiscrimination concept from a volitional foundation is an invitation to doctrinal incoherence and unprincipled, ad hoc decisionmaking. To understand the centrality of discriminatory intent in proving discrimination, it is helpful to focus on two hypotheticals outside the areas of race.

Assume that a university's German department hires only professors who were raised and educated in Germany. The rationale is that the students should learn to speak a foreign language from teachers with a native accent. Because of the Holocaust, there are virtually no Jews among the eligible candidates. The question is whether the German department's policy discriminates against otherwise qualified, non-German Jewish candidates.

In thinking about the issue, one turns intuitively to the intent or good faith of the German department members. One asks questions about the faculty members: Were they Nazis or Nazi sympathizers? Is there evidence of anti-Semitic activity or conduct? What kinds of rules are applied elsewhere? What is the history of the rule? Why was it adopted? Are there educational reasons for the rigid rule? Are nonnative speakers reasonable substitutes? Clearly the inquiry turns on the credibility and good faith of the decisionmakers—on intent to discriminate.

If the members of the department have implemented a neutral policy out of a rational commitment to a legitimate educational philosophy, then the conclusion likely will follow that no discrimination has occurred. To be sure, Jewish applicants will be disadvantaged in their career advancement, but that will merely be the unfortunate consequence of a neutral educational decision. The loss will have to be absorbed—unless, that is, there is some affirmative obligation on the part of the university to be especially solicitous of Jewish applicants. Only if some affirmative duty exists does reliance on an effects or impact standard make sense analytically.

The German department hypothetical illustrates the intensely procedural orientation of the nondiscrimination principle. One examines the process to determine whether the facially neutral policy is legitimate or pretextual. Exclusive or primary focus on results or outcomes departs from the fundamental principle of nondiscrimination. Naturally, adverse consequences are far from irrelevant. Outcomes raise legitimate questions about the fairness and neutrality of a process, and these inferences may justify a finding of purposefully discriminatory conduct. But the ultimate focus of the analysis is on the decisionmakers and the actual reasons for their decision. Otherwise, one moves subtly from a principle of nondiscrimination (the "fair shake" concept) to a principle of entitlements based on ascriptive criteria such as a race, religion, or sex (a "fair share" concept). Sophisticated and forthright commentators recognize the theoretical shift. In the political arena, however, the subtlety and the importance of the change are often not identified or acknowledged.

A second hypothetical considers whether the concept of discrimination can appropriately be applied in the absence of a finding of discriminatory intent. Assume that a company establishes a dress code requiring its secretaries

to wear dresses and high-heeled shoes. Is this discriminatory as applied to male secretaries? The code clearly disadvantages men and can be changed at little or no cost to the employer. This may be a legitimate basis for barring such an employee dress code, if the employer is seen to have an affirmative duty not to disadvantage an identifiable, gender-defined group (males) by discouraging its members from applying for or retaining their secretarial positions.

This analysis, however, does not ask whether the rule discriminates against men. Instead, it simply establishes that men are disadvantaged and asks if that disadvantage serves important and legitimate functions. If the disadvantage can be avoided with no significant harm to the employer, disallowing the rule might be appropriate. That decision would reflect a principle of Hold Harmless Accommodation (HHA) that proscribes employer behavior disadvantaging a gender-based group if that disadvantage can be avoided without substantial detriment to the employer's business interests. HHA requires more than evenhanded nondiscriminatory treatment; it requires adherence to an underlying affirmative value—the duty not to disadvantage a group unnecessarily by the application of nondiscriminatory, albeit harmful, rules.

If the HHA principle were the only rationale supporting a remedy for discrimination, the argument that the nondiscrimination principle must rest on a finding of purposeful discrimination could be challenged. The nondiscrimination theory, however, offers an alternative analysis. Consider the justification for the dress code. Presumably, neatness and professional appearance would be the proffered rationales. But application of the dress code to men would promote the opposite. At the same time, it would discourage men from applying for or retaining their jobs. The absence of a plausible, nondiscriminatory rationale suggests the code is a device to disadvantage men intentionally and thus discriminate against them. As such, the code violates the nondiscrimination norm.

In sum, the race discrimination label should be reserved to describe those decisions that either employ a racial criterion or are designed intentionally to harm a person or a group because of racial identity. Such an approach comports with the Supreme Court's analysis under the Fourteenth Amendment's equal protection clause. It properly necessitates an examination of discriminatory intent or purpose while recognizing that "discriminatory intent need not be proven by direct evidence."[9]

The traditional objection to an intent standard is the practical problem of proof. A plaintiff can easily demonstrate statistically that an act adversely affects a racial minority. Statistics are readily available and the issues often reduce to a question of numbers. Proof of discriminatory intent, on the other hand, may be difficult to uncover. If governmental action occurred long ago, the problems of reconstructing facts and circumstances may be insurmountable. Also, plaintiffs and the courts face a formidable task in determining whose intent is decisive in making out a case of discriminatory purpose and in determining what intent "really" existed. The pragmatic concern, and not an unrealistic one, is that a good bit of intentional discrimination may go undetected and therefore unremedied. As a result, the question becomes whether, consistently with the intent framework, a court may use some sort of effects test to accommodate the legitimate concern for proof.

At least two different types of effects tests must be distinguished. A "substantive" effects standard purports to measure race discrimination by focusing on the impact of seemingly neutral conduct. Evidence of good faith is not an adequate defense against a showing of racially disproportional result. A substantive effects standard, however, in which good faith is not an adequate defense, cannot be squared with the nondiscrimination principle because the test rests on the unaccepted concept of affirmative entitlement to representation based on race.

A different effects analysis, the "evidentiary" effects test, can accommodate the nondiscrimination principle with the pragmatic problems of proof. The evidentiary effects concept retains the basic theory of nondiscrimination, but permits an inference of discriminatory intent where certain results can be demonstrated. It accepts the process orientation of the nondiscrimination principle, but also recognizes that the behavior of complex organizations like governments may not be easily personalized so as to identify intent. Evidence of good faith is always a defense.

A substantive effects standard diverts analytical inquiry away from the basic process of decisionmaking and directs it toward results. It transforms the nondiscrimination value from a doctrine of racial neutrality to an affirmative duty to consider race explicitly in effectuating an aliquot matching of a particular benefit to racial criteria.

The substantive effects approach subtly but necessarily adopts a philosophy that racially proportional participation in society's institutions is the norm. Color-blind rules and procedures are insufficient; racially based numerical outcomes control. Integration, not desegregation, and quotas, not fair hiring practices, become central.

Under the nondiscrimination principle, major attention to outcomes is inappropriate in the absence of evidence of intentional discrimination.

For proponents of the substantive effects approach, the nondiscrimination principle is a means to the end of equal political and economic status for blacks and whites as groups. If the nondiscrimination principle fails to produce the desired results, these advocates are prepared to abandon the principle. Equality of end result replaces equality of opportunity as the yardstick for measuring civil rights progress.

Faithful compliance with a racially neutral procedure does not necessarily lead to any predetermined outcome, however. For a wide variety of reasons having nothing to do with racial discrimination, racial rates of participation in specific institutions may not be consistent with overall population ratios. The small number of elected black officials or the perception that black

political interests have a low priority may mean only that blacks voted for the losing candidate. If one is guided by the principle of nondiscrimination, single-minded attention to outcomes is inappropriate in the absence of evidence that existing or previous intentional discrimination caused the disproportional results.

