Wisconsin Consultation: Focus on Affirmative Action

Wisconsin Advisory Committee to the United States Commission on Civil Rights

April 1998

The United States Commission on Civil Rights

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957, and reestablished by the United States Commission on Civil Rights Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the 1983 act, as amended by the Civil Rights Commission Amendments Act of 1994, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, disability, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study and collection of information relating to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections; and preparation and issuance of public service announcements and advertising campaigns to discourage discrimination or denials of equal protection of the law. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

The State Advisory Committees

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 3(d) of the Civil Rights Commission Amendments Act of 1994. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference that the Commission may hold within the State.

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These papers presented at a consultation conducted by the Wisconsin Advisory Committee to the United States Commission on Civil Rights were prepared for the information and consideration of the Commission. Statements and viewpoints in the papers should not be attributed to the Committee or the Commission, but only to the individual authors.

Letter of Transmittal

Wisconsin Advisory Committee to the
U.S. Commission on Civil Rights

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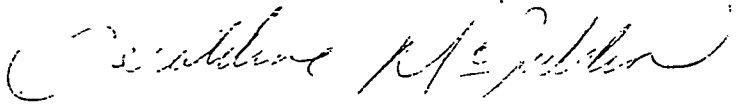
The Wisconsin Advisory Committee submits this report, *Wisconsin Consultation: Focus on Affirmative Action*, as part of its responsibility to advise the Commission on civil rights issues within the State. The report was unanimously adopted by the Advisory Committee by a 10–0 vote. The Advisory Committee is indebted to the individual participants for their time and expertise and the Midwestern Regional Office staff for their assistance in the editing and preparation of this report.

To explore the issue of affirmative action in a diverse and bipartisan manner, members of the Advisory Committee invited individuals to present papers explaining their understanding and experiences with affirmative action. These papers are presented unedited and unabridged. This publication is one in a series of six reports on affirmative action completed in 1996 by the States of the Midwestern Region. An appendix in this document lists a compendium of all papers received in this series by the participating State Advisory Committees.

A special effort was made by the Advisory Committee to receive papers from individuals with practitioner or legal experience in affirmative action. To that end papers in sections I and IV were received from representatives of the State of Wisconsin, the city of Milwaukee, two major law firms, and private institutions and parties. Sections II and III contain academic analyses of affirmative action and positions from selected community organizations. Also included in this report in section V are position papers from national religious organizations.

The Advisory Committee understands that the Commission has an active interest in this topic and anticipates that the Commission as well as the public will find the material in this volume informative.

Respectfully,



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Introduction

I. The Wisconsin Advisory Committee

The Wisconsin Advisory Committee believed that as part of its obligation to advise the Commission on relevant information within the jurisdiction of the Commission, it could not ignore the issue and debate on affirmative action. The essential purpose of the Advisory Committee's examination and report on affirmative action is both to clarify the arguments and to illuminate the debate in a nonpartisan manner. The Advisory Committee engaged in this study is structured to be politically, philosophically, and socially diverse. It includes representation from both major political parties and is independent of any national, State, or local administration or policy group. For purposes of this discussion, the Advisory Committee uses The United States Commission on Civil Rights definition of affirmative action:

> A term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination from recurring in the future.[1]

In exploring the issue of affirmative action, Advisory Committee members carefully sought presenters in a genuine spirit of openness and bipartisanship. Each member of the Advisory Committee was to invite two participants to present a position and/or a perspective paper on affirmative action, with the invited individuals known to be knowledgeable in the principles of equal opportunity, nondiscrimination, and civil rights.

Twenty individuals accepted invitations and presented papers. These are collected in four sections: (1) Legal Perspectives of Affirmative Action and Its Enforcement, (2) Academic Examinations of Affirmative Action and Its Role in American Society, (3) Practitioners of Affirmative Action and Their Experiences, and (4) Community Organization Positions on Affirmative Action.

This consultation is one of a series of five projects in 1996 on affirmative action being conducted by the Midwestern State Advisory Committees to the United States Commission on Civil Rights.[2] Presenters and authors of papers in this report are residents of Wisconsin.

II. Affirmative Action in Employment

In the 1960s government entities at Federal and local levels began to expand civil rights protection to employment on the basis of race, color, religion, sex, and national origin. Affirmative action was included in several of these initiatives.

The Rehabilitation Act of 1973 and the Vietnam Veterans Readjustment Act of 1974 contain affirmative action language mandating firms with Federal contracts undertake personnel actions to employ and advance qualified handicapped individuals and veterans of the Vietnam era and disabled veterans. Section 503(a) of the Rehabilitation Act of 1973 reads:

> Any contract . . . entered into by any Federal department or agency . . . shall contain a provision requiring that . . . the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities.[3]

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1 *See generally,* U.S. Commission on Civil Rights, *Statement on Affirmative Action*, Clearinghouse Publication 54, (October 1977), p. 2.

2 *See* U.S. Commission on Civil Rights State Advisory reports: *Illinois Consultation: Focus on Affirmative Action, Indiana Consultation: Focus on Affirmative Action, Michigan Consultation: Focus on Affirmative Action,* and *Ohio Consultation: Focus on Affirmative Action.*

3 29 U.S.C. § 793(a)(1988 & Supp. 1993).

The Vietnam Era Veterans Readjustment Assistance Act of 1974 contains an affirmative action requirement identical to Section 503(a) of the Rehabilitation Act.[4]

Two Executive orders were issued in the 1960s initiating an obligation of affirmative action on Federal contractors. In 1963 President John F. Kennedy executed Order 10925, which among other things established the President's Committee on Equal Employment Opportunity. This Committee was authorized to oversee the equal opportunity and nondiscrimination requirements of Federal contractors. Executive Order 10925 mandated Federal Government contractors to "... take affirmative action to ensure that applicants ... and employees ... are treated ... without regard to race, creed, color, or national origin."[5]

This was followed by Executive Order 11246, signed by President Lyndon B. Johnson in 1965 and amended in 1967 to include gender as a protected status. It is considered the defining authority of affirmative action for Federal contractors, ordering the inclusion of an equal opportunity clause in every contract with the Federal Government. In that clause providers of goods and services to the Federal Government agree to a policy of nondiscrimination in their personnel policies and an obligation of affirmative action in their personnel policies as part of their contractual obligations to the government.

> All Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: During the performance of this contract, the contractor agrees as follows: (1) The contractor will ... take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.[6]

The Federal Government enforces the provisions of Executive Order 11246 through the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor. In September 1996 the Indiana Advisory Committee to the U.S. Commission on Civil Rights released a report on the enforcement of affirmative action in Indiana by the U.S. Department of Labor. The Committee found that the OFCCP, the Federal Government enforcement agency, proscribes (1) preferences on the basis of race or gender and (2) quotas, which require consideration of abilities and qualifications be subordinated in order to achieve a certain numerical position.[7] The Advisory Committee also found the program to be a useful tool in promoting equal employment opportunity.

> The enforcement of affirmative action compliance by the OFCCP in Indiana has helped to ensure that employers take more responsibility in seeking, recruiting, and hiring women, minorities, and individuals with disabilities than might otherwise have been the case. OFCCP audits bring the issue of equal employment opportunity to the attention of the highest levels of company management, making ... equal employment opportunity a company priority.[8]

The Indiana Advisory Committee further found that affirmative action—as enforced by the OFCCP in Indiana—does require hiring goals. These goals are distinct from quotas in that in those particular job groups where minorities and/or females are underutilized according to their availability in the relevant labor pool Federal contractors must undertake a specific affirmative recruitment of qualified minorities and

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4 Pub. L. No. 93–508, 88 Stat. 1578.

5 Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963).

6 Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

7 *See* "The Enforcement of Affirmative Action Compliance in Indiana Under Executive Order 11246," report of the Indiana Advisory Committee to the United States Commission on Civil Rights, August 1996 (hereinafter referred to as *Indiana SAC Affirmative Action Report*).

8 *Indiana SAC Affirmative Action Report*, p. 76.

females so that such individuals would be included as applicants in the selection pool.

Similarly, State and local municipalities have local contract compliance offices which monitor the equal employment opportunity and affirmative action achievements of firms contracting with these governments. Many of these local programs are similar in design and intent to the Federal program.

Title VII of the Civil Rights Act of 1964 also contains affirmative action language. The statutory intent of affirmative action in title VII differs in intent from the above.

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.[9]

Title VII of the Civil Rights Act of 1964 neither requires nor prohibits affirmative action measures. The most recent Federal civil rights legislation, the Civil Rights Act of 1991,[10] expressly preserves lawful affirmative action plans, leaving the courts to decide the proper parameters of such plans.

In addition to the affirmative action obligations on Federal contractors, the Federal Government has also issued regulations calling for affirmative action in apprenticeship programs and programs serving migrant and seasonal farmworkers. Federal regulations set out affirmative action requirements for apprenticeship programs administered by the Department of Labor,[11] and Federal regulations require State agencies participating in the administration of Services for Migrant and Seasonal Farmworkers to develop affirmative action plans.[12]

III. Set-Asides

Although not specifically referred to as "affirmative action," government efforts to increase minority and female participation in contracting and government assisted programs is also considered, by some, to be affirmative action initiatives. Under these programs "set-asides" or "participation goals" for members of racial or ethnic minorities and businesses owned or controlled by these or other disadvantaged persons have been implemented at the Federal, State, and local levels.

The legality of such initiatives were recently scrutinized by the U.S. Supreme Court in *Adarand Constructors, Inc. v. Pena.*[13] Although upholding the constitutionality of set-asides, the Supreme Court's decision requires strict scrutiny of the justification for, and provisions of, a broad range of existing race-based affirmative action programs, limiting the authority of government entities to adopt and implement race conscious measures in the absence of specific findings of discrimination. The strict scrutiny standard requires that such "affirmative action" efforts by government entities be narrowly tailored to meet a compelling governmental interest. [These efforts must be: (1) supported by a pattern and/or practice of discrimination, (2) narrowly tailored in application, temporary in duration, and not intended to achieve or maintain a specified gender or racial balance, and (3) not trammel unnecessarily on nonminorities.]

IV. Present Controversy

Affirmative action has moved beyond provincial legal and academic inquiries and into open public and political discussion. The 1995 hearing on affirmative action before a House of Representatives House Judiciary subcommittee was

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9 Pub.L.No. 88-352, July 2, 1964, 78 Stat. 241.

10 Pub.L. 102-166, 105 Stat. 1076.

11 19 C.F.R. §§ 30.3-30.8.

12 20 C.F.R. § 653.111(a),(b)(3)(1994).

13 115 S.Ct. 2097 (1995).

described as "tense and sometimes rancorous" as House Republicans considered purging sex and race preferences from Federal laws.[14]

Emotions surrounding affirmative action have been chronicled by the press. In a 1995 cover story of *Newsweek* on affirmative action, Howard Fineman wrote:

But the most profound fightthe one tapping deepest into the emotions of everyday American lifeis over affirmative action. It's setting the lights blinking on studio consoles, igniting angry rhetoric in state legislatures and focusing new attention on the word "fairness."[15]

Robert Entman, professor of journalism at North Carolina State University, argues that media reporting has sensationalized the issue by depicting it as predominantly a serious and emotional conflict of interest and values between white Americans and African Americans.

The predominant thrust of the news coverage [of affirmative action] during 1995 emphasized black-white discord despite evidence of shared interests and shared positions. By selectively framing the debate, the media may have contributed to undermining empathy and trust between adherents of different positions on affirmative action and in particular, between blacks and whites.[16]

In 1995 President William J. Clinton directed Federal agencies to review existing affirmative action programs.

Let us trace the roots of affirmative action in our never ending search for equal opportunity. Let us determine what it is and what it isn't. Let us see where it has worked and where it has not, and ask ourselves what we need to do now. Along the way, let us remember always that finding common ground as we move toward the 21st century depends fundamentally on our shared commitment to equal opportunity for all Americans....

The purpose of affirmative action is to give our nation a way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve, and contribute.... This review concluded that affirmative action remains a useful tool for widening economic and educational opportunity....

...Let me be clear about what affirmative action must not mean and what I won't allow it to be. It does not mean—and I don't favor—the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean—and I don't favor—numerical quotas. It doesn't mean—and I don't favor—rejection or selection of any employee or student solely on the basis of race or gender without regard to merit.[17]

Critics argue that affirmative action is not working and is moving the society to a position at odds with the original intent of recent civil rights legislation: a color-blind society. On March 7, 1995, Senator Jesse A. Helms (R, NC) introduced the Civil Rights Restoration Act of 1995, to amend the Civil Rights Act of 1964 making preferential treatment an unlawful employment practice. In remarks on the Senate floor concerning the bill, Senator Helms stated:

Hubert Humphrey hated the idea of quotas and preferential treatment based on race. He knew instinctively that such program, if instituted, would turn America inside outwhich is exactly what has occurred. There is much evidence that affirmative action programs have exacerbated racial problemsnot healed them....

Affirmative action and quota programs have at the end of the day harmed the very people their proponents designed them to assist.... Although Federal agencies designed affirmative action programs to benefit victims of discrimination at the lowest rungs of the economic ladder, today they benefit chiefly educated, middle-class minorities....

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14 Nancy E. Roman, "Affirmative action spurs exchanges tinged with rancor," *The Washington Times*, Apr. 4, 1995, p. A10.

15 Howard Fineman, "Race and Rage," *Newsweek*, Apr. 3, 1995, p. 24.

16 Robert M. Entman, "Accentuating the Negative: Media Coverage of Affirmative Action," a report to the Human Relations Foundation of Chicago, November 1995, p. 1.

17 Remarks by the President on Affirmative Action, The White House, Office of the Press Secretary, July 19, 1995.

After 30 years, it is obvious that this social experiment called affirmative action has outlived its usefulness. It is time for the Federal Government to scrap these programs, and restore the principles upon which our country was builtpersonal responsibility, self reliance, and hard work.[18]

Former Senator Robert S. Dole (R, KS), the Senate majority leader, has introduced the Equal Opportunity Act of 1995, legislation designed to end race and gender preferences. Commenting on the need for a new civil rights agenda in the *Wall Street Journal*, Senator Dole wrote:

We are now engaged in a contentious and difficult debate over the merits of affirmative action and the role of preferential policies in our society.

Perhaps the most striking aspect of this debate is not its passion or its complexity, but its irrelevance. The simple truth is that preferential policies don't mean anything to the millions of Americans who each day evade bullets,send their kids to substandard schools, and wade through the dangerous shoals of our nation's underclass.

Making government policy by race only diverts us from the real problems that affect all Americans of whatever race and heritage. Rather than having a potentially divisive argument over affirmative action, our most pressing need is to develop a civil rights agenda for the 1990s, one that is relevant to the needs and challenges of our time.[19]

V. Wisconsin Attitudes Towards Affirmative Action

In October 1995 the Wisconsin Policy Research Institute, Inc., released its *Wisconsin Citizen Survey*. The survey was the institute's 14th survey of Wisconsin residents since 1988. One section focused on residents' views of affirmative action. Overall, the poll results clearly indicate that most Wisconsin residents are opposed to programs that set aside numerical targets or quotas in employment or higher education. Residents have much more ambivalent feelings toward other types of affirmative action and would not necessarily favor elimination of all activities designed to assist women and racial minorities.[20]

Three-fourths (76 percent) of Wisconsin residents oppose affirmative action programs that require businesses to hire a specific number or quota of minorities or women. Fifty-nine percent, however, favor affirmative action programs that promote employment for minorities and women, but do not contain quotas. . . .[21]

Nearly two-thirds (64 percent) of Wisconsin residents approve of ending affirmative action programs that require businesses to hire a specific number or quota of minorities and women. One-third (32 percent) disapprove of ending such programs, with the balance undecided.

Only 44 percent of residents approve of ending Federal affirmative action programs that promote employment for minorities and women, but do not require quotas; 50 percent disapprove of ending such programs, with the balance undecided.

Most (68 percent) Wisconsin residents oppose reserving openings at colleges and universities for blacks and other minorities; 26 percent favor reserving openings, with the balance undecided.

Residents are closely divided as to whether colleges and universities should have affirmative action programs to ensure that black and other minority students have a fair chance to be admitted. Overall, 47 percent of State residents favor such programs and 48 percent opposed them, with the balance undecided.

Residents are evenly divided about the meaning of affirmative action. Forty-seven percent think of it as mainly setting quotas for fixed numbers of positions for

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18 141 Cong. Rec. S3471, 3473 (daily ed. Mar. 3, 1995) (Statement of Senator Helms).

19 Bob Dole and J.C. Watts, Jr., "A New Civil Rights Agenda," *The Wall Street Journal*, July 27, 1995.

20 Wisconsin Policy Research Institute, *The Wisconsin Citizen Survey* (hereafter referred to as *Citizen Survey*), October 1995, p. 6.

21 Ibid., p. 4.

women and minorities and 45 percent think of it as mainly increasing the amount of effort spent to find qualified women and minorities, with the balance undecided.[22]

The survey also found women and minorities with different views about what affirmative action is. When asked if affirmative action is mainly setting quotas, 53 percent of men said yes, while only 42 percent of women said yes. To the same question, 49 percent of whites said yes, while only 26 percent of blacks said yes.[23] On affirmative action and reverse discrimination:

> One-fourth (26 percent) say that they or someone they know has been discriminated against because of affirmative action programs for minorities or women, compared to 72 percent who say they have not been affected. . . . Only 17 percent of State residents say that affirmative action programs always discriminate against whites, while 76 percent say that there can be affirmative action programs that do not discriminate against whites.[24]

The survey illustrates the differences among Wisconsin residents in their understanding about what exactly affirmative action is and how it is implemented. Some consider all affirmative action a set of mandated race and gender quotas, and by implication a form of discrimination against males and nonwhites. Others view it as a program to insure fairness in selection. It is anticipated that the following discussions will at least clarify the essential features of affirmative action, and in so doing this and future discussions of affirmative action can be based upon the actual practices and efficacy of affirmative action.

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22 Ibid.

23 Ibid.

24 Ibid., pp. 4–5.

I. Legal Perspectives of Affirmative Action and Its Enforcement

Affirmative Action in Employment: A Commentary on OFCCP Enforcement of Executive Order 11246

By Ann Barry and the Human Resource Management Association of Southeastern Wisconsin, Inc.

I. Introduction

In Wisconsin, all employers must comply with State and Federal equal employment opportunity laws. Below is a brief summary of the State and Federal laws:

Wisconsin Fair Employment Act (1945)

Wisconsin became one of the first States to pass an employment discrimination law. As passed in 1945, the law initially prohibited discrimination on the basis of race, creed, religion, and national origin. Today, the law includes many more prohibitions: age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, unfair honesty testing, unfair genetic testing, membership in the National Guard State Defense, military forces of the U.S. or Wisconsin, or any other reserve component, and use or nonuse of lawful products off employer's premises during nonworking hours. The law is administered by the Department of Industry, Labor and Human Relations, Equal Rights Division.

Civil Rights Act (Title VII) (1964)

Title VII is the major law covering private employers of 15 or more employees, labor unions, and employment agencies. The law forbids employment discrimination or discrimination in union membership based on race, color, religion, sex, or national origin. It covers hiring, promotion, firing, transfer, or any other condition of employment. The law was passed because many States, particularly in the South, did not have any State laws prohibiting employment discrimination. Employer defenses for unequal treatment consist of: bona fide occupational qualification (BFOQ), business necessity, and business justification. The law is administered by the U.S. Equal Employment Opportunity Commission.

Executive Order 11246 (1965)

This order, signed by President Johnson, forbids employment discrimination based on race, color, religion, sex, or national origin by government contractors, whose contracts are in amounts greater than $10,000. It imposes additional requirements to develop written affirmative action plans and take positive steps to eliminate bias when the employer has a Federal contract or subcontract of $50,000 or more, and employs 50 or more workers.

Vocational Rehabilitation Act (1973)

This law covers government contractors, with section 503 requiring that such employers do not discriminate against the handicapped. Section 504 covers employers receiving Federal monies. Employers with Federal contracts over $50,000 and having 50 employees or over must have written affirmative action plans outlining steps taken to hire the handicapped.

Americans With Disabilities Act (1990)

This Federal legislation grants civil rights to individuals considered "disabled." The law builds on title VII and the Rehabilitation Act of 1973, but goes beyond the workplace to govern other services, activities, and benefits. A "disabled" condition is one that impairs a major life activity. Employers must provide reasonable accommodation for "disabled" workers unless that accommodation would pose an undue hardship on the business. As of July 26, 1994, this law applies to employers with 15 or more employees. The agency responsible for administering employment

provisions of the law is the Equal Employment Opportunity Commission.

The law prohibits discrimination against applicants or employees because of a handicap, and further, requires reasonable accommodation. [Wisconsin's handicap law in its Fair Employment Act applies to all employers, not just government contractors.]

II. Explanation of Executive Order 11246 and OFCCP

On September 28, 1965, Executive Order 11246 was issued by President Johnson. This order prohibits employment discrimination based upon race, color, religion, sex, and national origin by Federal contractors and subcontractors *and* requires Federal contractors and subcontractors to take affirmative action to recruit, hire and promote qualified minorities and women. This Executive order followed the enactment of the title VII of the Civil Rights Act of 1964 (Title VII), the Federal law that provides for *equal* opportunity in employment. 42 U.S.C. § 2000e-1, *et seq.* Although title VII neither requires nor prohibits affirmative action; Executive Order 11246 requires nonconstruction contractors and subcontractors with more than 50 or more employees and $50,000 or more in Federal contracts to develop and maintain affirmative action programs for minorities, women, and of the disabled. The Office of Federal Contract Compliance Programs (OFCCP), which is part of the United States Department of Labor, enforces these mandates and has the authority to debar contractors who fail to implement acceptable affirmative action programs.

A. Brief Description of OFCCP Functions and How Its Functions Differ From Those of EEOC

State and Federal laws establish agencies to enforce equal opportunity and affirmative action laws. The Federal equal opportunity law, which is codified at 42 U.S.C. § 2000e and is referred to as title VII, established the Equal Employment Opportunity Commission (EEOC) to investigate discrimination complaints and to enforce the law. Under Federal law, an employee or applicant for employment who suffers discrimination on the basis of a protected classification may file a complaint and receive various types of remedies. These remedies include backpay, front pay, reinstatement, retroactive seniority, back benefits, and other benefits of employment. The employee or applicant may, under certain circumstances, also receive punitive damages. The EEOC has jurisdiction to investigate claims involving employers of 15 or more persons. The EEOC begins its investigations when an employee or applicant files a complaint. The EEOC will investigate the merits of the specific complaint or complaints filed with the agency. It does not, however, do random investigations.

In contrast, the Office of Federal Contract Compliance Program's primary mandate is to carry out the affirmative action programs prescribed in Executive Order 11246, the Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Act of 1974. These laws require Federal contractors and subcontractors to take action to employ, advance, and retain individuals who are part of certain protected classifications. Among the individuals protected by these laws are minorities (blacks, Hispanics, Native Americans/Alaskan natives, and those of Asian/Pacific Islander/Indian subcontinent heritage), women, handicapped persons, Vietnam Era Veterans, and disabled veterans.

The OFCCP has interpreted its regulations to include a requirement to search out possible discriminatory practices and procedures by Federal contractors and subcontractors. The agency uses a variety of statistical and other tools to make determinations about the actions companies take that involve members of the above protected classes. If the OFCCP has statistical evidence that raises an inference of discrimination, the OFCCP will attempt to find possible legitimate reasons for a contractor's actions. However, the agency will take action when it is unable to satisfactorily resolve situations that may involve discriminatory treatment or impact. Depending upon its findings, the agency may send its recommendations to the Office of the Solicitor at the Department of Labor to begin class action proceedings when it believes a class is involved. The agency may also attempt to resolve instances of possible discrimination through the use of its various resolution procedures.

B. The OFCCP Regulations

The regulations governing the OFCCP are found in 41 CFR chapter 60. These regulations establish the Office of Federal Contract Compliance Programs and give that agency jurisdiction over the employment practices of Federal contractors and subcontractors. The regulations specify certain actions that Federal contractors and subcontractors (with a few limited exceptions) must take. The regulations also outline the procedures the agency must follow during an affirmative action review and the sanctions that may be imposed when there is a finding of noncompliance.

The regulations that define what elements must go into a service or supply company's affirmative action plan for minorities and women are found in 41 CFR § 60-2, including the statistical components. Specifically, 41 CFR § 60-2 requires that all affirmative action plans contain the following statistical reports:

1. A work force analysis that examines a contractor or subcontractor's work force according to the department or work unit to which each employee belongs.
2. A job group analysis that examines a contractor or subcontractor's jobs in groups drawn together because of similar duties, similar wages, and/or similar opportunities for advancement.
3. An availability analysis that examines the percentage of minorities and women that are available internally and externally in case a position opens in a particular job group.
4. A utilization analysis that compares availability percentages to the percentages in a contractor's job group in order to determine where the contractor should focus its affirmative action efforts. When the percentage of women or minorities in a job group is not equivalent to the availability figure, a contractor is required to establish a placement goal.

The regulations also require that contractors regularly monitor their progress towards meeting affirmative action objectives. Two additional statistical reports, a goals progress report and a personnel activity table, are used to examine hires, promotions, and other personnel activity that might show whether a contractor's affirmative action efforts are meeting with success.

Along with the various statistical components in 41 CFR § 60-2, there are narratives that contractors and subcontractors are required to complete. Among these narratives are the following:

1. A description of the actions taken to make employees and outsiders aware of the contractor's status as an equal opportunity employer.
2. A listing of the responsibilities of the person assigned to act as the contractor's equal opportunity coordinator as well as the responsibilities of other members of management.
3. A discussion of the problems suggested by the contractor's statistical analyses and its review of its practices and procedures.
4. A plan of actions to be taken to correct problems and to fully implement the contractor's affirmative action plan.
5. A review of the contractor's progress towards meeting its most recent affirmative action placement goals, and a review of the reasons the contractor did or did not meet these numerical targets.

These regulations list other narratives and reports that must be developed to have a viable affirmative action plan for minorities and women, but the items above are the most significant. Affirmative action plans for minorities and women must be updated on an annual basis, and all the statistical and narrative sections listed above must be redone every year.

There are additional duties that are prescribed for Federal contractors and subcontractors under the other portions of 41 CFR Chapter 60. Section 60-3, referred to as the Uniform Guidelines on Employee Selection Procedures, establishes certain tests to determine the validity of an employer's selection process. The uniform guidelines contain instruction on the use of the 80 percent rule which is the basis for the creation of most impact ratio analysis reports. Section 60-4 establishes the affirmative action duties for Federal construction contractors. The regulations in section 60-4 allow for the creation of craft goals to be enforced by the OFCCP for construction jobs. Section 60-250 outlines the elements of an affir-

mative action plan for disabled veterans and Vietnam era veterans. Section 60-741 outlines the elements of an affirmative action plan for handicapped workers. While sections 60-250 and 60-741 do not require the many statistical analyses found in section 60-2, these regulations do place certain outreach and record collection responsibilities on Federal contractors and subcontractors.

The regulations in 41 CFR chapter 60 are supported by a series of internal OFCCP procedures and directives. The OFCCP has a manual of several hundred pages that explains and expands on the responsibilities found in Chapter 60. The manual is in wide use among Federal contractors and subcontractors. The manual acts as the foundation for all OFCCP reviews, providing forms, letters, and instructions for opening, conducting, and closing affirmative action reviews.

C. Enforcement Experience

1. OFCCP Industry Liaison Group

The Human Resource Management Association (HRMA), a chapter of the Society for Human Resource Management (SHRM) located in southeastern Wisconsin, has established an Industry Liaison Group (ILG) that communicates with the OFCCP. The ILG members include a number of local Federal contractors, subcontractors, attorneys, and consultants that work with Federal contractors and subcontracts on a frequent basis. The ILG has found the OFCCP to be receptive to its suggestions and ideas. In fact, the Milwaukee OFCCP office has made changes to several of its practices based on suggestions from the ILG. One of the most concrete examples of these changes involves the OFCCP's willingness to give greater recognition to the positive efforts made by companies during the onsite portions of its reviews and in resolution documents and other pieces of correspondence. ILG members have also had a constructive dialogue with the OFCCP on issues such as "who is an 'applicant'," "what can we expect during OFCCP reviews," and "what new developments are occurring at the OFCCP."

2. Consistency During Compliance Reviews

One of the concerns routinely expressed by contractors that have gone through OFCCP reviews involves the issue of consistency. The concern about consistency takes two forms:

> First, there is a concern expressed by some companies that have had more than one OFCCP review that a company may receive different instructions from different OFCCP reviewers/auditors on the same point.
>
> Second, there is a concern among companies that have discussed their OFCCP reviews with each other that different companies receive different instructions from the OFCCP after taking the same or similar actions.

An illustration of each of these concerns may be valuable. With respect to the first expressed concern regarding consistency, a contractor might have been instructed during an OFCCP review to count hires, promotions into, and promotions within a job group as placements for the purpose of determining whether it has met its affirmative action goals. Several years later, the same contractor might be instructed that only hires and promotions into, but not promotions within, a job group are to be counted as placements. Two different OFCCP reviewer/auditors might provide viable rationales for taking these different approaches. Unfortunately, the contractor is left in an untenable position, having been told different things by different auditors that might fundamentally affect the way it statistically projects its affirmative action efforts.

An illustration of the second type of concern about consistency might follow the same facts above. Two contractors discussing OFCCP requirements might discover they are counting placements differently, where one company counts promotions within a job group as placements and the other company does not. The inconsistency between OFCCP auditors causes confusion for both companies.[1]

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1 While this idea of what gets counted as a placement may initially sound like a minor statistical issue, a "placement" is a fundamental concept for OFCCP reviews. Companies are required under the federal regulations to set numerical goals for

a. Paperwork Burdens

One of the most common concerns voiced by HRMA members involves the paperwork burdens placed on them by the OFCCP. There are two different types of paperwork burdens that contractors typically discuss. First, there is a perception that there are too many statistical reports. Company representatives commonly state that it takes them tens or hundreds of hours to complete work force analyses, availability analyses, applicant reports, and other statistical reports required to prepare for OFCCP reviews. The OFCCP tends to be very particular about the way in which most of these reports are done; errors in the way work force analyses or availability analyses are prepared often result in citations in the documents used to resolve reviews. Some companies have spent many hours working on availability analyses, only to have the OFCCP tell them that the contractor misread or misapplied some rule and that the company would therefore need to revise and resubmit the analysis. Contractors are also concerned that some reports, such as work force and job group analyses, are a duplication of effort, providing essentially the same information in two slightly different guises.

The result of the level and complexity of statistical reports is that contractors refocus their energies on preparing reports rather than doing outreach. Time that could be spent contacting agencies, developing creative programs, and networking with groups having access to members of protected classes is lost. Contractors instead must spend time designing, preparing and reviewing the many statistical reports required by the OFCCP. Contractors often state that rather than providing direction, the statistical reporting frustrates their ability to do effective affirmative action.

The second type of paperwork burden involves the type of outreach that some contractors are required to do. It is not uncommon for OFCCP reviewers (who are called equal opportunity specialists or EOSs) to require contractors to send letters to half a dozen or more recruitment sources each time they have an opening. Contractors with multiple openings during the course of a year may send out hundreds of letters to these agencies. It is not unusual for contractors to receive little or no response from some of these recruitment sources. When contractors do get responses, it is not unusual that the candidates are not qualified for the particular positions that are open. There are some recruiting agencies referred by EOSs that are both responsive and able to supply viable candidates. In many cases, however, the agency contacts are not helpful in finding viable candidates. In these cases, the agency contacts just create a paperwork burden because employers must send and retain letters, document their outreach efforts, respond to unqualified candidates, and document their responses to these candidates. The OFCCP's legitimate interest in having contractors expand their recruitment sources is undermined by the contractor's need to devote time and resources to sending out and collecting letters.

Similarly, contractors are required to send letters to all recruitment sources informing these sources that they are equal opportunity employers, and requiring the recruitment sources to certify that they will abide by the contractor's equal opportunity policy. Contractors rarely receive a response from their recruitment sources indicating that the source will not supply diverse candidate pools. Contractors must also secure written certification from their vendors and suppliers that the vendors and suppliers will abide by all relevant EEO and affirmative action regulations. Suppliers and vendors rarely return such certifications and never indicate they will not live up to their EEO/AA responsibilities. Letters of this sort

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job groups that do not have as many females and/or minorities as the internal and external pools from which candidates are drawn. Companies must then make efforts to correct this underutilization by targeting its affirmative action efforts accordingly. The OFCCP measures a company's willingness and ability to meet goals by looking at the number of placements into underutilized job groups. The percentage of placements into a job group should theoretically meet or exceed the percentage of females and/or minorities available for such positions. If a company has only a small number of placements in a particular job group, the determination of whether promotions into a job group are counted as placements may be a critical issue in the OFCCP's inquiry into whether goals were met.

again take time and resources away from contractors who might better use this time making personal contacts with nontraditional recruiting sources or establishing special educational programs for members of protected classes.

b. Contradictory Roles: Outreach vs. Enforcement

The OFCCP's primary mandate is to ensure that Federal contractors and subcontractors are taking affirmative action to hire, advance, and retain the protected classes noted above. The OFCCP carries out this mandate by requiring contractors to make outreach efforts to attract members of these protected classes. The OFCCP also carries out this mandate by attempting to rectify possible instances of what it perceives to be discrimination. Most contractors would agree that there is value in finding candidates from diverse pools and in preventing discriminatory conduct. Contractors are often frustrated, however, by the agency's efforts to encourage outreach while simultaneously punishing perceived discriminatory behavior.

OFCCP auditors frequently require significant additional outreach as part of the process of resolving affirmative action reviews. Contractors that are hiring are typically required to make special contacts to agencies that have access to members of the protected classes. Contractors are also typically required to find, train, and promote females, minorities, and others in their work forces that are good candidates for advancement. Supervisors are often instructed by OFCCP auditors to keep comprehensive notes of all contacts with protected class candidates and human resource staff members are required to provide training for supervisors on the special needs of females, minorities, handicapped persons and covered veterans.

Contractors that have taken the initiative to do additional outreach have on occasion subjected themselves to additional adverse scrutiny. Several HRMA member companies have undergone special scrutiny during OFCCP reviews after making a special effort to draw females and minorities in applicant pools. Companies that have large numbers of females and minorities in applicant pools are assumed to have large numbers of *qualified* females and minorities. While the OFCCP allows contractors an opportunity to explain recruitment practices, an initial inference of discrimination may be raised when contractors are successful in their outreach efforts. Similarly, several HRMA members that hire females, minorities and members of the other protected classes have undergone special scrutiny because of statistics suggesting that minorities and females are not advancing at a sufficiently rapid pace. The company that takes the initiative to find members of protected classes opens itself to possible adverse consequences at several levels, leaving the company with less incentive to make outreach efforts.

3. Regulatory Compliance Issues

a. Work Force Analysis

The current regulations specify that the work force analysis list all job titles by "department," show unit supervision of each department, show "lines of progression," and give the total number of employees and their sex/ethnic classifications for each job title. Although this configuration is compatible with an industrial-age organization structure, it is used by a diminishing number of employers. It is incompatible with the computer software used in the human resources information systems of most organizations, which tend to list individuals separately, not by job title, and by "accounting code," not department. Supervisors are often assigned to accounting codes different from the codes assigned to their subordinates. Also, many organizations have matrix organization structures or use work, cross-functional, or project teams, none of which can be captured by the requirements of the current regulations.

b. Eight Factor Availability Portion of Utilization Analysis

Several of the eight factors specified in the regulations are irrelevant to assessing the percentages of females and minorities available for hire. For instance, the percentages of women and minorities who are unemployed add no meaningful information beyond that represented by their percentages in the total work force which includes the unemployed. The minority population is similarly irrelevant because it includes people under 16 years of age. Additionally, the regulations give no useful guidance about how to "weight" the percentages derived from the various factors.

c. Definition of "Applicant" Is Unclear and Some Definitions Are Untenable

In spite of dramatic changes in the employment marketplace and the manner in which related business functions are conducted, the OFCCP holds rigidly to the original definitions and enforcement guidelines governing applicant flow. Within the environment of the Internet and the "World Wide Web," these make little sense and threaten to wrest control of the recruitment and employment functions from the employer. If, as asserted by OFCCP, anyone offering their resume for consideration on the Internet is an applicant, employers who "look" at the Internet could be faced with hundreds of thousands of "applicants" who may have no real interest in the employer, and, in fact, may be half a world away from the employer's established recruitment area.

In addition, some employers have been surprised by inquiries from sources neither solicited nor desired, as a variety of independent third parties, from bulletin boards to contingent search firms, pick up and pass on advertisements and/or resumes through far-reaching electronic media. The implications of this are disturbing not only for the intolerable and impossible reporting burden associated with tracking such applicants, but for their potential impact on the employer's relevant labor markets and related availability statistics. Adding such applicants to the employer's applicant flow could significantly and unrealistically alter an employer's recruitment practice, in the eyes of OFCCP, without the employer even being aware of it.

Similarly, the emergence of contingent workers and their use as an applicant pool has produced confusion about the tracking of such employees as applicants and the responsibility for applicant tracking. Using a "one applies/all apply" criterion fails to recognize legitimate differences among the contingent work force and the role of temporary/contract labor companies in screening and placing workers with the employer for regular jobs on the basis of both applicant interest and credentials. Temporary help companies typically do not maintain separate statistics for temporaries who are not referred for consideration or placed with a customer, yet these are considered part of the applicant flow under OFCCP guidelines. Employers, as customers to such companies, do not have access to these data. Again, the OFCCP regulations appear to mandate removal of the recruitment and selection process from the control of the employer.

D. Suggestions for Change

1. OFCCP Should Have One Role: Affirmative Action Advocate or Enforcement Agency

OFCCP's contradictory roles as change agent and discrimination investigator put both contractors and the agency in an awkward position. Many HRMA members would like to make outreach efforts and focus their activities on ways to find, advance and retain members of the protected classes described above. HRMA members facing OFCCP reviews must, however, spend significant time preparing and reviewing statistical reports and the information underlying these reports to ensure that, when statistical reports may suggest discrimination to the OFCCP, the contractor has an adequate response.

One simple way to cure this conflict between the OFCCP's two roles would be to remove the investigation of possible discriminatory actions from OFCCP reviews. Under such a proposal, OFCCP's sole job would be to help companies find ways to do more effective outreach. OFCCP would assist contractors in finding effective recruitment agencies. OFCCP would assist companies in preparing policies and practices that advance and retain minorities, females, and other members of protected classes. All instances where the OFCCP identifies possible discrimination would be turned over to the EEOC. As the EEOC is already charged with the task of eliminating discrimination, this would centralize enforcement effort and eliminate duplication of activities. The EEOC could determine whether statistical tests such as impact ratio analysis tables provide sufficient evidence to prompt a more complete investigation. The OFCCP, in turn, could focus its efforts on helping companies take the affirmative action steps at the heart of its mandate. HRMA members would benefit from such a proposal because they could use the OFCCP as a body to assist in meeting diversity objectives. OFCCP visits would no longer be a time for worried preparation, and instead might be perceived as a welcome aid in meeting legitimate business objectives.

2. Paperwork Burdens Should Be Reduced to Provide More Time for Other Work

The reduction of paperwork burdens would benefit the interests of both contractors and the OFCCP. HRMA members who were relieved of doing all the statistical reporting currently required by the regulations report that they would spend more time developing creative solutions to affirmative action related problems. Most companies report that they intuitively have a better sense of the availability of minorities and women for certain jobs than complex availability analyses provide. Companies would prefer to devote time to pinpointing where they can realistically increase their percentage of members of protected classes and developing concrete plans to meet these targets. For example:

(1) Time currently spent reconciling work force and job group analyses could be spent putting mentoring programs in place;
(2) Time currently spent preparing eight factor availability analysis could be spent in personal meetings with representatives of local organizations serving minorities and women; and
(3) Time currently spent deciphering impact ratio analyses could be spent talking with employees about specific training needs and finding programs that would assist employees in their efforts to advance.

HRMA members also report that if they were relieved of writing letters to multiple agencies and vendors, they would spend more time on some of the programs outlined above.

While some HRMA members would like to see a decrease in the paperwork aspects of affirmative action, some HRMA members find the statistical reporting done for affirmative action plans a useful tool. Charts measuring progress towards meeting affirmative action placement goals can be effective as a yardstick for measuring change. Tables showing how many minority and white applicants were hired can be useful in determining whether some part of the hiring process needs greater attention. HRMA members are concerned, however, when the statistical reports overwhelm the rest of their affirmative action activities. An impact ratio analysis table is useful if it provides information where a company should devote its affirmative action efforts; however, it is not useful if it takes hours and hours to develop and then becomes a tool for the OFCCP to find marginal statistical evidence of possible discrimination.

3. Policies Regarding Temporary Employee Tracking and Definition of Applicant Should Be Developed

The OFCCP should provide enough leeway in interpreting and enforcing its own regulations for employers to maintain control over their own recruitment policies. Applicant flow reporting requirements should be limited to individuals actively expressing interest in specific positions and/or job groups with the employer. For individuals who do not express a specific interest, employers should be free to match them with job groups deemed appropriate based on the applicant credentials relative to position and job group requirements. For example, those applicants without a high school diploma should not be part of the applicant pool for the brain surgeon position unless they actually apply for that position. The inclusion of such individuals as applicants only skews the data and does not provide the contractor with meaningful statistics.

4. Work Force Analysis

Regulations should be changed to require employers to list the sex and ethnic classification of each employee by job title and to indicate where those titles fit in their organizational structure using whatever format is most compatible with that structure.

5. Eight Factor Availability Portion of Utilization Analysis

"Factors" of availability should not be specified. Employers should simply be required to discover and enumerate the percentages of females and minorities that exist in the specific recruitment sources it uses or could reasonably use in each job group and weight those percentages by the proportion of incumbents in the job group who would likely be replaced by using each specific source. The regulations could list examples of recruitment sources such as universities, incumbents in other job groups, electrical engineers in the metropolitan area, etc. Employers should be required to analyze the job titles within each of their job groups, consider current and potential recruitment sources that would maximize qualified fe-

male and minority applications, and apply the proper weighting.

6. Permit Contractors to Develop Job Groups That Provide for Meaningful Analyses

The way companies presently are required to develop job groups to establish affirmative action goals can be ineffective and rigid, preventing an affirmative action plan from becoming an effective management tool. EEO-1 categories are very broad and are not consistent with the way an organization is managed. This is particularly true when companies are structured along functional lines. EEO-1 categories do not take into consideration the ways in which companies recruit and the required functional skills employees must have. Larger organizations need categories more refined than those used for EEO-1 purposes. This would allow contractors the opportunity to better manage and measure good faith efforts, and analyze what truly is happening in their organizations. In addition, career paths in large organizations are getting shorter. Job groups based on EEO-1 categories would be problematic because they would prevent meaningful analysis. For smaller organizations, EEO-1 categories are sometimes not broad enough, as such companies may not have enough employees in certain EEO-1 categories to allow for statistical significance. As a general matter, job groups should be allowed to correspond to the nature of the company, rather than a rigid and ineffective format such as EEO-1 categories.

7. Clarify Promotion Analysis

The regulations need to specify how promotions should be analyzed. For example, are promotions to be analyzed "to" the job group, "from" the job group, or "within" the job group? OFCCP's enforcement stance is unclear and there is no guidance in the regulations.

8. Compliance Audits Should Be More Meaningful

HRMA offers the following recommendations to make compliance audits more meaningful to both contractors and the OFCCP.

a. Consistency in EOS assignments

Many contractors dread compliance audits because they do not know what to expect. EOSs look for and require different items, thereby making it difficult for contractors to respond in an appropriate fashion. The same EOS should be assigned to handle all compliance reviews for a particular contractor, especially where the contractor has multiple facilities being audited separately within the same district.

b. Develop EOS Expertise in an Industry

EOSs should be assigned to a particular industry to develop expertise and understanding that could lead to greater consistency. For example, financial institutions have reported that different EOS's have told different financial institutions to handle the same item in different ways.

c. Strive for Consistency Among EOSs

Where different EOSs are used to audit a particular company, the entire process would be enhanced if the current EOS were required to speak with the prior EOS about such things as verbal agreements between the former EOS and the contractor about making certain changes or formatting their affirmative action program, and then required to honor such agreements.

d. Daily Communication during Audits

Audits would be more efficient and worthwhile if, during an audit, the EOS spent some time at the beginning of each day identifying for the contractor what would be discussed that day and what items would be reviewed. Some time should also be spent at the end of the day to discuss what had been done. Such a procedure would enhance the spirit of cooperation and education in which this process should operate.

III. Conclusion

It is hoped that by alleviating confusion and paperwork burdens that have become a central focus of affirmative action compliance, an employer's role in providing for the advancement of females and minorities in the workplace will become meaningful. This will not only serve to meet the mandates of affirmation action compliance but will also serve to strengthen employers as a whole as a result of increased diversity.

Note: Ann Barry presented this paper on behalf of the Human Resouces Management Association of Southeastern Wisconsin (HRMA), Inc. HRMA is a professional organization composed of human resource management professionals, with membership exceeding 690 individuals representing over 350 employers.

HRMA members represent employers ranging in size from fewer than 100 employees to over 5,000 employees. HRMA is 1 of the 10 largest organizations affiliated with the Society for Human Resouces Management, formerly the American Society for Personnel Administration, and has been an active chapter for SHRM for 71 years.

Affirmative Action: An Employer's Perspective

By Timothy G. Costello and Shelly A. Ranus

Introduction

The debate over affirmative action in employment has become a no-nonsense front and center topic of legal discourse, heightened in intensity since the Supreme Court handed down its most recent opinion on the issue in *Adarand Constructors v. Pena* (1995).[1] Perhaps this is true because like other 30-year-old programs, it has acquired barnacles over time, misunderstandings, misinterpretations, and mistakes of intent and execution.[2] The nexus of the legal debate over the legitimacy of affirmative action in employment stems not from the what, but from the how. Employers generally agree that all Americans deserve equal opportunities and treatment in their quest to prosper in the workplace. However, most employers do not subscribe to the notion that a level playing field can only be attained by government implementation and monitoring of hiring preferences and incentives. Instead, affirmative action measures in employment serve only to perpetuate the very perceptions of inequality between minorities that the Supreme Court originally refuted in *Brown v. Board of Education*.[3] Only equal treatment of all employee applicants, regardless of their race or sex will result in equal opportunities for all.

