VICTIM-SPECIFIC REMEDIES: A MYOPIC APPROACH TO DISCRIMINATION

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INTRODUCTION

Affirmative action[1] has been the subject of debate for decades.[2] Is it legal? Does it work? Do we need it? It is no surprise that the conflict remains unresolved. An unusual aspect of today's debate, however, is that the battle lines have become less clearly drawn. Opponents of affirmative action can no longer be dismissed as conservative, overtly racist proponents of white male supremacy and "Jim Crow" segregation. In an Orwellian twist of fate, important and respected public figures have begun to challenge the direction and ideology of the civil rights movement. Asserting claims of morality and justice, these figures have charged traditional civil rights groups with losing sight of their appropriate goal — equality. Affirmative action's new opponents and revitalized old adversaries rely on two major themes: (1) affirmative action benefits minority members who have not themselves been victims of discrimination[3] and (2) affirmative action injures innocent majority members. Acting on these premises, former allies of the civil rights movement such as the Civil Rights Division of the Justice Department and the United States Commission on Civil Rights have joined in a campaign to eliminate race-conscious relief for discriminatory practices. They have declared that race-conscious relief, in spite of its necessity, is illegal. In 1983, for example, the United States supported a petition for certiorari which sought to overturn the City of Detroit's decision to adopt an affirmative action plan for its police force. The government brief stated:

> We do not believe that this [plan] can be sustained under the relevant statutes; nor do we believe the City's decision here can be squared with the Constitution *notwithstanding the fact that the City's action was expressly made as a response to undeniable past discrimination against blacks that had created a police force that was largely unresponsive to the concerns of a substantial portion of the City's*

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1. As used here, affirmative action means an active effort to remedy past or present discrimination by taking into account race, sex or national origin. It includes goals, timetables, and other numerical, race-conscious remedial schemes.

2. See text accompanying notes 85-129 infra.

3. See, e.g., Statement of United States Commission on Civil Rights, 2 Empl. Prac. Guide (CCH) 5108 (Jan. 13, 1984) (" 'Simple Justice' is not served, however, by preferring nonvictims of an employer's discrimination over innocent third parties . . . .").

population.[4]

The premise underlying these new challenges to affirmative action appears to be that race-conscious relief is fundamentally wrong and incompatible with our concept of justice. The new opponents assert that equality means just that — equal treatment.[5] Despite its superficial appeal, this moral claim does not withstand analysis. There is a point beyond which even justice becomes unjust. One cannot preach color-blindness in a color-conscious society and claim moral sanction.

The addition of morality to the affirmative action equation casts the debate in a different light. Is affirmative action right? In answering this question, we cannot restrict our attention to legislative enactments or judicial pronouncements alone. This article looks beyond strict notions of legality to the broader question of fundamental fairness. More specifically, it questions the theory that relief should be limited to actual victims of discrimination and argues that the effects of systemic discrimination are too complex to lend themselves to so limited a cure.

In his book, *A New American Justice*, Daniel Maguire describes the scope of the problem and the shape its solution must take:

> The sociological process by which a caste system has been created and maintained in this nation is as mighty as it is complex. It is a social achievement. It involves stubborn myths and ideology with all the ways of thinking, the symbols, the blind spots, the uncritical attitudes, the socially supported patterns of caring and not caring, and the overwhelming momentum of three centuries of belief in the inferiority of the Negro . . . . To say we must find the offenders against blacks one at a time and try them on an individual basis would be as realistic as saying that if you prosecute individual criminals when you happen to catch them, organized crime will go away . . . . Both the sociology and the ethical theory operating here are unsound. The fixation is at the level of one-to-one individual justice. Such a constricted perspective is useless in the face of the actual problem. One cannot rechannel a river by scooping out buckets of water. We cannot dismantle a caste system any more than we can reform a sexist society simply by plodding from one specific violation to another, leaving the distorted and distorting structures substantially intact. Patterned injustice requires patterned redress.[6]

This article explores the term *victim* in the context of racial discrimination in employment.[7] It concludes that fairness requires a broader definition

4. Brief for United States at 7-8, Bratton v. City of Detroit, 712 F.2d 222 (6th Cir.), cert. denied, 104 S. Ct. 703 (1984), reh'g denied, 104 S. Ct. 1431 (emphasis added).

5. See text accompanying notes 105-123 infra.

6. D. Maguire, A New American Justice 90-91 (1980).

7. Discrimination on other bases (sex, national origin, etc.) and in other contexts (educa-

of victim in our society, and that remedial programs which fail to adopt such a definition are chronically ineffective.

I
FROM GOOD FAITH TO REAL NUMBERS: A BRIEF HISTORY OF AFFIRMATIVE ACTION

Affirmative action arose out of a need to remedy pervasive and longstanding discrimination. The concept of affirmative action goes back to the post-Civil War Reconstruction period when the federal government passed a series of measures designed to assist former slaves.[8] As a term of art, affirmative action was first used in a section of the 1935 National Labor Relations Act designed to protect trade union members against unfair trade practices.[9] In the context of remedying employment discrimination, New York State used the term in its 1945 Human Rights Act.[10]

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tion, housing, etc.) are not discussed, although many of the considerations herein will be applicable to those situations.

8. The Congress which enacted the fourteenth amendment adopted race-conscious measures designed to provide special assistance for blacks during the Reconstruction era. Among the enactments to redress the wrongs against blacks were: the Freedmen's Bureau Act, 13 Stat. 507 (1865) which created the Bureau of Refugees, Freedmen, and Abandoned Lands and had special provisions for food, clothing and shelter for freed refugees, black and white; the Freedmen's Bureau Act, ch. 200, 14 Stat. 173-77 (1866) which had special provisions for education, land distribution and court administration; and the Colored Servicemen's Claim Act, 15 Stat. 26 (1867) which had special provisions to protect the enlistment bounties of black soldiers. Bounties were authorized for soldiers who had enlisted in the Union army; the Colored Servicemen's Claim Act protected only black payees. Citizen's Commission on Civil Rights, Affirmative Action to Open the Doors of Job Opportunity 30 (June 1984) [hereinafter Affirmative Action to Open the Doors].

9. Id. at 29. Congress charged the National Labor Relations Board with the responsibility of protecting the rights of workers to associate, organize and negotiate terms and conditions of employment. To safeguard these rights, Congress gave the Board authority to require employers to cease and desist from unfair labor practices:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

29 U.S.C. § 160(c) (1982).

10. Id. at 29. In pertinent part, the statute provided that:

> If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful employment practice as defined in this article, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this article, and including a requirement for report of the manner of compliance.

Human Rights Act of 1945, ch. 118, 1945 N.Y. Laws 132, 462 (codified at N.Y. Exec. Law § 297(4)(c) (McKinney 1982)).

The genesis of numerical race-conscious relief as a form of affirmative action can be traced to the Federal Executive Order Program. As far back as 1941, the executive branch has addressed the difficult problem of discrimination in employment through this program.[11] Initially, the program sought only voluntary compliance with its policy of equal employment[12] and relied on the good faith of federal contractors.[13] In 1961, President Kennedy added an affirmative action requirement.[14] Kennedy's order required publication of a contractor's non-discriminatory policy and notification of labor representatives. These affirmative steps proved inadequate to remedy discrimination in certain sectors of the labor market.[15] As a result, the Department of Labor devised a series of programs requiring construction contractors to set specific numerical goals to "assure minority group representation in all trades and in all phases of the work."[16] The first of these labor programs were established in St. Louis, San Francisco, Cleveland and Philadelphia. While each of the programs called for an affirmative action plan, the Cleveland area program was the first to generate controversy. It required that the low bidder submit a plan with specific numerical goals intended to assure minority representation. The winning contractor was required to indicate the total number of employees he would use and his "goal" for minority utilization.[17] The Philadelphia Plan included many of the elements of the Cleveland program, and went a step further by formalizing the requirement for minority utilization. It required

11. See Goldstein, The Importance of the Contract Compliance Program: Historical Perspective, NAACP Legal Defense and Educational Fund, Inc. (May 1981).