There are at least two different types of substantive effects standards. Under either approach, evidence of discriminatory purpose is nonessential, and evidence of good faith is not a defense. Under an extreme form, the absolute substantive effects approach (ASEA), liability flows from a showing of mere disproportional racial impact. Justifications are immaterial. Under the more common form, the presumptive substantive effects approach (PSEA), a showing of disproportional racial impact establishes a prima facie case of liability. A defendant must explain and justify its conduct based on neutral and adequate grounds.

An example of the ASEA is the Supreme Court's decision in *Board of Education v. Harris,*[10] which involved a Federal aid program to assist school districts undertaking desegregation programs. The Court held that districts qualified for Federal aid only if they showed improved racial balance within their schools. No explanation was deemed adequate; even if a school district was pursuing desegregation in good faith, the absence of improvement in the numerical indicators disqualified the district from receiving Federal funds.

The ASEA works much like the Court's rigid one person, one vote rule in congressional apportionment decisions. Established in a series of cases in the 1960s, the rule operates with mathematical precision in validating or invalidating apportionment of congressional districts. The numerical data control, and the Court will accept virtually no justification for deviation.

What makes apportionment cases analytically coherent is their clear articulation of a core value—one person, one vote. In his classic dissent in *Baker v. Carr,*[11] Justice Frankfurter argued that "[o]ne cannot speak of 'debasement' or 'dilution' of the value of a vote, until there is first defined a standard of reference as to what a vote should be worth."[12] And establishing the proper "standard of reference" necessitates the adoption of a core value. Two years after *Baker,* the Court embraced the equal population principle, which has since served as the constitutional apportionment standard. This standard allows the Court to review apportionment schemes on the basis of numerical outcomes, because the doctrine establishes an underlying right to which all voters are entitled.

The presumptive substantive effects approach (PSEA) bears a close doctrinal kinship to the ASEA. Under the PSEA, evidence of a discriminatory purpose is nonessential; a showing of disproportional racial impact establishes a prima facie case of liability. But under the PSEA, unlike the ASEA, the prima facie case may be rebutted. Once a plaintiff shows that a racially disproportional impact exists, a defendant has an opportunity to justify its conduct.

The PSEA rests upon the principle of Hold Harmless Accommodation (HHA). Disproportional impact on a racial minority is prohibited unless there is a substantial justification for the rule, standard, or law. The Supreme Court's decision in the seminal case of *Griggs v. Duke Power Co.*[13] illustrates the principle of Hold Harmless Accommodation in the area of employment discrimination. In *Griggs,* the defendant had openly discriminated against blacks prior to the effective date of the fair employment provisions (Title VII) of the Civil Rights Act of 1964. Blacks had been confined to dead-end jobs in five departments. After the law became effective, Duke Power allowed transfers from the dead-end jobs if employees had a high school diploma or passed a standardized general intelligence test. These requirements worked to the disadvantage of blacks "because whites as a group had a higher percentage of high school diplomas and scored better on the tests than blacks as a group."[14] Despite the disadvantage to blacks, Duke Power made no attempt to determine whether the criteria were related to job performance.

In *Griggs,* the Supreme Court declined to require a finding of purposeful discrimination for a plaintiff to prove a Title VII violation. Instead, the Court noted the disproportional disadvantage suffered by blacks and the company's failure to take steps to determine whether its policy promoted its legitimate interest in screening qualifications of job applicants. The Court held that where blacks were disproportionally disadvantaged by an employment practice, an employer had an affirmative obligation to ascertain whether the screening practices were job-related. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

Griggs did not involve discrimination as that concept has been used in this article. Rather, *Griggs* narrowed the discretion of a decisionmaker to foreclose job opportunities without justification. The requirement imposes a duty on employers to accommodate the interests of blacks.

Thus, *Griggs* subtly moved from the principle of nondiscrimination to a position of HHA that, on the surface, has considerable appeal—even if employers do not discriminate on the basis of race, they may not irrationally, without substantial justification, conduct their affairs to the wanton disadvantage of blacks. Yet, upon scrutiny, the HHA principle is only intelligible if it embraces some affirmative obligation to accommodate racially disproportional disadvantage, even if a racially neutral process of decisionmaking were in operation. For that reason, the rationale of the *Griggs* decision, which establishes an affirmative duty to accommodate nondiscriminatory hiring practices to racial outcomes, lent itself to both expansion of the underlying entitlement and to narrowing the scope of legitimate justifications. Both developments transform the HHA principle into one embodying broader affirmative race-based entitlements.

Because the underlying rationale of any substantive effects approach must include adoption of affirmative race-based entitlements, such a standard is doctrinally inconsistent with the nondiscrimination principle. An evidentiary effects analysis, however, offers an attractive alternative that accommodates legitimate concerns about problems of proof with the basic commitment to the principle of nondiscrimination and the requirement of discriminatory intent. By focusing on the significance of circumstantial evidence, the evidentiary effects approach improves the court's ability to reduce the amount of undetected intentional discrimination.

Under an evidentiary effects approach, proof of impact alone permits an inference of discriminatory intent if that impact is of a

sort almost certainly caused by a discriminatory act. The defendant must then explain its conduct on the basis of neutral, nonracial policies. Because good faith is a defense and the defendant may rebut the inference of discriminatory intent, the fundamental principle of nondiscrimination is preserved. In essence, this type of effects doctrine incorporates the traditional principles of circumstantial evidence.

An analogy to the tort doctrine of "res ipsa loquitur" may be helpful. Res ipsa is largely an evidentiary rule for proving negligence where a plaintiff has difficulty securing the evidence necessary to make out a case. Under res ipsa the underlying theory of liability—negligence—remains the same; a plaintiff, however, can create an inference of negligence without directly showing that the defendant committed the negligent act. Although the factfinder can hold the defendant liable on the basis of this inference alone, res ipsa affords the defendant an opportunity to rebut the inference by showing either that no negligence occurred or that the negligence did not cause the injury. The ultimate burden of persuasion rests with the plaintiff.

To be faithful to the nondiscrimination principle, civil rights laws should allow defendants to show good faith (i.e., nondiscrimination) as a defense against a claim of illegal discrimination.

Applied in the nondiscrimination context, the res ipsa idea suggests an accommodation between principle and pragmatic problems of proof. Where common sense and experience indicate that a certain racially disproportional impact almost always results only from purposeful discrimination and where direct proof of the discriminatory conduct itself is nearly impossible, some form of an evidentiary impact approach may be justifiable. Such an approach would permit a defendant to present evidence indicating a neutral, nonracial basis for the decision to justify its conduct. The factfinder would weigh the evidence to determine whether, with the assistance of the res ipsa-type inference, the plaintiff carried his burden of persuasion on the ultimate question of intent.

Optimally, Congress could identify types of conduct which have very little social utility, which are subject to abuse by persons seeking to discriminate against minorities, and which strongly imply covert intentional discrimination. These specific procedures or practices could be enumerated in legislation so that the existence of these practices and other unexplained disproportional results would raise an inference of racially discriminatory intent. In the alternative, the courts could conclude that certain practices or procedures qualify for res ipsa-style treatment.

Congress and the courts, however, must be careful not to accept this invitation so enthusiastically as to swallow up, by procedural artifice, the underlying intent principle. The use of impact data as an enforcement device is "based on the...proposition that one necessary *consequence* of racial discrimination is racial imbalance" in outcomes.[15] Yet there is a risk that "the distinction between cause (racial discrimination) and consequence (racial imbalance) tends to be blurred," so that evidence of disproportional impact might routinely become "determinative of the outcome."[16] For all practical purposes, the evidentiary effects standard in such a case would become a substantive effects standard. Used selectively and judiciously, however, this approach offers an opportunity to strike a balance between principle and pragmatism.