Thus, this paper will present arguments that affirmative action programs are detrimental to employers and employees, as America increasingly participates in a global economy for the following reasons:

1. Affirmative action in employment was never intended to read beyond its original goal of affirming equal employment to all employees regardless of race or sex.
2. The costs and disadvantages to employers and minorities that are associated with affirmative action plans have not, and will not, yield a viable employment benefit to minorities.
3. Individual redress for individual instances of discrimination is a sufficient, particularized, and efficient means of ferreting out discrimination in the workplace.

Each of these propositions will be expanded upon in forthcoming paragraphs.

Affirmative Action in Employment was Never Intended to Reach Beyond its Original Goal of Affirming Equal Employment Opportunity to All Potential Employees Regardless of Race or Sex

Three significant pieces of "legislation" address the idea of equality in employment:

1. Executive Order 10925;[4]
2. The Civil Rights Act of 1964;[5] and
3. Executive Order 11246.[6]

Each piece of "legislation" was never envisioned by its authors to be a mandate requiring preferences in hiring.[7] Executive Order 10925

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1 Adarand Constructors, Inc. v. Pena, No. 93-1841 (1995).

2 "Affirmative Action: Not an All-or-Nothing Issue," *USA Today*, Mar. 24, 1995, at 12A.

3 Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954).

4 Exec. Order 10925 (1961); 3 C.F.R. § 448 (1959-1963).

5 Pub.L.No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a et seq. (1988 & Supp 1994)).

6 Exec. Order No. 10, 925, 26 Fed. Reg. 1977 (1961), Exec. Order No. 11 (1964–1965), 461, 3 CFR 339 (1964–1965).

7 *See generally*, Hugh Davis Graham, *The Civil Rights Era* (1990).

used the phrase "affirmative action" in a general sense, and firmly linked the now expanded phrase to the fundamental goal of providing equal opportunity in employment for all potential employees. The Civil Rights Act of 1964 was steered through Congress by supporters who specifically confirmed that the Act would not require an employer to achieve any kind of racial balance in the work force by giving preferential treatment to any individual or group.[8] When President Lyndon B. Johnson signed Executive Order 11246 in 1965, its language mirrored that of Executive Order 10925; the few efforts that Johnson made towards expanding Executive Order 11246 so as to require employers to use race as a factor in making employment decisions were so controversial that they were rescinded.[9]

The political winds that changed the course and purpose of affirmative action in employment occurred gradually, throughout all branches of government, during the 1970s. The Supreme Court initiated this gradual change when it noted in *Griggs v. Duke Power* that an employer could not utilize minimum credentials in hiring if those credentials served to act as a "headwind" for minority groups, regardless of proof that such hiring procedures were not implemented with discriminatory intent and were generally considered to be fair.[10] The Supreme Court continued to support affirmative action programs in various contexts for several years; for example, in *Fullilove v. Klutznick* the Court held that Congress could constitutionally require that 10 percent of Federal funds granted for local public works be awarded to minority businesses, if Congress proved that it was serving a legitimate public interest.[11] Although both the Civil Rights Act of 1964 and Executive Order 11246 are silent on the issue of affirmative action, the Supreme Court has also imposed specific remedial quotas, albeit disguised as "goals" for egregious past discrimination, to benefit minority group members who were not themselves the victims of discrimination.[12]

The recently issued *Adarand* decision has been favorably received by employers, and it represents a shift in the Court to a position more closely aligned with the original congressional intent of the use of the term "affirmative action."[13] Instead of allowing Congress to require governmental contractors to implement affirmative action programs in order to gain the benefit of receiving government contracts, it requires Congress to compellingly prove that such measures are necessary within a given occupational field. No longer will independent goals such as "diversity" be sufficient to justify affirmative action plans. As Justice Sandra Day O'Conner said in her opinion, increasing diversity in the workplace "is clearly not a compelling interest," but "rest[s] instead on illegitimate stereotypes." Further, the Supreme Court stated that "societal discrimination" is not a good enough reason to implement affirmative action plans; identified discrimination within a particular employment field must be shown. Sim-

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8 Specifically, Senator Hubert Humphrey (Democrat, Minnesota) and Senator Joseph Clair (Democrat, Pennsylvania), both supporters of the Act, held that the burden of proof would be upon the Equal Employment Opportunity Commission to prove that personnel actions by employers were specifically because of race; they also assured that quotas are themselves discriminatory. *See* U.S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* (Washington, D.C.; U.S. Government Printing Office, n.d.), p. 3005).

9 Lara Hudgins, "Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease," 47 *Baylor L. Rev.* 815 (1995), pp. 819–20.

10 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

11 Fullilove v. Klutznick, 448 U.S. 448 (1980).

12 See United States v. Paradise (1987); Local 93 of the International Association of Firefighters v. City of Cleveland (1986).

13 Two members of the Court, Justice Antonin Scalia and Justice Clarence Thomas, would have extended the *Adarand* decision to fully align with the original intent of Executive Order 10925, the Civil Rights Act of 1964, and Executive Order 11246; they believe that the Constitution flatly prohibits group remedies for past discrimination without individuals proving that they were subjected to discrimination. Justice Scalia wrote that, "under our Constitution there can be no such thing as creditor or debtor race. The concept is alien to the Constitution's focus on the individual. . . ."

ilarly, because the Court has been very demanding before allowing an inference that statistical disparities among racial groups are caused by local discrimination rather than other factors, it seems likely that specific and particularized discrimination must be shown.

Social engineering through affirmative action plans that require employers to meet certain hiring requirements was never intended to occur. Instead, the legislation discussed herein shows that the policymakers of the 1960s were smarter than those of later decades—they knew that the only fruitful means of restoring dignity and equality to minorities was to give equal opportunities to all. Although the legal branch of government temporarily bought into the notion that a level playing field meant implementing affirmative action plans, the Supreme Court has since corrected itself, concluding that social engineering has been a disappointing error in judgment, and a significant divergence from the Constitution.

The Costs and Disadvantages to Employers and Minorities that Are Associated with Affirmative Action Plans Have Not, and Will Not, Yield a Viable Employment Benefit to Minorities

Affirmative action in employment is most commonly defined as actions by employers that are necessary to assure nondiscriminatory employment practices. When affirmative action programs are implemented, the definition of what is "necessary" becomes greatly expanded, until in reality there is no perceptible difference between rhetorically condemned quotas and unilaterally imposed affirmative action "guidelines." Affirmative action in employment does not serve to aid minorities; rather, it serves to limit the development of those qualities that have caused every minority group in America to succeed (i.e., hard work, strong education, entrepreneuralism, and family stability).

It is no light burden that is placed on employers who contract their products and services to governmental entities. Federal contractors and subcontractors include most major businesses and corporations, as well as many small firms.[14] An employer must retain an affirmative action plan in place with "goals and timetables."[15] Although the OFCCP stridently declares that "goals and timetables" are not quotas, the requirement that employers retain affirmative action plans and be subject to OFCCP compliance reviews causes employers to shoulder a very time consuming and costly burden.

OFCCP compliance reviews serve to generate onerous amounts of paperwork, burdensome costs to the employer, and unnecessary time consuming attention to compliance procedures. The OFCCP's regulations long have required major Federal contractors to prepare and maintain written affirmative action plans containing specific, results-oriented procedures; however, the OFCCP's regulation and compliance officers insist that contractors organize and display their work forces in ways that do not comport with how individual businesses are managed.[16] As a result, parts of the required affirmative action plan, such as the work force analysis and the utilization analysis, become incredibly expensive and time consuming.

Human resource information databases do not generate statistics in the same manner as the OFCCP requires. The information must be reassembled to comply with OFCCP reporting requirements. The generated reports are handed over to the OFCCP, but they do not serve to inform the employer or the OFCCP accurately about minority representation in the corporation,

14 Robert R. Reich, Secretary, U.S. Dept. of Labor, "OFCCP: Making EEO and Affirmative Action Work" (September 1993).

15 *See* 41 CFR Part 60-2. According to § 60-2.11 of OFCCP's regulations, contractors must organize job titles into job groups, estimate the "availability" of women and minorities for jobs in each group, compare the current utilization of women and minorities in each job group with their estimated availability; if the current utilization of women or minorities is less than what would reasonably be expected given their availability, then the job category is declared "under-utilized," and annual goals are implemented to correct the under-utilization.

16 Ibid.

since the reports do not bear any resemblance to how the business is managed.

An additional example of the burdensome nature of the affirmative action plans, as regulated by the OFCCP, is the scope of the plans themselves. Covered Federal contractors are required to have a written affirmative action plan at each establishment located in a different labor market area, regardless of the size of the establishment, or the manner in which the corporation is organized. This proves to be an inaccurate and unnecessary burden, since most businesses are not run on a location-by-location basis, and the effort necessary to create separate affirmative action plans is, at the least, duplicative.

Although just a few of the many burdens that the OFCCP imposes on employers have been named, they are certainly excessive when compared to the minute number of employers that the OFCCP determines are engaging in discriminatory employment practices (a suspect number, given the differential between employer corporate structure practices and the OFCCP's review). Between 1982 and 1994, out of 17,502 completed complaint investigations, only 13 debarments have been issued.

The OFCCP's focus on employer hiring practices is fundamentally displaced because it presumes that a small number of minorities in a given work force is the result of employer discrimination. In fact, other barriers such as a lack of education or poor training of minorities are often the real problem.[17] Employers cannot, and should not, be culpable for this societal misfortune by unilaterally shouldering the burden for a minority's lack of training and credentials. Employers should be compelled to implement affirmative action plans only where a legitimate nexus exists between the problem—employer discrimination, and the injury—a lack of minorities in the work force. As Justice Scalia intimated in *Johnson v. Transportation Agency*, it is not the job of the government to alter social attitudes, but merely to eliminate discrimination.[18]

The effect of affirmative action programs is pressure—pressure to present a diverse company that complies with governmental standards. The result is that employers must engage in a time- and resource-consuming activity when those assets must be efficiently used in a global economy. Another result is that employers, in an effort to avoid extending painful hours of OFCCP audits, may feel compelled to hire minorities who are less qualified for the position than other candidates.[19] This hampers the employer even further in the global economy, as it reduces efficiency and output. This also opens up employers to reverse discrimination lawsuits by better qualified applicants who were passed over for the less qualified minority applicant.

In addition to the heavy burden that affirmative action places on employers, it sets up a familiar contradiction that minority employees must live with: racism is fought by linking black skin to deprivation and need, and white skin to privilege.[20] The greatest sufferer of the consequences of this easy, shorthand method of delineating between the haves and have-nots is the minority. This is due to the fact that affirmative action plans wrongly treat minorities as a commodity—if the office does not employ an adequate number of minorities, then the OFCCP will chastise accordingly." The result is that minorities may be treated in a manner that is detrimental to all involved.

Another, and perhaps more obvious, result of preferential treatment is that every minority professional, regardless of qualifications, is tainted. Coworkers believe, as may the applicant, that he/she was hired because of his/her race. That

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17 Michael K. Braswell et al., "Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy," 57 *Alb. L. Rev.* 365, 437 (1993).

18 *See* Johnson v. Transportation Agency, 480 U.S. 616, 668 (1987) (Scalia, J. dissenting).

19 Nicolaus Mills, ed., *Debating Affirmative Action; Race, Gender, Ethnicity, and the Politics of Inclusion*, (Delta, 1994); *see also*, Charles Murray, *Affirmative Racism*, pp. 201–203.

20 "Race and the Curse of Good Intentions," *The New York Times*, Op-Ed, Oct. 24, 1995.

suspicion, even for prominent and successful minorities, such as Yale law professor Stephan Carter and economic professor Glen Loury, follows minority professionals throughout their careers. Certainly the high road is to allow minorities to shed this stigma by ensuring that they are not hired because they were the "best black" candidate, but rather, because they have battled for excellence and have shown themselves best able to meet the standards and requirements of the job. This will only occur if affirmative action plans are no longer an employer's requirement to fulfill.

Individual Redress for Individual Instances of Discrimination is a Sufficient, Particularized, and Efficient Means of Ferreting Out Discrimination in the Workplace

Justice Scalia most proficiently pointed out in *Adarand*, " . . . Individuals who have been wronged by unlawful facial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual. . . . " The fatal flaw of government-required affirmative action plans is that they provide a systemic, nonparticularized benefit without any evidence of individual discrimination. Indeed, if Executive Order 11246 and the OFCCP were completely eliminated, the remedy for individual discrimination, Title VII and State laws prohibiting discrimination, would remain powerful and effective.

It is not possible for the OFCCP to limit itself to its original jurisdiction—that of overseeing affirmative action plans—because it must entangle itself in ferreting out unlawful discrimination. In compliance review auditors are motivated by the mindset that, "I know you are discriminating and I am going to find out where." Thus, auditors do not account for the qualified applicant pool, nor do they focus on reviewing employer-implemented outreach and developmental programs. Instead, auditors tend to focus on individuals to determine if the minority and nonminority are accorded equal favorability (without attention to the details of resumes). This type of particularized hunt for supposed employment discrimination should not be engaged in by the OFCCP. Taxpayers and employers alike could legitimately ask how this type of doubling up with the EEOC's enforcement of the nondiscrimination provisions of Title VII, the Equal Pay Act, and the Americans with Disabilities Act serves to efficiently utilize government resources. The answer is, it doesn't.

The OFCCP's ineffectiveness in ferreting out discriminatory employment practices that, in the majority of cases do not exist prior to an audit can be compared to the enormous success of individuals or the EEOC who have sued employers under Title VII, the Equal Pay Act, and the Americans with Disabilities Act. The 1991 amendment to the civil rights act specifically granted compensatory and punitive damages so that employees would be additionally empowered to receive recompense for discriminatory practices, and to send a strong message to employers that severe chastisement awaits those who engage in either systemic or intentional discrimination.

Conclusion

The original intent of affirmative action was to serve as a government-imposed requirement for advertising and recruiting. The purpose was to compel employers to equally offer employment opportunities to all Americans by forcing them to recruit diverse applicants. With advanced technology, mass media, and other modern recruiting methods, minorities are well informed and now equally capable of seizing potential employment opportunities as all other Americans, especially given today's labor market. The elaborate, now archaic, advertising mechanism called affirmative action is no longer necessary. Instead, it serves to place burdens on the employer and the minority with no corresponding return benefit.

Disassembling Myths and Reassembling Affirmative Action Concepts

By Phoebe Weaver Williams

Discussions about affirmative action are often clouded with political rhetoric that not only obfuscates but on occasions demonizes its goals and purposes. I have two goals for this discussion. One is to add to the discourse that disassembles some of the myths about affirmative action.[1] Another is to reassemble affirmative action concepts in light of emerging business objectives and economic and social challenges facing African Americans.

Initially, I will set forth some of the parameters I will use when examining this subject. I do not claim a universal perspective on this issue. Often discussions about affirmative action, particularly those of academics, are presented as neutral, perspectiveless positions. Yet, closer examination reveals that the position of the speaker influences the discussion. My desire is to resist the disingenuous posture of perceived neutrality by acknowledging that I approach this discussion from my perspectives and experiences as an African American woman. Discussions about affirmative action evoke for me a range of reactions—from painful and frustrating memories of discrimination to recollections of hope and faith grounded in spiritual beliefs.

I. Disassembling Myths

Myth: Affirmative action programs fuel racial tensions and resentments retarding progress towards a "colorblind" society where racial identities are irrelevant considerations.

Affirmative action programs have been demonized as evils that regenerate racial antagonisms and fuel racial tensions. Regardless of their specific content and operation, opponents of affirmative action programs often characterize them as monolithic strategies. They then identify affirmative action as the cause of a number of racial problems—from reinvigorating the popularity of racial hate groups to splintering various liberal and progressive interracial coalitions. African Americans are admonished that our support of affirmative action empowers our enemies and disappoints our friends. It is a paradox that white women, who are also beneficiaries of affirmative action, are not similarly remonstrated. Their "backlash" is often portrayed as resentments stemming from their *deserved* progress.[2] Our "backlash" is often attributed to our *undeserved* progress at the expense of deserving white males.

Concerns about affirmative action as the cause of escalating racial tensions are often expressed in a contextual void that renders invisible other social phenomena responsible for heightened racial tensions. More reasoned discussions about racial relations acknowledge that various social phenomena create racial tensions.[3] Among them are selfishness, self-interest, fear of competition, and media promotion of racial propaganda.[4] With so many factors motivating racial hostilities, opponents of affirmative action should be challenged to explain how and why they have isolated affirmative action as *the* causal factor of increasing racial tensions. This challenge ought to be placed in a proper historical perspective which documents that concerns about escalating racial tensions have been routinely expressed whenever African Americans confronted racially oppressive

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1 *See generally*, John E. Morrison, "Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action," 79 *Iowa L. Rev.* 313 (1994); Richard Delgado, "Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?," 89 *Mich. L. Rev.* 1222 (1991); Randall Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate," 99 *Harv. L. Rev.* 1327 (1986).

2 *See generally*, Susan Faludi, *Backlash* (1991), p. xix (attributing backlashes as reactions to women's progress and efforts to improve their status).

3 *See generally*, Michael Lerner & Cornel West, *Jews & Blacks* (1996) pp. 135–179.

4 *See generally*, Patricia J. Williams, *The Rooster's Egg*, 88-108 (1995).

policies. Racial tensions have surfaced with each instance of African American entry into previously segregated institutions. Whether racial progress was represented by lunch at the White House[5] or interracial sports competition[6] or desegregation of public schools African Americans have been constantly reminded to beware of escalating racial tensions.[7]

Building on the metaphor which analogizes affirmative action programs as something akin to kindling that accelerates and fuels racial resentments, experience should teach us that if one accelerant is not available, the racial arsonist will simply manufacture or devise another. Racial hostilities did not begin and will not end with the elimination of affirmative action programs.

Myth: Affirmative action programs stigmatize their beneficiaries reinforcing stereotypical notions of racial inferiorities.

The stigma argument may proceed from several directions.[8] I will focus on the perceived stigma that attaches to the beneficiaries of affirmative action. The concern often raised is that all African Americans will internalize notions of inferiority because we have been identified as being entitled to special programs.[9] This myth has been challenged on a number of levels. To the extent that affirmative action diminishes our accomplishments, Professor Randall Kennedy has reasoned that uncertainties about our accomplishments should be balanced against the stigmatization that results if we are "virtually absent from important institutions in society."[10] Professor Patricia Williams has reminded us that it is also "very demeaning" for African Americans to remain unemployed in disproportionately large numbers.[11]

Myth: Existing antidiscrimination and equal opportunity legal protections address racial discrimination in our society.

Over the past few years I have examined the breadth of markets that are largely unregulated by existing antidiscrimination schemes. From car purchases[12] to obtaining insurance[13] or professional medical services,[14] studies suggest that

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5 A. Leon Higginbotham, Jr., "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague," in *Race and Justice, Engendering Power*, pp. 3, 17–18 (Toni Morrison ed. 1992) (describing the reaction of United States Senator Benjamin Tillman of South Carolina to the invitation extended for lunch at the White House by President Theodore Roosevelt to Booker T. Washington; quoting Senator Tillman's angry response: "Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back in their place.")

6 Allen Guttmann, *Sports Spectators*, p. 119 (1986) (describing race riots by whites against blacks after Jack Johnson's victories over white boxers); Othello Harris, "Muhammad Ali and the Revolt of the Black Athlete," p. 56 in *Muhammad Ali, The People's Champ* (Elliot J. Gorn Ed. 1995) (noting that Johnson's victories over white boxers so infuriated whites that race riots occurred and after a white regained the title, Blacks were barred from interracial competition for two decades).

7 A. Leon Higginbotham, Jr. *supra* note 5 at 17-18 (relating how on Mar. 11, 1956, 96 members of Congress declared in a "Southern Manifesto" that the Supreme Court's *Brown v. Board of Education* decision had "'destroy[ed] the amicable relations between the white and negro races'" . . . and "'planted hatred and suspicion where there had been heretofore friendship and understanding'").

8 Morrison, *supra* note 1, at 342 (describing the various dimensions of the stigmatization argument).

9 Ibid. (challenging the stigma argument along with arguments that affirmative action programs erode merit standards and individualism goals).

10 Ibid. at 342 n. 192 (quoting Professor Randall Kennedy).

11 Ibid. at 342 n. 192 (quoting Professor Patricia Williams).

12 Ian Ayers, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations," 104 *Harv. L. Rev.* 817 (1991).

13 Gary Williams, "The Wrong Side of the Tracks: Territorial Rating and the Setting of Automobile Liability Insurance Rates in California," 19 *Hastings Const. L. Q.* 845 (1992) (describing redlining practices in the setting of car insurance rates in the state of California).

14 *See generally*, Council on Ethical and Judicial Affairs, "Black-White Disparities in Health Care," 263 *JAMA* 2344 (1990).

race discrimination disadvantages African Americans in a variety of economic transactions.

Yet, critics of affirmative action often proceed with arguments for dismantling affirmative action programs from assumptions that the necessary legal protections are in place to address racial discrimination in our society. They ignore the limited scope of the laws that prohibit discrimination. Federal statutes forbidding discrimination in employment do not address the racial discrimination against black consumers. Even the comprehensive legislative schemes that protect consumers against racial discrimination are generally limited to discrete markets.[15]

Myth: Affirmative action programs divert energies from human capital development to programs that benefit only a few middle class elite African Americans leaving behind large segments of a black underclass.

Discussions about the causes of racial economic inequality often focus on two opposing issues: whether institutional racial discrimination or individual behaviors better explain the economic "plights" of African Americans. Both liberal and conservative discussions succumb to this dichotomous approach. I suggest that when assessing and evaluating affirmative action measures consideration should be given to the arguments of progressive scholars. I join them in recognizing the relationships between governmental policies and the development of human capital.[16]

Contrary to the myth, affirmative action programs do not divert energies from human capital development. Rather, they can provide the ongoing structures that nurture and encourage the development of skills, constructive work habits, and passions for learning and entrepreneurship.

I am currently the first and only African American tenured member on the faculty of Marquette University Law School. At just the right point in my career, I was fortunate that certain members of the administration and faculty decided to move beyond the usual recruiting methods.[17] When I entered law school I operated from an optimism that was derived in part from positive employment experiences with the Federal government. As a law student I was energized and motivated by the outreach efforts of a law firm that I eventually joined as an associate after graduation. The opportunity to work during the summer and part time during the fall for that law firm sustained my enthusiasm for practicing law even though I knew that the representation of African American attorneys in majority-owned firms was minuscule. (I believe at the time there were only about five or six Black attorneys working at white law firms in Milwaukee.) Examination of affirmative action efforts in other sectors of Milwaukee reveals that such programs have continued to encourage rather than stifle development of human capital.[18]

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15 *See generally*; Equal Credit Opportunity Act, 15 U.S.C. Sec. 1691-1691f; Home Mortgage Disclosure Act, 12 U.S.C. Sec. 2801-10; Community Reinvestment Act, 12 U.S.C. Sec. 2901-05.

16 *See generally*, Cornel West, *Race Matters*, p. 12 (1993) (acknowledging that structures and behaviors are inseparable); J. Owens Smith, *The Politics of Racial Inequality*, pp. 3–4 (1987) (concluding that racial groups need not only cultural values which promote acquisition of human capital but also systems of protection which guarantee access to the mainstream of society's income redistribution system); Martin Carnoy, *Faded Dreams, The Politics and Economics of Race In America*, pp. 7–12 (1994).

17 C.F. Delgado, *supra* note 1, at 1228 (attributing his own and the employment of most law professors of color to luck or the result of student pressure or activities).

18 Tom Daykin and Tannette Johnson-Elie, "Contractors seek minorities to work on 2 major projects," *Milw. J. Sent.*, Feb. 12, 1995, at 8D (describing pressures on construction apprenticeship programs to increase the numbers of minority apprentices so that hiring goals on two major public projects will be met); Mike Dries, "Purging Past Prejudices," *Bus. J. Milw.*, Sept. 23, 1995, at 1 (describing multifaceted minority business training programs which incorporate recruitment for construction trade apprenticeship programs, mentoring of superintendent/project manager trainee programs, and business development technical assistance programs into affirmative action efforts); Barbara Kueny, "Meeting Planners Use Cash's Clout to Coax More Hotel Jobs for Minorities," *Bus. J. Milw.*, Sept. 5, 1992 at 10 (describing scholarship funds, tuition reimbursement programs, internship programs, and mentor programs growing out of affirmative action efforts by the Milwaukee hospital-

Finally, opponents criticize affirmative action programs for not addressing the problems of a growing Black "underclass." However, when doing so they often fail to acknowledge certain realities. Affirmative action programs were not meant to serve as the panacea for addressing each and every one of the problems stemming from the legacy of racial discrimination. Accordingly, it is unfair to criticize affirmative action programs for not resolving societal problems they were not designed to address. Affirmative action programs are only one strategy in the matrix of social structures necessary for economic success.[19]

II. Reassembling Affirmative Action Concepts

Affirmative Action Is a Business Imperative

Legal discussions primarily focus on whether race conscious affirmative action programs are appropriate and necessary remedial measures for addressing specifically identified discrimination. Business discussions are rapidly moving beyond this narrow focus. Demographic trends predicting increasing numbers of racial minorities in domestic workforces have prompted private employers to consider diversity policies as business imperatives.[20] Business objectives of increasing revenues by marketing to diverse cultures have likewise redirected justifications for diversity programs from equity-oriented to profit-oriented grounds.[21] Finally, affirmative action concepts have broadened to include more definitions of diversity that consider differences among employees such as race, gender, age, work, and family issues.[22]

Affirmative Action as an Evolving Strategy For African Americans

A criticism often lodged against affirmative action is that many programs have evolved from measures designed to eliminate racial discrimination to those that ensure equal results among racial groups. To the extent that affirmative action is criticized because it has simply evolved, I disagree. As we learn more about racism, its effects, and the manner by which it impedes the progress of African Americans, affirmative action concepts should evolve. They should evolve to address the specific manifestations of racism in our changing society. They should also evolve to address the particular economic and social challenges facing African Americans.

Note: The author expresses her appreciation to Deborah Kurkowski Doerr for providing research assistance in the preparation of this paper.

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ity industry).

19 Kennedy, *supra* note 1, at 1334 (expressing similar arguments); *see also*, J. Owens Smith, The Politics of Racial Inequality (1987) (describing how various governmental policies interacted with and encouraged various ethnic groups to develop the necessary human capital for economic success in the United States).

20 "White, Male, and Worried," *Business Week*, Jan. 31, 1994, at 50, 54 (quoting the CEO of a major corporation as describing diversity as a "business imperative"); Kueny *supra* note 18 (noting that Milwaukee must be viewed as a city which is a good place for minorities to do business if it expects to tap into the $3 to $6 billion national market of minority meetings and conventions).

21 Ibid., at 55 (noting that companies with desires to compete in the global marketplace consider diversity as important to meeting those goals).

22 Ibid., at 54.

II. Academic Examinations of Affirmative Action and Its Role in American Society

Affirmative Action As Discrimination: An Historian's View

By Thomas C. Reeves

Since definition should usually precede discussion, let us begin by being frank about affirmative action. It is, and was designed almost from the start to be, a form of discrimination. In the name of equality and justice, Americans today are defined by government and business on the basis of their race, sex, national origin, disability status, and military record, and are treated accordingly.

The beneficiaries of affirmative action are in general minorities and women, who, abundant evidence makes clear, have suffered from discrimination. The victims in general are white males, who, it is contended, are somehow collectively guilty of that discrimination.

At the heart of affirmative action is the racial and sexual quota. As Professor John Ellis has written, "No matter how often quotas are disavowed, they always reappear, because comparison to demographic percentages is what affirmation action is all about.... Quotas are for affirmative action what the gulag was for the Soviet system: its most real manifestation."[1]

In Executive orders issued by Presidents Kennedy and Johnson, the phrase affirmative action, making its debut, was used to convey the desire to eliminate discrimination. But just before Johnson issued his order in 1965, he gave a speech at Howard University that made it clear that he was interested in "equality as a result" as well as equality of opportunity. "This is the next and the more profound stage of the battle for civil rights."

Others were of like mind. From the mid-1960s on, bureaucrats serving the Equal Employment Opportunity Commission deliberately construed the Civil Rights Act of 1964 to permit the establishment of affirmative action discrimination. Quotas were first employed by the Federal Government during the Nixon administration, and the use of such euphemisms as "goals," "timetables," "set-asides," "aggressive recruitment," and "taking race into account" flourished throughout the Nation.

The United States Supreme Court played a major role in this policy. Cases in 1971 and 1978 paved the way for race-based privileges. In 1978, in *Regents of the University of California v. Bakke*, the Court first upheld explicit discrimination against whites. The following year, in *United Steelworkers of America v. Weber*, quotas were approved officially. Congress was active as well.[2]

Today, according to the Congressional Research Service, the Federal Government alone has 160 race and gender preference programs. Under current law, more than 100,000 companies and universities that employ more than 50 people and have Federal contracts exceeding $50,000 must establish "goals and timetables" to hire and promote women, minorities, Vietnam War veterans, and people with disabilities.[3] Federal agen-

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1 John Ellis, "Class-Based Affirmative Action," *Heterodoxy*, May 1995, p. 14.

2 For a solid and concise historical survey, see Paul Craig Roberts and Lawrence M. Stratton Jr., "Color Code," *National Review*, Mar. 20, 1995, pp. 36, 38, 40, 44–48, 50–51, 80. For excellent, full bodied studies, see Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (New Brunswick, 1991), and Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* (New York, 1996).

cies, operating under racial mandates, disburse more than $13 billion a year to minority-owned businesses.[4]

Seeking government contracts and eager to avoid discrimination lawsuits, businesses have routinely employed racial and sexual quotas.[5] One 1989 survey found that only 14 percent of Fortune 500 companies hired employees on talent and merit alone; 18 percent admitted having racial quotas, while 54 percent said they had "goals."[6]

Paul Craig Roberts of the Institute for Political Economy believes that the United States has become "a caste society in which there are two classes of citizens: those who are protected by civil rights laws and white males, who are not."[7]

Technically, affirmative action, as it is now practiced, is illegal under Title VII of the 1964 Civil Rights Act.[8] This proscribes preferences in employment for any group or individual because of race, sex, religion, color, or national origin. The whole point of the civil rights movement of the 1950s and 1960s was equality and the elimination of discrimination. Senator Hubert Humphrey, chief sponsor of the 1964 Civil Rights Act, flatly rejected the concept of quotas. But this has long been conveniently forgotten by advocates of special privilege.

There are a great many proponents of affirmative action discrimination, of course, especially among those who have benefitted from it. In late 1995, for example, *The Wall Street Journal* ran a front-page story on Atlanta corporate attorney Oliver Lee. The son of an illiterate garbage man, Lee was helped as a youngster by a federally funded program that gave special academic attention to selected black youths. "Affirmative action," he says, "is extremely important, crucial to the further peaceful development of our society. When you close off options, you're almost pushing people into stealing."[9]

Women in academia, for example, tend to favor affirmative action discrimination as they have prospered greatly from it. In order to attain sexual parity in the faculty, half of those hired in the University of Wisconsin system during the 1993–94 school year were women. In keeping with this favoritism, the "tenure clock" for women in the system has been extended for personal reasons, including family responsibilities. And publication requirements in some cases have also been lowered for women. Betsy Draine, associate vice chancellor for academic affairs at U.W.-Madison, says, "A woman on the tenure track may not develop the same friendship network that her male colleagues develop by, for instance, going to sports events. She doesn't learn the informal tactics that ensure success, like which journals really count among her colleagues."[10]

Black academics have also prospered by the push for minority faculty members and are very seldom opposed to affirmative action. Indeed, employment advertisements have for many years expressed open preference for minorities and women. In the case of minorities, the demand is great, in part, because the supply is limited: in 1989, blacks, Hispanics, and Native Americans produced fewer than 1,500 doctorates—not

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3 About 22 percent of the Nation's labor force works for employers policed by the contract compliance office. Asra Q. Nomani, "Affirmative Action Agency Is Assailed For Pushing Quotas," Preferential Hiring," *Wall Street Journal*, June 16, 1995.

4 Paul M. Barrett and G. Pascal Zachary, "Race, Sex Preferences Could Become Target In Voter Shift to Right," *Ibid.*, Jan. 11, 1995.

5 Paul Craig Roberts, "The Rise of the New Inequality," *Ibid.*, Dec. 6, 1995.

6 Roberts and Stratton, "Color Code," *National Review*, Mar. 20, 1995, p. 36.

7 Roberts, "The Rise of the New Inequality," *Wall Street Journal*, Dec. 6, 1995.

8 Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a et seq. (1988 & Supp 1994)).

9 Rochelle Sharpe, "Oliver's Twist: Affirmative Action Lifted Mr. Lee, and He Has Never Forgotten," *The Wall Street Journal*, Dec. 27, 1995.

10 Tom Vanden Brook, "Women academics progress, but slowly," *Milwaukee Journal Sentinel*, Nov. 29, 1995.

enough for half the colleges in this country to hire one new minority Ph.D.[11]

When a contractor is chosen for a public project because the owner of the company is a woman or a minority, the beneficiaries are, quite naturally, elated. (The Wisconsin Center and Brewer stadium projects have minority employment "goals," and at least 25 percent of the total dollar amount of contracts awarded must go to minority businesses.)[12] Women comprise 23 percent of the legal profession. When the Clinton administration allocated 31 percent of its nominees for Federal judgeships to women, feminists cheered.[13]

Reverse discrimination can be profitable to politicians on both the left and right, of course. Many of them who promote quotas, set-asides, and the like are rewarding financial donors, searching for votes, and boosting their credentials as "caring" and "compassionate."

There are also the untold numbers of government bureaucrats, civil rights "consultants," and lawyers who have a direct financial incentive to promote racial and sexual favoritism. The city of San Diego, for example, pays its equal opportunity program's administrative analyst $107,998 plus a generous benefit package. The University of California's affirmative action bureaucracy is estimated to cost taxpayers more than $10 million a year.[14]

How do the bureaucrats keep busy? Chicago's Daniel Lamp Company employed a 100 percent minority work force in 1991. The Equal Employment Opportunity Commission sued the company for having the wrong mix of Hispanics and blacks.[15] The director of affirmative action at California's Chico State University attacked an advertisement for a "dynamic teacher" as "restrictive," "Euro-centric," and "phallo-centric."[16]

In academia, the affirmative action bureaucrats are often backed by a variety of accreditation boards as well as by government. The North Central Association, for example, reaccredited the University of Wisconsin-Milwaukee in early 1996 but raised a serious concern: "Inadequate progress has been made in the areas of race, gender and ethnic balance at all levels of the university." This is, of course, a demand for further and more effective affirmative action discrimination. Association officials vowed to return in 3 years to monitor the school's "progress."[17]

The ranks of affirmative action proponents reach beyond those who have profited from it, of course. Idealism is a powerful motive. Some believe, for example, that the American dream will not be fulfilled until women and minorities are represented in positions of power and affluence in exact or at least fairly close proportion to their percentage of the population. This is thought to be a highly moral position, providing reparations for past and present discrimination.

The Glass Ceiling Commission, a Federal commission studying the progress of women and minorities in the work place, complained in late 1995 that only 0.4 percent of all senior managers of leading corporations were Hispanic, though Hispanics make up 8 percent of the Nation's work

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11 Thomas Sowell, *Inside American Education: The Decline, the Deception, the Dogmas*, (New York, 1993), p. 149.

12 Tom Daykin, "Goals set for contract distribution," *Milwaukee Journal Sentinel*, Feb. 12, 1996.

13 Associated Press story in *Ibid.*, Jan. 8, 1996.

14 K.L. Billingsley, "Status Quota," *Heterodoxy*, February 1995, p. 5.

15 Roberts, "The Rise of the New Inequality," *Wall Street Journal*, Dec. 6, 1995.

16 Paul Craig Roberts, "No one seems to care that we've demonized white men," *Milwaukee Journal Sentinel*, Jan. 14, 1996.

17 Tom Vanden Brook, "UWM is re-accredited despite finding of some weaknesses," *Ibid.*, Feb. 5, 1996. Professional accreditation bodies and special interest groups also put pressure on schools within academic institutions to conform. Richard Bernstein reports, "In the name of diversity, genuine diversity of opinion is discouraged, since any school that has nonorthodox views on racial preferences will, quite simply, not get accredited." See Richard Bernstein, *Dictatorship of Virtue: Multuculturalism and the Battle for America's Future* (New York, 1994), pp. 123–27. For a good survey of the issue, see "The State of American Higher Education: A Conversation with David Riesman, Part Two," *Academic Questions*, Spring 1995, pp. 32–43.

force.[18] The obvious solution to the problem is to promote Hispanics, because they are Hispanics, until the 8 percent figure is reached. Thereafter, the population statistics should be carefully monitored and appropriate adjustments made by American business and government. How many Eskimos should be senior managers of the top Fortune 1,000 industrial and 500 service companies? Consult the latest census data.

Liberal political scientist Andrew Hacker has written, "By the end of 1991, only 1.7 percent of America's chemical engineers, only 0.9 percent of its architects, and a mere 0.6 percent of its airline pilots were black. There is a special need for an increased black presence in these and other areas, and with as little delay as possible. If we insist on making black Americans match others' scores on the prevailing tests, their representation will not be much different in the year 2010." The solution is obvious: affirmative action discrimination. "If nothing else, this can be construed as a price we should pay for social stability."[19]

Anger, envy, and revenge—historically not among the higher virtues—are also motives behind affirmative action. Many black and feminist leaders have vented their rage against the historic leadership of white males in all walks of American life. Indeed, the justification for the many hundreds of women's studies and African-American programs in American higher education assumes the existence of an oppression so vast that it cannot be adequately examined in all other academic disciplines.

What about the fact that white males continue to dominate leadership positions in America? Isn't that the simple result of discrimination against everyone else? Fantastic quantities of research would be needed to prove that assertion. And even if this Oliver Stone-like conspiracy could be proved, is discrimination best answered by discrimination of another kind?

Opponents of affirmative action discrimination include, of course, those who have been its victims, those who, solely because they are white males, are excluded from jobs, promotions, business opportunities, admission to colleges and universities, and so on. A study by the National Opinion Research Center in 1990 reported that 1 in 10 white males had been injured by affirmative action. In 1993, for example, 75 supervisors in New York's Human Resources Administration were skipped over for promotion because, as one official said, they were "too white and too male."[20] Similar cases abound in the massive literature on civil rights.

Asians have suffered too, especially when quotas have been placed upon them in academia. Preferential, race-conscious admission policies at the University of California at Berkeley, for example, have received much attention. In 1989, Berkeley turned down more than 2,500 white and Asian applicants with straight-A averages.[21]

Some who oppose affirmative action discrimination deny that America is any longer engaged in widespread racism or sexism. There is merit to this argument, even though, of course, racism (black as well as white) and sexism (female as well as male) continue to exist—and, given human nature, no doubt always will.

It is a question of degree, and the progress made in just the last quarter century has been remarkable. Today, for example, a hard-core racist would have a difficult time enjoying the major professional sports. One thinks of the nationwide adoration of basketball player Michael Jordan and of the veneration in Wisconsin of Green Bay Packer Reggie White—both multimillionaires whose success was earned not granted.

The love affair between the Packer all-star and predominantly white Wisconsin, for example, has received national attention. Reggie White is also an ordained minister, and when his church in

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18 Diane Lewis, "Commission targets 'glass ceiling,'" *Wall Street Journal*, Nov. 23, 1995.

19 Andrew Hacker, "An Affirmative Vote for Affirmative Action," *Academic Questions*, Fall 1992, p. 27.

20 Bernstein, *Dictatorship of Virtue*, p. 128.

21 Dinish D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* (New York, 1991), pp. 24–58. The A average figure is on p. 36.

Knoxville, Tennessee, was burned down on January 8, 1996, apparently by racial extremists, Wisconsinites rallied quickly to raise funds to replace the structure. Within a month, nearly $300,000 had been collected, the great bulk of it from Wisconsin residents.[22] On February 14, at the ground-breaking ceremony in Milwaukee for the Wisconsin Center, White shared the stage with the Governor and Mayor and gave the ceremonial blessing.[23]

Many of our most popular show business personalities are from the ranks of those said by some to be cruelly oppressed. One thinks of Oprah Winfrey, Bill Cosby, and Michael Jackson, three of America's wealthiest citizens. Successful black and female businesspeople and politicians abound. In 1995, tens of millions of Americans of all sorts expressed support for General Colin Powell as President of the United States. (According to the Gallup Poll, in late 1995 Powell was the second most admired man in America, trailing only President Clinton.)[24] The movie "Waiting to Exhale," which starred black women, was a major box office hit in early 1996. There is serious talk of placing the highly popular female Governor of New Jersey on the G.O.P. presidential ticket in 1996, a move pioneered by the Democrats in 1984.

Some who oppose affirmative action discrimination argue that it is designed primarily to appease the consciences of whites, and that the policy avoids deeper issues. Black scholar Shelby Steele, for one, has stated: "What I don't like about racial or other kinds of preferences is that they are always a circumvention. And what are they circumventing? Usually something that is difficult and hard-earned, like talent or competence or character or the mastery of a certain range of knowledge. Black Americans, like all Americans, need policies that encourage these qualities, because they are the only qualities that will deliver us to an equality of condition with others." Steele calls for developmental assistance and an "absolute commitment" to end discrimination of all kinds.[25]

Some critics point to the racial disharmony brought about by affirmative action discrimination, and they are pointing to a very real problem. On campuses, for example, where minority students have been admitted because of race, those students have often chosen a self-segregated lifestyle. Dropout rates for these students are extremely high. Black scholar Thomas Sowell has described the hatred and damage to self-esteem created by placing people in serious academic courses who are unprepared to compete successfully.[26] I have seen this tragedy repeat itself in my classes for many years, and I deplore the needless suffering.

Some critics also note that preferential admission policies in higher education largely benefit blacks from the black middle and upper middle classes—people who have not been truly disadvantaged. And affirmative action does nothing positive on behalf of the millions of poor whites who can easily document their own disadvantaged status.

Favoritism also encourages the poison of self-pity and encourages the often destructive view that the world somehow owes one a living.

Public opinion tends to oppose affirmative action discrimination by substantial margins. On campus, for example, one survey of 5,000 college students at 40 colleges showed that at predominantly white colleges, 93 percent of white students and 76 percent of black students agreed that all undergraduates should be admitted by meeting the same standards. At predominantly

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22 Margo Huston, "White flooded with offers to rebuild," *Milwaukee Journal Sentinel*, Jan. 13, 1996; Jim Stingl, "Bradley Foundation donates $3,000 to White's Church," *Ibid.*, Jan. 14, 1996; Tom Silverstein, "White wants to add to Packers contract," *Ibid.*, Feb. 1, 1996; Katherine M. Skiba, "Fire at White's church seen as isolated event," *Ibid.*, Feb. 6, 1996.

23 Front page photograph, *Ibid.*, Feb. 15, 1996.

24 "Religious Leaders High on the List of Most Admired," *emerging trends*, January 1996, p. 4.

25 Shelby Steele, "Response: Against Paternalism," *Academic Questions*, Fall 1992, p. 35.

26 Sowell, *Inside American Education*, pp. 144-48, 152-63.

black colleges, more than 95 percent of the students of both races were of the same opinion.[27]

A Gallup Poll taken in July 1995 shows that Americans reject employment quotas 65 percent to 35 percent, and college admission quotas 57 percent to 39 percent. Favoring a less qualified minority over a white college applicant is rejected by 84 percent, including 68 percent of blacks interviewed.[28] An Associated Press poll found, in 1995, that only 16 percent supported affirmative action when they understood it to include quotas.[29]

A poll published by the Wisconsin Policy Research Institute in November 1995 showed that 76 percent of Wisconsin residents oppose requiring business to hire a specific number of minorities and women, and 68 percent oppose reserving openings at colleges and universities for blacks and other minorities. Still, 59 percent favor programs without quotas that would help minorities and women get jobs or college admittance.[30] Most Americans, it seems, want to help the disadvantaged, but they oppose discrimination.

The Governors of California and Louisiana have attempted to ban affirmative action discrimination in their States.[31] The University of California Board of Regents has tried to end racial preferences on their campuses. The California Civil Rights Initiative, ensuring that the State government enforces laws without discrimination in favor or against anyone, is said to be supported by 65 percent of California voters.[32] Former Senator Bob Dole and other Republicans have called for the abolition of affirmative action in Federal hiring and contract programs.

No doubt reflecting public opinion, a Federal court of appeals, in 1994, declared unconstitutional a University of Maryland scholarship program open only to black students.[33] In early 1996, the United States Supreme Court cleared the way for white males to challenge government affirmative action "goals" in court, even when they have not been personally damaged by them. The decision casts doubt upon the viability of a preferential system in California which steered $1.1 billion a year in business to companies owned by minorities and women.[34] In March 1996, the Fifth U.S. Circuit Court of Appeals ruled that racial quotas in university admissions are unconstitutional, a decision that many critics of affirmative action hailed as the beginning of the end for reverse discrimination.

Still, millions of Americans are convinced that racism and sexism are of major consequence and that the appropriate remedy is reverse discrimination. A polarization between those who hold this view and the majority of Americans is becoming more acute. This is especially true between blacks and whites. One can see this racial tension, for example, in responses to the O. J. Simpson case—a majority of blacks seeing a white conspiracy against the accused, and a majority of whites seeing the defendant guilty as charged. The inflamed reactions to *The Bell Curve*, which dealt with the issue of white and black intelligence, and Dinish D'Souza's *The End of Racism*, which argued that the plight of black Americans is largely

27 Ibid., p. 163.

28 Roberts, "The Rise of the New Inequality," *Wall Street Journal*, Dec. 6, 1995.

29 Howard Goldberg, "Poll shows affirmative action split," *Milwaukee Journal Sentinel*, Jul. 15, 1995.

30 "Poll Favors Independent in 1996," *Wisconsin Update*, November 1995, pp. 1–4.

31 Gale Holland, "Louisiana Governor calls for an end to affirmative action," *USA Today*, Jan. 12, 1996.

32 Editorial, "Clarifying California," *Wall Street Journal*, Dec. 6, 1995.

33 A proposal to offer financial assistance for blacks at Marquette University was abandoned because administrators feared costly lawsuits based upon the Federal court decision. Tom Vanden Brook, "Aid plan rejected amid MU suit fears," *Milwaukee Journal Sentinel*, Jan. 22, 1996.

34 "Supreme Court eases suits aimed at affirmative action," *Ibid.*, January 17, 1996. In February, the Court initially approved the redrawing of racially gerrymandered voting districts in Georgia. "What's News—," *Wall Street Journal*, Feb. 7, 1996.

attributable to their own dysfunctional culture, also illustrate the polarity.

