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## Letter of Transmittal

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

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The Indiana Advisory Committee submits this report, *Indiana 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 13–0 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 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 experience in affirmative action. To that end section I of this report contains papers from the former mayor of Indianapolis, the director of eeo/affirmative action programs in Bloomington (Indiana), a former eeo Federal official, as well as papers from attorneys with legal experience in civil rights. Sections II and III contain academic analyses of affirmative action and positions from selected community organizations. Also included in this report in section IV 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,

Paul Chase, *Chairperson*
Indiana Advisory Committee

## Indiana Advisory Committee to the U.S. Commission on Civil Rights

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# Introduction

## I. The Indiana Advisory Committee

The Indiana Advisory Committee feels that as part of its obligation to advise the United States Commission on Civil Rights on relevant information within the jurisdiction of the Commission, it could not ignore the civil rights issue and debate on affirmative action at this time. 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 Indiana Advisory Committee 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 contemporary term that encompasses 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.[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.

Eighteen individuals and organizations accepted invitations and presented papers. These are collected in four sections: (1) Affirmative Action and Its Implementation, (2) Academic Examinations of Affirmative Action, (3) Community Perspectives regarding Affirmative Action, and (4) Position Statements on Affirmative Action from National Organizations. 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]

## II. Background

In the 1960s government entities at Federal and local levels began taking an active role to eliminate discrimination on the basis of race, color, religion, sex, and national origin. These initiatives included antidiscrimination measures in areas such as employment, housing, and education. Some efforts also included affirmative action.

The preeminent antidiscrimination legislation of the civil rights era is the Civil Rights Act of 1964.[3] Title VII of that act prohibits employment discrimination, but it neither requires nor prohibits affirmative action measures.[4] The most recent Federal civil rights legislation, the Civil Rights

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

2 *See also* U.S. Commission on Civil Rights State Advisory Committee reports: *Illinois Consultation: Focus on Affirmative Action* (1997); *Michigan Consultation: Focus on Affirmative Action* (1997); *Ohio Consultation: Focus on Affirmative Action* (1997); and *Wisconsin Consultation: Focus on Affirmative Action* (1997).

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

4 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. 1994).

Act of 1991,[5] expressly preserves lawful affirmative action plans, leaving the courts to decide the proper parameters of such plans.

The principal legal requirements of affirmative action at the Federal level include Executive Order 11246,[6] as amended, the Rehabilitation Act of 1973,[7] and the Vietnam Veterans Era Readjustment Assistance Act of 1974.[8] Executive Order 11246, signed by President Lyndon B. Johnson in 1965 and amended in 1967 to include gender as a protected status, 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.

> 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.[9]

Similarly, the Rehabilitation Act of 1973 and the Vietnam Veterans Readjustment Act of 1974 contain affirmative action language mandating that firms with Federal contracts to 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 handicapped individuals.[10]

The Vietnam Veterans Era Readjustment Assistance Act of 1972 contains an affirmative action requirement identical to section 503(a) of the Rehabilitation Act.

At the Federal level, the affirmative action obligation of firms with Federal contracts to provide equal employment opportunity to minorities and women is monitored by the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor. The OFCCP considers affirmative action as the active effort by employers to eliminate existing barriers to equal employment opportunity. Specifically, the OFCCP defines affirmative action as:

> In the employment context, affirmative action is the set of positive steps that employers use to promote equal employment opportunity. . . . It refers to a process that requires a government contractor to examine and evaluate the total scope of its personnel practices for the purpose of identifying and correcting any barriers to equal employment opportunity.[11]

The Indiana Advisory Committee did a study of the enforcement of affirmative action in Indiana by the OFCCP in 1995 and unanimously issued a report with findings on the agency's operations in the State. The Committee found that the OFCCP proscribes both preferences on the basis of race or gender and quotas, which require consideration of abilities and qualifications be subordinated in order to achieve a certain numerical position.[12]

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5 Pub. L. No. 102–166, 105 Stat. 1076.

6 Exec. Order No. 11246, 3 C.F.R. § 339 (1964–65), *reprinted in* 42 U.S.C. § 2000e note (1988).

7 Pub. L. No. 93–112, 87 Stat. 55.

8 Pub. L. No. 92–540, § 503(a), 86 Stat. 1074, 1097 (codified at 38 U.S.C. §§ 2011–2013 (1988)).

9 Exec. Order No. 11246, § 202(1), 3 C.F.R. 339 (1964–1965 *reprinted in* 42 U.S.C. 1000e note (1988)).

10 Pub. L. No. 93–112, 87 Stat. 355.

11 OFCCP, U.S. Department of Labor, "OFCCP Defines the Terms!," released March 1995.

12 *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*).

Additionally, it found the Federal affirmative action contract compliance program active in the State. In the 2-year period, October 1, 1992, to September 30, 1994, the OFCCP conducted 217 compliance reviews of affirmative action programs of firms holding Federal contracts. Moreover, these reviews were conducted in every part of the State. The Advisory Committee concluded:

> 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 both affirmative action and equal employment opportunity a company priority.[13]

The Advisory Committee further found that affirmative action—as enforced by the OFCCP in Indiana—does mandate hiring goals in those particular job groups where minorities and/or females are underutilized according to their availability in the relevant labor pool. To meet these goals, the OFCCP requires Federal contractors undertake a specific affirmative recruitment of qualified minorities and females so that such individuals would be included as applicants in the selection pool. During the review, the OFCCP assesses the good faith effort of the employer in these activities. The report noted:

> The OFCCP compliance review [determines] the contractor's compliance with affirmative action obligations, including attainment of minority and female hiring goals. A contractor's compliance status is not judged solely on whether the employment goals and timetables are met, but is determined by the entire program and the good faith efforts to make the program work towards the realization of the program's goals. In evaluating good faith effort, the OFCCP examines the efforts undertaken by the contractor to find qualified minorities and females and employ them in those jobs where they are absent or there is an underutilization based on determined availability.[14]

The Advisory Committee found criteria for establishing such good faith effort was not quantifiable and varied between district offices and individual compliance officers. The report concluded:

> A criterion used by the OFCCP in assessing affirmative action compliance is "good faith" effort. . . . The standard for evaluating good faith effort needs attention from the OFCCP. Subjective enforcement of finding good faith efforts insufficient when (hiring) goals are not attained forces employers to place an inordinate emphasis on numbers.[15]

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,[16] and Federal regulations require State agencies participating in the administration of Services for Migrant and Seasonal Farmworkers to develop affirmative action plans.[17]

Within the public sector of the State of Indiana, each agency publishes an affirmative action plan annually. In these plans, the individual agencies develop goals and timetables for improving the representation of minorities and females. These plans are reviewed and monitored by the director of affirmative action for Indiana State Personnel. The affirmative action plans are public documents and are maintained in the State library.

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

14 Ibid., pp. 24–25.

15 Ibid., p. 76.

16 19 C.F.R. §§ 30.3–30.8.

17 20 C.F.R. § 653.111(a),(b)(3)(1994).

Although not specifically referred to as "affirmative action," government efforts to increase minority and female participation in contracting and government assisted programs may be considered 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.*[18] 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 and gender 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.]

Indiana law provides that contracts with government contractors must contain a provision by which the contractor agrees to not discriminate against employees on the basis of race, religion, color, sex, national origin or ancestry.[19] Indiana's express policy is to protect its citizens' civil rights. Most local governments in Indiana simply require successful bidders to sign a contract with this provision or, at the most, to submit affirmative action plans.

## III. 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 Subcommittee of the House of Representatives Judiciary Committee was described as "tense and sometimes rancorous" as House Republicans considered purging sex and race preferences from Federal laws.[20] Emotions surrounding affirmative action have been chronicled by the press. In 1995 a cover story of *Newsweek* was devoted to affirmative action in which Howard Fineman wrote:

> But the most profound fight—the one tapping deepest into the emotions of everyday American life—is over affirmative action. It's setting the lights blinking on studio consoles, igniting angry rhetoric in state legislatures and focusing new attention of the word "fairness."[21]

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

18 115 S.Ct. 2097 (1995).

19 Ind. Code § 5-16-1(a) (Burns 1989)

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

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

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.[22]

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. Senator Robert J. Dole (R, KS), the former Senate majority leader, introduced the Equal Opportunity Act of 1995, legislation designed to end race and gender considerations in employment and contracting. 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.[23]

## IV. The Consultation

The Advisory Committee's consultation evoked diverse sentiment on affirmative action. In listening to a variety of presenters on affirmative action, the Advisory Committee heard the current debate on affirmative action as a continuation of this country's struggle with race relations.

Dealing successfully with the problems of race relations both for Indiana and the society at large remains vexing. Affirmative action, as one of the tools employed to deal with some aspects of racial and gender inequities, is embroiled in controversy. The controversy is compounded to a large extent by individual differences in interpretation of the program's definition and design. These differences translate into different conclusions about the program's effectiveness and efficacy.

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

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

# I. Affirmative Action and Its Implementation

## Reflections on the Indianapolis Experience in the 1980s with Affirmative Action and Equal Opportunity

By William H. Hudnut

Although "affirmative action" has fallen into disrepute these days as a political phrase and governmental policy, it nonetheless carries important meaning. The legacy of the 1970s and 1980s to the 1990s is not that America must back away from a commitment to equal opportunity, but that we must figure out how to implement that commitment without falling into the trap of reverse discrimination.

More on that later, however. First, let us look at my experience as Mayor of Indianapolis in the mid-1980s, when the Federal Government sued our city to dismantle its affirmative action program.

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In January 1976, during my first few weeks in the office of mayor of Indianapolis, after being elected the previous November, my heart and mind boiled over with concern about the status of minorities and women in our police and fire departments. Of course, the larger issue involved discrimination against these groups in our society in general, in local government, and in the community. Clearly discrimination still existed all the way from corporate board rooms to the television studies to the purchasing office in City Hall, and needed to be eradicated. But when I was elected mayor, the immediate, compelling problem had to do with perceived discrimination in the hiring and promotion processes within the Indianapolis police and fire departments.

Prior to my election, lawsuits had been filed by disgruntled African American police officers, alleging such discrimination and the consequent denial of civil rights to the aggrieved parties. The suits were pending in the Federal system when I became mayor.

Consequently, before my first month in office had run its course, I issued an executive order stating that henceforth, in our hiring practices, at least 25 percent of our new recruits to the police and fire departments should be minorities and/or women. To say the least, the order caught some of my fellow Republicans by surprise. While it sounded like the establishment of a rigid quota system, in practice, it was a goal—a voluntary commitment, as witnessed by the fact that during my time as mayor, one recruit class that appeared before me to be sworn in was all white males. I swore them in, but in private conversation, asked the chief of police to make sure this never happened again . . . and it did not.

Sometimes our goal was met, sometimes it was not. Nevertheless our determination to increase the percentage of minorities and women in the fire and police departments never wavered.

The same voluntary policy applied to the promotion process in both departments. We made a conscientious effort to assure women and minorities of equal opportunity to climb the ladder. And before we were done, in 1991 when I left office, a woman was serving as a deputy chief in the police department, and the fire chief was an African American (and a Democrat!).

The days of domination of the hiring and promotion processes by the "good old boys," all of whom were white males, were over. Finished, also, was the tendency to hire and promote relatives of persons on the force and politically acceptable individuals, who came to the personnel office and the merit board with credentials attesting to their proper political party status, that is to say, with letters signed by precinct committeemen, ward chairmen, and the county chairman in the party to which the mayor belonged recommending them for favorable consideration. Henceforth, our

city was committed to doing its best to institute a merit based personnel system, where men and women would be recognized on the basis of their performance, not their political connections with the party in power, or their relatives, or—for that matter—their political party affiliation. When we were interviewing for a new police chief, I said any questions were fair game except two: candidates could not be asked about their politics or their religion (traditionally, the fire chief had been Roman Catholic, and the police chief Protestant).

Over the years progress was made, not remarkable, but slow and steady. Our goal was to narrow the gap between the percentage of minorities in our community's work force and the percentage of minorities in the police and fire departments.

We worked with the U.S. Department of Justice, signing two consent decrees. In the first, we agreed that our voluntary guidelines, already in force, would become binding by law until such time as our long term goals (approximately 17 percent of community representation) were reached. A second and similar consent decree was approved in 1979 that established a 20 percent short-term goal for women in police department recruit classes. Thereafter, a short-term goal was set for the fire department providing that the percentage of women hired should match the percentage of women applying to the department.

Additionally, promotion goals were established in both departments in order to have each rank reflect the percentage of minorities in the rank from which the promotions were occurring. As more minorities were hired at entry-level positions, the percentage of minorities in the upper ranks would start to increase.

At the end of 1975, our fire department had 7.9 percent minorities and no females; the police department had 9.8 percent minorities and 6.8 percent females . . . this in a city where the minority population was roughly 23 percent. Ten years later, the fire department's percentages had increased to 13.3 percent minority and 1.4 percent females, while the police department's had increased to 14 percent minorities and 11.1 percent females.

Moreover, things were going pretty smoothly. Nobody was actively complaining about our policies, and no lawsuits alleging reverse discrimination were being filed, even though—inevitably—some white males who were passed over for promotion were exceedingly disgruntled.

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Then, in January 1985, the U.S. Department of Justice sent us a letter indicating that in their opinion, the U.S. Supreme Court's decision in *Firefighters Local Union #1784 v. Stotts*[1]—a case originating in Memphis, but in the opinion of the Civil Rights Division of the Department of Justice applicable to many other cities—required us to modify our consent decrees. This seemed ironic, since the same Department of Justice (although under the control of Republicans now, not Democrats) had only a few years previously mandated an opposite policy on our city.

I was astonished that the Department of Justice would try to force us to dismantle our affirmative action program. I was taken aback that they would lay on Indianapolis, the largest Republican city in the country at the time, such a mandate without even visiting with us about it first. We thought about the matter for a month or so, and then responded with a long letter on February 20 indicating that we did not believe that *Stotts* could "clearly and without equivocation be read as broadly as the Justice Department claims," that we thought our interim hiring and promotion goals were "within the four corners of our Consent Decrees," and that we consequently would not "voluntarily join in a motion to modify the current Consent Decrees."

But to no avail. On April 29, 1985, the U.S. Department of Justice filed a motion in the U.S. District Court to require Indianapolis to modify its consent decrees to eliminate the hiring goals. Their motion directed that a different approach "substitute for the hiring goals an enhanced re-

1 467 U.S. 561 (1984).

cruitment program, coupled with procedures that ensure nondiscriminatory selection."

I held a news conference that day and said we would "fight as hard as we can" against the order, "all the way to the Supreme Court if necessary," because we had come "too far along the road of minority involvement to turn back now." I believed we had experienced too much success with our program simply to give it up, as the Department of Justice wanted. I offered the opinion: "If we want a higher standard of hiring than the Justice Department requires, I do not understand why they felt they could not permit us to do that." I concluded by saying that regardless of the outcome of this battle in the courts, our city would voluntarily sustain the policy in question as long as I was mayor.

Without installing a rigid quota system, my intention was to use gender- and race-conscious guidelines within a pool of qualified candidates to bring more minorities and women into the police and fire departments and promote them through the ranks. We would continue to act affirmatively in behalf of such individuals, who for too long had been excluded from the mainstream of opportunity in our country, and who would never be included unless conscious policies from the top down (this kind of thing would never percolate up from the bottom) were adopted and implemented. How else would these persons be able to advance in a country where the average woman earns approximately 65 percent of what a man earns for comparable work, and the average African American family's income is some $8,000 less than the average white family?

The system will not correct itself. If left to itself, it will discriminate against minorities and women. It will tend to recruit and promote white males and give business to firms owned and operated by them. Without strong commitment and positive leadership from the top, the "good old boy" network will prevail. And this is true in a lot more areas of our society than just police and fire departments.

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I felt the Department of Justice was absolutely wrong in initiating this action against the city of Indianapolis, and elaborated this belief in various debates that ensued on national television and in the newspapers. They were wrong, in my opinion, legally, morally, and politically—a point I tried to make clear in arguments presented in my 1987 book, *Minister Mayor*. I repeat these arguments here.

**First, we thought that the interpretation by the Department of Justice of *Stotts* was too narrow.**

*Stotts* concerned a very particular set of facts dealing with layoffs and the seniority system in Memphis. Construing it more broadly to call into question all hiring and promotion goals and affirmative action programs in governmental jurisdictions around the country was legally unwarranted.

Furthermore, what does a proper reading of the Declaration of Independence and the U.S. Constitution mean, if not that all persons in our society should have equal opportunity? And if that is denied, should not affirmative steps be taken to correct the injustice? President Abraham Lincoln once said: "Most governments have been based on the denial of equal rights of men; ours began by affirming those rights." (In those days, nobody was troubled by the generic use of the word "man." I am confident that had he lived one hundred years later, Lincoln would have been sensitive to the problem of equal rights of women as well as minorities.)

We all understand that the U.S. Constitution and Bill of Rights say what the U.S. Supreme Court says they say. Therefore, it is quite possible that my opinions on this matter are flawed, at least according to the prevailing wisdom of the 1990s. But we have to live by the light that shines in our sky, and the convictions we hold in our hearts. And so I stood fast, and did not back down. I say this, I hope, without appearing to be self-righteous. I took this stand because I thought it was right, pure and simple. There was no political mileage for me in it, just a lot of grief and headache. But it had to be done.

**Second, there was—and remains—a moral dimension to the issue.**

I could not square what the Department of Justice was doing with my understanding of the biblical injunctions to bear one another's burdens in love, and to be our brother's (and sister's) keeper. Obviously, we have miles to go before we sleep in our march toward the realization of the dream that all of us might one day sit down

together at the table of brotherhood and sisterhood. There is also much important work to do in other areas of civil rights, in the areas of education and business, for example, in order to achieve equal treatment and equal opportunity for all Americans regardless of race, sex, creed, color, or national origin.

But why turn the clock back? Why say that voluntary affirmative action to remedy the injustice of unconstitutional discrimination is wrong, when for so long equal opportunity has been denied women and minorities? Cutting through the smokescreen of diversionary arguments about reverse discrimination, why not say that the speedy and full integration of minorities and women into American life is a reasonable and urgent national priority, and that a strong commitment to affirmative action and equal opportunity, not to be confused with a rigid quota system for hiring and promoting, is a legitimate means of attaining that overriding national goal?

So ran my thinking at the time the Department of Justice challenged the city's affirmative action programs—even though I recognized that affirmative action has some unfortunate unintended consequences, as well as some obvious defects. However, as very few issues of importance are either wholly black or wholly white, but rather inhabit the realm of indeterminate gray, and very few policies of the government are either wholly good or wholly evil, our job as moral persons in an immoral society is to endeavor to ascertain where the preponderance of right lies, and then move in that direction.

I strongly felt this required me to implement a program of some kind of affirmative action, even though it aggrieved certain parties. Where sizable groups of people have been prevented from enjoying a full and equal share of the pie of American opportunity for so long, we have to ask (as Charles Krathammer did in the September 16, 1985, issue of *The New Republic*) if correcting the so-called evil side effect of reverse discrimination is any more morally compelling than redressing the historic injustice done these groups.

**Third, I thought the Department of Justice was making a political mistake—both small "p" and capital "P."**

It was a political mistake ("p") because it stirred things up in our local police department, and made it tougher to govern. Politics is the art of governing the *polis*, the city. Yet the consequence of the Justice Department's action was to fan the fires of racism in our community, arouse emotions, increase tension between African Americans and whites, disturb our harmony, and bring a lot of latent resentment to the surface that gave bigots a chance to attack.

Great turmoil ensued inside the police department. First, the Fraternal Order of Police (FOP) decided to take the side to the Department of Justice. Then assistant police chief Joseph Shelton, the highest ranking African American in the department and who would subsequently became the city's director of public safety, said he was going to resign from the FOP. Then all the African American officers in the police department started talking about resigning as a bloc. Then the FOP reversed itself, and on and on.

None of this destabilization would have occurred if the Department of Justice people, who had never had to administer the affairs of a large city and seemed to be proceeding purely on ideological ground, had left well enough alone, In the words of some old Hoosier philosopher, "If it ain't broke, don't fix it." A mayor's job, in part, is to hold a community together and keep it from flying apart. In this instance, unfortunately, the Department of Justice was not helping us very much in trying to do that.

It was also a small "p" political mistake because it ran counter to the announced decentralization philosophy of President Ronald Reagan. President Reagan came to power riding a wave of resentment against the heavy hand of centralized government. He advocated the right of States and local governments to make their own decisions. He wanted local government entities to have a greater share of the power and resources allotted them through a devolution of authority back from Washington to State capitals and cities. Now his Department of Justice was suggesting that the locals did not know how to run their own affairs, and needed to be told what was best, and was forcing them to change their ways. And on top of this, there was the preposterous contradiction of the current Department of Justice, which was reversing actions taken 8 years previously by its predecessor. The destabilizing influence of putting local government on this kind of yo-yo was considerable.

I also felt the Justice Department's action was a Political mistake (capital "P"). It implied that the Republican Party was insensitive to the historic problems of minorities and women in achieving their rightful place in American society. It suggested that Republicans were a party of people who had "made it." It called for us, in the name of color-blindness, to throw everything open so that everybody could compete on an equal footing. This is fine in an ideal world, but in the real world such policies are a reversion to a discredited system where white males were awarded most of the jobs and received an incredibly disproportionate share of the pie. As one white police lieutenant remarked to me, "Had the Justice Department won and our City lost, we would have been driven back into the old caste system of segregation, and we don't need that."

The genius of American politics lies in the ability of both major parties to occupy the viable middle between the extremes of liberal and conservative. What the Republicans were doing in this instance was to send out a message of exclusion, and if you please, of intolerance and extremism. They were creating a small tent, just as those today are, who are insisting in uncompromising terms that rigid adherence to the pro-life side of the abortion argument be made a litmus test for serving in public life. In appearing to give the back of their hand to the dispossessed and disadvantaged in our society, this action by the Department of Justice narrowed the base of the Republican party; it did not broaden it. I think that was—and is—a Political (GOP) mistake.

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I tried to take our case privately to Washington. In September 1985 a meeting was arranged between myself and (then) Attorney General Edwin Meese in connection with a meeting of the Advisory Commission on Intergovernmental Relations (ACIR), on which both of us served. However, the Attorney General left early and we missed each other. Later in the day I went over to the Department of Justice but was told the Attorney General could not see me. I was referred instead to the assistant attorney general heading up their civil rights division, William Bradford Reynolds.

The assistant secretary and his lawyers spent 45 minutes with me in a very unproductive conversation. Reynolds kept telling me that the overwhelming majority of African Americans disagreed with affirmative action, according to polls he had taken, and that our city was guilty of unconstitutional discriminatory hiring practices based on a rigid quota system.

I responded that we did not have a quota system, but rather goals toward which we were moving, and I thought we were within our Constitutional prerogatives in doing this. Our aim was to increase the number of job opportunities in our fire and police departments for women and minorities on the basis of race- and sex-conscious policies applied to a pool of well-qualified applicants. I explained that I liked to think of our hiring and promoting policies, not as a vertical list where better qualified white males were passed over to get to less qualified females and minorities, but as a circle, with everyone inside that circle being qualified. Whoever was chosen would not "pass over" someone else in the selection process.

Assistant secretary Reynolds did not buy my reasoning. He said the Constitution was on his side, and he was going to proceed with the litigation against us. I thought this issue had many ramifications, with different cases working their way up to the U.S. Supreme Court, so I stopped trying to persuade him of the merits of our position. I was content to leave the matter to the highest court in the land to decide. Our motion to dismiss the Justice Department's complaint against our city had been filed, and was lodged in the Federal court system. So I stood up, shook hands with Mr. Reynolds, and said as I left, "I'll see you in court."

About the same time, I wrote the Attorney General a letter outlining our city's position and asking him to reconsider, but I never heard from him.

I also wrote President Reagan the day after the 1986 Martin Luther King Day celebrations. The activities of the day had reinforced my concern about how deeply many Americans felt about the need to rectify past wrongs involving racial discrimination. My intent was to encourage the President not to yield to the importuning of those who wanted to "turn the clock far back on civil rights advances over the last 25 years" by watering down or terminating the Executive Order on affir-

mative action, Executive Order 11246. I expressed the hope he would support it as originally promulgated by President Lyndon Johnson in 1965, and amended by President Richard M. Nixon in 1971 to include "goals and timetables." That letter, too, received no answer.

