The Myth of Reverse Race Discrimination: An Historical Perspective

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COMMENT

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In the 1960's, through long summers of racial violence and civil disorders, the disruption of the lives of white America brought home black America's message: discrimination against them, as a class of people, would no longer be tolerated.\(^1\) Theoretically, discrimination ends when all persons are treated equally.\(^2\) In practice, however, the effects of discrimination are far-reaching and the concept of equal treatment is illusory. A black wo/man\(^*\) denied an education or the opportunity to work at some time in the past remains disadvantaged in the present job market where s/he* competes with others not similarly denied. Equal opportunity, therefore, takes on new meaning when viewed in terms of the past as well as the present and the future.\(^3\)

The solution thus far, to the elimination of the present effects of past discrimination, has been termed affirmative action by some and preferential treatment by others. This vehicle for achieving equality has met with resistance from those who feel that while past preference for white America was wrong, present preference for black America constitutes, not a solution to the problem, but the substitution of one evil for another.\(^4\)

This paper will analyze the competing considerations in America's struggle for true equality for all its people. The basic premise upon which the analysis will be made is that it is in the best interest of the country to achieve equality among the races, at every level of American society, as quickly as possible. This author views discrimination and the present effects of past discrimination, as experienced by black America, as an evil facing Americans of every

\(^1\) See National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders (1969) [hereinafter cited as Report on Civil Disorders].

\(^2\) Black's Law Dictionary, (Rev. 4th ed. 1968) defines discrimination as "...a failure to treat all equally."

\(^*\) Editor's Note: Author's use of "wo/man" and "s/he" is to replace the American use of "he" as the universal gender.


color. The sooner this country can rid itself of the evil, the sooner it can be on its way to achieving a decent, orderly society of free wo/men.

Discrimination and Effects of Discrimination Against Blacks Is A Presently Existing Problem Which Must Be Resolved

Discrimination against the black wo/man is a part of America's present as well as a part of its history. Testimony of Harvey Oostdyk, Educational Director of the New York Urban League, before the National Advisory Commission on Civil Disorders, revealed that in the 1960's, while more than 50 per cent of all high school graduates attended college, the comparable figure for disadvantaged high school graduates (many of whom are black) is only 8 per cent. While enrollments of blacks in four year colleges increased by over 170 per cent in the 1960's, their enrollment constitutes only 6.5 per cent although they constitute 12.4 per cent of the college age group nationally. Although educational figures are disturbing, the effects of discrimination are noticeable in even more frightening ways on other levels of society.

President Johnson recognized the link between discrimination and civil disorder when he addressed the nation on June 27, 1967:

The only genuine, long range solution for what has happened lies in an attack—mounted at every level—upon the conditions that breed despair and violence. All of us know what those conditions are: ignorance, discrimination, slums, poverty, disease, not enough jobs.

The following month, President Johnson established the National Advisory Commission on Civil Disorders to answer three critical questions: What happened? Why did it happen? What can be done to prevent it from happening again?

What happened and why it happened were already known. While media coverage exaggerated the event, citizens across the country realized that their cities had been shaken. Examinations of why it

5 REPORT ON CIVIL DISORDERS, supra note 1, at 250.

6 Peterson, College Admissions Quotas: Time to Decide If Whites are Victimized, N. Y. Times, November 25, 1973, at E9, col. 1.

7 E.g., National Prisoner Statistics No. 42, Executions, 1930-1967, at 10-11 (1968), reveals that 53 percent of those persons actually executed for conviction of capital offenses are non-white, compared to the 11 per cent of non-whites in the total population. Justice Douglas in Furman v. Georgia, 408 U.S. 238, 250-51 (1972) discusses ethnic disparity in final dispositions for capital crimes: "In several instances where a white and a Negro were co-defendants, who, under Texas law were given separate trials, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty."