When four of the six minorities appointed to cabinet-secretary posts by President Clinton faced Justice Department investigations on ethics charges (all four were black or Hispanic), some critics automatically saw racism and sexism at work.[35]

There is, today as well, a growing antagonism between men and women, the former tending to be more conservative about affirmative action and related social and cultural issues than the latter. That gap is being translated into political differences and may well have an impact on the elections of 1996. White men tend to be especially sympathetic toward G.O.P. candidates.[36]

After all these years, few seem fully satisfied with the results of affirmative action. As James Neuchterlein has put it, "Whites see a vastly expanded field of opportunities that blacks have failed fully to use to their advantage. . . . Blacks see whites as engaged in a massive self-deception as to the persistence of racial prejudice." Whites and blacks, Neuchterlein writes, "live in different conceptual universes on questions of race."[37] And many women continue to rail against the "glass ceilings" that allegedly stifle their professional advancement.

The divisiveness is such that some have expressed despair. Conservative Dave Shiflett has written, " . . . whining by white males, as Justice Clarence Thomas has made clear, is both useless and embarrassing. So best to sit back and enjoy the discrimination as much as possible—which is not so hard as it sounds. Watching management devising and implementing affirmative action plans can be as amusing as watching dancing bears being trained to roller skate."[38] Many liberals, on the other hand, anticipate increasing tyranny as wicked right-wingers win elections and threaten what the Clinton administration proudly refers to as the quest for "diversity."

What this historian can conclude is modest but, I hope, instructive. In the first place, it is clear to me that race continues to be our most pressing national problem. More blacks are moving into the middle class than ever before, but the social and economic distance between most whites and blacks remains vast and may, for a variety of reasons, grow larger. It is highly doubtful that racial discrimination is the major factor in this tragic disparity.

There seems to be little ground for mutual understanding about how to solve the problem. One exasperated conservative wrote not long ago, "After all, whites are not *forcing* blacks to have their current illegitimacy rate (68 per cent, nearly three times as high as in the immediate aftermath of slavery) or to provide over half of U.S. murder victims (94 percent of whom are killed by other blacks)."[39] Blacks respond angrily to such rhetoric with charges of racism, convinced anew that they live in a hostile and threatening environment. No more urgent task confronts us than the creation of good will among blacks and whites, a goal frustrated by affirmative action discrimination.

Secondly, affirmative action in some form is deeply embedded in society and is not likely to end in the near future. For one thing, liberals, who control the media and dominate education at all levels, have made it an integral part of their ideological agenda. (CBS news correspondent Bernard Goldberg wrote recently, "The old argument that the networks and other 'media elites' have a liberal bias is so blatantly true that it's hardly worth discussing anymore.")[40] Affirmative action has also proved to be popular in business,

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35 Helene Cooper, "A Question of Justice: Do Prosecutors Target Minority Politicians?," *Ibid.*, Jan. 12, 1996.

36 Gerald F. Seib, "In Historic Numbers, Men and Women Split Over Presidential Race," *Ibid.*, Jan. 11, 1996.

37 James Neuchterlein, "O. J. Simpson & the American Dilemma," *First Things*, December 1995, p. 11.

38 Dave Shiflett, "Rocky Mountain Hire," *The American Spectator*, December 1995, p. 44.

39 Peter Brimelow, "He Flinched," *National Review*, Nov. 27, 1995, p. 61.

40 Bernard Goldberg, "Networks Need a Reality Check," *Wall Street Journal*, Feb. 13, 1996. For a sample of life in

not only as a way of avoiding lawsuits but of attracting customers.[41]

The affirmative action of the long-term future, however, may likely be more of the original brand that is seen now, dedicated to the elimination of discrimination rather than its promotion. Quotas, "goals," "set-asides," and the like may not survive because most Americans consider them unfair.

Then too, the rapid ascent of women into the professions and in business will surely decrease their support of reverse discrimination. (Today, one-third of all business owners are women. The Small Business Administration in 1995 guaranteed $1.45 billion in 14,000 loans to women, four times the loans made in 1992.[42] Female gynecologists today initially earn $20,000 a year more than their male counterparts.)[43] Not needing it, they will feel sufficiently self-confident to consider favoritism demeaning, which, of course, it is.

The media stereotype of women as liberal feminists is already untenable. In 1994, 55 percent of white women voted Republican.[44] According to the Gallup poll, there are far more women than men who identify with the "Christian Right."[45]

Affirmative action is not the only source of assistance to minorities and women. In the private sector successful people have been reaching out to their less fortunate brothers and sisters for years. The Hispanic Chamber of Commerce of Wisconsin, for example, assisted 32 small businesses in 1995 and helped two African American women start a business. This 290 member organization has been developing businesses and creating jobs in the Hispanic community since the early 1970s. It enjoys the support of banks, corporations, and politicians.[46]

Moreover, in the 1990s the Nation is growing increasingly conservative. According to an exit poll taken in the fall of 1994, only 11 percent of the Nation's voters called themselves liberal while 12 percent said they were "somewhat liberal." In contrast, 48 percent called themselves conservative or somewhat conservative.[47] This trend does not bode well for affirmative action discrimination.

Most Americans have always admired achievement, and when individual merit is again rewarded, without consideration of race, sex, and the other current categories of distinction, the Nation will surely be a healthier, happier place. Such a utopia may never occur, but it is worth working for. The elimination of all forms of discrimination should surely be among the Nation's highest priorities.

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contemporary academia, *see* Thomas C. Reeves, "Partisan Revelry at the Advocacy Conference," *Academic Questions*, Fall 1995, pp. 53-7.

41 Leon E. Wynter, "Business and Race," *Wall Street Journal*, Feb. 7, 1996.

42 "Women struggle for capital," *Milwaukee Journal Sentinel*, Jan. 30, 1996.

43 Andrea Gerlin, "The Male Gynecologist: Soon to Be Extinct,?" *Wall Street Journal*, Feb. 7, 1996.

44 Kellyanne Fitzpatrick, "By the Right-Vote!," *National Review*, Dec. 11, 1995, p. 76.

45 "Who Belongs To The Religious Right?," *emerging trends*, April 1995, p. 2.

46 Tannette Johnson-Elie, "Hispanic chamber celebrates a year of 'small miracles,'" *Milwaukee Journal Sentinel*, Jan. 18, 1996.

47 Telephone poll conducted by Greenberg Research for the Democratic Leadership Council, released on Nov. 17, 1994 by the Roper Center for Public Opinion.

Affirmative Action at Work: Battleground of Competing Values

By Bron Taylor

Introduction

Affirmative action has become a battleground over competing values and different perceptions of social facts. Although people of good will disagree over the moral permissibility of affirmative action, public discourse about such policies has become increasingly rancorous. The most basic errors of ethical reasoning are common as some with firm convictions attack straw men of their own creation, launch ad hominem attacks, and routinely beg the central moral and factual questions.

Between 1985 and 1989 I spent a great deal of time observing affirmative action programs first hand, providing affirmative action training to ordinary workers in a large government workplace, and doing empirical research assessing the impact of an aggressive affirmative action program within this workplace and upon its workers' attitudes. My research objective has been to bring ethical reflection down from the ivory tower, down from intellectual abstraction divorced from social reality, and instead to engage in moral reflection cognizant of the actual impact of affirmative action on real people.

Unfortunately, most of the debates about affirmative action occur without reference to the actual impacts of such policies and are not characterized by fair minded consideration of all arguments and concerns. Even when the impacts of such policies are considered, the resulting reflections are usually based on anecdotal information that tends to reinforce preconceived ideas, rather than on careful empirical research designed to overcome the very human tendency to notice only that which confirms preconceived beliefs.

I began my investigations into affirmative action sympathetic to the plight of women and people of color in the workplace, but troubled about many affirmative action practices. After years of empirical analysis and moral reflection about this complex area of public policy, I consider myself a strong but ambivalent supporter of affirmative action. I do not defend every practice implemented under the umbrella of affirmative action law. But I have concluded that, on balance, these policies are morally warranted, partly because critical moral reasoning undermines the moral premises and empirical claims of their opponents. Indeed, the empirical evidence suggests that these policies have salutary social consequences.

It is important to begin this analysis in a novel way—by framing the question in a fair and neutral way. After this, I will explore the values and facts now providing the central battleground for the affirmative action controversy.

Framing the Question—Affirmative Action as Preferential Treatment

Fairly framing the issue is no easy task. Even when describing today's civil rights laws we quickly encounter strenuous disagreement. It is instructive to begin by focusing on one of the most crucial judicial rulings and its legacy, the Supreme Court's *Griggs v. Duke Power Co.* ruling, which governed antidiscrimination law between 1971 and 1989, and again since the Civil Rights Act of 1991 was signed reluctantly by George Bush.

The *Griggs* decision held that title VII of the 1964 Civil Rights Act forbids not only practices adopted with a discriminatory motive, but also practices which, though adopted without discriminatory intent, have a discriminatory effect on minorities and women. This was the beginning of a legal framework for bringing "disparate impact" cases. The Court ruled that employers cannot use non-relevant job requirements to screen applicants when such requirements disproportionately and adversely affect black applicants. (Specifically, it prohibited Duke Power Company from requiring intelligence tests or a high school diploma as a prerequisite for low-level jobs.) The Court concluded that employers must be able to demonstrate that challenged job practices are required by "business necessity." In other words, practices that adversely affect minorities or women must be related to (or be good predictors of) job performance.

The practical consequence of this ruling, in combination with other civil rights laws and Presidential orders, has been the proliferation of affir-

mative action programs. Employers attempted to diversify their workplaces in part to shield themselves against litigation; and the courts could order such programs as remedies in discrimination cases. The 1989 Supreme Court decision in *Wards Cove Packing v. Atonio* made it much easier for employers to justify employment practices that excluded women and minorities, thereby reducing the pressure on them to diversify their workplaces. The hotly disputed Civil Rights Acts of 1991 was signed by President Bush only after the Thomas confirmation hearings raised the ire of many American women, complicating Republican reelection hopes. When Bush caved-in and signed the bill, the *Griggs* standard was reestablished, as were pressures on employers to actively pursue a race- and gender-balanced work force.

Trying to frame the issue to their advantage, opponents of the 1991 act denounced it as a "quota bill." This quota charge involved a significant overstatement, ignoring the real-world distinction between "quotas" (fixed proportional hiring requirements) and "goals and timetables" (flexible hiring targets for diversifying workplaces and measuring progress toward diversity). Proponents also tried to frame the question to their advantage, first accurately denying that the bill would promote quotas: clear antiquota language was included in the bill. However, proponents of the bill overstated their case. Senator Kennedy's chief attorney, for example, who was involved in drafting the bill, even told me that "this bill has nothing to do with affirmative action!" In his zeal to get the bill passed, he and other proponents inaccurately denied that antidiscrimination law (and not only affirmative action law) pressures employers to diversify, numerically, their work forces, leading to preferential personnel practices. Such proponents also wanted to ignore how discrimination litigation often results in settlements or judicial rulings that establish affirmative action style goals and timetables designed to diversify a workplace. Moreover, such proponents of the 1991 civil rights bill also inaccurately denied that such goals and timetables can and sometimes do become inflexible quotas.

Meanwhile, on the other hand, opponents of such practices often asserted that the presence of goals and timetables inevitably lead to the hiring of unqualified workers. There is, however, no compelling empirical evidence that goals and timetables lead to the hiring of incompetents *more often than is the case in the absence of such goals.* Industrial psychologists acknowledge, for example, that predicting job success is an imprecise art—mistakes are inevitable. Part of the overall problem here is that anecdotes are often mustered to buttress the assertions that unqualified workers are being forced on employers. Of course, the problem with such evidence is that people tend to notice only those incidents reinforcing their preconceptions—and this is why empirical evidence, designed to overcome this tendency, is critical for thoughtful policy deliberations.

To fairly frame the question, therefore, we must not assume that anecdotal stories about incompetent workers being hired under these policies demonstrates that these policies, and not the imprecision of hiring processes, are responsible when this occurs. Even more importantly, contrary to the claims of many proponents of these policies, we must acknowledge their preferential dimensions. When we debate these policies, we should have preferential, goal-type practices in mind. Antidiscrimination law, and affirmative action statutes, executive orders, and judicial rulings all contribute to pressures on employers to extend hiring and promotion preferences to women and people of color.

By attempting to frame the debate in terms favorable to their conclusions, both opponents and proponents are guilty of begging the essential question—and here it is: Should antidiscrimination law put pressure on employers to diversify their workplaces, promoting the use of goals and timetables, or rather, does such pressure violate important moral principles? Put differently, the critical moral issue is whether the law should encourage result-oriented affirmative action.

Framing the Question—Options for Civil Rights Legislation

Understanding the options available to legislators when structuring antidiscrimination and affirmative action law provides further background essential to a fair-minded framing of the question. Indeed, when considering the various options available for antidiscrimination law, we can see why such law is so complex and controversial. Such laws must first articulate the appropriate remedies and who is entitled to them. A host of additional questions follow. Is it ever permissible

to preferentially treat individuals from one group because of their race or gender? What standards should be used to determine which race-conscious decisions are morally permissible and benign? What proof, with antidiscrimination law, should be required to trigger remedies and enforcement? Who should be responsible for enforcement, and what sort of remedies should those responsible for enforcement be empowered to impose? Should those caught discriminating be subject to criminal or civil trials and punishment, or both? If enforcement actions are limited to civil remedies, should the civil remedies include compensatory and punitive monetary damages, or rather, should the remedies only restore victims to their place had the discrimination not occurred? Who should benefit from compliance efforts, only those individuals who can be identified as victims, or all members of the group illegally discriminated against? Who should be prohibited from discriminating: all individuals; all institutions; only government agencies and contractors; private companies or clubs? Most of the above questions have been disputed in legislative and judicial battles over affirmative action.

Discrimination: Personal or Structural

The answers to many of the previous questions depend on assumptions about the nature of discrimination. If discrimination simply results from prejudiced individuals, enforcement will appropriately focus on the behavior and statements of suspect individuals. If discrimination is subtle or even nonintentional, enforcement will first evaluate if hiring criteria actually predict job performance, and if not predictive of job performance, it must be determined if these practices weed-out minorities or women. With a more complex view of discrimination, the focus will be more on institutions and structures than on individuals.

Clearly discrimination can become institutionalized, independent from conscious intent. (For example, job prerequisites that do not predict job success or failure, but that are used to reduce and make more manageable the numbers of applicants, sometimes disproportionately screen out nonwhite applicants.) Word of mouth hiring, in a deeply segregated society, inevitably discriminates against people of color. Most opponents of civil rights laws see discrimination primarily as the result of personal prejudice. They then assert that such discrimination is in decline and conclude that preferential responses to it are unnecessary. When recommending remedies, they usually endorse civil remedies when derogatory racial statements provide "smoking gun" evidence of discriminatory intent.

It is critical to note that although "enforcement" is often the only antidiscrimination measure endorsed by opponents of affirmative action, *criminal penalties have never been seriously considered.* Ironically, conservatives who otherwise strongly argue that harsh penal punishments deter wrongdoing deny the value of such penalties when it comes to race-and gender-based discrimination. Indeed, they usually go further, arguing that even allowing *monetary* penalties is bad because it fosters divisiveness and litigation. In the recent debates over the Civil Rights Act of 1991, for example, many opponents of the bill resisted the extension to women of the right blacks *already* had to collect both compensatory and punitive damages in egregious cases of harassment and job discrimination.

It is difficult *not* to suspect the motives of those who wish to limit our response to discrimination to the enforcement of civil law, especially those who simultaneously resist putting any teeth in such enforcement efforts, as is often, if not usually, the case.

The Heart of the Debate: Affirmative Action and the Equal Opportunity Principle

Of course, most of the debates about affirmative action center around the impact of such policies on the opportunities of all concerned. Indeed, there appears to be a remarkable, near-consensus in U.S. culture about the idea of "equal opportunity based on merit." Grounded in 19th century philosophical liberalism (a philosophical tradition encompassing most of those whom we call conservatives and liberals) the equal opportunity principle declares that preferred jobs and salaries should be distributed through a competition—unmarred by discrimination—in which the "best qualified" applicants get the preferred positions. Inequalities are justifiable so long as they result from a fair competition. The equal opportunity principle presumes that all people of good will would endorse and benefit from such a merit-society. This distributive ideal has been the central

moral underpinning of U.S. civil rights legislation. Most arguments for and against affirmative action, therefore, are framed in terms of the question: Does affirmative action promote or hinder equal opportunity. Opponents say it does not and instead spawns reverse discrimination. Proponents say that on balance affirmative action does promote equal opportunity, at least long-term.

Different Conceptions of Equal Opportunity: Formal and Substantive

Even though the vast majority of Americans express support for the equal opportunity principle, the different meanings "equal opportunity" has to different people complicates the matter. For some, equal opportunity is a purely formal, i.e. procedural notion, referring only to equality before the law. According to such formal conceptions of equal opportunity, there should be no race or gender-based laws restricting access to the market competition. Others insist that equal opportunity is a meaningless notion unless it is more substantive in nature, referring to whether people have actual equal life chances to prepare themselves and compete in market society.

So although most endorse the equal opportunity principle of distributive justice, confusion and disagreement over its meaning helps explain the controversy. Without resolving whether we want a formal or substantive form of equal opportunity it is difficult if not impossible to decide whether it is ever permissible to pressure employers to practice goal-type preferential hiring.

When thinking about affirmative action, for example, opponents of goal-type practices tend to have in mind the more restrictive, formal-procedural conception. This is especially true when they complain that the focus of such policies has shifted from insuring that individuals are *protected* from discrimination to specifying hiring proportions. Such critics often assert that hiring preferences also reduce productivity because less qualified people are hired, and conclude that this harms U.S. society and global competitiveness. These critics believe there should be no legal barriers to talents—but that no one should try to manipulate who gets what—the results must be left to market competition.

Proponents of goal-type practices, on the other hand, tend to think that equal opportunity should refer to actual life chances to develop one's talents. They reason (or assume) that in the absence of discrimination (and other social disadvantages), individuals from different groups would be hired in approximately equal proportions to their presence in the workforce. Such proponents conclude that discrimination prevents many from developing their talents. From this perspective, preferential affirmative action can be seen as a strategy to help equalize life chances by giving individuals opportunities to develop their talents. Moreover, for proponents of goal-type practices, achieving equal opportunity involves more than prohibiting discrimination, because discrimination is often subtle, systemic, and hard to prove.

That this debate occurs at all is troubling. On the one hand, equal opportunity does seem intuitively to be a good moral principle. However, if this principle has any moral force it must include more than a legal proceduralism unable to address inequities in the building blocks of opportunity. It seems to me that many opponents of affirmative action ignore this, maintaining either a callous indifference to the existence of vastly unequal life chances, or an incredible ignorance about such inequalities. Surely we ought to factor into our moral deliberations how life chances are substantially based upon unearned social privileges or disadvantages.

Social Building Blocks of Equal Life Chances

I think this can be quickly illustrated if we ask ourselves: what are the social prerequisites of equal opportunities. In other words, what is necessary for us to develop the natural talents with which we are born?

Some of the answers are obvious, others less so but as important. First, we would need an unprejudiced society that does not perpetuate stereotypes, or at least a society able to prevent people from acting on their prejudices.

Second, we would need public and private sector commitment to identifying vestiges of discrimination institutionalized through nonrelevant job requirements. (This is the insight articulated in the *Griggs* decision.) For example, educational degrees not relevant to the job in question should not be used as screening devices. Such degrees are disproportionately possessed by individuals from nondisadvantaged groups.

Third, we would need nondiscriminatory recruitment, promotion, and firing procedures. There would have to be a society wide commitment to recruiting from all groups and to eliminating discriminatory criteria in all personnel decisions. For example, "word of mouth" recruitment tends to perpetuate current work force composition; interviews held away from minority communities and advertized only in anglo media are less likely to draw minority applicants; and interviews that discourage women and minorities through inappropriate or illegal questions or statements must also be rooted out. Moreover, upwardly mobile job ladders must be accessible to those in job classifications disproportionately filled with individuals from disadvantaged groups.

Fourth, educational and cultural experiences would have to be equalized. I think we ought to be honest about this. Equalizing educational experiences and, thus, life chances would require public policies resembling at least one of three objectives: either wealth would have to be redistributed so that everyone would have equal access to the education and cultural experiences upon which opportunities are based; or, we would have to harm the educational and cultural opportunities of the economically and socially privileged, lowering their opportunities to the level of disadvantaged groups; or a third, less mean spirited option, would be to implement public policies (and encourage or mandate similar policies for the private sector) designed to raise the educational and cultural experiences of disadvantaged groups until functional parity is reached. Although U.S. society has made some efforts in the third direction, especially with regard to education and through programs such as Head Start, it is obvious that broadening overall educational and cultural opportunities is difficult if not impossible to achieve.

Fifth, we would need rough parity in the nutritional and emotional building blocks of human development. U.S. culture has made some feeble efforts in this direction through food programs and laws designed to protect children from abuse and neglect—but on balance—inequalities in the nutritional and emotional prerequisites to equal opportunity are not narrowing significantly.

Finally, democracy itself may be a prerequisite to equal life chances—if being able to meaningfully participate in the decisions that affect one's life is prerequisite to the full development of innate talents.

The above digression into the building blocks of equal life chances is designed as a counterweight to facile assumption, embedded in the American Dream mythology of U.S. culture, that with sufficient initiative anyone can achieve their dreams. Although many if not most would agree that the moral force of the equal opportunity principle depends on the hope for "equal life chances," too few of us have thought carefully about how complicated, difficult, and ultimately impossible it would be to completely equalize the building blocks of equal opportunity.

Although redistributing wealth may be an essential prerequisite to an equal opportunity society, clearly this is an unlikely prospect in U.S. culture. It is not surprising, therefore, that those who support equal employment opportunity as a goal logically turn to other policies designed to improve the opportunities of disadvantaged individuals, including affirmative action.

Common Arguments Against Preferential Affirmative Action

Showing the inadequacy of a purely procedural conception of the equal opportunity principle does not lead inevitably to the conclusion that preferential affirmative action is morally permissible. We must also seriously consider several important arguments against such policies. The best of these arguments acknowledge that we are far from achieving an equal opportunity society, but nevertheless reject affirmative action, asserting that it does more harm than good or fails to deliver what it promises.

Common Moral Arguments Against Goal-Type Affirmative Action

One of the most serious complaints about goal-type affirmative action is that it involves unfair *overgeneralization.* On the one hand, it is *overinclusive.* It helps those who do not need help—middle and upper class women and minorities who generally are not prevented from developing their natural talents. On the other hand, it is *underinclusive.* It fails to help those most disadvantaged by discrimination—those who qualify for few if any jobs. It is also underinclusive in its

failure to enhance the life chances of disadvantaged white men.

A second major objection is that affirmative action requires *some* white men to bear the burden for discrimination (requiring that they sacrifice positions) even though they may not personally be guilty of discrimination. Preferential affirmative action does seem to run afoul of the common intuition that compensatory justice should require actual perpetrator(s) to compensate the real victim(s).

A third major objection is that, rather than helping minorities and women, affirmative action programs stigmatize them with a mark of inferiority, reinforcing prejudices that they are not good enough for their positions. These charges have been made throughout the controversial history of these policies, but have been strengthened recently as a few black conservatives iterate such concerns and these views are given massive attention by the white dominated media.

Just as serious is a fourth charge, that such policies exacerbate hostilities among various racial and gender groups. Critics of affirmative action often voice such criticisms, sometimes even providing some plausible but inconclusive evidence to buttress their claims.

To my mind, these types of arguments provide legitimate reasons to doubt if antidiscrimination law, and the types of affirmative action it fosters, are morally warranted.

Evaluating These Arguments

My own research has illuminated these criticisms. First of all, it confirms the conclusion of the Senate Report on the Civil Rights Act of 1990 which favorably viewed the law under the *Griggs* standard. The report stated that under *Griggs*, in hundreds of cases, "Federal courts have struck down unnecessary barriers to the full participation of minorities and women in the workplace, and employers have voluntarily eliminated discriminatory practices in countless other instances . . . opening up new jobs and careers to millions of Americans" (Senate Report 101-315, p. 15). This is undoubtedly true. The institutional context of my research was almost exclusively white before *Griggs*, its professional ranks were exclusively a white-male preserve, and in the absence of *Griggs* fostered changes this would still be largely true today. Other social science studies confirm my own at this point. (See for example, the summary of such studies in G. Ezorsky's *Racism and Justice: The Case for Affirmative Action* (Cornell University Press, 1991).

Although any morally sensitive person would be concerned about "overgeneralization," and although affirmative action does not help all those who have been disadvantaged by discrimination, it is an overstatement to suggest that affirmative action never helps the most disadvantaged. It does not help them all, but I found many cases of inner-city poor people who in the absence of *Griggs* would not even have known about the jobs they eventually won. Hiring goals force employers to actively recruit in new areas and ways. This helps to overcome nepotistic word-of-mouth hiring, and the pernicious but understandable human tendency to hire people with whom we are most comfortable—generally people sharing our own racial and class backgrounds. Of course, hiring goals also help to overcome the effects of *mean-spirited* race and gender based discrimination. There is plenty of empirical evidence demonstrating that such discrimination is alive and well in the U.S. Moreover, there are now good empirical studies demonstrating that affirmative action does economically help disadvantaged minorities (again, see Ezorsky).

Although there are certainly disadvantaged people who such programs do not reach, by forcing employers to recruit among disadvantaged groups, at least for unskilled positions, people with few job skills do sometimes gain entry level jobs providing them the opportunity to further develop themselves. And the central affirmative action practice of eliminating nonjob related hiring criteria functions to open opportunities not only for minorities, but also for white men who lack the same credentials as persons from the targeted group. We ought not reject public policies that do *some* good because they do not do enough. U.S. society does little to redistribute wealth and opportunity—the tax structure is, all impacts considered, regressive. Affirmative action may not adequately address inequalities with regard to the building blocks of opportunities, but it seems clear it does some good along these lines.

Those who raise the second major objection, painting drastic scenarios about the negative stigmatic harms suffered by women and minorities as a result of goal-type affirmative action, ought to

provide empirical evidence for their claims. I have found no compelling empirical evidence that preferential treatment leads to long-term psychological harm. (Perhaps it is worth asking why, if preferential treatment psychologically harms its beneficiaries, concern about such harm has never been expressed with regard to how it has damaged its usual beneficiaries, namely white men.)

My own research found that preferential treatment enhances the emotional health and self-confidence of its beneficiaries. It certainly is common to hear people claim that women or minorities were only hired because of affirmative action. Certainly such statements sometimes cause hurt feelings. They do not, however, cause psychological damage, but rather, such statements intensify the resolve of those so accused to prove their abilities. Women and minorities who benefit from affirmative action programs are well aware that they are under greater scrutiny to prove themselves—and while they may resent the double standard—most succeed. Getting jobs for which they would not otherwise have received serious consideration, and then succeeding, enhances self-esteem far more than a few mean-spirited comments ever could harm it. During my interviews, several beneficiaries of affirmative action related how, before affirmative action, they had *no* self- esteem, locked as they were in dead-end jobs. After meeting increasing challenges and opportunities, their self-confidence was increasing in proportion to their skills. Overall, most affirmative action beneficiaries have felt the sting of prejudice anyway, so new forms of prejudice suggesting that "affirmative action hires" cannot do the job, did not seem very different to many of my respondents. Ezorsky offers a different rebuttal to the psychological damage claim, arguing that by increasing employment among blacks, the stereotype that blacks are lazy is eroded. In light of my interviews and such arguments, I have concluded that at best, it is quite patronizing to oppose affirmative action because it might promote feelings of inferiority in women and minorities. At worst, it is a wolf's argument in sheep's clothing.

Similarly, those who claim that affirmative action increases hostility among groups also ought to provide empirical evidence for their assertions. There may be such evidence in other cultures (India, for example). But through my research within one U.S. workplace, I have tentatively concluded that although bigots hate affirmative action, affirmative action does not *create* bigots. Even among strong opponents of goal-type affirmative action, I found very few who were so mean-spirited that they transferred their hostility toward the policy to the women and minorities with whom they work. I often heard disclaimers like, "I don't blame them for taking the job when it was offered to them. I just don't like it because I don't think they were the most qualified." Generally speaking, distaste for affirmative action does not lead in a causal fashion to increasing hostility toward those who benefit from it.

Of course, the strength of the four major consequentialist or fact-based arguments against affirmative action is directly related to one's perceptions about the prevalence of discrimination in U.S. culture. If discrimination is in serious decline, then given the potentially negative consequences of preferential affirmative action policies, we should be wary because the purported cure might produce effects worse than the disease. We certainly would not want to exacerbate prejudice and discrimination. To evaluate such arguments, we must carefully examine the empirical data. Again and again studies testify to the persistence of both intentional and structural discrimination in U.S. culture. Discrimination has not evaporated with time. The belief that the trajectory of U.S. history is toward greater inclusion and equal opportunity is based on patriotic faith not social reality. I believe that the assertion that we are winning the war against discrimination reflects one of the central, naive self-deceptions that cloud much thinking about civil rights.

The Inegalitarian Logic of the Equal Opportunity Principle

My argument so far asserts that on balance, preferential affirmative action has had a salutary effect and that the typical objections to it are based on significant overstatements and misperceptions. But any critical analysis of this issue should also pause to scrutinize the logic of the equal opportunity itself, even when it is interpreted compassionately in terms of concern for equal life chances. We need to ask, is equal opportunity based on merit really what we want? Or, is equal opportunity a good principle that nevertheless ought to be supplemented or qualified by other principle(s) of distributive justice? Is this the sole

principle by which all preferred positions and salaries should be distributed?

John Schaar argues that we should not embrace the equal opportunity principle as the axial distributive justice principle. It does not really provide a context for everyone to develop their talents, he asserts, because society only rewards those talents already consistent with its current values. In other words, the equal opportunity principle is inherently conservative. Schaar complains that the equal opportunity principle makes individualism "the reigning ethical principle" since it insists that everyone make it on their own. Moreover, he objects to how the equal opportunity divides communities that should be standing in solidarity against current, unequal social and economic structures. Schaar writes:

> Equal opportunity breaks up solidaristic opposition to existing conditions of inequality by holding out to the ablest and most ambitious members of the disadvantaged groups the enticing prospect of rising from their lowly state to a more prosperous condition. The rules of the game remain the same . . . the social-economic system is unaltered. All that happens is that individuals are given the chance to struggle up the social ladder, change their position on it, and step on the fingers of those beneath them.[1]

He concludes that the equal opportunity principle is antithetical to a genuinely democratic concept of equality—a conception that is opposed to oligarchy as such, even an oligarchy of the naturally talented. Schaar has identified the key problem with the dominant principle of distributive justice in U.S. culture—that of basing rewards on natural talents that are fundamentally *unearned.*

By revealing the inegalitarian logic of the equal opportunity principle, Schaar warns us against viewing this notion as *the* principle of distributive justice. Even if we were to achieve a perfect equal opportunity society where burdens and benefits were distributed exclusively through a fair competition open to natural endowments, does this satisfy all of our moral intuitions and sentiments? Can we truly say that the resulting inequalities would be just, when they are based on unmerited inborn talents? It seems to me that we ought to promote greater substantive equality of condition, not merely a procedurally fair competition. This imperative becomes even more clear the more we understand resource limits and the ecological costs of unbridled industrial growth.

If Schaar's analysis shakes our faith that all rewards should be distributed to those endowed with natural talents valued by the current society, then we might find ourselves more open to considering results oriented principles of distributive justice that promote greater economic equality. If so, perhaps affirmative action could be justified as one means of promoting greater substantive equality of condition.

Putting It All in Perspective

Finally, beyond the general critique of the equal opportunity principle, we should recognize that on practical grounds, hiring the "best qualified" is a highly overrated goal. Most jobs in this country can be done well by many people. And although most of us would want the "best qualified" brain surgeon, there are far more people available with the requisite intelligence, coordination, stamina, and level-headedness than there are such jobs. Indeed, while intelligence is probably the easiest trait to measure, other virtues may be more important, even if impossible to measure. Predicting job performance is a very difficult art-science—and there is a great deal of naivete in assuming job tests and screening devices have predictive value. Much of what the law under *Griggs*, and the recently passed Civil Rights Act of 1991 reestablished, was the insistence that employment criteria that discriminate against individuals from traditionally excluded groups cannot be used unless we can be reasonably sure that such criteria predict job performance. Assuming for the moment the validity of the equal opportunity principle, what could be more fair? One of the central self-deceptions of our "equal opportunity" culture resides in the American dream myth: with sufficient determination, one can become anything one chooses. Unfortunately, the dream

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1 John Schaar, in "Equality of Opportunity and Beyond," J.R. Pennock and J.W. Chapman eds., *Nomos IX*, (Atherton, 1967).

mystifies the reality: discrimination exists, people have unequal and sometimes unappreciated natural talents, and in the last analysis, there is limited space at the top.

(Incidentally, speaking against the argument that affirmative action leads to declines in workplace productivity, are recent studies demonstrating that due to the *Griggs* standard, businesses now have testing procedures in place that are much better at predicting job performance than was the case before the scrutiny of such practices was mandated by Federal law.)

The complexity of the issues surrounding civil rights law, and the variety of competing values involved, certainly muddies the moral landscape. But we should be clear at least about this: We live in a political context that rejects virtually all redistributive policies. Affirmative action is not a perfect policy. It certainly falls far short of helping all disadvantaged individuals. Nevertheless, it does have a redistributive effect, and the empirical evidence shows it does more good than harm.

To my mind, it would be best if we could help create the political will needed to enact redistributive and other policies that would enhance the building blocks of equal opportunity for all disadvantaged persons regardless of race or gender. Combined with strong antidiscrimination enforcement, such policies could do as much to equalize life chances and move us in the right direction. This ought not, however, lead us to the conclusion that preferential affirmative action would not be needed in the presence of policies favoring the disadvantaged. There would still, in all probability, be the need to keep pressure on many employers to look beyond their own and their current workers family and friends when opportunities arise.

Be that as it may, justice-concerned realists certainly should recognize that, in the absence of comprehensive public policies designed to redress inequalities of opportunity and all forms of discrimination, affirmative action is better than nothing—especially since, in this culture, at this time, nothing remains the likely alternative.

An Ethic of Care and Affirmative Action: A Critical Analysis of Supreme Court Jurisprudence

By Francis Carleton

I. Introduction

The Supreme Court has handed down since the mid-1980s several key decisions regarding the deeply controversial issue of affirmative action in the workplace. I have chosen to analyze three of the most important ones from the perspective of an ethic of care. I believe that a feminist conception of such an ethic provides a method of analyzing what elements of the Court's affirmative action jurisprudence are worth keeping, what is worth serious criticism, and how we might go about reconstructing a jurisprudence of affirmative action that moves American society in the direction of honoring and valuing diversity in the workplace while advancing justice.

An ethic of care has received a great deal of attention within the feminist community since the publication of two seminal books: Carol Gilligan's *In A Different Voice*[1] and Nancy Chodorow's *The Reproduction of Mothering*.[2] Gilligan's analysis, the more popular and influential of the two, included, in brief, the argument that there exist at least two different human voices. She found that women tended to exhibit a style of reasoning premised on a deep concern for the well being of others and a commitment to cooperation and the preservation of relationships. She identified this largely feminine voice as constituting an ethic of care. Men, conversely, seemed more drawn to an ethic of rights, a style of reasoning based on a competitive, individualistic, and hierarchical conception of the world. Subsequent scholars, especially in the field of feminist legal theory, have sought to explore further the gendered nature of these different voices and how an ethic of care might be used to reshape society in ways that are both humane and democratic.

Several feminists have undertaken the project of figuring out how the complex debate over the philosophical contours of an ethic of care and its various dimensions might be used to establish progressive social change. Leslie Bender, for example, consistent with the feminist commitment to applying theory to social practice, has argued that "To extend feminism's challenges beyond the academy, we must apply the insights of feminism . . . to law creation, interpretation, and the training of future lawyers."[3] That is the focus of this paper: To utilize an ethic of care and its related concepts to analyze critically Supreme Court jurisprudence and suggest an alternative jurisprudence that will advance the possibility of a more fully diverse workplace. It will also suggest how the general debate over affirmative action might be reshaped by an ethic of care.

II. The Multiple Dimensions of an Ethic of Care

There are at least three aspects of the intense philosophical debate over an ethic of care that are valuable for analyzing judicial public policy. I will review, briefly, the relationship between an ethic of care and an ethic of rights, the centrality of contextual considerations to an ethic of care, and the important link between empathy and an ethic of care.

An Ethic of Care/Rights

Mary Raugust, a feminist philosopher, defines an ethic of care as constituted by, at its core,

1 Carol Gilligan, *In A Different Voice*, (Harvard University Press: 1982).

2 Nancy Chodorow, *The Reproduction of Mothering*, (University of California Press: 1978).

3 Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort," D. Kelly Weisberg ed., *Feminist Legal Theory: Foundations*, (Temple University Press: 1993).

"cooperation, relationship, and interdependent nurturance."[4] She also emphasizes the importance of recognizing and acting upon the deep obligation that we owe to one another to protect vulnerable individuals and groups from harm. I believe that such an ethic has great applicability to the debate over affirmative action. I argue below that affirmative action, to the extent that it provides for those on the margins of society a chance to make it in the workplace as a remedy for both past and present discrimination based on race, class and gender characteristics, promotes an ethic of care. An ethic of rights, conversely, with its individualistic, competitive and hierarchical thrust, tends to legitimate the practice of individuals aggressively wielding their rights in order to secure for themselves space within which to triumph over others. The concern here is that such an approach to the law will tend to favor those individuals and institutions with the political, social and economic power to manipulate legal rights to their advantage. An ethic of rights, in short, will tend to work to the disadvantage of many women, minorities, and the poor. As one legal analyst has observed, an ethic of rights often allows "management prerogatives [to] trump the civil rights of minorities and women" when the courts have dealt the issue of discrimination in the workplace.[5]

While one can define an ethic of rights as wholly incompatible with an ethic of care, there are good reasons for thinking of these two ethical positions as somewhat compatible. Susan Okin, for example, has observed that "Many rights entail positive obligations and substantive responsibilities on the part of others."[6] With regard to the issue of affirmative action and disadvantaged groups and individuals, for example, I argue that those in our society who have suffered a history of exclusionary practices and continue to battle in the present persistent but often subtle discrimination have a right to equal opportunity in the workplace and educational institutions. In this way some aspects of an ethic of rights can be combined with a real concern for people on the margins of society. The courts, therefore, need not discard an ethic of rights, but rather they need to consider how an ethic of rights might be combined in a way that promotes a more inclusive, diverse, and equitable society.

Care and Context

Successful conceptualization and implementation of an ethic of care requires "a deep and thoughtful knowledge of the situations, and of all of the actors' situations, needs and competencies."[7] That is, to fully understand who is in need of protection from harm, and who might extend that protection, and how that protection might be extended, requires that relevant parties pay serious attention to the complex context within which all of us live. Kenneth Karst has applied this method of reasoning to the judicial arena by arguing that "Judges decide concrete cases, and they perform best when they inquire into the concrete facts that touch the lives of real people who will be affected by their judgments . . . there is no escape from contextual judgment if the judge wants to do a decent job."[8] The flip side of such reasoning is an abstract and formalized understanding of legal issues. Such an approach tends to result in a dehumanizing jurisprudence that elevates the judiciary's role as a solver of abstract intellectual puzzles over the needs of vulnerable people.

Care and Empathy

Empathy, in the context of an ethic of care, refers to the ability and willingness of people and

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4 Mary Raugust, "Feminist Ethics and Workplace Values," E. Cole and S. Coultrap-McQuin eds., *Explorations in Feminist Ethics*, (Indiana University Press: 1992).

5 Mark Weber, "Beyond Price Waterhouse v. Hopkins," *North Carolina Law Review*, v. 68, p. 495.

6 Susan Okin, "Thinking Like A Woman," Deborah Rhode ed., *Theoretical Perspectives on Sexual Difference* (New Haven: Yale University Press, 1992).

7 Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

8 Kenneth Karst, *Belonging to America* (New Haven: Yale University Press, 1989).

institutions to adopt the perspective of vulnerable and marginalized people and groups in society. Richard Delgado has argued that the law has a vested interest in empathizing with outsiders, since courts typically reflect the experiences of a society's more powerful members. The introduction of the narratives of those on the margins of society, however, give courts the opportunity to "build a world richer than [they] could make alone."[9] Lynn Henderson, in a similar vein, emphasizes the extent to which the perspective of traditionally disempowered groups in society can enhance legal rationality by enabling "the decisionmaker to see other 'right' answers, or a continuum of answers."[10] I argue that if the courts are to conceptualize and implement effectively an ethic of care, they must demonstrate both the willingness and ability to listen, really listen, to the experiences of women, minorities, and the economically disadvantaged.

III. An Analysis of Three Supreme Court Cases

The various dimensions of an ethic of care described above can be used to interpret the Supreme Court's jurisprudence on the issue of affirmative action in the workplace. I have chosen to concentrate on the cases of *Johnson v. Transportation Agency* (1987), *City of Richmond v. J.A. Croson Co.* (1989), and *Adarand Constructors, Inc., v. Pena* (1995).

To place the Court's affirmative action cases in some context, it is critical to point out that during the time span covered (1987–1995), the Court became significantly more conservative. The political climate in America also became more conservative, although the impact of this variable on the Court's behavior is difficult to ascertain. Not surprisingly, therefore, one can trace in the three cases a distinct decrease in support for affirmative action programs in the workplace. We find in *Johnson* an endorsement of affirmative action, albeit within certain boundaries. Two years later, however, the Court handed down, in *Croson* a decision that was moderately hostile towards affirmative action based on race, although Justice O'Connor implied in the majority opinion that the Court was only targeting a relative narrow range of such programs. And then, in *Adarand*, a majority of justices produced a far-reaching opinion that was more aggressively disdainful of race-based affirmative action than any of the Court's earlier rhetoric. It is also worth noting that the legal attack on affirmative action in *Johnson* suffered from certain procedural limitations inherent in title VII of the Civil Rights Act of 1964 litigation. In the subsequent cases, however, the foes of such programs shifted the basis of their attack to the 14th amendment's equal protection clause, a legal tactic that has proven more inhospitable to affirmative action policies initiated by the government. What follows is a careful and critical analysis of these three cases. I provide in the paper's conclusion some discussion of affirmative action in general and where both the courts as well as society might head in the future.

In 1987 the Supreme Court handed down the case of *Johnson v. Transportation Agency, Santa Clara County*. At issue was whether a State agency could voluntarily implement an affirmative action policy designed to enhance the presence of women and minorities. More specifically, Santa Clara County wanted to construct "a work force whose composition reflected the proportion of women and minorities in the relevant labor market" (Belton, 1988:119). The county eschewed rigid quotas, and instead required that "short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions" (*Johnson*). When a female applicant for a position in the department was chosen over a male applicant, the male in question, Paul Johnson, filed suit in Federal court. Johnson claimed that the county was in violation of title VII of the Civil Rights Act of 1964, which forbids sex discrimination in the workplace. He argued that he was passed over for the job in question despite the fact that he had scored

9 Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative," *Michigan Law Review*, v. 87, pp. 2411–2441.

10 Lynn Henderson, "Legalisty and Empathy," *Michigan Law Review*, v. 83, pp. 1574–1653.

higher than the chosen woman on an examination that was part of the application process. The case worked its way up to the Supreme Court, where a majority of Justices ruled against Johnson and in favor of the county's affirmative action plan.

Justice Brennan, writing for the Court's majority, ruled that the transportation agency did not violate title VII by taking applicants' sex into account during the hiring and promotion process. Brennan divided the Court's opinion into three basic sections. First, the plaintiff in this case, the challenging employee, had the primary burden of proof in contesting the agency's affirmative action program. Second, the Court held that employers, in defending their affirmative action programs against the challenge of plaintiffs, need not point to their own past practice of discrimination against protected groups. Rather, they need only "point to a conspicuous imbalance in traditionally segregated job categories" to justify the implementation of an affirmative action program. This imbalance, Brennan wrote, can be measured through a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market for unskilled jobs, and a comparison with those in the labor force who have the relevant qualifications for skilled jobs. Finally, Brennan ruled that Johnson's rights in the instant case were not unduly trammeled, nor did the plan in question create an absolute bar to his advancement in the workplace. Title VII, the Court concluded, was not violated by the agency's affirmative action plan.

Each of the Court's rulings in *Johnson* can be interpreted from the multiple perspectives of an ethic of care. The burden of proof issue demonstrates a Court that empathizes with employers who voluntarily implement affirmative action programs. That is, Brennan, as per previously established title VII standards, places the primary burden of proof on those who would challenge such a program. In such cases, therefore, the ultimate burden of persuading the courts that affirmative action plans are illegitimate lie with the plaintiff. This judicial approach provides significant protection for employers willing to take the necessary steps to create a more even playing field for traditionally disadvantaged groups. The employer's perspective is given great weight in *Johnson*.

The Court's decision to allow voluntary affirmative action programs designed to remedy societal imbalances in workplace opportunities represents both a contextual as well as a distinctly care-oriented jurisprudence. First, the Court validated the importance of marked gender imbalances in the workplace. Brennan stressed the importance of contextual information regarding the composition of the agency's work force. He thus affirmed the vital importance of taking into account not just specific and identifiable evidence of blatant and intentional discrimination, but also the disparate impact that broad societal discrimination, both historical and contemporary, can have on the racial and gender makeup of the workplace. He effectively, if only indirectly, places discrimination in the workplace within its proper and necessary context.

Brennan also refused to require of employers a demonstration of past discrimination against protected groups. I argue that this holding implies the responsibility that employers have to ameliorate not only verifiable discrimination in their own workplace, but also broader societal discrimination that has resulted in such phenomena as massive occupation segregation based on traditional gender stereotypes. In this case in particular, the Court seems to be making a genuine effort to support the breaking down of cultural conceptions of gender that have discouraged women from pursuing workplace opportunities in the field of trucking (the disputed position was that of road dispatcher for Santa Clara County). Johnson's brief, ironically enough, reinforces this point. Johnson argued that the agency itself was not guilty of discrimination, but rather the underrepresentation of women at the agency was due to the fact that "women had never trained for and were not interested in such work." The Court seems to give employers the right to implement affirmative action programs to remedy just this sort of deep social discrimination by allowing proof of gender disparities in the workplace as justification for remedial action. This represents an aggressive and wide-ranging endorsement of an ethic of care.