12. Executive Order No. 8802 (June 25, 1941) "established for the first time a national policy supporting equal employment opportunity 'regardless of race, creed, color, or national origin,' " making it "the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination . . . " Id. at 9. Federal contractors were expected to comply with this policy.

13. See generally, R. Nathan, Jobs and Civil Rights (1969); Affirmative Action to Open the Doors, supra note 8, at 32-39.

14. Executive Order No. 10,925 declared that it was "the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all" and required all government contractors to "take affirmative action to ensure" fair employment. Exec. Order No. 10,935, 3 C.F.R. 448 (1961) (preamble & § 301(1)). Among the affirmative steps provided for were: (1) posting the non-discriminatory clause of the Executive Order; (2) indicating the non-discriminatory policy in all solicitations and advertisements; and (3) notifying each labor union or representative of workers of the contractor's obligations under the Executive Order. A contractor's failure to abide by the stated requirements could result in the termination of the contract. Id. at §§ 301(6), 312-15.

15. The construction industry presented special problems for the compliance program because: "(1) manpower [was] organized on an area basis and varie[d] from community to community, (2) manpower assignments [were] generally controlled through strong hiring halls, and (3) employment [was] intermittent." Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341, 343 (1970).

16. Id. at 343-44 (citing U.S. Dept. of Labor Operational Plan for Construction Compliance (Mar. 1967)).

17. Id. at 346. Between June and November of 1967, Cleveland contractors committed themselves to hire 110 minority group persons out of a total of 475 in the mechanical trades and for jobs covered by the operating engineers.

"representative numbers" instead of mere tokenism.[18] The Philadelphia Plan, like the Cleveland program, resulted in numerical commitments[19] by contractors and gave rise to claims that the executive order program required an impermissible quota.

Although both the Cleveland and Philadelphia plans contained numerical elements, neither imposed a quota.[20] The plans required only that contractors make good faith efforts to achieve the articulated goals:[21]

> All that a contractor [had] to do to be eligible for a contract [was] make a *commitment* to seek in good faith to meet his self-imposed goal. There [was] neither *per se* compliance nor *per se* violation associated with the goals or the ranges. Minority utilization above or below the goals, or above or below the ranges, at most [was] *presumptive evidence of compliance* on the positive side, and on the negative side, *evidence of probable cause to believe that a review* of a contractor's overall compliance posture [was] warranted.[22]

Prior to the implementation of goals and timetables, the term affirmative action did not have a clear meaning for contractors. Although later plans made the award of a contract contingent on the apparent low bidder's submission of a numerical affirmative action program, even these plans were rejected by the Comptroller General[23] because their affirmative action component still failed to inform prospective bidders of the definite minimum requirements for an acceptable program.[24] As a result, the Department of Labor revised the Philadelphia Plan to include a requirement that contractors submit bids setting minority utilization goals within ranges established by the government.[25] The revision provided contractors with an objective standard against which to measure equal employment progress.[26] In addition to providing guidance for contractors, numerical goals encouraged positive efforts to remedy historical patterns of exclusion in the construction industry: "The premise of the Execu-

18. Id. at 348 (citing R. Nathan, supra note 13, at 111).

19. Jones, supra note 15, at 348. During 1968, contractors committed themselves to employing 226 minorities out of a total workforce of 920 in the mechanical trades.

20. A quota is an inflexible requirement that an employer hire or promote a specific number or percentage of minorities or other protected classes without regard to availability or qualification. Id. at 378.

21. Goals and timetables are targets for the employment of qualified minorities or other protected classes. Employers are expected to make good faith efforts to achieve the targets within the specified time frame. Failure to attain a target will not automatically result in sanctions.

22. Jones, supra note 15, at 379 (emphasis in original).

23. 48 Comptroller Gen. 326 (1968).

24. Jones, supra note 15, at 360.

25. Id. at 365.

26. As one court later observed, "[N]umerical objectives may be the only feasible mechanism for defining with any clarity the obligation of the federal contractors to move employment practices in the direction of true neutrality." Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 686 (7th Cir. 1972)(quoting Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1304 (1971)).

tive Order is that systemic discrimination in employment exists, or has existed, and unless positive action is undertaken, mere neutrality will, at best, project yesterday's conditions into the future."[27]

The revisions of the Philadelphia Plan did not end the controversy, but merely shifted its focus. The Comptroller General agreed[28] that the revised plan contained the requisite specificity, but declared that it established quotas and therefore violated Title VII of the Civil Rights Act of 1964.[29] In response, the Attorney General issued an opinion that the Executive Order Program in general, and the Philadelphia Plan in particular, were lawful.[30] In 1969, the Comptroller General challenged the legality of the program's numerical requirements in Congress.[31] Congress allowed the program to continue. The Philadelphia Plan was subsequently upheld by a federal court.[32]

Goals and timetables soon came under congressional scrutiny again during consideration of the 1972 amendments to Title VII. Congress realized that government had a special obligation to eliminate past discriminatory practices and to take affirmative steps towards minority participation in civil service:

> The Federal government, with 2.6 million employees, is the single largest employer in the Nation. It also comprises the central policy-making and administrative network for the Nation. Consequently, its policies, actions, and programs strongly influence the activities of all other enterprises, organizations and groups. In no area is government action more important than in the area of civil rights.[33]

Not only were minorities excluded from many job categories, but, when employed, they were "concentrat[ed] in the lower grade levels indicat[ing] that their ability to advance to the higher levels [had] been restricted."[34] Congress sought to address the "government's failure to pursue its policy of equal opportunity"[35] by expanding Title VII's coverage to cover the federal govern-

27. Jones, supra note 15, at 367. Public hearings conducted by the Department of Labor had identified six trades where minority participation was "far below that which should have reasonably resulted from participation in the past without regard to race, color and national origin . . . ." Id. at 368.

28. 49 Comptroller Gen. 59 (1969).

29. 42 U.S.C. §§ 2000e-17 (1982). Title VII of the 1964 act addresses discrimination in employment. It prohibits discrimination against employees and applicants for employment because of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1982).

30. 42 Op. Att'y. Gen. 405 (1969).

31. The Comptroller General asked a Senate Subcommittee to attach a rider to a pending appropriation bill to limit the use of funds in contracts requiring specific goals. 115 Cong. Rec. 40,019 (1969). The Senate passed the rider. 115 Cong. Rec. 40,039 (1969). However, the House at the urging of President Nixon rejected it. 115 Cong. Rec. 40,922 (1969). The Senate reconsidered and reversed its position and voted to strike the rider. 115 Cong. Rec. 40,749 (1969). Goldstein, supra note 11, at 38-40.

32. Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).

33. S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971).

34. Id. at 13.

35. H.R. Rep. No. 238, 92d Cong., 1st Sess. 23 (1971).

ment. Moreover, Congress ordered the Civil Service Commission[36] "to take whatever affirmative steps are needed to . . . obtain full and immediate compliance with the Civil Rights Act of 1964."[37] When proposals to prohibit race-conscious remedies came to the floor, Congress soundly rejected them.[38]

II
NUMERICAL REMEDIES AS RELIEF FOR SYSTEM-WIDE DEPRIVATIONS

Numerical remedies were a response to the recalcitrance and indifference of employers. They were not motivated by a desire to turn the system upside down. At the same time as the federal government was focusing its attention on the construction industry, courts were finding that minorities were disproportionately excluded from other employment opportunities as well.[39] In the vast majority of cases, where courts imposed numerical relief,[40] the offending

36. The Commission was charged with the responsibility of monitoring the affirmative action success of each department and agency in the federal government:

> [The Civil Service Commission shall] be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment.

42 U.S.C. §§ 2000e-16(b) (1982).

These responsibilities were transferred from the Civil Service Commission to the Equal Employment Opportunity Commission under the Reorganization Plan No. 1 of 1978. See 42 U.S.C. §§ 2000e-4 (1982).

37. S. Rep. No. 415, 92d Cong., 1st Sess. 22 (1971).

38. For example, Senator Ervin of North Carolina had proposed the following amendment to the pending legislation:

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

Amendment No. 829 to S. 2515, 92d Cong., 2d Sess., Jan. 27, 1972. This wholesale rejection of any type of numerical, race-conscious relief was defeated 44 to 22.