8 Address by Lyndon Baines Johnson to the Nation, June 27, 1967.

9 REPORT ON CIVIL DISORDERS, supra Note 1, at 1.

10 Id. at 201-213.
happened revealed, or rather confirmed, that the black experience in America left much to be desired. The incidents which triggered the riots were symptoms, not causes. The causes ran deep into the daily lives of blacks in cities North and South. Living conditions were only an aspect of the frustration and despair that led to the civil disorders of the sixties and while basic economics was obviously a motivating factor, the alienation of the black person from the protective rewards of a law and order society made civil disorders inevitable. While it is not the purpose of this article to examine the morality of racial violence and civil disorder, it is a subject which should not be totally ignored.

Left to be answered was the question of prevention. The President had recognized the obvious in his June 27, 1967 address: elimination of the causes. The National Advisory Commission focused on four areas: employment, education, welfare, and housing. In employment, the Commission stressed the utility of Title VII of the 1964 Civil Rights Act and affirmative action to hire and promote by linking training with enforcement. In the educational arena much emphasis was placed on inequalities in primary and secondary education, but higher education did not escape the Commission’s attention. Recognizing that the inequalities at lower levels of education left college-aged minorities incapable of effective competition, the Commission urged expansion of existing Upward-Bound programs of the Office of Economic Opportunity. Upward-Bound students (students from poverty backgrounds) attend intensive summer sessions on college campuses and receive special assistance during the school year. Recognizing that even expansion of Upward-Bound would be inadequate compensation for previous secondary

11 Id. at 91-145.
12 Id. at 91-93 suggests eight basic causes: pervasive discrimination and segregation, black migration and white exodus, black ghettos, frustrated hopes, legitimation of violence, powerlessness, incitement and encouragement of violence, and the police.
13 Clark & Clark, Denial of Rights to Black Citizens — A Speculation on the Relation to Violence and Civil Disorders, 46 DENVER L.J. 63, 79 (1969) (rioters’ desire to secure goods was immediately apparent).
14 Id.
15 See generally Alioto, The Moral Basis of Violence, 44 NOTRE DAME LAWYER 1045 (1968-69); Mac Guigan, Civil Disobedience and Natural Law, 11 CATH. LAW. 118 (1965); Powell, A Lawyer Looks at Civil Disobedience, 23 WASH. & LEE L. REV. 205 (1966) (the author, Lewis F. Powell, Jr., was appointed to the Supreme Court by President Richard Nixon on December 9, 1971); Smith, The Legitimacy of Civil Disobedience as a Legal Concept, 36 FORDHAM L. REV. 707 (1967-68).
16 See text accompanying note 9 supra.
17 REPORT ON CIVIL DISORDERS, supra note 1, at 229-263.
19 REPORT ON CIVIL DISORDERS, supra note 1, at 234.
20 Id. at 250.
school inequalities, the Commission recommended an additional one year of college preparation for disadvantaged youths.\textsuperscript{21} The Commission did not deal specifically with inequalities in professional and graduate-level education.

The author has proceeded this far without more than a mention of the problem of reverse race discrimination because she feels that these charges must be viewed in their historical perspective rather than in a vacuum of legal thinking. The documentation of past discrimination against minorities serves also to document its counterpart: unfair advantages to non-minorities. If minorities are underrepresented in higher levels of education it is safe to assume that non-minorities are overrepresented. Stated simply, what society has been taking from its minorities, it has been giving to its non-minorities. The reverse discrimination aspect of affirmative action is, in reality, the removal of that benefit which American society has for so long bestowed, without question, upon its privileged classes. The question, viewed in this light, becomes: "Is the removal of a benefit, given for centuries to some at the expense of others, truly a discrimination against that long-privileged class?"

The Prohibition Against Discrimination Protects All Persons

Although black persons have traditionally been on the receiving end of discriminatory practices, the prohibitions against discrimination apply equally to protect all persons. Early thirteenth amendment cases stressed its application to whites as well as Negroes, despite its obvious purpose to eliminate existing Negro slavery.\textsuperscript{22} The earliest civil rights legislation, enacted simultaneously with the thirteenth amendment, stated: "all persons born in the United States . . . are . . . citizens of the United States . . . [and] shall have the same right . . . as is enjoyed by white citizens."\textsuperscript{23} Happily, this choice of words has not been interpreted to deny protection to white citizens. It is, after all, thirteenth amendment legislation and does not use the term "Negro" but rather "all persons" in its delineation of scope.\textsuperscript{24}

Contemporary civil rights legislation dropped the "white citizen" standard, clearly stating, "All persons shall be entitled to . . . full and equal enjoyment . . . without discrimination or segregation

\textsuperscript{21} Id.