We in Indianapolis, in turn, resolved to maintain a strong voluntary recruitment and promotion program for minorities and women in the police and fire departments regardless of what happened in the courts. Our motion to dismiss the Justice Department's complaint remained lodged in the Federal court system. In the summer of 1986, three cases, two involving the cities of Cleveland, Ohio, and Jackson, Michigan, and one involving the Sheet Metal Workers Union, were decided by the U.S. Supreme Court. As our city understood these decisions, the Supreme Court carefully considered, and then rejected, arguments against race-conscious relief remedies—including the use of goals and timetables—that benefit persons not identified as individual victims of past discriminations. I responded not only on behalf of myself and the city of Indianapolis, but also for the U.S. Conference of Mayors as chairman of its subcommittee on civil rights, when I said, "I have felt in my heart all along that our position was correct, and am glad that at least for the moment, our position has been sustained."

The Supreme Court's decisions were clearly a victory for proponents of affirmative action, and a defeat for the ideologues at the Department of Justice. Subsequently the Department of Justice ended its effort (without comment) to throw out our city's affirmative action plan contained in the consent decrees. As we wrapped up this matter, I can say in retrospect, I am glad we won this one, and I am grateful for the checks and balances that keep the American system of government working for all its citizens.

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## Some Concluding Observations

**First**, affirmative action plans have their flaws; this we have always known. Recent developments in the courts and the political arena have made abundantly clear some of these flaws. Whites who have been passed over, not received contracts, not gotten into school, etc., have legitimate grievances—though I personally do not think their complaints outweigh the grievances of those who have suffered the pain of discrimination based on race or gender for decades, if not centuries. Preferential treatment and reverse discrimination rub against the grain of our American tradition of equal justice for all.

This explains why many conservatives today are eager to mount a broad-gauged attack on all Federal affirmative action efforts. If that does not work, they will cherry pick narrower slices of the issue, such as Federal contract compliance programs, Small Business Administration set-asides, and certain employment policies. Some conservative organizations such as the Institute for Justice and the Center for Equal Opportunity say that opposition to affirmative action is both morally and politically right, and that anything falling short of this is "capitulation that rarely works."

The merit in their position is that these conservatives want to limit the overreaching hand of government and build a greater sense of responsibility and independence into the moral fabric of our society. They aim at replacing an entitlement mentality with an empowerment one, believing that the cycle of dependency that a welfare, statist philosophy of government has promoted over the decades must be broken. But doing this without appearing to be insensitive to the agony many Americans have felt over the decades as they have been forced to endure various forms of discrimination, and without encouraging a reversion to "the caste system" mentioned above, is the challenge.

Somehow a fine balance must be achieved between the effort to remedy past wrongs and the current perception that the system of affirmative action devised over the last two decades is unjust. This will not be an easy undertaking.

**Second**, it may be possible to make a beginning at this by stressing equal opportunity rather than affirmative action. This may be dismissed as semantics, or a mere linguistic strategy, but it seems to me to put the emphasis where it belongs, squarely on the fundamental American belief that while people are not equal in talents or resources, they should be equal in opportunity. If one person can climb to the top of the pyramid, all should have equal opportunity to do so.

**Third**, we might ask, could some of these programs be "means-tested?" Could they be based

upon a person's or company's means, rather than on race or gender? Could such a test of financial capacity, or lack thereof, be applied to programs to assure equal opportunity in both the employment of individuals and the awarding of contracts? It might be difficult to work out, but certainly more Americans would believe that such an approach would be fairer than one based on race or gender alone.

**Fourth**, perhaps the voluntary nature of the program can be strengthened, so that the inflexibility of a "quota system" can be avoided. In Indianapolis, I said it was our goal to hire a percentage of minorities in the police and fire departments equal to that in the population as a whole. But it was not an inflexible requirement without conformity to which, a recruit class would not be constituted. Our goal also, on construction projects, was to include minority- and women-owned businesses at a given percentage, say ten, but not have a rigid set-aside program in place that would disqualify others from consideration if that percentage were not reached. For example, the city was sued by a company to whom we did not award a contract because they refused to put down on paper how they planned to incorporate minorities and women into their work plan, and we prevailed.[2]

**Fifth**, in the effort to fine-tune policies, can we not conduct the dialogue with as much civility as possible? It strikes me that this whole area of discussion in the "naked public square," where values seem so strikingly absent, is particularly susceptible to being stalked by the demons of prejudice, bigotry, and demagoguery. We need to remember that there are many issues on which people of good conscience, sound reason, and upright character will differ, without either side being necessarily wrong. A willingness to negotiate with and mutual respect should characterize the approach, so the whole effort does not deteriorate into hateful speech or hurtful action.

**Sixth**, as already implied, a strong commitment to justice and compassion on the part of movers and shakers, leaders in all realms, can make a tremendous positive difference. In the last analysis, equal opportunity cannot be commanded, but a commitment to it can be institutionalized from the top down. It must be implemented from the bottom up, but that will never occur if the will do it is missing at the top of whatever hierarchy happens too be involved. Leadership creates positive change. It creates a vision, in this instance, of equal opportunity; it communicates it; and it cultivates it, makes it happen. This requires the courage to think outside the box, to stand sometimes alone, against the wind, but it can be done.

In conclusion, an appreciation of, and commitment to, "diversity" is a value to be cherished in our society today . . . and institutionalized. It is a fragile flower, and can easily wither. Conscientious efforts to put together programs to assure our fellow citizens of equal opportunity under the law to pursue their dreams and advance their ambitions *are* praiseworthy. I believe affirmative action plans, carefully crafted and responsibly administered, fall into that category.

If our national ideal of "*e pluribus unum*" is to be realized, we have to practice respect and appreciation for our neighbor, however, different. America is more like a salad bowl than a melting pot. Our nation of diverse races, creeds, and colors can degenerate into a society divided into fixed ethnicities, which "nourishes a culture of victimization and a contagion of inflammable sensitivities," (to borrow Arthur Schlesinger, Jr.'s, phrase) if we do not take care. The key is talking things through, exploring differences, being self-critical, and asserting one's point of view and one's self, while ultimately letting an evolving discussion bind people together, rather than drive them apart, as we tinker and experiment and struggle to make our ideals come true. Martin Luther King, Jr., was right when he observed, "We are caught in an inescapable network of mutuality. Whatever affects one directly affects us all indirectly." Our community will disintegrate if we lose our commitment to commonality, a commitment that lies at the heart of efforts that people of goodwill are making to assure us all of equal opportunity.

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2 *See*, Hunt Paving Co., Inc., and Indiana Constructors, Inc., v. City of Indianapolis, et al., 800 F. Supp. 740 (1992).

After the "not-guilty" verdict came down in the trial of the policemen who had beaten him in Los Angeles, setting off riots in May 1992, Rodney King plaintively asked, "Can't we all get along?" In answering his own question, he pointed us in the right direction: "We've just got to. We're all stuck here for awhile. Let's try to work it out." We must try to build cities that are cooperative and compassionate, shoring up the "infrastructure of the spirit." We will not always succeed. But we must keep on trying to work it out, believing that one day "we shall overcome."

# Mending, Not Ending, Affirmative Action: The Approach of Bloomington, Indiana

By Barbara E. McKinney and Colleen Foley

On July 19, 1995, President William J. Clinton announced his continued support for affirmative action. In particular, he said he supported affirmative action which accomplished the goal of increasing opportunities for minorities but without quotas in theory or practice; which prohibited illegal discrimination of any kind, including reverse discrimination; which eliminated any preference for people who are not qualified for any job or other opportunity; and which required the program to end as soon as it succeeded. In short, President Clinton said of affirmative action, "Let's mend it, not end it."[1]

Critics said that without quotas, affirmative action is meaningless, and accused the President of again straddling the mushy middle. Rush Limbaugh, for example, said that "without quotas, affirmative action can't exist because you can't satisfy affirmative action supporters without counting heads to 'prove' that these programs are working. As soon as you count heads, you are engaging in quotas."[2] But since 1983, the city of Bloomington, Indiana, has had an effective and unique affirmative action policy that satisfies the goals President Clinton described. The purpose of this paper will be to explain, in practical terms, how this policy works and to describe the benefits it has achieved.

Indiana's express policy is to protect its citizens' civil rights, under Ind. Code § 22-9-1-2 (Burns 1991). Indiana law also provides that contracts with government contractors must contain a provision by which the contractor agrees not to discriminate against employees on the basis of race, religion, color, sex, national origin or ancestry.[3] Most local governments in Indiana simply require successful bidders to sign a contract with this provision or, at the most, to submit affirmative action plans. However, as is often the case, the city of Bloomington has implemented a different policy. Using these two State laws as a basis, the Bloomington Common Council, in 1983, amended the Bloomington Human Rights Ordinance to require all bidders for city projects costing more than $10,000 to have approved affirmative action plans on file *before* the bids are open.[4] Failure to comply with this requirement makes the bidder ineligible for bidding.[5]

Under Bloomington's plan, all requests for bids inform prospective bidders that they must submit an affirmative action plan to the contract compliance officer at their earliest opportunity, and in no event any later than 24 hours before the bid deadline. The request for bids tells bidders what must be in the plan: a current work force breakdown, an internal grievance procedure, a nonretaliation statement, a designation of a person by name or position who is responsible for implementing the plan, a statement that the plan is applicable to both applicants and employees, a description of how the bidder recruits minorities, a statement that the bidder provides for equal access to training programs and an explanation of the bidder's methods of communicating the operations of its affirmative action plan to its employees and applicants. The request for bids includes the name and work hours of the contract compliance officer.

Describing this plan takes some time, but complying with this requirement is relatively easy.

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1 Speech by President Bill Clinton, July 19, 1995.

2 The Rush Limbaugh Show, July 20, 1995.

3 Ind. Code § 5-16-1(a) (Burns 1989).

4 Bloomington, Ind., Municipal Code § 2.21.060 (1983).

5 Ibid.

Bidders can submit their own affirmative action plan. The contract compliance officer reviews it, using a checklist, and lets the bidder know if there is any deficiency that needs to be corrected. Once the officer is satisfied that the plan meets the city's requirements, she sends an approval letter to the department requesting the bids. A copy of the approval letter also goes to the bidder and in the contract compliance files.

The contract compliance officer keeps these files indefinitely. A company that wishes to bid again with the city does not need to submit a new affirmative action plan, but only an updated work force breakdown. (Under the human rights ordinance, information on the work force breakdown must be less than 6 months old. The breakdown, a one-page form, shows how many men, women and minorities work for the company and in which positions.)

If the bidder fails to submit an affirmative action plan that complies with the city's requirements before the bid deadline, the contract compliance officer notifies the bidder and department letting the bid. The officer declares the bidder ineligible for the bid, but the bidder can appeal the officer's finding to the Contract Compliance Committee, a committee of the city's Bloomington Human Rights Commission (hereinafter BHRC). The committee will consider the officer's decision and the bidder's explanation. If the committee overturns the officer's decision, the company's bid is then eligible for consideration by the city. If the committee supports the officer's decision, the bidder can appeal that decision to court under Indiana's Administrative Orders and Procedures Law.[6]

In 1985, a bidder took the Contract Compliance Committee to court, and the city's procedures were upheld. The Indiana Court of Appeals held that the BHRC had acted within Its authority in effectuating Bloomington's civil rights policy by requiring bidders to first submit affirmative action plans, before the city accepted the bid.[7] The Court said that Associated Sign's original bid, which failed to include an adequate affirmative action plan, constituted a major variance from the invitation to bid. The Court rejected Associated Sign's contention that it should have been allowed to amend its affirmative action plan after submitting its bid. The Court said that doing so would result in unfair competition—unfair to bidders who chose not to submit a bid because of the affirmative action requirement and also unfair to those who put the time, effort and resources into an acceptable affirmative action plan as required.[8]

In 1995, Bloomington's contract compliance officer reviewed 170 affirmative action plans. That may sound like a daunting figure, but in practice, it is not. In most cases, the bidder already has a plan on file, and all the officer has to do is obtain an updated work force breakdown form and using the word processor, fill in the blanks on the approval letter. Doing this takes all of five minutes. Reviewing a new plan and getting any problems corrected takes a little longer, but with fax machines and e-mail, not much longer.

The officer attempts to resolve any problems before the bids are open, and in most cases is successful. The city averages less than one appeal every 2 years to the Contract Compliance Committee, and have not been taken to court over our affirmative action procedures since 1985.

Small companies, particularly family-owned companies in rural Southern Indiana, are sometimes intimidated by the affirmative action requirement. They fear that they will have to prepare a behemoth government document. This is especially true if they have seen affirmative action plans prepared for the Federal Government, which may run to hundreds of pages. But when the officer gives them a two-page sample affirmative action plan, in which they merely have to fill in the blanks, and a blank one-page work force breakdown form to complete, their fears tend to

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6 Ind. Code § 4-21.5-1-1 (Burns 1995).

7 Appeal of *Associated Sign & Post, Inc.*, 485 N.E.2d 917, 923 (Ind. App. 1985).

8 Ibid. at 925.

When prospective bidders complain about the affirmative action requirement, we remind them that under the ordinance, the requirement imposed on bidders has to be "limited to measures similar to those which the city is required to take in its affirmative action with regard to its own employees."[9] Thus, the city is not asking bidders to do anything it does not do itself. In the past eight years, two prospective bidders initially refused to submit a bid because of the affirmative action requirement. However, both companies eventually complied and concluded that the requirement was not unduly burdensome.

The city of Bloomington's policy has been criticized for allegedly requiring contractors to establish goals and timetables.[10] Instead, as noted above, the ordinance requires only that the bidder state its current work force breakdown. A low number of female or minority employees does not make the plan unacceptable. Requiring goals and timetables would be unfair to many bidders, especially those in rural areas where the minority population is often minuscule and those which are small, family-owned and operated companies. When companies are bidding with the city for the first time, they are often concerned about "meeting quotas," but it is made clear that the bid will not be rejected based on the company's work force. On the other hand, it certainly does not hurt that bidders know that the city has this data and keeps it on file.

Over time, a number of benefits to Bloomington's affirmative action policies and procedures have been realized. One obvious benefit is that it requires every bidder, not just every successful bidder, to have an affirmative action plan on file. The sweeping ordinance mandates that many companies which never would have considered implementing an affirmative action plan, at least until they were a successful bidder, do so. It serves an educational function, reminding the companies of civil rights laws and requiring the companies to put in writing their commitment to the law. For instance, small companies tend to recruit new employees through word of mouth, which does not lend itself to minority hiring in many cases. Once a company has implemented an affirmative action plan, it then has an obligation to recruit applicants in a way more likely to result in minority applicants learning of the opening. (Publishing an advertisement in a newspaper of general circulation complies with this requirement, but if the company wants to go further and send job notices to specific, local minority groups, the compliance officer will provide a mailing list.) It puts the companies into contact with the BHRC, and often they call back with questions about prevailing wages, sexual harassment, the Americans with Disabilities Act, minority recruiting or other similar issues. It is a useful tool when a company with an approved affirmative action plan on file is charged with discrimination through the BHRC. As part of our investigation, the human rights commission can verify if the company is complying with its plan. If the human rights commission discovers that it is not, it can declare that company ineligible for future bids with the city, either permanently or until the company is in compliance with its affirmative action plan. The city can also cancel or suspend its contract with the bidder in whole or in part and/or recover liquidated damages of a specificized sum.[11] Studies show that companies which have affirmative action plans on file tend to have slightly higher minority hire rates than one would expect, based on the population at large.[12] Whether it is because they have been required to have affirmative action plans or because of other factors is impossible to tell.

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9 Bloomington, Ind. Municipal Code § 2.21.070 (1983).

10 *See, e.g.*, Comment, In re Associated Sign & Post, Inc., "The Affirmative Action Obligations of Government Contractors in Indiana," 61 *Ind. L. Rev.* 792, 806 (1986).

11 Bloomington, Ind., Municipal Code § 2.21.070 (1983). It should be noted that these remedies are rarely used.

12 A study done in 1990 by the BHRC showed that Bloomington companies with affirmative action plans on file with the BHRC employed, on average, 2 percent more minorities than one would expect based on census figures.

In short, the city of Bloomington has an affirmative action policy which meets each of the criteria that President Clinton set forth in July, 1995. The city has increased opportunities for minorities without imposing any type of quotas; hundreds of bidders over the years have been reminded of their obligation under the law to not discriminate; and no preferences for unqualified people have been established. The program has been and is a successful educational program which the city sees no reason to end at this time. We believe the city's plan could serve as a model for local governments throughout the Nation.

# Affirmative Action Plans or Government Investigations, Which Serves Us Best?

**By Michael Vlantis**

My approach to affirmative action comes from a background of working in investigation and enforcement of the provisions of the Fair Labor Standards Act (minimum wage, overtime, and child labor laws), the Equal Pay Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act.

My experience has demonstrated to me that efforts to correct the problems covered by these laws, without active, fully staffed, properly equipped, and empowered enforcement agencies, will not succeed. The early efforts of the Equal Employment Opportunity Commission to resolve discrimination questions through persuasion and conciliation without the support of legal enforcement powers attest to the ineffectiveness of this approach.

Having said this, I recognize that resolving these problems through the administrative and legal process of a governmental agency, while necessary and justified by the common good, is an expensive and time consuming operation. Unfortunately, the process too often supports the adage that justice delayed is justice denied.

Not only is it true that this process is generally a costly and time consuming one for the governmental enforcement agencies, i.e., the taxpayers, but it also tends to be equally, or even more costly to the organizations that are investigated. This is true even in those cases where violations are not found or complaints substantiated. In addition, even under the best circumstance, with the most professionally conducted investigation, the investigation will be disruptive to any organization's normal day to day operations.

Since the majority of investigations are complaint activated, they do tend to stay confined to those issues charged in the complaint. However, during the investigative process, any other apparent or potential violations found can be pursued by the investigative agency. This in turn increases the agencies costs and use of resources as well as extending the costs and disruptions to the investigated organization.

In regard to the timeliness of the processing of complaints, governmental budget constraints as well as increasing complaint numbers have extended the time between the filing of a complaint and the initiation of the investigative process. These delays, however justified, serve to make completion of the investigations more difficult for all concerned. Records get misfiled discarded or lost. Witness memories become less reliable, or the witness may have moved on and become less readily accessible.

In addition, the positions of the opposing parties tend to harden and remedial costs continue to increase. For example, the longer the time period between the discriminatory act and resolution, the greater the remedial cost of such things as lost wages, benefits, etc. becomes. With this increase in potential awards or liability the more difficult it becomes to resolve the dispute through compromise or settlement. This tends to increase the administrative and legal costs to all parties involved.

Given this background, when I hear the advocates of eliminating affirmative action argue that all programs should be done away with and that any resulting injustices should be handled through the available means that are currently in place, it appears to me that these arguments are somewhat disingenuous. This is particularly true since these same advocates are generally among those that so vociferously argue that government is too big and intrusive into our lives now. Yet in this situation they argue against a process that reduces government intervention in favor of a process that would surely increase it.

While it is true that some private discrimination suits can be initiated directly by aggrieved individuals or groups, i.e., those dealing with Minimum Wage, Overtime and Equal Pay violations, most potential litigants are first required by law to file a complaint with the proper Federal, State or local agency. Depending on the type of discrimination involved, there is a minimum waiting period that must elapse before an individual is allowed to take their case to court as an

injured party. This waiting period was designed to give the appropriate agency time to settle the dispute administratively. Therefore, in the case of practically all charges brought,the complaints must, by law, first be taken through some governmental agency process.

Thus it would seem that the argument of those who would dismantle affirmative action programs in order to preserve the fairness they claim to support, would in turn support stronger sanctions against those found guilty of discrimination, as well as supporting possible criminal sanctions against repeaters. They should support making larger monetary awards available to those discriminated against. They should also support providing for larger budgets to cover the staffing, equipment and facilities needed by the responsible enforcement agencies to handle the greater number of claims that would surely follow. To do less than this, clearly taints the position of fairness of those who would totally eliminate affirmative action programs.

My experience brings me to believe affirmative action programs, while clearly not perfect, certainly have been effective in relieving some of the past and present effects of discrimination. One of the clearest signs of this was found in my later years of employment. Very often when there was a charge involving a female complainant the attorney representing the organization complained against would be female. When I first started my government career some 30 years ago about the only females then found employed in major law firms were secretaries and file clerks. I sometimes wonder how many of them would have been more skillful advocates than their bosses, had they not been kept so busy getting coffee.

Affirmative action plans have clearly been beneficial to the total public good. The plans are developed after input from all concerned areas of the organization. The procedures to follow and the levels to be attained are for the most part self-determined. When the process is in place and operating, along with policies to prevent future discrimination, only vigilant maintenance of the program is required from that point on.

Affirmative action programs are clearly less costly and less disruptive to the participating organizations than would be the investigative and litigating review of governmental agencies or the effects of private litigation. After all, affirmative action programs generally have their geneses after either an organization has been found guilty of discrimination or after conducting an internal review and having come to the conclusion that it could discriminating.

While I make no pretense to having any special skills or expertise in the preparation of affirmative action programs, I would suggest two ideas that I think might assist in making these plans more equitable and more generally acceptable.

**First**, incorporate the individual and/or family income and finances of all applicants, in the selection criteria of plans such as those covering college admissions.

**Second**, build in monetary incentives in the bidding process for contractors that demonstrate a prior commitment to the principles of a discrimination free work force.

One way the second idea could be implemented would be to allow a discrimination-free contractor to match or underbid a successful first round contractor whose work force would not meet a community profile of the area in which the work was to be performed. I would expect that demographers and work force analysts could construct such a profile fairly easily. Thus the contracting agency would be able to get the low bid and support nondiscriminatory contractors. At the same time contractors would have a financial incentive to employ a nondiscriminatory work force.

I believe that affirmative action programs have, particularly where the process is conducted openly, been found fully acceptable to the majority of our citizens. Affirmative Action has been our most successful method of dealing with the vestiges of past discrimination. As with any program a periodic review is always useful and warranted, however, this by no means requires the elimination of successful and ongoing programs just to please a vocal minority.

# The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment

By Barbara J. Fick

## Introduction

A precondition for any discussion of affirmative action is defining the meaning of the term. The concept of affirmative action has been bandied about in such an elastic way that many people view it as a code word for reverse discrimination, lowering standards or rigid quotas. As used in this paper, affirmative is a flexible tool to promote equality of opportunity in the employment context. The purpose of affirmative action is to both remedy past and present discrimination as well as to prevent future discrimination.

Consistent with the affirmative action guidelines promulgated by the Equal Employment Opportunity Commission,[1] an affirmative action plan identifies employment policies and practices which present barriers to the hiring, advancement and retention of women and minorities, and establishes goals and timetables as a device for measuring progress in overcoming racial and gender discriminatory practices.

An affirmative action plan is based on merit, not the lowering of standards. An affirmative action plan analyzes the employer's current work force to determine whether there is a manifest imbalance between the racial and gender composition of its work force and the composition of the "qualified" labor pool from which the employer draws its employees. Where such an imbalance occurs, the employer analyzes its job policies and procedures in an attempt to identify, and discontinue, those practices which may be causing the imbalance. The plan establishes a timetable, taking into account employee turnover and the legitimate interests of non-minority employees, during which time the employer can expect to achieve a racial and gender balanced work force. The plan does not result in hiring unqualified applicants, nor does it completely bar nonminority candidates from consideration.

This paper will discuss affirmative action only as it is practiced in the private sector employment context. Affirmative action undertaken by Federal, State or local government entities is subject to a different set of legal restrictions, and may be justified by different considerations, which will not be discussed herein.

## The Legality of Voluntary Private Sector Affirmative Action

The legality of the implementation and maintenance of voluntary private sector affirmative action plans under title VII of the Civil Rights Act has been affirmed by the Supreme Court in both *United Steelworkers of America v. Weber*[2] and *Johnson v. Transportation Agency*.[3]

In *Weber*, the employer's affirmative action plan set aside 50 percent of the openings in a craft-training program for black employees, to be effective until the number of black craft workers at the plant approximated the percentage of blacks in the local labor force. Less than 2 percent of the employer's craft workers were black even though 39 percent of the labor force was black. The employer established the craft-training program in order to train its own production workers to fill craft openings. No special qualifications were needed to enter the program; the employer used seniority and the affirmative action plan to designate the entrants. A white production employee who was denied entry to the program challenged the affirmative action plan in court, alleging that it discriminated on the basis of race in violation of title VII. The lower courts agreed,

1 29 C.F.R. §1608 (1995).