Finally, Brennan's argument that the agency's affirmative action plan did not unduly infringe Johnson's rights is manifestly contextual as well as sensitive to the need to balance rights with responsibilities. The Court emphasized the tem-

porary, provisional and flexible nature of the agency's plan. For example, the agency was commended for the use of "reasonable aspirations" rather than rigid quotas in their plan. Brennan also complimented the agency for their express direction that "numerous factors be taken into account in making hiring decisions, including the qualifications of female applicants for particular jobs." Brennan noted that the Agency's disputed program "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." He concluded that the Agency's attempt to hire and promote more women "visits minimal intrusion on the legitimate expectations of other employees." This line of argument is therefore both contextual as well as sensitive to the very real need to balance rights with responsibilities. The Agency, in other words, does have a responsibility to diversify their workplace, but they must do so in a way that does not obliterate the legitimate rights of other employees.

The plaintiff in *Johnson* attempted to deconstruct affirmative action programs enacted by a branch of state government through the mechanism of title VII. Perhaps not surprisingly, this attack on affirmative action was joined by the Pacific Legal Foundation, a conservative interest group. The Court soundly rejected this approach, and made it clear that employers have significant latitude to enact affirmative action programs directed at mitigating gender and sex discrimination in society at large. Procedurally, title VII places the ultimate burden of persuasion squarely on the employee who wishes to challenge an employer's workplace policies and practices. Once this legal strategy was defeated, however, the opponents of affirmative action based on race turned their attention to another approach. The following two cases demonstrate the rather ironic success that antiaffirmative action forces have had through the 14th amendment's equal protection clause.

The Supreme Court eroded government-sponsored affirmative action in the case of *City of Richmond v. J.A. Croson* (1989). Here the City of Richmond, understood as an arm of the State government of Virginia, put into place an affirmative action program that required "contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more" minority business enterprises. The city's plan was designed to address the massive fact that just over half of the city's population was black, while less than 1 percent of minority-owned businesses received prime contracts from Richmond.

A bitterly divided court, in a majority opinion written by Justice O'Connor, ruled that Richmond's affirmative action program might be in violation of the 14th amendment's equal protection clause. The Court held, most importantly, that any State government agency that employs "a rigid racial quota in the awarding of public contracts" will be subject to strict scrutiny[11] by the courts should such a policy be challenged. The ultimate burden of proof, then, falls not on the challenging employee, but rather it is the employer that must justify their actions. The Court sent the case back to the appellate court, where strict, rather than intermediate, scrutiny must be applied. This was the first time that the Court held that affirmative action programs initiated by a State government must be subject to this heightened level of judicial scrutiny. Two earlier Supreme Court cases, *Fullilove* (1980) and *Metro* (1990), had established the more lenient standard for Federal affirmative action programs using race as a criterion. Justice O'Connor made it clear in *Croson*, however, that the Court was singling out for strict scrutiny only state policies that have "a rigid rule erecting race as the sole criterion." In this sense, then, the Court established a fairly

11 Strict scrutiny, which has traditionally been applied to cases where the government has used race as a component of public policy to exclude African Americans, requires the government to show that the disputed policy is narrowly tailored to advance a compelling government interest. This burden of proof is rarely carried successfully. Intermediate scrutiny, on the other hand, which is reserved for government policies based on gender, requires only that the government demonstrate that the policy in question substantially advances an important government interest. This burden of proof is more easily carried successfully.

limited precedent regarding State-level affirmative action programs that take race into account.

Justice O'Connor argued that there is no way for the judiciary to distinguish between benign and pernicious racial discrimination "absent searching judicial inquiry." She also indicated that racially-based affirmative action programs cannot be justified via "an amorphous claim that there has been past discrimination in a particular industry." Justice O'Connor did concede, however, that if Richmond can ascertain how many qualified minority business enterprises are available and this pool differs too markedly from how many of them get prime contracts, this would constitute a compelling government interest. She dismissed, however, the relevance of "past societal discrimination in education and economic opportunities."

Applying an ethic of care to the above set of arguments yields a valuable critique of the increasingly conservative Court's decided antipathy for affirmative action. First, the Court's refusal to differentiate between pernicious race discrimination in governmental policies (i.e., Jim Crow laws in the South prior to 1964) and affirmative action policies indicates a refusal to consider carefully the context within which race-based programs necessarily exist. Justice Marshall, in an angry dissent, makes just this point: "A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism." The majority thus deny the critical importance of placing government policies in context, and choose instead to regard all race-based programs as identical in their relationship to the 14th amendment's equal protection clause. This approach seems to disregard the particularly egregious history of race discrimination not only in America in general, but perhaps especially in a city that was once the capital of the Confederacy during the Civil War. As Justice Thurgood Marshall previously noted, strict scrutiny is "strict in theory, but fatal in fact."[12] I argue that if the Court's majority is prepared to think seriously and critically about American history as well as the dilemma of persistent but often subtle race discrimination, they could make genuine and legitimate distinctions between benign and pernicious discrimination, and respond accordingly when deciding which analytical framework to apply in particular cases.

Justice O'Connor dismissed what she called Richmond's "amorphous" evidence of past societal discrimination to justify their affirmative action program. Her contempt for the evidence presented at trial reveals a hostility towards the perspective of those who would implement affirmative action programs in the workplace. I also argue that the Court's establishment of strict scrutiny as a method of evaluating race-based affirmative action programs demonstrates a desire to minimize the perspective of employers when they make a good-faith effort to diversify their workforce. An approach that is more empathic relative to Richmond's point of view can be found in Justice Marshall's dissent. Marshall, in contrast with O'Connor, argued that sufficient proof *was* presented, including "statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry . . . [and] studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting." The majority, however, reject the city's perspective with a wave of the hand.

The Court in *Croson* also rejected the importance of past racial discrimination in economic and educational arenas. This signifies both a very pinched conception of an ethic of care as well as a denial of the importance of contextual information. That is, the Court's refusal to accord intermediate scrutiny to affirmative action programs designed to respond, at least in part, to racial discrimination in society at large demonstrates a very narrow conception of the responsibilities that all governmental entities have to address

12 Fullilove v. Klutnick, 448 U.S. 448 (1980).

pervasive social harms. In addition, Justice O'Connor downplayed the very real link between race discrimination in both education and the economy and the subsequent availability of minority owned construction firms in Richmond. Justice Marshall, in dissent, emphasized that "If Richmond indeed has a monochromatic contracting community . . . this most likely reflects the lingering power of past exclusionary practices." Marshall then recited a long and disturbing history in Richmond of discrimination in the areas of voting rights, public education, and housing. We find in this dissent an intense awareness of the importance of discrimination in society at large and the subsequent responsibility that the City of Richmond has to remedy such wrongs in a range of ways. Thurgood Marshall, in other words, provides a jurisprudence of affirmative action that is both empathic relative to governments that undertake such policies as well as deeply contextual.

The Court extended the strict scrutiny standard to Federal affirmative action plans based on race in *Adarand Constructors, Inc., v. Pena.* Strict scrutiny, the Court ruled, must be applied to any Federal program that uses race as a factor. The factual situation in *Adarand* was as follows: The Federal government had a policy of granting general contractors "a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals.'" One of the key measures of disadvantage was race. Petitioner Adarand challenged the government's use of race-based criteria in identifying recipients of these incentives (women also qualified for such incentives, as did various ethnic minorities). Adarand argued that such racially targeted programs violated the fifth amendment's equal protection clause. The lower appellate court rejected Adarand's claim, but the Supreme Court, by a vote of 5–4, held that the lower court used an improper standard of review. The appellate court had ruled, consistent with *Metro Broadcasting, Inc., v. FCC* (1990), that the Fourteenth Amendment's equal protection clause imposed a higher standard of review for state-sponsored affirmative action than did the Fifth Amendment. The Supreme Court remanded the case back to the lower court to reconsider the case consistent with *Croson. Metro* was overturned by the Court in *Adarand.* Justice O'Connor, writing for the Court in *Adarand*, held that the use of racial factors in Federal affirmative action programs must withstand "strict scrutiny."

Much of the analysis in *Croson* applies to *Adarand*, and so I will only highlight two issues in the present case. First, I argue that the majority's unwillingness to differentiate between remedial race-based programs and pernicious and exclusionary race-based policies reveals a failure of contextual reasoning at the expense of abstracted and formal logic. Justice Stevens, joined by Justice Ginsburg, leveled a similar critique in *Adarand* when he wrote that "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." Stevens also argued that the Court's obsession with applying an abstract standard to all cases "risks sacrificing common sense at the altar of formal consistency." Alan Freeman, a legal scholar, points out that "Only in the messy particularity of historical and current social reality can one rediscover what it means and has meant to be black in America."[13] But the Court's majority rejected such contextual reasoning and embraced instead a formal logic that cannot perform the difficult but necessary work of judging the merit of government affirmative action programs that employ race as a factor. The Court flattens a complex reality in favor of a blunt, one-size-fits-all approach to the Federal Government's attempts to create a more equitable society.

What is perhaps most disturbing about the Court's holding in *Adarand* is that it seems to go significantly further than *Croson* in terms of limiting a wide range of race-based affirmative action programs at both the national and State levels. First, the program in question only provided some unspecified "monetary compensation" for construction firms that had prime contracts with the Federal Government then subcontracted some of their work to companies owned by socially and

13 Alan Freeman, "Antidiscrimination Law: The View From 1989," D. Kairys, ed., *The Politics of Law*, (Pantheon: 1990).

economically disadvantaged individuals. This seems to fall outside those race-based affirmative action programs specifically singled out by Justice O'Connor for strict scrutiny in *Croson*. Again, in the earlier case, the Court had argued that only those programs that employed a "rigid rule that erects race as the sole criterion" would fall under strict scrutiny. In the instant case, however, the government's policy states that monetary incentives will be used to benefit construction companies owned and controlled by "socially and economically disadvantaged individuals." And this broad category included African Americans, women, Hispanics, Native Americans, and Asian Pacific Americans as well as "any other individual found to be disadvantaged." Justice O'Connor did not speak to any of the other categories, nor to the flexible nature of the term "economically disadvantaged," but instead explicitly singled out only the use of race as *one* of the categories used by the Federal Government to act affirmatively on behalf of disadvantaged people. She even notes that had race (and, impliedly, ethnicity, as O'Connor noted later in the Court's opinion) not been one of the criteria in the program in question, "relaxed judicial scrutiny" would have been appropriate (*Adarand*, quoting respondent's brief).

Further (and even stronger) support for the proposition that the Court in *Adarand* went further in restricting affirmative action programs enacted by the government than it had in *Croson* can be found in Justice O'Connor's claim that the government must "justify *any* racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." This is a far cry indeed from her claim in *Croson* that only a very small subcategory of particularly rigid and narrow race-based policies would be subject to strict scrutiny.

Conclusions

The Supreme Court's arguments in *Johnson*, in response to a challenge to affirmative action programs via title VII, demonstrate a commitment to an ethic of care as well as the legitimate rights of all employees to fairness in the workplace. The Court also demonstrated a willingness to listen seriously to the employer's defense of their affirmative action program. In *Croson* and *Adarand*, however, a more conservative Court, through an analysis of the 14th amendment's equal protection clause, espouses a jurisprudence that shows evidence of a tenuous attachment to an ethic of care, is relatively acontextual, and does not give employers who wish to implement affirmative action programs much of a chance to articulate their perspective. The dissents in each of these cases, however, articulate an alternative jurisprudence that does take seriously an ethic of care, is deeply contextual, and provides for employers a genuine opportunity to defend their use of affirmative action. In short, an ethic of care, in combination with the related concepts of empathy and context, provide a way to critique and analyze the Supreme Court's affirmative action jurisprudence. We have also seen how such an ethic can suggest a method of legal reasoning and a set of legal policies that will permit, or even encourage, the creation and implementation of affirmative action policies that can go some distance towards the creation of an equitable and diverse workplace in America.

I argue that affirmative action programs must take into account those factors that deny equality of opportunity in American society. This means that employers should consider the race, class, and gender of applicants for jobs as well as educational institutions. This is critical contextual information that must play a central role in shaping both public and private conceptions of the good society. Effective affirmative action policies should also make provision for the recruitment and retention of disadvantaged people into both the workplace and educational settings. We as a society have a deep and genuine responsibility to reach out to those on the margins of society and provide for them an equitable opportunity to join the social, economic, and educational mainstream of American society. Finally, those in positions of power must make a real effort to empathize with the experiences of those who have traditionally dwelt on the lower rungs of the American hierarchy. Only by so doing will there be any possibility at all of decisionmakers committing themselves to promoting an ethic of care that encompasses those people who have not yet shared in the American dream.

I also believe that affirmative action can only be one part of an overall strategy to mitigate the marginal position of women, racial minorities, and the poor (as well as, I might note, all of the complex intersectionalities among these non-

clusive categories). As such, advocates of progressive social change must continue to devote their resources to programs such as Headstart, low-cost housing for the poor, and urban renewal projects that take seriously the idea of community integrity as well as the expansion of economic opportunity. Affirmative action in both the workplace and education, while potentially a valuable tool for the creation of a more equitable society, must be placed into the coherent context of an overall set of strategies for reducing gender, race, and class inequalities in the United States as we race headlong into the 21st century.

The Relevancy of Affirmative Action for a Recent Immigrant Among the Minority Population

By Sebastian Ssempijja

Introduction

That a bipartisan civil rights commission has chosen to seek consultations at this juncture in a presidential election year, seems to suggest assiduous attention to the volatile affirmative action issues. Prevailing political campaigns seem to stir up more controversy over the original, subsequent, and prevailing intentions and spirit of affirmative action. In the process of political sound bites, affirmative action has become a code word for specific audiences and constituents. The attendant themes of fairness, discrimination, and equal opportunity have become loaded and quite divisive as Fineman so depicted in has April 3, 1995, *Newsweek* magazine article.[1] Concurrent with this debate, are the emotive issues of immigration reforms, national isolationism, and economic protectionism.

Before I embark on the difficult task of sharing my deliberations on affirmative action themes, I need to give a glimpse of what has formed my perspective on this issue. I have lived in this country since 1978. I completed my undergraduate and graduate education at Marquette University from where I earned a Ph.D. in educational psychology and counseling in 1990. Like most foreign nationals beginning a new life in this country, I have endured a lot and sacrificed much to attain my educational and career objectives. My work over the last decade has been in the service of children and families with special needs.

As a psychologist and full-time program director at St. Aemilian-Lakeside, Inc., in Milwaukee, Wisconsin, I have grown to appreciate the need for legal protections of individuals with emotional, cognitive, physical, and substance induced disabilities. The practice of psychology in the trenches of the dispossessed, disenfranchised, economically marginalized and socially depersonalized has been a baptism of fire for me. The suffering endured by certain segments of the population is, in many ways, reversible, preventable and curable. As a mental health professional, I subscribe to the views that personal, familial, social and community networks are essential in alleviating much personal agony. This latter is frequently a symptom of and/or exacerbated by a sense of loneliness, alienation, and estrangement from vital support systems. Hence the need to see an individual as an integral part of a community. As Tyler, Brome, and Williams have so aptly proposed, race and ethnicity constitutes a framework through which cultures define themselves and relate to each other.[2]

One cannot discuss themes of political, social, and economic fairness in a vacuum without reference to individuals, their basic micro- and macro systems, their State and the entire United States as a nation. Consequently, I submit the following views on the relevancy of affirmative action from the conviction that:

(a) the government has a duty to monitor and enforce the civil rights of its citizenry;

(b) the government, in the service of the people, should regard the equal protection clause (the 14th amendment to the United States Constitution) as a compelling interest of a state and nation;

(c) the health and welfare of all citizens is a legitimate government goal achieved through building a nation based on a multiracial, multicultural, diverse community;

(d) the United States of America has engaged in an experiment and an ongoing exercise of plu-

1 H. Fineman, "Race and Rage," *Newsweek*, Apr. 3, 1995.

2 B.F. Tyler, R.D. Brome, and E.J. Williams, *Ethaic Validity, Ecology, and Psychotherapy: A Psychosocial Competence Model*, (New York: Plenum Press, 1991).

ralism and diversity as lessons to the world in multicultural coexistence;

(e) pursuance of civil rights and the spirit conveyed in affirmative action ideals depicts a moral and programmatic orientation embedded in the actions of the proponents of the various civil rights acts especially those of the 1960s. These acts seem to be bold steps to promote the spirit and intent of the equal protection clause.

Permit me to explain each of the above view in some detail.

1. The Government Has a Duty to Monitor and Enforce the Civil Rights of Its Citizenry

In a political atmosphere that argues against "big government," the opponents of affirmative action have found refuge. In the same breath, these forces that seek to derail affirmative action and the spirit it represents, use the tools and lubricant of government for their own ends. Ultimately, the issue hinges on who has the power to influence and benefit from the provisions of government. In the process, as it so routinely happens, the powerless constituents are left with nothing. The denial of equal access to the political, economic and social justice becomes the moral and practical rationale for opposing affirmative action programs.[3] The latter programs had to be based upon legal tenets promulgated in the various civil rights acts, especially that of the Civil Rights Act of 1964.[4]

The power of the government to pass and monitor these laws remains a beacon of hope that the spirit of the Constitution will survive the periods of emotional irrationality and political rhetoric. Faith and trust in government to fulfill its social contract with its citizens guide those who demand equal protection under the law. This view emanates from political theory and philosophy that gave rise to the American Constitution.[5]

As a recent immigrant and observer of the pros and cons of affirmative action and various civil rights acts, I am swayed to believe that the government needs to stay involved in this issue. There is no doubt that the gains made by minorities may never have been, had it not been by the power and force of law to change the status quo.

2. Ensuring Equal Protection for All Is In the Best Interest of the Nation

Prejudice and discrimination on the basis of gender, national origin, religion, race, color, and disabilities is fundamentally irrational and absurd. Yet, the human mind and psyche have conjured up many elaborate arguments to perpetuate and justify untold hatred toward certain individuals and groups of people. Complex mechanisms of fear have been used to conditionally teach and carry on prejudice from one generation to another. This as true in the United States as it is in Germany, the Balkans, in India, in Africa, South America, and other parts of the world. The dynamic of fear is used to increase mutual avoidance, mutual suspicion and hatred. The cycle repeats itself and fuses easily into more complex hatefilled phenomena until it is broken.

By promoting mechanisms of mutual contact and remaining committed to equality, the government functions as a catalyst in breaking down barriers.[6] Such a process is eventually carried forward by individual citizens, by churches, synagogues, mosques, and other places of worship, as well as community agencies. That there is harmony among the various groups of people ought to be a compelling interest of the government. Here the idea of the scrutiny test (as part of the equal protection tests) becomes relevant as explained by Epstein and Walker.[7] Additionally, this scrutiny is augmented by the suspect class test by which

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3 G. Ezorsky, *Racism and Justice: The Case for Affirmative Action*, (Ithaca: Cornell University Press, 1991).

4 J.N. Sedmak et. al., *Primer on Equal Employment Opportunity*, the Bureau of National Affairs, Inc. (Washington, D.C., 1991) and L. Epstein et al, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, (Washington, D.C.: CQ Press, A Division of Congressional Quarterly, Inc., 1991).

5 N.B. Moore and K. Bruder, *Philosophy: The Power of Ideas*, 2nd edition (Mountan View, CA: Mayfield Publishing Company, Mountain View, 1993).

6 C.R. Salomone, *Equal Education Under Law* (New York: St. Martin's Press, 1986).

compelling state interests may be achieved via least restrictive means.[8]

In the 1990s it is tenable to argue that a diverse population greatly benefits the state and the Nation. To appreciate such a notion requires a mindset that transcends parochial reality reference forms. Essentially, people have to be educated and slowly conditioned into seeing people's diversity not as a negative, rather as an asset. Such a notion was promoted by Juanita Salvador Burris in 1995 before the Illinois Advisory Committee to the United States Commission on Civil Rights. She argued that the citizens be encouraged to relate to one another and increase global human interdependence.[9] At the same hearing Kalayil, commenting on Chicago's Devon Avenue international community, alluded to interethnic coexistence and economic interdependence among the Asian American communities.[10]

With this let us examine the contributions of recent immigrants to the Unites States.

3. A Multiracial, Diverse, and Multicultural Community Benefits This Nation

Just as the freeways of the Nation are traveled by vehicles from various parts of the world, so are the people on them. While the early immigrants were mainly from Europe, today's United States is comprised of people from many countries and backgrounds.[11] The Illinois Advisory Committee to the United States Commission on Civil Rights heard from many in May 1995, about the contributions to the development of this nation by Asian Americans. Recent immigrants greatly benefit this nation in business, science, health, and community building. Kotkin and Kishimoto illustrated the notion of the United States becoming a world nation.[12] Immigrants from Mexico, Cuba, West Indies, Korea, China, and Japan have greatly contributed to the financial prosperity of the United States. Greenwald discusses the troublesome idea of cutting off the brains by reducing numbers of high-tech immigrants.[13]

There is no doubt that the climate of equal opportunity created under the umbrellas of the civil rights acts and affirmative action has enabled many recent immigrants to succeed. That immigrants do benefit this nation is not fully appreciated by the people on the American streets. The erroneous notion that immigrants take jobs and "contaminate" the American way of life persists. Reasons for this misinformation are partly by design, i.e., antiimmigration publicity and politics, and by default due to lack of structural mechanisms by which an average person can interact with people of other cultures. The greatest barrier is fear and prejudice.

For instance, this author is under no illusion as to the explicit and implicit prejudices heaped upon recent immigrants from various parts of Africa. However, he is also cognizant of the fact that many of his fellow African immigrants arrive and begin to glean a living under austere and grim conditions. Relative success is experienced by the majority of his fellow African immigrants in due time. But there is a personal emotional cost.

In the process of attaining success a wide continuum or range of forms of prejudice are experienced and sustained. With time and acclimation to this culture, some people try to seek remedies against the injustices they suffer. The majority, however, may be suffering quietly. The psycho-

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7 L. Epstein et al, pp. 462–64.

8 Ibid., p. 465.

9 Illinois Advisory Committee to the United States Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in Metropolitan Chicago* (1995), p. 217.

10 Ibid.

11 Epstein, p. 499.

12 J. Kotkin and Y. Kishimoto, *The Third Century: America's Resurgence in the Asian Era* (New York: Crown Publishers, 1988).

13 J. Greenwald, "Cutting Off the Brains," *Time*, Apr. 3, 1995.

dynamic process of enduring various forms of hardship is guided by the prospects of better times. Hence, for many a sense of hopelessness and being trapped does not set in. It is in this context of sustained hopefulness that affirmative action has been relevant to directionality, productivity, and increased ego strength. Concurrent with the firmer sense of productive self is the vital contribution to the community. Such civic involvement ranges from church, school, work environ ment, and volunteer work to financial assistance to family members back home in the country of origin. In this way America's economic power stretches its tentacles to various corners of African countries and the world in a personal, concrete, relational manner.

4. Pluralism and Cultural Diversity Stand as Lessons to the World in Multicultural Coexistence

It is amazing to observe that in spite of the United States' complex history on race relations, it remains as the only country to absorb many people of diverse origins and provide hope for a heterogeneous society. The principles of the American Constitution beacon and guide many emerging democracies. The spirit in the Bill of Rights is similarly studied to set up standards in various countries. The exporting of American concepts on social justices, womens' rights, labor unions, systems of education, religions, and various forms of technology has further influenced international thinking. The United States can and should continue to be a race model and live by the eternal moral ideals set in the Constitution on equality, liberty, and justice for all.

That the government should move to equally protect its people (in spite of reality inconsistencies) puts pressure on oppressive governments to change. Such role modeling becomes most meaningful in the face of recent worldwide incidents of ethnic conflicts. The racial, ethnic, religious, and political conflicts and crimes in various parts of the United States are grim reminders of the venomous fangs of the serpent symbolizing prejudice and hatred. The carnage and brutality that has unfolded in the Balkan wars, the terror and suspicion of the Middle East, the gruesome and horrific scenes from Rwanda and Burundi, the firebombing of refugee homes in Germany, and the arsonic destruction of black churches in the southern States of the United States are but a few of the many overt and covert acts born out of the spirit whose effect were meant to be remedied by some of the civil rights acts and affirmative action plans.

It is against the background of the unimaginable, but quite probable evils, engineered by human beings against each other, that I feel the grave need for continued government involvement. The notion that government can and should continue to nurture the precepts of equality, justice, and liberty is supported by the positive net effects of the polices enacted to comply with the civil rights acts. Such a role of government is well stated in Salomone's assessment that "once we set upon a theory of rights, that choice shapes our vision of the relationship between the individual and the state which, in turn, leads us to certain policy alternatives."[14] Efforts to dilute and/or erode gains made via the equal opportunity mechanisms will lead to adverse effects among the targeted groups. Furthermore, such actions if sanctioned by the government will signal a return to the oppression of the past and blow out the candlelight of hope for many disadvantaged people. Inadvertently, the United States government will give signals of passive approval to repressive governments and bodies in other parts of the world.

Summary and Recommendations

The central aim of this paper is to document a personal perspective on the relevancy of affirmative action to a recent immigrant among the minority population. I have shared my philosophical, moral, and pragmatic assessments of the phenomenon and effects of prejudice and discrimination. The background of ethnic tensions and prejudice in my native country of Uganda have helped to shape my orientation. While I cannot pretend to have fully grasped and

14 Salomone, pp. 35–36.

experienced the mental and psychic anguish of United States born African Americans, I have drunk from the cup that bonds all people of African descent with regard to racial prejudice and discrimination. I thus regard myself as an active member of the African American community, a subgroup of those described by the Supreme Court as "discrete and insular minorities that have experienced a history of unequal treatment and a lack of political power. . . . "[15]

This collective experience is shared by other recent immigrants from Africa and other communities of the African diaspora. As I write this paper, I grieve over a recent incident in a small Wisconsin community. A health specialist was recruited to serve in a small needy community. He is a recent African immigrant who accepted the challenge of contributing, via his profession, to this community. His wife was recently stopped by police, forced to leave her car, kneel in the mud, was handcuffed and questioned about guns (allegedly in the car and her home). Reportedly, police had been called by someone who saw her wield a gun! All these events happened as the lady returned from picking up her 10-year old child from school.

Such incidents raise the serpentine head of prejudice I referred to above. Discrimination continues in housing, employment, education, freedom to travel without being harassed because of one's color. I know that efforts to erode the safety mechanisms of affirmative action and the related civil rights acts will mean open season for those intent on making the lives of minorities miserable. Let the forces of reason, morality and justice reign. The Commission needs to advocate for the equal protection of all persons at the National and local levels. Only this will reassure people like that shaken lady in a small Wisconsin town. Her son can then continue to believe and trust the police, his teachers, and neighbors. The boy's father can continue his work in the community, knowing there is support and acceptance, not racial hatred and danger lurking in the dark always!

15 Epstein, p. 464.

Affirmative Action: Equity and Efficiency?

By Dereka Rushbrook

Public policy choices often require analysts to assign relative values to seemingly contradictory goals, both desirable in their own right, but apparently at opposite ends on the spectrum of possible outcomes. De Tocqueville observed a young United States, and predicted conflict between its citizens' desire for both freedom and equality. More recently, debate has turned towards the "tension between individual responsibility and social responsibility."[1] For economists, the perceived tradeoff is often one between efficiency and equity, although these terms often serve as surrogates for views on more specific social and political issues. The debate over affirmative action is generally perceived as one set within this framework, with efficiency and equity juxtaposed, despite attempts by its proponents and opponents to claim both as arguments in favor of their positions.

Affirmative action originated in title VII of the Civil Rights Act of 1964, which made it unlawful for employers to "refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." As part of the Civil Rights Act, affirmative action, along with other anti-discrimination laws, was justified on the basis of fairness. In determining whether discrimination has occurred, courts have used two standards: disparate treatment and disparate impact. Disparate treatment is rarely found, and would clearly violate the principle of equity. Cases of disparate impact, which may be a reflection of discrimination in employment practices, are often evaluated on the basis of efficiency arguments.

Affirmative action programs can be grouped into three major types. The first, and most common, consists of a policy of deliberately selecting minorities and women when choosing between equally qualified candidates for an opening or promotion. The second group would deliberately select qualified, but not necessarily equally qualified, women and minorities for a position. The third category of program, and that often identified as synonymous with affirmative action by the public, is the implementation of a quota system to achieve a given distribution of employees according to race, religion, sex, and national origin. The degree to which equity and efficiency are in potential conflict will vary with the type of program implemented.

Both efficiency and equity may be assessed in two broad areas in the labor market. Equity, or fairness, however defined, is a matter of concern both at the point of opportunity (the acquisition of skills, and information on and the right to apply for job openings) and at the outcome (unemployment and labor force participation rates, relative wages, distribution in various professions). Efficiency in the allocation of resources will affect both the individual firm and worker and, insofar as it influences gross domestic product and the distribution of income, society as a whole. Both may be used as arguments for or against affirmative action programs, as well as measures of their success.

Efficiency

Although Becker developed a model of discrimination in labor markets that explains how employer and customer prejudice lead to wage differentials and segregated workplaces, neoclassical theory predicts that in competitive markets, discriminating firms will be driven out of business by those firms which, because they do not discriminate, are more efficient. This would imply that there is no need for government policies to correct for inequities, as they would naturally be eliminated by competitive market forces. Unfortunately, history proves otherwise.

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1 Victor Fuchs, "The Tofu Triangle," *The Wall Street Journal*, Jan. 26, 1996.

Efficiency arguments against affirmative action run along two lines: that the programs reduce productivity by forcing firms to hire less competent individuals, and that public and private resources are drained by the high cost of the enforcement of and compliance with antidiscrimination laws. In 1993, *Forbes* published an article by Peter Brimelow and Leslie Spencer (criticized strongly for its methodology by Frank McCoy),[2] claiming that affirmative action quotas had depressed gross national product by four percentage points.

On the other hand, other estimates put the negative impact of discrimination in education and employment at a similar level. This discrimination continues despite the implementation of affirmative action programs, and results in reduced levels of investment in human capital and lower productivity in the workplace. Lower productivity can result from the hiring of less qualified workers, as well as from reduced output by those operating in a hostile environment.

These efficiency arguments center on the incentive effects of affirmative action programs on individual investment in human capital. If discrimination bars minorities from skilled (generally higher paying) positions, individuals will have no incentive to invest in training as they are less likely to succeed in securing a position that will allow them to realize the potential returns from their investment. Affirmative action may therefore lead to higher levels of education and training attained in the economy, increasing productivity and growth. Potential productivity will no longer be foregone due to a lack of access to productive resources.

On the other hand, if affirmative action programs create the perception—or reality—that minorities and women may gain access to these positions without the requisite skills, fewer workers will find it necessary to acquire those skills, leading to counterproductive effects. These repercussions include not only lower levels of productivity in the economy overall, but also results that run directly against one of the core beliefs of advocates of affirmative action. An optimistic contention is that affirmative action can offset incomplete information sets on the part of discriminating firms. Those previously reluctant to hire minorities will no longer hold the same prejudices, as affirmative action programs will allow them to learn that there is no inherent difference in skill levels and productivity based on race or gender. If, however, quotas create incentive effects that reduce skill acquisition, existing prejudices may be reinforced rather than erased.

Affirmative Action and the Firm

Many firms have gone far beyond legal requirements in using affirmative action to achieve diversity. Private initiatives now outweigh public initiatives in many areas. In part, firms are reacting to changes in the composition of the labor force. Over 50 percent of college graduates are now women, over one-third of MBA recipients are women, and it is estimated that only 10 percent of those entering the labor force in the next century will be white males. Firms in other nations face similar pressures, with less resources and a more hostile institutional environment.

If firms are to operate successfully in this climate, they must carry affirmative action policies beyond the stops of hiring and promotion to ensure the creation of an environment that allows each worker to contribute to the fullest extent possible. Firms typically thought of as conservative in nature have pursued these efforts as vigorously as have those with more liberal reputations. AT&T runs workshops addressing the impact of homophobia. Corning made diversity one of its top three imperatives, but found that affirmative action in employment programs alone merely led to the loss of expensively trained employees who did not feel comfortable in the workplace. As a result, it instituted mentoring programs and sensitivity training for managers, and attempted to increase the diversity of institutions in the surrounding community.[3] Pacific Bell found itself sponsoring AIDS awareness workshops and videos, and tail-

2 Frank McCoy, "Rethinking the Cost of Discrimination," *Black Enterprise*, January 1994.

3 "Affirmative Action: Why Bosses Like It," *The Economist*, Mar. 11, 1995.

oring work schedules to accommodate workers with AIDS. Firms which retain their female and minority employees reduce recruitment and training costs, directly improving their rates of profit.

Diversity has become a strategic imperative. Building a work force of quality employees entails searching as widely as possible. Utilizing this work force effectively, however, requires a workplace where each individual feels free to operate without encountering prejudice or disrespect. Skagit Valley Community College, in Washington State, reports that in interviews with regional employers, it discovered that the primary reason for termination of employment by the employer was an inability to get along with coworkers of a different background. In this context, an effective affirmative action program becomes a necessity. Other incentives to increasingly recruit and motivate minority and female workers include an increasingly diverse customer base, broader perspectives on product development, and the belief that diversity allows firms to more effectively form global alliances and operate in the international marketplace. Even Wall Street appears to reward firms that successfully implement affirmative action programs: those recognized by the Department of Labor for doing so are generally rewarded by an increase in their share price within 10 days. Those firms chastised in the press for cases of discrimination frequently suffer a fall in their share prices.[4]

One indicator of corporate recognition of the need to manage diversity is the industry growing up to help firms do this. Once a diverse work force has been recruited and is in place, a company faces the challenge of successfully managing a multicultural workplace. Consultants run seminars and day-long workshops for employees, and resource catalogs for managers increasingly include book and video titles like "Meeting the Diversity Challenge," "Helping New Employees Feel Valued," and "Understanding Different Cultural Values and Styles," with publicity arguing that the most successful firms are those that understand diversity and seek to profit by using it to their advantage in the marketplace. Firms must send a clear signal of their commitment to their employees. One potential signal is the existence—and pay level—of an affirmative action officer.

Equity

Black Enterprise holds that affirmative action has been the single biggest contributor to the opening up of education, employment, and business opportunities over the last 30 years. Despite these growing opportunities, however, inequality persists. The group which has appeared to benefit the most from affirmative action has been white women, who have seen the male-female wage gap narrow and the difference in male-female unemployment rates almost eliminated. Minority women have also gained more rapidly than have minority men, amongst whom blacks made the least gains.

In the most recent recession, African Americans were the only group to report a net job loss. Unemployment rates for blacks remain at double those for whites. Structural changes in the economy during the 1980s were particularly hard on minorities, who were "overrepresented" in high-paying manufacturing jobs in the automobile industry. This trend may continue with the restructuring of government and the elimination of jobs in the civil service, where African Americans are also overrepresented. Black males continue to earn less than white males even when differences in wages are adjusted for years of education. Studies, including one by *The Wall Street Journal*, using coached minority and white applicants with identical resumes and similar interviewing techniques, continue to provide empirical evidence of discrimination in hiring for jobs at all levels.

The correlation of inequality with race and gender is a clear problem in a society that prides itself on its democratic identity and the assumption of class mobility. America, as the land of opportunity, has held out the promise of evaluation on individual merit, of equal life chances, and

4 Peter Wright, "Competitiveness Through Management of Diversity: Effects on Stock Price Valuation," *Academy of Management Journal*.

of the ability to move up through society by working hard and investing in oneself. As income distribution worsens and mobility between income groups decreases, blacks appear to have been more severely affected than have whites. Although income gains slowed for whites in the 1980s, their losses paled beside those of African Americans, who saw their gains cut in half.

Clearly, affirmative action has stalled. Public sentiment against it has grown, often because of inaccurate perceptions of the goals of existing programs. When affirmative action first was put into place, support was often stronger amongst the public than in the firms that were to implement the programs. Now, as headlines increasingly document new assaults on affirmative action, there has been a public backlash at the same time that firms are realizing the imperative of actively seeking out and successfully managing a diverse work force. As polls show increasing job insecurity and falling household incomes, with decreased mobility for low-income workers, the need for constructive affirmative action programs, without the inefficiencies or negative perceptions created by the labelling of "quotas," remain. If the United States is to take full advantage of its richest resource, its people, and to remain a dynamic leading economy, as well as to fulfill the promise of equal opportunity which it has held out over the years, we must continue to invest in all of our people so that individuals reach their own potential. Affirmative action has been, and must continue to be, an important tool in this struggle.

III. Practitioners of Affirmative Action and their Experiences

Affirmative Action Hiring in the Milwaukee Police Department

By Kenneth Munson and Joan Dimow

I. Introduction

In 1976, as a result of legal action by applicants and the United States Department of Justice, the Milwaukee Police Department, Milwaukee Fire and Police Commission, and the city of Milwaukee came under a court order requiring that two of every five police officers hired be from specified minority groups (African American, Hispanic, and Native American), and that one of every five officers hired be a woman (of any race).

The court order also applies to police aides, recent high-school graduates who perform functions that do not require police powers, while earning college credits in police science at a local technical college. With satisfactory performance, they enter the first police training class after their 21st birthdays.

This paper will discuss affirmative action in the Milwaukee Police Department. We believe that increased diversity in a police department is important for two complementary reasons:

- A police department that is perceived by the citizenry as representative of the community will find a greater level of cooperation and trust, leading to effective crime prevention and resolution.
- Officers who regularly work with others of different race, ethnicity, and cultural values, and come to value and respect those coworkers as individuals, will better interact with the diverse members of the community they are sworn to protect and serve.

II. History of the Affirmative Action Order

A. The Fire and Police Commission and Its Role in Police Hiring

The Fire and Police Commission (FPC) is the civil service testing and hiring agency for the Milwaukee fire and police departments. The FPC was created on April 11, 1885, by Chapter 378 of the Wisconsin Laws of 1885. As stated by Milwaukee Mayor Emil Wallber in 1885, "The primary object of the law is to provide effectually that hereafter politics shall have no voice or power in either the police or fire departments . . . ." Prior to that time, service in either department was seen as a "political perquisite," and the makeup of the departments changed regularly upon election of each new mayor, as was common throughout the country. Rules promulgated by the Board of Fire and Police Commissioners (the board, as used in this paper, refers to the appointed commissioners as a body) in 1885 initiated a merit hiring system whereby all applicants were required to be of good moral character and to pass written, oral, physical, and medical examinations prior to appointment.

Chapter 586 of the Wisconsin Laws of 1911 modified the role and authority of the board, granting it the authority to hear complaints of property owners against members of either service, and to hear appeals of departmental disciplinary action, and eliminating the power of the mayor to remove a chief for cause. Statutory changes enacted in 1969 and 1977 broadened the scope of Board authority to hear citizen complaints from electors (1969), and then from any aggrieved person (1977). Also in 1977, the board received statutory authority to conduct policy reviews of the departments and to suspend any rule of either department deemed inappropriate. In the same year, the Milwaukee Common Council passed City Ordinance 275, which limited future chiefs to a 7-year term.

In 1980, a change in State law gave the board limited authority to suspend and replace department rules. In 1984, the board was authorized to prescribe general policies and standards of the departments, inspect books and records, review

the efficiency and good conduct of the departments, issue written directives to the chief, and create (rather than merely modify) department rules.

The Board of Fire and Police Commissioners consists of five Milwaukee residents appointed by the mayor and confirmed by the Common Council. They serve overlapping five-year terms. The first African American Commissioner was appointed in 1968; the first woman was appointed to the board in 1969. The current board includes two African Americans, a man and a woman, a Hispanic woman, and two white men. While the suits that led to the court order were in litigation, an African American was chairman of the Board of Fire and Police Commissioners.

The scope of authority of the board is contained within Wisconsin Statutes Section 62.50. Among other statutory responsibilities, the Board of Fire and Police Commissioners sets employment standards and qualifications for entry-level positions, carries out recruitment programs, and administers competitive entry and promotional examinations. For the Police Department, FPC staff give examinations and provide eligibility lists for police officer, detective, sergeant, lieutenant of detectives, and lieutenant of police, as well as for certain civilian positions, including police aide and telecommunicator. For all these positions, the Milwaukee Police Department (MPD) must hire from the top of the eligible list.

Increased participation of women and minorities in all facets of the department is a shared goal of the board and recent chiefs of Police. Specific recruitment efforts target these populations, and as their representation in the department has increased, merit-based promotional testing conducted by FPC staff has resulted in women and people of color being promoted to the supervisory positions of sergeant, lieutenant, and lieutenant of detectives. Chief Philip Arreola, who has commanded the MPD since November 1989, has also recommended, and the board has approved, the appointment of women and minority members of the department to command positions (captain and higher), which are exempt from the civil service process.

B. The Litigation

In August 1974, Christine Ward, a female African American candidate for the position then called "patrolman," brought suit "individually and on behalf of all other persons similarly situated" against the five fire and police commissioners, individually and in their official capacities.[1] The class action complaint asked for relief from practices that discriminate against women, and noted specifically that "on June 22, 1974, fifty women took the Police department's written test for police patrolman, and all passed. Thirty-eight women took the physical agility test on July 13, 1974, and all of them failed."

In October 1974, the United States Department of Justice filed a civil action against the City of Milwaukee, the chief of police, and the fire and police commissioners, alleging a pattern or practice of discrimination based on race and sex with respect to employment.[2] Until 1975, men were hired as "patrolmen," and women as either "policewomen," or "police matrons." Police matrons cared for women prisoners in the city jail. They performed no police functions, and received less pay than Patrolmen who cared for male prisoners. In addition, patrolmen could be reassigned to other police department duties. Policewomen received the same training as patrolmen, had the same powers of arrest, and carried firearms, but were assigned to cases involving women and children. No physical fitness test was required for Policewomen. They received the same pay as patrolmen, but were not eligible for promotional opportunities, although they sometimes served as "acting desk sergeant" in the Youth Aid Bureau, and carried out the same function as male "acting detectives" in the Vice Squad.

In the early 1970s, the board had begun making special efforts to recruit minorities, including adding a community relations staff member with this function, advertising in minority-oriented

1 Ward v. Block, No. 74-C-333 (ED Wis. filed _).

2 United States v. Milwaukee, No. 74-C-480 (ED Wis. filed _).

newspapers, meeting with representatives of community organizations, and consultations with recruiters in other employment sectors. The patrolman application process had been opened to women, with the initial results which led to *Ward v Block*.

During the 2 years between the filing of the original complaint and the 1976 court order, the board and commission staff had taken a number of steps in anticipation of likely resolution. These included a testing consultant's analysis and modification of the physical ability test for relevance to the job. The 38 women who had failed the test in 1974 were given an opportunity to take a new physical ability test in February 1975. Twenty-four took the test, and four (not including Ms. Ward) were placed on eligible lists. The first woman hired as a "patrolman," in April 1975, was Ada Wright, an African American who remains a member of the department in the specialist position of police alarm operator.

The board changed its rules in 1975 and early 1976 to end appointments to the positions of police matron and policewoman. All new hires, both men and women, would be "police officers." Incumbent police matrons were allowed to remain in that position or apply for the position of Police Officer, with the maximum age limit of 33 waived for them. Incumbent policewomen were given the choice of remaining in that position or converting to police officer positions; for those who changed, experience as policewomen would count in determining promotion eligibility. Several women chose to remain in their positions; at this writing, the MPD still has three police matrons.

An interim court order had required the board to hire five women in October 1975, and five more in January 1976. The board chose to include 11 women in the October 1975 police officer class, 10 from a special recruitment for women, and one who had applied before the special recruitment. This woman, Hattie Nichols, remains in the department today as a detective.

Also in anticipation of resolution, the board had begun hiring two minority recruits for every three majority recruits. By the time of the September 1976 court order, there had been several interim orders, and the two suits—*Ward* and *U.S. v Milwaukee*—were ultimately consolidated. The last order concerning police hiring required that of every five new officers or police aides hired, two must be designated minorities—African American, Hispanic, or Native American—and one must be female. The effect of 20 years of affirmative action hiring in the MPD has been considerable.

III. Impact of the Court Orders

In 1972, when the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights held hearings on *Police Isolation and Community Needs* in Milwaukee, no data were available on minority representation in the Milwaukee Police Department.[3] Estimates suggested about 60 minority members, mostly African American; about 3 percent of the department.[4] There was one African American captain of detectives, three minority sergeants, and "approximately six" minority detectives; all other minority members were at the rank of patrolman. Although the USCCR did not address the representation of women, women at that time were allowed to serve only in the limited roles of policewoman and police matron.

In 1975, an analysis by the U.S. Department of Justice found one African American captain, 5 sergeants, 2 detectives, and 44 patrolmen; 1 Hispanic detective and 4 patrolmen; 1 Native American detective; 15 white policewomen and 9 matrons; and 1 African American policewoman. There were over 2,000 white men in sworn positions.[5] The 59 minority members were less than 3 percent of the department. The 1970 U.S. Census had shown Milwaukee to have a population of

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3 U.S. Commission on Civil Rights, Wisconsin Advisory Committee, *Police Isolation and Community Needs*, 1972.

4 Numbers and percentages in this report refer only to sworn members of the Milwaukee Police Department; that is, those with police powers. Clerical and other support staff are not included in these numbers, and are not covered by the court order.

5 U.S. v. Milwaukee, affidavit of William D. Harkins.

717,100: 84.4 percent white, 14.6 percent African American, and 1.0 percent other.

The table that accompanies this history illustrates the increasing numbers of women and people of color in the MPD, and their movement upward through Milwaukee Police Department ranks over 20 years. The "Specialists" category includes sworn personnel who have been given technical training, such as Identification Technicians. These are generally exempt positions, filled at the chief's discretion. Some incumbents are "Limited Duty" officers who are medically unable to handle full street assignments but can do desk work. As explained above, policewoman and police matron are titles that precede the hiring of women as police officers; incumbents were allowed to retain this title, and are limited to specific duties; matrons are not armed. These positions are converted to police officer as they become vacant.

The 1980 U.S. census showed a population decrease to 636,200: 73.3 percent white, 23.1 percent African American, and 3.6 percent other. In 1985, FPC data show the department was more than 10 percent African American, almost 4 percent Hispanic, 1 percent Native American, and more than 7 percent female (including women of all races). Three African American men and one Native American man had reached the rank of lieutenant,[6] 9 percent of all lieutenants. Eight African American men were sergeants, more than 5 percent of all sergeants. Sixteen African American men and one woman, four Native American men, and three Hispanic men were detectives, 11 percent of all detectives. Nine women who had been employed prior to 1975 remained in the old classifications of policewoman or police matron; 137 other women were police officers and two were specialists. One African American woman had been promoted to detective, but no women were in supervisory positions.