\textsuperscript{22} Slaughter House Cases, 83 U.S. 36, 90 (1872); Hodges v. United States, 203 U.S. 1, 16-17 (1906) (the Supreme Court in Jones v. Alfred H. Mayer, 392 U.S. 409 (1968) restricted its overruling of Hodges so as not to include its application of the thirteenth amendment to all races).


\textsuperscript{24} Gressman, \textit{The Unhappy History of Civil Rights Litigation}, 50 MICHI. L. REV. 1323, 1326 (1952).
on the grounds of race, color, religion, or national origin.”

The Higher Education Guidelines of Executive Order No. 11246 state positively:

The nondiscrimination requirements of the Executive Order apply to all persons, whether or not the individual is a member of a conventionally defined “minority group.” In other words, no person may be denied employment or related benefits on grounds of his or her race, color, religion, sex or national origin.

The 88th Congress’ concern over the possibility of its civil rights legislation being interpreted to give preference to previously denied minorities is evidenced by two sections of Title VII: Seniority or merit system — Ability tests and Preferential treatment not required on account of numerical or percentage imbalance.

It is in the application of these principles that the question of reverse race discrimination arises, for Title VII grants affirmative relief. Fashioning such relief in these situations necessitates a balancing of the Act’s express purpose of eliminating discrim-

28 Equal Employment Opportunities Act, 42 U.S.C. §2000e-2(h) (1964). Seniority or merit system; ... Ability tests; ... Norwithstanding any other provision of this title [42 U.S.C. §§2000e - 2000e-17], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work at different locations provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.
29 Equal Employment Opportunities Act, 42 U.S.C. §2000e-2(j) (1964). Preferential treatment not to be granted on account of existing numerical or percentage imbalance. Nothing contained in this subchapter [42 U.S.C. §§2000e - 2000e-17] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 U.S.C. §§2000e - 2000e-17] to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage or persons of any race, color, religion, sex or national origin employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.
30 Equal Employment Opportunities Act, 42 U.S.C. §2000e-5(g) (1964), amended, 86 Stat. 103 (March 1972). Injunctions; Appropriate affirmative action; Equitable relief; ... If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order (Continued on next page)
ination based on race (stated positively: to bring about Equal Employment Opportunity) and the Act's proscription against preferential treatment.

The Problem Areas In Elimination of Discrimination

Bearing in mind the purpose of the Civil Rights Act and the evil against which it is aimed, courts have attempted to apply the spirit of the law in a manner that is equitable to all.\textsuperscript{31} The courts stress their appreciation for the fact that the issue comes before it emotion-packed, dramatically affecting the lives of the parties involved.\textsuperscript{32}

Where not even \textit{de facto} discrimination was proven, a school board's attempt to racially and ethnically balance its faculty with its school distribution, but which made it virtually impossible for "other whites" to obtain employment or re-employment, was held to be "the imposition of one form of racial discrimination in place of another."\textsuperscript{33} In \textit{Auerbach v. African-American Teachers' Association, Inc.},\textsuperscript{34} overcoming effects of previous discrimination was not in issue. The defendant teachers society was fined \$3,500.00 for abusing and ejecting white teachers from a meeting held in the school auditorium. In both cases discrimination against blacks was absent. In \textit{Anderson} the factor played a key role in the court's determination.\textsuperscript{35} In \textit{Auerbach} it was irrelevant. Discrimination against the black wo/man is well documented,\textsuperscript{36} and where discrimination is found courts must rectify the situation.\textsuperscript{37} The approach taken depends, of course, on the facts of each case.