To sum up, the nondiscrimination principle is process oriented, and proof of its violation must focus on the process and criteria of decisionmaking—i.e., intent either to discriminate or to disadvantage based on race. The concept of "discriminatory effect" stemming from neutral legislation is anomalous and analytically devoid of meaning. Similarly, the concept of "unintentional discrimination" is, upon scrutiny, analytically incongruous. Their use should be discontinued.

To be faithful to the nondiscrimination principle, civil rights laws should allow defendants to show good faith (i.e., nondiscrimination) as a defense against a claim of illegal discrimination. Where an effects test is already in existence through legislative or administrative action, adherence to the principle of nondiscrimination should lead to construing the effects language as evidentiary rather than substantive in character. This would allow for a good faith defense in rebuttal to the inference of discrimination from racially disproportional outcomes. Opposition to a good faith defense is a sure tip-off that race-based entitlements, not nondiscrimination, are being promoted. This agenda may be overt or hidden, explicit or beclouded by obfuscation—but careful analysis indicates that a substantive effects approach, where good faith is irrelevant, is inconsistent with the nondiscrimination principle.

In short, a good litmus test of whether the nondiscrimination principle or a principle of race-based entitlements is being advocated is this: If good faith is a defense, then nondiscrimination is the principle; if not, racial entitlements are the goal, either overtly or covertly. ◆

END NOTES

1. Brest, Forward: In Defense of the Antidiscrimination Principle, 90 *Harv. L. Rev.* 1 (1976), p. 7.
2. Fiss, Fair Employment Laws, 38 *U. Chi. L. Rev.* 235 (1971), p. 243.
3. Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 *U. Pa. L. Rev.* 540 (1977), p. 550.
4. *Rogers v. Lodge,* 102 S. Ct. 3272, 3275 (1982).
5. *Whitcomb v. Chavis,* 403 U.S. 124 (1971).
6. Perry, *supra* p. 549.
7. *Personnel Adm'r v. Feeney,* 442 U.S. 256, 279 (1979).
8. Fiss, *Gaston County v. United States:* Fruition of the Freezing Principle, 1969 *Sup. Ct. Rev.* p. 379.
9. *Rogers v. Lodge,* 102 S. Ct. 3272, 3276 (1982).
10. 444 U.S. 130 (1979).
11. 369 U.S. 186 (1962).
12. Id. at 300 (Frankfurter, J., dissenting).
13. 401 U.S. 424 (1971).
14. Belton, Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and *Weber,* 59 *N.C.L. Rev.* 531 (1981), p. 542.
15. Fiss, Fair Employment Laws, *supra* p. 269.
16. Id. at 270.

An Interview with Assistant Attorney General for Civil Rights, William Bradford Reynolds

A Defense of the REAGAN Administration's Civil Rights Policies

Since his appointment as Assistant Attorney General for Civil Rights, William Bradford Reynolds has generated one controversy after another. Almost invariably these disputes have centered on his opposition to race and gender conscious policies to remedy effects of past and present discrimination. We thought that the inaugural issue of New Perspectives *would be a particularly appropriate place to question him in depth about his reasons for opposing such policies and about alternatives that he would propose in their stead. Reynolds was interviewed by* New Perspectives *Editor Linda Chavez and Executive Editor Max Green.*

New Perspectives: *What do you see as the Civil Rights agenda for the 1980s?*

Reynolds: I think that we should bring the behavior of the government on all levels into line with the idea of according equal opportunity for all individuals without regard to race, color or ethnic background. In my view this means that we should remove whatever kinds of race- or gender-conscious remedies and techniques that exist in the regulatory framework, to ensure that the remedies that are put in place are sensitive to the non-discrimination mandate that is in the laws. We've got a ways to go before we get there.

We must, of course, also seek the removal of the more subtle forms of discrimination that obviously still exist.

NP: *How would you respond to the following argument? Indisputably blacks and other minorities have suffered discrimination in the past. As a result, not just individuals but blacks in general have been disadvantaged. Therefore society has an affirmative obligation to right that historic wrong by putting into place an affirmative action program for those who lived through those years of discrimination, and their children who must, in some way, be affected by the experiences of their parents.*

Reynolds: If I have Patient A lying in bed with appendicitis, I am not going to cure the effects of his condition by taking the appendix out of Patient B. The problem with your argument is that it assumes that the potential of every black in this country is restricted by a heritage of past discrimination in earlier generations. That is really not the case. Nor is it realistic to assume that society could "right the wrongs" of years of past discrimination by adequately compensating all those who suffered from such offensive conduct. Surely, it is small comfort to those who for years endured the outrages of discriminatory conduct to bestow on others (not themselves victims of discrimination) preferential treatment solely because they are of the same race.

The best, and most lasting, answer of society to right the historical wrong is to bring that wrong (*i.e.*, discrimination on account of race) to an abrupt halt. The most lasting effect of past discrimination that is still with us today is a continuing tolerance of racial classification. As long as we continue government decisionmaking by racial classification, we do not cure that effect, we perpetuate it.

NP: *Doesn't that put you at odds with the Supreme Court, which ruled in* Weber *that it was permissible for employers and unions to voluntarily adopt race-conscious policies and which further ruled in* Fullilove *that Congress had the right to enact legislation that was race-conscious in nature in order to remedy past discrimination?*

Reynolds: The dissent in *Weber* poked gaping holes in the majority's analysis of Title VII legislative history and persuasively demonstrated that the statute was indeed intended to prohibit discrimination for or against anyone, white or black, on account of his color. Quite apart from that, however, *Weber* clearly does not represent general acceptance by the Court of

Editor's note: Subsequent to this interview, the Supreme Court issued its decision in Firefighters Local No. 1784 *v.* Stotts. *At a conference sponsored by the Bureau of National Affairs, Mr. Reynolds interpreted the decision "not merely [to] hold that Federal courts are prohibited from ordering racially-preferential layoffs to maintain a certain racial percentage, or that courts cannot disrupt bona fide seniority systems," but also that "Federal courts are without any authority under Section 706(g)—the remedial provision of Title VII—to order a remedy, either by consent decree or after full litigation, that goes beyond 'make whole' relief for actual victims of discrimination."*

Illustrations by Dean Williams

race-conscious remedies designed to benefit nonvictims of discrimination. Indeed, the majority decision was exceedingly narrow. What the court held was that, for a limited period of time—not to maintain a particular balance in the work force, but simply to repair what has been acknowledged to be discriminatory behavior on the part of the private employer—Title VII does not forbid a training program that discriminates in favor of blacks and against whites. There is nothing in *Weber* to suggest that government at any level—Federal, or state or local—can engage in such conduct. Quite clearly, there is a greater tolerance for discrimination in the private sector under the laws in this country than can be found in a public context. *Weber* holds only that, in a narrow set of circumstances, *private* discrimination may temporarily be tolerated under Title VII; it provides no authority for race-conscious activity by any branch or arm of the government, whatever excuse or reason might be offered.