According to the 1990 U.S. census, Milwaukee's population of 628,088 was 63.3 percent white, 30.5 percent African American, and 6.2 percent other races. The Census counts Hispanics first in a racial group, then by ethnicity; 6.3 percent of Milwaukee's population, of various races, identified themselves as of Hispanic ethnicity. Asians and Pacific Islanders accounted for 1.9 percent of the population.

By the end of 1995, the department roster showed that 18.1 percent of sworn members were African American, 7.8 percent Hispanic, 1.7 percent Native American, and 0.5 percent Asian or Pacific Islander,[7] in total 28.2 percent of sworn members. More than 14 percent of sworn members were women (including three women who remain in the police matron classification. The last policewoman retired in 1994.).

- Detectives included 35 African American men and women, six Native American men, 16 Hispanic men, and one Asian man, in total 24.5 percent of all detectives. More than 10 percent of detectives were women, five of them African American.
- The supervisory position of sergeant included 25 African American men and women, 12 Hispanic men and women, and one Native American man, in total 19.6 percent of all sergeants. More than 8 percent of sergeants were women, six of them African American and one Hispanic.
- The rank of lieutenant included four African American men and one man of Pacific Islander descent, together 7.4 percent of all lieutenants. Two of 68 lieutenants were women.
- At the command ranks of captain and above, there were four African American men and one woman, two Hispanic men, and one Native American man, together 22.9 percent of all command personnel. Two of 35 command per-

6 Figures cited combine the ranks lieutenant of police and lieutenant of detectives.

7 Asians and Pacific Islanders were not included in the consent decree, but their presence in Milwaukee has increased in the past decade; the Board considers it important to remain informed on their representation in the Milwaukee Police Department.

sonnel were women, one African American and one white.[9]

The large increases over the past decade in both absolute numbers and percentages of women and minorities reflect a very large number of new hires in the years 1991 through 1995.[10] A large number of personnel reached retirement age in those years, which resulted in many vacancies. Most retirees were white men; their replacements were 40 percent minorities and 20 percent women. In addition, city administration increased the number of authorized positions from 2,056 in 1985 to 2,138 in 1995.

IV. The Recruitment and Hiring Process

Candidates for police officer must pass a multiple-choice written test of reading comprehension and other basic skills, a physical ability test that includes strength and agility, an oral interview, a detailed background investigation, and a medical exam plus drug screen. The majority of candidates fail or drop out at some point in the process; in the last 3 years, about one in seven of those who took the written test were appointed to the police academy. Successful candidates are placed on eligible lists which remain in effect for 2 years. When academy classes are to be filled, names are taken from eligible lists in the court-directed ratio of two people of color for every three whites, and one woman for every four men.

In the first years of the court order, it was sometimes difficult to bring in enough minority recruits to make a class as large as the board and MPD would prefer. In 1981, the Milwaukee Fire and Police Commission engaged a firm of consultants, Dresner, Morris, Tortorello + Sykes Research (DMT+S) to conduct a study of community attitudes toward the MPD, its officers, and the FPC itself. One of the study's goals was to provide information that would help the FPC in its recruitment of Hispanic, Native American, and African American officers. The survey found substantial racial polarization within the MPD, with the majority of African American officers rating the relationship between themselves and the department negatively, including dissatisfaction with promotional opportunities and assignment practices. At that time, there were no African American officers above the rank of sergeant, and few on special squads.[11]

In their survey of African American and Hispanic young adults (ages 20 to 32, within 1 year of the age requirements for application at that time), the consultants found that four-fifths believed more African Americans and Hispanics in the police department would help to ensure fairer treatment of minorities. They found that job characteristics, particularly helping people in trouble, strongly appealed to these potential candidates, but that the content of the FPC's advertising campaign was not striking "responsive chords" in this population. The consultants recommended that in addition to salary and job security, future advertising should "summon forth the positive feelings of helping others and being an agent of change within the Milwaukee Police Department."[12]

The consultants also found that 90 percent of African American officers interviewed had never been asked to help in minority recruitment. DMT+S suggested that with a reoriented advertising campaign, plus the active involvement of

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9 In addition, a white female Captain is on leave from the MPD while serving as U.S. marshal for the Eastern District of Wisconsin, and an African American male captain is on leave while serving as director of security for Milwaukee Public Schools.

10 1991: 176 recruits in three classes, a record number
1992: 232 recruits in four classes, a new record
1993: 119 recruits in two classes
1994: 120 recruits in two classes
1995: 223 recruits in four classes

11 *The State of Police-Community Relations: A Report to the Milwaukee Fire and Police Commission*, Dresner, Morris, Tortorello + Sykes Research, 1981.

12 Ibid.

minority officers, the FPC should have no difficulty in recruiting adequate numbers of qualified minorities to fill classes.[13]

The consultants concluded that "the most important problem currently facing the commission and the department is the substantial alienation of a major portion of Black Milwaukeeans from their police department . . . no department can hope to effectively serve the community as a whole when a significant portion of its population is substantially alienated from it." Like young minority adults surveyed, respondents from the general population and African American officers believed that this problem could best be alleviated by hiring more minority officers and improving community relations. DMT+S also recommended that police interaction at the community level be increased, examples being foot patrol and formation of a police athletic league.[14]

The MPD's move toward neighborhood policing has placed many officers in on going working relationships with community residents and business owners, and applicants often say they have been encouraged to apply by neighborhood officers. The League of Martin, an organization of African American officers, has developed a workshop on test-taking skills to which all applicants are invited. Many who have not taken written tests in several years find this helpful both in the material presented and in the welcoming attitude of the police officer volunteers who present the workshop.

These changes in public perception, plus expanded recruiting initiatives, have enabled the board to meet its affirmative action goals while hiring 870 new recruits from 1991 to 1995. Recruiting initiatives have included contacts with the military and community agencies, visits to schools, job fairs, festivals, and other events to talk about police work, and use of police officers to assist FPC recruiters. FPC staff and the MPD also streamlined the application and background investigation process, so that candidates move through the process more quickly. The net result has been the ability to send large classes to the academy as needed.

The requirements for application are basic: the candidate must be at least 21 years old, a United States citizen, a high school graduate (or hold a general education diploma), and must have a driver's license and no felony convictions. Since January 1993, the Wisconsin Law Enforcement Standards board has required that an officer who does not have at least 60 college credits at the time of hire must complete those credits within 5 years. Past sampling of candidates and recruits has shown that white candidates are much more likely than minority candidates to have this much education on entry, meaning that a larger proportion of minority officers will have the additional stress of attending school on their own time during their first year on the job. To alleviate this burden for all those who do not have the required credits on entry, the MPD has developed an agreement with Milwaukee Area Technical College (MATC), under which recruit training at the Milwaukee Safety Academy will earn 21 credits toward the MATC associate's degree in police science.

A general application period every 2 years typically generates an eligible list of "majority" men that expires 2 years later without being exhausted. That is, the number of eligible white men and others not covered by the court order is usually more than will be hired. In most cycles the eligible lists of women and minority men derived from the general recruitment are exhausted (that is, job offers are made to all available persons) before all classes are filled, and the board has opened additional recruitment periods specifically for those groups.

V. Promotional Issues

In 1983, the League of Martin, an organization of African American officers, charged the MPD with discrimination in assignments, transfers, and promotions. A resulting court order required that a number of African American officers be transferred from police districts in predominantly

13 Ibid.

14 Ibid.

African American areas of the city to other areas. The order also required that new selection procedures be put in place for promotion to sergeant and detective, for assignment to positions such as identification technicians, and for special assignments such as the tactical squad.

There are no affirmative action goals for promotion. Persons who achieve a position on an eligible list are ranked by total score in a series of job-related tests and assessment exercises. Examinations for promotion to detective, sergeant, lieutenant of detectives, and lieutenant of police are generally given every 2 years. Requirements include a minimum of 4 years' experience as a Police Officer for the Detective and sergeant examinations, and at least 3 years in those positions for the lieutenant examinations. (The board has at times required different levels of experience for some examinations.) An officer with less than the required minimum experience (for example, with 3 years and 10 months), would not be eligible until the next examination cycle. Since eligible lists remain in effect for 2 years, and promotions are made only as authorized positions become vacant, it may take much longer than 4 years from date of hire to actually be promoted, even assuming that the candidate is successful in her or his first testing cycle. Changes in race and gender composition of promoted ranks therefore occur slowly, but are obvious in the 20-year comparison that follows this text.

While increased numbers of women and minorities in the department have led to promotions, it is important to note that there are many fine officers of all races and both sexes who are not interested in supervisory responsibility. Others choose to remain sergeants because they like staying close to the daily activity of officers. Not everyone can or wants to move into higher ranks.

VI. Other Issues

While affirmative action has effectively increased diversity in the Milwaukee Police Department, to better mirror the community it serves, the process has not been easy or smooth.

An FPC staff review in early 1991 of people who had left the MPD in the years 1987 through 1990 showed that although retirement accounted for more than 85 percent of 305 white men who left in that period, more than 90 percent of 75 women and minority men who left did so before retirement eligibility.

A 1991 survey of women and minority men in the MPD, sponsored by the Bradley Institute for Democracy and Public Values, found that women of all races reported a low level of acceptance and sometimes outright hostility from male colleagues, but they and men of color saw improvements in opportunity in recent years, and particularly noted the increased numbers of women and people of color at supervisory ranks.

The affirmative action hiring policy has also been subject to charges of "reverse discrimination." In particular, the LEOCARD organization (Law Enforcement Officers' Coalition Against Reverse Discrimination) has sued the City, the board, and the MPD, saying that the 40 percent minority and 20 percent female hiring goals are discriminatory, and further alleging that race and gender quotas are used in promotional eligible lists. This litigation is currently pending.

The court order does not cover Milwaukee's newest ethnic groups—Southeast Asians of Hmong, Laotian, Vietnamese, and Thai origin. They are therefore not included in the 40 percent of new hires for each police officer class who are "minorities." Southeast Asian community organizations have been vocal on the need for officers who can communicate with persons whose English is poor. The board and police department agree on this need, and recruiters have regular outreach programs to attract bilingual persons who can help to better serve these ethnic groups. In addition, officers of other ethnic backgrounds have developed close working relationships with Southeast Asian organizations in their patrol areas, and have become a recruitment referral source.

The board has also modified the requirements for Police Aide, so that high school graduates who are not yet United States citizens who have made application or intend to do so on reaching age 18, may enter this program. With satisfactory performance, Police Aides enter the Police Academy in the first class after reaching age 21.

The 1990 Census showed just over 11,800 persons of Asian or Pacific Islander ancestry in Milwaukee, less than 2 percent of the total population. About half were Southeast Asians, accounting for 1 percent of the city population. The earliest known Asian/Pacific Islander hires, who

were department members prior to 1985, are now a detective and a lieutenant. There are currently 11 sworn personnel, nine of them at police officer rank, of Asian and Pacific Islander ethnicity.

VII. Conclusion

It would be naive to say that the court order alone would have resulted in the changes we see in MPD demographics. Aggressive recruiting was essential to success, and women and minority men found it difficult to fit into the climate they initially found in the department. Change in the working climate was a slow process, and one that is still on going. Those individuals who persevered, and those who successfully competed for promotion, made the working climate more hospitable for all who followed. They helped to achieve a "critical mass"—a large enough number of women and minorities to be routinely visible rather than unusual, so that potential applicants think, "I would fit in," rather than "I never see anyone like me," and current employees see applying for promotion as a realistic option. In addition, the pace of change in the past decade has been accelerated by large numbers of vacancies (due to both retirements and position funding) and resultant hiring. No court order and no amount of aggressive recruiting can fill public sector positions which are not vacant.

Nor would these changes in MPD demographics have been of the same extent without the litigation and court orders. While American society as a whole has become more open to women and minorities in positions of authority, without the court order, we might not have been able to sustain the aggressive recruiting to bring in women and minorities. If, for example, the percentages of new hires in the past 5 years who were women and minorities had been half what the court order requires (that is, 10 percent and 20 percent, rather than 20 percent and 40 percent), the department today would still be less than 10 percent women and less than 20 percent minorities (compared to actual proportions greater than 14 percent and 28 percent).

Affirmative action has been effective in making the Milwaukee Police Department more demographically representative of the community it serves. The department has changed not only in total representation of women and minorities, but in their representation at upper echelons. This change has occurred concurrently with other changes in policing, particularly the increased emphasis on crime prevention and neighborhood policing. We believe that these changes have been good for our city.

Note: Most of the information in this paper came from Milwaukee Fire and Police Commission office files. Other sources of information included *1885–1985 Commemorative Booklet* (Milwaukee Board of Fire and Police Commissioners, 1985), *A Report to Mayor John O. Norquist and the Board of Fire and Police Commissioners* (The Mayor's Citizen Commission on Police-Community Relations, 1991), and *Police Protection of the African American Community in Milwaukee* (Wisconsin Advisory Committee to the U.S. Commission on Civil Rights, 1994).

Table of MPD Ranks Showing Race and Sex of Incumbents

Rank	April 1975	December 1985	December 1995
Captain & above	34 white men 1 black man	46 white men	26 white men 4 black men 2 Hisp. men 1 N.Am. man 1 white woman 1 black woman
Lieutenant, Lt. Det., & Admin Lt.	46 white men	40 white men 3 black men 2 N.Am. men	61 white men 4 black men 1 As/PI man 2 white women
Sergeant, Det. Sgt, Admin Sgt	151 white men 5 black men 1 Hisp. man 1 N.Am. man	193 white men 16 black men 3 Hisp. men 4 N.Am. men 1 black woman	159 white men 19 black men 16 Hisp. men 6 N.Am. men 1 As/PI man 20 white women 5 black women
Specialists	93 white men*	82 white men 1 black man 1 N.Am. man 2 white women	50 white men 4 black men 2 Hisp. men 3 white women 2 black women
Officer	1554 white men 44 black men 4 Hisp. men	1131 white men 152 black men 72 Hisp. men 15 N.Am. men 2 As/PI men 90 white women 40 black women 5 Hisp. women 2 N.Am. women	861 white men 261 black men 120 Hisp. men 26 N.Am. men 5 As/PI men 182 white women 49 black women 13 Hisp. women 3 N.Am. women 2 As/PI women
Policewoman (Matron)	24 white woman 1 black woman	9 white women	3 white women
Total	**2113 sworn personnel**	**2053 sworn personnel**	**2122 sworn personnel**

* May include a small number of civilians, source not clearly annotated.
Source: Milwaukee Fire and Police Commission.

Affirmative Action in Wisconsin State Government

By Gregory C. Jones

I. The Wisconsin State Government Affirmative Action Plan

As opposed to a court ordered affirmative action program, Wisconsin State government operates under a voluntary affirmative action plan. Since 1978, the division of affirmative action has advised and assisted the secretary of employment relations, the administrator of merit recruitment and selection, agency heads and university chancellors on establishing policies and programs to ensure equal employment opportunity and affirmative action in the civil service system.

Wisconsin State law defines affirmative action as specific actions in employment that are designed and taken for the following purposes:

(1) ensuring equal employment opportunities,
(2) eliminating a substantial disparity between the proportion of members of racial ethnic, gender orpersons with disabilities groups in state job classification grouping and the proportion of thosegroups in the relevant labor pool, and
(3) eliminating present effects of past discrimination.

Affirmative action efforts have improved recruitment planning for State job vacancies, representation of affirmative action group members on State employment lists and there have been steady increases in the representation of minorities and women in the State's work force. Underutilized job groups declined job groups declined from 11 in 1990 to 4 in 1993 for women. In July, 1995, racial/ethnic minorities made up 6.4 percent of the work force compared to a State labor force rate of 6.6 percent.

Wisconsin State government's work force comprises over 2,500 job titles that are placed in 50 job groups and includes 40,416 classified civil service employees located throughout the State in he 72 counties. The majority of State government employees are covered by a labor relations agreement with typical entry into the work force through examination, interview, and selection. After entering the work force, an employee has certain opportunities regarding upward mobility, such as reclassification and promotion. An employee may also transfer within and between departments. In addition to classified employees, there are a number of unclassified employees who enter the work force through an appointment process without examination. The State's affirmative action (AA) program is applied to only those positions in the classified system.

What is the role and responsibility of the division of affirmative action?

In general, affirmative action is: (1) a system of procedures and standards serving to meet a higher goal-equal employment opportunity (EEO), and (2) a management tool for the enhancement of diversity in each agency's work force.

The Wisconsin Division of Affirmative Action is responsible for the development of affirmative action/equal opportunity standards which all agencies comply with. The standards provide the agencies with a framework to operate their affirmative action/equal employment opportunity programs and develop their affirmative action plans.

Specifically the Division has three major goals:

1. Ensuring Equal Opportunities

This is done through the affirmative action/equal opportunity standards based on Federal and State laws that prohibit discrimination based on age, race, gender, disability, ancestry, creed, color, religion, national origin, arrest or conviction record, martial status, political affiliation, sexual orientation, or membership in the national guard.

2. Eliminating present effects of past due discrimination.

This is done through a continuous review of the personnel process to identify employment procedures that may be discriminatory. This includes reviewing the recruitment and outreach efforts, the certification process, the interview process, and the selection process. After a review, recommendations for improvement are made. The division of merit recruitment and selection conducts

adverse impact review on all exams to determine whether there is a disparate impact on affirmative action groups (women and minorities) in the exam process.

A major activity under this goal is the development of programs to address the lingering effects of discrimination. The development of affirmative action programs is based on a biennial comparison of the State's work force with the State's available labor pool. This review is called "the underutilization analysis." It includes a statistical comparison of the following five factors.

1. Applicant flow data (the percentage of women and minorities among those seeking employment in the relevant labor or recruiting area). The department has information on the race and sex of nearly all applicants for State positions since 1989. The information on persons who pass civil service exams is used as the most important factor in the underutilization analysis because it is the most objective measure of actual applicants who posses the minimum qualifications for positions. All the other availability factors are estimates of potential applicants.

2. Total work force data is the percentage of women and minorities in the total work force in the immediate labor area. Data on the total work force (an estimate of all persons employed or unemployed and looking for work) is used for a small number of job groups, which include classifications that do not require any particular training or experience. The weight is determined according to the percentage of such classifications in a group. The U.S. census is the source of the data.

3. Education data on the race and sex of recent graduates in specific program areas. These data are obtained from the University of Wisconsin system, the Wisconsin technical college system and private colleges and universities in the State. The weight for the factor is determined by the percentage of classes in the job group that are included in the entry professional program—by definition, positions where the typical well-qualified candidate has a college degree with little or no experience.

4. Requisite skills data external, i.e., the percentage of minorities and women among those having the necessary skills in the immediate labor area. This information is acquired from the 1990 U.S. census and provides the details needed regarding the percentages for women and minorities with the necessary skills. The weight is determined by historical information on the percentage of vacancies in the job group that are filled by applicants who are not State employees.

5. Internal requisite skills data, i.e., the percentage of minorities and women among current employees who are promotable or transferable. This the factor recognizing one of the applicant sources as current State employees. To determine the availability percentages for this factor, the division examines new entrants into each job group (promotions and transfers) and determines from which job group they were moving. The race and sex percentages of the "feeder" job groups are then included in a weighing procedure to determine the final percentages for this factor.

These five factors are typically used to determine a percentage for the availability of women and minorities in the 50 job groups.

Once the availability *percentage* is determined, it is compared with the current percentage of women and minorities in the State's work force. When the percentage in the work force is 80 percent or less than the percentage of availability in the labor force, that job group is declared underutilized. Affirmative action programs can be applied to underutilized job groups. As an example, an exam is given for a job that is underutilized. Currently, the candidates with the highest five scores are certified to proceed to the interview stage of the employment process. However, since the job is in an underutilized job group, the affirmative action program called expanded certification is applied automatically.

Under expanded certification, the three highest scoring women or minorities or both who pass the exam are included among the total number of candidates certified to the interview. All candidates certified must be interviewed—unless they themselves decline the interview. A balanced panel includes representation of women or minorities or persons with disabilities on the interview panel. This standard is intended to eliminate bias in the interview process, reduce any cultural barriers between interviewer and interviewee and provide a more complete discussion of the qualifications of each candidate in the interview. All agencies are required to have a policy on balanced interview panels that may include a waiver explaining their effort to balance the panel when they are not able to.

In the selection stage for an underutilized position, the agency is required to prepare written justification when a minority or woman is certified and interviewed, but not hired. This procedure is intended to ensure reasonable effort has been made not to discriminate against women or minorities, and provide tangible information so that the division of affirmative action can enhance or develop programs to respond to shortcomings. The division has used information from the justification to hold "mock interviews" with candidates who competed successfully in future interviews.

3. Monitor and evaluate equal opportunity efforts

This is done through several reports on the progress of change within the State's work force. Annually, the division produces a report on hires, promotions and discharges for women, minorities, and persons with disabilities. Consistently, the division monitors the efforts of the agencies in complying with the standards developed by the division. The division is always reviewing statistical change with the job groups in State employment.

How does the Division go about meeting its role and responsibility?

The Division focuses on the following areas:

(1) The Division monitors the agencies' affirmative action/equal employment opportunity plan for compliance with the standards. Each staff person in the division participates in these compliance reviews. When an agency is not in compliance, we use this opportunity to educate and inform them of the purpose of the standard, and the role that the particular standard plays in the overall goal of diversity. The information learned from monitoring is used to inform other agencies about successful programs.

(2) The Division is involved in the development of programs that promote opportunity and provide exposure to Wisconsin State government. Examples of these programs include the summer affirmative intern program, the cooperative education program, the targeted recruitment program and the resume referral program. These programs address the old reason most often given for the lack of progress in hiring women, minorities, and persons with disabilities—"we can't find them."

(3) The Division advocates the enhancement of equal employment opportunity/affirmative action in the rules and practices of the personnel process. Division of affirmative action staff are assigned to work with other divisions in the department of employment relations. One of the functions is to review their policies, procedures and programs to ensure that equal employment opportunity is taken into consideration.

II. Programs and Reports

A. The Summer Affirmative Action Intern Program

Since 1974, over 1,740 students have been placed in more than 30 different State agencies and university campuses throughout the State. The program assists State agencies and universities in promoting equal employment opportunity by providing them with a pool of candidates who are racial/ethnic minorities, females, and persons with disabilities. The program provides students with on-the-job experience, training, and exposure to the Wisconsin civil service system. To be eligible, a student must be a junior, senior or graduate student at the beginning of the next school term or in the second year of a 2-year technical college program.

B. The Cooperative Education Program

This program is designed to provide relevant work experience and job training to students in institutions of higher education, leading to permanent State employment, and strengthen each State agency institution, and University of Wisconsin campus affirmative action performance by placing special emphasis on recruiting affirmative action group members. The program allows agencies to employ students in part-time, permanent, or project positions, provide on-the-job training, and move students into entry-level positions upon completion of the training program. Three hires were made under this program in 1995.

C. Resume/Skills Bank

Resumes of women, minorities, and persons with disabilities are referred to agencies to assist them in meeting equal employment opportunity goals. Over 1,000 resumes are contained in the

bank. Agencies use the bank extensively when a position is underutilized and for limited-term employment opportunities.

D. State and Federal Required Reports

The annual affirmative action report is required by the State and reports on the representation of women, minorities, and persons with disabilities in the work force. It is used to identify patterns and trends in the work force and identifies progress.

The aid to families with dependent children report comes under the State initiative to encourage employment of recipients of aid to families with dependent children, the division of affirmative action reports on such hires. In 1995, 149 recipients were hired in 15 agencies and university campuses.

The division produces a report on the status of veteran employment in State service. The report includes hires in all employment types, i.e., permanent, project, limited term, seasonal and sessional.

The written hiring reasons report, which is required by the State, reports on the reasons for selecting the person, if the person appointed is not a veteran, the spouse of a veteran, or a person the hiring of whom would serve affirmative action purposes.

The Federal equal employment report requires the reporting the representation of minorities and women in the State's work force. The report shows the representation of women and minorities in the work force, new hires, and by pay level.

Affirmative Action at a Small, Private, Liberal Arts College

By Michele A. Wittler

"Ripon College, historically, has been committed to the principle of equal rights, especially in connection with equal employment opportunity. In reaffirming this commitment, the College declares its support of the position respecting both nondiscrimination and affirmative action set forth in Executive Order 11246, as amended, and administered by the Office of Civil Rights. Ripon herewith establishes a plan for affirmative action that will further insure effective implementation of nondiscriminatory institutional policies concerning the recruitment, appointment, and promotion of faculty and staff and the enrollment and counseling of students."[1] With those words, Ripon College, a small, private, liberal arts college in rural Wisconsin, formally established its first plan for affirmative action in 1973. Since that year, Ripon College has had an affirmative action program. In details and language, the plans have changed over the years; in general goals and tone, they have not. It is viewed that affirmative action is entirely consistent with the mission of the institution.

Current Affirmative Action Program

The Ripon College affirmative action program (1993–94 through 1995–96) has the following sections: forward, policy statement, and affirmative action plan, which consists of objective, goals, implementation, and evaluation. There are special sections for employees and students. The policy statement is:

> It is the policy of Ripon College to provide equal employment and enrollment opportunities on the basis of merit and without discrimination for reasons of age, color, gender, national or ethnic origin, race, religion, sexual orientation, or disability. All applicants for employment and enrollment will receive fair consideration. Qualified women, people from minority groups, and individuals with disabilities will be sought out and encouraged to apply.
>
> The President of the College is responsible for overseeing the Affirmative Action Program. All members of the College community are expected to comply with the intent and application of the Ripon College policy as delineated in the Affirmative Action Plan.[2]

The goals of the plan reflect the institution's concern relative to campus climate, cultural diversity of the campus community, and equal opportunity for women, people in designated minority groups and individuals with disabilities. In the early years of affirmative action, goals were often stated in terms of striving for a particular makeup of a population relative to gender and ethnic background. For example, in the first plan, back in 1973, a projection of how many faculty positions would be available in the several years hence was made and a call to fill those expected openings with anyone other than a white male was put forth. In addition, it was stated that the faculty, which at that time was 9 percent women, should be 17 percent women within 5 years. (As a note, in the 1993–94 academic year 28 percent of the faculty were women.) Recently the goals have not been numerically specific, but rather have called for an increase in the number of women and people in minority groups in the ranks, throughout the college, where they are underrepresented. The program is reviewed and updated every 3 years and then approved and reaffirmed by the board of trustees.

Affirmative Action Officer

The president of the college appoints an affirmative action officer to administer the plan. The officer has been a full-time employee of the College who assumes the additional responsibility, without additional pay. Since 1973, there have

1 Ripon College Plan for Affirmative Action, 1973.

2 Ripon College Affirmative Action Plan, 1993–94 through 1995–96, policy statement.

been four different officers. Care is taken to appoint a person who is sensitive to the issues that swirl around affirmative action, and who has sufficient status within the community to be effective.

The specific duties of the affirmative action officer include examining and updating the program every 3 years, disseminating the plan to the campus community, serving as a resource person to the administration and others involved in hiring and to anyone having questions about the policy, overseeing the collection and analysis of employment data, preparing the annual report on affirmative action and presenting it to the board of trustees, reviewing recruitment activities, job descriptions and job advertisements, conducting exit interviews, serving as the affirmative action grievance moderator, and reporting any apparent violations of the policy to the president. All involved in the hiring process are encouraged to consult the affirmative action officer should there be any question about the process relative to affirmative action. There have been cases where this was not done, and where the outcomes seemed to be inconsistent with the policy; the affirmative action officer, upon becoming aware to the situations, has written letters of reprimand. Although ever is the need to educate the campus about the affirmative action program, recent experience is that the affirmative action officer is consulted regularly to help sort through complicated specific situations where affirmative action might be a consideration.

For example, it is unusual for a search to be conducted and for none of the candidates invited for interviews to be women. However, if a department has a short list and no women are on it, usually the chair or department head will contact the affirmative officer before anyone is interviewed. In that sort of a case, the way the position was announced and advertised will be scrutinized, and the nature of the applicant pool will be reviewed. Sometimes, funds are made available to interview an additional candidate, provided that at least one of the candidates is a woman. Sometimes the search is extended. There is concern that women, or persons in minority group designations, may not appear as strong candidates "on paper" or that there might be biases among those involved in the hiring process that would cause inappropriate discrimination. Especially in cases where women have not held positions on campus (at Ripon College those positions would include president and vice-presidents), there is great interest in bringing in candidates other than white males for interviews. As well as seriously considering the candidate, doing so helps educate the community that women, for example, could be in those positions.

The affirmative action officer interviews all those who leave the employment of the college. All that is said is held in confidence, unless the employee wishes to have something passed on. It has not been unusual for the affirmative action officer to relay comments and thoughts to others on campus usually because the employee has not had a comfortable opportunity to do so. The questions posed have been developed over the last decade. They are: 1) When did you begin to work for Ripon College? What is your position? 2) What is it like to work at Ripon College? Please talk about your position and the college as a whole. 3) What problems are you aware of at Ripon College? 4) What ideas do you have relative to solving those problems? 5) Do you see any "isms," like racism, sexism, ageism, etc., at Ripon College? 6) What is it like to live in the city of Ripon or near Ripon? 7) Other comments?

It is explained at the onset of the interview that what is said is held in strict confidence and that the affirmative action officer is looking for patterns in what people are saying. If similar comments are made, the affirmative action officer, as long as confidentiality can be maintained, will pursue conversations and possible actions. The goal is to improve the College. Experience indicates that employees are pleased to have been interviewed and are reflective and candid in their responses. It has only been in recent years that all employees have received an exit interview; before that only women and members of minority groups were afforded the opportunity.

The affirmative action officer is encouraged to take the initiative to address issues highlighted in the affirmative action program. Although many, if not all in the college community are concerned with campus climate and issues of diversity, the affirmative action officer is in a special position to direct attention.

Challenges

Challenges persist as Ripon College strives to meet the goals put forward in its affirmative action program. While the rural setting and perhaps even distance from a major metropolitan area are attractive features for some prospective students and employees, more often we are told that the isolation is undesirable. Certainly employment opportunities in the area for spouses are limited. The temptation to use our location as an excuse is resisted while attempts are made to have a campus environment that is supportive and welcoming. Although an annual report on affirmative action is given to the board of trustees, the success of the plan often relies on the good will of all those in the community making employment and promotion decisions as well as those whose decisions or actions affect the campus climate.

Benefits

There are many benefits for Ripon College by having an affirmative action program. The program requires data collection and analysis of employment and enrollment information. That report receives the attention of the board of trustees and the highest level of administration in the College. The focus placed on affirmative action is from sources of influence within the organization. Therefore, the potential exists for emphasis to be placed on various aspects of the plan. It is a strength that the information is presented, in person, formally, and regularly. The reports have become an important record for the college. Another benefit is that there is a mechanism for review of job descriptions, search and hiring procedures, and other personnel practices. This opportunity provides for a view from a perspective not only different from those most closely involved, but from a perspective grounded in attention to affirmative action. Even the forms that must be completed by the department heads and submitted to the affirmative action officer, when there are changes in personnel, serve to elevate the expectation that the affirmative action policy must be supported.

Perhaps the greatest benefit is that the affirmative action plan encourages conversation. The scope of the plan is broad. An objective of the plan is to provide an environment conducive to working and learning as well as fair opportunity for all members of the community. Within the framework of the affirmative action program, there exists many occasions for conversations among individuals across campus which often lead to new understanding and provides the impetus for developing strategies to counter subtle (or not so subtle) forms of inappropriate discrimination.

In summary, the benefits that flow to Ripon College from having an affirmative action program include the formal presentation of a report containing statistical information about the employees and students and a discussion of progress made, the focus of attention of affirmative action at all levels within the organization, a means to review personnel policies and procedures, and conversations aimed at finding ways to improve the climate on campus for women, members of minority groups, and individuals with disabilities.

Affirmative Action: Pushing Equal Opportunity

By Maureen Manion

As syndicated columnist David Broder observed last July, "Affirmative action has long been customary in politics. . . . It was called 'balancing the ticket.' . . . It was only when affirmative action was explicitly targeted to women and minorities that we began to hear complaints of reverse discrimination and solemn lectures about the degrading effects of group preferences."[1] As the political atmosphere of the 1960s, heady with optimism and zealous for reform, cooled in the cynical aftermath of Watergate and Vietnam, the public enthusiasm for programs which would take race into account in order to get past the divisive issue of racial inequity also cooled. The cynical 1970s gave way to the "me generation" 1980s, and the Reaganite "Morning in America" began to look like a cold dawn for the social programs in general and the affirmative action programs in particular which had sought to achieve that "color blind" constitutional standard articulated as early as 1896 by the Great Dissenter Justice John Marshall Harlan in *Plessy v. Ferguson.*[2]

The U.S. Supreme Court moved away from its passionate opposition to de jure segregation and leadership in racial equity issues (e.g. *Brown v. Board of Education*)[3], through the era of Regents of the *University of California v. Bakke,*[4] when remedial quotas were disallowed but "race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination . . . " were permitted.[5]

The Court's most recent cases, *City of Richmond v. J.A. Croson Co.*,[6] *Ward's Cove Packing v. Antonio*,[7] *Martin v. Wilks*,[8] tinker with" acceptable standards" for racial classifications in law. Most recently in the Court's *Advanced Constructors v. Pena* decision, the Supreme Court moved away from its 1990 *Metro Broadcasting v. F.C.C.*,[9] and supported an "extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment."

The Court has come to reflect the growing ambivalence of the larger American public about just how to implement a public policy that will result in the sort of legal/constitutional equity demanded by the 14th amendment but resisted by generations of social custom and practice. Last May's determination by the Supreme Court to refuse to hear the University of Maryland's plea to save a scholarship program for black students was described in a *New York Times* editorial as "a depressing setback for civil rights."[10] The Court, for so many years the arena for policy and attitudinal changes that took America's racial dilemma

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1 *Green Bay Press Gazette*, July 25, 1995, p. A5.

2 163 U.S. 537.

3 347 U.S. 483, 1954.

4 438 U.S. 265, 1978.

5 Ibid.

6 488 U.S. 469, 1989.

7 490 U.S. 642, 1989.

8 490 U.S. 755, 1989.

9 497 U.S. 547.

10 *New York Times*, editorial, May 25, 1995, p. A16.

by the horns, in recent years has revealed an uncertainty about just what the appropriate constitutional measures should be for identifying and implementing racial equity. It seems to have concluded that race-based programs are not the answer to equity, but it is also unwilling to abandon them entirely. When is "enough" truly "enough?" In its uncertainty and the fragmented opinions of its members, the Court reflects the public mood, skeptical, divided, and impatient.

The ascendant "politics of meanness"[11] in America today seems to have no tolerance for the process and implementation of affirmative action, and barely pays lip service even to its goals, a racially undifferentiated playing field of American society in general and business and education in particular. The political problem of quantifying equality of opportunity has become in the public mind the perceived enforcement of equality of outcome. Expanding economic opportunities facilitated the "startup" period of affirmative action. The present more technological and demanding job market has created a more hostile environment for any race or gender based "preferential treatment." Social and demographic shifts as well as economic globalization seem to be revealing a deterioration in both quality of life and social and economic expectations. A convenient scapegoat for the stressed worker is at hand: affirmative action.[12]

There are larger issues into which the issue of affirmative action may be folded. The changing global economy in which stability and financial security are problematic for the traditional working class has made these workers more resentful of their insecurity and perceived displacement by "less qualified" minority and women workers. The old code words of "States rights" have become "unfair quota systems," "racial and gender preference," and "reverse discrimination." Instead of getting past race, critics of affirmative action feel that taking race into account has led to disappointing outcomes for both women and racial minorities and to a "white male backlash" with an accompanying cultural image of the white male who has suddenly lost position, power, and prestige and become the newest category of victim. (A legitimate study might be made regarding this "cult of the victim" which at present permeates the American judicial system, interlinking the litigation obsession ranging from product liability to punitive damages to race and gender discrimination. Criminalizing race and gender discrimination, as suggested by some critics of affirmative action such as Shelby Steele, would replace civil class action and "group rights" suits with criminal procedures. This would still, it would seem, retain the courts as the governmental institution most constantly at the center of racial conflict, leaving open the question whether the permanent solution to this issue can be achieved outside the more "political" and "socio/economic" venues of American Society.)

Disenchantment with affirmative action has been part of a larger social/political shift from the "liberal" paradigm of a government programmatic approach to social and economic issues to the "Conservative" approach stressing deregulation, voluntarianism, and individual responsibility incentives and competition. In the contemporary search for villains to blame for the high cost of government regulation, the tax burden, and the "failure" of the social programs which aspired to overcome poverty, a convenient candidate for arch villain has become affirmative action.

Has affirmative action balkanized America both intellectually and culturally is a provocative question posed by Harvard sociology professor Orlando Patterson.[13] Quotas, diversity, and multiculturalism have become emotion-laden political code words, and race-norming and set-asides have evoked criticism and negative responses

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11 Bob Herbert, *New York Times*, Apr. 5, 1995, p. A17.

12 Two works that address these issues from different perspectives are Kristin Bumiller, *The Civil Rights Society*, Baltimore: Johns Hopkins (1992); and Andrew Hacker, *Two Nations: Black, White, Separate, Hostile, Unequal*, New York: Charles Scribners, 1992.

13 *See* Orlando Patterson, *New York Times*, Aug. 7, 1995; and "Fighting bias with bias?," *New York Times*, Sept. 25, 1995, p. A8.

from both whites and blacks, men and women. (For example, this autumn's dispute over Boston Latin's "quota" or "set-aside" for 35 percent minorities prompted some minority students to describe the effort as "ambiguous" and "belittling."[14] It has become clear to many observers, black and white, male and female, that affirmative action as proposed and established in the 1960s, implemented in the 1970s, and challenged in the 1980s and 1990s, is not the simple and easy answer to addressing equity in American society. Even with populations fully supporting this approach with open minds and hearts, questions would remain. With an increasingly suspicious and antagonistic population, these questions have become overwhelming, some would say exacerbating racial and gender conflict. Stereotyping African Americans, or Hispanics, or women as "incompetent beneficiaries of... preference serves no one in our fragmented and uneasy society."[15]

I believe, however, that a case can still be made in support of affirmative action, in spite of diminished political support and in some quarters significant and frequently passionate hostility. Racism persists, and with it, inequity. While there are those who would lay the blame for this persistence at the door of affirmative action, the preponderance of evidence, from statistical to anecdotal, would not appear to support this causality.

Affirmative action has sought to level the playing field, and in the 30 years it has been in place, that playing field would seem to have tilted measurably. According to the Bureau of Labor Statistics, among African Americans, high school graduation rates have improved, the percentage holding bachelor degrees has moved up 5 percent, and African American women with similar education and jobs have achieved pay equity with white women, although these are still significantly lower than equivalent white men.[16] In the work place, affirmative action has been most successful at lower level positions. The Glass Ceiling Commission has reported that the invisible barrier does in fact exist. After 30 years of affirmative action programs, 95 percent of senior management positions are still held by white men who constitute 43 percent of the work force.[17]

Sexism persists. "Affirmative Action is as much about sex discrimination as race discrimination," according to Katherine Spillar of the Feminist Majority.[18] A white male backlash sees affirmative action for a woman as taking "a job from her husband—nothing less than reverse discrimination." Affirmative action for women, from this perspective, has been a contributing factor to the deterioration of the American family, the increase in societal violence (including rape), and social pathology among our children.[19]

Perhaps the most frustrating thing of all, according to some observers, is that "white men don't get it—they don't think they have a problem [with racism and sexism]."[20] "Racist Chic" was cited in 1995 in the wake of a series of publications which put together some genetic and cultural claims of black inferiority to fuel the position that whites in fact have nothing to be ashamed of, they should not be criticized for racism.[21] A very short step indeed to the position that affirmative action results in an inferior work force or classroom.

The claim that affirmative action has actually triggered significant adverse discrimination

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14 *New York Times*, Sept. 25, 1995, p. A8.

15 *New York Times*, Mar. 11, 1995, p. A17.

16 *Milwaukee Sentinel*, Feb. 23, 1995, p. 2A, figure I.

17 *New York Times*, Mar. 17, 1995, p. A14, figure II.

18 *New York Times*, Feb. 6, 1996, p. A8.

19 *See among others* Susan Faludi, *Backlash*, (New York: Crown 1991).

20 *Milwaukee Sentinel*, Feb. 23, 1995, p. 5A; Bernice Sandler, "Women Faculty at Work in the Classroom," Center for Women Policy Studies.

21 *New York Times*, Oct. 13, 1995, p. A11.

would appear, however, to be largely unfounded. In a report by Rutgers law professor Alfred W. Blumrosen, which was commissioned by the Labor Department to study discrimination in employment, very little evidence of employment discrimination against white men was discovered. From 1990–94, there were fewer than 100 reserve discrimination cases among more than 3,000 discrimination opinions by Federal district and appeals courts, and among these only six instances of reverse discrimination were found.[22]

Since the 1960s by many measures, American society has become more equitable economically and culturally. The black and white middle classes have shown some convergence and in spite of ongoing debates over comparable worth and appropriate gender roles, pay and opportunities for men and women have drawn closer. Persistent gaps remain, however, and in fact there are some areas where income and opportunity disparity seems to be growing. For example, last year's census figures show the median income for white families has increased 9 percent over the past twenty years to $39,320, while African American families' median income remained stagnant at $21,500, and African American children are three times as likely as white children to live in poverty.[23]

Eddie Williams, of the Joint Center for Political and Economic Studies, urges that in the light of the persistent income gap "some effort on the part of government, which are in part based on racial discrimination," should be made.[24] Even Shelby Steele, although an avowed opponent of affirmative action, acknowledges serious discrimination problems: "Discrimination is the greatest and most disruptive social evil." While urging an end to affirmative action, he calls for an awareness of the reality of black alienation and a "moral authority" which would condemn discrimination as a criminal offense.[25]

In spite of the widespread resistance to it, it would seem that affirmative action, at least in a "corrected version" as suggested by President Clinton, should be retained as public policy. We as a society still need it. A just society free of racial and gender discrimination still eludes our grasp. It is necessary to further the vision of diversity as, in the words of Orlando Patterson, "an opportunity for mutual understanding and the furtherance of an ecumenical national culture."[26] As *New York Times* columnist Bob Herbert observed in his column, "What you do not want to do, in a country where there are still prodigious amounts of race and sex discrimination, is abandon a long and honorable fight for justice in the face of political hysteria."[27]

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22 *New York Times*, Mar. 31, 1995, p. A11.

23 *Milwaukee Sentinel*, Feb. 23, 1995.

24 *New York Times*, Feb. 23, 1995, p. A10.

25 *New York Times*, Mar. 1, 1995, p. A15.

26 *New York Times*, Aug. 7, 1995, p. A11.

27 Bob Herbert, *New York Times*, Apr. 5, 1995.

Strong Affirmative Action Monitoring Guarantees Impartial Employment Opportunities for Women and Minorities Currently Not Welcome in Wisconsin's Construction Industry

By Karen Meyer*

Affirmative action policies are strictly enforced on Federal construction projects in the State of Wisconsin but minority workers on private, State, or municipal projects still face tremendous obstacles from hiring discrimination and hostile work environments. Women and minorities still find it very hard to initially break into construction jobs and skilled trade apprenticeships. The people who do succeed in acquiring jobs often leave the same careers they fought so hard to attain when continual unemployment and hostile working conditions negatively affect their health and family lives.

In my 8 years working as an operating engineer (heavy equipment operator) in the Milwaukee area, I continually experienced hiring discrimination by contractors and my union. On the job, I was called vulgar names, grabbed, sexually harassed, threatened, had my car and crane sabotaged, was kept in menial jobs, denied training, and eventually blacklisted out of work for standing up for my civil rights, equal employment opportunity and humane treatment.

Other tradeswomen told me they experienced similar problems including sexual assault, touching, men exposing themselves, work sabotage, and pranks.

I never experienced discrimination before I worked in the construction industry. Women are the biggest minority in construction, but they represent less than 2 percent of the construction work force. Working as a "token" minority was very hard for me. You are constantly watched and scrutinized. What you do or do not do is noticed by everyone and becomes a hot topic for gossip by coworkers. There is constant pressure to perform. Mistakes are blown out of proportion and used against you as proof of your lack of skill. As a token worker, I felt isolated and alone.

I went for years without working with another woman on a job. Most male minority tradesmen tell me they experienced the same difficulties without the gender and sexual emphasis. An African American operating engineer told me, "I would rather be any color man in this industry, but not a woman. We have problems, but women are treated worse."

Complaining about a discrimination problem usually makes the situation worse. Your complaint is usually just shrugged off. The animosity toward you often increases as you are labeled; you lose your job and fight a court case for years, which may amount to nothing and never cover your losses.

Working in a hostile environment as a token takes its toll on your nerves, overall health, and personal life. The stakes are high: job, salary, reputation, and self-esteem, but most women and minorities end up leaving the trades. Economically it is hard, you usually lose a high-paying job for a much lower paying position if you can find one. Many suffer through long periods of unemployment and incur large doctor and attorney fees fighting discrimination cases.

Even some labor unions who should be protecting the rights of their dues-paying members often turn a deaf ear on discrimination complaints. Some labor unions are themselves a discrimination problem.

Early in my construction career, I found it hard to believe so many construction companies violated discrimination laws and got away with it. Why was this happening? What good is a law if it is not enforced?

Traditionally, the construction industry has been a white male dominated domain. Even in the 1990s when affirmative action policies have helped integrate other occupations, Wisconsin's

* The author extends thanks to Richard Oulahan, executive director of Esperanza Unida, for ideas contributed to this paper.

construction industry is still in the dark ages on issues of civil rights. The only glimpse of work force equality exists on Federally funded jobs where construction companies are closely monitored by the U.S. Department of Labor Office of Federal Contract Compliance Programs.

Women and minorities are a threat to many white male construction workers. They fear they will lose their jobs and their trades will be devalued by the influx of minority workers.

Many white male construction workers believe strongly in stereotypes. Women are meant to stay at home and raise children. Women are too weak and stupid to handle a man's job. Blacks, Hispanics, and Indians are dishonest, lazy and too high on drugs and alcohol to keep a job. If no one is there to stop them, these beliefs are often put into action.

How can you break down the racial and gender barriers in Wisconsin's archaic construction industry?

Affirmative action policies combined with strong monitoring and enforcement is the only way to assure fair and impartial employment equality. Whoever controls the money defines the rules for the construction project. When Federal money is involved, a job is closely monitored and affirmative action policies enforced. On private contracts and even some State and municipal work, there are policies that give the appearance of a good faith effort to employ minority workers but the projects are not effectively monitored. Construction companies can simply go through the motions of affirmative action and not actually hire any minority workers or keep them short-term to look good on paper. Policies can be distorted to accommodate the employer's predominately white male work force. Without monitoring and enforcement, affirmative action is a toothless dog.