\textit{Continued from preceding page}

such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

\textsuperscript{32}Chance v. Board of Examiners, 458 F.2d 1167, 1178-79 (2nd Cir. 1972).
\textsuperscript{34}356 F.Supp. 1046 (E.D.N.Y. 1973).
\textsuperscript{36}See text accompanying notes 5-15 supra.
Seniority

The effects of past discrimination are perhaps most apparent in seniority situations where benefits are granted to a person who has honestly earned them but denied to a person who, not being hired because of his or her race, was denied even the opportunity to earn them. This situation results in a perpetuation of discrimination. When faced with this problem the court in Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States went beyond the appearance of neutrality. While not allowing white incumbents (who had received their seniority benefits through prior preference) to be bumped from their jobs, the court nonetheless prohibited the defendant from awarding future jobs on the basis of a system which "locks in" prior racial classifications. In Quarles v. Philip Morris, Inc. the court interpreted the allowable bona fide seniority system to be one that incorporated no unnecessary retardation of formerly excluded blacks. What at first blush may appear to be discrimination against whites in the denial of benefits which they earned, can be seen as merely the removal of advantages earned under a system which unconstitutionally discriminated against blacks.

Testing

Testing and job requirements in the hiring process present another area in which whites feel they are now suffering a disadvantage. Tests are attacked by black persons for two reasons: cultural bias and job-unrelatedness. Once a plaintiff establishes a prima facie case of racial discrimination, usually by statistics,
the burden is on the defendant to prove that the test is job-related.\textsuperscript{48} Failure to prove the job-relatedness of the test results in its being abandoned, and along with it go promotional lists of those who have passed the test.\textsuperscript{49} Whites who have "worked diligently for years to pass the . . . examinations and rise to a more responsible job"\textsuperscript{50} find the elimination of promotional lists, on which they have earned a place, to be unfair. Indeed, in \textit{Chance v. Board of Examiners}, one such teacher furnished an "eloquent \textit{amicus} brief and oral argument."\textsuperscript{51} In reaching an admittedly difficult decision, the court considered several factors: denying an injunction against use of the tests would result in continuance of the already determined discrimination; white teachers on the list could serve in acting capacities; minority persons whom the board had placed in acting capacities because of their ability to perform might lose those jobs; and neither the children nor the school system would suffer great harm.\textsuperscript{52} The clearest argument in favor of the injunction and against charges of unfair treatment by whites who had passed an admittedly discriminatory test was that those teachers affected adversely:

\[\ldots\] would not be denied "an equal opportunity in the future to qualify under such examination procedures as are found to be constitutionally permissible."\textsuperscript{53}

\textbf{Paper Qualifications}

Paper qualifications, such as the high school diploma, have likewise been held to have a discriminatory effect on minorities and their use has been prohibited where defendant is unable to demonstrate a relation between the qualification and job performance.\textsuperscript{54} Abandonment under such circumstances operates to remove an unfair advantage previously enjoyed by non-minorities rather than to grant an unfair advantage to unqualified persons. The argument that a wo/man is unqualified because s/he lacks a paper degree or other requirement later found to be an invalid measure of qualification is a contradiction in terms. It is an argument that the \textit{Griggs} court both anticipated and rejected.\textsuperscript{55}

\textsuperscript{49} \textit{Chance} v. Board of Examiners, 458 F.2d 1167, 1176 (1972).
\textsuperscript{50} \textit{Id}.
\textsuperscript{51} \textit{Id}.
\textsuperscript{52} \textit{Id}.
\textsuperscript{55} \textit{Id}. at 428-29.
That the objective of the courts has been to remove artificial barriers rather than lower valid standards is demonstrated in *Castro v. Beecher* and *Spurlock v. United Airlines*. In *Castro* the court upheld a high school diploma requirement for the position of police officer, stressing the police department's need for officers with a high level of education and cited, *inter alia*, the recommendation of the President's Commission on Law Enforcement and Administration of Justice that "The ultimate aim . . . should be that all personnel with general enforcement powers have baccalaureate degrees." In *Spurlock*, requirements of a college degree and a minimum of five hundred flight hours for applicants for the position of flight officer were upheld even though a prima facie case of racial discrimination had been made by plaintiff. The defendant carried its burden by arguing that a college degree evidences an ability to cope with vigorous training and refresher courses. The minimum hours requirement was upheld on the basis of statistical evidence showing a significantly higher failure rate among those with less than the required number of hours.