In many respects, *Fullilove* underscores the point. That, too, is a narrow ruling, which can certainly be read as involving what was essentially victim-specific relief. The court in *Fullilove* approved a Congressional enactment providing that minority businesses have a certain number of slots set aside for their benefit. Those chosen to participate, however, were required to go through an administrative process to demonstrate that they had indeed been the subject of the discriminatory activity. Under its 14th Amendment, Section 5 authority, Congress could take this kind of action after a finding of discrimination. But a state or local government, which doesn't have the same 14th Amendment, Section 5 authority under the Constitution, could not do something similar.

NP: *How do you define discrimination?*
Reynolds: I would define discrimination as the treatment of certain individuals in a manner that is, by design, unlike the treatment afforded other individuals who are similarly situated for reasons that are not based on a person's talent and worth, but rest, instead, on the most irrelevant of personal characteristics such as race, sex, religion, national origin, age or disability.

NP: *So much social and economic disadvantage is described as the result of discrimination. Do you see a link between disadvantage and discrimination? Is it necessarily true that all disparities between groups are an outgrowth of discrimination or are there other reasons that might explain them?*
Reynolds: It's probably accurate to say that, for a number of years, discrimination has caused social ills we still are dealing with today, and that those social ills are responsible, at least in part, for economic disparities.

But I think it is terribly wrong and exceedingly naive to equate discrimination and economic disparity and to say that because there is an economic disparity, it is due to discrimination.

The major problem we have today is that those social ills which are generated by discrimination and by a host of other problems cannot be effectively treated with our existing scheme of civil rights laws, as Congress recognized when it passed them. Plainly, our civil rights legislation was *not* intended to address all the social ills in society. It was, quite clearly, individual-oriented in its thrust, not group-oriented. By that I mean that Congress, when it enacted the great civil rights statements of 1964, 1965, 1968 and 1972, made no effort to go back in time and redress all the wrongs suffered by particular groups. Rather, it sought to deal with the problem of discrimination largely in prospective (or forward-looking) terms, commanding that it end—and end promptly. Any individual who had in fact suffered from discriminatory conduct was to receive "make whole" relief, and in these terms the legislation had a retroactive aspect—but this retroactive feature of the civil rights laws was aimed at *individuals* who actually were injured, not at groups defined by race or sex.

Indeed, this is, in my view, one of the overriding strengths of our civil rights laws: they are *not* special-interest legislation, but belong to all citizens and provide to *everyone* the same degree of protection against unlawful discrimination.

NP: *Often affirmative action programs are used as a mechanism for increasing representation of minorities and women in better paying jobs. Do you think they actually serve that purpose?*
Reynolds: Consider the effect of racial quotas or goals. What they require is that a certain number of people in a group, because of their race or sex, will receive preferential treatment. But it is a limited number of people and those who benefit will be those that are the most advantaged in that group. Thus, those who are most disadvantaged gain no benefit at all by this kind of "affirmative action." If anything, the opposite is true, because once the quota is filled, the door is slammed on other members of that group no matter how qualified they may be. Thus, the rest of that group is still waiting in the unemployment lines for a job. In addition, the individuals who have gotten the advantage come to the work force with the stigma that necessarily attaches when you tell somebody: "You can't make it on my terms, so we're going to put you on a preferential track." There are inevitably nagging self-doubts that the individual has when you do that.

"I think it is terribly wrong and exceedingly naive to equate discrimination and economic disparity and to say that because there is an economic disparity, it is due to discrimination."

NP: *Should the Federal government require employers to put into place any kind of affirmative action program?*
Reynolds: I think affirmative action, as it was originally conceived in the 1960s by the Kennedy Administration, was very legitimate. Affirmative action then meant programs that would reach out into communities that were poor and reach individuals that had not been located before and, through recruitment and training programs, would make available to those individuals the same opportunities that were routinely afforded to others in the community. If affirmative action is talked of in terms of affirmative outreach to ensure that the entire community has an equal opportunity to compete on an equal basis for the available jobs, that, to me, makes a lot of sense. Instead of a race-conscious or

sex-conscious quota, you search out as many qualified blacks and women as you possibly can find. If I can find a hundred and fifty that deserve to be hired, then I ought to hire them all and not be content with a number arbitrarily selected as a quota set-aside or goal.

NP: *Why should there be a special effort to recruit in the black community? Why shouldn't there be equal efforts made to recruit everybody?*
Reynolds: Employment discrimination in this country has been manifested primarily, over the course of time, in the recruitment effort. You don't really have employers that go out and recruit like crazy, and then slam the door in the face of every black that applies for a job. What you have is an old-boy "buddy" system. There are employers out there, who when they get a vacancy, turn to the foreman and say, "Find me real quick your nephew, or what have you, and fill this vacancy." So they go out and they recruit in one section of town, and by the time the news gets out to the rest of the community that there is a vacancy, it has already been filled, invariably before anybody in the black community ever heard about it.

NP: *Some of the criticism that has been aimed at this Administration has centered around its cuts on civil rights enforcement budgets. Do you see the amount in the Federal budget for Federal civil rights enforcement as a good indicator of the general committment to civil rights enforcement?*
Reynolds: You don't solve civil rights problems, or any other problems for that matter, simply by throwing more money at them. In the Justice Department, we have in fact increased the budget of the Civil Rights Division over the last three years.

NP: *Discrimination has diminished over the past 20 years, and yet, Federal civil rights enforcement budgets have increased. Are there certain areas in which we face greater problems, ones that are more intractable than others?*
Reynolds: I am not sure that it helps too much to try to gauge discrimination in terms of the size of the Federal civil rights enforcement budget. There still is a serious problem of discrimination in this country, and that requires the allocation of resources to enforce the civil rights laws. While the instances of obvious, flagrant discrimination are plainly far fewer today than some 20 years ago, the subtler forms of discrimination are probably more prevalant. In some respects, that does make the problems in this area more intractable.

Take the area of school segregation, for example. There, the problem is of a much different dimension today, and it certainly is not nearly as widespread as it was before. One obvious reason is that we now have a large number of schools that are under consent decrees. And many that are not are now operating in a way that is fully sensitive to the existing laws. That does not mean that there is no discrimination in the school area; it means, rather, that it takes a more subtle form and is of a different variety, and, therefore, it may well, in some instances, cost more in terms of effective enforcement. One situation we are looking into, for example, is where school authorities, in terms of the inputs to education, intentionally shortchange the predominantly black and Hispanic schools in the system and "load up" the white schools. In such circumstances, you do not have a quality education being provided evenhandedly throughout the system for reasons that are plainly discriminatory. Such conduct is as offensive as excluding children from attending certain schools because of their race, and, if proven, would constitute a constitutional violation. But, that is a most difficult case to put together. It takes a lot of resources and it takes a lot of time, and it is just one example to suggest why even as discrimination begins to become less of a problem, the budget stays at a certain level or even increases.

In the employment arena, there probably still is quite a bit of discrimination, but I do not think it is nearly as great as many people contend. The major problem you have in the employment area now is really a product of the many social problems that we discussed earlier. If you have a number of people applying for jobs who have not had the full educational advantages as other people have had and they are turned away when the employer makes his selection based on merit, the employer is not discriminating on account of race or sex or national origin. He is making his decision based on the qualifications presented by individuals.

It does not help the situation very much to play a numbers game and require that the employer bring into his workforce a certain number of women, or a certain number of blacks, or a certain number of Hispanics, simply to make his workforce look like it's more representative. You still have the intractable problem that there are all of those disparities built into the social fabric for any number of reasons, and they exist for the most part well before you get to the employment door.