People with a role in the industry have to agree about what is wrong and the extent of the problem. Discrimination for women and minorities is widespread in the skilled trades and is the rule, not the exception. Once we have agreed there is a problem, all those who have a major role in the industry must commit to positive and measurable change.

Federally funded projects have strong affirmative action policies and monitoring units. We need to struggle to get these same policies applied on the State and local projects that traditionally have had weaker policies and monitoring components.

The private sector should also work to create employment standards that reflect fairness in job access to their construction projects.

Strong affirmative action criteria must be implemented on all construction projects. If these criteria become a part of the bid specifications, the owner of the project (Federal, State, county, city, or private) can guarantee fair job employment distribution.

The only measure of success will be an increase in construction work force representation by women and minorities, and, so far, that has not happened.

Achieving Participation Goals for Women in the Construction Work Force

By Nancy Hoffmann

Background

Executive Order 11246, as amended,[1] establishes specific affirmative action standards for women in construction, and consolidates and standardizes existing contractor requirements for the purpose of promoting equal employment opportunity for women in the skilled construction crafts. The national placement goal, for purposes of measuring contractor's affirmative action plans, is set at 6.9 percent in each craft. Compliance is monitored by the Office of Federal Contract Compliance Programs (OFCCP).

Title 29, Code of Federal Regulations, Part 30, Equal Employment Opportunity in Apprenticeship and Training Amendment,[2] require affirmative action plans for apprentice sponsors[3] that assist in the recruitment and retention of women indentured to apprenticeship. The national goal for indenture of women in the skilled craft apprenticeships where women are underrepresented is 20 percent. Compliance responsibility by the Bureau of Apprenticeship and Training (BAT) is shared with the OFCCP. These two sets of regulations provide the major support for civilian women to enter the skilled crafts trades in the construction industry.

While affirmative action regulations have been in place since 1978 to assist women seeking to enter these occupations, and for employers to successfully gain this work force, there have been insignificant gains in the numbers of women employed in the construction industry. The gains that have taken place have been concentrated in a few crafts, rather than across the full range of construction occupations. There are also profound geographic variations of trade participation throughout Wisconsin. The 6.9 percent goal for women in the construction work force of Federal contractors and the 20 percent goal for women in indentured apprenticeship in the skilled crafts has not been met in Wisconsin in the 18 years that have passed since these regulations were put into effect.

Prior to 1980 female participation in construction apprenticeship was less than 1 percent Statewide. In 1990, the Bureau of Apprenticeship Standards statistics show an increase to 1.6 percent (or 61 females out of an apprenticeship work force in construction of 3,658). In November of 1995, female representation had increased to only 2.9 percent. The 20 percent goal for women in the construction trades apprenticeship will not be met until the year 2149 (153 years) if the gains inch along as they have since enactment of the regulations 18 years ago.

The journey level work force in the skilled construction trades ranges between occupations. According to 1990 Federal census bureau statistics, the largest representation of females is found in the paperhanging, glazier, and painting occupations (35 percent, 11.8 percent and 10.5 percent respectively). Women are represented in paving equipment operation, insulation work, and sheet metal work in the 4 percent to 5 percent range. The other trades, such as carpentry, plumbing, pipefitting, and electrical are all at 1 percent to 2 percent. Women now comprise 4.1 percent of the construction laborers in the State.[4] As of 1990 there were no female concrete or terrazzo finishers or tile setters.

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1 41 C.F.R. § 60 *et seq.* (1996).

2 29 C.F.R. § 30 *et seq.* (1996).

3 In Wisconsin, apprentices are indentured to Joint Apprenticeship Committees which are considered sponsors.

4 The laborer occupation has been approved by the U.S. Department of Labor as an apprenticeable occupation. State action will lead to the start of sponsor programs in the next year or two.

Minority women make up a small proportion of those employed in the construction crafts. Their representation relative to the entrance of females in the skilled crafts in all industries remains at about 16 percent of the total females employed.[5] Their representation in construction is lower than for the manufacturing and service industries. The regulations that apply to minorities in apprenticeship and the construction work force, which are higher in some geographic areas than those for women, are applicable for minority women. These goals as they relate to minority women are met at a percentage much less than those for women overall.[6]

The poor performance in meeting the goals of the order and amendment is in large part due to a lack of understanding on the part of contractors. While meeting the goals of the regulations is an important accomplishment, utilization of the strategies outlined in the legislation would provide the most effective methods for reaching the goals. Actual hiring of women for the skilled crafts is an activity that must take place to achieve the goals, but to achieve recruitment and retention of qualified candidates in sufficient numbers requires awareness on the part of sponsors and contractors of the full range of affirmative action steps contained within the order and amendment.

A Personal Perspective

I, like most women, was unaware of the existence of Executive Order 11246 or CFR Part 30 in the late 1970s and early 1980s. Few women applied for construction apprenticeships during this same period of time. In 1979, I applied for a plumbing apprenticeship, passed the aptitude exam, and after the Joint Apprenticeship Committee interview was ranked 136 out of 138 on the apprenticeship hiring list.[7] This meant that 135 candidates (all males) would need to be indentured before I would have an opportunity to start an apprenticeship. Despite my sincere desire to work in the construction industry as a plumber, I did not maintain hope that I would obtain this opportunity. It was as a direct result of Executive Order 11246 that I received a call from the apprenticeship coordinator, telling me to report for work as an apprentice plumber the following Monday. I was not aware until later that I had become the first female plumbing apprentice in southeast Wisconsin. The mechanical contractor that indentured me was starting a Federally funded project under contract with the Department of Housing and Urban Development and decided to indenture the only available female. I successfully completed a 5-year term as an apprentice, obtained my journeyman's license from the State of Wisconsin, and my journeyman union card. I subsequently went on in my plumbing career to become a master plumber, an inspector, a designer and a business owner. My success in the industry is due to factors such as a forward looking Plumbing and Mechanical Contractors Association, a supportive union, and a lot of hard physical and academic effort on my part. The opportunity to enter and succeed in the construction industry was only made available to me because of the affirmative action called for in the Executive order.

For women, this story is still replicated today. The slow progress towards meeting the goals that measure the effectiveness of contractor's affirmative action plans is illustrated well by the experience of the second female plumbing apprentice to become indentured. The time of her first application for apprenticeship in 1980, (within 1 year of my starting an apprenticeship), until her indenture was 6 years.

Need For New Workers in Construction

The entrance of women into the skilled trade work force in Wisconsin is necessary to help the construction industry meet the demand for replacement workers. An independent study by the Associated General Contractors in the greater Milwaukee area finds that retirements are out-

5 Women and Nontraditional Work, Wider Opportunities for Women, 1993.

6 Minority references will be included to address the status of minority women under the regulations.

7 Ranking of the candidates is based solely on the interview process and does not consider exam scores. It is not uncommon for women and minorities to be ranked low under this process.

pacing new entrants to the construction trades by about 100 to 200 people a year.[8] Labor market information published by the State projects annual openings for construction workers at 2,314 through the year 2005. The skilled craft annual openings comprises 795 of these projected occupational opportunities.[9] The majority of openings are due to separations, and in the case of laborers, operating engineers, and carpenters, the separations are due to retirement.[10]

The Governor's Commission For A Quality Work force surveyed 1,850 employers, including the construction industry, because of their potential to offer high wage/high skill jobs to Wisconsin workers. Nine out of 10 employers reported a skilled labor shortage. The implication for employers competing for workers is that, "as competition increases, employers will need to create a more diverse workforce," and, "to obtain the workers they need, employers will need to expand opportunities for women and minorities to prepare for and obtain high skill/high wage jobs."[11]

Goals as Benchmarks

The goals in and of themselves, have not provided the impetus to increasing female participation in this work force. Additional components of the Executive order that articulate minimum recruitment and retention activities can be utilized more effectively to increase female participation and can indeed assist Federal contractors to attain the increase that is desired across the journey level and apprentice work force. Studies by tradeswomen's advocacy groups have documented that the affirmative action steps are among the most useful.[12] Selected steps from the 16 points from 41 CFR 60-4.3(a)[13] are as follows:

a. Ensure and maintain a working environment that is free of harassment, intimidation, and coercion and where possible assign two or more women to each construction project.
b. Establish and maintain a current list of minority and female recruitment sources and provide written notification of employment opportunities to community organizations.
e. Develop on-the-job training opportunities and/or participate in local training, apprenticeship and upgrading programs that address the contractor's employment needs and that expressly include women and minorities.
f. Disseminate the contractor's EEO policy to unions and training programs and solicit cooperation in meeting the contractor's obligations.
g. Review the contractor's EEO policy at least annually with supervisory personnel.
h. Advertise the contractors EEO policy specifically with media that targets women and minorities.
i. Direct recruitment efforts to schools, community agencies, and training organizations that specifically serve females and minorities.
j. Encourage present female and minority workers to assist in the contractor's recruitment efforts.
n. Ensure nonsegregated facilities except to assure privacy between the sexes.
p. Conduct annual reviews of EEO policies and affirmative action obligations.

Most importantly, a key requirement in 41 Chapter CFR 60-4.3(a)8 describes the methods by which contractors can access the desired workers through cooperative association.

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8 *Construction Labor Report*, The Bureau of National Affairs, 1996.

9 *Wisconsin Projections 1992–2005*, Wisconsin Dept. of Industry, Labor & Human Relations, 1995.

10 The trade associations have monitored the average age of workers in these occupations, which range from 48 to 55 years.

11 A Worldclass Workforce For Wisconsin, Governor's Commission For A Quality Workforce, Recommendations & Executive Summary, 1991.

12 *Breaking New Ground: Worksite 2000, Chicago Women in the Trades*, 1992; *Building Equal Opportunity: Six Affirmative Action Programs for Women in Construction, Chicago Women in Trades*, 1995; *Training, Placing, and Retaining Women in Nontraditional Jobs Manual. Wider Opportunities for Women*, 1993.

13 The apprenticeship amendment contains 10 points that are equivalent to the order's 16 points.

> Contractors are encouraged to participate in voluntary associations which assist in fulfilling any one or more of its affirmative action obligations.... The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and a participant, may be asserted as fulfilling any one or more of its obligations ... provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female work force participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor.

The goals, in each case, are provided as measures of the efforts of contractors and institutions to gain female representation. The historical concentration on the goals, without a planned educational strategy aimed at the contractors and institutions that can make these regulations work, has led to resentment on the part of many individuals involved; the contractors, the women who have entered the trades as affirmative action hires, and the institutions that are responsible for enforcement. The contractors are inadvertently constrained by the focus on goals and the calculations that exhibit their willingness to comply. This has led to the historical unfamiliarity with the portions of the order and amendment that lead to the creation of viable affirmative action plans.

Communication to Contractors

Communication of the requirements to the contractors that are responsible for compliance with the order is a primary problem. There is a general assumption that the affirmative action requirements are contained within the bid and contract documents. The reality is quite different. At best, the entire section is attached to the bid specifications; at worst, it is referenced and on too many occasions it is illegible from the numerous times it has been copied. There is no consistent format for the articulation of the requirements. Typically, the notification contains the Notice Of Requirement for Affirmative Action to Ensure Equal Opportunity. The bidders' attention is called to the Equal Opportunity Clause, goals are expressed for minority and female participation, and it is articulated that compliance will be based upon the contractors implementation of the Equal Opportunity Clause (which details the contractor's specific action obligations required by the specifications and its required efforts to meet the goals). It is here that the contractor is made aware that compliance with the goals will be measured against the total number of work hours performed.

This notification is seriously lacking in the information needed by contractors to understand the requirements to which they are subject. The concentration on goals stems from the fact that, very often, this is the only information received by the contractor, either prior to bid, or at the time of executed contracts. Understandably, the individual contractor is unaware of the specific affirmative action steps that can assist in the recruitment and retention of the targeted population. Sub-contractors that also must meet these requirements are further removed from the awareness of the contract requirements. The logistics are outlined, but not the more important direction as to the methods that can be used to reach the goals, beyond simple hiring. If the contractor is not familiar with how the goals are used as a measurement of the effects of the contractor's actions, it can lead to the perception of goals as quotas. The contractors can easily come to the conclusion that their contractual responsibility consists of "hire 14 men, 1 woman. (A more accurate depiction of this scenario is, from the perspective of contractors, unions, trade associations, and joint apprenticeship committees, hire 14 qualified men, 1 unqualified woman). As I mentioned early on, the 16 points describe the range of steps that can lead to an eventual work force that meets the goals in each craft. The contractor can undertake the activity of hiring, and meet the contractual obligations over a period of time and in a manner that does not set up unqualified women for failure, or contractors for continually futile efforts at meeting the contract goals.

New Entrants to the Work Force

Utilization of a standard and constant pool of minorities and women for Federal contract jobs

has been a long accepted practice within the industry.[14] In the Milwaukee area, a minority contractor, who employed a substantial percentage of minority men in a trade, provided these workers to majority contractors on an hourly basis to enable the majority contractors to meet county, State, and municipal contract requirements. This inhibited the employment of new entrants into the construction trades. If the contractor's only awareness is of the goals, their methods will only address short-term goals. Contractors will more likely be recognized as making good faith efforts if they have an understanding of the affirmative action steps.

The Trade Association's Role

Contractors and sponsors can request assistance from their trade associations, the unions, the community, and compliance agencies in meeting the goals. A usual practice for making "good faith efforts" is through the trade association membership. The associations often provide organized outreach and recruitment activities in the schools and the community. A contractor's participation in these membership organizations can assist in reaching the goals. Too often the associations' programs are not results oriented, and have a continued history of good faith effort without result. A method by which the trade associations can develop a unified plan for outreach, recruitment, and retention can take the form of hometown plans,[15] which are cooperative agreements between contractors, unions, and representative community agencies. These plans create a partnership where all stakeholders in affirmative action work together.

Interagency Cooperation

Wisconsin-based compliance agencies have a history of working together on training and employment projects. These relationships have not been expanded to include the agencies at the local point of implementation of affirmative action plans such as the counties and municipalities. Employment and training departments of state government can help provide a full range of assistance to contractors and sponsors. Definitive responsibility for leadership and formalized systems to support the efficacy of these relationships are not in place. A formal, cooperative system would ultimately be able to provide assistance to contractors and sponsors by mitigating the communication deficit.

Remedy

While the OFCCP can undertake to remedy individual contractors' failure to make good faith efforts, this takes place usually at a point when the contract work is underway because the OFCCP regulations are work force oriented, not project oriented. The labor force is already on the job, and consideration of the requirements for the aforementioned reasons has not taken place. This puts the OFCCP in a position of addressing the compliance after the fact as opposed to being able to educate the contractor so they are well equipped to make good faith efforts prior to beginning work. The OFCCP conducts compliance reviews to accomplish two goals: regulation and education. An "after-the-fact" education process for the contractor may contribute at a later date to the meeting of goals by the contractor, but valuable job openings are gone unfilled by the underrepresented groups. The OFCCP District offices must, given the present system of notification, awareness on the part of contractors, and because of its regulations, conduct this process on a contractor-by-contractor basis. The ineffectiveness of this is made obvious by the limited number of reviews that take place annually and the low number of contractors that are audited for a second time within a 5 to 10 year period. The OFCCP considers remedy (absent discrimination) for past failure to consist of commitment to future performance. Given that the contractor likely was unaware of the requirements for performance, this nonpunitive remedy is reasonable. For egregious violation of the affirmative action

14 Transfer of women or minorities between projects or contractors for the purpose of meeting goals is a violation of the Order.

15 There were originally 33 hometown plans in operation in selected cities. Presently there is only one operating under the order.

standards, remedy is commensurate with the degree of violation. The unfortunate aspect of the process is that valuable OFCCP time is dedicated to the after-the-fact education of the contractors. Contractors who are informed, and have commenced appropriate activities at the beginning of the contract, can be provided technical assistance that further develops the contractors capacity to hire and retain a female work force.

The Bureau of Apprenticeship and Training (BAT) and the Bureau of Apprenticeship Standards (BAS)[16] can apply deregistration as a remedy for willful noncompliance with the amendment. A sponsor is typically provided additional technical assistance in cases where there is a lack of results for increasing female representation. The BAT and BAS have proactively addressed the affirmative action requirements through an apprenticeship model[17] that has lead to the inclusion of affirmative action plans in the trade apprenticeship standards by the state trades advisory committees, with adoption by local committees. Affirmative action steps that mirror those of the Order and Amendment are included in the model. Clear and comprehensive articulation to the local committees by the BAS, BAT and state committees is necessary for the adoption of standards to equate with effective implementation at the local level where the indenture of apprentices takes place. Continued selection and training practices that deter the entrance of women into the skilled trades need immediate remedy. The Committees, which are made up of contractors, unions, and trade association representatives, possess the greatest responsibility for ensuring a work force representative of women and minorities.

Opportunity for Assistance to Contractors and Sponsors

In Wisconsin various initiatives have shown that a coordinated effort to achieve the goals can lead to success for all interested individuals. Opportunity exists to assist Federal contractors, apprenticeship sponsors, and private industry to recruit, train, and retain women in the construction occupations through employment and training initiatives. There is availability of funds for demonstration and implementation projects, and models of successful collaboration, recruitment, training, and retention programs for replication. Legislation related to employment and training through the Job Training Partnership Act, and the Women in Apprenticeship and Nontraditional Occupations (WANTO) and the Intermodal Surface Transportation Efficiency Act (ISTEA), support the increased entrance and retention of women in construction and skilled occupations by providing funds for demonstration projects and institutionalization strategies that will assist employers (and Federal contractors) in their efforts. These Federal initiatives, which have been implemented in Wisconsin, articulate the strategies and methods by which women can become represented in the skilled trades through marketing, training, and support services. The "best practices" gleaned from these initiatives are often related to the 16 points of the order.

In southeast Wisconsin the JTPA Nontraditional Employment for Women (NEW) Act demonstration project has implemented exposure elements aimed at women for nontraditional occupations, which includes construction, into all elements of service delivery at Job Centers.[18] The strategies and methods will be implemented on a Statewide basis after evaluation of the project. This will dramatically increase women's aware-

16 The BAT and BAS share compliance responsibility under a cooperative working agreement.

17 Sponsors Guidelines and Procedures for Developing and Implementing Equal Employment Opportunities in Apprenticeship, Department of Industry, Labor & Human Relations, 1992

18 Job centers are the unified delivery locations for employment and training services of Job Service, the vocational colleges, community agencies, and State-funded JTPA, JOBS, and economic support programs. The NEW Act project has developed methods that provide 100 percent exposure of nontraditional career options to women at the centers. Screening, preparation, and training methods are to be evaluated for their effectiveness in preparing women as qualified candidates for construction and other nontraditional employment.

ness of the construction trades as a career option, and therefore create a pool of qualified apprenticeship candidates.

The Dane County WANTO project provided training and technical assistance directly to requesting employers and unions to assist in the recruitment and retention of women in construction.[19] The local tradeswomen's network has built its capacity as well as the capacity of the recipients to increase participation in the work force. The evaluation of the activities' success will provide another source for best practices that can be utilized by Federal contractors and apprenticeship sponsors.

ISTEA legislation[20] was the impetus for a collaborative model of development for program services that would assist the entrance of women and minorities into the heavy and highway construction industry. Department of transportation and apprenticeship bureau representatives, industry representatives, and community representatives led a design process that was inclusive of all those that stood to benefit from a well-planned initiative to recruit, screen, prepare, and place women and minorities in road construction.[21] The process by which a southeast Wisconsin model training program was created, simultaneously created a model for public-private-community cooperation. This model has been replicated in the Community Liaison Group to the OFCCP.

The Community Liaison Group is a public-private-community initiative that is directly linked to the OFCCP.[22] It provides the means for direct linkage between employers, community organizations, and interested government agencies. This working group has formalized the processes that were used in the ISTEA model, and linked with the existing Industry Liaison Group to the OFCCP to implement communication and cooperation strategies that will lead to employment for underrepresented populations that are covered under Executive Order 11246.

Recommendations

Achieving female participation in the construction work force requires commitment and cooperation from all stakeholders in affirmative action. Each stands to gain from a communication and education system that can be built through formalized linkages between the stakeholders. Contractors, sponsors, trade associations, and unions can maintain a strong work force by utilizing the untapped candidate pool of women and minorities. The compliance agencies can achieve the goals of the regulations by concentrating their efforts on education and technical assistance. The community agencies can better facilitate access to construction career opportunities for the individuals they represent.

Six recommendations that can help make this a reality are:

1. Require results-oriented affirmative action programs and support compliance by maintaining the goals contained in the order and amendment.

2. Develop a formal system of linkages between all levels of government to effectively educate the contractors, sponsors, trade associations, unions, institutions, and community about the affirmative action steps and the resources available to implement the steps.

3. Develop consistent and clear notification methods and reporting protocols at all levels of government contracting that supports unified efforts to achieve "work force oriented" goals.

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19 The recipients were the State District Council of Carpenters and Findorf, Co..

20 ISTEA provided over $1 billion over 6 years to Wisconsin for highway and transportation improvements and allows States to spend up to 1/2 percent on training and supportive services for women and minorities.

21 Represented organizations included; Wisconsin Dept. of Transportation, Bureau of Apprenticeship Standards, Bureau of Apprenticeship and Training, Wisconsin Women's Council, Wisconsin Technical College System, Dept. of Industry Labor & Human Relations, Wisconsin Roadbuilders Association, District Council of Laborers, Operating Engineers, Associated General Contractors, and various community agencies that represent underutilized populations in the construction industry.

22 The idea for community liaison groups is based upon industry liaison groups to the OFCCP which were created for the purpose of positive interaction between the OFCCP and regulated contractors.

4. Create public-private-community consortiums that work cooperatively to assist the entrance of all underrepresented populations into the construction work force.

5. Involve the state job center system in the recruitment, screening, and preparation of candidates for employment in the construction industry.

6. Maintain contractor and sponsor accountability through a "results-oriented" approach to compliance monitoring.

IV. Community Organization Perspectives Affirmative Action

Proactive Affirmative Action: A Position Paper

By Dennis Gabor

I. Introduction

A. Background and Current Perspectives

When anyone tries to climb the corporate ladder or aspires to receive a promotion in their place of work they are involved in a process called *affirmative action*. When President John F. Kennedy in 1961, and later, the authors of title VII of the 1964 Civil Rights Act initially enacted affirmative action legislation, it represented an opportunity for women, minorities, and later under new legislation, adults with disabilities to obtain jobs for which previously they likely would not have considered pursuing. The subsequent three decades of Supreme Court decisions, however, have redefined affirmative action significantly. Changing policies have created difficulties for all individuals in clearly understanding the rationale for their being hired or promoted when their organization is required to hire or promote individuals who are members of an underrepresented group.

Originally affirmative action was *not* designed to be a quota system but a recruitment effort that would seek out individuals from underrepresented groups who would not otherwise apply for certain jobs. Financial incentives were also offered to encourage such recruitment efforts. As the Supreme Court began to hear cases involving affirmative action, past discrimination was used as an argument to correct previously established recruitment and hiring practices. During the first two decades, the Supreme Court repeatedly redefined the issue of affirmative action while the government began to compile demographic information required of employers regarding hiring and promotion decisions to determine if discrimination did occur. The burden of proof, therefore, rested on the employer to prove that they did not discriminate in hiring and promotion decisions. The philosophy of the period was expressed in the words of U.S. Supreme Court Justice Harry A. Blackmun, "to get beyond racism, we must first take into account race."[1]

Supreme Court decisions over the past decade have viewed affirmative action from a different philosophical point of view. While the justices still agree with the original principles underlying affirmative action, the burden of proof has been transferred to the plaintiff, making it mush more difficult to prove overt discrimination. In light of this change of policy, it is questionable whether affirmative action is an effective tool to assure that women, minorities, and disabled workers are being properly considered when hiring or promotion decision are made.

B. The Experience of Various Underrepresented Groups

When affirmative action was implemented, blacks and Hispanics fared well as more opportunity was made available. As the Supreme Court redefined affirmative action, however, these minority groups have suffered losses. Today, many members of these groups are found in lower paying jobs and are not being placed or promoted to positions in which they can sustain themselves and their families. Furthermore, there are fewer students coming from these minority backgrounds while universities struggle to increase recruitment of this population.

Compounding this issue, is the stigma of affirmative action. Some blacks and Hispanics wish to

1 Regents of the Univ. of California v. Bakke, 438 U.S. at 407 (1978).

be hired or promoted to a higher position based on their abilities and skills to perform a job and not to fulfill quotas. Some underrepresented groups view affirmative action policy as a detriment rather than an aid to their careers. Shelby Steele, a black professor at San Jose State University who has written extensively in the area of affirmative action states, "Affirmative action policies have tended to give blacks special entitlements that in many cases are of no use because blacks lack the development that would put (them) in a position to take advantage of them."[2] This statement helps to illustrate the important role that training plays in a person's employability. Affirmative action efforts should be directed at the development of talents, skills, and abilities among the members of underrepresented groups. This development must begin at the elementary school level and continue through the transition to work.

Women and individuals with disabilities have fared somewhat better. Many of them, who have taken advantage of affirmative action policies to improve their abilities and skills, find themselves in jobs that previous generations did not enjoy. They are experiencing difficulties, however, in continuing this development.

We have been discussing workers with disabilities along with women and minorities. In this regard it needs to be pointed out that, unfortunately, the Americans with Disabilities Act (ADA), a landmark legislation passed in 1990, did not address affirmative action in regard to this group. The ADA concerns itself primarily with reasonable accommodation for workers with disabilities who already possess talents, abilities, and skills. Like affirmative action policies, it does not address *how* persons with disabilities are to develop the abilities and skills needed to obtain good jobs.

C. Changing Demographics and Employment Needs

The face of America is changing. The qualifications needed by all American workers require an increasingly higher degree of expertise. In addition, American workers are steadily becoming older. As the baby boom generation approaches retirement age, fewer workers will be available for the complex jobs of the next century. To fill the void, women, minorities, disabled workers, as well as newly arrived immigrants may provide an adequate supply of candidates. Herein, however, lies the paradox. The new jobs of the next century will be increasingly in the service and information-based industries. Different and more sophisticated abilities and skills will be needed to perform these jobs than those earlier generations. Unfortunately, many women, minorities, and disabled workers, those individuals in greater supply, are not prepared for higher level jobs. This presents difficulties for these underrepresented groups and employers as well.

II. An Innovative Approach: Proactive Affirmative Action

We believe the success of affirmative action is dependent upon the development of the talents, skills, and abilities of all individuals, and, in particular, those of underrepresented populations, so that optimal performance may be achieved from the individuals's perspective and from the employer's point of view. Each party, therefore, has shared responsibilities. Individuals need to be offered and avail themselves of the opportunity to achieve the necessary skills and abilities to perform a meaningful job and the employer is likewise obliged to hire persons from underrepresented groups who have adequate training and assist all their employees in continuing to develop their work skills and abilities. Historically, these benefits have been offered primarily to white males. To achieve an equitable society women, minorities, and disabled workers need similar access.

Vocational Training: The Key Missing Element

The key missing element to affirmative action in many instances is vocational training. Affirmative action represents a complex issue and the solutions cannot address only those concerns specific to women, minorities, and disabled workers. Some form of resolution is needed for individuals

2 From D. Altschiller, *Affirmative Action: The Reference Shelf*, vol. 63, no. 3, (1991).

considering whether they have the appropriate abilities and skills for a particular job they are seeking.

It is our view that the most vital issue facing workers today is whether they possess the skills and abilities needed to perform the jobs of the future. This need is compounded for women, minorities, and disabled workers since many do not have the appropriate education and training. Their needs are immediate and they must be addressed through affirmative action policies. The focus for employers, however, is to recruit workers who can perform the technical jobs of today and the future. A paradoxical situation is thus created for recruiters seeking to fill vacancies while, concomitantly, feeling threatened by potential legal action.

The government, with the business community and the education establishment, needs to jointly and cooperatively accept responsibility for affirmative action efforts. Our schools must insure that curricula are relevant and updated regularly and members of underrepresented groups need to be actively involved in the process. For these efforts to be successful, businesses and education need to direct the focus to providing and recruiting individuals with appropriate abilities and skills. In light of global competition, the successful companies of the 21st century will require a diverse and dedicated work force to remain competitive. It only makes good sense that businesses become an active partner in a proactive affirmative action effort. It is advantageous, therefore, that the business community enjoins the process of affirmative action since they will benefit greatly from these efforts.

III. The Milwaukee Center for Independence

Established in 1938, the Milwaukee Center for Independence is a nonprofit, nonsectarian, comprehensive, community-based rehabilitation facility, which is accredited by the Commission on Accreditation of Rehabilitation Facilities. Our mission is to provide services of outstanding quality to persons with special needs in the greater Milwaukee area, enabling them to reach their optimal level of independence and dignity. Every day over 2,000 individuals receive services from a staff of 225 highly qualified individuals. The primary disabilities of the people served include aging-related disabilities, brain injuries, childhood developmental delays, developmental disabilities, learning disabilities, mental illness, and physical impairments. Many of these individuals also are economically disadvantaged. The agency's programs include sheltered employment for adults with developmental disabilities and mental illness, vocational evaluation and counseling, job placement and coaching, medical day treatment for adults with chronic mental illness, a community living program, and an early childhood intervention program. In addition, an older adult program provides day treatment to the frail and disabled elderly and is constantly striving to instill and enhance meaning and purpose to individuals in the later stages of life. A full range of rehabilitation therapies are offered including occupational, physical, and speech therapy, audiology, and psychotherapy.

The Milwaukee Center for Independence is an enthusiastic participant in affirmative action initiatives. We are particularly sensitive to the needs of persons from underrepresented groups since our mission is directed toward vulnerable populations. Our approach to affirmative action can be described as proactive and encompasses the following approach.

1. We aggressively seek to recruit people to enter the work force to the extent their capabilities will allow. These people come from different racial and ethnic backgrounds and have a variety of severe disabilities, economic disadvantages, and other special needs. We have been quite successful in our recruitment efforts with churches and local community agencies that represent diverse populations. They are aware of the strengths of our vocational training programs that have prepared many individuals for community employment.

2. We strongly emphasize realistic training for the competitive job market. A critical aspect of this activity is the development of a solid work ethic, a sense of personal responsibility and the pride of living a more independent lifestyle. Lacking the appropriate vocational development and work skills, these individuals are reluctant to enter the competitive work force. Our vocational training programs provide doors of opportunity to the world of work by which our trainees greatly enhance their level

of personal independence and societal participation. The training received at the Milwaukee Center for Independence has resulted in a two to threefold increase in the typical community employment placement rate of 15 percent to 20 percent for this population. During 1995, 382 individuals were involved in vocational training, and 53 percent are now working in the community. Our programs include training in manufacturing, custodial services, food services, clerical/customer service, health care activity aide, and computer operator.

A new and innovative program that was implemented during the past year is the match program. This initiative encourages people with disabilities and other special needs to seek community employment where they have been extremely reluctant to do so. The match process involves vocational training and transition into temporary employment where they can display to their employer attributes of dependability, punctuality, task concentration, and attention to detail, among others. Often lacking knowledge and understanding of the capabilities of this population, employers are able to see firsthand the quality of training and work skills of these individuals prior to making a long-term employment commitment.

3. We vigorously pursue, generate, and nurture positive relationships with employers throughout the greater Milwaukee area. In this way, a wide base of placement sites are developed for our trainees. We are acutely aware of the needs of employers and the type of individuals they seek. Through our relationships, we assist them to overcome their concerns just as we help our trainees overcome their barriers to employment. Employers have grown more comfortable with recruiting these individuals as they have seen the quality of our vocational training programs and the comprehensive job support services we profile subsequent to placement.

It is through such initiatives as these that we at the Milwaukee Center for Independence feel we can best realize the objectives of affirmative action.

IV. Conclusion

Affirmative action currently does not provide the necessary ingredients that will allow women, minorities, and persons with disabilities to improve the quality of their lives. Most individuals from underrepresented groups want the opportunity to lead independent lives. They require, however, the proper training to develop their talents, abilities, and skills so that they can achieve such independence. Proactive affirmative action seeks to provide individuals from underrepresented populations with the training necessary to obtain and maintain meaningful and productive employment. In this process, employers need to be informed about the issues facing these individuals, and community-based agencies such as the Milwaukee Center for Independence attempt to satisfy this need. Moreover, the Office of Federal Contract Compliance Programs has been effective and needs to continue this effort to facilitate communication between business and industry and community-based agencies. This important relationship enhance understanding of the issues facing women, minorities, and workers with disabilities.

We also need to support the expansion of affirmative industries. These industries are focused upon essential services, such as custodial and food service, and provide job opportunities to the underrepresented population. Affirmative industries are effective in providing individuals with a transition to jobs in other industries. They provide, therefore, a stepping stone to higher paying jobs while incorporating skill training as part of their mission.

The strength of our work force, our businesses and, ultimately, our society lies in the rich diversity of our people. Affirmative action policies need to be redirected to provide this diverse work force with the abilities and skills needed for the future. Dr. Martin Luther King so eloquently indicated that "a man should be judged on the content of his character, not by the color of his skin." Affirmative action policies should similarly espouse, first and foremost, that individuals should be judged on their abilities and skills.

Breaking Through Multiple Barriers: Minority Workers in Highway Construction

By Janice A. Schopf

Background

Employment paying a good living wage has long been considered an important factor in the lives of US citizens for many reasons. It can provide meaningful activity thus supporting pride and a sense of well-being. Wages paid in exchange for work done are used to support the most basic needs of food, shelter, and clothing. Additionally, luxury items can be purchased to enhance life, and experiences bought to renew the body and soul. This equation is believed to be a factor in reduced crime, disease, and increased cultural success. As stated in the 1995 *Affirmative Action Review: Report to the President*, "The consequences of years of officially sanctioned exclusion and deprivation are powerfully evident in the social and economic ills we observe today."[1] This statement was made in reference to the United States as a whole, and we in Wisconsin are no exception.

In the State of Wisconsin we have experienced consistent growth in minority population with an increase in African Americans alone at 33.9 percent between 1980 and 1990. That is the smallest increase in any decade since 1940.[2]

Forty percent of black individuals and 38 percent of black families in Milwaukee County are living at or below the poverty level. For American Indians, it is 34.7 percent for individuals and 32.5 percent for families. Figures for other minority groups reflect a similar picture, while whites have 16 percent and 12 percent respectively.[3] Yet a recent study focusing on the central city of Milwaukee shows that in 95 percent of the households surveyed someone was looking for work. The area studied includes 75 percent of the African American and more than half the Hispanic populations in the metropolitan area. Eighty percent of households contained at least one person who works, and 71.4 percent had an individual working full time. Almost half of these workers were looking for a new or different job because of low wages, no health insurance, and the temporary nature of their jobs.[4]

At the same time, in the highway construction industry in the State of Wisconsin the annual worker retention rate is only 30 percent.[5] Candidates are always needed to fill well paying, permanent positions. Add to that projections by the State of Wisconsin Department of Labor indicating strong growth in highway transportation-related construction and one would think there might be a good match with at least some of the large numbers of unemployed and/or underemployed minorities living in the households cited above.[6]

In the city of Milwaukee, children of these unemployed minority families come to the Lavarnway Boys & Girls Club. They show up for fun and educational activities, but also for the free meals provided daily. Often their parents approach staff in the clubs for job referrals. At the same time,

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1 U.S. Department of Justice, Civil Rights Division, *Affirmative Action Review: Report to the President* (1995), p. 3, hereafter referred to as *Report to the President*.

2 Donald B. Dodd, *Historical Statistics of the United States*, (1993).

3 U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *1990 Census of Population: Population Characteristics*.

4 Jack Norman, "UWM report rebuts collapse of work ethic," *Milwaukee Journal Sentinel*, Feb. 4, 1996, Metro section, p. 1.

5 George Polk, director TrANS Program, Feb. 12, 1996.

6 DILHR, State of Wisconsin, *Wisconsin Projections 1990-2005: Industries, Occupations, Labor Force* (1993), hereafter referred to as *Wisconsin Projections*.

members of the Boys & Girls Clubs of Greater Milwaukee Board of Directors are well positioned in companies hiring to fill well paying jobs. Yet the two groups, though they had tried, had not come together.

Historically, the Civil Rights Act of 1964 and affirmative action legislation had helped bridge this gap for some. It would no longer be legal to bar minorities from applying for positions such as firefighters or police officers as was the case in "thousands of towns and cities" prior to civil rights legislation.[7] But still the gap exists.

II. Current Dilemma

Initially, three factors were instrumental in starting some productive action to close this gap in the State of Wisconsin.

- It became obvious that minority candidates did not hear about the job openings. They were outside of the "recruiting loop." The process of "in-house referrals" was not addressed in the Civil Rights Act. Basically, this is the practice where new employees are sought through existing employee referrals. This has been the process in construction trades, for example, where the white men who work there refer friends and relatives, also white men. This has provided a capable hiring pool that remained culturally sterile. Attempts to diversify the work force failed because the white men generally did not know men of other cultural groups to refer.

Comfort may have also, deliberately or subconsciously, played a part in their decisions to refer only their peers. Either way, minorities did not have access in this referral system.

- Employers, in a position to hire, did not know how to open up the "recruiting loop." They did not know how to connect with minorities. Should they go to their homes? their churches? post job announcements on super market bulletin boards?
- Work force projections by DILHR indicate the work force is expected to be 65 percent minority and female by the year 2000.[8] From a purely statistical point of view, minorities needed to be accessed as workers. Employers needed to know how to recruit, hire and train minorities or they would not have an adequate work force. This was not solely a humanitarian issue.

Where at this point to turn for a solution? Let me quote the words of Lyndon B. Johnson when he spoke at Howard University in 1965, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."[9] I contend that noticing how our recruitment of minorities excluded them led to an overall awareness of all the other ways we discriminate in the employment field. We cannot expect to bring minority workers and employers to the starting line, just let them go, and expect a developed work force who will be a credit to the employer, support growth in the industry and be proud citizens of the United States of America. What we need is to look at the entire employment system from recruitment through retention, and notice how many equal opportunities there are for minorities to fail. Then we must develop equal opportunities for success.

III. Initiatives

Looking at the entire employment system from recruitment through retention, three events have been critical to success in Wisconsin, both for minorities and employers:

- a personal initiative on the part of a company owner,
- a government funding initiative called ISTEA, and
- a program using that government funding, named TrANS.

A. Personal Initiative

The first event, the personal initiative, involved a highway construction company owner who was a board member of the Boys & Girls Club

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7 *Report to the President*, p. 7.

8 *Wisconsin Projections*.

9 Robert K. Landers, "Is Affirmative Action Still the Answer?," *Editorial Research Reports*, Apr. 14, 1989, p. 201.

of Greater Milwaukee and a Milwaukee central city minority, who is a branch director at the Lavarnway Boys & Girls Club. One needed workers to fill well-paying, permanent positions, the other knew minorities needing the same. In 1989, these two began to talk about their needs to see if there could not be a "win-win" solution. In a voluntary action to get underrepresented individuals working, they made a move away from the traditional in-house referral recruiting system.

A date was set for the two groups to meet. This event was held in a Boys & Girls Club, in the central city of Milwaukee. This was a show of good faith. The employer was willing to come to the candidates, an experience rather foreign to minorities in the highway construction arena. Top level managers and foremen arrived, interviewed minority candidates in a receiving line and then compared notes. Some applicants with less than ideal backgrounds (incarceration, drug treatment, etc.) showed such motivation and drive that individual interviewers advocated for them to be hired, persuading their peers that this person had what it took to be successful. Seventy five minority men and women showed up for that first event and 30 were hired. All but one made it through their employment experience satisfactorily that summer.[10]

Critical to the success of this first step was preparation on both sides to avoid or deal with the opportunities for failure and turn them into steps toward success. Each of the two groups participating, the employer representatives and the minority candidates, were coached to ensure understanding of what was expected. Once on the job, each minority worker had a mentor, a coach, or what was at times referred to as "a friendly ear." They met and talked regularly and were up front about progress and problems.

Measures taken by these two men went beyond opening the network to recruit minorities. Problems (opportunities for failure) were encountered immediately that would have kept the majority of these candidates from actually working regardless of their potential. Two major problems were valid driver's licenses and cars. Arrangements were made by the employer to cosign loans for cars and to pay fines for retrieval of licenses. It was agreed that all advances in pay involved in getting people up and working would be deducted in reasonable amounts from future paychecks.

Everyone had an investment in this experience. The foremen had helped make hiring decisions. The workers had been recommended by their good friend and ally at the Boys & Girls Club, after hearing their pleas for help with finding a good job. All had something to gain. The company would be accessing an untapped work force market and the employees would get a good living wage from steady employment.

B. Government Funding

The second event happened in December 1991 when the Intermodal Surface Transportation Efficiency Act was signed into law by President George Bush. ISTEA, pronounced as "Ice Tea," was not an affirmative action program but a collaboration between the Federal Highway Administration and State transportation agencies. It is mission was (and is) to ensure the highest quality surface transportation system, to promote economic vitality for the Nation, and to enhance the quality of life for *all its people*. The increase in funding made available through ISTEA was expected to result in 600,000 new jobs.[11]

C. TrANS

The third event was a combination of the first two. In 1995, many of the principles of the personal initiative mentioned earlier, and the funding from ISTEA, were brought together in a program titled Transportation Allied for New Solutions, commonly referred to as TrANS. Representatives from all fields involved in highway construction and minority hiring came together. Highway construction companies, employment specialists with community organizations, the DOT, DOL, State legislators and union representatives all sat together around big tables

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10 Sam Williams, branch director of Lavarnway Boys & Girls Club, interview, Jan. 24, 1996.

11 U.S. Department of Transportation, Federal Highway Commission, *Civil Rights Implications of the Intermodal Surface Transportation Efficiency Act of 1991*, Pub. # FHWA-CR-92-004.

to develop a plan to hire minorities and women, *and* support them in becoming a part of the companies' successful work teams. ISTEA, and therefore TrANS, is not an affirmative action program and all participation was voluntary. After the first year, hiring and retention is at about the 50 percent mark, well above the industry average.[12] In addition, as the TrANS program launches into its second year, referrals are pouring in with no advertising needed. The program participants—minorities and women—are referring their peers: other women, other Native American Indians, other Blacks, etc. One successful participant has referred eight individuals, including his own brother and sister. The TrANS Program has become the "in-house referral system" for previously underrepresented groups.

Critical to the success of these initiatives might be that they approached this challenge as a system. Civil rights legislation opened some doors but left candidates kind of lost and bewildered once inside (and thus unemployed).

The TrANS program was designed to deal with more than just opening the recruiting mechanism, the in-house referral system that had previously excluded minorities. TrANS also dealt with other identified systems that exist in both the minority community and the road construction industry. Employment in a company that is been built around whites will use a system that is meaningful to them. As minorities enter, they bring knowledge of their cultural system with them to the workplace. Neither is wrong, just different. Neither needs to be in conflict to the point where whites cannot successfully hire minorities or minorities cannot successfully work in previously white-dominated workplaces. TrANS prepared all parties involved to understand the systems and problem solve ahead of time. The TrANS Program was also proactive in that it paid attention to new barriers or roadblocks as they emerged so they could be resolved.

IV. Opportunities for Success of Failure?

A. Driver's License

The most immediate problem area for many potential workers who were interviewed in that first event at the Boys & Girls Club was the lack of a valid driver's license. Many candidates had fines that needed to be paid in order to recover their licenses. Some had fines even though they had never had a driver's license. During problem solving in this area in the TrANS Program, staff became aware that in the State of Wisconsin, it is necessary to take Driver's Education at a cost of about $150.00 in order to qualify for the examination process. In addition, driver's education is offered in the high schools, still at the above cost, and priority is given to seniors, then juniors, etc. For at least the past 4 years, this program has not been offered during the summer months; during the school year there are frequently scheduling conflicts. At age 18, behind the wheel driver's education is no longer mandatory so numerous poor minorities wait to turn 18 to get their license. They do not, however, apparently wait to drive. Thus, young minorities start driving, get stopped and fined for driving without a license and then money becomes an even bigger issue in getting a valid driver's license. In both programs discussed previously, assistance was provided in the form of loans and/or intervention with the court system to resolve the driver's license issue.

B. Transportation

Once drivers licenses were reinstated, a car loomed as a problem for many. But that did not stop the powers that be. Again, cosigning of loans was made available through the employer so cars could be purchased from a reputable dealer. There was no excuse for not making it to work and being on time. In the TrANS program, assistance was also given to participants to get them wheels. After one young man started working in mid-summer, he relied on family members at first to drive him the 30 miles, one way, to and from work. The TrANS Program was low on funding, having al-

12 Polk interview.

ready used most of its money to help the earlier hires. This young man was going to rely on rides until he made enough money to buy a car. After finding a good used car for sale in the rural area near work, he needed a ride during his lunch hour to go to the owner, put a down payment on the car, and then pay it off with future checks. TrANS personnel were available to provide that ride and help him get a car.

C. Interviewing Skills

One problem area already understood was the interviewing process. In some cultures, strong, frequent eye contact is seen as inappropriate and egotistical. Rather, it is seen as a sign of respect to look down or away from a superior or person in charge. Thus the poor marks given at times to minorities when interviewing. The same is true for what we call "selling yourself" which is seen in some cultures as bragging and not appropriate either. In training, this was taken out of the context of bragging and participants were taught to share their strengths as a worker with potential employers. Then the employer could see how valuable they might be.

D. Timeliness

Being on time for work is a message written in stone for multitudes of nonminorities who have grown up in a family environment with what has become known as a strong work ethic. Cultural awareness may teach us how relative "on time" is. In a recent diversity training, it was explained that if a meeting is scheduled to start at 8:00, whites believe they are "on time" if they show up promptly at 8:00 or better still, 5 minutes to. In the African American culture appropriate arrival would be around 8:20 or 8:30, while Native Americans would plan to start the meeting whenever everyone showed up. A young African American male, starting work at one highway construction company almost 5 years ago thought he had this "on time" thing under control when he proudly got to work at exactly 7:00 AM, his assigned starting time. However, he had a bag in his hand containing his McDonald's breakfast . . . uneaten as of yet. It took a few more steps for him to understand on time meant you have done *everything* else you need to do to start your day *before arriving at work*. In fact, arriving 5 or 10 minutes *before* 7:00 is really what the employer has in mind.