2 443 U.S. 193 (1979).

3 480 U.S. 616 (1987).

holding that all employment preferences based on race, even those pursuant to an affirmative action program, violated title VII. The Supreme Court disagreed and reversed the holdings of the lower courts.

Initially, the Court noted that an interpretation of title VII to forbid all race-conscious affirmative action would be contrary to the purpose sought to be achieved by the law. The statute was intended to cause employers to evaluate their employment practices and attempt to eliminate "the last vestiges of an unfortunate and ignominious page in this country's history."[4] Title VII was not meant as a purely reactionary statute for prosecuting offenders, but was also intended to spur proactive conduct by employers aimed at preventing discrimination.

In discussing the Congressional purpose behind title VII, the Court read the language of §703(j) as an indication that Congress chose *not* to prohibit all race-conscious affirmative action. Section 703(j) states that nothing contained in title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of . . . race. . . ." This language does not, however, forbid *voluntary* action by an employer.

Additionally, the Court noted that Congress wanted to prevent undue Federal regulation of business which would interfere with or limit "traditional business freedom" or "management prerogatives" in running the business, including the freedom to establish voluntary affirmative action programs.

Finally, the Court suggested several criteria to consider in determining whether an affirmative action plan is "bona fide" in the sense that it is consistent with the policy and purposes of title VII. First, the plan must be designed to break historic patterns of racial segregation in employment opportunities and jobs. In *Weber* the clear imbalance between the racial composition of the employer's craft force and the local labor force suggested such historic patterns. Second, the plan does not unnecessarily trammel the interests of white employees. In *Weber* no white employees lost their jobs because of the plan, and operation of the plan did not absolutely bar white employees from entry to the training program (indeed 50 percent of the slots were filled by whites). Last, the plan is a temporary measure designed to eliminate racial barriers to employment, not to maintain an already achieved racial balance. In *Weber* the plan itself stated that it would end when the percentage of black craft workers approximated the percentage of blacks in the labor force.

In *Johnson* the employer used an affirmative action plan in making promotions to jobs in which women were significantly underrepresented.[5] The plan required the employer to consider gender as a plus factor when making a decision about whom to promote from among a pool of qualified applicants. When a job vacancy arose for a position of dispatcher, twelve employees applied for the promotion, and seven were found to meet the qualifications for the job. In making its choice from among the seven qualified candidates, the employer considered the fact that there were no women currently employed in the skilled craft category and promoted a woman. A man who was rejected for the job alleged that the employer's decision was sex discrimination in violation of title VII. The Court of Appeals held that the employer had acted pursuant to a bona fide affirmative action plan; therefore, taking gender into account was lawful under title VII.

The Supreme Court agreed and in its holding reaffirmed the crucial role that voluntary employer action plays in furthering the purpose of title VII in eliminating the effects of discrimination in the workplace. The Court found that the employer's affirmative action plan met the criteria established in *Weber* and was therefore valid under title VII. There was a manifest imbalance between the percentage of qualified women in the labor force and the percentage of women actually

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4 Weber, 442 U.S. at 204, citing Albermarle Paper Co. v. Moody, 442 U.S. 405, 418 (1975).

5 Although this case involved a public sector employer, the employer's conduct pursuant to its voluntary affirmative action plan was challenged only under title VII. The petitioner did not raise a constitutional challenge to the pan under the equal protection clause of the fourteenth amendment. The Court, therefore, limited its analysis to title VII jurisprudence.

employed by the employer. The plan did not authorize the absolute promotion of women; rather gender constituted one factor among others, including qualifications, to be taken into account in making the decision. No male employee lost his job due the plan, nor was any male employee barred from consideration for a promotion. Lastly, the plan was temporary in nature, designed to attain a balanced work force.

The force and continuing applicability of the *Weber* and *Johnson* decisions to private sector affirmative action plans has not been undermined by the Supreme Court's recent rulings on the use of set-asides and minority preferences in the public sector. These later cases, including the Court's most recent decision in *Adarand Constructors, Inc. v. Pena*[6] are firmly embedded in Constitutional jurisprudence and equal protection analysis and apply the strict scrutiny test to governmental conduct based on race. Such constitutional analysis does not, however, apply to nongovernmental, private sector employers. Thus, the decisions in *Weber* and *Johnson* which not only uphold the legal of voluntary private sector affirmative action programs but also emphasize their consistency with the underlying goals of title VII to ensure equal employment opportunity for all, are as persuasive and binding today as when they were issued.

## Encouraging the Use of Voluntary Affirmative Action

Even if affirmative action is still legal, that does not imply that it should necessarily be encouraged. It would be naive to suggest that the use of affirmative action in making employment decisions does not create resentment among at least a segment of the American populace. If the barriers to equality have been sufficiently breached to allow for equality of opportunity, then the advantages to be gained from further use of affirmative action may not be enough to offset the detriment created within the body politic from its continued use.

Have the barriers been breached? Initially one can look at the numbers. For every dollar that white males earn, black males earn 74¢, white females earn 71¢ and black females earn 64¢.[7] In 1991, the total unemployment rate for black workers (10.1 percent) was almost twice that of white workers (5.6 percent).[8] The Glass Ceiling Commission Fact-Finding Report found that in Fortune 1000 industrial corporations and Fortune 500 service corporations, 97 percent of senior level managers are white, 0.6 percent are African American, 0.3 percent are Asian, 0.4 percent are Latino and 3–5 percent are women. While these statistics paint a broad picture, they are not refined enough to allow for a conclusion that race or gender discrimination is the reason behind such disparities.

Other studies, however, which have refined the statistical analysis to account for factors such as education, length of employment or career choice, allow for the logical conclusion that race and gender discrimination is a cause for some differences in employment results. A study of the 1972–1975 graduating classes from the University of Michigan Law School revealed significant wage differentials between men and women lawyers after 15 years of practice. Controlling for grades, hours of work, family responsibilities, labor market experience and choice of career paths, there still existed an unexplained 13 percent earnings advantage for males over females.[9]

A 1990 Business Week study of 3,664 business school graduates found that a woman with an MBA degree from a top 20 business school earned 12 percent less in her first year of employment than her male counterpart. The Glass Ceiling Commission Fact-Finding Report concluded that despite identical education levels, ambition and

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6 115 S.Ct. 2097 (1995).

7 *The Glass Ceiling Fact-Finding Report. Good for Business; Making Full Use of the Nation's Human Capital.*

8 U.S. Department of Commerce, *Statistical Abstract of the United States*, 422, Table No. 662 (1995).

9 Robert Wood, Mary Corcoran and Paul Courant, "Pay Differentials Among the Highly Paid: The Male-Female Earnings Gap in Lawyer's Salaries," 11 *J. of Lab. Econ.*, July 1993.

commitment to career, men still progress faster than women.

But perhaps the most telling statistics of all are those obtained in employment testing studies. Employment testing is a technique whereby job applicant characteristics are controlled by selecting, training and credentialling testers to create a pool of job applicants who appear to be equally qualified for the jobs they seek. These testers are then paired by either race or gender and sent out to apply for jobs. When tester pairs experience different treatment during the job interview process, it is fairly easy to infer that the difference in treatment was caused by the difference in either race or gender.

The Fair Employment Council of Greater Washington conducted employment testing studies in the D.C. area between 1990 and 1991. The results of the studies indicated that blacks were treated significantly worse than white testers 24 percent of the time and hispanics were treated worse than whites 22 percent of the time. Job offers were given to 46.9 percent of the white testers but only to 11.3 percent of the blacks. In those cases where job offers were given to both white and black testers, whites were offered higher wages 16.7 percent of the time.[10]

A 1990 GAO audit study compared the experience of hispanic and white job testers; hispanics received 25 percent fewer job interviews and 34 percent fewer job offers than whites.[11] A 1991 Urban Institute employment discrimination study involving black and white testers showed that 20 percent of the time whites advanced further in the hiring process and 12.5 percent of the time whites received a job offer and blacks did not. A 1995 study in Philadelphia sent comparably matched resumes of male and female applicants to restaurants. In high-priced restaurants, men were more than twice as likely to receive an interview and five times more likely to receive a job offer.[12]

Just because the facts indicate that race and gender discrimination are still a very real problem does not necessarily mean that affirmative action is the solution. There are both state and Federal laws which prohibit employment discrimination based on race and gender; perhaps more vigorous enforcement of the existing laws is the answer. While obviously enforcement can only help in the fight to ensure equal opportunity, it is not a cure-all for the problem. From a strictly pragmatic viewpoint, more vigorous enforcement is unlikely. Government budgetary cutbacks are contracting enforcement resources. Moreover, given the cost in financial as well as emotional terms for an individual to pursue litigation, there is no reason to suspect an increase in enforcement efforts on this level.

From a realistic viewpoint, litigation is unlikely to achieve the desired goal of eradicating discrimination. It is aimed at trying to fix a problem after it has occurred, rather than preventing it from happening in the first place. The damage has been done, the opportunity lost, and a life and career disrupted, even if years later the employee is hired or promoted.

Employment discrimination in the 1990s is much more subtle and indirect, making it harder to identify and prove via litigation, but not making it any less effective in its impact on women's and minorities' employment opportunities. For example, Pettigrew and Martin reported the results of two experiments studying and comparing the interactions between black applicants and white interviewers and white applicants and white interviewers.

Unknown to the interviewers, the applicants were carefully trained confederates who had rehearsed the same responses to all the interview questions. Consequently, there were no objective differences in the performances

10 Marc Berndick, Jr., Charles W. Jackson and Victor A. Reinoso, "Measuring Employment Discrimination Through Controlled Experiments," 23 *Rev. of Black Pol. Econ*, 25 (1994).

11 U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination* (March 1990).

12 David Neumark, Roy Blank and Kyle Van Nort, "Sex Discrimination in Restaurant Hiring: An Audit Study," National Bureau of Economic Research Working Paper No. 5024 (1987).

of the black and white applicants. But there were major differences in the behavior of the white interviewers as a function of whether they were questioning a black or white applicant. With a black applicant, there were significantly more behaviors that Mehrabian has labeled "low immediacy." Black applicants received less eye contact, less forward body lean, and shorter interviews—all indications of negative interaction. The black applicants also faced interviewers who sat further away and made many more speech errors.

Do these differential responses make a difference in the applicants' performance? To find out, Work and his colleagues reversed the design of the experiment, using white confederates as interviewers and white subjects as job applicants. The carefully trained interviewers responded to half the applicants with the low-immediacy behaviors that black applicants had received in the first study. The other half of the applicants received the "high-immediacy" behaviors that white applicants had experienced earlier.

The results are dramatic. The subjects exposed to the low-immediacy behaviors were aware that they had been treated coldly; they rated their interviewers as less adequate and friendly. More importantly, when independent judges later rated videotapes of the second study's applicants, those whites who had been treated "as blacks" were judged to have been more nervous and to have performed less effectively. The interviewers' behaviors had caused a genuine decrement in applicant performance.

These two interview experiments capture important elements of modern racial behavior. Low immediacy behaviors are subtle—particularly in contrast to the blatant bigotry of dominative prejudice. Not surprisingly, whites are generally unaware of these shifts in their behavior; typically, they perceive black responses to them as caused not by their own behavior but by something distinctive about the blacks.[13]

Another subtle, indeed often unconscious, yet proven hiring phenomenon is what Lester Thurow labeled "statistical discrimination." Statistical discrimination occurs when an employer uses a group identifier, such as race or sex, because it believes differing traits attributable to the group are predictors of job performance, and the employer is either unable or unwilling to determine on an individual basis whether the applicant indeed possesses the group trait. With regard to a particular applicant, the employer's assumption that race or sex is a valid indicator of work behaviors may or may not be correct. But, if on the average the employer expects to be correct in his assumptions, he will continue to use group membership as a basis for choosing among otherwise qualified applicants.

For example, the employer believes that on the average when women have children they will quit work. In reviewing applications, the employer is looking for candidates not only with the appropriate job skills but also possessing job personality traits. The employer, in choosing among candidates, all of whom have the skills, is looking for a "reliable" employee. In rejecting a female candidate, the employer may act on his assessment regarding reliability based on his assumptions about the reliability of women generally.

A study done by Braddock and McPartland found statistical discrimination affected hiring decisions for lower level jobs. In hiring for these types of positions, employers are generally unwilling to invest much time or effort in screening candidates; it is not cost-effective. The lack of information about specific candidates resulted in employers filling in the gaps by using "statistical discrimination." They found that "attitudinal traits are at least as important as educational training in hiring decisions for many jobs, especially jobs filled by high schools graduates." The study also revealed that the average employer perceives racial and ethnic differences related to these attitudinal traits. Blacks are perceived as higher risk employees; therefore employers are more likely to avoid hiring minorities, particularly for those jobs where attitudinal traits are important.[14]

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13 Thomas F. Pettigrew and Joanne Martin, "Shaping the Organizational Context for Black American Inclusion," 43 *J. of Social Issues*, pp. 41 and 53–54 (1987).

14 Jomills Henry Braddock II and James M. McPartland, "How Minorities Continue To Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers," 43 *J. of Social Issues*, pp. 5 and 13 (1987).

A 1986 study for the Center for Social Organization of Schools at Johns Hopkins University on the effect of applicant race on job placement was based on a national survey of 1101 personnel officers and other executives responsible for hiring. The results showed that "white personnel officers tend to assign black male high school graduates to lower paying positions than those assigned to white male high school graduates." The study also found that among college graduates, race was a significant determinant of female job status. The authors suggested that these results were likely caused either by "old fashioned prejudice" or "statistical discrimination."[15]

A related phenomenon that affects both hiring and promotion decisions is known as "homosocial reproduction," a term coined by Kanter in her book *Men and Women of the Corporation*. "There is ample evidence from organizational studies that leaders in a variety of situations are likely to show preference for socially similar subordinates and help them get ahead."[16] In other words, people tend to hire people like themselves; those inside an organization attract and select others like themselves. Peggy Stuart, in a 1992 article noted that "Executives hire by the white male model." She quotes from the president of a corporate consulting firm who stated "It's unintentional, but executives hire and promote by the white male model. They tend to pick guys like themselves."[17] So long as whites and males continue to occupy the majority of managerial positions within corporations, the potential for homosocial reproduction exists.

Given the subtle, and indirect nature of modern day employment discrimination, a proactive policy embodied in an affirmative action plan requiring decision-makers to confront the issue of race and gender as they make their employment decisions will help to prevent them from unconsciously discriminating in their decisions based on race and gender. The way in which discrimination operates shows us that when employers do not take race or gender into account the result is *not* neutral decision making, but rather decisions which unconsciously favor whites and males.

## The Necessity for Goals in Affirmative Action Plans

Affirmative action plans without goals or numerical targets are ineffective. Many critics of affirmative action see goals or targets as requiring the hiring or promotion of unqualified persons in order to achieve the goal. This is rarely the case. First, it should be noted that the goal is based on the racial or gender composition of the "qualified" labor pool; the goal is established taking qualifications into account. Second, an employer establishes the timetable for achieving the goal taking into account employee turnover and the availability of qualified applicants. Third, the employer itself has voluntarily established the plan, and it is not in its own best interest to slavishly adhere to numerical goals of its own making at the expense of productivity and profitability. The employer's interests in achieving both its affirmative action goals as well as maintaining and increasing profitability ensure that goals remain flexible and not rigid. There is no incentive for an employer to hire an unqualified person merely to achieve a voluntarily set goal.

Given that goals indeed are flexible, it is fair to ask what purpose they achieve. In answer to this query it is instructive to consider the U.S. experience in its negotiation attempts to open the Japanese markets to American products. Throughout these negotiations, the U.S. has consistently demanded that numerical targets be set in order to assess the progress made toward achieving the objective of open markets. As a New York Times article noted, many American corporations argue that "while in formal terms Japan's market may be open, in practice it is not."[18] Japan's history of

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15 Jomills Henry Braddock II, Robert L. Crain, James M. McPartland, and Russell L. Dawkins, "Applicant Race and Job Placement Decisions: A National Survey Experiment," Center for Social Organization of Schools, Johns Hopkins University (1986).

16 Rosabeth Moss Kanter, *Men and Women of the Corporation*, pp. 47–48 (1977).

17 Peggy Stuart, "What Does the Glass Ceiling Cost You?," 71 *Personnel Journal*, p. 70 (1992).

mercantilist protectionism, its deep cultural traditions and the clubby nature of its business connections make the Japanese market difficult to break into. Thus, market share statistics become an objective indicator of progress toward market entry.

This same analysis could be applied to entry into the U.S. employment market by women and minorities. While in formal terms, given the legal prohibitions of title VII, equal opportunity is assured, in practice it has not yet been achieved. The history of racial and gender discrimination in this country, the social and cultural biases and stereotypes, and the subtle and indirect form which much discrimination takes, make the employment market difficult to break into. Numerical goals are needed to measure progress so that the purpose of the affirmative action plan is more than merely aspirational.

It is somewhat of an axiom in corporate life that if you value a concept you measure it. Corporations measure corporate performance through profit and loss statements, they measure employee performance through job evaluations, they measure product quality through customer surveys. If the concept of equality of job opportunity is to be truly valued in corporate America, it is important to measure the corporation's performance in this area as well. A measuring device is essential for determining progress; affirmative action goals and timetables are the means for assessing performance and progress.

## Conclusion

Should the use of voluntary affirmative action in private sector employment be maintained and encouraged? Yes. Discrimination is not a thing of the past. Affirmative action is a useful and effective tool to help break the barriers to equality of opportunity. It is not the only answer but it is an appropriate one. The Johns Hopkins study concluded that a commitment by employers to affirmative action accounts for a modest but significant increase in annual median wage for black male high school graduates, and employers with strong affirmative action policies were more likely to assign white female college graduates to more gender-balanced jobs. Most interesting, the study showed that affirmative action is not always a zero-sum game: "White workers also receive higher, although not statistically significant, pay and prestige increments as a result of strong employer commitment to affirmative action."[19] Leonard's study on the effect of affirmative action on employment also concluded that "affirmative action has actually been successful in promoting the employment of minorities and females, though less so in the case of white females."[20] The Glass Ceiling Commission recommended that affirmative action be used as one method, among others, to select and promote qualified women and minorities.

Affirmative action is a realization that merely forbidding discriminatory acts is not sufficient to remedy the long history of discrimination in this country, nor is it sufficient to weed out the ingrained and often unconscious societal and cultural biases and stereotypes which act as barriers to equality of opportunity. For those who suggest that attitudes have changed and it is time to look ahead, not behind, my answer is that we don't need to look behind to see discrimination at work. We are within one generation of rampant overt race and gender discrimination, and—as studies show—subtle and indirect discrimination is still at work. One need only look to Northern Ireland or the former Yugoslavia for evidence that social and cultural biases are not so easily eradicated over a few years, or even several generations. We always hope for the quick fix, but some problems are not so easily cured. As a society we are reluctant to talk about racism and its existence, perhaps hoping that if we ignore the problem it will go away; that if we tell employers not to consciously consider race and gender in making em-

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18 Sheryl W. Dunn, "A Deal on Auto Trade: The Market; But Is Japan Indeed Protectionist?," *N.Y. Times*, June 30, 1995, p. D5.

19 Braddock, Crain, et al., *supra* note 12.

20 Jonathan S. Leonard, "The Impact of Affirmative Action on Employment," 2 *Journal of Labor Economics*, pp. 439 and 459 (1984).

ployment decisions, the results will be race and gender neutral decisions. Not so; denying the fact that race and gender still matter, will result in decision making that falls back into the old habits, habits which favor whites and males. Maybe one day we will achieve a society where race and gender will not be a disadvantage in competing for employment; that time is not yet here.

# The Americans With Disabilities Act and Affirmative Action

**By Kent Hull**

The significance of "affirmative action" in implementation of the Americans with Disabilities Act (ADA) is evident in the early provisions of the statute. In the "Findings," Congress recognized that:

> [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;[1]

This language, distinguishing between "outright intentional exclusion" and "discriminatory effects" suggests that Congress envisioned a statute which would provide remedies for the consequences of established practices and patterns. Other provisions, such as paragraph (2), state that, "[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem. . . . "[2] Here, the statute acknowledges the existence of historical events which gave rise to the need for the ADA. The findings also speak of the absence of "legal recourse to redress such discrimination" and the "inferior status in our society" of disabled people.[3]

Evidence of legislative intent to change deeply entrenched patterns appears in a second provision:

> Individuals with disabilities are a discreet and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;[4]

This formulation of discrete and insular minority originated from that used by the Supreme Court of the United States to describe what are now referred to as "suspect classes."[5] In the ADA, Congress not only affirmed the notion that some problems of disabled people may be remedied by traditional civil rights legislation, but also that those remedies should root out persistent and deeply established discriminatory practices.

It is significant that in the Findings approving "affirmative" and "effective" remedies to change past practices, Congress articulated a clear rationale for this legislative policy choice. First, the legislation recognizes that, as of 1990, approximately 43,000,000 Americans have "one or more physical or mental disabilities" and that the number is increasing as the population ages.[6] Second, the justification for the ADA reform was pragmatic: the statute recognizes that "economic self-sufficiency" for disabled people and a policy to end

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1 42 U.S.C. §12101(a)(5).

2 Ibid. §12101(2).

3 Ibid., §12101(4),(6).

4 Ibid., § 12101(7).

5 United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

6 42 U.S.C. §12101(1).

"dependency and non-productivity" are worthwhile economic goals. In short, one purpose of the ADA is to assist disabled people in making greater economic and social contributions to society as a whole.

The "Findings" are, therefore, more than a mere precatory declaration of good intentions. In this initial provision of the ADA, Congress has accomplished three important goals:

1. It has stated that the remedies and strategies associated with civil rights legislation for other groups are applicable, and relevant to the problems of disabled people.
2. It has supported that declaration with a conclusion that economic self-sufficiency and well-being for disabled individuals, as well as the Nation as a whole, justify the ADA.
3. The affirmative action requirement of this law is articulated as part of legislation overwhelmingly passed by Congress, and not as a judicial doctrine or as administrative policies issued through rules or guidelines.

This affirmative action mandate arises from the public political process, sensitive to popular opinion. The ADA is consistent with previous legislation, agency rules, and judicial interpretations. Indeed, one can argue that the ADA, to a large extent, simply affirms the concepts established in earlier law.

In a second, preliminary portion of the ADA, Congress may have implicitly indicated its intent that remedial affirmative action remedies are part of the law. The definition of the term "disability" reenacts that which had earlier been established under section 504 of the Rehabilitation Act of 1973, as amended.[7] Both the section 504 and the ADA definitions set forth three categories of individuals:

1. Those with a physical or mental impairment that substantially limits one or more of the major life activities of such individuals;
2. Those with a record of such impairments; or
3. Those being regarded as having such an impairment.[8]

The first part of the definition—including those with a substantial limitation on a major life activity—encompasses people ordinarily considered as having a disability with characteristics such as mobility, visual, hearing, or mental limitations. The second part—those with a "record" of an impairment—include at least two groups. First, are those who, at some point in their lives, may have had a substantial limitation on a major life activity, but who no longer do. An example might be persons once treated for cancer, which has not recurred. Nevertheless, because of the record of the past disability, they sometimes encounter discrimination.

Others covered by the "record" part of the definition would include those improperly qualified as disabled because of misdiagnosis, racial, or cultural bias. An example might be an elementary school student with a learning disability who was improperly diagnosed as being mentally retarded. Also, some students in racial groups have been classified as disabled as a result of IQ tests which are now acknowledged to be biased. Individuals with such records suffer discrimination either because the nature of their disabilities was misclassified or, in fact, they were never disabled in the first place.

The third part of the definition—covering those "regarded as" having an impairment—is related to, but even broader than, the provision protecting those with a "record" or an impairment. Congress recognized in both the ADA and section 504 that some individuals with characteristics that are not actually disabling nevertheless encounter discrimination and are treated as if they were disabled. An example might be an individual with a disfiguring facial scar which, in reality, does not substantially limit one or more of that person's major life activities, but nevertheless results in other individuals' treating that person as if he or

7 29 U.S.C. §794.