Certainly we are in a different place in 1980 than we were in 1960. And, because of that, all of us, including the leadership of the civil rights community, have to come to grips with the fact that you can't use the techniques of the 1960s to deal effectively with the somewhat different, more subtle, problems of discrimination in the 1980s. Unfortunately, that adjustment has not been fully made by the civil rights community. We still are hearing the same kind of arguments and the same kind of rhetoric that we heard in the 1960s: "Everything that is wrong is due to discrimination. The only explanation is discrimination. If there is a numbers discrepancy, it must be due to discrimination. And, if there is any economic disparity, it can be blamed on discrimination." And so on.

We need to acknowledge the fact that that is too simplistic a response and that there are a host of other social problems that contribute in large measure to the disparities. Rather than looking to the civil rights laws to address all these social ills—a task they were never intended to perform, and one for which they are terribly ill-suited—we should undertake to define the problem areas more precisely and then seek to have Congress, through legislation, devise more meaningful responses that are better tailored to remedy the real concerns.

NP: *What do you see as the major progress that you have been able to make during your tenure in civil rights enforcement?*
Reynolds: I think we have made a lot of progress in terms of reawakening the public debate on a number of issues.

I have in mind, specifically, the whole question of affirmative action. It is, I think, a monumental step forward that the majority

of people in this country are now willing to question responsibly whether preferential treatment on account of race or sex is a legitimate course for government to follow. As that public debate continues, I am confident it will ultimately influence a change in that policy. Already, we are seeing more caution in the courts on this issue, and in recent years Congress has been resolute in its resistance to efforts to tack onto appropriations legislation "affirmative action" preferences based on race and sex.

I would point as well to the mandatory busing question as another area of major progress. There, the public has collectively stood up and by-and-large said that mandatory busing has not achieved what it promised. In fact, it has in most instances been terribly counterproductive. Again, attitudes have changed drastically: both Houses of Congress have voted overwhelmingly against the use of forced busing as a remedy in school cases; the courts are no longer rushing to embrace that remedial technique; and even the NAACP recently moved toward the voluntary magnet-school alternative that has been developed by this Administration. Plainly, we are making progress.

There is nothing in the Constitution to suggest that there is an obligation to "integrate" if you have in mind some racial proportionality in the classroom.

NP: *But doesn't your earlier, general criticism of race-conscious techniques and your specific critiques of busing directly conflict with the Supreme Court decision in* Swann v. Charlotte-Mecklenberg *that upheld a court ordered busing plan?*
Reynolds: What the Chief Justice said in *Swann* was that if you had a violation based on race, you can remedy the injury to the victims of that discrimination by using a race-conscious form of relief.

We have said throughout this Administration—and I firmly believe—that race-conscious remedies that do indeed "make whole" the victims of discrimination are not only permissible, but indeed mandated.

In the school context, if you have a segregated school system, every student in that system is a victim of discrimination. There is no way that you can get around that. If you have got a school system that is putting children in schools or keeping them out based on race, then a race-conscious remedy that reaches the victims is not contrary to the law.

Swann held that school authorities, found to have discriminated in the assignment of students, have an affirmative obligation to desegregate the dual school system. There, the district court chose to utilize mandatory busing as a tool of desegregation, and the Supreme Court held that it was not going to disturb that particular decision. In the Supreme Court's view, there is enough discretion in the district court to tolerate the ordering of such relief. But, the court in *Swann* clearly did not hold that mandatory busing was constitutionally required—only that it was an *available* remedial technique. Even as to its "availability," the Court was careful to say that it should be used sparingly and not for the purpose of achieving racial balance in the classrooms. Never have I said that the use of mandatory busing as a remedial technique to redress unlawful racial discrimination is unconstitutional or unlawful—such a position would be untenable after *Swann.* But, I can and do say that reliance on such a remedial tool is horrendous public policy. I, therefore, will certainly do everything that I can to desegregate dual school systems without resorting to mandatory busing. The success being achieved under our alternative magnet school approach—that serves not only to desegregate the schools but also to better educate the students—shows that there is indeed a better way than the one that has been pursued so woodenly by the courts over the past 10 years.

NP: *In the school context, do you differentiate between desegregation, breaking down the barriers to equal opportunity for blacks and whites, and an affirmative obligation to integrate? And do you think that the Constitution requires both in equal measure?*
Reynolds: I think that the Constitution requires "desegregation" in those instances where school authorities intentionally segregated the public schools on the basis of race. But, there is nothing in the Constitution, or in Supreme Court decisions in this area, to suggest that there is an obligation to "integrate"—if by "integration" you have in mind some racial proportionality in the classroom, whether 70/30, or 60/40, or 80/20. In constitutional terms, no child can be denied the opportunity to attend any public school in the system because of his or her race; nor can he or she be deprived on account of race of an educational opportunity equal to that afforded others in the school system. The constitutional command is that, to the extent such school attendance barriers or educational barriers have been erected, they must be removed "root and branch;" that is the "desegregation" imperative. If that is accomplished, the fact that there might remain in the school district a school that continues, by choice, to be predominantly one-race, offends no law.

NP: *One last question. What about the claim that* Charlotte-Mecklenberg *itself is an example of how forced busing, or court mandated busing can work? There was an article this past year in the* New York Times Magazine *that held it up as an example.*
Reynolds: I think there are better examples, communities where, indeed, that remedy has worked. The best results have in fact been found in very small school districts where they have very few schools, and require the students to travel only short distances. When, in such circumstances, the community has provided strong support, forced busing has been a successful desegregation tool.

Charlotte-Mecklenberg is hardly a success story, however, primarily because the *Charlotte-Mecklenburg* remedial plan has undergone so many modifications. The parties kept coming back to court precisely because the *Charlotte* plan was not working in certain respects, and the court continually modified, and modified, and modified, and modified the plan, effectively taking over the running of that school system. Thus, what you now are looking at in *Charlotte-Mecklenburg* is a desegregation plan that bears little resemblance to the one first put in place. ◆

Books

Autumn of the Matriarch

by Tod Lindberg

OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS.
Gloria Steinem
Holt, Rinehart and Winston. 1983. 370 pp. $14.95.

Gloria Steinem is certainly one of the United States' best-known proponents of feminism, a natural consequence of her many years as an effective stump speaker, organizer, and polemicist for what was perhaps the most important social and cultural movement of the 1970s. *Outrageous Acts and Everyday Rebellions*, a national bestseller throughout Fall 1983, is a collection of Miss Steinem's essays and journalism, drawn chiefly from her writings since her "discovery" of feminism in the late 1960s while a contributing editor and columnist for *New York* magazine. *Outrageous Acts* is, she writes, "the first book I can call my own" (she had also written, in the 1950s, a guidebook to India that was not published in this country, and had edited an anthology called *The Beach Book* that was published in 1963).

The book is divided, somewhat arbitrarily and with considerable overlap, into four sections. The first, "Learning from Experience," features some journalism from the 1968 presidential campaign, an account of the life of Miss Steinem's mother, and a piece called "I Was a Playboy Bunny," Miss Steinem's diary of the two weeks or so she worked, on journalistic assignment and under an assumed name, in the New York Playboy Club. The second section, "Other Basic Discoveries," is a collection of Miss Steinem's renderings of some familiar feminist themes—the sexism of the language, the distinction between erotica and pornography, women's discovery of their bodies, and so on.