E. Priorities

Family ties have been most enduring in the lives of many minorities, getting little if any competition from a job commitment or employer. White employees may have equally strong family ties but have learned to balance family responsibilities and full time employment. When unemployment is common, it is easy to establish a routine of dropping everything to respond to family demands, and relatives become dependent on different individuals' availability. As a manager in a social service agency, I received a call from one of my staff early one morning. This person of color was informing me that he would not be in to work because he had to travel to Tennessee to pick up his sister from college. It was not a good day for him to take off, especially with no real warning. However, the family had decided he was the one who should go. They were not accustomed to his commitment at work. Interaction with the family system is necessary at times to get all parties involved to be supportive of one person's employment and it's requirements.

E. Self-Esteem

Work rituals to initiate new employees are common in the highway construction industry. With information up front, the new minority worker need not be suspicious of harassment or discrimination when jokes are played on him or he is not called by name. It is customary to refer to new employees as "new guy" and should not be viewed as a lack of respect. And when a new worker removes his tool belt at lunch time, he will find it nailed to the ground when he tries to pick it up and put it on. Coworkers will laugh and ridicule him, only because he is learning a lesson the hard way. Told never to remove that belt during work hours, he broke a rule and was forced to suffer the consequences, which are designed to leave a lasting impression. With prior warning, and understanding, it is less likely that this will be seen as discrimination. As a curriculum item in the TrANS training program, participants are taught this can and does happen to everyone regardless of their race or gender.

V. Summary

The sampling of situations you have just read are typical of those that occurred in the TrANS program. All are real and all were resolved

positively resulting in worker development and retention. By combining the leadership model first used in the personal initiative and government funding from ISTEA, more companies and more workers participated. At the end of the work year, questionnaires were sent to all participants and employers in this program. Of the 24 employers questioned, 14 responded. Their comments, as well as the statistical data, are favorable.

- All want to participate in the future.
- One employer commented, "... we would hire many more if they are qualified."
- Nine employers reported a greater retention rate for these workers than they usually experience.
- Three reported equal retention.
- Only one reported a lesser rate.
- The 65 percent retention rate in this program is twice the industry standard!
- All employers who currently have employees from the TrANS program indicated they would be recalling them.

As for the worker participants, let me rely on their words.

- An African American male states, "I feel that I will get called back next year because I am a good, hard worker and a valued employee."
- And another speaks for the group when he says, "You helped me and 35 other people make a decent living in a job market that tends not to hire Blacks."

Those "decent livings" translate into:

- 45 individuals earning an average family supporting wage of $12.71 per hour.
- The return to the economies of local communities is estimated at $545,000.[13]

VI. Recommendations

Do we need affirmative action? Yes. We need affirmative action with a new basis, a shift in consciousness. What we need is resource development of our humanity. Our people in this country are our resources. Affirmative action all too often carries the concept of government knocking on our doors, demanding we do something, or else. Resource development is simply developing people, their skills, their talents, and everyone's humanity.

We, as a government, use public funds every day to develop what is deemed good for our country. Funding goes to corporations to market in foreign countries, to farmers to support their businesses, to doctors and teachers to encourage them to work in underserved areas. We do not go on at length figuring out how oppressed they have been. We acknowledge it would help us all, as would minority development. It would provide our country with much needed workers, buyers of goods and services, leaders and role models, as well as healthy, confident parents who raise healthy, confident children who in turn can contribute to their fullest potential. Do we all not stand to gain from this?

Important features of this resource development would be:

- Resource development programs that are comprehensive, designed to deal with what we already know to be problematic. Additionally, we need a strong commitment to look at new information and obstacles that are sure to arise as we get into the process. We need to stay in this for the long haul. We do not know the entire scope of this situation or what challenges it may bring. If we did we would likely have solved the problems already.
- Ownership by all parties involved is crucial. Every group participating needs to come to the table from day one, share responsibility for this resource development and every one needs to stand to gain something.
- All resource development programs must include training on diversity, change, and building community. These are essential components in the programming we are trying to develop and implement. Without greater skill in these areas, we will surely meet with frustration and failure.
- And finally, I recommend the use of initiatives such as ISTEA and programs such as TrANS

13 Milwaukee, WI YWCA, *Year End Analysis for TrANS Program*, p.1.

for modeling around the country. Though our development of certain diverse cultures has been lacking, there are well designed, successful programs in place. We would benefit from a comprehensive search and review to identify such programs. Some may be affirmative action programs, some may not. What matters is that the groundwork has been laid and they can provide the leadership for more widespread success in the development of our minority population.

Thirty Year Retrospective: Women and Affirmative Action 1965–1995

By Eileen D. Mershart

Much has been said and written about the issue of affirmative action and the glass ceiling. 1995 was no exception, indeed, it was, in many ways, a banner one for headlines and reports on both of these issues. Examples include the Federal Glass Ceiling Commission, which issued its report in March 1995.[1] George Stephanopoulos, senior adviser and Christopher Edley, Jr., special counsel to the President were charged by the President to do a complete review of all affirmative action programs. Their report was published on July 19, 1995.[2]

There is today a deep questioning of the meaning of affirmative action, gender, and race in this country. 1995 was an emotional year for the country's psyche. There are many examples. The Governor of California called for and won the dismantling of affirmative action within the university system. Implementation of that decision has been delayed for 1 year with a renewed effort underway to have the action reviewed again.[3] In November 1996, California voters will be asked to vote on a referendum that would end all affirmative action in the State.

Another example is the review of the all male-status of the Citadel in South Carolina. The picture of the students rejoicing at the withdrawal of Shannon Faulkner is one that is riveted in the minds of many in this country. And there is no doubt that the O.J. Simpson trial also had a profound and confusing impact on the hearts of many.

Many questions face us in 1996 and beyond. Is there any need for affirmative action? What is it in the first place? Is there or is there not a glass ceiling? Is there a connection or interrelationship between the two? What is the pipeline and does it matter? Why are there so few women CEOs or top administrators, or members of boards of directors?

It seems that a discussion of all of these issues frequently begins with an emotional jumpstart, with a story or an anecdote of an incident that is unfair and that has molded opinion and will not be dislodged. So it is into these troubled and turbulent waters that we will go.

An overview ought to start with definitions. Even this, however, is contentious. As William Raspberry wrote in his *Washington Post* column "Not There Yet," Lyndon Johnson had a "fairly modest" idea about affirmative action. Raspberry wrote, "It was based on the observable fact that institutions tend to re-create themselves unless acted upon by some outside force."[4] Johnson, Raspberry said, wanted organizations to cast a wider net. He was simply trying to get women and minorities in the door. He was certainly not thinking about the glass ceiling. But today the issues are joined. The debate is not just about affirmative action or getting women and minorities in the door. **It is about getting them in the pipeline. It is also about keeping them in the pipeline and about advancing them within the organization.** For purposes of this paper then, the glass ceiling is defined as those artificial barriers

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1 *A Solid Investment: Making Full Use of the Nation's Human Capital—Recommendations of the Federal Glass Ceiling Commission*, (Washington, D.C.: November 1995). Printed copies are available from the U.S.Government Printing Office and on the Internet at http://www.ilr.cornell.edu.

2 George Stephanopoulos, George and Christopher Edley, Jr., *Affirmative Action Review—Report to the President*, (Washington, D.C.: The White House, July 19, 1995).

3 "U. of California Delays Shift in Affirmative Action Policy," *New York Times*, Jan. 24, 1996.

4 William Raspberry, "Not There Yet: Why We Still Need Affirmative Action," *The Washington Post*, Feb. 17, 1995.

based on attitudinal or organizational bias, intentional or unintentional, that prevent qualified individuals from advancing upward in their organizations. The pipeline refers in part to the position of women and minorities throughout organizations—from entry level to CEO.

One might ask, then, is the job of affirmative action done? If it was to get the door open have we not done that? Is it not time to dismantle our diversity efforts in this country and let these troubled waters be calmed? Afterall, there are women and minorities in the pipeline. Is that not enough?

To answer these questions, this paper will look at the placement of women in jobs and careers over the course of the past 30 years and see where they are today. In this context it will also examine the barriers that have been identified to the advancement of women and minorities within organizations.

The Governor's Task Force on the Glass Ceiling in Wisconsin, in their 1993 report, framed the discussion of barriers to the advancement of women and minorities as either attitudinal or organizational. Simply stated, attitudinal barriers stem from how people view others. Put another way, "traditional managers have greater comfort with their own kind."[5]

In that report, Jude Werra, an executive search consultant in Milwaukee, has said that the expeditious route to promote employees involves the "low hanging fruit phenomenon." One picks the people who are visible. The problem is that most executives are white males. Werra explains that when individuals have minimal contact and experience with a category of people, the result is a tendency to stereotype the individuals in that group. Further, this can lead to, and may be the cause of communication and productivity problems between and among groups. What occurs next is "lopsidedness"—distorted levels of promotion, awards, relocations, performance feedback, and travel assignments.[6]

To further compound the upward mobility problem, Werra reported, executive search people commonly recruit people from similar positions to new organizations. Therefore, the availability of women and minority applicants is negatively affected if those groups of individuals are already underrepresented.[7]

In 1965, President Lyndon Johnson signed Executive Order 11246 and amended it in 1967 to include gender. Executive Order 11246 ordered the inclusion of an equal opportunity clause in every contract with the Federal Government. What was institutionalized 30 years ago was a contractual obligation.

> Since its early use . . . affirmative action has evolved into a contemporary term encompassing any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex or disability along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.[8]

The words of Jude Werra in 1993 in describing how it is that organizations reproduce themselves simply have the ring of common sense. "Low hanging fruit phenomena" has no legal, contractual meaning, but we know what he is describing. Today, the Federal Glass Ceiling Commission echoes these same words in defining affirmative action to be used as a tool by businesses:

> Affirmative action is the deliberate undertaking of positive steps to design and implement employment procedures that ensure the employment system provides

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5 *Report of the Governor's Task Force on the Glass Ceiling Initiative*, State of Wisconsin, November 1993. Copies can be obtained from the Wisconsin Women's Council, 16 N. Carroll, Suite 720, Madison, WI 53703.

6 Ibid.

7 Ibid., p. 12.

8 U.S. Commission on Civil Rights, "Briefing Paper for the U.S. Commission on Civil Rights: Legislative, Executive & Judicial Developments of Affirmative Action" (1995). *See generally* U.S. Commission on Civil Rights, Statement on Affirmative Action, (October 1977).

equal opportunity to all. The Commission recommends that corporate America use affirmative action as a tool ensuring that all *qualified* individuals have equal access and opportunity to compete based on ability and merit.[9]

The Commission report goes on to say: "Affirmative action, properly implemented, **does not mean imposing quotas, allowing preferential treatment or employing or promoting unqualified people.** It means opening the system and casting a wide net to recruit, train, and promote opportunities for advancement for people who can contribute effectively to a corporation and, consequently, the Nation's economic stability."[10]

The definition of affirmative action embodies efforts to increase the supply of qualified individuals of all ethnic groups and both genders. Having access to widely different ethnic, racial, and social backgrounds accelerates the quest for corporate excellence. One of our nation's greatest assets is our diversity—it is our strength. As commerce becomes more global and competitive, it is imperative that businesses engage the full potential of our labor force, which is increasingly composed of women and minorities from diverse backgrounds and cultures.[11]

While 30 years have elapsed since Lyndon Johnson asked the country to cast a wider net, to in fact "provide opportunities to a class of qualified individuals," we have a long way to go.

We could test the waters and wipe affirmative action out and wait and see what happens to the pipeline and what happens to the further advancement of women and minorities within organizations and to the tenuous toehold that has been gained or not. The choice is really ours to make and in the end it will be a political one. To make it we should first examine the reality of where women stand today.

What is the occupational position of women now and what has it been over the course of the past 30 years? In 1965 women accounted for 35 percent of the American labor force and by 1974, 39 percent.[12] "Between 1960 and 1992, the female labor force participation rate rose from 38 percent to 58 percent and the female proportion of the U.S. labor force grew from 33 percent to 45 percent.[13]

In 1990, nationally, 56.8 percent of all working age women were in the labor force and 59.7 percent of women with children under 6 years of age were in the labor force.[14] The critical question is where are women employed and what have been the changes over these past 30 years? First, a retrospective. The *1975 Handbook on Women Workers* gives us this perspective.

Although increasing numbers of women have become employed in traditionally male career fields in the last decade and a half, women are still concentrated in a relatively small number of occupations. For example, in 1973 more than two-fifths of all women workers were employed in 10 occupations—secretary, retail trade salesworker, bookkeeper, private household worker, elementary school teacher, waitress, typist, cashier, sewer and stitcher, and registered nurse. Each of these occupations employed more than 800,000 women.

There were 57 occupations in which at least 100,000 women were employed. About three-fourths of all women workers were employed in these 57 occupations . . . In 17 of the occupations, women accounted for 90 percent or more of all employees . . . [15]

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9 *A Solid Investment*, p. 22.

10 Ibid.

11 Ibid.

12 U.S. Department of Labor, Employment Standard Administration, Women's Bureau, *1975 Handbook on Women Workers*, Bulletin 297. Hereafter cited as 1975 Handbook on Women Workers.

13 Cynthia Costello and Anne J. Stone, *The American Woman: 1994–95 Where We Stand* (New York: W.W. Norton and Company, 1994) p. 281.

14 Ibid.

These themes are echoed yet today. Nationally, an overview yields this information:

* Together, just two industries—service and trade—employed 68 percent of all female workers in 1992, compared to less than half of all male workers.
* Women workers are concentrated in a narrower range of occupations than men. Administrative support jobs, professional specialty positions, and service occupations accounted for 59 percent of all employed women in 1992.
* Black and Hispanic women workers are more concentrated in service occupations than white women. One in four black and Hispanic women workers is in an administrative support job—a proportion close to that of white women.
* Women's presence has increased noticeably in once overwhelmingly male professions such as medicine and the law, but not in traditionally male skilled blue-collar trades.[16]

In 1992, the year for which we have the most recent census data, in Wisconsin, women constituted approximately 46 percent of the labor force and the participation rate of women in the labor force reached its highest level in 1992, 64.8 percent.

Women increased their presence within managerial and professional occupations between 1980 and 1990; the growth was most dramatic within the managerial sector. At the same time women's proportion among the sales force and the service sector declined somewhat. The largest group of women were employed in administrative support positions in 1990 which include clerical workers. Women were also concentrated in private household worker occupations and service employee occupations. Within sales occupations, women were 11% of supervisors and proprietors, 29% of sales representatives, and 68% of sales workers. As authority increased the presence of women decreased.[17]

This leads us to the next question. What were the findings of the Governor's Task Force on the Glass Ceiling?

Of particular interest was the number of white women and men and minority women and men at various levels of management . . . The percentage of women decreases the higher the level of management; women constitute 34% of upper management, but only 18% of executives. Minorities are seriously underrepresented at all levels. Minority women never exceed 2% of any level of management. The data clearly indicate that a glass ceiling exists for women.[18]

The report also looked at eight different categories of businesses concluding that the glass ceiling varied depending on the business. Women constitute 37 percent of executives in health care, but only 9 percent of executives in manufacturing. The legal profession had 12 percent of white women as executives and 1 percent of minority women.[19]

The picture of women today is not complete unless we also look at the position of women on boards of directors. More than half of the Fortune 500/Service 500 Companies do not have a woman serving on their board of directors.[20] A recent report in *Fortune* identified a mere 19 women (one half of one percent) among the highest-paid officers and directors of the 1,000 largest U.S. industrial and service companies.[21] Further, the rate of representation of women on the boards of the largest corporations increased only marginally (by 3 percentage points) over the 5 years from

15 *1975 Handbook on Women Workers*, pp. 91–92.

16 Costello and Stone, *The American Women*, pp. 281–82.

17 Barbara Burrell, Ph.D., *Profile of Wisconsin Women*, (Madison: Wisconsin Survey Research Laboratory, University of Wisconsin-Extension, March 1994), p. 17.

18 *Report of the Governor's Task Force on the Glass Ceiling Initiative*, pp. 8–9.

19 Ibid.

20 *Catalyst*, 1992.

21 *See* Fierman, *Fortune*, 1990.

1984-1988[22] and in the year ending March 31, 1993, women held 5.9 percent of total directorships of Fortune 500 industrial firms.[23]

In 1992, Korn Ferry International conducted a study of 322 boards. They found that "fully 89 percent of the companies surveyed locate (new) board members through the recommendation of the chairman." Eighty percent of the board chairman are the companies' top executive—their chief executive officers. The study also found that the number of boards using nominating committees had dropped from 61 percent in 1990 to 51 percent in 1991. It was 54 percent in 1987. The average annual compensation was $33,133."[24]

The Governor's Task Force on the Glass Ceiling also looked at the issue of boards of directors in Wisconsin and found that in 1993, only 6 percent of private sector and utility director seats were held by women. Women fared a bit better on foundation boards. Of the three types of foundations, women constituted 30 percent of community foundation boards, 21 percent of private boards, and 14 percent of corporate boards. Minorities represented 3 percent of community foundation boards, 3 percent of private and 6 percent of corporate boards.[25] One could make the argument that the low hanging fruit phenomena is working well when it comes to boards of directors.

Throughout this paper, two themes become clear. The first is a historical one; that while women have advanced there is still much to be done both in terms of where women are employed and what positions they hold. Occupational segregation has not disappeared, nor has discrimination. The description in the *1975 Handbook* and the *1994 Profile* have far too familiar a ring and should give us great pause.[26] The second theme to emerge is the connection between the continuing need for affirmative action and its integral role in the progression of women into higher levels of authority within organizations. It remains the first step, but not the last.

Women and minorities must be in the pipeline. That is an imperative. And affirmative action is a viable and worthy tool to accomplish that goal. That which holds women and minorities back must also be eradicated. Stereotypical attitudes that form the basis for sexism and racism must be dealt with lest women and minorities who are in the pipeline languish there. To be in the pipeline is not enough. Until we live in a society that is free of bias, affirmative action serves as a reminder to cast a wider net.

Many studies have delineated corporate barriers to furthering diversity. Those listed in the Wisconsin Glass Ceiling Study include: lack of mentoring, lack of networking opportunities, an outdoor man's corporate culture, family unfriendly policies, lack of career pathing, lack of resources, lack of cross-training, sex discrimination, immediate supervisors who do not guide career progression, lack of political savvy, resistance from colleagues and family members, and sexual harassment.

The executive summary of the Federal Glass Ceiling Study notes that "broad and varied experience in the core areas of the business; access to information, particularly through networks and mentoring; company seniority; initial job assignment; high job mobility; education; organizational savvy . . . " are also key ingredients to staying and moving up. The study notes "that women and minorities have limited opportunity to obtain broad and varied experience. They tend to be in supporting, staff function areas—personnel and human resources, communications, public relations, affirmative action, and customer relations.

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22 *Catalyst*, 1989.

23 Diana Bilimoria and Sandy Kristin Piderit, "Board Committee Membership: Effects of Sex-Based Bias," *Academy of Management Journal*, 1994, vol. 37, no. 6, p. 1453.

24 "Study Finds Corporate Boards Mostly Rich, White Men," *Milwaukee Sentinel*, Aug. 5, 1992.

25 *Report of the Governor's Task Force on the Glass Ceiling Initiative*; p. 11 and table 5.

26 While this paper has not dealt with the question of pay equity, part-time work, and benefits these issues should not be ignored in the larger picture.

Movement between these positions and line positions is rare in most major companies . . . "[27]

Many organizations have the means within their reach to address these barriers and are doing so. In September 1995, Secretary Robert Reich recognized several companies for the work they are doing to further diversity. Xerox Corporation of Stamford, Connecticut, received the Secretary's Opportunity 2000 Award for the work the company has done in identifying and developing employees for managerial ranks and for its demonstrated succession planning which has used the skills of minorities and women **at all levels**. Others receiving awards were CBS, Inc., Seattle First National Bank, and Mobil Corporation.[28]

As further testimony to the efficacy of staying the course with affirmative action, we have these words from John F. Smith, chief executive officer and president of General Motors:

> When it comes to affirmative action, we will continue to press the envelope, but at the same time we will be moving to a broader concept—that is, managing diversity. As a global company, we want to fully benefit from a diverse workforce. Our commitment to diversity extends beyond the door of our company. It includes our dealerships, our suppliers, and the many communities we operate in. In our industry, as in this nation, our diversity is our strength. This diversity is more than merely part of our national heritage; it is part of our national pride. Having people of widely different ethnic, racial and social backgrounds in our corporation has not slowed our pursuit of excellence—it has accelerated it. We will continue to do everything possible to bring minority group members and women into General Motors and the mainstream economy. We cannot, must not, waste this talent.[29]

The Milwaukee Journal sounded this warning:

> Notably, the new onslaught on affirmative action is not coming from corporate America. Large firms now tend to view affirmative action as good business practice. To sell products or service to a diverse community, it helps to have a staff that looks like the community. Besides, the relative ranks of white male workers, for whom jobs have traditionally been reserved, are shrinking. Thus, many corporations recognize that they must help develop new sources of talent. And that means looking to women and people of color . . . [30]
>
> Properly executed, affirmative action should not mean that a clearly superior candidate will lose out. Rather, it should mean that employers make extra efforts to recruit qualified minority and women candidates. And if the final candidates for a job are more or less equal in qualifications, then the need to enhance diversity in the work force should carry the decision. All in all, the nation won't just drift into racial and gender fairness. America must take affirmative measures to get there.[31]

As the first woman president of the American Bar Association noted, affirmative action " . . . has nothing to do with placing people that are not qualified in places where they do not belong. Affirmative action is about recognizing that we have had in this country a history of racism and sexism that is not going to be overcome by wishing it away."[32]

Recommendations

The recommendations are threefold: first, those made by the President's advisers; second,

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27 Executive Summary, Section I (Introduction, Overview and Highlights of the Research), *Federal Glass Ceiling Report*, pp. 5–6.

28 U.S. Department of Labor, Office of Public Affairs, "Labor Secretary Reich Honors Employers for Leadership in Developing a Diverse Workforce, Increasing Nation's Productivity," news release, Washington, D.C. Sept. 13, 1995. See also, H.G. Heneman and Robert L. Heneman, *Staffing Organizations*, Middleton, WI: Mendota House, 1994.

29 *A Solid Investment: Making Full Use of the Nation's Human Capital*, p. 22.

30 "Affirmative Action: Too Soon to Abandon Fight for Fairness," *The Milwaukee Journal*, Mar. 6, 1995.

31 Ibid.

32 Francine Schwadel and Amy Stevens, "The ABA Endorses Affirmative Action," *The Wall Street Journal*, Aug. 10, 1995, p. B7.

those of the Federal glass ceiling commission; and third, those that in my work I have found need to be addressed.

In their *Report to the President*, George Stephanopoulos and Christopher Edley recommended that current law and policy regarding nondiscrimination, the illegality of quotas, the enforcement focus on "good faith efforts," and the relationship of equal opportunity to legitimate qualifications be underscored and reinforced. Plans should be finalized and implemented to reduce paperwork. Finally, the Secretary of Labor should explore means of collaborating with the private sector on promoting best practices in providing equal opportunity. These recommendations form a good beginning and need to be pursued as do the recommendations of the Federal Glass Ceiling Commission.

* The CEO should communicate visible and continuing commitment to workforce diversity throughout the organization; all CEO's and boards of directors should set company-wide policies that actively promote diversity programs and policies that remove artificial barriers at every level.
* All corporations include in their strategic business plans efforts to achieve diversity both at the senior management level and throughout the workforce. Additionally, performance appraisals, compensation incentives, and other evaluation measures must reflect a line manager's ability to set a high standard and demonstrate progress.
* **Corporate America must use affirmative action as a tool ensuring that all qualified individuals have equal access and opportunity to compete based on ability and merit.**
* Organizations expand access to core areas of the business and to various developmental experiences, and establish formal mentoring programs that provide career guidance and support to prepare minorities and women for senior positions.
* Companies provide formal training at regular intervals on company time to sensitize and familiarize all employees about the strengths and challenges of gender, racial, ethnic, and cultural differences.
* Organizations adopt policies that recognize and accommodate the balance between work and family responsibilities that impact the lifelong career paths of all employees.

I embrace these recommendations, but I would go further as well if we are truly going to compete in a global economy and not lose any of our most important resource—our people. Therefore, my recommendations also include strengthening the Family and Medical Leave Act and providing child care that is affordable, accessible, and of high quality. European countries are far more advanced than we are in both of these areas. I would strengthen the Nation's sexual harassment laws as well as their enforcement. Finally, I would increase funding and staffing of the EEOC, the OFCCP, and reaffirm our commitment to the Equal Pay Act.

Greater education and training needs to be done for those doing the hiring in organizations. Specifically, employers need to be trained about how to develop a more diverse applicant pool, how to evaluate education and qualifications and what discrimination is and what its effects are in the workplace.

The conclusions that I draw from my work, from my observations and my research is that discrimination is very powerful and today it has become far more insidious. Much still needs to be done. Rhetoric such as we have heard in recent political debates and television ads that play to peoples fears are a disservice to our country. It is not new to use economic fear to exploit people, but it is never productive. In fact the long-term economic impact of potentially disenfranchising numbers of people is very harmful.

It is heartening to note that progress has been and still is being made. The political question for policy-makers and voters will be whether to continue using affirmative action as a tool. My position is that we must reaffirm our commitment to the original intent of affirmative action—to cast a wider net, to look beyond the "low hanging fruit." The evidence compels us to do so.

The Assault on Affirmative Action and Reality

By Ellen Bravo

The National Association of Working Women is a national membership organization founded in 1973 and dedicated to empowering women to improve their status and conditions on the job. Its constituents are mostly nonmanagement women in traditionally female jobs, particularly office jobs. The organization has an 800 hotline number through which it hears from women in every kind of work.

What is heard from these callers and from members are many variations on the theme of discrimination and injustice. Some examples are blatant, like women who came to the organization after experiencing everything from vulgar sexual remarks to indecent exposure and fourth degree sexual assault; or the woman who was told her maternity leave was "not in the company's business plan." Other examples are more subtle—a star performer whose supervisor suddenly finds problems with her work and lets her go when she becomes pregnant; or the woman who gets passed over for a new management job, even though she currently performs most of the job duties, simply because she is a secretary. Many examples are laden with other forms of discrimination on the basis of race, age, sexual orientation, ability, as well as gender.

A 9to5 member expressed excitement at learning of this official hearing into discrimination. It was explained that the topic was actually affirmative action. "How did it happen," she asked, "that women are still on the bottom, and instead of asking what can be done about that, we are being asked to prove that we are not getting an unfair advantage?"

There is frustration. Only 5 percent of senior management are women, less than 3 percent people of color, 1 percent women of color. Women's wages are still substantially behind those of men. When race is added, white women earn only 75 percent of white men's wages; African American women a dismal 63 percent, and Latinas a shocking 56 percent. More women and families are living in poverty. The income gap between blacks and whites has grown. Yet the spotlight is one of the few programs aimed at undoing past discrimination.

The 9to5 member's question about the focus of this hearing are not rhetorical. Equality and justice in this country are under siege. The attack on affirmative action is just one example. 9to5 wants to add its voice to many others around the country in an effort to set the record straight.

Language has been used to obscure the real issues. Opponents describe affirmative action with words like "quotas," "preference," "hiring anyone who happens to be of a certain race or gender." In fact affirmative action simply means the opposite of negative action. It is about expanding opportunity that has been restricted. Affirmative action means *going out of your way* to find qualified applicants who previously were excluded or discouraged or overlooked. I have always liked the explanation given by Mary Frances Berry, who I once heard say: "I was the first black woman chancellor at the University of Colorado. Affirmative action did not make me qualified to be chancellor. It helped the administration recognize my qualifications."

Opponents language of "restoring fairness" and "equal treatment" hide the reality of this country's history. For centuries this country has had a form of affirmative action for many white men: those in charge hired people who were related or familiar. This form of affirmative action is still quite prevalent.

- A 1994 study of the New York City police force, for example, showed that 50 percent of the white recruits had a relative on the force.
- Nearly 10 percent of the firefighters and paramedics in the LA fire department are related.
- More students are admitted into college because they are children of alumni than are students of color admitted through affirmative action programs.

Some people would like it believed that those who get the job are always the most qualified for that job. To paraphrase Eleanor Holmes Norton, the idea that so many people of the same race or

gender happen to be clustered in the lowest paying jobs by coincidence, or because of a lack of merit or talent or initiative, is outrageous and wrong.

Has anyone unqualified ever been hired in the name of affirmative action? Of course. But that is the result of tokenism, not affirmative action. If there is going to be talk about people who do not deserve to be in the positions they are in, the conversation should start with a long list of executives and politicians and others, most of whom are white males.

The attacks on affirmative action also hide the reality of the present. Discrimination is widespread, always harmful, sometimes lethal. Studies show that most employers would not have reached out to people of color and women if affirmative action had not required them to do so. It can be expected that the destruction of affirmative action mandates would take a terrible toll.

Finally, the language of the opponents of affirmative action diverts attention from the real problems for white males in the United States today. Many know white men who have lost their job and had a hard time finding another one that pays the same. Today 10 million white men are among the poor. In 1979, 8 percent of white men earned poverty wages; that grew to 14 percent in 1992—an 83 percent increase.

But who took those jobs? It certainly was not women or people of color, who have also been battered by rampant downsizing and corporate flight to lower wage areas. And while more white men than in the past are poor, this is one area where women continue to hold the lead. In 1992, 24 percent of women received poverty wages. As usual, the numbers are higher for women of color—27 percent for African Americans, 37 percent for Latinas.

The jobs that have disappeared must be traced directly to corporate greed, to a structure that rewards layoffs with an increase in stock prices (to the huge betterment of company officials who hold large quantities of stock); and to trade and tax policies that lower living standards in this country instead of raising them around the world. Inciting anger over affirmative action is a smokescreen designed to cover up the real culprits and stop effective action for change.

Affirmative action, of course, is only one tool in an arsenal that must include many more. There should be hearings to discuss what other solutions are needed to remove the obstacles for women-measures such as an adjustment in the minimum wage; requiring the same base pay and prorated benefits for people doing the same job for the same company regardless of the total number of hours worked; pay equity; and family-friendly policies, including affordable leave, flexible schedules and quality child care. There should be a hard look at certain corporate practices and questions asked on how to change them. And there needs to be talk about strengthening *enforcement* of antidiscrimination measures.

In conclusion, I speak strongly and unequivocally in favor of affirmative action and call on the Commission to hold hearings on the real problems of discrimination and exploitation that are so harmful to huge numbers of people and so destructive to the values of this country.

Affirmative Action—Should It Be Continued, Modified, or Concluded

By Charmaine Clowney

I. Background

The debate over affirmative action is tapping into the emotions of Americans. There is a growing dissatisfaction with the philosophy of affirmative action, a continued opposition to quotas, and a perception that affirmative action goals have been achieved. The dynamics of this debate in 1996 call into question how affirmative action will be enforced in the future.

The critics of affirmative action contend that many women and racial minorities are no longer disadvantaged because of their gender and race. They argue that not only are affirmative action preferences noncompetitive and unfair to innocent bystanders, but also that the preferences persist even when they are no longer necessary as remedies for proper discrimination. Critics argue that Federal affirmative action programs are rigged with abuses. They talk about companies hiring unqualified employees, colleges admitting unqualified students to meet numerical goals, and minority entrepreneurs fronting for white firms to win set-aside contracts. Others argue that affirmative action stigmatizes those who succeed on their own merits without preferences and that affirmative action has already helped middle class beneficiaries and missed those disadvantaged by poverty or class. Such critics contend that because of these abuses, affirmative action has had an adverse effect on the American society and economy and, therefore, should be eliminated.

Affirmative action supporters on the other hand argue that affirmative action is necessary and should remain because discrimination still exists in this society, causing women and other minorities to lag behind white males in terms of economic status. They contend that affirmative action is about inclusion; it is about giving qualified women and racial minorities who have been shut out a genuine shot at performing. Responding to the assertion that affirmative action programs have achieved their goals, Barbara Arnwine of the Lawyers Committee on Civil Rights Under Law asked, "If African Americans are taking all these jobs, why is there double digit unemployment in the African-American community?"[1]

Many supporters of affirmative action are members of the education system who contend that diversity preferences for racial and ethnic groups in admission policies and hiring integrate classrooms and improve the quality of education. In May 1995, the American Council of Directors approved a statement that reads:

> The American Council on Education (ACE) has a long standing record of commitment to higher education for all qualified Americans and to the advancement of groups that in the past have been denied equal educational opportunity. In light of recent questions about the impact of affirmative action in college and university admissions and employment, and the prospects for its continuation, the Board of Directors wishes to . . . restate its support for efforts by higher education institutions to achieve diversity in their student populations and their faculty and staff.

The ACE further stated that:

> The Nation's colleges and universities have made important strides in recent years towards ending discrimination and enhancing the participation of success of historically disadvantaged minorities and women of all races. Various forms of affirmative action from outreach and admission policies to employment incentives, to specific training programs have played an important role in the relative success that has been achieved to data and should not now be abandoned.[2]

In August 1995, American Council on Education vice president Terry W. Hartle sent a letter to members of the United States Senate urging

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1 *U.S. News and World Report*, Feb. 13, 1995.

2 *Black Issues in Education*, vol. 12, no. 13, Aug. 24, 1994, p. 13.

them to oppose legislation that would eliminate all Federal affirmative action programs. In his letter he noted:

> Affirmative action programs have been an indispensable part . . . to increase access to education and advancement. . . . If the United States is to overcome the legacy of discrimination, it must maintain its efforts to expand educational opportunity and carefully tailor affirmative action programs that contribute to this effort.[3]

While addressing a United States House of Representatives Judiciary Committee subcommittee, Sister Sally Furay, provost of the University of San Diego, asserted that affirmative action is needed because prejudice still exists. She stated that: "Since the Civil Rights Act went into effect in 1965, attitudes have not disappeared, discrimination has just become more subtle. . . . We need affirmative action to level the playing field, to emolument the job monopoly."[4]

Connie Rice of the NAACP Legal Defense and Educational Fund expressed her support of affirmative action in a recent interview, stating that, "If we abandon affirmative action, we return to the old-boy network."[5]

Supporters of affirmative action acknowledge that there are some abuses in some affirmative action programs. However, many of them would probably agree that such abuses pale by comparison with scandalous Defense Department overruns, tax evasion, securities fraud, and Federal subsidies for wealthy weekend farmers. There is reason to get affirmative action back on track, but not to derail it entirely.

II. Politics

The critics of affirmative action have managed to get the attention of some Republicans and some presidential hopefuls who are now introducing legislation to end affirmative action. In a speech on March 15, 1995, GOP presidential candidate Robert Dole singled out Executive Order 11246 and its goals as departing from its original purpose. Dole said that Executive Order 11246 warranted both legislation by Congress and revision by the President to force the Federal Government to live up to the color-blind ideal by prohibiting It from granting preferential treatment to any person, simply because of race or gender. In July 1995, former Senator Robert Dole introduced S.B. 1085, the Equal Opportunity Act of 1995, which would prohibit the use of race and gender by the Federal Government in awarding and administering Federal contracts, hiring, promotions, and administering federally-conducted programs or activities. Rep. Charles Canady, chair of the House Judiciary Constitution Subcommittee, has introduced H.R. 2138, a bill similar to Dole's.

Dole's bill is viewed by many as being politically motivated, since in his earlier opinions he supported affirmative action. In 1986 he was one of 23 Republican senators who urged President Reagan not to overturn affirmative action programs. It should also be noted that when Elizabeth Dole was Secretary of Labor, she was accountable for enforcing Executive Order 11246 and was a proponent of affirmative action.

California Governor Pete Wilson, who not long ago was a GOP presidential candidate, made opposition to affirmative action a cornerstone of his bid for the Republican presidential nomination. Wilson argues that it is unacceptable to impose wrongful discrimination upon members of one group to compensate another. He further argues that affirmative action is not merit based and that it pits group against group and that the 1960s enactments seeking to redress two centuries of unfairness were never intended to last forever.

On June 1, 1995, Wilson signed the California Executive Order W-124-95, to curb affirmative action programs that give preferential treatment to women and members of minority groups in State hiring and contracts. Also in July 1995, Wilson successfully led the University of California regents to vote for a plan to end affirmative

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3 *Higher Education and National Affairs*, vol. 44, no. 15, Aug. 14, 1995.

4 BNA Current Development, vol. 4.

5 *U.S. News and World Report.*

action practices in hiring, contracting, and admissions, but increase outreach efforts to attract low-income students and others who may be disadvantaged. It is important to note that the current board comprises a majority of Republican appointees including five members who were appointed by Wilson.

The plan was proposed by regent Ward Connerly, a black businessman who was appointed by Wilson. Connerly argues, "race is the raw nerve of the Nation. . . . The universities have that nerve exposed more than any other segment of our society." He further stated, "I am certain it is not in the best interest of black people to let ourselves be defined as socially and economically disadvantaged and incapable of achieving success on our own."

Through October 1995 there were demonstrations by college students and the public against the plan. Also, many California leaders and educators opposed the plan. Willie Brown, former Speaker of the California Assembly asked the board not to vote to end affirmative action programs before the voters have spoken. Daniel L. Simmons, chairman of the systemwide academic council, stated:

> The university has been thrust into the arena of presidential politics in a way that will politicize the university and in a way in which it can only lose. . . . The decision has nothing to do with what is appropriate for the university and has all to do with which side you are on.[6]

Eve Paterson of the San Francisco-based Lawyers Committee for Civil Rights stated that Wilson is "attempting to ride a race horse of affirmative action in order to get to the White House."[7] Jeff Eisenach, president of the Progress and Freedom Foundation and long-time advisor to House Speaker Gingrich commented, "The Republican Party is at risk of using affirmative action as a destructive force in 1996."[8] However, another Republican, Rep. Jim Sensenbrenner (R, Wis.), referring to the California executive order, stated, "California Governor Pete Wilson did the right thing to sign an executive order today putting an end to those types of practices and Congress should do likewise." During a field hearing on group preferences and the law, Sensenbrenner stated that Federal affirmative action programs are "well intentioned social programs that have gone terrible awry. . . . It pits race against race, gender against gender, and ethnic group against ethnic group." Other politicians who have openly expressed their views on affirmative action include Rep. Brian Bilbray (R, Cal.) who said that affirmative action "violated the basic premise that judges people by the content of their character rather than by the color of their skin." He contended that race and gender preferences in government programs actually harm those that the programs are supposed to protect.[9] William Bennett, former Secretary of Education stated, "Affirmative Action has not brought us what we want—a colorblind society. It has brought us an extremely color conscious society."[10]

Wil Marshall of the moderate Democratic Leadership Council's Progressive Policy Institute said in an interview with *National Review*, "The trap the Republicans are laying for the Democrats is to reflectively defend that status quo." In an interview with *U.S. News and World Report*, he stated, "Obviously a lot of Republicans look at affirmative action as the ultimate wedge issue." Even though President Clinton has vowed to continue supporting affirmative action, he seems ready to depart from affirmative action hard-liners by sympathizing with and making administration policy account for white male resentment. (In the 1994 elections 60 percent of white males

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6 Chronicle of Higher Education, July 1995.

7 *National Law Journal*, Aug. 28, 1995.

8 *Newsweek*, July 1995.

9 *BNA Current Developments*, vol. 4, p. 695.

10 *U.S. News and World Report*, Feb. 13, 1995.

voted Republican.) At the same time, Joel Kotkin, formerly of the PPI stated, "What affirmative action turns out to do, is to supercharge the careers of middle-class minorities who are increasingly really the base of the Democratic party."[11]

III. The Courts

While the Civil Rights Act of 1991 works to preserve affirmative action in employment and while sweeping changes in the current affirmative action doctrine are not expected, there is some evidence of a contemporaneous hostility to racial preference among some of the lower Federal courts. The Supreme Court has been closely divided for many years of the issue of affirmative action as indicated in decisions handed down in past cases.[12] Some justices still support affirmative action and on the other side there is a core group of Supreme Court justices opposed to racial preferences or racial classification. Justice Scalia and Justice Clarence Thomas argue that government affirmative action programs based on race are unconstitutional. The two justices with Justice William Rehnquist have "made clear their firm and absolute opposition to any voluntary affirmative action."[13]

The most recent *Adarand v. Pena* decision should have little practical impact on private and voluntary affirmative action. In Adarand the court declared that all racial classification imposed by whatever Federal, State or local government actor must be analyzed by a reviewing court under strict scrutiny.

Strict scrutiny means that the reason for using a racial classification must be "compelling" and the means adopted must be "narrowly tailored" to advance it. (There are still many questions about how the strict scrutiny standard will be applied.) Because of the complexity on the issue of discrimination, the Supreme Court upheld race and gender to be taken into account to expand opportunities for minorities and women but also made it clear that lawful affirmative action in no way permits reverse discrimination, or requires quotas from minorities and women. Justice Sandra Day O'Connor emphasized "the unhappy persistence of both the practice and the lingering effect of racial discrimination against minorities in this country is an unfortunate reality" as a basis for the necessity for the continuation of affirmative action. Also Justice Harry A. Blackburn stated, "In order to get beyond racism, we must first take account of race." On the other side, Justice Clarence Thomas contends that affirmative action programs stamp minorities with a badge of inferiority.

IV. The Clinton Administration

President William J. Clinton has expressed his strong support for affirmative action programs and has also clarified that the purpose of affirmative action is to address the systematic exclusion of individuals of talent. Asked about his views on affirmative action in a *U.S. News and World Report* interview in February 1995, President Clinton responded that, "There is no question that a lot of people have been helped by it. Have others been hurt by it? What is the degree of that harm? What are the alternatives? That is the discussion we ought to have."

Soon after he made this statement, President Clinton made a directive to Federal agencies to review existing programs for evidence of quotas, preferences for unqualified individuals, reverse discrimination, and continuation of programs after their purpose has been achieved. On July 19, 1995, the results of the 96 page, 5 months long, study were announced. The following are some of the findings and conclusions in the report.

The report started by clarifying the definition of affirmative action. "For purposes of this review, affirmative action is any effort taken to expand

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11 *National Review*, Mar. 20, 1995.

12 Regents of University of California v. Bakke, 438 U.S. 265 (1978); Richmond v. J.A. Croson Company (1989); Johnson V. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); United Steel Workers of America v. Weber, 443 U.S. 198 (1979); Adarand Construction Inc. v. Pena, 93 U.S. 1841 (1995).

13 *Virginia Law Review*, p. 583.

opportunity for women or racial, ethnic, and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration."

As to whether affirmative action works, the report stated that affirmative action works because the race and gender conscious measures are used "to eradicate discrimination, root and branch." The race and gender conscious measures "remedy past and current discrimination of the lingering effects of past discrimination—used sometimes by the court order or settlement, but most often used voluntarily by private parties or by governments." The report further stated that these measures prevent future discrimination or exclusion by "ensuring that organizations and decisionmakers avoid hiring or other practices that effectively erect barriers." The report stated that, "to genuinely extend opportunity to all, we must take affirmative steps to bring underrepresented minorities and women into the economic mainstream, and in so doing there will be benefits to these groups, to the institutions and to the entire society."

As to whether affirmative action is fair in response to the issue of quotas and reverse discrimination and if programs continue even after their purpose has been achieved, "the OFCCP has noted that reverse discrimination complaints, including objections to de facto quotas, are very rare in their administrative mechanism or at the EEOC."

The report further states that "EEOC and court records simply do not bear out the claim that white males or any other group have suffered widespread reverse discrimination." Regarding the OFCCP, which implements affirmative action requirements for Federal contractors and subcontractors, the report states that under OFCCP regulations "the goal setting process today clearly does not impose preference or quota-like requirements," but are used to target and measure the effectiveness of affirmative efforts. The report states the "OFCCP polices the affirmative action requirement of E.O. 11246 by auditing for good faith efforts, not for whether any specific numerical goal has been met." Also under OFCCP regulations, numerical affirmative action steps are not required unless underutilization exists. The report further states that productivity at contracting firms has not been affected by OFCCP and the OFCCP has not caused contracting firms to hire less qualified workers and that other studies reported exemplary affirmative action programs helping companies' stock market values. The report mentions that lawyers who work with contractors on OFCCP matters consistently stated that employers' major concerns have nothing to with goals operating as quotas, but rather the irrelevance of some factors OFCCP requires to be considered in the workforce availability analysis, the length and paperwork burden associated with the preparation of the affirmative action plan, the emphasis on minor or technical requirements, and the mechanism for selection of contractors for review.

The review recommended that the Secretary of Labor should reinforce the current law and policy regarding nondiscrimination and enforcement should focus on "good faith efforts" by instituting changes in the guidelines for the Executive Order and should collaborate with private sector leaders to promote the best practices in providing equal employment opportunity. Also the Department of Labor should plan to reduce the employer paperwork burden. This would include streamlining the written affirmative action plan, limiting audits to areas of specific concern and eliminating unnecessary forms required from contractors. The report further stated that "affirmative action is only one of several tools used in the public and private sectors to move us away from a world of lingering biases and the poisons of prejudice, toward one in which opportunity is equal. Affirmative action measures recognize that existing patterns of discrimination, disadvantage, and exclusion may require race- or gender-conscious measures to achieve that equality of opportunity." The report stated that affirmative action should offer every American a fair chance to achieve success which is a central tenet of our constitutional and political system and a bedrock value in the American culture. The report concluded that affirmative action continues to be valuable, effective, and fair.

V. Position Statements on Affirmative Action from National Organizations

The Episcopal Church and Affirmative Action

Introduction

The support of affirmative action by the Episcopal Church is based primarily upon the Church's understanding of justice, and upon the identification of racism as a sin. In the 1985 Blue Book Report to the General Convention, the Standing Commission on Human Affairs and Health address institutional racism in these words:

The new Testament makes clear that "In Christ there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for all one in Christ Jesus" (Galatians 3:28). Our distinctive natures are maintained whole while our unity is secured "in Christ." We are defined as one, as whole, as unified by our relationship to Jesus Christ. Christians share with people of good will a deep concern and respect for the dignity of human beings everywhere.

The National Council of Churches defines racism as the intentional or unintentional use of power to isolate, separate, and exploit others. This use of power is based on a belief in superior racial origin, identity, or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group which, in turn, sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, and military institutions of societies.

Racism is more than just a personal attitude; it is the institutionalized form of that attitude.

Institutional racism is one of the ways organizations and structures serve to preserve injustice. Intended or not, the mechanisms and function of these entities create a pattern of racial injustice. . . .

Historically, people of European ancestry have controlled the overwhelming majority of the financial resources, institutions, and levers of power. Racism in the United States can, therefore, be defined as white racism: racism as promulgated and sustained by the white majority.