39. See, e.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972) (535 member fire department all-white); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (" '[I]n the thirty-seven year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers.' "); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335 (2d Cir. 1973), cert denied, 421 U.S. 991 (1975) ("[W]hile Bridgeport has a combined Black and Spanish-speaking population of 25%, members of these minorities only represent 3.6% of the Department.") (footnote omitted).

40. The numerical relief discussed herein is a hybrid. The relief is not a quota, but it requires more than would be embodied in goals and timetables. Goals and timetables are tied to considerations of available proportions of qualified protected group members. A hiring or promotion ratio may be greater than the availability proportion, although it retains the element of qualification. Thus, if an employer's workforce contains 10% minorities for a position when the available percentage of qualified minorities is 30%, a reasonable hiring goal might be approximately 30%. However, because the employer has restricted the hiring of minorities, a court may impose a hiring ratio of 50% qualified minorities to achieve an employment goal of 30% minorities.

entity was a public employer.[41]

Discrimination in this sector was more than illegal. It was a violation of the public trust. The exclusion of large segments of society from society's benefits makes governance difficult, increases frustration, and diminishes confidence in the governing authority.

In *Bridgeport Guardian, Inc. v. Members of Bridgeport Civil Service Commission,*[42] the Second Circuit described this principle in the context of an urban police force: "Finally . . . this is not a private employer . . . . This is a police department, and the visibility of a Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is *plaguing* law enforcement."[43]

In the public sector, it is important that people believe that the American dream can be a reality for them. When the members of a certain group are excluded, they have a natural tendency to distrust and dislike those who deprive them of their share in society. Yet when people believe in government, they coooperate and thereby increase its efficiency:

> [Representation of blacks on the police force] involves the trust between a community and its police force and that representativeness is essential to citizen cooperation and crime prevention.
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> . . .[E]ffective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.[44]

Trust and confidence are essential not only to police departments, but to other public entities as well.[45]

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41. In extending Title VII's coverage to public employers, the House of Representatives described the necessity of addressing this problem:

> In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country — North as well as South. The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices. The report cites widespread perpetuation of past discriminatory practices through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities. *The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector.* The report found that in six of the seven areas studied, Negroes constitute over 70% of the common laborers, but that most white-collar jobs were found to be largely inaccessible to minority persons.

H.R. Rep. No. 238, 92d Cong., 2d Sess. 17, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2152 (emphasis added).

42. 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975).

43. Id. at 1341 (emphasis added).

44. Detroit Police Officers Ass'n. v. Young, 608 F.2d 671, 696 (6th Cir. 1979).

45. "The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 415, 92d Cong., 1st Sess. 10, reprinted in Subcommittee on Labor, Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 419 (1972).

Courts have found hiring ratios necessary not only to insure that a "critical mass" of minorities would be employed, but to restore faith in these public institutions. In *Morrow v. Crisler*,[46] the court found that the Mississippi Highway Patrol had hired only two black patrolmen in the sixteen months following the Fifth Circuit affirmance of a district court injunction against the Patrol's discriminatory hiring practices.[47] Sitting en banc, the Fifth Circuit held that some form of affirmative hiring relief was necessary to integrate the Patrol effectively. The court further noted that such actions were essential if this public body was to obtain the confidence of the black community:

> The reputation of the Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices . . . . Since we are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi . . . additional . . . measures [must] be taken . . . .[48]

The common thread running through these cases is a belief that courts must use positive action to overcome the effects of past discrimination:

> [T]he economic policies of this Nation must function within and be guided by our constitutional system which guarantees 'equal protection of the laws.' *The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.*[49]

This reality gave rise to the guiding principle of the federal civil rights effort: since discrimination has system-wide effects, the problems it has caused must be addressed through a system-wide solution. Hiring ratios were conceived of as one such solution.

III
THE SEARCH FOR ACTUAL VICTIMS

Opponents of affirmative action argue, however, that numerical relief plans do not limit their benefit to the victims of the prior discrimination.[50] Why, they ask, should nonvictims be given preference for positions in an em-

46. Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974).

47. Id. at 1055. Since the entry of the district court decree, only six out of 91 patrolmen hired were black. These six were the only blacks in a total force of approximately 500 troopers.

48. Id. at 1056.

49. Fullilove v. Klutznick, 448 U.S. 448, 465 (1980) (emphasis in original) (quoting a report by the House Subcommittee on SBA Oversight and Minority Enterprise, H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2 (1975)).

50. Relying on the Supreme Court's recent decision in Firefighters Local Union No. 1784

ployer's workforce? The question betrays a misunderstanding of the fundamentally structural nature of discrimination.[51] The effects of discrimination are too complex to address completely in this space. Nonetheless, it is important to focus on two socio-economic characteristics of discrimination which have significant bearing on the victim issue: (1) discrimination affects families, not just the specific individual who is denied employment; and (2) discrimination affects ethnically identifiable communities. This analysis suggests that the prevailing definition of victim is simply too narrow to embrace many unseen individuals who are truly victims of discrimination.

A. Children and Relatives as Victims

Structural discrimination is cyclical in its impact.[52] For example, discrimination in employment, deprives an individual of society's economic rewards.[53] Lack of economic resources, in turn, leads to poorer housing, less desirable living and working environments, and lower self-esteem. These environmental factors affect success in educational endeavors and the ability to obtain "credentials." Failure to secure the appropriate credentials affects the ability to secure good employment. The result is a vicious circle. Unless society takes affirmative steps to alter the status quo, treating minorities "equally"

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v. Stotts, 104 S. Ct. 2576 (1984), Assistant Attorney General William Bradford Reynolds summed up the position as follows:

> [F]ederal courts are without *any* authority under Section 706(g) — the remedial provision of Title VII — to order a remedy, either by consent decree or after full litigation, that goes beyond "make whole" relief for actual victims of . . . discrimination. Thus, quotas, goals and timetables, or other preferential techniques that, by design, benefit nonvictims because of race, cannot be a part of Title VII relief ordered in a court case, whether the context is hiring, promotion or layoffs.

Statement before the National Foundation for the Study of Equal Employment Policy, Washington, D.C., at 4-5 (Nov. 14, 1984).

51. Report of the National Advisory Commission on Civil Disorders 2 (1968) [hereinafter Kerner Commission Report]; U.S. Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination (Clearinghouse Publication No. 70, Nov. 1981).

52. As sociologist Michael Harrington put it:

> [T]he real explanation of why the poor are where they are is that they made the mistake of being born to the wrong parents, in the wrong section of the country, in the wrong industry, or in the wrong racial or ethnic group. Once that mistake has been made, they could have been paragons of will and morality, but most of them would never even have had a chance to get out of the other America.
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> There are two important ways of saying this: the poor are caught in a vicious circle; or, the poor live in a culture of poverty.

M. Harrington, The Other America: Poverty in the United States 15-16 (1963). See also O. Duncan, Inheritance of Poverty or Inheritance of Race?, in On Understanding Poverty 85-87 (Moynihan ed. 1968); K. Keniston, All Our Children 24-47 (1977).

53. The use of the terms "poor" and "poverty" are not meant to limit the import of this section to discrimination which results in poverty. While it is true that approximately one-third of blacks fit within the government's definition of poverty, economic disadvantage is relative. United States Bureau of Census, Current Population Reports, Characteristics of Population Below the Poverty Level: 1983, Consumer Income Series P-60, No. 147, Table 1, (1983). If an individual is trapped anywhere on the continuum from "poor" to "rich" there can be a quantitative difference in her lifestyle.

(in the sense of giving them no special consideration) will merely perpetuate inequality.

When an individual is discriminated against both her immediate and extended family are affected. Discrimination reduces the ability of the immediate family to secure food, shelter and clothing as well as the ability of broader family groups to provide support systems for their less fortunate members. The "rich" uncle, always ready to help is a familiar character in the pursuit of the American Dream.[54] Yet when all members of a group are restricted in job opportunities,[55] there are no alternate means of success. Among the poor, this problem is exacerbated since interaction with and dependence upon relatives tends to be greater.[56] When the support sytem weakens, each member of the family group suffers. The relationship of an individual to her family and society may be compared to a bedspring,[57] where each coil is connected to its neighbors (the immediate family) and those coils in turn are connected to others. When a crisis arises, an individual's ability to endure depends on the strength and support of the surrounding coils. If such support is lacking, the ensuing pressure may ruin the individual and, in turn, the system. Thus by denying an individual a job or full employment, an employer deprives the individual's relatives of her support, and they become victims of discrimination.