"Five Women," the third section, consists of profiles of Marilyn Monroe, Patricia Nixon, Jacqueline Kennedy Onassis, novelist and critic Alice Walker, and Linda Lovelace, star of the pornographic film *Deep Throat* (who made headlines in the late 1970s by claiming that her appearance in that film had come about through no willingness of her own, but rather as a result of her virtual enslavement to her husband and manager). The last section of the book, "Transforming Politics," includes a piece on the National Women's Conference held in Houston in 1977; a piece attacking the opponents of abortion ("If Hitler Were Alive Today, Whose Side Would He Be On?"); and a piece written with another well-known feminist, Robin Morgan, on the genital mutilation of women in many Third World countries, in tribal societies, and even, allegedly, in the United States today. The last essay of the book assesses feminism's progress so far, and offers advice for continuing the effort.

The themes that unify the pieces in this book are, of course, the themes that unify and make a movement of feminism itself. Thus, Miss Steinem spends the better part of a major essay documenting what seems to be the proposition that Hitler and the Nazis were sexist, and that this was true of them in much the same way that it is true of the opponents of the feminist agenda now. The characteristics shared by the Nazis and the opponents of today's feminist agenda, for example, the Catholic Church, is their desire to deny women autonomy and force them into their traditional roles under the patriarchy.

To this wide-ranging attack on sexual authoritarianism, which may be taken as Miss Steinem's (and feminism's) general indictment, one may add other details and refinements. For example, there is the difference between pornography and erotica: "Pornography is about dominance. Erotica is about mutuality." So it is that pornography is enslaving, erotica liberating. Or, as another example, we have the problem with representative government—that it circumvents the will of the people. Thus the failure of the Equal Rights Amendment to be ratified can be attributed to "two dozen or so aging white male legislators, plus economic and religious interests." Indeed, Miss Steinem asks:

> Why do [the media] allow legislators to vote against the majority opinion in their own districts, as reflected in independent polls, without fearing a journalistic expose of the special interest they are responding to?

Miss Steinem believes capitalism dehumanizes people by valuing them only in terms of money.

As a final example, we might take Miss Steinem's hostility to capitalism, which manifests itself in passing throughout the book. She sees capitalism as a source of inequity. "What did *equal pay* do for the nurse, for instance, who was getting the same low salary as the woman working next to her" in the "pink-collar ghetto?"—and she believes capitalism dehumanizes people by valuing them only in terms of money: She writes that "the biggest reason" that her mother, who suffered from mental illness, "was cared for but not helped for twenty years was the simplest: her functioning was not that necessary to the world. Like women alcoholics who drink in their kitchens while costly programs are constructed for executives

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who drink,...my mother was not an important worker."

There is something very familiar, and very tiresome, about the pieces in *Outrageous Acts and Everyday Rebellions*. In part, of course, this is due to the success that Miss Steinem and others have enjoyed in spreading their message for the past dozen years; what were once the views of a small and ridiculed group quickly became respectable, and began to exert a great influence on government policy, the university, cultural affairs, and so on. In another sense, the familiarity here comes from Miss Steinem's position vis-a-vis the feminist movement itself. She has never been one of the movement's leading thinkers or theorists; rather, she has been a journalist and a popularizer, writing mostly for *Ms.* magazine. Her goals have been to proselytize and to preach to the converted, not to address the subtlest counterarguments of her opponents. These, by and large, Miss Steinem feels she can ignore, perhaps thinking she has addressed them simply by noting that religion, or capitalism, or the "meritocracy that the establishment professes" is male supremacism and authoritarian. Her feminism is in this way a great convenience for her.

But if it is a convenience for her, it is a problem for the rest of us. For feminism has become a system of thought for Miss Steinem, in much the way, for example, that Marxism and Freudianism are systems of thought for others: Everything that happens, without exception, can be explained in terms that the system itself lays out. Nothing can happen outside of it, and nothing can contradict it. In the case of the feminist system, the fundamental principle is the existence of a patriarchy that has long ensured the domination of men over women. For Miss Steinem, this, along with its corollaries, explains everything from the wage gap, to the nuclear family, to the fact that her mother was mentally ill and did not get better. Even when she praises her fellow feminists for their success so far, she can understand that success only in terms of its effectiveness in weakening the patriarchy. And here, finally, is the greatest source of the tedium of *Outrageous Acts and Everyday Rebellions:* No matter what Miss Steinem is explaining, her explanation is the same. She is no longer capable of any insight that is not included in, and anticipated by, her feminism.

Feminism has become a system of thought for Miss Steinem like Marxism and Freudianism are systems of thought for others.

One must say that she is "no longer" capable of such insight because it is clear that she was once a perceptive, occasionally even acute, journalist. There are two examples of this in her book. Her brief profile of Patricia Nixon, written in the course of covering the 1968 presidential campaign, is very interesting. Miss Steinem, unlike many interviewers, was able to get Mrs. Nixon to speak revealingly of herself: She quotes Mrs. Nixon as saying, at the end of a long monologue, "I've never had it easy. I'm not all like you...all those people who had it easy." This prompts the following fascinating interpretation:

> For the first time, I could see Mrs. Nixon's connection with her husband: two people with great drive, and a deep suspicion that "other people had it easy"—in her phrase, "glamour boys," or "buddy-buddy boys" in his—would somehow pull gracefully ahead of them in spite of all their work. Like gate crashers at a party, they supported each other in a critical world. It must have been a very special hell for them, running against the Kennedys; as if all their deepest suspicions had been proved true.

In addition, her piece on the New York Playboy Club, "I Was A Playboy Bunny," written in 1963 for *Show* magazine, is good light reporting of the kind still practiced by some *New York* magazine writers. She brings much of the place to life: from the girl who is obviously too fat to be a Bunny, but who wants nothing more than this; to the tightness of the Bunny costume (except in the bust, which must then be stuffed with tissues or dry cleaners' bags); to the perhaps-typical discrepancies between promised income (much in tips) and income received; to the arduous physical demands of eight busy hours as the coat-check Bunny. It is a funny account, sympathetic to the people involved, harsh (though not shrill) to the institution. Alas, looking back on this piece from 1982, Miss Steinem notes that one of "the long term results" of the article was "realizing that all women are Bunnies."

But, of course, all women are not Bunnies. Miss Steinem, the title of her piece in the past tense, was correct in 1963; some women are reporters who were Bunnies for a while, and then moved on to other assignments. This is the book's clearest example of what feminism has done to Miss Steinem. Where once there was insight, truth even, now there is only zealotry. Perhaps we have not lost much in being deprived of Miss Steinem's genuine journalistic gifts since her discovery of feminism; but to the extent that her proselytizing has been successful—to the extent that she has made more people think as she now does—we have suffered a very great loss indeed. ◆

Books

How Much Does Discrimination Explain

by Thomas R. Brooks

THE ECONOMICS AND POLITICS OF RACE
Thomas Sowell
New York: William Morrow and Company, Inc., 1983. 324 pp. $15.

To devise effective strategies for minority progress, we need, as economist Thomas Sowell argues persuasively in his latest book, "an understanding of what does and does not produce prosperity and freedom." He succeeds in arming his readers with the facts and analytical tools essential to such an understanding. He does so through a wide-ranging exploration of the experiences of minority groups—the overseas Chinese, European immigrants to the Americas and blacks—in over a dozen countries. With fine-honed economic and historical analyses, Sowell cuts away conventional wisdom to yield an enriched comprehension of what it is that produces prosperity and freedom.

Sowell's book challenges the widely accepted view that discrimination is the cause of disparities in income and in the other indices of well-being. And it is a warning against the substitution of political for economic means of self-enhancement. "The politicalization of economic and social life," he writes, "*in*creases the costs of intergroup differences, and tends to heighten mutual hostility." (My italics.) Affirmative action frozen into law, numerical goals, quotas, strategies aimed at equality of result—all are doomed to fail and are destructive for all.