8 42 U.S.C. §12102(2).

she was disabled. By this provision, Congress attempted to provide a basis for combating discrimination based purely on stereotypes about some characteristics.

The breadth of the definition of disability supports the view that Congress expects remedial action which went beyond a mere neutrality or "evenhandedness" in treating disabled individuals. By allowing those with a "record" or those with the experience of having been "regarded as" having a disability, the ADA envisioned an enforcement effort which will root out deep sources of discrimination, including those which may not be easily proscribed. Implicitly, the language of the definition supports "affirmative action" in the sense that those individuals facing discrimination not easily categorized, and perhaps difficult to prove, nevertheless are protected and entitled to seek a remedy.

## The Origin of the ADA

The ADA is the most significant Federal statute now protecting the civil rights of disabled people, but its concepts are not entirely new. In 1973, Congress enacted section 504 of the Rehabilitation Act, which originally prohibited discrimination "solely by reason of" handicap or disability under any program or activity receiving Federal financial assistance. Subsequently, section 504 was amended to prohibit discrimination by any agency or department of the Federal executive branch including the United States Postal Service.[9] Section 504 was based upon section 601 of the Civil Rights Act of 1964, which had prohibited discrimination in federally assisted programs on the basis of race, color, or national origin.[10]

The section 504 mandate was intended to establish nondiscrimination and equal opportunity policies in governmental and publicly financed programs, with the hope that, eventually, the private sector would emulate this example. Yet Federal legislation did not reach into the private sector, with the exception of those businesses which contracted with the Federal Government for goods or services.[11] However, simultaneously, some States began passing legislation applicable to the private sector in employment, housing, and services, to protect disabled people, in a manner similar to State laws protecting racial and ethnic minorities.[12]

The ADA is important for two reasons: it is a Federal law protecting disabled people which reaches deeply into the private sector (comparable to title VII of the Civil Rights Act of 1964) and it provides the forum of Federal courts to ADA litigants to enforce those rights. At the same time, while the ADA is a major innovation, it builds upon the explicit language and judicial interpretations of section 504. For that reason, cases interpreting section 504, the administrative rules applying the statute, and the legislative history of this earlier law are relevant in understanding the present scope of the ADA.

Section 504, originally, had been proposed as an amendment to the Civil Rights Act of 1964 itself. Subsequently, Congress enacted the provision, instead, as a part of the Rehabilitation Act.[13] The proposed legislation, an amendment to title VI, would have emphasized the similarity of the discrimination faced by disabled people to that faced by other protected groups. One possible consequence of severing the early section 504 proposal from the civil rights legislation was that, implicitly, the Rehabilitation Act amendment might be interpreted to mean that solutions for discrimination against disabled people should be different from those against other protected groups. In a subtle way, the final placement of section 504 might have undercut the notion that courts should provide remedies comparable to those developed in other areas of civil rights.

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9 29 U.S.C. §794.

10 42 U.S.C. §2000d.

11 29 U.S.C. §793.

12 M.C.L. F.3d 1101, et seq.

13 119 Cong. Rec. 7114 (1973).

The early Federal court decisions interpreting section 504 resulted in a series of confusing rulings. One case held that disabled plaintiffs, as individuals, did not have a "private right of action" to enforce the statute, but instead were required to await governmental enforcement of the law against recipients of Federal assistance. That ruling was quickly reversed by a Federal appellate court.[14] The *Lloyd* ruling held only that disabled plaintiffs could bring private lawsuits to vindicate the rights embodied in section 504, but also contained language which indicated that Federal courts should enforce the law aggressively.

The underlying facts in *Lloyd* arose from a challenge to the Regional Transportational Authority in Chicago for its refusal to utilize buses which would be accessible to riders with physical disabilities. The seventh circuit ruling does not address the merits of that question, confining itself to the preliminary question of the right to bring an action in Federal court.

In upholding the plaintiffs position, the court noted similarities between section 504 and title VI, and looked for guidance in the Supreme Court's decision of *Lau v Nichols*, a ruling construing the latter provision.[15] *Lau* had held that the failure of the San Francisco school system to provide instruction comprehensible to non-English speaking students violated their right to a meaningful educational opportunity guaranteed by title VI. The *Lloyd* court's immediate reference to *Lau* was for its holding that title VI provided a private right of action to the students. However, *Lau's* substantive issue of affirmative, remedial action in the form of instruction in languages other than English had important implications for disabled people and section 504.

The seventh circuit quoted extensively from legislative history to show the connection Congress drew to title VI, especially the following language from a report of the Senate Labor and Public Welfare Committee which stated that the:

> . . . new definition [of the term "handicapped"] applies to section 503, as well as to section 504, in order to avoid limiting the affirmative action obligation of a Federal contractor to only that class of persons who are eligible for vocational rehabilitation services. . . . *Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination.*[16]

It was against this statutory and precedential background that the Supreme Court first considered section 504. In *Southeastern Community College v. Davis*, a hearing disabled woman sought admission to a federally assisted nursing school.[17] After apparently working for ten years successfully as a licensed practical nurse, the plaintiff sought admission to the school to obtain the status of a registered nurse. The Federal district court which conducted the trial found that she had a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear, and that she had difficulty understanding speech. She used a hearing aid and the court found that she was an excellent lip reader and that she was "skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others."[18]

The district court ruled in favor of the school on the grounds that the plaintiff could not meet the established admissions standards, and that the school was not required to make fundamental changes in its admissions requirements. On appeal, the Court of Appeals for the Fourth Circuit remanded to the district court in light of recently promulgated regulations issued by the then United States Department of Health, Education

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14 Lloyd v Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).

15 414 U.S. 563 (1974).

16 548 F.2d at 1285 (quoting from 1974 U.S.C.C.A.N. 6390).

17 442 U.S. 397 (1979).

18 424 F. Supp. 1341, 1343 (E.D.N.C. 1976).

and Welfare, which set forth requirements concerning the obligation of such institutions to make changes or modifications in their programs under section 504. The appellate court did not direct that she be admitted, but it did require that the school reconsider her application in light of the new HEW rules.[19]

The decision of the Supreme Court to review the case was somewhat surprising in light of the limited instructions by the fourth circuit to the college, as well as the absence of a trial court record which fully developed the issue of the plaintiff's abilities and limitations or the experience of other schools which had admitted hearing impaired nurses. The Supreme Court's opinion held that the college was not required to evaluate the plaintiff's academic and technical qualifications apart from her disability, and that the college could not be required to make extensive modifications to its academic curriculum so that she could participate.

Initially, the Court's opinion seemed to state that there was no "affirmative action" requirement under section 504. The Court wrote:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely by reason of his handicap, indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.[20]

This language implied that a covered entity had only a passive obligation to avoid acts of discrimination and no further responsibilities. Moreover, the Court distinguished between section 504 and other sections of the Rehabilitation Act, such as section 503, in which the statute expressly used the term "affirmative action"; by implication, the absence of such language in section 504 suggested that there was not a similar obligation under that statute. In this connection, the Court expressed its skepticism that language supporting affirmative action, either in legislative history, or in administrative rules issued by HEW, would establish any obligation. Indeed, the Court stated, "[W]e hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so."[21]

If the opinion has stopped at this point, it is unlikely that there would have been any further debate about an affirmative action remedy under section 504. However, the Court then concluded:

> We do not suggest that the line between a lawful refusal to extend affirmation action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or to otherwise qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.[22]

This language, then, opened the door to the possibility of some kind of "affirmative" obligation and remedy for disabled people. The upshot of the *Davis* opinion was that instead of defining fundamental principles by which covered entities could determine their responsibilities, the Court issued an opinion which settled very little. Inevitably, *Davis* would lead to more litigation to decide

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19 574 F.2d 1158 (4th Cir. 1978).

20 442 U.S. at 405 (footnote omitted).

21 Ibid., at 411–12.

22 Ibid., at 412–13.

whether defendants had properly "refused to discriminate" or improperly failed "to extend affirmative action."

It was not surprising that *Davis* generated both academic and judicial criticism.[23] In 1985, the Supreme Court clarified *Davis* when it was called upon the review a section 504 challenge to a Tennessee Medicaid statute which had reduced the number of days which persons could spend in a hospital. Because the impact of the reduction in services fell disproportionately upon disabled individuals, some of whom had conditions necessitating more frequent hospital visits, the lower Federal courts had concluded that section 504 required Tennessee first to assess less drastic alternatives to the plan adopted. The Supreme Court upheld the Tennessee plan as written, stating that it was an across-the-board reduction which affected all Medicaid recipients, not just those who were disabled. Of the total number of disabled people in the State's Medicaid program, most would not have been injured by the reduction.[24] While the disabled plaintiffs lost in *Alexander*, Justice Marshall, in his unanimous opinion, modified the earlier *Davis* language:

> While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under section 504, we assume without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped. On that assumption, we must then determine whether the disparate effect of which [the handicapped plaintiffs] complain is the sort of disparate impact that Federal law might recognize.[25]

The Court's statement had been preceded by this analysis of the nature of discrimination against disabled people:

> Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus (footnote omitted).
>
> In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the act (citation omitted), yet such barriers were clearly not erected with the aim or intent of excluding the handicapped.[26]

After quoting from portions of the legislative history of section 504, Justice Marshall wrote, "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design."[27]

*Alexander* thereby qualified the *Davis* interpretation. While the Tennessee plaintiffs lost on the merits, the reconsideration of *Davis* was important. Moreover, the decision to uphold the Medicaid statute may be partially explained on other grounds, such as the reluctance of the court to disturb a complex public benefits program and its long-established principle of deferring to State agencies in the administration of such programs.

## Conclusion

The ADA supports a continuation of affirmative action in a number of senses. First, as a legal remedy, the Federal courts have now recognized

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23 *Note*, Accommodating the Handicapped: the Meaning of Discrimination under Section 504 of the Rehabilitation Act, 55 N.Y.U.L. Rev. 881, 885–886 (1980); *Note*, Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern, 80 Colum. L. Rev. 171, 185–186 (1980); *see also* Dopico v. Goldschmidt, 687 F.2d 664, 652 (2d Cir. 1982).

24 Alexander v. Choate, 469 U.S. 287 (1985).

25 469 U.S. at 299.

26 Ibid., at 296–97.

27 Ibid., at 297 (footnote omitted).

that the statute supports a preference for businesses owned by disabled people and was rationally related to a legitimate governmental purpose, consistent with equal protection.[28]

Beyond this narrow legal point, the ADA is an "affirmation" of earlier policies reflecting affirmative remedies under section 504. The provisions pertaining to employment discrimination, for example, elevated to statutory language concepts which had previously existed only in administrative rules. The Act defines and requires "reasonable accommodation," and specifies examples of such changes or modifications which might be required including job restructuring, part-time or modified work schedules, or reassignment to a vacant position.[29]

By these legislative provisions, Congress addressed two concerns expressed by the Supreme Court in the *Davis* case. First, it reenacted provisions which the Court had questioned because they existed only as administrative rules. Second, the mandates for accommodation, modification, or change are now set forth explicitly in a statute passed through the full legislative process with approval by the President. There can be no objection that these provisions arose only from "undemocratic" bureaucratic policy-making.

At the same time, it would be a mistake to ignore administrative actions which have taken place pursuant to the ADA. The Justice Department was given lead authority to develop administrative rules which would establish principles by which other departments and agencies would develop and implement their own ADA policies. Those rules now expressly reiterate such standards as those prohibiting actions which result in benefits which are "not as effective" as those provided to non-disabled people.[30]

The ADA supports "affirmative action" not only in the sense that it "affirms" previous concepts consistent with that requirement, but in that it requires "action" by both government and the private sector. The Act is part of a change in our national policy which replaces the previous public policy that, at best, was either indifferent or paternalistic to the needs of disabled people. It recognizes, as did section 504 and similar State and local laws, that government has a responsibility for assisting individuals and families affected by disability.

The ADA should not be regarded as a solution to all of the problems which disabled people in our society have. Undoubtedly, experience with this law will reveal that some requirements or provisions should be altered or different solutions should be pursued for new problems. The ADA is a beginning and not a conclusion.

Yet the breadth and impact of the ADA should not obscure its foundations. It originated from earlier Federal, State, and local laws, many in existence for almost two decades, before the ADA enactment in 1990. It is not experimental in this sense; rather, it builds upon those earlier experiences.

Similarly, it should not be regarded as simply idealistic. Its fundamental premise is that our society needs the talent and resources embodied by disabled people, many of whom were previously excluded from employment and participation in public life. To the extent that "affirmative action" requirements lead toward that goal, the benefits are public, just as other phases of civil rights legislation have enriched our entire society.

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28 Contractors Association of Eastern Pennsylvania, Inc. v City of Philadelphia, 6 F.3d 990 (3d Cir. 1993).

29 42 U.S.C. §12111(9).

30 28 C.F.R. §35.130(b)(iii) (1995).

# II. Academic Examinations of Affirmative Action

## Affirmative Action as an Antidote to the Socioeconomic Bimodalization of Society

By Lynn R. Youngblood

The hypothesis that the elimination of affirmative action could result in the bimodalization of our society from a socioeconomic perspective, i.e. the diminution of a predominant middle class, and hence lead to possible destabilization of our society is based upon the combination of various United States demographic/political trends including: (1) the movement toward welfare reform, (2) the increasing percentages of the populations of minorities in the overall population, and (3) disproportional representation of minorities within the classifications of "working poor" and "welfare recipients." There would seem to be a dichotomy or inconsistency about a political agenda that simultaneously includes welfare reform and the elimination of affirmative action. On the one hand, we want to force able-bodied welfare recipients to acquire jobs (an admirable concept in itself) while at the same time liberalizing or eliminating regulations in the work or corporate cultures which reasonably assure access to those jobs for persons regardless of race and ethnic background.

The implementation of such an agenda would seem to adversely affect those groups which are already most disproportionately represented among the working poor and welfare recipients, namely blacks and Hispanics. A study of world history as well as an observation of current global events would imply that radical change in government is most likely to occur when a nation state reaches a point where there is a large underclass and where the middle class has evaporated over time and has dissolved primarily into the lower socioeconomic class. The question which must be addressed in the context of affirmative action is how the presence of such legislatively imposed policies contributes to a strong middle class or conversely, how the absence of same could be a contributing factor to an increasingly large underclass. While it may be difficult for most of us to consider the possibility of the American society becoming destabilized, there may well be cause for concern. Don Tapscott, author of *Paradigm Shift*, states that "the bipolarization of wealth in the United States is greater than any of the other so-called 22 developed countries.[1] Time Magazine indicated that of the ten major industrial countries, the United States has the largest gap between rich and poor.[2] (See table 1.)

So if one concedes that the above information is cause for concern, what evidence is there that loss of affirmative action could further contribute to both the perception and the fact that in the United States, "the rich are getting richer while the poor are getting poorer" and larger in number?

Affirmative action should apply some remedy, over time, to the above disparities if minorities are disproportionately represented among working poor and welfare. While we are all aware of gains which have been made in the market place by individual minorities, perhaps, thanks in large part to affirmative action, until the gross disproportionality is at least modified, we cannot be reasonably certain that we are not preparing the

1 Speech made by Don Tapscott, author of Paradigm Shift, EDUCOM National Conference, Portland, Oregon, Nov., 1995.

2 Robert Wright, "Who's Really to Blame?," *Time Magazine*, Nov. 6, 1995.

reasonably certain that we are not preparing the groundwork for internal conflict through the elimination of affirmative action.

Jon Shure, vice president for the Twentieth Century Fund, reporting in a Knight Ridder Financial News issue on the welfare piece, dispels one prevailing myth (that the majority of welfare recipients are African Americans) while at the same time pointing out the disproportionality matter. He indicates that African Americans count for only 37 percent of welfare recipients.[3] But according to the 1990 U.S. Census Bureau statistics, only slightly more than 12 percent of the U.S. population is African American (as an aside, the number of African Americans as a percent of the overall population grew from 11.7 in 1980 to 12.1 in 1990.)[4]

While the percent of welfare recipients who are Hispanic was not mentioned in the Shure piece, one could legitimately assume that the representation of Hispanics on welfare is approximately in the same disproportionality. Hispanic population growth is considerably more dramatic as a percent of U.S. population (6.4 in 1980 to 9.0 in 1990). Another way of looking at these statistics is the representation of whites within the U.S. population (83.1 percent in 1980 to 80.3 percent in 1990). As to how future demographic information may look in this regard, birth rates are in decline for both white and black women (births per 1000 in 1994 were 64.0 and 66.5 respectively). Hispanic

3 Jon Shure, "Welfare isn't the Problem; It's the Welfare Debate," reprinted with permission of *Knight Ridder Financial News*.

4 U.S. Census Bureau.

women show a rate of 99.2 in 1994, a significant increase from 4 years previous (93.2 in 1990).[5]

All of this data would tend to point toward an increasing population of minorities as compared to whites. The implications for the bimodalization referenced earlier seem obvious, i.e. a continuing and increasing disparity of income and wealth if current remedies are not left in place and perhaps others yet developed.

Another view of the disproportionality issue is consideration of the number of "working poor" in our country. Shapiro and Parrott indicate, *While most poor workers are non-Hispanic whites, black and Hispanic workers are substantially over-represented among the working poor, including the segment of the working poor that works full time throughout the year. Indeed, both black and Hispanic workers are about three times as likely to fall into poverty as are non-Hispanic whites.*[6] In 1993, while 5.3 percent of non-Hispanic white workers were poor, 15.2 percent of black workers and 17 percent of Hispanic workers lived in poverty. The incidence of poverty among full-time year-round workers is particularly striking among Hispanics. In 1993, some 8.6 percent of all full-time year-round Hispanic workers were poor, more than four times the 2 percent poverty rate among non-Hispanic white workers employed full-time year round. Blacks, too, are over-represented among the full-time year-round working poor. Five percent of full-time-year-round black workers fell into poverty in 1993, more than double the rate among non-Hispanic white workers.[7]

For those of us intimately involved in the general education process, one way of addressing the issue of enabling minorities to achieve gains in the overall economy is to glibly respond that educational opportunities are available to all, regardless of racial or ethnic background, and that the key to financial security is through access to education. Affirmative action advocates are concerned, however, that the barring of the use of racial preferences in student recruitment and the awarding of financial aid would be counterproductive in assuring access to higher educational opportunities.

Whether affirmative action and racial preferences are part and parcel of the same principle is legitimately debatable. In any event, it is interesting how this issue has become particularly politicized in California where a measure designed to overturn such preferences will appear on the ballot in November. It would seem problematic, at best, for the majority of voters to determine what might be in the best interests of enhancing the economic opportunities for minorities.

The foregoing paragraphs make reference to affirmative action and preferences as if they could be one. It seems likely that the current affirmative action debate is fueled in large part by the semantics surrounding the issue. How individuals define affirmative action impacts to a significant degree their attitudes toward it. The research of Crosby confirmed this. *Conflating affirmative action with quotas and preferential hiring is misleading, she says—yet effective in massing opposition to a policy that she believes makes psychological sense.*[8] Crosby reports that the Congressional Research Service found that only 10 percent of the Federal laws dealing with affirmative action involve set-asides. Most affirmative action laws involve shoring up mechanisms so that agencies can monitor whether the hiring of people in target groups matches the availability of talent. She goes on to demonstrate in her research that individuals who view affirmative action as

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5 *The Numbers News*, "Birth Rates Continue to Decline," August 1995.

6 Isaac Shapiro and Sharon Parrott, "An Unraveling Consensus? An Analysis of the Effect of the New Congressional Agenda on the Working Poor," (Washington: Center on Budget and Policy Priorities) 1995.

7 Ibid.

8 Scott Heller, "Defining Affirmative Action: What You Think It Is Affects How You Feel About It," describes the views of Faye J. Crosby, psychologist at the University of North Carolina.

monitoring have a far more positive feeling about it than those who think it is a quota system.[9]

The antiaffirmative action initiative in California, known as the California Civil Rights Initiative (CCRI), is currently perhaps the most visible movement nationally regarding efforts to overturn affirmative action policies. Affirmative action and preferences being considered as one and the same are central to this debate. Even so, one interesting response to CCRI was the assertion by Rockwell that there are many preferences within our society that we take for granted. Veterans receive preferences in contracting, hiring, and school admissions. Long-term company employees obviously receive a preference commonly known as seniority. Homeowners currently receive preferential tax treatments known as the homeowner deductions.[10] How many Californians who are likely to support CCRI in November at the same time are recipients of these preferences?

It is obvious that the anti-affirmative action movement in California is a political response to what is perceived by those politicians to be the predominant perception of the general public toward affirmative action. While it may be difficult to characterize what the various sectors of the general public think on this matter, it is interesting to view the representative response of a cross-section of what may well be the largest employment sector in our economy, civilian employees of the Federal Government. A 1992 survey of this cross-section of the 1.7 million full-time permanent civilian employees found that compared to a previous survey (1989), employees and supervisors alike believed that Federal work force quality was improving slightly.[11]

One could assume from this that as affirmative action has had an increasing impact upon the Federal employee work force, the quality of work has not suffered and has, in fact, improved slightly, at least in the minds of the employees themselves. But when the question of the propriety of affirmative action considerations in the hiring process was asked of these same respondents there was far from a consensus. While 52 percent of women and 69 percent of minority group members (including men and women) agreed that affirmative action considerations should be taken into account when choosing among highly-qualified candidates, fewer than half (44 percent) of all government employees agreed. And, about one-third (33 percent) disagreed.[12]

Another interesting observation from the same study found a significant difference in the view of the importance of affirmative action when separating the "employee" group from the "employers." While just 31 percent of the nonminority male employees supported the government's affirmative action policy, the policy was supported by nearly two-thirds (64 percent) of the Senior Executive Service.[13] Such a response may well show how important it is for senior executives to accept the challenge to generate support for affirmative action from among their subordinates. Such an assertion is supported by the research of Marylee C. Taylor who, in her analysis of the national data comparing racial attitudes, studied the issue of whether affirmative action has created a white backlash that exacerbates racial divisions in America. She found that *contrary to public perceptions of a growing backlash, whites who have first-hand experience of affirmative action are more—not less—likely than other whites to sup-*

9 Ibid.

10 Excerpt taken from questions raised by Paul Rockwell, formerly an assistant professor of philosophy and librarian in the San Francisco Bay area, in a press statement from *Angry white guys for Affirmative Action*, delivered as part of the campaign against the anti-affirmative action "California Civil Rights Initiative."

11 Merit Systems Protection Board (MSPB), "Working for America: An Update," July 1994, pp. vii–x., SuDoc Number: MS 1.2:EM 7/3/UPDATE.

12 Ibid.

13 Ibid.

*port social programs that focus on race. They are more likely to hold beliefs in support of affirmative action. They also may be more likely to reject stereotypes of minority groups.* Taylor hypothesizes that employers who practice affirmative action often make statements explaining and justifying their programs which prompts white employees to consider such efforts as important.[14]

Another representative group which is worth considering with regard to their views on affirmative action would be the "emerging voters," particularly those who are being admitted to college. While it could be assumed that the majority of these students might be concerned that the use of race in admissions might be detrimental to them (although one must concede that the survey to be cited was among students already "safely" enrolled as college freshmen), a large majority of these individuals support the use of race in college admissions. The Higher Education Research Institute's survey of the fall 1995 American freshman found that 70 percent of these students believe that race should be given at least "some special consideration" by college admissions officers. While the historically black colleges and universities showed the highest positive response to this question as might be expected (90.3 percent), two-year colleges (75.5 percent), four year colleges (70.2 percent) and universities (65.0 percent) also gave strong support to the question.[15]

This might imply that even if the populace in various States do attempt to overturn affirmative action, and are successful in doing so, such an overturn may be short-lived as the younger generations take a more tolerant approach to affirmative action policies. Little attention has been given in this treatise to the role of women in the workplace relative to the impact of affirmative action as an enhancement to their socioeconomic status. In no way is this meant to slight the gender factor, as affirmative action policies were clearly designed not only to increase access for minorities racially and ethnically, but to include gender preferences as well. It is not clear to this writer how the gender factor might contribute to the destabilization of society, the premise articulated early on here.