The child is an early victim of her family's economic disadvantage. Irregular employment, multiple jobs, and unusual hours make it difficult for parents to give their children time and help.[58] Little things, such as help with homework, are not available to many children. Home learning tools such as dictionaries, educational games, and story books are beyond the reach of the poor family.[59] Children in such families feel the immediate and direct consequences of the economic disadvantage. Furthermore, the long-term economic status of the child is strongly tied to the status of her parents:

> . . . [An] individual's acquisition of productive characteristics is favorably influenced by the economic success of the individual's par-

54. Even if there is no rich uncle, there may be an uncle or a cousin who can "put in a good word for you" at the office, parents who can help pay for your education or help you make a downpayment on a house, and/or friends of the family who can write glowing recommendations (backed by their own high professional positions) to prospective schools or employers.

55. For example, until recently it was not unusual for an employer to prevent all blacks from rising beyond the most menial jobs — and to pay them accordingly. See Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971).

56. U.S. Department of Health, Education and Welfare, Low-Income Life Styles 16 (L. Ireland ed. 1967).

57. Duhl & Chayes, Individual, Family and Community, 56 J. of Home Econ. 579, 584 (1964).

58. Low-Income Life Styles, supra note 56, at 39.

59. Id. at 42. See also Ferrara, Poverty and Family Life, New Cath. Rev. 280 (Nov./Dec. 1979). "Educators point to the deficiencies with which the poor children come to school, their lack of familiarity with books, pencils, crayons, pictures, and they concede that for many the school is unable to overcome the damaging effects of their lives at home . . . ." In today's environment, marked by an information explosion, one could add an encyclopedia and a home computer to the list of deprivations.

> ents. Thus, the deleterious consequences of past discrimination for the racial minority are reflected . . . by the fact that minority young people have less successful parents, on average, and thus less favorable parental influences on their skill acquisition processes.[60]

Although they may never have been directly denied a job or better housing, from both a functional and a moral point of view these children of the poor must be considered victims.[61]

B. Communities as Victims

Blacks and other minority ethnic groups are concentrated in identifiable communities. Increasingly, the black population is concentrating in urban centers and in specific communities within them. Blacks have been excluded from white residential areas through discriminatory housing practices and policies. White families refuse to move to areas where blacks reside and flee from areas where blacks begin to settle. Redlining, gentrification, and escalating costs restrict opportunities for blacks to relocate. The result is that blacks are socially and economically tied to an identifiable community.[62]

Data from the 1980 census confirm that eighty-one percent of all black Americans lived in metropolitan areas.[63] Thirty-four percent of all blacks in the country lived in the seven largest urban centers: New York, Chicago, Detroit, Philadelphia, Washington, Los Angeles, and Baltimore.[64] Each of these cities contains distinct, black communities.

Discrimination in employment creates a real and substantial economic harm which diminishes the quality of life within these communities. Statistics have consistently shown the black unemployment rate to be double or triple the rate for whites.[65] A greater proportion of the black population consist-

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60. Loury, Is Equal Opportunity Enough?, 71 Am. Econ. Rev. 122, 125 (1981). Loury's economic analysis comes to the conclusion that equal opportunity is not enough as racially neutral procedures merely perpetuate a historical process of discrimination.

61. This assertion is supported by sociological studies:

> In studying poverty one finds a number of causes. That racial prejudice is still a primary cause is evidenced by the fact that one out of every three blacks is poor . . . . Old age, disabilities, technological changes keep many people out of work and poor. Little education and serious illness are still other causes. Often these become the effects on one generation's poverty and the causes of a second generation's. The cherished myth of this land of opportunity is belied by the fact that most of the people who die poor were born poor.

Ferrara, supra note 59, at 279.

62. The Kerner Commission noted that by 1960 the average segregation index of the 207 largest United States cities had reached 86.2. In other words, to create an unsegregated population distribution, an average of over 86% of all blacks would have to change their residence within these cities. Kerner Commission Report, supra note 51, at 120.

63. See J. Reid, Black America in the 1980's 7, 37 Population Reference Bureau, Inc., No. 4, (Dec. 1982).

64. Id.

65. See Employment and Training Report of the President (Gov't Printing Off. 1982), Tables A-28, A-30, at 190, 194-96; The State of Black America 1984, National Urban League,

ently falls below the poverty level.[66] The Council of Economic Advisors estimated that in 1961, racial discrimination in employment prevented $13 billion from reaching the hands of low-income people.[67] Just as money makes money, poverty perpetuates itself, closing those within its grip into a cycle characterized by lack of opportunity.

The harm is not merely economic. Discriminatory practices also have significant sociological and pathological effects. The Kerner Commission,[68] for example, found that the civil disorders of the 1960's were caused, in large part, by racial segregation in the police forces of the nation's urban areas. In *Baker v. City of Detroit*,[69] the court described the racially charged atmosphere created by discrimination in the Detroit police force:

> The predominantly white composition of the Department facilitated discrimination. White officers knew that their fellow white officers were tolerant of discrimination against blacks. As a result, discriminatory behavior flourished. The black community, in turn, came to hate most white officers. Those white officers who were not prejudiced felt the hostility of the black community and the hatred of the black crowds which gathered at the scene of crimes. They responded with resentment of the community's attitude. Thus, the prejudice of some white officers spawned a cycle of violence and alienation in which both the Department and the community was [sic] caught.[70]

The history of race relations in Detroit provides a clear illustration of the value of affirmative action in mitigating the psychological and sociological effects of discrimination.[71] By means of numerical hiring ratios, the City of Detroit successfully increased the number and proportions of blacks at all levels in the police force. The result was a lessening of reports of police brutality, better cooperation with the community, and more effective action by the police force.[72] In contrast, the City of New Orleans, without the benefit of an affirmative action plan,[73] has experienced a steady increase in charges of police

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at 3-5; Bureau of Census, U.S. Department of Commerce, Social Indicators III, Table 7/18 (1980), at 358 [hereinafter Social Indicators III].

66. Social Indicators III, supra note 65, Tables 9/24, 9/25, at 491-95; State of Black America 1984, supra note 65, at 5-6.

67. H. Miller, The Dimensions of Poverty, in Poverty as a Public Issue 32 (B. Seligman ed. 1965). See also Kerner Commission Report, supra note 51; O. Duncan, supra note 52, at 97-108.

68. Kerner Commission Report, supra note 51, at 2.

69. Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979).

70. Id. at 997-98.

71. See, e.g., *Detroit Police Officers' Ass'n*, 608 F.2d at 695-96.

72. *Baker*, 483 F. Supp. at 944-46.

73. The City was sued for discriminatory employment practices, but a consent decree incorporating affirmative action hiring and promotion was rejected by the district court. Williams v. City of New Orleans, 543 F. Supp. 662 (E.D. La. 1982). Sitting en banc, the Fifth Circuit affirmed this decision, but reaffirmed that hiring ratios were an acceptable remedy. Williams v. City of New Orleans, 729 F.2d 1554, 1557-58 (1984).

brutality and has been forced to initiate investigations and defend lawsuits in response to the growing number of incidents.[74] Without a substantial increase in the number of black police officers, the relations between the police and the community are not destined to improve.[75]

It is difficult to quantify the total effect of discrimination on a community. Numbers can measure unemployment and poverty, but they say nothing about community morale or self-esteem. Economic statistics cannot reflect the loss of hopes and aspirations[76] caused by the economic depression of a community. Nor can they quantify how discrimination reduces the number and impact of potential role models. The cyclical impact of discrimination is equally as evident in communities as it is in families. Lack of opportunity traps all members of a community in a vicious circle from which very few break free. All of them are victims.[77]

C. The Collateral Effect of Discrimination

Those who insist that remedies for discrimination should be victim-specific engage in an intellectual fiction which merely allows actual discrimination to escape redress. It is impossible to know what would have happened in the absence of discrimination. If policymakers allow themselves to become bogged down in a "quagmire of hypothetical judgments," many victims will simply slip through the cracks.[78] Even if one could determine who would have been hired for a given position in the absence of discrimination, such a

74. According to the United States Department of Justice, New Orleans leads the nation in police brutality complaints investigated by the FBI. See New Orleans Times Picayune, Mar. 17, 1982, § 1, at 19, col. 1. See also, e.g., CBS "60 Minutes," Jan. 16, 1983 (televised report of alleged police abuse in New Orleans); Stuart, Shootings by Police Roil New Orleans, N.Y. Times, Apr. 21, 1981, at A 12, col. 1. (In a six month period between the fall of 1980 and the spring of 1981, at least nine blacks were shot by police, seven fatally, in alleged incidents of excessive force.); New Orleans Times Picayune, Feb. 4, 1978, § 1, at 10, col. 1 (citizen's group organizing to protest police brutality received 30 complaints of abuse in one week.)

75. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967).

76. [W]hen daily experience shows a black, Mexican American, Puerto Rican, or Native American child that the adults with whom he lives, no matter how capable, have difficulty in gaining education and work, what can be concluded about his own future? Why should he remember what he learns in school when the process has no real use for him?

K. Keniston, All Our Children, supra note 52, at 35.

77. Recognizing that many unidentified persons in a community are victims of discrimination, the court in Geier v. Alexander, 593 F. Supp. 1263, 1265 (1984) soundly rejected attempts to expand the holding of the Memphis *Firefighters* case to impose a victim-specific requirement on school desegregation remedies:

> This Court need not trace a precise nexus between a specific black child and particular acts of racial discrimination to conclude that the individual has suffered the effects of racial discrimination. Rather, it is sufficient for this Court to base its remedial order on a finding that members of the defined group have suffered the effects of specific acts of discrimination.

78. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (1975). The Court allowed an averaging approach to classwide backpay because it was not possible to determine who would have gotten the positions in the absence of discrimination.

simplistic approach to victimization would not account for the ripple effect each discriminatory decision creates. Discrimination is better understood as a dual economic system in which each individual decision causes a series of ancillary results — some known, some unknown. Consider a situation where an employer's jobs fall into five groups (I, II, III, IV and V) ranging from the most desirable (I) to the least desirable (V). Blacks who are excluded from Group I have a number of options, one of which is to seek the best alternative position within the employer's workforce: a job in Group II.[79] When these best qualified[80] blacks occupy limited spaces in Group II, blacks who would have held these positions must pursue alternatives outside of Group II. This discriminatory bumping effect continues until blacks who would have held jobs in Group V have no viable alternatives within the employer's workforce. In its simplest form, this model describes a situation in which discrimination occurs only at Group I and results in successive I-group bumps. This discriminatory pattern impedes the progress of individuals not in competition for Group I jobs.[81] When discrimination occurs within more than one group and by more than one employer, the effects are multiplied.

When applied to the myriad jobs in the national workforce, this model indicates the inappropriateness of a victim-specific approach to relief. Traditionally, blacks have been excluded from certain job categories: managerial, administrative, professional sales and crafts.[82] They have been restricted to

79. An employee with Group I qualifications may also seek a Group I (or lower) job with another employer, a Group III or lower job at the same employer, or leave the job market entirely to seek further education, join the armed services, or become self-employed, etc.

80. For simplicity's sake, this model assumes that the best qualified persons within each racial group would hold the best positions.

81. Assuming ten blacks should occupy each group (although black participation in Group I is limited to five persons), the discriminatorily skewed pattern in our model would appear as follows (the Roman numerals in parentheses represent the group to which the individual would have been assigned absent discrimination):

Group	Blacks
I	5 (I)
II	5 (I), 5 (II)
III	5 (II), 5 (III)
IV	5 (III), 5 (IV)
V	5 (IV), 5 (V)
out of workforce	5 (V)

82. The 1980 Census showed a continued imbalance in the representation of blacks in these categories.

Occupational *Group*	% of *White*		% of *Black*	
	Men	Women	Men	Women
Executive, Administrative and Managerial	11.1	7.8	5.2	4.7
Professional Specialty	12.8	14.6	8.9	11.8
Sales	10.7	12.0	5.0	6.1
Precision Production, Craft and Repair	13.4	2.3	8.9	2.3
Service	11.6	16.3	23.1	29.3

1980 Census of Population, General Social and Economic Characteristics, U.S. Summary Table 89.

service categories. The result is an increase in the underemployment of black workers.[83] Black employees who in the absence of discrimination, would be managers or professionals have been relegated to such positions as operatives or even laborers. "Lesser qualified" blacks, in turn, were closed out of these positions. Discrimination affects these often unknown blacks as much as or more than their more visible counterparts.

Once a discriminatory hiring decision is made, it is impossible to restore the status quo.[84] Many persons will never realize their potential. Given the enduring and nationwide nature of discrimination, an approach which focuses only on identifiable victims inevitably underestimates the dimensions of the problem and makes its resolution impossible.

Taking a broader view of the term victim, however, neither ends the controversy nor solves the problem. This analysis is not intended to suggest a classwide plan of reparations. Rather, it is an attempt to put the equities in perspective. In many situations, compensating a class of blacks will result in disadvantages to whites. Proper balancing of competing interests requires an appreciation of the true impact of our solution or our failure to develop solutions.

IV
ANSWERING THE MORAL QUESTION

Numerically-based affirmative action has been approved by the courts[85] and there is evidence that it works.[86] However, opponents challenge the basic

83. Underemployment occurs when an individual is employed in a position below that in which his abilities would normally place him.

84. While the discussion has focused on employment decisions, a similar phenomenon would occur in other areas. For example, if school I restricts the admission of black students, those students may decide to go to school II, creating another rippling effect which ultimately leaves one group of black students without options.

85. As the Fifth Circuit observed,

> At this point in the history of the fight against discrimination, it cannot seriously be argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the *effects* of past discrimination. (emphasis added).

U.S. v. City of Miami, Fla., 614 F.2d 1322, 1335 (1980) (footnote omitted) (citing twenty-two cases from eight circuits), vacated, 664 F.2d 435 (5th Cir. 1981). See also Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); Parker v. B & O. R.R., 652 F.2d 1012 (D.C. Cir. 1981).

86. See, e.g., D. Ashenfelter & J. Heckman, Measuring the Effect of an Antidiscrimination Program, in Evaluating the Labor-Market Effects of Social Programs Press, Princeton 35 (D. Ashenfelter & J. Blum eds. 1976); U.S. Department of Labor, Employment Patterns of Minorities and Women in Federal Contractor and Non-contractor Establishments, 1974-80: A Report of the Office of Federal Contract Compliance Programs, Employment Standards Administration, (June 1984). These two studies compared the fair employment record of employers covered by the executive order program with those not covered by the program and found more progress among covered employers. For example, among the Labor Department's findings for the 1974-80 period were that:

> [1.] Minority employment grew at a rate of 20.1% among contractors and 12.3% among non-contractors. Id. at 39.
>
> [2.] The proportion of minorities in skilled and white-collar jobs increased 25% to

fairness of such a remedy. In their view, affirmative action strikes at the very essence of our national creed. Yet the victims of discrimination have an equitable claim to "secur[e] complete justice,"[87] a notion hardly alien to our national creed. Standing in the way, however, is a body of misconceptions about the intent and effect of affirmative action.[88]

A. The Myth of Meritocracy

Underlying much of the opposition to affirmative action is the myth that the American dream of success is based on merit, and that affirmative action undermines this system by ignoring merit in distributing rewards. In fact, the allocation of society's benefits has traditionally been based on many considerations other than merit. In education, for example, the well-known system of preferences for the children of alumni contributors is not merit-based.[89] Even if one wished to fill spaces in colleges and universities strictly on the basis of merit, it is doubtful that one could design an objective way to measure merit.[90] In truth, there are more qualified candidates than there are available positions in our educational institutions. As a result, these institutions look to such factors as diversity in selecting among qualified applicants.[91]

.474 in contractor workforces compared to an increase of 8.9% to .391 in noncontractor workforces. Id. at 145-46.