"The history of racial and ethnic groups around the world," Sowell writes, "is a story of the heights and depths of the human spirit—the glory of its perseverance in the face of every kind of adversity and the vileness of its brutality against the helpless." What surprises in Sowell's account of this history is not that some thrive in the face of adversity, do well despite discrimination and hatred, but that the despised are often essential to the economic well-being of their host countries.

The Spanish, for example, accomplished little in Argentina down to the mid-1850s. The country remained underdeveloped economically. Wheat, subsequently Argentina's greatest export, had to be imported. Cattle raising thrived, but little else. Then the Italians arrived, poor and despised by the Spanish-speaking Argentineans, who disdained menial labor. The Italians worked at whatever was available. By hard work and frugality, they not only prospered but were responsible for much of the subsequent agricultural and industrial progress of the country.

Overseas Chinese in Southeast Asia and Indians in East Africa have undergone analagous experiences. Both groups have made important contributions to the commerce of their respective host countries. And they have done so despite humble origins and although often treated as pariahs by the indigenous populations. As Sowell reminds us, most of the Chinese settling in Southeast Asia were of humble origin and, in some instances, were outcasts, vagabonds, and criminals. Their treatment has been rough. On more than one occasion the number of Chinese massacred in a few days has exceeded the total number of blacks lynched in the entire history of the United States. In Malaysia, today, the constitution reserves four-fifths of civil service jobs for Malays as well as three-fourths of university scholarships. Preferential treatment is also imposed in the private sector. Nonetheless, Chinese income remains double that of the Malays and the Chinese remain crucial to the Malayan economy as they do in countries elsewhere in Southeast Asia despite rank discrimination. In East Africa, the politicalization of race exacted its toll with the expulsion of the Indians from Uganda and virtual expulsion from Kenya and Tanzania to the evident detriment of the respective economies involved.

Sowell found that some groups do well despite discrimination and hatred and are often essential to the economic well-being of their host countries.

There is, as Sowell amply demonstrates, an interaction between group mores and new surroundings. Still, it is remarkable how social and economic patterns persist within ethnic groups. Chinese college students in Malaysia specialize in very much the same fields as they do in the United States—medicine, the natural sciences, engineering. Germans preserved their language and culture in tightly enclosed enclaves in the eastern United States, following in the wake of those superb frontiersmen, the Scotch-Irish. But where the Scotch-Irish cut trees and left stumps standing and let their farm animals roam, the Germans pulled stump and root and built huge barns for their livestock. The restless Scotch-Irish became the poverty-stricken "hillbillies" of

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the region while the Germans became some of the most successful farmers in America.

Time and again, in his exploration of minority group experiences around the world, Sowell discovered that those who were there first, even those who retained political control throughout, did not always end up first. Often, they "did little or nothing with the objective conditions which others developed to unsuspected heights." The point, he adds, "is not to praise, blame or rank whole races and cultures. The point is simply to recognize that economic performance differences are quite real and quite large."

As Sowell observes, "much of the literature on racial, national, and cultural groups attempts to be neutral on group differences.... Against the historical background of bias, bigotry, and sweeping stereotypes on group and national differences, this agnosticism or cultural relativism is understandable and perhaps laudable in intent. *But to ignore the large role that performance differences have played in human history is to ignore or misdiagnose important causal factors at work in that history.* Cultures are ultimately ways of accomplishing things, and the differing efficiencies with which they accomplish different things determine the outcomes of very serious economic, political, and military endeavors." (My italics.) It is important to diagnose causal factors not only because societies change—as Sowell points out, "one culture is not categorically or permanently superior to another"—but because in a democratic society we often seek change to improve the common lot among other things.

Nowhere has this been so true as in civil rights and in battling discrimination. We fought one of the bloodiest wars in history to free the slaves as well as to preserve a union that enhanced opportunity for all. After much travail, laws that explicitly discriminated by race and segregation under the rubric "separate but equal" were deemed unconstitutional. The Civil Rights Act of 1964 outlawed discriminatory practices by state and local governments and by private institutions. In sum, as Sowell neatly understates it, "government-created harm was reduced." A whole array of discriminatory practices came under attack by the courts, in national legislation and by successive Administrations. Sowell argues where political action has been effective is in *negating* the effects of state government action by the Federal government, a notable example being the crackdown on racial barriers to voting in the South. Yet, where the Federal government has attempted to move beyond this "essentially negative role" to produce positive benefits for disadvantaged ethnic and racial groups, the record has been far less impressive. A breakdown of "affirmative action" results, Sowell found, shows "disturbing counterproductive trends." For example, less fortunate blacks grew worse off economically while those already fortunate benefited more. Black males with eight to 11 years of schooling and less than six years of work experience earned 79 percent of the income of white males of the same description in 1967 (before quotas) and this fell to 69 percent by 1978 (after quotas). During the same span, black males who had completed college and had more than six years work experience rose from 75 percent of the income of their white counterparts to 98 percent. These opposing trends, Sowell convincingly argues,

> are a logical consequence of the incentives and constraints created by affirmative action policies. While government pressures to hire from designated groups created an incentive for employers to include representatives of such groups among their employees, continuing scrutiny of their subsequent pay, promotion, and discharge patterns made it especially risky to have employees from these groups who did not work out well. In short, the tendency was to increase the demand for 'safe' employees from government-designated groups—individuals with a college education or substantial work experience—and to *reduce* the demand for those lacking such education and experience.

As Sowell demonstrates, this pattern is not unique to blacks nor to the United States. In Thailand, for example, preferential treatment for Thais caused many Chinese businessmen to acquire a Thai partner, preferably one with influence with the Thai government. As Sowell wryly notes, this "presented new opportunities for Thais who were already more fortunate—but not for the Thai peasant out in the rice paddies."

Sowell has been accused by critics of ignoring discrimination in discounting racism as a factor in economic achievement, or lack thereof. However, as any careful reader of his work will attest, this is not the case. As he readily acknowledges in this book: "Historically, there is little question but that non-whites have encountered more economic and social barriers than whites in the United States....Yet, what is surprising is the cold fact that there has been little correlation between the degree of discrimination in history and the economic results today." Part of the confusion about that fact stems from confused comparisons. For example, when we look at economic groupings we see that Hispanics earn, as a group, far less than Polish Americans. Quick conclusion: Hispanics suffer greater discrimination than do Polish Americans. But, in fact, there is another explanation. Hispanics, on the average, are younger, at 18 years, than are Polish Americans, at 40 years. Common sense suggests that a man of 40 earns more than a boy of 18.

Comparative disadvantage is not a sufficient explanation of differing economic

results. As Sowell points out, it would be hard to claim that Puerto Ricans have suffered as much discrimination as blacks, who have higher occupational status and 20 percent higher incomes as a group. They are, incidentally, close in average age, 22 to 18, respectively, which is one reason why, as groups, they are low on the group earnings pole.

Still, as we know, the black experience differs in one major respect from that of all other immigrant groups. They were brought to the Americas against their will as slaves. Yet, even that prior disadvantage cannot explain fully subsequent developments. Differences in the fate of blacks, say, in Brazil and in the United States are illuminating. Among them, for reasons detailed by Sowell but too complicated to cover here, most Brazilians of African ancestry were freed *before* slavery was abolished as an institution. Moreover, racism is not as endemic in Brazil as it has been in the United States. Yet, apparently because Brazil has a highly rigid class structure, distribution of income is more unequal than in the United States.