**Affirmative Relief**

In fashioning affirmative relief against continuation of effects of past discrimination through present seemingly neutral practices, courts have taken a variety of approaches. Each case cited at the appeals level squarely faced the question of reverse race discrimination or minority preference. *Carter v. Gallagher* is most illustrative. The court recognized that the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* held the use of mathematical ratios constitutionally acceptable as a "starting point in the

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56 459 F.2d 725 (1st Cir. 1972).
57 475 F.2d 216 (10th Cir. 1972).
59 *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972).
60 *Id.* at 218-19.
62 Although *Carter* cited several Title VII cases as guiding the final affirmative order, the action was brought under 42 U.S.C. §1981 and is discussed in terms of equal protection rather than anti-preference.
process of shaping a remedy." It was, however, unwilling to approve the district court's absolute preference scheme, viewing it as "a present infringement on those nonminority group persons... equally or superiorly qualified" and as "implementation of one constitutional guarantee by the outright denial of another." Unable to ignore the defendant's past discriminatory hiring policy, the court settled on a "one minority to two nonminority" alternating ratio. The court expressly held that in the absence of validation studies of the tests used by defendant, the conclusion could not be drawn that a minority person (or any person) with a low test score was less qualified than a nonminority person (or any person) with a high test score.

Two dissenting judges felt that both the original and the modified order constituted "employment preferences based on race... prohibited by the Fourteenth Amendment." These judges expressed concern for nonminority applicants with equal or superior qualifications. This position fails to account for the majority court's finding that the tests used by defendants had not been validated and therefore could not be used to determine the relative qualifications of applicants. Faced with this situation and with the knowledge that past discrimination had been practiced openly, the majority court determined its primary function to be the elimination of past discrimination against minorities and "making meaningful in the immediate future the constitutional guarantees against racial discrimination."

The dissenting judges pointed out that present and future applicants are "in no way responsible for past discrimination." While it may be true that none of the individual applicants was directly responsible for the previous discriminatory practices of the instant defendants, it can be said with certainty that white persons in this society have unfairly (although perhaps indirectly) benefited by past racist practices. Opportunities for better and indeed more education as well as employment have been open to them and their families.

65 Id. at 330.
66 Id. at 331.
67 Id.
68 Id. at 332.
69 Id. This is the position taken by the dissenting judge in the original appeals court decision which reversed in toto the district court's absolute preference for twenty minority applicants. The majority opinion discussed at notes 61-66 was delivered on petition for rehearing en banc.
70 See text accompanying note 66 supra. See generally text accompanying notes 44-52 supra.
72 Id. at 332.
These unfair advantages must somehow be equalized unless America is prepared to write off a generation or two of minorities unfortunate enough to have been born before even lip service was paid to the notion of equality of dark-skinned and light-skinned persons.

Perhaps the approach taken by the Chance court, placement of persons in an acting capacity until non-discriminatory job-related tests can be developed, involves less danger of actual reverse discrimination against an individual white applicant than do immediate, permanent appointments. But removing oneself from the intimacy of white individual versus black individual, and looking at the total picture of discrimination against minorities, the conclusion is clear that an overriding consideration or, perhaps, a basic objective in this country must be to provide avenues for minorities to move immediately into the mainstream of American life. That objective cannot be accomplished until minorities are economically secure.

The Case for Higher Education

Employment

Universities and other institutions of higher education are employers as well as educators. As employers, they are subject to the provisions of all pertinent civil rights laws. In addition, those institutions with federal contracts are subject to Executive Order No. 11,246. Conceptually, the Executive Order is much like Title VII. Its proscription against discrimination applies to all persons. It is a violation of the Order for an institution to practice reverse discrimination. It does not require dilution of standards necessary to function so long as the university is able to demonstrate the standard's job-relatedness and there is no requirement that unqualified persons be hired. The main distinction between Title VII and Executive Order No. 11,246 is that while Title VII authorizes affirmative relief where an unlawful employment practice is found, the Executive Order places on every federal contractor an Affirmative Action requirement "to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded." The Order recognizes that unless positive action "to overcome the effects of systematic institutional . . . discrimination" is taken, "a benign neutrality in employment . . . will . . . perpetuate the status
quo ante indefinitely." Although the Executive Order was amended to eliminate discrimination against women as well as minorities, this discussion will concern race discrimination only, and provisions which have application only to discrimination against women will not be discussed.