[3.] The proportion of minorities in labor and service workers jobs in 1980 was 0.223 in contractor workforces compared to 0.393 in noncontractor workforces. Id. at 46.

The Department concluded that the collected data indicated "greater changes in participation rates were made by minorities . . . in employer establishments which have operated under the Executive Order's affirmative action requirements." Id. at 64.

87. Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836).

88. The following discussion is not meant to be an exhaustive treatment of arguments against affirmative action. It seeks only to address some of those arguments related to the fairness issue. For a more thorough analysis of the objections to affirmative action see D. Maguire, supra note 6.

89. While the suggestion that race may be an appropriate consideration in admissions decisions is often met with disapproval, there is general acceptance of the system of well-placed telephone calls from famous and/or wealthy alumni to secure their sons and daughters an education at renowned institutions of higher learning. See e.g., N. Y. Times, Oct. 16, 1984, at C11, col. 3 (Colgate Dean of Admissions quoted as saying alumni children "clearly get a preference"; Princeton's acceptance rate cited as 48% for alumni children compared to 17% overall).

90. Grade point averages are frequently utilized in evaluating students for admission to educational institutions. How does one compare grades in the varied disciplines in different schools, with different instructors? How does one compare someone who had to work while going to school with someone who devoted all of his or her time to studies? The potential factors and comparisions are too extensive to list. They make uniform, objective application impossible.

91. The President of Princeton University described the value of diversity as a factor in college admissions decisions this way:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not

In employment decisions, however, the concept of diversity has not gained much favor. The myth of meritocracy is too firmly entrenched in the workplace. The myth survives even though nepotism, cronyism, sectionalism and other forms of "in-group" preference are openly or covertly used to favor certain individuals. The "old boy" network is the classic barrier for those outside the system.[92] Mechanisms such as word-of-mouth recruiting feed on this system. Although often criticized as an informal mechanism for securing job applicants, recruitment of new workers by current employees still remains common.

B. The Myth of Lowered Standards

Opponents attack affirmative action because they believe it benefits "unqualified" minority group members. It is clear, however, that these opponents often have a vested interest in defending the use of certain qualifications as bases for selection. Many of them play a major role in setting the standards which define qualification. They have a vested interest in defending the use of credentials to justify selection. The legitimacy of their own position in society depends upon the legitimacy of the barriers they had to negotiate to reach that position. Their argument can prevail only if one accepts such qualifying standards without questioning their relevance.[93]

The validity of qualifying standards has repeatedly come under question in recent years. The earliest challenge arose in the context of overt racial discrimination supplemented by artificial barriers. In 1965, when Title VII made overt employment discrimination illegal,[94] many employers with a history of racial exclusion turned to more "neutral" forms of discrimination, including standardized intelligence tests and educational requirements. One of these employers was the Duke Power Company.[95] Prior to 1965, the company had excluded blacks from all departments but the Labor Department. As of 1965, any applicant who sought a job outside the Labor Department had to pass two written tests. In addition, any employee who wanted to transfer from the Labor Department had to be a high school graduate.[96] A disproportionate

learn very much when they are surrounded only by the likes of themselves." University of California Regents v. Bakke, 438 U.S. 265, 312, 313 n.48 (1978) (Powell, J., quoting the President of Princeton University.)

92. Networking often begins before an individual enters the permanent workforce. Summer jobs, part-time employment and future contacts are arranged by parents and relatives. When the beneficiary of this system applies for a position later, she can show prior work experience and present excellent references.

93. Under an appropriate value system, race itself may be a qualifying standard. D. Maguire, supra note 6, at 173 ("Since blacks [and other excluded groups] are more qualified than others to meet the society's need for ending monopoly and caste, being a member of those groups is a qualification.").

94. 42 U.S.C. § 2000e (1982).

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

96. Duke Power was organized into five departments: Labor, Coal Handling, Operations, Maintenance, and Laboratory and Test. In 1955, it had instituted the requirement of a high school education for initial assignment to any department except Labor and for transfer from

number of black employees could not qualify under these standards. In *Griggs v. Duke Power Co.*,[97] the Supreme Court held that these requirements violated Title VII.

The Court first noted that the objective of Title VII was "to achieve equality of employment opportunities" and that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[98] If the employment practice operated to exclude blacks from employment opportunities, the employer had "the burden of showing that any given requirement [had] a manifest relationship to the employment in question."[99] Since Duke Power Company could not demonstrate that its tests or high school requirement were job related, these qualifying standards were held unlawful.

Advocates have subsequently used the *Griggs* principle to challenge qualifying standards which disqualify protected groups. Cases have demonstrated that many such standards are not related to successful job performance. For example, in *Douglas v. Hampton*,[100] the plaintiffs challenged the validity of the Federal Service Entrance Examination (FSEE), which the federal government used as the basic means of selecting individuals for managerial and professional positions in the federal civil service. The FSEE was given to 150,000 applicants annually for 10,000 positions in over 200 job categories. Candidates for such diverse jobs as computer specialist, customs inspector, economist, psychologist and social service representative were all required to take this exam.[101] The plaintiffs, eight black college graduates, had been recruited by the Chicago Regional Office of the Department of Housing and Urban Development (HUD) to participate in its intern program. Three of the plaintiffs were hired as temporary employees, with permanent employment contingent upon passing the FSEE. All three failed and were discharged. The other plaintiffs had qualified for permanent positions by either achieving outstanding scholastic records or prior work experience. They took the FSEE to qualify for higher positions but failed to obtain the necessary scores.[102] The D.C. Circuit ruled that performance on this test was not an appropriate measure of qualification:

> Despite [plaintiffs'] lack of success on the FSEE, they apparently performed their jobs in a highly satisfactory manner. A HUD offi-

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Labor to any of the other three departments. This requirement was extended to transfers from Labor in 1965 when the company stopped restricting blacks to that department. At the time this qualification was imposed on potential black transferees, employess hired before 1955 in other departments were performing successfully on the job even though they had no high school diploma. Id. at 427-28.

97. Id.
98. Id. at 430.
99. Id. at 432.
100. 512 F.2d 976 (D.C. Cir. 1975).
101. Id. at 980-81.
102. Id. at 979.

> cial stated that [plaintiffs] were "extremely well qualified for Federal employment . . . [and] highly qualified for the positions to which they were assigned." [T]hey "received satisfactory evaluations and commentaries from their supervisors," he said, "and proved . . . their ability to progress to a higher and more responsible position within [HUD]."[103]

Many similar qualifying standards[104] have been dropped because they disqualified blacks and other protected groups at a disproportionate rate and failed to meet the requirement of job relatedness. Sometimes the elimination of these qualifying standards is accompanied by numerical, race-conscious remedies.[105] Those who assert that standards are lowered assume that the standards are valid for the purposes for which they are used.[106] The *Griggs* rule requires that the use of such barriers be based on more than assumptions.

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103. Id. at 979 (footnote omitted). A later test, the Professional and Administrative Examination (PACE) also had a disparate impact on blacks and Hispanics. The PACE, which was used to fill a wide variety of distinct positions, was challenged on the ground that it was not job related. Luevano v. Campbell, 27 Fair Empl. Prac. Cas. (BNA) 721 (1981). Based in part on the information and experience obtained in the FSEE litigation, the defendants agreed to phase out the PACE and to "develop an examining procedure designed to examine for a particular job category or group of job categories." Id. at 728.