In conclusion, affirmative action is necessary only if racism exists within certain sectors of our society. While most might agree that racism today is in decline, until it has been eliminated in the vast majority of arenas of employment and educational opportunity, the need for affirmative action will continue. The challenge, of course, is knowing when racism has really met its demise. A number of influential policymakers are convinced that racism is behind us, that racial preferences have now been in place long enough that we no longer have to exercise preferences, but rather exercise inclusion instead. But how we can confirm that as a society we are by and large ready to be inclusive is difficult at best. There are those who claim that racism is alive and well. This writer would be inclined to concur that it is alive, but the question of how well it is subject to conjecture. And until we know that racism is "terminal," society would seem to continue to need the affirmative action remedy.

But if affirmative action continues to mean "preferences," versus "inclusion," in the minds of both employers and employees, we do run the risk as a society of helping to resuscitate the terminal patient. The time could come when we begin to give back the gains made in the elimination of racism. Let us hope that our politicians and other important influence makers know when we have reached that point and provide us with the appropriate vehicles to maintain the gains in this struggle.

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14 "A Sociologist's Research Finds Little Evidence of White Backlash," *The Chronicle of Higher Education*, Nov. 17, 1995, p. A15.

15 Higher Education Research Institute, *The American Freshman: National Norms for Fall 1995*.

# Affirmative Action Into the Twenty First Century: Revision and Survival

By Dulce Maria Scott, Ph.D. and Marvin B. Scott, Ph.D.

Affirmative action was institutionalized at a time when a redefinition of justice, freedom and equality in America was underway as a result of the civil rights struggles of the 1950's and 1960s. While the civil rights revolution was foremost a struggle for liberty, affirmative action policies were aimed specifically at the achievement of equality.[1] While the concepts of freedom and equality have been part of the American ethos since the inception of our Nation, at the core of the debate in the 1960s and early 1970s was the question of how equal opportunity could be guaranteed to all Americans. Should equality be measured on the basis of individual opportunity of access or should it be measured in terms of tangible proportional group results?

Until 1969 affirmative action was based on the former etiology, but as a result of changes carried out to a large extent during the Nixon administration, it came to be defined in terms of proportional group results. In the 1990s, the debate over affirmative action has intensified as the Courts once again determine the constitutionality of racial, ethnic, and gender preferences in university admissions, hiring and contracts, set-asides, and racial gerrymandering. In this paper, as a way of building up towards our position on affirmative action, we first review the origins of affirmative action. Second, we review briefly arguments for and against various types affirmative action. Third, we present our own position.

## I. The Origins of Affirmative Action

The Civil Rights Act of 1964 forbade "discrimination because of race, color, religion, gender, or national origin." The drafters of the Act understood that "equal opportunity" would not mean "racial preference," as they explicitly expressed their opposition to such practice. For example, Senator Hubert Humphrey stated this opinion in the following way:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other type of persons or groups. It does not provide that any quota system may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.[2]

The leadership of the civil rights movement shared the same view. In statements in Congressional hearings during the discussion of civil rights laws, Roy Wilkins, the executive director of the national NAACP at the time stated:

> Our association has never been in favor of a quota system. . . . We believe the quota system is unfair whether it is used for Negroes or against Negroes. . . . We feel people ought to be hired because of their ability, irrespective of their color. . . . We want equality, equality of employment on the basis of ability.[3]

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1 Steinberg, Stephen, *Turning Back: The Retreat from Racial Justice in American Thought and Policy*, Boston Beacon Press, 1995, p. 164.

2 110 Cong. Rec. 11848 (1964), cited in Reynolds, Wm. Bradford, "Affirmative Action and Its Negative Repercussions," *THE ANNALS of the American Academy of Political and Social Science*, vol. 523, September 1992, pp. 40-1.

3 U.S. Congress, House, Committee on the Judiciary, Subcommittee no. 5, *Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States, 1963: Hearings on H.R. 7152*, 88th Cong., 1st sess., 2144, statement of Roy Wilkins. Cited in ibid.

Affirmative action came to have different meanings. To begin, it needs to be distinguished from policies of nondiscrimination or "equal opportunity laws" and policies, which forbade employers from engaging in discrimination when recruiting, hiring, and promoting workers. Such policies according to Thomas Sowell "require that individuals be judged on their qualifications" and that they "should be treated the same under the law, regardless of their race, religion, sex or other such social categories."[4] Yet, the legal guarantee of equal opportunity to all Americans did not contribute much to the eradication of the effects of two centuries of slavery and another century of Jim Crow or to the elimination of institutional discrimination. As expressed by Lyndon Johnson in a now overly cited passage from his 1965 commencement speech at Howard University:

> You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him 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.... We seek not just freedom but opportunity,... not just equality as a right and a theory but equality as a fact and as a result.[5]

In order to remove the shackles, Johnson had in mind not only affirmative action but also the various "war on poverty" programs such as Head Start, Aid to Families with Dependent Children, and various other programs designed to help the poor, and predominantly black, families attain higher levels of education and better skills.[6]

The term "affirmative action" had been previously used in a racial discrimination context in President John F. Kennedy's Executive Order No. 10,925 in 1961 "establishing an obligation on the part of Federal contractors not only to refrain from discrimination but to undertake 'affirmative action' to ensure that equal employment principles are followed in all company facilities."[7] This type of affirmative action would involve activities such as close monitoring of promotion decisions, special outreach programs which would spread information about employment or other opportunities to previously excluded groups so as to encourage them to apply, and so on. The selection process and decisions on hiring, promotion, and appointments would continue to be based on the traditional criteria of merit without regard to group membership. According to some civil rights leaders and analysts, however, this first type of affirmative action, which was dependent on the good will of employers and administrators, did not produce satisfactory results since the number of blacks in various significant areas of employment remained low. By the end of the 1960s, the unemployment rate of blacks was still twice as high as that of whites. Coupled with the urban riots, this state of affairs led liberal political leaders to conclude that a temporary recourse to results driven programs which guaranteed preferences to minorities was necessary in order to level the playing field for blacks. This type of affirmative action would seek to correct institutional racism rather than identifiable discriminatory acts.[8]

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4 Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: Quill William Morrow, 1984) p. 38. Conversely, according to Sowell, "'Affirmative Action' requires that they be judged *with regard* to such group membership, receiving preferential or compensatory treatment in some cases to achieve a more proportional 'representation' in various institutions and occupations.

5 *Public Papers of the President: Lyndon B. Johnson, 1965* (Washington, D.C.: Government Printing Office, 1965), 2:636. Cited in Graham, Hugh Davis, "The Origins of Affirmative Action: Civil Rights and the Regulatory State," *THE ANNALS of the American Academy of Political and Social Science*, vol. 523, September 1992, p. 56.

6 *See* Lipset, Seymour Martin, "Equal Changes versus Equal Results," *THE ANNALS of the American Academy of Social Science*, vol. 523, September 1992, p. 64.

7 The United States Commission on Civil Rights, "Statement on Affirmative Action," Clearing House Publication 54, October 1977, p. 5.

8 For a discussion of how racial preferences are morally justified to eliminate institutional racism, see Ezorsky, Gertrude, *Racism and Justice: The Case for Affirmative Action* (Ithaca: Cornell University Press, 1991).

This second type of affirmative action evolved out of a series of a series of executive orders, Equal Employment Opportunity Commission (EEOC) policies and guidelines, and court decisions. Statistical disparities in the workplace came to be viewed as proof of racial discrimination, and, as such, solutions were to be designed in terms of group remedies rather than the normal case by case redress. To authors such as Shelby Steele this meant that affirmative action had evolved from "simple anti-discrimination enforcement to social engineering by means of quotas, goals, timetables, set-asides and other forms of preferential treatment."[9]

"Goals" and "timetables" requirements were first applied in construction trades and later to all contractors. In February 1970, U.S. Department of Labor Order Number 4 required that Federal contractors submit written affirmative action plans modeled after the plan adopted by the city of Philadelphia in the construction industry. The ultimate goal of the Philadelphia Plan was that of making the work force in all trades 30 percent black, a percentage equal to the availability of blacks in the city's work force.[10]

In 1970, the EEOC also issued testing guidelines in order to prevent the application by employers of testing procedures which resulted in the hiring of proportionally fewer minorities than whites. In 1971, the Supreme Court concurred with lower court rulings that the Philadelphia Plan did not violate the Civil Rights Act. In other Court rulings, it was argued that "If a racial preference would produce the desired statistical result, . . . , its discriminatory feature could be tolerated as an unfortunate but necessary consequence of remedying the effects of past discrimination." Using race "to get beyond racism" was the way one Supreme Court Justice explained it in *Board of Regents of Univ. of Cal. v. Bakke.*[11] At the end of the 1970s, Congress authorized public contract set-asides for minorities and women.[12]

After 1972, Congress gradually expanded preference policies by adding rights and benefits for special constituencies, such as women, persons with disabilities, Native Americans, Hispanics, some Asians Americans, veterans, and so on. Affirmative action now encompasses about two thirds of the United States population, and even more in specific cases such as the City University of New York, where Italian Americans were added to the affirmative admissions programs.

Some scholars argue that while affirmative action could be justified in the case of blacks due to their three century of slavery and segregation, the same can not be said for groups composed to a large degree by recent arrivals to this country, with no past history of discrimination in this society. Jackson, for example, argues that the coupling of race and gender and of affirmative action and diversity has corrupted and undermined the initial intent of affirmative action, that of compensation for the historical deprivation suffered by blacks.[13] For other analysts, affirmative action is an inadequate vehicle through which the United States can make reparation to blacks for past oppression. Direct reparation, such as that considered for interned Japanese-Americans during World War II, would be a more appropriate form of compensation for blacks.

Affirmative action has been under attack since the late 1970s. In a well known "reverse discrimination" suit, *Board of Regents of Univ. of Cal. v. Bakke,*[14] the High Court stated in a deeply di-

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9 Steele, Shelby, "A Negative Vote on Affirmative Action," *The New York Times Magazine*, May 13, 1990, pp. 47-8.

10 For a more extensive discussion of the Philadelphia Plan, see Graham, "The Origins of Affirmative Action: Civil Rights and the Regulatory State," pp. 50-2.

11 438 U.S. 265, 407 (1978).

12 For an overview of public contract set-asides see LaNoue, George R., "Split Visions: Minority Business Set-Asides," *THE ANNALS of the American Academy of Political and Social Science*, vol. 523, September 1992, pp. 104-6.

13 Jackson, Jacqueline Johnson, "Race-Based Affirmative Action: Mend It or End It?" *The Black Scholar*, vol. 25, no. 3, Summer, 1995, pp. 30-42.

14 438 U.S. 265, 407 (1978).

vided ruling that quotas were illegal but that it was legal to take race into account as one of the factors in academic admissions. Several "reverse discrimination" suits have been filed since then. While the application of "goals and timetables" survived a frontal attack during the Reagan and Bush administrations, state commitment to enforcement policies ended in the 1980's.[15]

In the 1990s, affirmative action continues to be part of the political discourse as the Supreme Court and members of both political parties increasingly express opposition to racial preferences. In 1995, the Supreme Court issued a ruling requiring a test of strict scrutiny for public contract set-asides, restrained affirmative action in public school desegregation, and restricted majority-minority congressional redistricting.[16] In a press conference on February 24, 1995, President Clinton referring to affirmative action said: "We should not be defending things we can not defend. So it's time to review it and discuss it and be straightforward about it."[17] After a long review of affirmative action, the Clinton administration "decided to suspend for at least three years, all Federal programs that reserve some contracts exclusively for companies owned by minorities and women."[18] In July of 1995, as a result of efforts by California Governor Pete Wilson, the University's of California Board of Regents banned the application of racial preferences in admissions, hiring and contracts in all of its nine universities. Wilson continues on with efforts to eliminate preference policies at the level of the state and he is backing a proposed ballot initiative to end racial, ethnic and gender preferences in education, employment and contracts in California.[19] In a March 1996 decision, the 5th Circuit Court of Appeals ruled that the University of Texas Law School "could not give preferences to blacks and Hispanic students in admissions as part of a strategy to increase racial diversity" directly challenged the ruling made in the Bakke case.[20]

Defenders of affirmative action claim that it is successful in breaking down racial and gender barriers and in eliminating institutional discrimination. Opponents of affirmative action, on the other hand, argue that the policies have accomplished little and have not worn well over time. Steinberg claims that affirmative action has had a profound impact. As this scholar writes: "Lyndon Johnson's 1965 executive order, as amended by Richard Nixon's 1974 executive order, applied to 15,000 companies employing 23 million workers at 73,000 installations."[21]

Steinberg goes on to explain that black employment gains were particularly pronounced in the public sector in the 1970s as blacks continued to increase their numbers in this sector at a rate that was double that of whites. By 1982 the government employed 1.6 million blacks, roughly a fourth of all black workers. Below, before we define our position, we review briefly some of the arguments in favor of and against affirmative action.

## II. Review of Arguments For and Against Affirmative Action

We identified four distinct positions on affirmative action in the existing literature. At one

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15 *See* Jackson, Charles C., "Affirmative Action: Controversy and Retrenchment," *The Western Journal of Black Studies*, Winter 1992, vol. 16, no. 4, 180:189. See also Amaker, Norman C., *Civil Rights and the Reagan Administration*, Washington, D.C.: The Urban Institute Press, 1988.

16 For an overview of these three Supreme Court cases see Jackson, "Race-Based Affirmative Action: Mend it or End It?"

17 President Clinton, press conference, Feb. 24, 1995. Cited in *Indianapolis C.E.O.*, vol. 8, issue 3, August 1995, p. 30.

18 *The New York Times*, Friday, Mar. 9, 1996. For an excellent analysis of contradictions in Clinton's positions and policies on affirmative action, see ibid.

19 For a brief overview of Wilson's attempts to eliminate affirmative action in California see ibid.

20 *See, The New York Times*, Mar. 21, 1996.

21 Steinberg, *Turning Back*, p. 167.

extreme there are those who argue that "The time is long overdue to end it."[22] For some of these analysts, since the effects of past discrimination no longer pose obstacles to people of minority backgrounds, the role of the state should be limited to guaranteeing that discrimination on the basis of race does not take place. At the other extreme, there are those proponents of affirmative action who not only defend its continued existence, but also argue that we should return to the enforcement levels of the 1970s.[23] For these analysts, "the vestiges of past discrimination are continuing barriers to opportunities of the present generation of black people, discrimination is still an active problem, and substantial progress will not be made without affirmative government."[24]

Other analysts and policy makers take various middle of the road positions. Some oppose affirmative action as defined in terms of group parity representation and racial preferences, but favor the continuation of special outreach programs for minorities and women. For example, Clarence Thomas, in his confirmation hearings to the Supreme Court, expressed strong support for outreach programs to extend opportunity to women and minorities, but he also vehemently stated opposition to affirmative action programs which involve preferences. Stephen Carter and Paul Starr concur with Thomas in their support of the first type of affirmative action and condemnation of the second type.[25] In response to this position, supporters of affirmative action reminds us that: "What Justice Thomas and most opponents of affirmative action forget is that good-faith efforts to increase minority representation were generally ineffective until they were backed up by specific 'goals and timetables' that in fact gave preference to minority applicants . . . " and that " . . . affirmative action was never a desiratum to be pursued for its own sake, but rather a policy of last resort, invoked only after good-faith efforts to break down entrenched patterns of racial and gender segregation failed."[26]

A fourth position argues that affirmative action should continue to exist but that it ought to be based on class rather than race, ethnicity or gender. This ought to be so because the chief beneficiaries of affirmative action have been middle class blacks and middle class women. Exactly how much growth the black middle class has experienced is a matter of controversy. Some authors claim that it has expanded from some 10 to 30 percent of black families in the generation since 1964 while others argue that the size of the black middle class is still rather minuscule.

A well-known proponent of class, as opposed to race, based policies is William Julius Wilson who notes that despite the implementation of anti-discrimination legislation and "mandated and purposefully enforced" affirmative action programs, it was clear by 1980 that "conditions were getting worse, not better, for a significant number of black Americans."[27] In fact, according to some analysts, affirmative action indirectly contributes to the deterioration of inner city black communities. As middle class blacks move into the mainstream white economy and into more suburban areas, they take with them entrepreneurial skills and capital which would be necessary for the development of inner city economies. The existence of a middle class, some argue, is a necessary element in the maintenance of a prosperous and

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22 Sowell, Thomas, "The Twilight of Affirmative Action," *The Indianapolis Star*, Monday, Apr. 8, 1996.

23 *See,* ibid., pp. 164-5.

24 Taylor, William L. and Susan M. Liss, "Affirmative Action in the 1990's: Staying the Course," *THE ANNALS of the American Academy of Political and Social Science*, vol. 523, September 1992, p. 31.

25 Carter, Stephen, *Reflections of an Affirmative Action Baby*, (New York: Basic Books, 1991). Starr, Paul, "Civil Reconstruction: What to Do Without Affirmative Action," *The American Prospect*, no. 8, Winter 1992, pp. 7-14.

26 Steinberg, *Turning Back*, pp. 165-6.

27 Wilson, William Julius, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy*, (Chicago: The University of Chicago Press, 1987) p. 128.

According to Wilson, the plight of the new "underclass" is not caused by racism and institutional discrimination, but rather by structural changes at the level of the economy which are leading to loss of capital and jobs from inner city, among other less critical factors. As he writes: "Urban minorities have been particularly vulnerable to structural economic changes, such as the shift from goods-producing to service-producing industries, the increasing polarization of the labor market into low-wage and high-wage sectors, technological innovations, and the relocation of manufacturing industries out of the central cities."[28] As Wilson further suggests, there is an increasing mismatch between new employment opportunities and level of education among blacks.[29]

Wilson's arguments have been highly criticized by scholars, who, although acknowledging that economic and demographic changes negatively affect blacks and other minority groups in the inner cities, argue that it is housing and employment discrimination that keep minorities in inner city areas to begin with. They state that discrimination still remains a pervasive problem in our society, a problem which can not be redressed by individual lawsuits. Affirmative action is still needed to counteract the effects of past and ongoing discrimination.[30]

Shelby Steele is another scholar, among others, who claims that disadvantaged blacks do not benefit from affirmative action. According to this scholar, the failure of affirmative action to benefit poor blacks is evidenced by the fact that after 20 years of racial preferences the gap between median incomes of black and white families is greater than it was in the 1970s, a smaller percentage of black high school graduates go to college today than 15 years ago, and more black males are in prison, jail or in some other way under the control of the criminal justice system than in college. This, he writes, despite racial preferences.[31]

Steele makes a distinction between "racial representation" and "racial development." As he argues "Representation can be manufactured; development is always hard earned." While he concurs that blacks need policies that insure right to equal opportunity, he argues that what disadvantaged children need the most is a better shot at development—better elementary and secondary schools, job training, safer neighborhoods, better financial assistance for college and so on. And as he suggests, preferential treatment will not help the disadvantaged because it does not "teach skills, or educate, or instill motivation. . . ."[32]

Development policies, rather than racial preferences, would also ultimately eliminate what Steele, Carter, and Reynolds, among others, consider to be one of the nefarious side-effects of affirmative action. As Reynolds states: "behind every goal and timetable lurks the message that minorities can not make it under the same rules, that they need a certain set of privileges that come with being members of a particular race."[33]

Defenders of affirmative action dismiss claims that it only has benefitted those that were better off to begin with. They argue that this assumption is contradicted by the fact that among those minority students enrolled in medical school, a significant number were from poor, rather than middle class backgrounds. They also cite the implementation of affirmative action programs in occupations such as the police force and construction as evidence that working class individuals also benefit from the program.[34] Below we offer our views on affirmative action.

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28 Ibid., p. 39.

29 Ibid., p. 41.

30 *See* Taylor and Liss, "Affirmative Action in the 1990's: Staying the Course," pp. 36-7.

31 Steele, "A Negative Vote on Affirmative Action," p. 75.

32 Ibid., p. 73.

33 W. Bradford Reynolds, "Affirmative Action and Its Negative Repercussions," p. 47.

34 *See* Steinberg, *Turning Back*, p. 167. See also Taylor and Liss, "Affirmative Action in the 1990's: Staying the Course," p. 34.

## III. Our Views

Again in the 1990s, America debates the question of how justice and equality can be guaranteed to all Americans. While affirmative action—as defined by us as preferential treatment toward protected groups—attempted to guarantee equal opportunity to all, it is now time that its policies be reformed so as to ensure its survival into the twenty first century. We support the continuation of affirmative action programs which are based on class rather than race, ethnicity or gender, together with the preservation of strong enforcement of antidiscrimination laws and of effective outreach programs for minorities and women.

As stated by Marvin Scott: "The real issue is the number of poor people in this country. We're dealing more with the issues of class and status in America now, not black and white. We have approximately 260 million people in America, of which 60 million are from families with incomes of $15,000 or less. That's an intractably poor group of people in our society—the vast bulk of them majority Americans—who aren't being served by affirmative action or any other action. . . . Affirmative action was a well intentioned, very good program to bring about change. But if people haven't figured out how to use this program effectively to move forward, continuing it will spell disaster as we move into the fifth generation of welfare-dependent individuals within our society."[35]

Affirmative action was designed as a temporary remedy in order to level the playing field among the races. After a few decades of racial preferences, the children of those who were able to improve their socioeconomic status as a result of affirmative action should not continue to enjoy preferential treatment. The playing field has been leveled for them and strong enforcement of antidiscrimination laws should suffice to protect their right to equal opportunity of access. Developments stemming from an April 1989 class action law suit brought against Shoney's Inc. restaurants by black employees shows that blacks can effectively have recourse to the legal system in order to obtain redress in cases of unfair employment practices.[36]

Affirmative action programs based on income levels rather than group characteristics will ensure that the poor, including the black poor who currently do no benefit from affirmative action, are given opportunity to improve their social condition. While special outreach to preferred groups ought to continue, preferential treatment should be given only to those who are from a lower socioeconomic background. The right to equal opportunity for those who are not economically disadvantaged to begin with can be enforced with strong antidiscrimination laws.

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35 *Indianapolis C.E.O.*, vol. 8, issue 3, August 1995, p. 21.

36 For more information on this case see *The Wall Street Journal*, Tuesday, Apr. 16, 1996.

# The Effectiveness of Goals in Affirmative Action Programs

By Theodore R. Hood

One of the major issues being debated in our country today is affirmative action. Many blacks have accused whites of paranoia in labeling as "preferential" any new opportunity afforded blacks which blacks had not previously had before. Whites have countered with charges of "reverse discrimination." This polarization is rigid and the controversy touches raw nerves as it affects the life chances of insecure people during uncertain economic times.

The purpose of this paper is to present what I hope is an objective view of what and how affirmative action under Executive Order 11246 and its implementing regulations were administered in the employment context, by a Federal agency. A brief history of the development of affirmative action follows.

The first executive order concerning nondiscrimination was Executive Order 8802, issued by President Roosevelt on June 25, 1941. It read:

> Where as it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all or groups within its borders; and whereas there is evidence that available and needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national origin, to the detriment of worker's morale and national unity.[1]

It is crystal clear from the above that altruism was not the primary motivation for the issuance of this order. Rather, it was the shortage of manpower caused by the induction of hundreds of thousands of men in to the armed services. This shortage of manpower necessitated that drastic action be taken. In order to produce the materials necessary to bring the war to a successful conclusion, minorities and women were actively recruited and hired in unprecedented numbers. They filled positions in both the unskilled and skilled areas. The quantity and quality of products produced was excellent. At the conclusion of the war these workers were displaced by returning servicemen.

Subsequent to President Roosevelt most presidents have issued orders concerning civil rights. Executive Order 10925 was the first to define affirmative action in context of our discussion. This order was later amended by Executive Order 11246. It is interesting to note that at inception neither order included gender.

To ensure that Federal contractors were performing in accordance with provisions of the contractual requirements under E.O. 11246, Federal agencies and departments conducted compliance reviews. These reviews were to determine if prime contractors of sub-contractors maintained nondiscriminatory hiring and employment practices and were taking affirmative action to insure that applicants were employed and that employees were placed, trained, upgraded, promoted and otherwise treated during employment without regard to race, color, religion, or national origin.[2]

Yearly analysis of the results of these reviews indicated that very little progress was being made in minority hiring, placement, upgrading, etc. Therefore, after much comment and deliberation, it was decided that minority goals would be required by all Federal contractors. A majority of the comments received from major corporations favored the use of goals. They said that most of their business objectives were defined by numbers and percentages and were excellent measures of performance. A few years later E.O. 11246 was amended to include gender.