As Christians, we must recognize racism as a sin against God. We make this statement by the National Council of Churches our own and we go on to observe that racism knows no boundaries and penetrates religious and secular communities throughout the worship.

Several General Conventions have passed resolutions opposing racial discrimination within both Church and society. We are pleased to note the creation by the Executive Council of the national Coalition for Human Needs and of the staffing of several "ethnic desks" to address the problem programmatically. We are pleased to note, the National Conference on Racism, sponsored by the Coalition in February of 1982, which brought together 229 persons from 57 dioceses to raise the consciousness of dioceses and Church persons about racism, to confront the effects of racism, to share strategies for combating racism, and to enable dioceses and congregations to enact programs to combat racism.

As of 1984, fourteen dioceses and regional groups have reported substantial steps to enact plans to combat racism. These steps include local conferences, the establishment of diocesan commissions on racism, affirmative action policies, racial audits, and a survey of affirmative action practices by Episcopal seminaries. The 66th General Convention meeting in 1979 at Denver called on the Executive Council to design and implement an affirmative action plan for nondiscriminatory employment within the Episcopal Church Center affecting both clerical and lay persons. Such as Equal Employment Policy and Affirmative Action Program was drafted and adopted by the Council in February of 1982. The following September, the 67th General Convention adopted this affirmative action plan to cover the employees, committees, commissions, boards, and agencies of the General Convention, together with the firms from which Convention purchases goods and ser-

vices. Programs of education and public witness on affirmative action were also mandated.

The Standing Commission on Human Affairs and Health rejoices in these developments. We observe, however, that the program, as adopted, calls for monitoring; yet it is not evident to us that this is being done. What is needed now is a compelling reaffirmation of that policy and a wholehearted commitment to the implementation of the letter and the spirit of that policy. An increase in the number of persons and families living in or near poverty, a disquieting increase in the number of incidents which appear to be caused by racial polarization, and the evident erosion in the quality and moral fabric of life are but a few of the indicators which make the need for this commitment to action by the whole Church imperative.[1]

Reference in the report to the 1979 General Convention was to action taken to call for affirmative action for the following reasons:

1. According to the Bureau of Labor Statistics, minorities are more than twice as likely to be in lower paid service industries as the white majority; five times as likely to be private household workers; twice as likely to be farm laborers; while whites are twice as likely to be higher paid skilled craft workers and three and a half times more likely to be managers and administrators.

2. According to the United States Commerce Department, black family median income is 57 percent of white family income, and white high school dropouts have a 22.3 percent unemployment rate as against a 27.2 percent unemployment rate for black youth with a college education.

3. According to Statistical Abstracts of the United States, blacks are underrepresented in the less hazardous and are overrepresented in the more hazardous occupations—e.g., in the steel industry, of those working at the coke ovens, where lung and respiratory cancers are the highest, 90 percent are black.

4. According to the United States Commission on Civil Rights, " . . . overt racism and institutional subordination provide definite benefits to a significant number of whites . . . "—e.g., "exploitation of members of the subordinated groups through lower wages, higher prices, higher rents, less desirable credit terms, or poorer working or living conditions than those received by whites . . . "

5. According to the United States Commission on Civil Rights, many Federal agencies have ignored or subverted affirmative action requirement, thereby impeding minorities from moving into higher paid professional, managerial, and skilled trade jobs.[2] In September of 1992, the following paper was presented to the House of Bishops meeting in Baltimore, to examine the theology of justice and opposition to racism.

Following up on that action, the 1979 General Convention adopted a resolution supporting the principle of affirmative action, and called for programs of education on affirmative action:

RESOLVED, the House of Bishops concurring, That the 66th General Convention supports the principle of affirmative action—especially, special admissions programs for minorities in universities and professional schools and programs to upgrade unskilled workers to the skilled level; and be it further

RESOLVED, the House of Bishops concurring, That this 66th General Convention instruct the Executive Council, within the 1980–82 triennium, to initiate programs of public education on affirmative action at all levels of the Church; and be it further

1 Blue Book Reports, 1985, pp. 123 and 124.

2 *1979 Journal of General Convention*, p. C-133.

RESOLVED, the House of Bishops concurring, That this 66th General Convention instruct the Executive Council to communicate our support of affirmative action to the major religious bodies of the United States and urge them to endorse, support and implement affirmative action.[3]

At the 1982 General Convention, the Episcopal Church committed itself to support of affirmative action programs implemented by the Federal and State governments, aimed for voluntary implementation of affirmative action to place minorities, women, and other underprivileged persons in offices, committees, and commissions of the Episcopal Church, and called upon individual dioceses and congregations to do likewise:

RESOLVED, the House of Deputies concurring, That this 67th General Convention of the Episcopal Church:

1. Commits this Church, in the implementation of its program for 1982–85 to support, through prayer, education, and courageous public witness, the strengthening and advancing of Affirmative Action programs heretofore implemented by the Federal government and the States;

2. Commends the Presiding Bishop and the President of the House of Deputies for their efforts to make appointments to offices, committees, and commissions within this Church in such manner that minorities, women, and underprivileged persons of all kinds may be fairly and affirmatively represented at all levels of service and responsibility in this Church; and

3. Encourages individual Dioceses and congregations to examine the compositions of bodies providing leadership within their respective jurisdictions, with an eye that the membership of such bodies may be more truly representative of our brothers and sisters who came from minority or underprivileged backgrounds.[4]

In the next General Convention in 1985, the Episcopal Church called for the establishment of affirmative action programs at all levels within the Church, and specifically addressed the continuing concern over racism:

RESOLVED, the House of Bishops concurring, That the 68th General Convention calls on all dioceses and related institutions and agencies of the Episcopal Church to establish and publicize an Equal Employment and Affirmative Action Policy and to provide a means for effective monitoring of the same; and be it further

RESOLVED, That the Board for Theological Education is directed to develop, in consultation with the Council of Seminary Deans, an instrument and process to make an audit of racial inclusiveness to be found in the respective student bodies, faculty and trustees as well as in their curricula and field work; and be it further

RESOLVED, That the Executive Council use its existing program agencies and staff to ascertain what specific steps the dioceses and local congregations, the seminaries, and other agencies of the Church have taken to implement the 67th General Convention Resolution on racism which called for implementation of Affirmative Action programs, and report the findings to the Church at large by 1988.[5]

Having taken that general step, the Convention also specifically requested dioceses to not

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3 *1979 Journal of General Convention*, p. C-134.

4 *1982 Journal of General Convention*, p. C-145.

5 *1985 Journal of General Convention*, p. 161.

only establish such affirmative action programs, but provided for annual reporting, as well:

RESOLVED, the House of Bishops concurring, That the several Dioceses of the Church be requested to establish Affirmative Action procedures, using as a basis those procedures adopted by the 67th General Convention for the Executive Council, the General Convention, and the interim bodies of the General Convention; and be it further

RESOLVED, That the several Dioceses be requested to report annually their participation in such procedures to the Executive for Administration and to the Committee on the State of the Church, using a form prepared by the Personnel Committee/Department of the Executive Council.[6]

In 1988, the standing commission on the Church in metropolitan areas, in its report to the General Convention, again expressed its concern for the sin of racism, and urged a resolution supporting affirmative action, but coupled with a direct addressing of the matter or institutional racism in all areas of life, not just in the religious arena:

Our religious tradition teaches us that all people are created in the image of God and posses an inherent dignity and worth regardless of race or class. Despite this tradition, racism is still deeply ingrained throughout all the institutions in our society, including the Church. Its manifestations are often subtle and devastating. Historically, affirmative action has been seen as one effective remedy to offset past racial injustices. The view has been under hostile attack over the past decade and it needs to be reaffirmed at this stage in our history.[7]

In response to the Commission report, General Convention of 1988 adopted the following resolution:

RESOLVED, the House of Bishops concurring, That this Convention reaffirm its commitment to a vigorous affirmative action program in all institutions in society as a remedy to historical, racial and sexual injustices. Such a program, already instituted at the national Church level, should serve as a model to include an open and vigorous search to fill positions with women and minorities. This should include set targets and an extensive evaluation of performance; and be it further
RESOLVED, That this Convention urge all of its dioceses and congregations to address the issue of institutional racism in the political and economic arenas, and also in religious institutions; and be it further
RESOLVED, That congregations help their members to address patterns of racism in the settings where they work in educational and other community institutions, and in housing practices.[8]

In 1991 the Executive Council Commission on Racism reported that it was mandated:

(1) to offer and provide assistance to dioceses, congregations and agencies of the Episcopal Church in developing programs to combat racism;
(2) to offer and provide assistance in the development of affirmative action programs and monitoring implementation of the same;
(3) to offer and provide assistance in the evaluation of such programs;
(4) to report to the executive council annually and to report to the General Convention in 1991 and thereafter.[9]

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6 Ibid., p. 162.

7 Blue Book Reports, 1988, p. 210.

8 *1988 Journal of General Convention*, pp. 189–90.

Goals and Objectives for the Next Triennium

Among the goals and objectives for the next triennium are the following:

(1) Equip church members to understand institutional racism and develop plans and programs to combat racism using data resulting from the institutional racism audit.
(2) Influence and monitor the racial and ethnic composition of interim bodies, commissions, committees and networks of the Episcopal Church.
(3) Provide antiracism training for the executive council.
(4) Monitor implementation of affirmative action program, equal employment policy and purchasing practices at the Episcopal Church Center, which must be a model for the whole Church.
(5) Follow up on recommendations from meetings with Episcopal Church Center units/divisions.
(6) Continue the development of networks of trainers in provinces.
(7) Work with a minimum of 11 dioceses in developing programs to combat racism.
(8) Request a pastoral letter on the sin of racism from the House of Bishops.[10]

In response to the report, both the House of Deputies and House of Bishops of the 1991 General Convention conducted racism self-audits.[11] In addition, a resolution of specific actions was adopted:

RESOLVED, the House of Bishops concurring, That the 70th General Convention urge each Dioceses to implement and go strengthen initiatives with all congregations in the Diocese toward becoming a Church of all for all races and a Church without racism committed to end racism in the world; and that these initiatives include but not to be limited to:
Prayer and Worship—encourage the establishment of prayer groups and support groups around the theme of combating racism.
Planning and Funding—ensure that funding and planning structures affirm racial equity in appointments to and funding of all diocesan staffs, committees and commissions.
Deployment—support and actively work to assure that parishes who have never considered minority clergy for vacancies do so.
Recruitment—actively recruit and support minority candidates in their progress from postulancy to ordination.
Education—prepare educational material to provide parishes with an educational series on the nature of racism that will acknowledge racism as a sin and will work toward eliminating its existence in the Church.
Racial Survey—conduct a racial survey to determine where minority persons are in the Diocesan structures and parishes to determine if they are present on all Diocesan committees and vestries in proportion to their presence in the Church.[12]

Note: This position statement on affirmative action was received from the Rt. Rev. William Wantland, Bishop of the Eau Claire (Wisconsin) diocese.

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9 *Blue Book Reports*, 1991, p. 145.

10 Ibid., p. 146.

11 *1991 Journal of General Convention*, pp. 90 and 540.

12 Ibid., p. 382

Position Statement on Affirmative Action to the United States Commission on Civil Rights

From the Anti-Defamation League*

The Anti-Defamation League welcomes the opportunity to submit this statement to the United States Commission on Civil Rights. We believe this is a subject which warrants public attention and debate, and the League commends the Midwestern Regional Office of the U.S. Commission on Civil Rights for sponsoring this forum.

In the course of the last three decades, this country has made meaningful progress in redressing an historical legacy of segregation and discrimination and in ensuring and promoting minority participation in the full spectrum of American life. For many, this progress reflects the success of the civil rights movement in America, in which the Anti-Defamation League (ADL) has played an integral role. ADL has, in the past, filed *amicus* briefs in the United States Supreme Court urging the unconstitutionality of, or illegality of, racially discriminatory laws or practices in such cases as *Shelley v. Kraemer, Sweatt v. Painter, Brown v. Board of Education, De Funis v. Odegaard, Fullilove v. Klutznick,* and *Memphis Fire Department v. Stotts.* In all of these cases, the League has advocated the position that each person has a constitutional right to be judged on his or her individual merits. ADL clearly and unequivocally adheres to the notion that racial diversity in academic and employment settings is in the interest of this nation. However, the League rejects the concept that allowing special consideration of immutable characteristics is the only means to achieve the goal of full participation by all segments of society.

ADL has long adhered to the position that a primary goal of our society should be the elimination of all forms of discrimination and the establishment of equality of opportunity for all Americans. ADL was one of the first organizations to advocate and support legislative and administrative actions by government to prohibit discrimination in employment, education, housing, and other areas of American life. ADL played a significant role in securing the adoption of such laws and regulations, including the Civil Rights Act of 1964. Recognizing that antidiscrimination laws by themselves would not succeed in leveling the playing field because prior victims of discrimination frequently lacked the education and training necessary to compete in a merit-based process on an equal basis, ADL has supported a variety of traditional affirmative action measures in an effort to foster meaningful equality of opportunity. ADL continues to support affirmative action as it was originally conceived, as an effort to assist prior victims of discrimination.

A just society has an affirmative obligation to help undo the evils flowing from past discrimination by affording its victims every opportunity to hasten their productive participation in the society at their optimum level of capacity. Consequently, ADL advocates and supports provision for special compensatory education, training, retraining, apprenticeship, job counseling, and placement, welfare assistance and other forms of help to the deprived and disenfranchised, to enable them as speedily as possible to realize their potential capabilities for participation in the American economic and social mainstream.

While supportive of special efforts to recruit minorities and other elements of affirmative action as originally conceived, ADL has consistently opposed quotas, racial preferences, proportional representation, and the use of race as an absolute qualification for any post. Unfortunately, governmentally required numerical goals and timetables have frequently operated as the functional

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* This position paper was solicited through the Detroit regional office of the Anti-Defamation League. Harlan A. Loeb, assistant director, legal affairs, national office of the ADL, provided the statement. His signed correspondence is on file with the Midwestern Regional Office of the U.S. Commission on Civil Rights, Chicago, Illinois.

equivalent of quotas. Favoritism based on immutable characteristics such as race and ethnicity do not advance equality. The evolution away from a system of decisionmaking focused on individual merit and toward a system of group preferences has had a demonstrably negative impact on race relations in this country. Resentment has been aroused even among minority communities because the practice unfairly stigmatizes minorities in the eyes of fellow citizens.

The League believes that race-based preferences and quotas cannot be justified on the theory that the 14th amendment protects only racial minorities. Such a concept is wholly contrary to the basic constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex, or national origin. The equal protection clause protects all individuals, regardless of race, from State-sponsored discrimination. The rights conferred by the amendment are personal and cannot be waived. Even in cases where there is a history of past discrimination, it is generally inappropriate, ADL believes, to use race or ethnicity as a remedial tool. However, under narrow circumstances the League believes that race and ethnicity can be used remedially if a court makes a finding that there is a history of systemic and egregious discrimination, all other remedies have been ineffective, and the remedy is limited in duration. Similarly, the League does not deem it a racial preference if an employer, in response to current egregious and systemic discrimination, considers race and ethnicity in its hiring and promotion practices. Both of these exceptions, while perhaps narrower than the standard set forth by the United States Supreme Court in *Adarand V. Pena*, recognize that there are limited situations in which race must be considered to confront manifest and persistent discrimination.

There is no doubt that the playing field in this country is far from level, and our society has substantial headway to make in eradicating discrimination. To this extent, it is vital that we undertake a renewed commitment to fighting discrimination and promoting opportunity for all sectors of the American human landscape. Tougher and more aggressive enforcement of the civil rights laws is a substantial first step. Rather than cutting funding for enforcement of this country's civil rights laws, funding must be increased. The unprecedented case backlog at the Equal Employment Opportunity Commission is just one of many symptoms that should alert lawmakers that laws are hollow if they are not accompanied by the necessary enforcement resources.

The 1991 amendments to the civil rights act provide for a broader range of damages for successful claimants. Except for the substantial minority of litigants who can afford counsel in discrimination cases, few lawyers take discrimination cases on a contingency fee basis. Therefore, the futility of the damages provisions are obvious if injured parties have *no* day in court. The enormous discrimination lawsuits against Fortune 500 companies like Denny's or Wal-Mart, while appealing news stories, do not represent the bulk of discrimination complaints.

Most forms of discrimination are either too subtle to be actionable or too institutionalized to be penetrable. Therefore, enforcement of anti-discrimination laws is, in and of itself, insufficient. Although most observers candidly admit that discrimination continues in this country, they do not share the same unanimity when confronted with the "solution" question. In part, quotas and other forms of mandated preferences grew out of the recognition that "good citizenship" and "justice" were inadequate catalysts for the elimination of discrimination. It ism, however, possible to provide incentives without resorting to race-based preferences.

In some cities, for example, coalitions have formed between local industry, school representatives, government officials, and other community representatives to begin to grapple with the challenge of promoting diversity and equal opportunity. At the core of these initiatives is the conviction that outreach and education will go a long way in facilitating equal opportunity. The League has long believed that there is a positive correlation between ignorance and discrimination and a negative correlation between education and discrimination. For that reason, ADL has developed training and educational programs.

ADL's A WORLD OF DIFFERENCE Institute has documented success in training businesses, local government, and academic institutions in the value of diversity. By breaking down common myths and building an appreciation for diversity, the eradication of discrimination in employment and admissions can be accomplished. Federal and

State government should take the lead and mandate compulsory diversity education for all employers that receive Federal or State funds.

Universities and industry, through governmentally created incentives, should be encouraged to develop programs for the recruitment, training, hiring, and promotion of individuals who have a personal history of disadvantage. Economic rather than racial, criteria provide for an equitable basis upon which to develop special hiring and admissions programs. In valuing individual ability to triumph over hardship and adversity, we, as a society, acknowledge grit, determination, and perseverance "qualification criteria." Proactive measures must be taken to pull the outsiders into the economic mainstream, and economic factors furnish the most egalitarian means to accomplish this imperative objective.

ADL welcomes recent legal initiatives intended to restore merit-based decisionmaking and to prohibit any form of discrimination in employment, education, housing, and other areas of American life. Coupled with a commitment to expand the pool of qualities and characteristics which constitute the concept of "merit," there is room to be optimistic that race and ethnicity will not form the basis for privilege or discrimination.

Clearly, there is much room for improvement in this country's crusade against discrimination and bigotry. The Federal Government has the opportunity to take the lead, at least by example, in this most important obligation. The League, therefore, applauds the Commission's initiative in confronting this difficult problem and we thank you for the opportunity to participate.

A Statement on Equal Opportunity and Affirmative Action
The United States Catholic Conference*

Department of Social Development and World Peace
3211 4th Street, N.E.
Washington, DC 20017-1194

May 21, 1996

The Honorable Henry Hyde, Chairman
Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the United States Catholic Conference, the public policy agency of the nation's Catholic bishops, I write in opposition to HR 2128—the "Equal Opportunity Act of 1995." The Catholic bishops conference believes that passage of this bill would set back the nation's attempts to address the vestiges of racism and sexism and the resulting discrimination which have scarred our people, our communities, our government, and our society.

Our nation needs a renewed debate over how best to overcome the lasting consequences and current impact of racism and unjust discrimination in all of its forms. We need to examine which remedies are working well, which are in need of strengthening or reform, and which should be abandoned. Sadly, the often partisan debate and the sweeping nature of this legislation generate more heat than light, more political struggle than public dialogue.

When he came to our nation last fall John Paul II declared: "The basic question before a democratic society is how ought we to live together?" This question is at the heart of this discussion. Are we to see ourselves as isolated individuals competing for limited opportunities? Are we to divide ourselves into competing groups clawing for advantage?

In our 1979 pastoral letter on racism, ***Brothers and Sisters to Us***, the U.S. Bishops strongly state: "Racism is a sin; a sin that divides the human family, blots out the image of God among specific members of that family, and violates the fundamental dignity of those called to be children of the same Father . . . Racism is sometimes apparent in the growing sentiment that too much is being

given to racial minorities by way of affirmative action programs of allocations to redress long-standing imbalances in minority representation and government funded programs for the disadvantaged. At times, protestations claiming that all persons should be treated equally reflect the desire to maintain a *status quo* that favors one race and social group at the expense of the poor and nonwhite."

"Racism obscures the evils of the past and denies the burdens that history has placed upon the shoulders of our Black, Hispanic, Native American, and Asian brothers and sisters. An honest look at the past makes plain the need for restitution where ever possible—makes evident the justice of restoration and redistribution.

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* In response to an invitation from the Advisory Committee, the United States Catholic Conference submitted the following letter from William S. Skylstad, Bishop of Spokane and chairman of the domestic policy committee, to the U.S. House of Representatives Judiciary Committee as its position statement on affirmative action. The signed letter is on file with the Midwestern Regional Office of the U.S. Commission on Civil Rights, Chicago, Illinois.

We believe that the moral task before our leaders is to search for the common good in this divisive debate, to renew our nation by seeking opportunities for all Americans, acknowledging that this requires appropriate and judicious affirmative action to remedy discrimination and to offer opportunity for all, including those on the margins of our society.

As we said in our pastoral letter, ***Economic Justice for All***, "Discrimination in job opportunities or income levels on the basis of race, sex, or other arbitrary standards can never be justified. It is a scandal that such discrimination continues in the United States today. Where the effects of past discrimination persist, society has the obligation to take positive steps to overcome the legacy of injustice. Judiciously administered affirmative action programs in education and employment can be important expressions of the drive for solidarity and participation that is at the heart of true justice. Social harm calls for social relief."

Affirmative action—clear in purpose and careful in application—remains a necessary tool for reaching equal opportunity. To abandon this tool now would be to retreat in our struggle for justice and limit our hope for an inclusive society that harnesses the talents and energy of all our people.

Sincerely

[signed]

William S. Skylstad
Bishop of Spokane
Chairman, Domestic Policy Committee

A Human Relations Perspective on Affirmative Action

From The National Conference*

As a national leader in intergroup relations, beholden to no one group and concerned about all, The National Conference works to advance the goals of equality and justice for all races, religions, ethnicities, and cultures.

The National Conference, founded as The National Conference of Christians and Jews, has worked since 1927 to remedy the harmful effects of racial, ethnic, gender, and religious discrimination. Our efforts stem from the belief that our Nation is only strengthened by expanding the protection of equality to those Americans who have traditionally been denied the basic privileges and opportunities of citizenship. The National Conference has taken up the challenge to promote efforts to incorporate women and people of color into areas from which they have too long been excluded. Only by embracing our diversity and recognizing that we must strive to achieve racial and gender parity, can we truly lead the world on issues of social justice. As a human relations organization, The National Conference is concerned with any governmental action that would undermine our mission to "fight bias, bigotry, and racism" and our efforts "to promote understanding and respect for all."

The National Conference is concerned about the recent calls to end affirmative action initiatives. At a time when relations between America's ethnic, racial, and religious groups are often frayed and sometimes violent, efforts to promote diversity and equality are necessities, not merely civic ideals. A key component to the actual achievement of these goals has been and remains the use of affirmative action.

Until a more effective tool to fight bias, bigotry, and racism is developed, we stand firmly behind the continued use of affirmative action initiatives and remain dedicated to the expansion of opportunities and access for all races, religions, and cultures. In fact, affirmative action is arguably the most powerful instrument in the fight against gender and racial bias. In the last 30 years, largely because of affirmative action programs, our nation has made significant strides in providing access and opportunity for women and people of color. Yet, it is much too soon to declare victory over racial and gender bias.

Affirmative action should be viewed as one of the most productive routes for the emergence of people of color and women into the mainstream. It is a tool used to ensure equal opportunity in employment, business contracts, education, and housing. Affirmative action is a summary of those measures by which Federal, State, and local governments as well as academic institutions and corporations not only remedy past and present discrimination, but also prevent future discrimination. This is a worthy effort which is conceptually accepted by most Americans in order to attain an inclusive society. Affirmative action permits the use of racial- and gender-conscious measures to bring about equality of opportunity. As Justice Blackmun so eloquently stated, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

As to the claims that we, as a nation, no longer need affirmative action, there is absolutely no empirical data to support claims that we have leveled the playing field or reached a "color blind society." To the contrary, studies ranging from the Federal Glass Ceiling Commission Report to The National Conference's report on intergroup rela-

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* This position statement on affirmative action was solicited by the Advisory Committee through the Midwestern Regional Office of the U.S. Commission on Civil Rights. This article was researched and edited by Juan F. Otero, public policy fellow of the Washington National Office of The National Conference, and Brian E. Foss, vice president of The National Conference. The viewpoints expressed herein are a summary of the historical actions and philosophy of The National Conference, but do not represent specific policy statements of the National Office of The National Conference.

tions, *Taking America's Pulse*, continue to document the underrepresentation of women and people of color in all aspects of American life, and the continued misunderstandings and distrust between and among racial and ethnic minorities.

It is essential, therefore, for leaders in government, business, and the independent sector to continue their efforts to find avenues of access and opportunity for women and people of color with the objective that, one day, we can live in a world where color and gender are not taken into account. We will advocate the end of affirmative action when racial and gender discrimination have been ended.

This paper presents our philosophic and programmatic support for affirmative action initiatives by briefly examining the historical context of affirmative action, the potential miscommunication and misperceptions caused by such initiatives, and, lastly, suggests a new dialogue needed to bridge the gaps of communications that surround affirmative action.

Affirmative Action: A Historical Context

Affirmative action represents a proven means of empowering women and people of color to have more of a stake in society. For too long, we have allowed racial and ethnic conflict to divide our nation. The reason for this division is our failure to resolve our racial and ethnic conflicts in a meaningful and lasting manner. The effects of centuries of pervasive discrimination still linger. Racism still obscures our history and has blocked the full integration of those Americans who are not of European descent. The race issue pervades this nation's history, and its residue still finds its way into virtually every aspect of American society.

There are calls to rescind affirmative action, which stands at the center of the necessary racial pact that we negotiated just a generation ago. Recently, the leadership of both parties have called for a reexamination of Federal affirmative action programs. On the State level, California Governor Pete Wilson brought the issue to the forefront of political discussion, by calling for a state ballot initiative which would effectively end affirmative action in the Golden State.

Abandoning affirmative action principles would jeopardize progress made to date and restrict future gains by women and people of color. This would hamper the Constitution's promise of equal opportunity for all. Outlawing affirmative action would therefore result in the loss of a necessary remedy in the ongoing struggle to end discrimination and to achieve equal opportunity in the workplace and in higher education.

Intergroup Relations in the Current Affirmative Action Debate

In the context of human relations, affirmative action is one of today's most debated and divisive issues. Simply mentioning the phrase creates tension and taps into the emotions of many. Supporters and opponents alike agree on one thing—after 30 years, this controversial policy has acquired misunderstandings, misinterpretations, and mistakes of intent and execution over time.

It is indeed unfortunate that we have opted to undertake a national debate on affirmative action within this framework of miscommunication and misunderstanding. In order to forego having this debate become overly divisive, The National Conference strongly advocates dialogue, research, and communication on the issue. Our continuing work to find common ground on potentially divisive issues, including affirmative action, has taught us that the search for good human relations most frequently occurs only in the wake of racial and ethnic disruptions.

The current dialogue has become unnecessarily hostile and misinformed on the benefits of affirmative action. The National Conference is working to bring civility to the intense level of discord surrounding this issue. It is our goal to guide this discourse away from the extreme rhetoric of polarization to a place where we can work together in a manner which benefits society as a whole and strengthens and unites our communities.

Tensions between our racial, ethnic, and religious communities bring forth discussions about how our nation, comprised of diverse ethnic, religious, and racial groups, can truly improve understanding and respect for each other. The Rodney King riots in Los Angeles, the Crown Heights murders in New York City, and the recent beating of illegal immigrants in California are a few examples of intergroup conflicts that have given rise to dialogue on methods of improving our interaction with each other.

We hope that the often ill-informed rhetoric, from all parties involved, will be lessened so that we can begin to actually listen to each other and, ultimately, move the debate to a point where we are able to calmly discuss methods to improve and enhance the effectiveness of affirmative action's ultimate goals.

Potential Perils of Affirmative Action in a Human Relations Context

For some, the basic question presented by affirmative action is whether government should consider factors of race and gender in its employment and contracting decisions. Our long history of using race and gender classifications to hold back entire groups and generations of American citizens creates a tension with governmental policies that use skin color and gender as criteria for opportunities and access.

A. Divisions Exacerbated by Affirmative Action

Currently, the affirmative action public policy could be interpreted as detrimental to race relations. Women and people of color compete with white males for benefits and opportunities based on group status rather than individual merit. Intended beneficiaries and innocent victims of redistributive affirmative action plans, concurrently seeking benefits and opportunities in employment and education, succumb to the "You're in, I'm out" conflict. The result of these group-based affirmative action or diversity policies is intergroup resentment and discord.

Moreover, a basic tenet of human rights is that the dignity of an individual should never be sacrificed to any interest, including the national interest. Under this line of thought, affirmative action plans that look to "collective" retribution are regarded as an affront to the concept of individual merit.

We acknowledge that there may be imperfections in affirmative action programs as they are presently administered. We support efforts to review such policies for the purposes of enhancing their effectiveness. Until there is a viable policy alternative in place that can act as a broad based strategy to combat the efforts of past and present discrimination, we will continue to vigorously support the core principles of affirmative action.

B. Misperceptions Surrounding Affirmative Action

By providing accurate information, creating an atmosphere for civic and civil discussion, and facilitating a process for common action by people in need on all sides of this issue, The National Conference hopes to foster a thoughtful societal conversation on affirmative action.

A clear example of the misdirected tenor surrounding affirmative action involves the use of quotas. Quotas have been outlawed by Federal and State statutes and regulations. Only in rare instances of court-ordered, short-term time spans have numerical targets been allowed to remedy egregious discrimination by a specific employer.

Another related misperception concerning affirmative action involves the use of goals and timetables approved by courts and government agencies. In no uncertain terms, goals are not tantamount to quotas. Goals represent useful benchmarks for measuring progress. They allow the achievement of nondiscrimination by schools and employers in their selection and assessment procedures to be measured and analyzed.

A far more serious misperception is that affirmative action gives preferences to unqualified women and people of color. The statistical evidence simply does not support this broad assertion. Neither laws nor proponents of affirmative action support placing unqualified people in jobs. The United States may well be at a point in its human relations evolution that highly specific goals and targets are no longer required, but it is folly to assume that the objectives of affirmative action have been achieved to the point of full and fair inclusion of women and minorities.

Affirmative Action as a Unifying Tool

Affirmative action, as implemented by courts, businesses, educational institutions, the Federal executive branch, and most states is not what is dividing America today. Rather, it is the persistence of the same social ills this public policy was designed to help remedy. Affirmative action is the easier target for those in our society who will not admit to or confront the larger, more challenging problems of intergroup prejudice and discrimination.

Affirmative action directly addresses our current state of race relations by offering an equitable redress to centuries of racial and gender discrimination. In the end, affirmative action is a flexible concept which includes various actions to overcome those barriers not based upon merit and qualifications. As long as such barriers exist, many women and people of color will be deprived of opportunities and access. For example, where an employer formerly may have only used word-of-mouth announcements for new job openings, thus perpetuating an all white-male work force, the employer's affirmative action plan may include job posting and announcements in media targeted to reach women and people of color. An educational institution may use scholarships which are designed to attract students who belong to groups that were historically denied admission, or, realizing the inferiority of instruction and teaching in certain urban public schools, might use tests which would try to reveal the real intelligence and intellect of students who have come from disadvantaged educational environments. Other programs may include training and apprenticeship efforts. Affirmative action also has been a significant and needed tool for effective enforcement of anti-discrimination laws. Not only is affirmative action used as a remedy in cases of proven racial or gender discrimination, it has also been voluntarily adopted to prevent and avoid future racial or gender discrimination.

Conclusion

Affirmative action benefits all Americans, not just its immediate beneficiaries. The fact that women and people of color have made significant gains over the past 30 years is due largely to effective affirmative action programs in both the private and public sectors. Affirmative action acts as a measured, effective response to discrimination designed to achieve real, not illusory, equality for women and people of color. Just as the Equal Protection Clause and the civil rights laws have had to become part of the fabric of American life, affirmative action contributes to achieving a nation that is free of bias, bigotry, and racism.

We are all bound together in a vast network of affirmative action, of mutual support systems, which we take for granted. The National Conference's Survey, *Taking America's Pulse* documented that when Americans were asked "Do you favor full racial integration, integration in some areas of life, or separation of races," 68 percent of Americans favor "full integration" with another 17 percent favoring "integration in some areas." Only 7 percent nationwide would rather see "separation of the races." These statistics provide hard evidence that Americans are not simply giving lip service to the concept of integration and diversity but expressing positive support for programs that promote racial parity. This is seen by the overwhelming 87 percent majority of Americans who agreed that "If America wants to be competitive in the world, it is in our self-interest to educate and give job-training to racial minorities." Culturally, our report showed most Americans ready to embrace the notion of equality of access and opportunity.

In the private sector, many business leaders have dedicated themselves to managing diversity by doing everything possible to advance the careers of women and minorities. Their commitment is rooted in doing what is right for business and doing what is right in order to give every individual an opportunity to develop to their full potential. This kind of commitment is exactly the spirit that brought forth voluntary affirmative action initiatives and it is precisely the kind of commitment that will sustain affirmative action in the future.

This dedication must be expanded in the private sector and preserved in the public sector. We are dangerously close to repeating history by turning back the clock on State and Federal affirmative action initiatives. We urge individuals and all leaders to maintain their support for the core principles of affirmative action in order to advance opportunity and access for all Americans.

National Association of Manufacturers Position Statement on Affirmative Action

The National Association of Manufacturers*

Subject: Affirmative Action

The National Association of Manufacturers (NAM) supports affirmative action as an effective method of achieving civil rights progress. Industry realizes that it is good business policy to encourage and promote programs that enhance minority and female participation at all levels within the workplace.

Affirmative action programs have strengthened the fabric of society and created an environment of cooperation and understanding among people of diverse backgrounds. In endorsing affirmative action, it should be made clear that goals, not quotas, are the standard to be followed in the implementation of such programs.

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* This position statement was solicited by the Advisory Committee through the Midwestern Regional Office of the U.S. Commission on Civil Rights. The position statement correspondence is on file with the Midwestern Regional Office, Chicago, Illinois. The date of the statement is May 24, 1985.

Authors

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Appendix

Affirmative Action Papers in the Five Volume Series by State Advisory Committees in the Midwestern Region of the United States Commission on Civil Rights.

The State Advisory Committees participating in this series of consultations on affirmative action are: Illinois, Indiana, Michigan, Ohio, and Wisconsin. The State Advisory Committee report in which the paper appears is listed in parenthesis.

Papers

"A Human Relations Perspective on Affirmative Action," The National Conference (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"Achieving Participation Goals for Women in the Construction Workforce," by Nancy Hoffmann (Wisconsin)
"Affirmative Action: A Critically Important Policy," by Nancy Kreiter (Illinois).
"Affirmative Action: A Latino Perspective" (Illinois)
"Affirmative Action: A Proactive Approach to Equality and Equity in Employment," by Thelma T. Crigler (Illinois)
"Affirmative Action—A Sensible Tool," by Sam H. Jones (Indiana)
"Affirmative Action: An American Tradition," by Donna R. Milhouse (Michigan).
"Affirmative Action: An Employer's Perspective," by Timothy G. Costello and Shelly A. Ranus (Wisconsin)
"Affirmative Action and the Asian Pacific American Community," by Ann E.Y. Malayang (Michigan).
"Affirmative Action as Legal Remedy and Compensatory Opportunity," by Howard L. Simon (Michigan).
"Affirmative Action at the University of Michigan," by James J. Duderstadt (Michigan).
"Affirmative Action: What Is It? A Layperson's Perspective," by Patricia L. Bell and John T. Blackwell (Michigan).
"Affirmative Action and Asian Americans: Lessons from Higher Education," by Yvonne M. Lau (Illinois)
"Affirmative Action and Government Spending: Cutting the Real Waste," by Ronald E. Griffin (Michigan).
"Affirmative Action and Misconceptions in the National Debate," by Marvin A. McMickle (Ohio)
"Affirmative Action and the Conflict of Opposing Conceptions of America's Future," by Charlie Jones (Ohio)
"Affirmative Action and the Practical Realities Confronting Employers," by J. Stuart Garbutt (Illinois)
"Affirmative Action and the Rule of Law," by Robert L. Willis, Jr. (Michigan)
"Affirmative Action as Affirmative Government Purchasing," by Ronald E. Hall (Michigan).
"Affirmative Action as an Antidote to the Socioeconomic Bimodalization of America," by Lynn R. Youngblood (Indiana)
"Affirmative Action as Discrimination: An Historian's View," by Thomas C. Reeves (Wisconsin)
"Affirmative Action as Good Business," by Roland C. Baker (Illinois).
"Affirmative Action at a Small, Private, Liberal Arts College," by Michele A. Wittler (Wisconsin).
"Affirmative Action at Ameritech," by Douglas L. Whitley (Illinois).
"Affirmative Action at Procter & Gamble," by John E. Pepper (Ohio).
"Affirmative Action at Work: Battleground of Competing Values," by Bron Taylor (Wisconsin).
"Affirmative Action Controversy," by Jacqueline H. LaGrone (Indiana).
"Affirmative Action: Equality of Opportunity and the Politics of Change," by Robert T. Starks (Illinois).

"Affirmative Action: Equity and Efficiency," by Dereka Rushbrook (Wisconsin).
"Affirmative Action Hiring in the Milwaukee Police Department," by Joan Dimow and Kenneth Munson (Wisconsin).
"Affirmative Action: Implications for Indiana," by Joanne M. Sanders (Indiana).
"Affirmative Action in Employment: A Commentary on OFCCP Enforcement and Executive Order 11246," by Ann Barry (Wisconsin).
"Affirmative Action in Hiring and Contracting: An Effective Public Policy," by James W. Compton and James H. Lewis (Illinois).
"Affirmative Action in Multiracial America," by Jeryl Levin (Illinois).
"Affirmative Action in the Federal Government-A United States Air Force Perspective," by Michael B. O'Hara (Ohio).
"Affirmative Action in the Twenty First Century," by Ellen Frankel Paul (Ohio).
"Affirmative Action in Wisconsin State Government," by Gregory C. Jones (Wisconsin).
"Affirmative Action into the Twenty First Century: Revision and Survival," by Dulce Maria Scott and Marvin B. Scott (Indiana).
"Affirmative Action: Mend It—But Don't End It," by Sam Thomas, III (Ohio).
"Affirmative Action Plans or Government Investigations: Which Serves Us Best?," by Michael Vlantis (Indiana).
"Affirmative Action Programs in Not-For-Profit Human Service Organizations," by Karen Johnston (Illinois).
"Affirmative Action: Pushing Equal Opportunity," by Maureen Manion (Wisconsin).
"Affirmative Action Recruitment, Hiring, and Employment of People With Disabilities," by Nancy Griffin (Indiana).
"Affirmative Action Set Asides: Bad Programs," by Larry Robinson (Ohio).
"Affirmative Action—Should It Be Continued, Modified, or Concluded," by Charmaine Clowney (Wisconsin).
"Affirmative Action: Still Needed After All These Years," by Samuel Rosenberg (Illinois).
"Affirmative Action: Time To Rethink Anti-Discrimination Strategy," by Lee H. Walker (Illinois).
"Affirmative Action: What is Our Future? What Is Best For America? A Case for Affirmative Action," by Samuel Gresham, Jr. (Ohio).
"Affirmative Action Versus Markets as a Remedy for Discrimination," by John Lunn (Michigan).
"(The) Ambivalent Future of Affirmative Action," by Jonathan L. Entin (Ohio).
"(The) Americans With Disabilities Act and Affirmative Action," by Kent Hull (Indiana).
"The Episcopal Church and Affirmative Action," The Episcopal Church General Convention (Illinois, Indiana, Michigan, Ohio, and Wisconsin).
"An Economic View of Affirmative Action," by Hedy M. Ratner (Illinois).
"An Ethic of Care and Affirmative Action: A Critical Analysis of Supreme Court Jurisprudence," by Francis Carleton (Wisconsin).
"(The) Assault on Affirmative Action and Reality," by Ellen Bravo (Wisconsin).
"Beyond Black and White: Asian Americans and Affirmative Action," by Gail M. Nomura (Michigan).
"Breaking Through Multiple Barriers: Minority Workers in Highway Construction," by Janice A. Schopf (Wisconsin).
"(The) Case For Maintaining and Enhancing the Use of Voluntary Affirmative Action in Private Sector Employment," by Barbara J. Fick (Indiana).
"City of Columbus Predicate Study Summary," by Gwendolyn Rogers and Melinda Carter (Ohio).
"Civil Rights Issues Facing American Muslims in Illinois and the Lack of Affirmative Action Inclusion," by Moin "Moon" Khan (Illinois).
"Affirmative Action—A Success Story for One Minority-Owned Business," by Vijay Mahida (Michigan).
"Detroit Branch NAACP Statement on Affirmative Action," by Joann Nichols Watson (Michigan).
"Disassembling Myths and Reassembling Affirmative Action," by Phoebe Weaver Williams (Wisconsin).
"Effectiveness of Goals in Affirmative Action Programs," by Theodore R. Hood (Indiana).

"(The) Folklore of Preferential Treatment," by Kenneth W. Smallwood (Michigan).
"General Motors Corporation Position on Affirmative Action," by William C. Brooks (Michigan).
"(The) Impact of Affirmative Action on Opportunities in Illinois: Beliefs Versus Realities," by Cedric Herring (Illinois).
"Impact of Affirmative Action on the Hispanic/Latino Community," by Joseph L. Mas (Ohio).
"Mending, Not Ending, Affirmative Action: The Approach of Bloomington, Indiana," by Barbara E. McKinney and Colleen Foley (Indiana).
"Michigan Department of Civil Rights Review of State Affirmative Action Programs," by Winifred K. Avery and Charles Rouls (Michigan).
"Myth Versus Reality: A Call for Integrity in the Debate of Affirmative Action," by Cathy J. Cox (Indiana).
"National Association of Manufacturers Position on Affirmative Action," the National Association of Manufacturers (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"Ohioans Oppose Preferential Programs Based on Race or Gender," the *Ohio Poll.*
"(The) Origins of Affirmative Action in Employment," by Ken Masugi (Ohio).
"Plurality and Affirmative Action: The Social Requirement of Diversity," by H. Paul LeBlanc, III (Illinois).
"Position Statement from the Anti-Defamation League on Affirmative Action to the United States Commission on Civil Rights," The Anti-Defamation League (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"(The) Practice of Affirmative Action by the Wayne County Commission," by Victor L. Marsh (Michigan).
"Practice Versus Politics, A Focus on Affirmative Action," by Alvin L. Pierce (Indiana).
"Proactive Affirmative Action: A Position Paper," by Dennis Gabor (Wisconsin).
"Racial Disparity and Employment Discrimination Law: An Economic Perspective," by James J. Heckman and J. Hoult Verkerke (Illinois).
"Reconsidering Strict Scrutiny of Affirmative Action," by Brent T. Simmons (Michigan).
"Reflections on the Indianapolis Experience in the 1980s with Affirmative Action and Equal Opportunity," by William H. Hudnut (Indiana).
"Reforming Affirmative Action in Ohio," by Governor George V. Voinovich (Ohio).
"Reinventing Affirmative Action," by Boniface Hardin (Indiana).
"(The) Relevancy of Affirmative Action for a Recent Immigrant Among the Minority Population," by Sebastian Ssempijja (Wisconsin).
"(The) Role of Affirmative Action in Promoting Intergroup Relations," by Horacio Vargas (Michigan).
"Southern Illinois: A Case for Affirmative Action," by Don E. Patton (Illinois).
"Statement on Equal Opportunity and Affirmative Action," by The United States Catholic Conference (Illinois, Indiana, Michigan, Ohio, Wisconsin).
"Statement on Affirmative Action from the Mexican American Legal Defense and Educational Fund" (Illinois).
"Strong Affirmative Action Monitoring Guarantees Impartial Employment Opportunities for Women and Minorities Currently Not Welcome in Wisconsin's Construction Industry," by Karen Meyer (Wisconsin).
"(The) Theology of Racism and Affirmative Action," by Rt. Rev. William C. Wantland (Wisconsin).
"Thirty Year Retrospective: Women and Affirmative Action 1965-1995," by Eileen D. Mershart (Wisconsin).
"Time To Dismantle Affirmative Action," by Rebecca A. Thacker (Ohio).
"What Affirmative Action Requires," by Emily Hoffman (Michigan).
"(The) World Your Children Will Inherit," by Jeannie Jackson (Michigan).

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Hood, Theodore R., "Effectiveness of Goals in Affirmative Action Programs" (Indiana).

Hudnut, William H., "Reflections on the Indianapolis Experience in the 1980s with Affirmative Action and Equal Opportunity (Indiana).

Hull, Kent, "The Americans With Disabilities Act and Affirmative Action" (Indiana).

Jackson, Jeannie, "The World Your Children Will Inherit" (Michigan).

Johnston, Karen, "Affirmative Action Programs in Not-For-Profit Human Service Organizations" (Illinois).

Jones, Charlie, "Affirmative Action and the Conflict of Opposing Conceptions of America's Future" (Ohio).

Jones, Gregory C., "Affirmative Action in Wisconsin State Government" (Wisconsin).

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Loeb, Harlan A., *see* "Position Statement on Affirmative Action to the United States Commission on Civil Rights" (Illinois, Indiana, Michigan, Ohio, Wisconsin).

Khan, Moin "Moon," "Civil Rights Issues Facing American Muslims in Illinois and the Lack of Affirmative Action Inclusion" (Illinois).

Kreiter, Nancy, "Affirmative Action: A Critically Important Policy" (Illinois).

LaGrone, Jacqueline H., "Affirmative Action Controversy" (Indiana).

Lau, Yvonne M., "Affirmative Action and Asian Americans: Lessons from Higher Education" (Illinois).

LeBlanc, H. Paul III, "Plurality and Affirmative Action: The Social Requirement of Diversity" (Illinois).

Lewis, James H. and James W. Compton, "Affirmative Action in Hiring and Contracting: An Effective Public Policy" (Illinois).

Levin, Jeryl, "Affirmative Action in Multiracial America" (Illinois).

Lunn, John, "Affirmative Action Versus Markets as a Remedy for Discrimination" (Michigan).

Mahida, Vijay "Affirmative Action—A Success Story for One Minority-Owned Business," (Michigan).

Malayang, Ann E.Y., "Affirmative Action and the Asian Pacific American Community" (Michigan).

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