104. Among the other standards which have been rejected as not job-related are: educational requirements, see, e.g., Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir. 1978) (high school diploma for office, clerical, technician and supervisory positions; college degree for positions of systems, traffic and scheduling analysts), cert. denied, 439 U.S. 835 (1978); Donnel v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (high school diploma for entry into apprentice program); United States v. Georgia Power Co., 474 F.2d 906, 918 (5th Cir. 1973) (high school diploma for new employees and incumbent employees wishing to transfer from job classifications of laborer, janitor, porter and maid) and experience requirements; U.S. v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978) (high school diploma for firefighters), aff'd in pertinent part, 633 F.2d 643 (2d Cir. 1980); see also Thornton v. Coffey, 618 F.2d 686, 691 (10th Cir. 1980) (preference for prior guard experience invalid where National Guard had history of excluding blacks); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978) (requirement of prior experience for entry into craft positions invalid because not shown to be job-related); U.S. v. San Diego County, 21 Fair Empl. Prac. Cas. (BNA) 402 (S.D. Cal. 1979) (four years experience for promotion to sergeant invalid where disparate impact on women and minorities); Crockett v. Green, 388 F. Supp. 912 (E.D. Wisc. 1975) (preliminary injunction against use of experience requirement for craft jobs where blacks excluded by prior discrimination), aff'd, 534 F.2d 715 (7th Cir. 1976); Carter v. Gallagher, 3 Fair Empl. Prac. Cas. (BNA) 692, 711 (D. Minn. 1971) (high school diploma for firefighters), aff'd in pertinent part, 452 F.2d 315, 326 (8th Cir. 1972), cert. denied, 406 U.S. 950 (1972).

105. See, e.g., Kirkland v. New York State Dep't of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974)(civil service test with adverse impact held invalid as not job-related; interim ratio of one minority to four white appointments established), aff'd in relevant part, 520 F.2d 420 (2d Cir. 1975).

106. This appears to be based on an intuitive belief in the reliability of tests and other selection procedures: if you score higher on a civil service examination you must be better qualified for appointment or promotion. It follows, therefore, that persons with lower scores are "less qualified." The major premise in this syllogism, however, is not necessarily valid. *Griggs* requires that you validate it.

C. *The Myth of Innocence*

Critics often argue that affirmative action is detrimental to "innocent" white workers. This assertion has a dual appeal: it creates competing equities and it eliminates guilt as a spur to remedial change. Historically, white America has shown a general unwillingness to accept responsibility for present or past discrimination and discriminatory systems.[107] White Americans cannot cloak themselves in a mantle of innocence by simply failing to acknowledge that racism has become institutionalized to protect the white beneficiaries of the status quo. Denying this condition cannot excuse white employees from sharing the responsibility for correcting the condition. Benefits gained by whites as a class have resulted in losses to blacks as a class. Society as a whole has suffered from this discriminatory imbalance. Affirmative action has sought to establish equilibrium through class-based compensation. While affirmative action's critics assert that the term "victim" must be construed narrowly, they often define innocence very broadly and ignore the historical context in which discrimination has occurred.

The question of innocence appears in its most problematic form in the context of job seniority. Opponents of affirmative action assert that the white beneficiaries of seniority are innocent and should not be asked to yield their positions in the workforce.[108] Can such a claim be justified when the accrual of seniority occurs in a discriminatory environment? Many of these seniority rights were negotiated without the effective participation of blacks at a time when whites benefitted from a 100% quota for many positions.[109] If a white

107. For example, a 1968 Gallup Poll asked the question, "[w]ho do you think is more to blame for the present conditions in which Negroes find themselves — white people, or Negroes themselves?" Of all those responding, 24% blamed whites and 56% blamed blacks; of all whites responding, 23% blamed whites and 58% blamed blacks. The poll showed only minor regional differences. H. Erskine, The Polls: Recent Opinions on Racial Problems, in Pub. Opinion Q. 696-703 (1968). Thus, only four years after the passage of the Civil Rights Act of 1964, a majority of white Americans saw black Americans as responsible for their own living conditions, ignoring centuries of ingrained discrimination.

108. Assistant Attorney General William Bradford Reynolds declared that the *Stotts* decision, supra note 50, made it "abundantly clear" that "nonvictims" could not be preferred over "*wholly innocent* employees or potential employees" (emphasis added). Statement before the National Foundation of the Study of Equal Employment Policy, Washington, D.C. (Nov. 14, 1984). Id at 6.

109. The union movement did not escape the pattern of racist segregation in America. Exclusion of blacks from unions was widespread. The craft unions were particularly guilty. Craft unions excluded blacks by constitution (e.g., the Brotherhood of Railway Carmen), by ritual (e.g., the International Association of Machinists), by imposing onerous requirements (e.g., the Plumbers' and Steamfitters' Union) and by practice (e.g., the International Brotherhood of Electrical Workers). S. Spero & A. Harris, The Black Worker 57-59 (1974). Even unions which admitted blacks did not always allow them full participation (e.g., the constitution of the National Rural Letter Carriers' Association provided that "only white members are eligible to serve as delegates to conventions or to hold office.") Id. at 62. As a result of such discrimination, black workers had to organize their own separate unions. Id. at 116-27. Control of collective bargaining, however, was still in the hands of whites:

> The degree of autonomy enjoyed by the Negro locals [was] questionable. During contract negotiations, whatever settlement [was] reached by the white locals [was]

male worker participates in an enterprise, knowing that the results are manipulated to insure his success, can he morally claim innocence? If discrimination enables whites to attain seniority, should seniority rights be an insurmountable obstacle to remedying that discrimination? By accepting the benefits of discrimination against blacks, a white incumbent employee becomes an accomplice to the deprivation, even if he would not personally have chosen to discriminate. Whether or not (and in what cases) seniority should take precedence over affirmative action depends on whether one utilizes an individual or a group analysis. When it resolved this conflict in favor of seniority on the particular facts of *Firefighters Local Union 1784 v. Stotts*,[110] the Supreme Court focused strictly on the individual. In *Stotts*, the city of Memphis had complied with a district court order to make necessary layoffs in a manner which would not reduce the percentage of black workers which had been achieved through affirmative action.[111] In the Supreme Court's analysis, the black firefighters who benefitted from the proportional layoffs were not the individuals victimized by the prior discrimination. On the other hand, the white workers disadvantaged were innocent individuals because they had not

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> ordinarily accepted by the colored locals. In terms of representation from the international unions, Negro members generally [had to] rely upon white officers and representatives. It [was] unlikely, therefore, that "separate but equal" accurately described the status enjoyed by Negro members or their segregated local unions in the Southern pulp and paper industry.

H. Northrup, The Negro in the Paper Industry, in 4 Studies of Negro Employment: Negro Employment in Southern Industry, pt. 1, at 37 (quoting I. Brotslaw, Trade Unionism in the Pulp and Paper Industry 138-41 (unpublished manuscript)). See H. Hill, Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action, 12 J. of Intergroup Rel. 5 (Winter 1984).

110. See note 50 supra.

111. The circumstances leading to *Stotts* arose in 1974 when the City of Memphis agreed in a consent decree to increase minority hiring in several city agencies, including the fire department. A class action suit by Carl Stotts in 1977 led to a second consent decree in 1980 covering only the fire department. Among other things, the City agreed to a long-term goal of increasing the proportion of black firefighters to a level approximating the percentage of blacks in the Shelby County labor market (35%). In May, 1981 the City announced projected budget deficits and necessary layoffs. Although blacks still comprised less than 12% of the fire department, the City proposed to make layoffs on a "last hired, first fired" basis. The District Court issued a restraining order and directed the City to formulate a plan which would not reduce the percentage of black workers. The City complied and laid off 24 firefighters, 3 of whom were black (6 blacks would have been laid off on strict seniority basis). The Sixth Circuit affirmed the District Court's decision, but the Supreme Court reversed the Court of Appeals, holding that the seniority system was not intentionally discriminatory. *Stotts*, 104 S. Ct. at 2581-82.