Sowell states that there has been little correlation between the degree of discrimination in history and the economic results today.

Consequently, black-white economic differences are less here than in Brazil. This suggests, Sowell writes, "that racism may be less of a factor in economic advancement than is commonly supposed. Historic headstarts in acculturation seem as highly correlated with economic advancement in comparing people of African ancestry in Brazil and the United States as in making internal comparisons among the Negro populations in both countries."

Surely, slavery affected the acculturation of the slaves and of their descendants. It is instructive, therefore, to compare slavery and its consequences, as Sowell does, in the British West Indies and the United States. Slaves in the West Indies were treated with greater brutality and with less concern for the fate of infants and pregnant women than in the United States. True, emancipation was some thirty years earlier, but it was followed by a period of extreme economic dislocation and the virtual re-enslavement of the blacks by debt peonage. Yet, West Indian black immigrants not only do better than native blacks, but second generation West Indians in the United States earn more than the average American. Cultural differences—the West Indians were more urban, more skilled, more frugal and more entrepreneurial—account for the differences in performance. Surprisingly, as Sowell demonstrates, these cultural differences reflect differences in the respective slave economies. The death rate was higher in the West Indies, seasoned slaves were re-sold to the United States, so the supply was constantly replenished which meant that African cultural survivals were more common. The huge size of the West Indian slave population relative to the handful of whites meant that slaves had to grow their own food and along with free Negroes were the major suppliers of food to the larger society. Even in the slave era, Sowell tells us blacks "had economic incentives to exercise initiative, as well as experience in buying, selling and managing their own affairs. This experience was usually denied slaves in the United States, who were issued rations, and who were deliberately kept in a state of dependence which was not feasible under West Indian conditions."

Slavery in the United States was less physically harsh than elsewhere. Material conditions were not significantly worse than among contemporary white working class Americans and not as bad, as W.E.B. DuBois pointed out, as peasants in Ireland and elsewhere in Europe at the time. But, as Sowell writes, "slavery was much more than economic exploitation. In order to reduce escapes and force people to engage in uncompensated labor, blacks were deliberately kept illiterate, fearful of brutal punishments, and self-abasing in the presence of whites." The end of slavery "did not mean an equally sudden end of ignorance, fear, or subservience on the part of blacks.... In short, slavery not only inhibited the development of the education, work habits, or personal pride needed by free men; its ideological aftermath tended to penalize the development among blacks of these traits that were rewarded among other Americans."

Despite great adversity, detailed and analyzed by Sowell in a powerful section of the book, there was progress, albeit slow progress from Emancipation down to the present. Blacks, today, Sowell argues, "despite historically unique forms and degrees of discrimination and oppression," are not "economically unique." They do not have the lowest incomes, or occupations or the highest incidence of broken homes. "Blacks," he writes, "are today one of a number of low income American racial or ethnic groups with a number of serious economic and social problems. Blacks are unique only in how far they have come and the degree of opposition they have encountered."

"One of the hardest realities to accept," Sowell tells us, "is that we cannot prescribe end results but can only initiate processes." Society for Sowell is not a *tabula rasa,* on which we may write what we will. Groups carry their own messages with them from country to country. With the passage of time groups interact and evolve, but in a complex manner that defies control. Schemes of molding peoples—"Russification" under the Czars, mass indoctrination under Communist

rule, draconian measures by Nyere in Tanzania or Pol Pot in Cambodia—produce more agony than adaptation. An equality of result is only achieved in the graveyard. Recent policies in the United States—the imposition of quotas, welfare programs creating dependency—though not as harsh as other schemes for remolding people may prove almost as disastrous. Some of the costs, as Sowell points out, are already apparent. Preferential treatment has increased white resentment, possibly explosively so. Moreover, it has not accomplished what it set out to do. For example, Sowell writes, "the purpose of employment quotas ('affirmative action') in the United States was to improve the economic condition of various racial and ethnic groups, both absolutely and relative to Americans as a whole. The actual consequences, however, have included a further falling behind in family incomes as regards Puerto Ricans and Mexican Americans, and a more mixed result among blacks as a whole, with better-off blacks continuing to progress and poorer blacks falling behind." Social and redistributionist policies embodied in present welfare programs have caused a sharp increase in the number of female-headed black families, which accounts for the recent dramatic divergence between black and white family incomes.

Politics provides no easy answers as witness the case of Irish Americans. Historically, as Sowell points out, "Irish Americans have been pre-eminent [in political cohesion, power] and have also been the most politically successful of political pressure, bloc voting, achievement of political all American ethnic groups.... Yet the Irish were the *slowest* rising of all European immigrants to America. The wealth and power of a relatively few Irish political bosses had little impact on the progress of masses of Irish Americans."

"Economically," Sowell writes, "the question is how best to make the existing human capital more widely available, so that the less fortunate have more opportunity to achieve higher levels of productivity and consequently higher real income. Politically, the question is how to transfer the fruits of existing human capital through redistribution policies, both domestic and international. These two approaches conflict sharply."

Sowell is dead set against the politicalization of race, indeed of economic and social life altogether. There are, he argues, "quite aside from more efficient economic allocation...fewer social frictions to the process of price competition than the process of political competition." Quotas, as an instance, make for Balkanization and, as Sowell notes, "Culturally Balkanized nations have repeatedly fallen victim to internal disintegration or to conquests by more united peoples."

Quotas make for Balkanization and culturally Balkanized nations, says Sowell, have repeatedly fallen victim to internal disintegration or to conquests by more united peoples.

Consensus, he remarks, "is very costly to achieve in general; where there are great disparities in values—as between racial, religious, and ethnic groups—these costs can reach very high levels, including bloodshed and the tearing apart of the whole society." When one contrasts, as Sowell does, multiracial societies that rely on market exchange with more politically directed societies—Hong Kong and Singapore as against Guyana, South Africa or Malaysia—one finds it is the latter that have suffered extensive racial or ethnic conflict, ranging from chronic riots to full-scale civil war.

Human capital, Sowell argues convincingly, does best in the market, which is not a specific set of institutions "but simply the freedom to choose among existing institutions or to create new institutions, contracts, or relationships to meet one's economic purposes." Moreover, "*acting* on stereotypes or other misjudgments in a competitive market means incurring serious costs and even jeopardizing one's own economic survival." Markets not only punish and reward but, more importantly, inculcate those attitudes and work habits that form the basis for economic and social well-being. As Sowell perceptively notes, it would be best "to allow systemic processes to generate material benefits and personal freedom." "Virtually every portion of the human species excels at something," he remarks. "From an economic point of view, this means that mutual benefits can result from cooperation among different racial and ethnic groups, whether through domestic markets, international trade, or the migration of peoples. From a political point of view, however, it is very difficult to get acceptance of these intergroup differences and their beneficial economic consequences." The conflict between the economic consequences and the political consequences of these group differences is at the heart of Sowell's work.

His argumentation is richly textured and complex. It deserves the closest attention that a reader can give. What is truly needed, he concludes, "is not a blueprint to be imposed from on high but an understanding of what does and does not produce prosperity and freedom. History can be a valuable help in this. But we must never imagine that we can either recreate or atone for yesterday. What we can do is make its experience the basis for a better today and a better tomorrow."

The *Economics and Politics of Race* is a major contribution to this worthy task. ◆

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