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1 3 C.F.R. 957 (1938–1943).

2 43 Fed. Reg. 49,245 (1978).

The adoption of the requirement that mandates that Federal contractor establish goals and timetables has engendered a significant amount of negative feelings regarding Affirmative Action. A number of political, educational, and business leaders have postulated that goals and quotas were synonymous. Nothing could be further from the truth.

Mr. Leonard Garmet who was a presidential counselor during the Nixon Administration addressed the issue in a letter to all Federal agencies. In that correspondence a quota was defined as a numerical objective which had to be obtained. Failure to do so would result in some sort of punitive action. A goal was defined as a numerical objective to which a Federal contractor should direct his good faith efforts to achieve. Failure to meet the goal only requires presentation of that good faith effort.

The regulatory requirement for the establishment of goals and timetables can be found in Code of Federal Regulations (C.F.R.) 41 CFR 60-1 and CFR 60-2. 41 CFR 60-2 is better known as "Revised Order #4." This regulation requires that all Federal contractors with a contract of $50,000 and 50 employees establish affirmative action programs.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good effort. The object of these procedures plus such effort is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate.[3]

The goal requirement can be found at 41 C.F.R. 60-2.12. The goals and time tables developed by the contractor should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus in establishing the size of its goals and length of its time tables, the contractor should consider the results which could be reasonably be expected from putting forth every good faith effort to make its overall affirmative action program work.[4]

a.Goals should be significant, measurable, and attainable.
b.Goals should be specific for planned results, with timetables for completion.
c.Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonable attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.[5]

The above guidance was and is currently the standard used in evaluating goal formation and use in the executive order programs.

## Case Histories

1. In the mid 1960s one of the Fortune Magazine's top 50 companies opened a manufacturing plant in Indianapolis, Indiana. There were over 6500 employees. In the white collar work force there were about 500 workers. White females were concentrated in the traditional clerical occupations. There were no minorities. In a blue collar work force of 6000 there were six minority men. There were no females in the blue collar work force.

2. A second fortune 500 manufacturing plant in Indianapolis during the same period of time had slightly more than 10,000 workers. There were approximately 800 white collar workers. Females were concentrated in the traditional clerical occupations. About 5 percent of the workers were minority. In a blue collar work force of approximately 9200, 10 percent were black. The blacks were concentrated in the unskilled categories. There were 2 minority females who had not been displaced by returning GIs. There were no white females.

3. In the late 1960s a third Fortune Five-hundred company located in Lafayette, Indiana had approximately 3000 workers. There were approximately 200 white collar workers. Females were concentrated in the traditional clerical occupa-

3 Ibid. at 49,250.

4 Ibid.

5 Ibid.

tions. There were no minority workers. In a blue collar work force of approximately 2800 there was one minority employee. Odd as it may seem he was a skilled craftsman.

What the above case histories indicate, which were typical of employment patterns in the district, is that there was a substantial underutilization of minorities and women employed by these Federal contractors. Underutilization is defined as employing protected group persons at a rate less than their availability in the work force. It is only reasonable to expect that if qualified or qualifiable protected group persons are available in the labor area from which a contractor recruits, that his recruitment would reflect such representation.

After several years of compliance review activity the penetration rate of protected group person into covered contractor work forces improved. In the mid 1970s a follow up review was done on case history 2 mentioned above. While the contractor had increased the participation rates of minorities overall we found that they were concentrated in lower unskilled blue collar work force. There was still a significant under utilization of women in the blue collar area. After weeks of negotiations the contractor committed himself to a maximum 10 years for full goal participation for protected group workers. In the white collar area the negotiations were protracted and contentious. The computer model used by the contractor proposed goals of from 5 to 99 years for most job groups. Some of the higher managerial and executive job groups had an asterisk and no time table. When questioned about the time table for achieving the ultimate goal the contractor said he could not project accurately but it would be 100 years and more.

Moreover, the computer model used by the contractor was biased on several factors. For example, no majority white would be passed over for promotion, despite the fact that most of these people had been hired and promoted under earlier discriminatory employment practices. After weeks of acrimonious negotiations, and over $500 million in contract awards being delayed and held in abeyance, the vice chairman of the corporation entered the impasse. He agreed with the OFCCP position that 100 years and more was an unacceptable time table for reaching the ultimate goal. He believed that if American industry could put a man on the moon that surely his company could achieve the goal of equal employment for all its workers in less than 100 years. Thereafter the ultimate time tables for achieving goals in these areas was reduced to 50 years.

In retrospect it is safe to say that neither the vice chairman nor I fully understood the resistance and reluctance of his employees to implement such a program. While there has been some limited progress in the penetration rates of women and minorities into there higher level positions, it appears the original position of well over 100 years for full utilization in these positions was overly optimistic.

## Enforcement

"Any violation of the order, equal opportunities clause, the regulations in chapter 60, or of applicable construction equal opportunity requirements, may result in the institution of administrative or judicial proceedings to enforce the order and to seek appropriate relief."[6] Under normal circumstances the first step in the enforcement proceedings is the issuance of a show cause notice. This notice requires the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriates action to ensure compliance should not be instituted. At the end of the 30 day period the office of Federal contracts compliance programs may request that the solicitor of labor issue an administrative complaint against the alleged violator. After service the contractor must answer the complaint in 20 days. Normally a hearing is held and an administrative law judge rules on the issues. Another avenue that the OFCCP may pursue is to seek enforcement of the order by referral to the Department of Justice for judicial proceedings. This would result in civil action being sought by the Justice Department in the Federal courts.

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6 Ibid., p. 49246.

Perhaps the most potent sanction provided in E.O. 11246 is the one which provides for partial or complete cancellation of government contracts and debarment from future contract awards until the violations identified by the OFCCP have been corrected. Armed with such a potent weapons one would presume that the OFCCP was a tiger on enforcement and that violators were swiftly and effectively pursued. Nationally there are hundreds of thousands of Federal contractors, yet the number of show cause letters issued by OFCCP has been small, the number of administrative complaints minuscule. In all its history less than a dozen contractors have been disbarred. Contrary to this woefully inadequate record the Indianapolis OFCCP office from its inception until 1989, had vigorously enforced the regulations. Over 100 show cause letters had been issued and more than 50 administrative complaint recommendations had been submitted to the Chicago regional office. Indianapolis was recognized throughout the country for its enforcement efforts. In the mid 1970s one of the Fortune 500 companies went to Federal court and retained a temporary restraining order against the Indianapolis office and OFCCP nationwide. The issues involved the use of the preaward process. Although the district director in Indianapolis was named as a defendant in the court action, neither he nor any employee of the OFCCP national office or the national solicitors office attended the hearing. The local U.S. Attorneys office represented the Federal Government. Unfortunately they had only limited knowledge about the case and only a few hours to prepare for the hearing. Needless to say the case was lost.

During the Reagan administration the OFCCP was under extreme scrutiny. Political appointees attempted to dismantle the agency through a number of actions the most notable being one which created what was euphemistically termed "Podium Policy." At meetings of the staff director, her deputy or her special assistant would change old policy or make new policy without any regard for the administrative procedure acts which governs the change and issuance of new regulations.

One example was the policy on disparate treatment in discrimination cases. The U.S. Supreme Court in its *Hazelwood School District v. United States* decision[7] had set the standard for when evidence of disparate impact would provide proof of disparate treatment at two or three standard deviations. The Agency established a new standard. No discrimination cases would be pursued unless the statistical disparity was six or seven standard deviations. After 4 or 5 years in operation this policy seriously affected the ability of the district offices to effectively enforce the executive order. The Equal Employment Opportunity Commission finally required the OFCCP to reserve this policy. However, hundreds of contractors had gone unscathed.

## Conclusions

Affirmative action is currently under attack on all fronts, housing, school, admissions, and employment. The most critical of these fronts is employment. In my judgment the controversy has been fueled by a substantial amount of misinformation. The facts follow.

First, affirmative action in employment does not sanction hiring unqualified persons for any job. As a routine procedure during every compliance review qualifications, educational level, and work experience are evaluated for both white and protected group workers in all major job categories. Contrary to the widely held belief that minorities and women are less qualified for their jobs than their white male counterparts, the opposite is true. In many cases the minority or female has better qualifications. In promotion discrimination cases some Federal circuits have ruled that despite better qualifications by a minority defendant, additional evidence in needed to prove discrimination.

The second fact is that goals are not quotas. A goal is a numerical objective to which a Federal contractor should direct his good faith effort to achieve. Failure to reach the goal only requires presentation of that good faith effort. A quota is a numerical objective which must be attained. Fail-

7 433 U.S. 299 (1977).

ure to do so will result in some sort of punitive action.

Finally for all who believe that protected group workers have arrived, just take a look around. The managerial and executive levels of the Fortune 500 companies is the domain of the white males—to a tune of more than 95 percent. Corporate board meetings reflect a similar composition. The reality of this seems to be that contrary to the often stated principal of best qualified and equal employment opportunity, the truth is that white males do not and will not give up without a fight for their economic advantage. It seems to me that if economic harmony is to be achieved some accommodation in this position must be made.

# Reinventing Affirmative Action

By Rev. Boniface Hardin

## Definition of Title

The title of this paper is "Reinventing Affirmative Action." This does not mean that I am opposed to affirmative action, its concept, or its impact. On the contrary, I have seen the long term positive results that affirmative action has had on people of color, women, and the disabled.

I want affirmative action to do more good, be more effective, and operate in a more pragmatic setting. The term "affirmative action," however, has been vilified and distorted in recent years. As a consequence, for the program to continue and provide some realistic effective equal opportunity in the future to minorities and others traditionally excluded from full participation in the American economy, it must be reinvented.

By reinvention I do not imply any overhaul of the current policy. Rather, I call for an acknowledgement from all leaders in every institutional segment of the need for this program based upon this country's history of bigotry and injustice, and for a new designation of the policy so that it can continue without the opprobrium of the current term.

## Historical Reflection 1

It is my strongest conviction that America is the best land in the world. The Constitution of this Nation, which forms the basis for this society, as presently amended, offers the essential framework for equal opportunity for all citizens. However, the people of this land do not always wish to observe the Constitution and its laws.

One could make a case that the signers of the Declaration of Independence and the framers of the original Constitution had tongue in cheek when they said it is self-evident that all men are created equal. They meant, of course, that in fact all free white men who owned property are equal and it was this philosophy that was embedded into the Constitution as first written.

It should be noted that legally statuted inequality extended beyond color lines in early America. There were many white men who were indentured servants who shared the lot of Negroes and Indians in experiencing unequal participation rights. However, as the country grew and expanded in the early 19th century the denial of equal protection under the Constitution became to be almost exclusively based upon color. Competing principles of color and property were established in the settling of the Northwest Territory and the Indiana Territory which created ambivalence in the minds of the populace. On one hand there was sentiment that slavery should be abolished, while support existed for taxing enslaved people of color like cattle.

This conflict set in motion a mindset that still exists today in Indiana—a conflict between an outward affirmation for the principles of equality and equal opportunity and the establishment and support of laws, mores, customs, and traditions that relegate people of color to an inferior status. Thus the State of Indiana fought on the side of the Union in this Nation's Civil War, a war fought in part to abolish slavery. Yet within the confines of its own borders it legislated and enforced a series of "black codes" long before many the Southern States enacted similar statutes.

In affirming the equality of all individuals, Indiana can boast of its antislavery abolition societies and its many stations of refuge in the underground railroad for slaves seeking freedom. Yet the State also permitted meetings that fermented oppression and hate against people of African ancestry, was foremost among all States in Ku Klux Klan activity in the first half of the twentieth century, and had numerous local openly segregated institutions well into the second half of the current century.

The Civil War has not ended in Indiana. Yet this is Indiana and it is our way. As a student of Indiana History, the Civil War between the North and South, a Board Member of the President Benjamin Harrison Home and enactor of the life and work of Frederick Douglass, I say the Civil War still lives on in the minds and hearts of its citizens.

This war was cruel and left no winners. While John Brown was hanged for stealing guns to free slaves at Harper's Ferry, Jeb Stuart, a West Pointer, who captured John Brown, joined the

Confederacy and was considered an honorable man. Union soldiers later marched off to battle singing, "John Brown's Body lies Moldering in the Grave."

It is not uncommon that persons in this State will accept the excellence of a person of color as an athlete on a basketball floor, but will challenge the right of a person of color to have equal opportunity in the workplace. And yet many of these same individuals work diligently and tirelessly to improve the welfare of communities populated by people of color.

What does this have to do with affirmative action? Only that the wounds of the South and North have not healed. The Congress of the United States is not always the place of righteousness, but often the demon of the 19th century which destroyed not only the many youth of that time but the second, third and fourth generation survivors. There continues to be hard feelings toward African Americans who are seen as the cause of this ancestral devastation.

## Historical Reflection 2

I suggest that we recall the 13th, 14th, and 15th amendments to the Constitution of the United States. The 13th Amendment outlaws involuntary servitude. Yet even today, migrant worker camps are allowed to exist in Indiana as a way of life, even as we speak.

The 14th Amendment establishes the criteria of citizenship in the United States. Yet the disparate impact of **Due Process** on African Americans in Indiana is only too evident in our prisons and **Death Row.**

The 15th Amendment articulates the right to vote, however we know that it took another 75 years and another amendment for women to gain what was lawfully theirs. The 1965 Voting Rights Act, which has to be renewed every seven years, also had to be enacted to thwart the voting abuses against African Americans, and it was finally put into law January 1, 1995—45 years after women's suffrage was embedded into the Constitution.

What does this have to do with affirmative action? Only that these amendments were accepted as the law of the land. The reality, however, was that such laws made to correct inequities were and are repudiated openly with impunity.

## Assessment for the Future

Many elected leaders at the national and local level do not understand what affirmative action is about and speak out of ignorance. Affirmative action is about opportunityopportunity to those whose heritage is servitude and hopelessness; opportunity to those whose skin color, ethnic background, or gender make them compete from an inferior position due to prejudice; opportunity for those culturally and socially ostracized.

Some of the elected officials attacking affirmative action include black legislators who take "conservative" points of view and promote a color-blind alternative to affirmative action. These representatives would do well to remember the corrective action that affirmative action has brought to many in the minority community. It may not have done everything, but without affirmative action there would not be the contrast observed in today's workplace and in institutions of higher learning. Without affirmative action there would not be the number of minorities and women working today in the skilled trades. Without affirmative action there would not be the visible number of minorities and women seen in the media on television and in the movies. Without affirmative action there would not be the number of minorities and women working in professional and managerial positions.

But affirmative action is not perfect. It has weaknesses. And some use these to inflame existing racial and ethnic tensions. These attacks have been relentless and so distorted the real policy that today the very term "affirmative action" is a bad word. It stands alongside other lightening rod words in this society—"religion," "politics," "abortion," "same sex relations,"—as words that evoke strong, often negative, emotions.

Affirmative action is simply the active effort to get past our prejudices. Affirmative action asks the decision makers to make the positive effort to ensure that unexamined biases are not eliminating women and individuals of different races and ethnic groups from employment and admission opportunities for reasons other than their qualifications.

But calling this effort "affirmative action" castigates these efforts with negative connotations. So we need to change the wording to keep the concept viable. We can call it "Acting Fairly" or

"Good Business Practices" to which those who have accepted affirmative action believe that is what it is anyway.

## A Note on Higher Education

It is my experience that jobs in the future will only be available to those who are educated. Those among us who are poor, minorities, women—particularly young single mothers—, and persons on fixed incomes who have not received education and training will not be a part of the labor force. The loss of these individuals from the labor force affects us all. They are not payees into the social security system, they are not taxpayers, they are not producers. Giving every individual a full option in the work force is an issue this society must face.

Yet the State of Indiana lags far behind virtually every other State in the Nation in having its citizens educated beyond secondary school. Clyde Engler, who has just recently resigned from the State of Indiana Higher Education Commission, indicated to the presidents of public and private institutions of higher education in Indiana that it would take this State until the year 2020 to get Indiana to the national median level of higher education. In this State, we would need to have 250,000 additional people with bachelor's degrees to reach the national average. Indiana is now challenging Mississippi to be the last ranked State in the educational achievement levels of its citizens.

Adding to the general malaise in educational opportunity in this State is the additional encumbrance borne by minorities. The civil rights literature, pro and con, continues to point out the strides in education made by minorities. However, a concomitant reality is that public and private schools in this State are not dedicated to the poor, African Americans, minorities or the adult learner unless they are the elite student.

In Indiana, we have Core 40 which sets up two tracks in the high schools. One is for vocational programs and the other for college. The net result of this process is that many persons, especially the poor, the African Americans, and minorities are tracked out of higher education opportunities, effectively shut out of college with the loss of future employment options.

## Final Question

If affirmative action is the right thing to do, are we who have worked so hard and long to get what little we have gained, willing to change words and approaches and partner with the few for the long term?

I know Indiana people to be good, but we are slow learners. Sometimes we are quite brusk, but we are worth all the struggle.

We do not need any more laws, in fact some may need to be taken off. But we need to use the existing laws to create the goodwill between people in all institutions that exemplifies a faithfulness to the Constitution and the laws of Indiana.

Corrective action, laws, penalties, and threats are not the ultimate future and success for an equal playing ground program. There are many persons who responded to the law in the first place, who adopted the program as the right way of doing things. These people need to be rewarded with some kind of tax relief and formal acknowledgement by the government.

Businesses are often honored by community organizations for doing good, and they appreciate the recognition and respond to such incentives as it is good business. Similarly, businesses that take the extra step to correct long term problems related to civil rights would welcome the annual recognition by the United States Commission on Civil Rights and other governmental agencies. It would be very American and good business.

There are many people who care about justice in the workplace, but we must mobilize them and build on what we have for the future. $F=CP^2$ (Future is change x possibilities x probabilities). This axiom holds true for affirmative action also.

# Affirmative Action Controversy

**By Jacqueline Hall LaGrone**

Affirmative action has become one of the top five controversial subjects in our country. It became a law from an executive order of the President of the United States. Numerous historical events that took place in the 1950s and 1960s sent a call throughout this country and to its leaders that the country was facing a dark and unhealthy future. It became very disturbing, especially to those leaders with a vision and a moral conscious in the tradition of their Judeo-Christian faiths.

The economic base was designed and tilted to give the white males control of the country's purse strings. They had the power to determine where others would work, where others would live, and how they were able to financially take care of their families. Jobs with lucrative salaries or wages were not open to all Americans.

The Civil Rights Act of 1964, as amended, had eased some of the pain, but it only addressed and covered fairness in entry level jobs with little possibility for upward mobility. Minorities were legally classified as African Americans, Asian Americans, the physically handicapped, and other ethnic groups. White females were also covered as a protected class.

White females could be seen occupying jobs as secretaries, telephone operators, sales ladies, waitresses, etc. However, minority groups were confronted by employment directors with a message that they need not apply for the above mentioned "white women's" jobs. These jobs did not yield very attractive paychecks at the time either. Jobs as school teachers and nurses were available to both races for those who were fortunate enough to obtain a college degree. Even if they became school teachers and nurses, minorities were primarily placed in segregated institutions.

There were religious and socially conscious groups that were organized to address the problems of segregation in various areas, and the small amount of capital available or accessible to minorities. Some of these groups, to name a few, were the National Association for the Advancement of Colored People (NAACP), the Anti Defamation League (ADL), National Council of Negro Women, the National Urban League, the Southern Christian Leadership Council (SCLC), and the National Organization of Women (NOW).

It became a serious concern that minorities and women were not recipients of upper level jobs in such areas as lower, middle, and upper management, and a lack of diversity in pink-collar places of employment. The focus was on the unevenness of a large segment of its citizenry.

With the meeting of the concerned minds of the organized groups and the minds of the leaders who made up the United States Congress, who also had the vision and moral conscious to act wisely, the affirmative action policy under Executive Order 11246 became the law of the land.

Application of the new law was very slow as employers were hesitant to change their hiring practices. At first, isolated areas of application became visible. When contracting jobs for the government, there were provisions for contractors to recruit minorities for a certain percentage of the jobs based upon availability estimates of the relevant minority population and the employer's utilization of minorities in various job categories.

There was also a reluctance to implement the set-aside programs mandated by the government. Some problems arose in that area because most minorities had small businesses, which did not have the capital nor the equipment to make competitive bids. This was due to their having been kept out of the industry for decades due to racism.

Thirty years of affirmative action to help diversify the work place has made life better for a large number of families, resulting in the black middle class. Yet there has not been enough time for these families to realize gains to pass down to others with less resources and education of their own. Hiring practices have not been made so secure by years of affirmative action that it is time to revert to the past. Citizens over the age of 45 can remember those harsh, cold, critical times. A crucial goal for cities and municipalities was to employ minorities in the same percentage as were represented in the population. These goals and timetables were never realized, in part, because of the negative reaction from white males in the work place.

Minorities and women have appreciated the gains they have made that could not have been achieved otherwise. A comfortable and relaxed mood set in because these groups believed the affirmative action laws would not be changed or reversed.

Better education and job training were still encouraged by citizens who cared. Funds became available for college for low and medium income families through scholarships and loans. Many have taken advantage of these opportunities, while a few have abused them. Life in America was improved and setting a good example other countries struggling with the issues of human and civil rights. Minority families and families headed by single women could see some light. Minorities and single women were slowly moving out of the lower income status to a more secure lifestyle.

Well, a new day that is not so inspirational is looming. There are new and more powerful people who are strongly planning the demise of affirmative action and other crucial programs that have aided the low and moderate income families, and those even less fortunate citizens. These individuals and groups are not wasting much time in their haste to abort and dismantle programs that have contributed significantly to the health of our society.

Along with this backlash is the fear among minorities that they are about to lose what they worked so hard to gain. Is it by design that hate and distrust of minority ethnic groups is fostered so that there will be difficulty banding together to work out solutions to combat these new problems that exist?

This author has felt that our children should be exposed to conversational Spanish in the third through eighth grade in the public school system. By doing this, although many of us do not share the same cultural practices, it would make it easier for us to be able to talk with each other. There is a need for us to communicate better—at work, at school, while shopping, and at meetings—when it is in our best interest to do so. We need to understand more about each others' culture. Through dialogue we may find that we have more in common than we think. Regardless of what happens to us in the future, we can deal with our problems better if we stay informed as to what is currently taking place that can affect our lives. We must watch for ploys that are designed to keep us confused and defeats our ability to come together.

An apocryphal saying is pertinent, "There are two things you do not ever want to see made: one is sausage and the other is law." We need to watch law being made, though. We need to discipline ourselves and watch C-Span and other in-depth news programs. We will then learn how laws are made, altered, and aborted.

There is a lot of talk about having lost one generation, but we have lost more than one. In some cases we have lost the children, parents, and grandparents. We cannot rehabilitate our children without programs and counseling for parents and grandparents who have lost their way.

If we seriously reflect on the immediate past history of African Americans and other minority groups, is it feasible to equate the time of their improvement during the affirmative action period as suspiciously close to the time when the escalation of drugs reared its ugly head in minority neighborhoods? Was it just coincidental or was it by design? One might wonder when minorities have such "timely" setbacks throughout their history. It is understandable how an atmosphere of paranoia can cause reactionary behavior by those in targeted areas.

Problems such as drugs, violence, X-rated movies, videos and music are crashing in all around minorities especially. Drugs will be the hardest to get rid of. Drugs, such as alcohol and cocaine, are one of the biggest causes of family deterioration, crime, and death at an early age. It can sabotage all efforts and energies for a better life.

Abolishing affirmative action will certainly speed up the demise of the minority community. The vicious circles of violence, drugs, and hopelessness will seep into every part of the minority community. There are some things even the rich and the powerful and our best educated citizens cannot buy. Two of them are peace and tranquility. Drugs coupled with the dismantling of the affirmative action mandate are two forces that threaten the health of our country—and a mentally healthy society is just as important as a physically healthy society.