The university's first obligation is to determine whether "underutilization" of minorities exists; underutilization is defined as "having fewer . . . minorities in a particular job than would reasonably be expected by their availability." It is the university's responsibility to develop specific goals and timetables to overcome all underutilization. Factors involved in projecting a goal are: the extent of the deficiencies, the availability of qualified minorities, and the expected turnover in its workforce. Techniques and procedures to locate qualified members of previously disadvantaged groups must be adopted and existing obstacles (discriminatory standards) must be removed.

Failure to reach goals is not conclusive. However, the university must determine the cause of the failure. Compliance is spoken of in terms of both the letter and spirit of the law, and failure to comply due to conditions somewhat out of the university's control, such as an inaccurate estimate of turnover or a change in the overall employment market or unavailability within the desired group do not constitute non-compliance so long as the record indicates that the affirmative action requirements were followed. The Executive Order distinguishes quotas which are rigid and exclusive measures of performance from goals which are an indicator of probable compliance and achievement.

The Executive Order is critical of the "old-boy" approach to university hiring. While this and other traditional methods are not proscribed by the Order so long as their effects can be mitigated, active recruitment of minorities in both academic and non-academic areas must be undertaken. Previously unexplored channels must be located and used.

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79 Id.
80 Id. at 8 (anti-nepotism policies), at 12 (employment policies relating to pregnancy and childbirth), at 13 (child care leave — makes leave available to men and women on an equal basis), at 14 (child care — which, of course, will improve employment opportunities for men and women within the university structure).
81 Id. at 3.
82 Id.
83 Id. at 3 & 4.
84 Id. at 4.
85 Traditional word-of-mouth notification among personal friends within the profession. Obviously, where a university has discovered underutilization it should not rely upon closed-circuit recruitment processes.
86 Id. at 5 & 6.
All personnel policies and practices must be scrutinized. Recruitment, hiring, placement, promotion, termination, conditions of work, rights, and benefits (salary, leave policies, and fringe benefits) must be applied in a non-discriminatory manner.87 "Clusters" of minorities in certain job classifications or departments is indicative of such discrimination and "appropriate remedies must be afforded those persons previously assigned in such manner.88 Back pay awards as provided for in Title VII, the Equal Pay Act,89 and the National Labor Relations Act90 will be pursued by the Executive Order enforcement agency, the Department of Labor's Office for Civil Rights, where employees were not protected by statute at the time of the violation.91

Admissions

Elimination of employment discrimination on both academic and non-academic levels is, of course, only a part of the picture. Students like to think that the primary purpose of the university is education and, indeed, institutions of higher education were participating in affirmative action admissions programs as early as the 1960's.92 The political and economic climate of America in the 1970's made it inevitable that these programs would come under attack since seats in graduate and professional schools are at a premium and literally thousands of highly qualified would-be lawyers, doctors and dentists are turned away each year.

Attack upon affirmative action programs on the basis of an alleged violation of the equal protection clause of the fourteenth amendment is not new. In the employment arena such attacks were made indirectly through appeal of court-ordered affirmative relief.93 In the educational arena the attack is necessarily launched directly, because educators have instituted affirmative action programs on their own initiative rather than awaiting a court order to do so.

When the Supreme Court granted certiorari in the case of De Funis v. Odegaard94 educators, lawyers and the press predicted a final