One segment that aired on C-Span in August 1995 was a Washington D.C. town hall meeting hosted by Eleanor Holmes Norton, the Washington, D.C., delegate to the United States House of

Representatives. The topic of the meeting was the Washington, D.C. public school system and its leadership. Mayor Marion Barry and House Speaker Newt Gingrich addressed the participants and the audience.

Speaker Gingrich took the podium, spoke a few minutes about the format of the meeting, promising to take the names and addresses of those who aired grievances and get back to them in the near future. Ninety percent of those who spoke were minorities. Near the end of the line was a white man about 50 years old. He stated, "Mr. Gingrich, I have a different type of question for you. You and I have had affirmative action available to us for the past 400 years. I do not think it is fair to cut off African Americans, women, and other minority groups from affirmative action after only 30 years." He stopped there as if he had asked a question and expected an immediate response. Speaker Gingrich only commented that he had his name and address and that the format for him was the same as for the others and did not allow for a response at that time. This author feels it is unfortunate that the audience and those watching on television were deprived of a response from the Speaker on such a vital issue.

# III. Community Perspectives on Affirmative Action

## Myth Versus Reality: A Call for Integrity in the Debate of Affirmative Action

By Cathy J. Cox

"We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." We learn this statement from the Preamble to the Declaration of Independence in our early years in school and are taught to believe it was intended to create a nation where all people had the same opportunities and rights. At a very young age, we are socialized to believe the American myth of the land of equal opportunity, where anyone can succeed based solely on their own merits. Most of us were called to affirm this American mythic faith on a daily basis as we recited "one nation under God, indivisible, with liberty, and justice for all." Unfortunately, we were not taught at the same time that these beautiful proclamations of justice and equality were never intended to apply to African Americans, Native Americans, women or other significant groups in our society.

In the current debate about affirmative action, Senator Jesse Helms called us to reaffirm our faith in the American myth once more when he observed that affirmative action "flies in the face of the merit-based society [envisioned by] our Founding Fathers." I propose, however, that it is precisely because of the type of "merit-based" society which our Founding Fathers envisioned and designed that affirmative action was and continues to be a necessity in our society.

In recent months, affirmative action has become a buzz word in the media, political and business circles, and conventional wisdom predicts that it will be a "wedge issue" in 1996 political campaigns. In the midst of the political and media debates, however, misrepresentations and faulty interpretations have created misunderstandings which are coloring the public perceptions of affirmative action.

With this paper, I propose to examine some of the myths that are distorting and undermining the integrity of the current debate. For the purposes of this paper, the term affirmative action is used to refer to those policies and procedures (in both the public and private sectors) which are designed to aggressively correct and undo past discriminatory and exclusionary practices that have kept ethnic minorities, women, handicapped individuals and Vietnam veterans out of the mainstream of American life. These policies and procedures imply that employers will take "active" steps to seek out, train, educate, hire and promote persons who are qualified and qualifiable to create representative pools which mirror the makeup of the surrounding population and who can then be judged and evaluated on equal footing.

The Civil Rights Act of 1964 and the ensuing executive orders began the movement toward the eradication of discriminatory employment patterns in recruitment, selection, assignment, promotion and salary levels. Now, three decades later, we still find substantial evidence of racist and sexist systems and discriminatory patterns. People of color, women and the disabled still face barriers in obtaining employment, promotions and equal pay. Without the benefit of local, State, and Federal enforcement of the spirit and intent of the laws, and without the protection that these laws provide, the gains made by minorities, women and disabled persons will erode through the intentional and unintentional revival of racist, sexist and other exclusionary policies and practices. A clear example of this can be found in Richmond, Virginia where minority contracting has gone from 35 percent to preaffirmative action

has gone from 35 percent to preaffirmative action levels of 1 percent since the Supreme Court's 1989 *City of Richmond v. J.A. Croson Co.* decision applying a strict scrutiny standard to contractor set-aside programs at the State and local level.[1]

One of the myths about affirmative action which abounds in the contemporary debate is that special advantages given to people of color and women result in the hiring and promotion of unqualified people. The reality is that nothing in the law or the Executive Orders suggests or requires that unqualified individuals should be hired. Affirmative action does, however, require careful scrutiny to make sure that qualifications are pertinent and that unreal or artificial requirements, which have nothing to do with job performance, are not applied.

Much of the affirmative action debate has also centered around the concept of quotas. In reality, there are few quotas or fixed percentages of benefits reserved for women or people of color. In fact, neither voluntary nor governmental programs place quotas or set-aside requirements on employers requiring that a certain number of women or people of color be hired or promoted. In most cases, actual quotas or rigid goals for hiring and promotions are only enforced in cases where there are proven past discriminatory practices as a means to correct such injustices. Otherwise, "quotas" is an inaccurate term which is being used to refer to hiring goals and the numerical recognition of the lack of representation of people of color, women and people with disabilities in the total work place and/or division or departments within it. Often, what is being referred to as "quotas" in the contemporary debate are actually measurable objectives toward an employment pattern that is representative of a given community's available work force.

One of the most powerful myths influencing public debate on affirmative action is the assertion that it results in "reverse discrimination" against white males in our society. This myth centers around the idea that the world is full of women and black Americans prospering unfairly at the expense of white males. Although there are cases where the requirements of affirmative action have been misinterpreted by employers and reverse discrimination has occurred, this is truly the exception to the rule. According to this myth, affirmative action has resulted in the systematic oppression of white men.

The opponents of affirmative action say that the preferential consideration and treatment given to women, people of color and those with disabilities is nothing more than a turning of the tables with white males the victims of blatantly discriminatory and prejudicial practices. However, the reality is that white males are 41 percent of the population and 47 percent of the work force but comprise 70 percent of judges; 71 percent of air traffic controllers; 73 percent of lawyers; 75 percent of police detectives and supervisors; 84 percent of construction supervisors; 80 percent of tenured professors; 80 percent of the U.S. House of Representatives; 89 percent of the U.S. Senate; 97 percent of school superintendents; 99.9 percent of professional athletic team owners; 94 percent of fire company supervisors; 95 percent of senior managers; 95 percent of owners of the broadcast industry and 100 percent of U.S. Presidents.

According to recent U.S. Bureau of Labor and Census statistics, women make up 46 percent of the total work force. However, only 5 percent of the most senior executive positions in corporations are held by women. Of all executive, administrative and managerial positions in the private sector 49.4 percent are held by white men, 35.9 percent by white women, 2.3 percent by black men and 2.2 percent by black women. Those jobs with the least security, opportunity for promotion, lowest pay and fewest benefits continue to be overwhelmingly held by women as shown by the fact that women comprise 62 percent of temporary workers and 67 percent of part-time workers. And, 68 percent of people employable with disabilities between the ages of 16 and 64 continue to be unemployed.

According to a 1992 report from the U.S. Bureau of Labor Statistics, the median weekly earning of full-time wage and salary workers continues to show great disparities in income based on

1 488 U.S. 469 (1989).

gender and race. The median weekly income of a white male is $518. That of a white female is $388. For black males the amount is $380; black females $336. Hispanic males earn approximately $345 a week and Hispanic females $303 a week.

In 1992, blacks made up only 17.3 percent of the total police force in an average of the 50 largest U.S. cities and women were only 11.6 percent. On college campuses, whites continued to make up 77 percent of U.S. college enrollment in 4-year colleges and universities in 1992.

In spite of these statistics which show that, while progress has been made for women and people of color, the gender and racial gaps in hiring, promotion and salaries are still substantial; opponents of affirmative action continue to argue white males are now the victims of systematic oppression and there is no longer a need for affirmative action. White males continue to be the beneficiaries of what Senator Helms refers to as the "merit-based society envisioned by our Founding Fathers."

In reality, the United States, from its establishment on, was never intended to be a meritocracy. Since its inception, the United States has given preferential treatment to certain groups of people--primarily white males--including the right to vote, own land, apply for loans and enter institutions of higher learning. Practices and policies that give preferential treatment to targeted groups have actually benefited white males throughout history. From informal practices such as the "good old-boys network" in which contacts, referrals and references tended to promote the hiring and promotion of one's social and racial peers to institutional practices such as the awarding of legacy scholarships which are still commonly offered by most institutions of higher education, white males have benefited from preferential treatment.

In July 1995, President Clinton stated the when he released the results of the affirmative action review of Federal programs:

> 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. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced long standing and persistent discrimination.... When affirmative action is done right, it is flexible, it is fair, and it works.

The President called for the reform of any Federal affirmative action programs that operate on the basis of the myths we have discussed by creating a quota, creating preferences for unqualified individuals, or creating reverse discrimination.

The myths presented above have served to undermine the public conception of affirmative action. These misrepresentations have created and distorted the foundation of the public debate up to now must be corrected if we are to have meaningful discourse about how to create a nation where all people have an equal opportunity to participate in the American dream. Affirmative action is not about giving some people preferential treatment at the expense of others, hiring those who are not qualified or about race counting and quotas. It is about ensuring opportunity for all, giving all people a sense that they can rise to the highest level of their ability. We do not live in a color or gender blind society. Discrimination, stereotyping, sexism, racism, and xenophobia are prevalent in all sectors of our society. These realities go against America's most cherished stated principles of hard work, fair play, equality of opportunity and advancement based on merit. Affirmative action is an attempt to make the promises of the American myth of liberty and justice for all a reality for more than a select few and, in today's society, is still needed.

# Affirmative Recruitment, Hiring and Employment of People With Disabilities

By Nancy E. Griffin

Beginning in the late 1960s and early 1970s a movement known as "Independent Living" began among small groups of citizens with disabilities in the United States. This movement was led, for the first time, by people who experienced significant disabilities who were seeking opportunities to return to their homes and communities from institutions, to become contributing citizens and tax payers in our society. The independent living movement was significantly impacted by other social and civil rights movements of that era such as the black civil rights movement, the women's movement, the growing consumer movement, and the movement toward demedicalization and alternative medicine and health care strategies.

People with disabilities, and our families began to develop a growing sense of identity as a unique community and culture in America—a newly defined, and distinct minority, whose civil and personal rights had until then been uniformly denied, and whose responsibilities had be abrogated by paternalistic care in segregated settings.

As the independent living movement grew, its members began to develop and implement a unique philosophy, calling for radical change in our society. This philosophy simply stated, is that all people, including those with even the most significant disabilities, have the right to maintain control over the activities of their everyday lives, the right to make personal choices from an array of acceptable options, to participate to their fullest abilities in the life of their families and communities, and to enjoy the responsibilities of full citizenship in our nation.

Through persistent advocacy, people in the independent living movement have convinced the United States Congress to passed incremental legislation which empowers and supports this philosophy. This legislation began with the Architectural Barriers Compliance Act in the late 1960s and Title V of the Rehabilitation Act of 1973 which was the first legislation in the world providing civil rights protections for people with disabilities. Over the past two and a half decades additional laws have been passed extending our rights. These include the Education for All Handicapped Children's Act of 1976 (now known as IDEA), Title VII of the Rehabilitation Act in 1978 which established Federal mandates and funding of Centers for Independent Living, the Civil Rights Restoration Act, the Air Carriers Access Act, the Fair Housing Amendments Act, and most notably the Americans with Disabilities Act of 1990—landmark civil rights legislation covering employment, State and local government services, and access to public accommodations and public telecommunications.

## History of Independent Living Centers

Throughout this history of change and empowerment for people with disabilities Congress has recognized that we have continued to experience the highest levels of unemployment and lowest levels of income of any minority group in our nation. As noted earlier, in 1978 Congress established Title VII of the Rehabilitation Act creating the first 10 centers for independent living. These unique organizations were established to begin an effort to address the multiple and complex issues which continued to exclude people with disabilities from full participation in our society. These issues include not only employment, but also access to affordable accessible housing, transportation, education, community-based personal assistance services, and assistive technology to name only a few.

To advance the philosophy of independent living, centers for independent living—now over 300 across the Nation—are required to meet a series of standards in order to access Federal funding. These standards basically challenge centers for independent living to demonstrate models for successful integration, employment and empowerment of all citizens with disabilities.

Centers must be nonprofit and community based, so each one is driven by a locally defined mission to address critical issues identified by members of its own community. Centers may not operate congregate residential programs in order to enhance integration into the community.

Most importantly for this discussion, centers for independent living must maintain "consumer control." "Consumer" is the term used to refer to the customers or our services—people of all ages who experience one or more significant disabling conditions, regardless of the existence any one specific diagnosis. This requirement means that centers must maintain a majority of people with diverse disabilities on their Boards of Directors, a majority of the management staff who are people with disabilities, and a majority of the balance of staff who experience diverse significant disabilities.

## Employment Implications

As I am sure you can imagine, these requirements along with our philosophy have led centers for independent living to create and implement aggressive affirmative action policies and practices in the recruitment, hiring, and employment of our staff and volunteers. I will now share with you some of the strategies centers for independent living have implemented to meet these philosophical and legislative directives.

## Recruitment

Affirmative action in recruitment can be challenging when an organization is seeking employees with disabilities, since these individuals are often excluded from the mainstream employment services, advanced education and the usual employment networking opportunities from which nondisabled individuals frequently benefit. To offset these obstacles centers for independent living have utilized a variety of recruitment strategies.

First of all we analyze our job requirements based on necessary competencies and personal experience, at least as much as on educational degrees or employment history. Centers utilize nontraditional recruitment networks, including our own consumers and past customers, other organizations serving people with disabilities, community and neighborhood organizations such as churches, social and educational clubs, youth organizations, disability related support groups, and such publications as nursing home newsletters and minority newspapers.

Most recently, centers for independent living have begun to expand recruitment and publication of employment opportunities through local, State and national electronic bulletin boards and the internet. I anticipate that this will become an increasingly effective recruitment tool as technology becomes more and more accessible to all members of our society.

## Hiring

Since centers for independent living are already employers of a significant number of individuals who experience a wide variety of disabling conditions, we are rarely intimidated or put off by applicants with disabilities. As people with disabilities we know all too well the myths and fears under which too many employers still labor when faced with an applicant who has a disability. We also have considerable insight and understanding of the capabilities offered by people with even the most significant disabilities which may not be as obvious to nondisabled employers.

Because of this unique perspective, centers for independent living are also likely to be very aware of the civil rights of applicants and less likely to base our judgement of qualifications on personal appearance, communication style or ability, or paper credentials. In fact, I have often found myself in the position as an interviewer, or having to redirect job applicants' responses to avoid unnecessary discussion of irrelevant disability-related information. What I am after is the applicants abilities, experience and willingness to strive for achievement. These are the qualities I believe most employers are seeking in their employees, although many still have difficulty in looking beyond "appearances" whether that be based on race, sex, age, ethnicity or disability.

Also due to our personal and employment experience, centers for independent living have well developed strategies and resources for providing reasonable accommodations in the hiring process. All of our job announcements are available in alternative formats (braille, large print, cassette tape, computer disc, etc.) upon request; applicants are notified of their right to accommodations throughout the application and interview process, and we have developed skills and resources to identify and/or negotiate varied accommodations with each individual applicant. (Accommodations may include extra time to complete an exam or application, provision of readers or scribes, interpreters, and alternate format materials.)

Let me be clear that this is not always an easy experience. As with any new effort, trial and error

may be necessary, and the first attempt may not be wholly successful. However, we have found that relying on the experience and expertise of the applicant in defining his/her own accommodation needs most often leads to a satisfying and successful outcome.

## Employment

As you may well imagine, centers for independent living are often fairly unusual work places in some ways. Obviously, centers must be models of accessibility in terms of the built environment, and we provide many and diverse adaptive workstations, technology aides, and assistive devices to enhance the productivity of our employees. In addition, we have become quite adept at designing effective means of communications among staff, consumers and the public.

Once again, we rely heavily upon the knowledge and experience of our employees in the selection, design and implementation of reasonable accommodations. Frequently, this approach allows us to use low-tech, inexpensive alternatives, many of which are constructed or created by our own staff or volunteers from the community. However, we also stand by the commitment to purchase or provide whatever accommodations any individual employee may reasonably need to establish or maintain productive employment, within the limitations of our budgetary constraints. (Please note that in the ten years in which IRCIL has been in operation, cost has never become a restraint in provision of any accommodations to an employee.)

Since the majority of our employees do experience a variety of disabling conditions and impairments, we also rely a great deal on team work, and must work together to assure that one person's accommodation does not become a barrier to his/her coworkers.

As an example, one of our employees experiences a progressive neuromuscular disorder which impairs her ability to maintain consistent body temperature, especially during cold weather. She requested that the thermostat be set two degrees higher throughout the office during winter months. We also had an employee who experiences an uncontrolled seizure disorder which is exacerbated by elevated temperature, and an uneven temperature control system which provided a difference of between five and ten degrees from one area of the office to another.

After discussions with both employees, we decided to provide a high output space heater for one who was cold, (cost, about $40) with no adjustment in the office thermostat to assure the highest functional ability for the other employee. Now, our "cold employee" keeps her individual office at a temperature of approximately 82 degrees while the rest of us remain at a comfortable 72 degrees.

Finally, here are a few brief descriptions of the limitations experienced by some of the employees of centers for independent living, and a sampling of the accommodations which have been provided to maximize their productivity.

- A job developer who is blind uses a personal Kerzweil reader to keep up with his mail, read the want ads and professional journals, and assist consumers in developing effective resumes. ($2,500)
- An information and referral specialist who experiences quadriplegia worked with two other employees to design a computer and library workstation which is elevated to comfortable height for him, and has no obstructions below the desk top to impede his movement in a power wheelchair. ($50)
- A receptionist who has spina bifida uses a small plastic foot stool to assist her in maintaining balance at her desk as she swivels between computer, telephone and greeting the public. ($10)
- A program manager who has HIV works a self-defined, flexible schedule (including any of the 24 hours in a day) to maximize her productivity and avoid excess fatigue. (no cost)
- A supervisor who is blind developed an interoffice e-mail system via modems on a computer, with his existing voice output software, to communicate with two direct care staff workers who are deaf and use sign language. ($500)
- A person who experiences bipolar disorder has negotiated a "cueing" system with a coworker to alert her at times when her behavior indicates a need for adjustment in her medication regime. (no cost)
- A male employee who experiences traumatic brain injury resulting in loss of short term memory and attention deficits "shares" an

administrative assistant position with a person who has limited vision. Together they conduct all of the functions of the administrative assistant and provide personal assistance services to the agency director who has quadriplegia, including assistance during travel.

These are only a few of the many example of successful accommodations leading to productive employment of people with varied significant disabilities. Through affirmative recruitment and hiring, followed by ongoing provision of reasonable accommodations centers for independent living across the United States continued to demonstrate that employees with disabilities are qualified, capable and productive employees. Any employer facing the realities of our nation's shrinking work force would benefit from affirmative hiring of this untapped resource.

# Affirmative Action—A Sensible Tool

**By Sam H. Jones**

Indiana—a State that has an ugly historical legacy of racism, intolerance and poor race relations—has made some progress. Indeed in the last decade or two under several governorships, a level of sensitivity and understanding of the importance of affirmative action compliances, strategies, and goals that increase opportunities for qualified African Americans and minorities has been evident. Progress has been made but more is needed.

The Indianapolis Urban League was founded in the Fall of 1965 as nonprofit, nonpartisan, interracial community-based social service/civil rights organization. Our local affiliate is one of 114 affiliates across the Nation that is affiliated with the National Urban League, now in its 86th year. The Indianapolis affiliate is one of six Urban Leagues in Indiana and is funded by the United Way of Greater Indianapolis, individuals, organizations, businesses, and government bodies.

The mission of the Indianapolis Urban League is to assist African Americans in achieving social and economic equality. The Indianapolis Urban League implements its mission through advocacy, "bridge building" among the races, direct program services, technical assistance, and factfinding information dissemination.

There can be no doubt that the 1954 *Brown v. Board of Education* decision and the *Civil Rights Act of 1964* have fundamentally changed civil rights and social justice in America. In theory, at least, African Americans now enjoy the same citizenship rights and protections as white Americans. While strides have been mae, the reality is that racism and discrimination are still very much a part of the body politic.

Since the 1980s, affirmative action remedies, a tool used to make opportunities available to minorities for some 30 years, have been under attack. Those who are against affirmative action complain that it uses quotas and encourages discrimination against other groups.

Affirmative action opponents further argue that it is divisive and victimizes others, namely white males. In addition, they state that American society is now "color-blind" in respect to the treatment of minority citizens. Those who wish to end affirmative action state that discrimination occurs *occasionally* but that offenders will *voluntarily* correct themselves. They say there is no longer any need for affirmative measures of redress, nor for aggressive enforcement activity.

If our society were truly open and the playing field of opportunities level, then perhaps such tools to rectify the historical evils of individual and institutional racism and discrimination would not be needed. However, reality presents a much different picture.

What would our schools look like, what would our work force look like, and what about voting rights and housing, if affirmative relief tools had not been in place? African Americans, other minorities and women would indeed be in their "place" out of sight and mind, excluded and unemployed.

Though critics argue minority groups are receiving special treatment, they somehow ignore that in far too many cases the glass is already full and the ceiling already in place. The playing field is not level, it is still tilted. Proponents of affirmative action do not talk in terms of numbers but in terms of reasonable goals, percentages, timetables, and opportunities.

In rather tenuous economic times when far too many workers not only are concerned with stagnant wages, but who are even more fearful of losing their jobs for whatever reasons—the politics of blame and division fuel these anxieties. Affirmative action as it relates too African Americans, women, and other minorities is the target of unfounded truths. Such rhetoric implies that *these people are not qualified* and *they are getting "your" jobs.*

Unfortunately these attitudes and tactics will be reflected in this year's Presidential campaign. Already we have witnessed several States who have overturned affirmative action programs. There are some running for political offices across Indiana who would like this to occur as well.

Let the record show that they will be in for a major battle. In addition, those who are opposed to affirmative action should be aware of the nu-

merous corporations here and across the Nation that support this remedy. Former Mayor of Indianapolis, William H. Hudnut, and a number of proponents of affirmative action placed their political and social lives on the line as they endorsed affirmative action remedies as one of the tools to address the ugly legacy of racism and discrimination in the Indianapolis Fire and Police department.

Should affirmative action policies be reviewed? Of course. But eliminated? No. What else can we put in its place—good faith?

Can such divisive, bitter, and often racist oriented rhetoric fuel hate crimes as well as violent opposition the to the Federal Government, i.e., assaults on government officials and terrorist acts as in the Oklahoma city bombing? Is there a connection—we believe so!

The gains made by African Americans and other minorities must not be eroded nor should society turn back to the "good old days." The 1965 Voting Rights Act should be enforced consistently and without qualifications. Executive Order 11246, which requires minority employment goals and timetables by Federal contractors, should be maintained and strongly enforced. In addition, the Fair Housing Act of 1968 should be enforced with its "effects" tests in place.

Contrary to popular belief, Indiana and this Nation still have a long way to go in the area of civil rights and social justice. Indeed the Urban League receives a growing number of complaints from clients about discrimination practices on a daily basis regarding hiring practices and promotions and even blatant racist behavior.

The Indianapolis Urban League remains firmly committed to the cause of racial and social justice and will continue to press the case in those areas where it is still lacking. The Urban League also recommends that:

* The 1989 U.S. Supreme Court decision in the City of Richmond V. Croson, which attacked the validity of minority set-aside programs, should be reversed.

* The Equal Remedies Act, which has been put forward to eliminate caps on damages awarded for employment discrimination under Title VII of the 1964 Civil Rights Act, should be passed.

* Legislation should be implemented to counteract the U.S. Supreme Court decision in St. Mary;s Honor Center v. Hicks, and to shift the burden of proof in employment discrimination cases back to the employer.

Last year a front page article in the *Indianapolis Star* entitled, "Black families income hasn't grown since '69," painted a troubling picture. According to census data, the real income of black families in 1993 had not changed from 1969. One-third of all African American families still live in poverty, and blacks earn less than their white counterparts in all jobs at all levels, including those who are college educated. This picture would reflect a higher percentage of blacks in poverty and a much smaller black middle class if affirmative action remedies and antidiscrimination redress had not been instituted three decades ago.

Dr. Margaret C. Simms, research director at the Joint Center for Political and Economic Studies in Washington, D.C., in the article remarked, "This portrays the black population doing all the right things—going to school, going to work, trying to fulfill the American dream. But not getting the same reward."