87 Id. at 5-13.
88 Id. at 9.
91 HEW, HIGHER EDUCATION GUIDELINES, at 11 (1972).
92 See text accompanying notes 20 and 21 supra.
94 82 Wash. 2d 11, 507 P.2d 1169 (1973), vacated as moot, ___________U.S._________, 42 U.S.L.W. 4578 (U.S. April 12, 1974).
answer to the questions presented by affirmative action programs. Plaintiff, Marco De Funis, had applied to and was rejected by the University of Washington School of Law for the class commencing September 1971. Plaintiff's undergraduate junior-senior grade point average was 3.71, his average LSAT score was 582 (512, 566, 668) and his average writing score was 61 (62, 58, 64). These figures were combined to produce a Predicted First Year Average (PFYA) of 76.33. The policy of the defendant law school was, with few exceptions, to accept all applicants with PFYA's over 77, to reject all applicants with PFYA's under 74.5, and to reserve judgment on those applicants with PFYA's between the two cutoff points. Applicants who indicated that they were Black, Chicano, American Indian, or Filipino escaped this system. Regardless of their PFYA, their applications were considered by members of the Admissions Committee, selected presumably for their experience with minority students. The minority applicants were considered competitively with one another, never with the remaining applicants described above. Thirty-six minority students with lesser grades and scores were admitted in the year that plaintiff was rejected. De Funis alleged he had wrongfully been denied admission to the law school and asked the court to order defendants to admit and enroll him in the class for which he had applied and, if defendants failed to do so, that he recover damages of not less than $50,000.00.\(^{95}\) The trial court ruled that defendant had discriminated against plaintiff in violation of the equal protection clause of the fourteenth amendment and granted injunctive relief. The Supreme Court of Washington, in reversing the superior court, framed a broad issue:

... whether the law school may, in consonance with the equal protection provisions of . . . the federal constitution, consider the racial or ethnic background of applicants as one factor in the selection of students.\(^{96}\)

Support for an affirmative answer to an issue thus stated can be drawn from cases involving elementary and secondary education, which qualified the color-blind requirement of *Brown v. Board of Education*\(^{97}\) to allow color classification for the purpose of achieving equality.\(^{98}\) The question of whether any and all racial classification is per se unconstitutional was answered in the negative; only in-

\(^{95}\) *Id.* at 1172. (Plaintiff also raised questions concerning the University's duty to give preference to state residents. This issue was decided against plaintiff at trial and affirmed on appeal).

\(^{96}\) *Id.* at 1171.

\(^{97}\) 347 U.S. 483 (1954).

vidious racial classification is per se unconstitutional, and the classification here was not invidious. The court considered and rejected the contention that invidious discrimination occurred because plaintiff and others were denied a "benefit." The court was, however, unable to find that the classification was "benign" and proceeded to apply the compelling state interest standard of review to find that the heavy burden had been met.

The defendant’s rationale for its admissions policy was twofold: first, to obtain a reasonable representation from minorities within its classes and second, to increase participation in the legal profession by persons who, having suffered discrimination in the past, are now grossly underrepresented. The court recognized the need for correcting the shortage of minority attorneys, prosecutors, judges, and public officials as an “undeniably compelling state interest.” Considered and rejected was the suggestion that the objective could be accomplished through the less restrictive alternative of improving elementary and secondary education, recognizing that eighteen years after the Brown decision, “minority groups are still grossly underrepresented in law schools.” In concluding that the defendants’ admission policy was not arbitrary and capricious, the court stressed that no minority quota had been established and that only qualified minority applicants were admitted. Less emphasis on conventional standards in the minority admissions process was explained by defendant Odegaard, University President, not as a reduction in law standards but as a recognition that “conventional standards are not good indicators and . . . something more is needed.”

The dissenting justices of the Supreme Court of Washington adhered to the proposition that “Only in individual accomplishment can equality be achieved.” The Chief Justice in dissent doubted

99 82 Wash. 2d 11, 507 P.2d 1179.
100 Id. at 17, 507 P.2d at 1181.
101 Id. at 18, 507 P.2d at 1182.
102 Id. at 19, 507 P.2d at 1184-85.
103 Id. at 20, 507 P.2d at 1175. Not until Sweatt v. Painter, 339 U.S. 629 (1950) was it established that a state could not comply with the equal protection clause by providing separate-but-equal law schools.
104 Id. at 26, 507 P.2d at 1184.
105 Id.
106 Id. at 27, 507 P.2d at 1185. This was established through testimony of the law school dean. The trial court did not find otherwise.
107 Id. at 28, 507 P.2d at 1186. See generally text accompanying notes 44-55 supra.
108 Id. at 28, 507 P.2d at 1197.
the existence of prior racial discrimination\textsuperscript{109} and both justices would have had the majority hold that plaintiff was denied equal protection of the laws.\textsuperscript{110}

After argument, the Supreme Court, in a per curiam decision, declined to rule on the merits of the case, holding that because the plaintiff was in his final quarter of law school the Court could not “consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.”\textsuperscript{111} Justice Brennan with whom Justices Douglas, White and Marshall joined, dissented on the issue of mootness. He reasoned that any number of natural causes could prevent De Funis from completing the quarter and that by respondent’s own admission, the petitioner would then be subject to “some discretionary action by the University on such request [for admission for the remainder of his law school education].”\textsuperscript{112}

In a separate dissenting opinion, Justice Douglas discussed the merits of the case and indicated that he would have vacated the Washington Supreme Court judgment and remanded for a new trial on the issue, inter alia, of whether the LSAT in its present form should be eliminated for racial minority applicants. Calling upon his personal knowledge of cultural bias in admissions tests he reasoned that a school might constitutionally put racial minority applicants into a separate class for the purpose of probing their capacities and potentials so that racial factors do not militate against or in favor of any applicant.

Justice Douglas twice repeated the sentence, “The key to the problem is consideration of such applications in a racially neutral way.”\textsuperscript{113} A racially neutral approach, he conceded, would require more effort on the part of admissions committees than is necessary when LSAT scores and undergraduate grades are the dominant features of selection. But this approach, he emphasized, is required by the equal protection clause. In rejecting the argument that there exists a compelling state interest to justify racial discrimination as practiced under any quota system, Justice Douglas makes it clear that population equivalencies are racial barriers forbidden by the Constitution. Although Justice Douglas would have remanded for new trial, he seems to clearly state that the defendant-respondent’s admissions program constituted a reservation of some proportion of the class for minority students. The fault in the admissions program

\textsuperscript{109} Id. at \textbf{---}, 507 P.2d at 1189.
\textsuperscript{110} Id. at \textbf{---}, 507 P.2d at 1199, 1201.
\textsuperscript{111} DeFunis v. Odegaard, \textbf{---}U.S.\textbf{---}, 42 U.S.L.W. 4578 (U.S. April 23, 1974).
\textsuperscript{112} Id. at 4588.
\textsuperscript{113} Id. at 4584, 4586.
seems to be not that the PFYA was not weighted as heavily for minority students, but that minority students were compared only with one another. Citing cases from Brown to Swann, he concludes:

A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must clearly be disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.114

The substantive issues presented but not reached in De Funis will surely confront the Court in the foreseeable future. The author will not speculate whether the Court will adopt the approach of Justice Douglas. It is clear, however, that if such an approach is adopted, universities will be forced to expand their admissions programs far beyond what they are today, for clearly the equal protection clause will not allow a mere return to the mechanistic approach of the PFYA for all students. The ability of the universities, already struggling for existence, to expand the time and cost involved in their admissions programs was not considered by Justice Douglas and surely could not be used to justify discriminatory admissions. Eventually, universities faced with a command from the Court to select its students in a racially neutral manner could be forced to select students by lot. Justice Douglas allowed for the possibility of reserving a certain number of seats for selection by lot and indicated that the court's inquiry would end when it could be found that there was no "invidious" discrimination in the selection process.

Conclusion

The question of how the people in this country can achieve the values established in our Constitution is not easily answered. For only twenty-four years has a serious effort been made in that direction,115 and a great deal remains to be accomplished. Injustice has been done and injustice must be remedied. If the price for achievement of constitutional values is inconvenience or sacrifice, the price must be paid by Americans of every color. Employment and education can no longer depend on performance on culturally biased tests not proven to be related to the position sought. White Americans can no longer name the game, stack the deck, and then demand, under the guise of equal protection, to walk away with all of the prizes. Justice Hale in his dissent in De Funis doubted that prior racial dis-

114 Id. at 4587.
115 The author views Brown v. Board of Education as the turning point, for the separate-but-equal doctrine was nothing more than self-imposed ignorance of the realities of American life.
This author doubts that the proponents of reverse discrimination, if given the obviously impossible opportunity, would trade her/his place in society for the overprotected, over-advantaged position of the minority person in America today.

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