An Urban Institute hiring study in 1995 found that 20 percent of the time blacks did not advance as far as whites in the hiring process, and of those completing the hiring process blacks were denied jobs 15 percent of the time compared to whites with equal qualifications and status.

These facts demonstrate the continuing need for affirmative action and for the legal recourse that guarantees fairness and remedies against discrimination. The facts also demonstrate that affirmative action has worked and that women and minorities have made significant gains in the workplace.

The success and progress gained by African Americans, which includes self-development and self-help initiatives, are more likely to be realized when these efforts are undergirded by strong public policy support.

The late Dr. Martin Luther King, Jr., said 30 years ago that, "You cannot legislate morality, but you can regulate behavior." The late director of the National Urban League, Whitney M. Young, Jr., said, "Our goal must be to move beyond racism and create an open society; a society in which

each human being can flourish and develop to the maximum of his/her God-given potential; a society in which ethnic and cultural differences are not stifled for monotonous conformity; a pluralistic society, alive, creative, and open to the marvel of self-discovery."

# Practice Versus Politics, A Focus on Affirmative Action

By Alvin L. Pierce

The current debate over affirmative action in the country is based more on politics than on a sincere desire to measure and evaluate its effectiveness as a program. Since affirmative action is such a divisive issue in America, politicians have used it as a tool to gain political advantage over rivals when advantageous to do so. The debate tends to focus on social issues, specifically, how affirmative action has not solved the problem of poverty and lower educational attainment among minority groups. In addition, too much attention is focused on how a few nonminorities have suffered what they perceived to have been reverse discrimination. Politicians have used incomplete, slanted information to distort the true intentions and outcomes of affirmative action programs, while stirring up the negative, sometimes racist passions of the uninformed. On the other hand, little attention has been given to the raw statistics used by Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), to enforce Executive Order 11246.

The statistics should reveal good faith efforts and measurable progress contractor's across this nation have made in accomplishing the objectives of affirmative action. This information should also reveal the major efforts beyond compliance many major corporations, and educational institutions have made to promote the value of diversity in the work place and in higher education. Furthermore, not much attention is given to the fact that most major corporations in America have embraced affirmative action as a viable method for achieving diversity in the work place. These efforts have produced more minority and female, CEO's, board members, doctors, lawyers, business managers, teachers, skilled laborers, technicians etc. than would have been created without affirmative action.

Affirmative action programs can also claim major responsibility for assisting not only minorities and females but also veterans, disabled veterans, and disabled individuals in finding meaningful , productive work in spite of major challenges. This fact alone disproves much of the rhetoric on which opponents of affirmative base their entire argument. Affirmative action has served to help all Americans have the opportunity to be contributing members of society.

If we can move the analysis away from mere political maneuvering, campaigns, and politicians in general, perhaps a fair evaluation of affirmative action can occur. The analysis should occur among practitioners working in the field of affirmative action, corporate, community, and educational leaders. In addition, those who have benefitted as well as those who feel they have suffered because of affirmative action should participate in this analysis. And finally, the OFCCP should participate in this analysis due to the agency's role in enforcing and evaluating affirmative action programs over the years.

There should be an assessment of the current situation in order to determine a desired future state. Next, the gaps should be identified and an action plan developed. Any attempts to merely get rid of affirmative action without this type of analysis is suspect, and irresponsible. Practitioners have played a major role in administering affirmative action programs over the years and have played a key role in the successes of affirmative action. Their knowledge and experience should be tapped.

Most practitioners in the field of affirmative action are usually caught between advocacy and compliance. While most practitioners are charged with developing, promoting, monitoring, and enforcing affirmative action programs within their organizations, they are typically the same individuals responsible for limiting the organizations' exposure and liability during compliance audits, charges, complaints, and legal actions. This dual role usually requires the practitioner to play both the advocate/change agent who addresses internal issues, and the company spokesperson/legal counsel when faced with outside scrutiny. Most practitioners know their organization's shortcomings and realize that their positions in many cases would not exit if there was no risk of legal exposure due to laws, executive orders, and compliance audits. These same practitioners, however, have in many cases become valuable change

agents in their organizations due to their knowledge of the organization and its employees. Without measurable goals and timetables many organizations would have never moved from mere compliance to seeing affirmative action and diversity as a part of the organization's overall business plan.

Most organizations develop a mission, vision, and a set of goals. Those goals that are deemed important usually have some sort of time table and measurement established. The architects of our current day affirmative action programs were strategic in realizing that goals can only be achieved through specific, measurable, benchmarks. In reality, measurable standards enforceable by law has been the primary leverage most practitioners have used to initially get attention for the cause of affirmative action within their organizations. A presentation of the statistics usually provided an accurate assessment of the organization. Presenting these statistics allowed the discussion in most organizations to move from just compliance to discussions of equal opportunity for all employees, and to finding ways to remove barriers which prohibit any employee from being successful. The analysis of the data has assisted most organizations in identifying problem areas which affect all employees.

Practitioners would perhaps agree that statistics, timetables, and goals are good as long as they are reasonable, and enforced only after appropriate notice, education, and technical assistance from the agency charged with enforcement. Organizations who have demonstrated compliance with regulations in the past should be able to continue their efforts free from continuous, strict, adversarial audits from the OFCCP. A schedule of periodic reviews to provide technical assistance and check compliance should be negotiated between the agency and organization. In addition, there should be continuous efforts to simplify reporting and statistical requirements. These type of changes would allow the OFCCP to focus more of its efforts and resources on those organizations who are out of compliance.

Affirmative action has been good for America. It's about economics! Arthur Fletcher, former chair of the United States Commission on Civil Rights and author of the *1969 Revised Philadelphia Plan*, which shifted voluntary affirmative action programs to enforceable mandated programs, feels affirmative action can be flexible and change. In his video, *The Real Truth*, he states that his original intent in developing enforceable standards was to deal with "economic discrimination versus social acceptance." Fletcher stressed that the goal was to increase economic participation of minorities and females in American society. This participation could help a family earn enough money to own a home, provide education for children, pay taxes, buy goods and services, and give to charity. Fletcher clearly states that while his plan was primarily designed to improve the quality of life for affected classes economically, he realized that affirmative action would need to change and be flexible as conditions changed. He feels that using "strict scrutiny" to determine discrimination (statistical analysis) and "narrowly drawn" plans to correct specific instances of discrimination provide the flexibility to meet affirmative action objectives while not penalizing anyone.

While most agree that discrimination has not been eliminated, it is obvious that increased economic participation of minorities and females has benefitted America. This is evident in the continuous growth of minority and women owned businesses. While progress has been made, minorities have yet to arrive. Government should continue to play a role to stop illegal discrimination and promote equal opportunity for all people, enhancing competition for the economic rewards of a free society. This requires that efforts to equal the playing field and/or correct past unchecked discrimination should only stop when the playing field is truly equal and illegal discrimination has been eliminated.

# Affirmative Action: Implications for Indiana

**By Joanne M. Sanders**

*"Women have become so powerful that our independence has been lost in our homes and is being trampled and stamped underfoot in public." Cato, 195 BC*

By definition, affirmative action is described as a measure or strategy—beyond simple discontinuation of discrimination—undertaken to correct, compensate or prevent discriminatory practices. All presidents since the Roosevelt administration have invoked executive orders which address issues of systemic discrimination, particularly in employment practices of Federal contractors. Over the years, bipartisan support for such strategies from the legislative and judicial branches of the government has been widely documented. As we know it today, the term "affirmative action" was coined within John F. Kennedy's Executive Order 10925, which urged all Federal contractors to invoke strategies to increase minority representation in their work forces. This was expanded under the Johnson administration through executive orders 11246 and 11375, the former adding goals and timetables and the latter introducing "sex" as a category protected under affirmative action.

To assume that people will do the right thing in hiring practices without the incentive induced by the law is to assume that the past 30 years has brought about a shift in consciousness exceeding any other social shift. A long history of discrimination cannot be reversed in a short period of time. Systemic oppression has been part and parcel of the history of our culture over the past few hundred years. Its roots are drawn from the colonizers' history of patriarchy, thus entrenching it even further.

In 1888, during a speech delivered to the International Council on Women, Elizabeth Cady Stanton said:

> The younger women are starting with greater advantages over us. They have the results of our experience; they have superior opportunities for education; . . . they will have more courage to take rights which belong to them . . . Thus far, women have been mere echoes of men. Our laws and constitutions, our creeds and codes, and the customs of social life are all of masculine origin. The true woman is as yet a dream of the future.

Stanton's words can easily be applied at this juncture. Women of my generation reflect on the strides that we've made and lament the "glass walls and ceilings" which confront and restrict us still! We yearn for a time when our daughters, or worse, our granddaughters will be the first to know some of the freedoms for which we still clamor . . . the right to expect that a perpetrator will pay a consequence for violent behavior, even if we are partnered in marriage . . . the right to assume a job for which we are fully qualified without rumors of having slept our way to the top . . . the right to expect that the qualifications articulated to us for a given position are the same qualifications for all . . . the right to expect that harassment in the workplace of any kind will *not* result in our quietly leaving *our* job while the offender comfortably continues in his . . . and the right to expect equal pay for equal work and comparable pay for comparable work!

Stanton's reference to "masculine origin" provides a means of examining the essence of the issue of equality. "Masculine origin" is reflected in our language which in turn, impacts our process of visualization. Think, for a moment about the term "man" as used in reference to "mankind." How many people in our culture actually read the term "man" and think about the overall population? In my opinion, few. The immediate visual is of a male person. It's no wonder we think in terms of the superiority of males and divisiveness of gender differences. Further, its no wonder that any forward movement on the part of women or people of color in the area of employment or other measures of economic power would serve to create a threat to men.

To understand the current movement to eliminate affirmative action, we will examine it under the influence of "masculine origin." In a nationwide survey compiled by the Yankelovich Monitor, a poll tracked social attitudes over the last twenty years. Subjects were asked to define masculinity. Surprisingly, the definition hasn't fal-

tered over that time period. And it did not include terms like "leader," "athlete," "decisionmaker," or other traits we have learned to assume to be "masculine" by virtue of being born male. Instead, the result reflected an economic framework. Masculinity was defined overwhelmingly as being "a good breadwinner."

In an era where the wages of average middle class men have been eroded through the process of deindustrialization, women and men of color are targeted as robbing those men of opportunities. What the proponents of such rhetoric fail to include in their assessment is the fact that the greatest influx of women into the work force has been a direct result of the impact of the erosion of their spouses' wages. As males lose 27 percent of their buying power, their families lose the ability to make the house payment, the car payment, the tuition payment. Large numbers of women accepted low wage, low skills jobs in order to make up this difference in the family budget.

It is no wonder the employment and training inroads of all women and men of color are perceived as a threat. It is no wonder we have inculcated "myths" of equality as evidence that we have arrived.

## Myths of Equality

Take, for example, the woman who aspires to and eventually attains the position of assistant, be it director, professor, manager. Within months of assuming her position, her authority is systematically undermined by her immediate supervisor, who feels the need to save face with other males on the staff by making it clear to them that her title reflects no authority and all assignments should be taken only from him. The promotion had to be made " . . . or she might cause trouble for the organization. . . . " No credibility is given to her capacity to assume the level of authority or to her overall contribution to the organization. The letterhead reflects her title so that outsiders perceive the organization as progressive. Introductions are made to others, ever inclusive of the title. The overriding message is " . . . we have come so far. . . . "

Another example is the experience of a male of color, recently relocating to this area. He assumes a professorship at a local University. He is very well credentialed and most recently, has successfully defended his Ph.D. dissertation. (There is an irony. His focus of study is the impact of deindustrialization on workers.) As a male of color, he learned early on, the importance an education would play in his destiny. One evening, he leaves his office to teach class. He drives to a lot near the building where his class is held. A young, white woman sits in her car in the lot where he parks. As he exits his car, he hears the click of her door locking. In our culture, a "black man" with a Ph.D. is foremost a "black man."

## Creating Perceptions of Equality

The *Issues Quarterly*, a publication of the National Council for Research on Women, has compiled statistics that they refer to as "Eye Openers" regarding affirmative action (IQ, vol. 1, no. 4). The following poignant facts reflect their statistics:

1. Women currently make up more than half the Nation's work force. Ninety-nine percent of women in the U.S. will work for pay some time during their lives. In 1968, on average, women left work for 10 years after their children were born; in 1987, they left for 6 months.

2. Between 1980 and 1990, the proportion of all managers who are white women grew by about one-third, from 27 to 35 percent, while the proportion who are women of color more than doubled, increasing from 3 to 7 percent.

   In 1990, among full-time salaried managers, only 6.3 percent of white women and 3.6 percent of women of color earned incomes in the top 20 percent.

   In 1992, when 42 percent of all managers were women, only 13 percent of the business experts named in the *New York Times, Wall Street Journal, Fortune* and *Business Week* were women.

3. A 1995 study by *Catalyst* found that 68 percent of the CEOs at America's leading corporations consider recruiting female directors a top priority and 86 percent consider increasing the number of women on their boards as "important."

4. As of March 31, 1995, women or people of color owned a total of 110 banks, or about 1 percent

of all commercial banks. Women alone owned .05 percent of the total.

In 1980, women-owned firms received 0.8 percent of Federal contract awards over $25,000 and 0.9 percent in 1991. In 1993, 1.8 percent of all Federal procurement awards and 1.2 percent of prime contracts went to women-owned businesses.

In 1994, the National Foundation for Women Business Owners found that the 7.7 million women-owned businesses in the US employed 15.5 million people—white people and people of color, including white men—35 percent more than all Fortune 500 companies combined. (In Indiana, women-owned businesses are the fastest growing segment of the private sector, ranking Indiana 13th among the fifty states, in the growth of such businesses.)

5. Between 1987 and 1994, 10,501 race-based reverse discrimination charges were filed by white men and resolved by the EEOC. Of these cases, the EEOC found that only 1,072, or approximately 10 percent, had merit. In 1994 alone, this number fell to 0.2 percent.

   In reverse discrimination cases, filed by either women or men in 1994, the EEOC found in favor of the complainants in 13.2 percent of race-based, 12.7 percent of national origin-based, and 16.6 percent of gender-based cases.

6. In 1966, 2½ million women attended college. In 1975, 3 years after President Nixon signed into law Title IX of the Education Amendments Act, the number of women in college doubled to over 5 million. In 1979, women college students outnumbered men for the first time in U.S. history. Currently, over 8 million women attend college composing 55.1 percent of the total enrollment.

   According to the EEOC, college educated women earn 29 percent less than college educated men and make only $1,950 more per year than high school educated white men.

7. The U.S. Department of Education estimates that only 40 cents of every $1,000 of Federal educational assistance funds minority targeted scholarships.

8. When Richmond, VA suspended its affirmative action programs in 1987, city contracts to minorities dropped from 41.6 percent to 2.2 percent.

   In Los Angeles, where nonwhites makeup two-thirds of the population only 5 percent of every public works dollar goes to minority-owned contractors.

9. In the mid-1990s, white men make up 33 percent of the population. They are:

   - 85 percent of tenured professors;
   - 85 percent of partners in law firms;
   - 80 percent of the U.S. House of Representatives;
   - 90 percent of the U.S. Senate;
   - 95 percent of Fortune 500 CEOs;
   - 97 percent of school superintendents;
   - 99.9 percent of athletic team owners;
   - 100 percent of all U.S. Presidents.

The above articulation can be read as a list of accomplishments over the last 20 years with a few "minor" references to compelling evidence of *some* disparate treatment. Equality? In the language of "masculine origin" perhaps. Major strides? From the perspective of the relative population, the numbers are dismal at best considering the level of effort and struggle. Do the statistics provide a basis for elimination of the law? Let's explore that for a moment.

## Indiana Experiences

I am not denying the strides we have made. I, myself, sit in an office where, 20 years ago, I would have been driven out by the process of in-house "initiation" or "rights of passage." And it is through my own experience that I know the distance we still must travel.

Since entering college and the work force in the late sixties, I have helped to shape the statistics articulated in the *Issues Quarterly*. I received my undergraduate degree in Industrial Management in 1972, a nontraditional track at that time. The jobs I was offered in the early 1970s were "administrative assistant" types (not so nontraditional for that time), even though my education pre-

pared me for the higher paying, professional level jobs. The large majority of these jobs were held by men, (to read, white men) some having the same level of education as mine, others with a high school diploma. At the time, I was married. The compelling argument for such disparate treatment was " . . . the men were predominantly 'heads of families.'" This status was not extended to women in the seventies.

Time marches on and I find myself a divorced, single parent, working two jobs. The compelling argument than shifted to " . . . if only you had 'better' credentials. . . . " So, as a divorced, single parent, working two jobs to make ends meet, I enrolled in a graduate program to attain a masters degree. Imagine the pleasure I now know, *credentialed and* working two jobs.

When aspiring to new challenges, I have been replaced by men with fewer credentials, whose entry level salary exceeded the salary I earned after several years in the position. The compelling argument again shifted to "heads of families." At the time, I was a credentialed, divorced, single parent, working two jobs to make ends meet. My "head of family" status was documented by the IRS in the 1980s but continued to be ignored or denied in employment practices.

The shift of consciousness I referred to earlier has *not* been reflected in my experience. In fact, the "heads of families" argument leads me to believe that the *substantive* shift is more in keeping with a backlash or reversal of consciousness. And, I regrettably report that my experience is not isolated. Women throughout the state of Indiana experience all forms of discrimination, sometimes blatant, more often subtle. The experiences are influenced by the projection and spin delivered by the media. Stories like " . . . the EEOC Reports Sexual Harassment is Declining . . . or Women Closing the Wage Gap . . . " influence how far an individual will go in pressing a discrimination claim. Throw in the overall economic environment, where asking for a raise ranks as one of the top three most fearful situations people find themselves in, and it's not much of a stretch to understand the fear associated with standing up for yourself in an already hostile environment.

## In Their Own Words

Many of the discriminatory practices go undetected or unrecognized until the women find themselves in settings where others share their stories. Denial is lifted and they begin to explore their experiences in a different light. The following cases are excerpts of interviews with individuals from various occupations and geographic areas of the state. They illustrate the range of practices from blatant to subtle.

One very capable woman reflects on her experience working for a not-for-profit project overseen by a local school system. When interviewing for a position, questions arose concerning her spouse's employer. In her community, the mere mention of the employer renders certain assumptions about the caliber of the compensation package available to her spouse. Her potential employer failed to share information with her regarding benefits available to her through the new employer's system, making the assumption that she was already covered under her spouse's package.

Shortly after assuming the position, she discovered that the benefits should have been made available to her as well as to others in the organization. She pursued the matter internally to no avail. She pressed on. No resolution. Eventually, her position was no longer funded. She pursued through litigation. The advice from her attorney was often biased because of her gender and her marital status. So to, the advice from the judge overseeing the case. She underwent the double whammy of pursuing a gender discrimination case and experiencing gender discrimination in the legal system. After two years (Spring 1996), the case was settled out of court, with the usual disclaimers that this was not an admission of guilt and, of course, no terms of the settlement were to be made public.

Another woman in a factory setting talks about her experience pursuing an apprenticeship. When first applying (1989) she was given a list of tasks she needed to complete in order to qualify for the three year program. She diligently followed up on each task and completed them long before the requisite deadlines. When submitting the necessary documentation to the committee, another list of prerequisites were handed to her with corresponding deadlines for completion. She persevered, met the deadlines,

and the process began again. She continued to persevere. The standards she was required to meet were *never* imposed on any of the males in the plant. Eventually her perseverance exceeded their patience and she acquired her journey level status (Fall 1994). She is now the first woman in the plant to hold a skilled maintenance position.

In 1992, two highly skilled, medical research physicians relocate to our state from a very reputable east coast research hospital. They are involved in cutting edge, state of the art, oncology research. They assume their new positions with the enthusiasm we all know when embarking on new challenges. Within months, their endeavors are restricted and they allege that they were treated differently because of their gender. They are relegated to "looking busy." They confront their supervisor. They are transferred to other departments and notified that they would be fired effective June of 1995. They seek legal recourse by filing a complaint with the EEOC. Upon hearing of the complaint, the institution begins proceedings to dismiss them immediately. Few lawyers care to undertake the case because of the nature of the institution against which they are filing suit. The press buries a small article about the case deep in a noncontroversial section of the local newspaper. No other articles have been printed to date. Only recently, have they acquired the services of an attorney who is genuinely interested in pursuing their case.

I could go on with women from other occupations; the fire fighters who struggle for promotion, the attorneys who are denied partnership tracks because of their gender, the management professionals who don't get beyond "assistant" because of their gender. The advice and services they receive from the legal system falls far short of remedying their situations. To their credit, they have banded together to form a support group which they call the POWS (P----d Off Women). Through this group, they share their successes and endure their failures, providing them the strength they need to persevere through the legal system.

The one resounding message women give throughout the state is that without the support of other women who have "been there," women could not amass the enormous energy required to follow their cases through to resolution. Additionally, the lack of financial resources is the main reason *most* women choose to quietly leave their jobs rather than seek legal remedies. In the case of the woman who was denied benefits, her attorney's fees alone exceeded $40,000. Without the support of her spouse, she could not have endured. Her experience has invigorated her to work on behalf of other women in reforming the legal system and eradicating its discriminatory practices.

As I mentioned earlier, the media spin of our accomplishments erodes public opinion if it is the average person's only source of information. Sexual harassment is a case in point. Although reported over the last several years that it is declining, a recent article in the *Washington Post* describes the " . . . 'largest sexual harassment suit nationwide' since the passage of the Civil Rights Act in 1964" filed against a Mitsubishi plant in Illinois. The case got very little coverage locally but considerable space in the Post. The *Indianapolis Star* today, however, carried a follow-up article about a woman from the same plant who has undertaken a campaign against the EEOC, saying she knows of *no* such behavior in the workplace. Yet, 26 women are included in the class action suit.

Women leave jobs daily because issues of sexual harassment are swept under the rug and problems (to read, perpetrators) are placed in other positions of higher authority and better pay. It's easier to relocate the problem than to address it. Most men with the authority to address harassment can't accept that the behavior goes on or deny that it really is unwelcome.

These cases do not even begin to address the issues of the working poor who are relegated to the lowest paying jobs because, as they traverse employment and training systems, they are confronted by front line workers, themselves the working poor, who are not given the training to enable them to suggest anything but the most traditional job placements. Women and men of color are relegated to food service and health care-related fields that require little or no training, thus committing them to the downward spiral of poverty. Does this constitute the level playing field sought by the legislation? Does this create an environment where employers will do the

right thing, left to their own devices? In my opinion, no.

## Conclusion

As we speak, the oppressor and the oppressed are locked in a dance of behavioral rituals which stymies both. While women and people of color are subjected and subordinated to the structures of power in this country, white men are forced into maintaining that structure. All are dehumanized, diminishing everyone's potential. All the "isms" in our society are interdependent. It's difficult to get at one without stumbling on or over another. What we lose without affirmative action is the full contribution of all women and men of color.

What we also lose as a society beyond the issues of employment is the opportunity for true relationship between women and men—partnership. As long as we are caught up in this dance, we will never know as Cady Stanton said "... the true woman ..." and I would add, the true man.

# IV. Position Statements on Affirmative Action from National Organizations

## 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.

# 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 antidiscrimination 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.

# 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, D.C. 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 above 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

# 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 services. 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**

**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 im-

1 Blue Book Reports, 1985, pp. 123 and 124.

2 *1979 Journal of General Convention*, p. C-133.

3 *1979 Journal of General Convention*, p. C-134.

plementation 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 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]

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4 *1982 Journal of General Convention*, p. C-145.

5 *1985 Journal of General Convention*, p. 161.

6 Ibid., p. 162.

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]

## 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

7 Blue Book Reports, 1988, p. 210.

8 *1988 Journal of General Convention*, pp. 189–90.

9 *Blue Book Reports*, 1991, p. 145.

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.

10 Ibid., p. 146.

11 *1991 Journal of General Convention*, pp. 90 and 540.

12 Ibid., p.382

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# Appendix

## Affirmative Action Papers in the Five Volume Series of 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)
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"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: Where Do We Go From Here?," by Joseph E. Gardner (Illinois).
"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)
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"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).
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"(The) Ambivalent Future of Affirmative Action," by Jonathan L. Entin (Ohio).
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"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).
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"(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).
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"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).
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"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).
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