Immediately following *Stotts*, several courts narrowly interpreted the Supreme Court's decision as specifically protecting vested seniority rights. See, e.g., U.S. v. Cincinnati, 35 Fair Empl. Prac. Cas. (BNA) 671 (6th Cir. 1983) (preliminary injunction barring disproportionate layoffs), 35 Fair Empl. Prac. Cas. (BNA) 675 (6th Cir. 1983) (permanent injunction), 35 Fair Empl. Prac. Cas. (BNA) 676 (6th Cir. 1983) (dissolving injunction); Vulcan Pioneers v. New Jersey Dep't of Civil Serv., 588 F. Supp. 716 (D.N.J. 1984) (injunction barring disproportionate layoffs), 588 F.Supp. 732 (dissolving injunction). Where, however, the race-conscious remedies did not affect vested seniority rights, other courts have held that such remedies were not barred by *Stotts*. See e.g., Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984), cert. denied, 53 U.S.L.W. 3483 (Jan. 7, 1985) (No. 84-606); Van Aken v. Young, 36 Fair Empl. Prac. Cas. (BNA) 777 (6th Cir. 1984); Deveraux v. Geary, 596 F. Supp 1481 (D. Mass. 1984).

personally discriminated against anyone. An alternative approach looks at the broader picture. When Memphis failed to hire blacks on a nondiscriminatory basis, two effects resulted: (1) certain unknown blacks were deprived of employment opportunities and (2) certain unknown whites received employment opportunities which they would not otherwise have received. While one may not be able to identify the specific white individuals who benefitted, it is reasonable to conclude that the more recently hired individuals were the most likely beneficiaries because they would not have had their jobs but for discrimination against blacks as a class.[112] Assuming, *arguendo*, that these whites are "innocent" by virtue of their state of mind, they nonetheless should not automatically secure a property right in their jobs, as those jobs retain the taint of prior discrimination.

Although seniority provides an important protection for workers, seniority rights should not be equated with merit. If merit were the only factor influencing an employer's choice of which employees to lay off, the choices might be very different from those dictated by a seniority list. Seniority is not "magical"[113] and the deference paid to it should be tempered by a sense of overall justice. The concessions Congress made for discriminatorily obtained seniority during the Title VII debates of the 1960's should not place seniority in a sacrosanct position.[114] Rather seniority should yield to affirmative action to eliminate the effects of prior discrimination.

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112. A simplified example will illustrate this analysis. Assume that Memphis had 100 firefighter positions in 1977. If it had hired blacks in a nondiscriminatory manner, approximately 35 of those positions would have gone to blacks. Instead, only 4 of those positions went to blacks. Approximately 31 whites have jobs which they would not have had in a nondiscriminatory system.

113. In an amicus curiae brief on the merits in *Boston Firefighters Union Local 718 v. Boston Chapter, NAACP*, 459 U.S. 967 (1982) (remanded for consideration of mootness), the Justice Department asserted that:

> [T]here is indeed something very important, if not "magical," about seniority systems in employment and the rights those systems allocate to employees that bear significantly on the propriety of a district court's exercise of equitable authority.

16 Lab. L. Series (BNA), No. 22, pt. 2, at 1201 (1984).

114. During the congressional debates concerning Title VII, Senator Clark, one of the floor managers of the bill, placed in the congressional record a Justice Department memorandum stating that Title VII would have no effect on existing seniority rights:

> [I]n the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 Cong. Rec. 7207 (1964). Section 703(h) of the adopted version of Title VII includes the following provision:

> Notwithstanding any other provision of this subchapter, 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 . . . system provided that such differences are not the result of an intention to discriminate because of race.

42 U.S.C. 2000e-2(h) (1982).

D. *The Myth of Equal Treatment*

Opponents of affirmative action further assert that the constitution is color-blind and that all persons are guaranteed the equal protection of the laws.[115] Does "equal protection" mean that one has the right to be treated as the equal of each other citizen or does it mean that one has the right to equal treatment as a citizen? The answer depends on what the context in which the term is used and how the principle is applied. As Justice Blackmun observed in *University of California Regents v. Bakke*, "in order to treat some persons equally, we must treat them differently."[116]

The drafters of the fourteenth amendment recognized the logic of this apparent paradox. The intent of the amendment was to ensure equal treatment of the newly freed slaves by taking into account their different circumstances. The amendment was adopted, in large part, to provide constitutional protection for laws enacted by the Thirty-Ninth Congress to assist freed blacks.[117] One of the most hotly debated of these legislative assistance programs was the 1866 Freedmen's Bureau Act.[118] Opponents argued that the Act secured the protection of the government for blacks only and that benefits should be provided equally to all citizens.[119] Proponents of the Act readily acknowledged that the Act made distinctions based upon race, but argued that it was inappropriate to treat the races as equal because blacks had been disadvantaged by prior discrimination:

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115. See, e.g., Abram Civ. Rts. Update (Mar. 1984) ("a principle that comes from the basic bedrock of the Constitution . . .; equal means equal.").

116. 438 U.S. at 265, 407 (1978) (Blackmun, J., concurring). See R.K. Fullinwider, The Reverse Discrimination Controversy: A Moral and Legal Analysis 199 (1980):

> What does "the equal protection of the laws" command? It cannot command that the laws treat all (literally) equally. Such a command would subvert the very process of legislation. "The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals." To interpret "equal protection" so that it would, for example, prohibit legislating tax relief for the elderly would be absurd. Thus, however, we are to understand it, constitutional equality must be compatible with laws which impose differential obligations and confer differential rights.

(footnote ommitted).

117. See, H., Flack, The Adoption of the Fourteenth Amendment 11-16 (1908).

118. The 1866 Freedmen's Bureau Act was one in a series of measures adopted by Congress to provide special assistance and protection for former slaves in rebel states. The idea of a special bureau for freedmen was introduced to Congress in an 1864 bill which was not enacted into law. An 1865 Act provided some of the relief in the earlier Bill, but included assistance for white refugees. 13 Stat. 507-08 (1862). By the time of the 1866 Act, the class of white refugees was practically non-existent and the Act was opposed as legislation exclusively for the benefit of blacks. 46 Cong. Globe, 39th Cong., 1st Sess. 544 (1866).

119. Senator Johnson objected to special educational assistance for blacks which was not available to whites:

> If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States who may need education and providng for.

46 Cong. Globe, 39th Cong. 1st Sess. 372 (1866).

> The object of the bill is to protect the colored man. The pro-slavery party on the other side of the House from the foundation of the Government up to the present time have done everything they could against ameliorating the condition of the colored men . . . . One object of the bill is to ameliorate the condition of the colored man . . . The gentleman has made another objection to this bill . . . . He says this bill provides one law for one class of men, and another for another class. *The very object of the bill is to break down the discrimination between whites and blacks* . . . . Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people.[120]

As passed,[121] the 1866 Act made specific distinctions based on race, including special education programs for blacks[122] and special protection for black homesteaders.[123] Proponents of differential treatment for blacks pointed out that whites already had political influence with which to protect themselves:

> The very discrimination [the Act] makes between "destitute and suffering" negroes and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.[124]

Although the proponents of these programs recognized that it was unjust to treat blacks only as equals, they had to respond to arguments that differences in treatment were not permitted by the Constitution.[125] The fourteenth amendment was one such response.[126]

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120. 46 Cong. Globe, 39th Cong. 1st Sess. 631-32 (1866) (emphasis added) (remarks of Congressman Moulton).

121. The original form of the Bill was vetoed by President Johnson. Messages and Papers of the Presidents, Vol. VIII 3,596-603 (1914). A new Bill was introduced later in 1866 (after the passage of the Civil Rights Act of 1866) and was substantially the same as the Bill vetoed by Johnson. 46 Cong. Globe, 39th Cong., 1st Sess., 932-43 (1866). Debate on the new Bill was limited since the issues presented had already been discussed by Congress.

122. 14 Stat. 176 (1866).

123. 14 Stat. 174-75 (1866).

124. 46 Cong. Globe, 39th Cong., 1st Sess., App. 75 (1866) (remarks of Congressman Phelps).

125. In his veto of the first version of the 1866 Freedman's Bureau Act, President Johnson declared that:

> [a] system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution, nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of one people more than another.

Messages and Papers of the Presidents, Vol. VIII 3,599 (1914).

126. When Congressmen Bingham introduced a newspaper article indicating that President Johnson's veto of the Freedmen's Bureau Act had caused "rejoicing" in the South, the Speaker ruled that it was relevant for the record since it related to the purpose of the Amendment:

> And if the Chair is correctly informed by the remarks of the gentleman from Ohio as

Just as the framers of the fourteenth amendment recognized that it was inappropriate to treat all people equally regardless of prior discrimination, we must recognize that people have been discriminated against, not only as individuals, but also as members of their race.[127] A balanced equation must take into account differences caused by such discrimination. Equality may in fact be denied when rules or programs do not distinguish between persons differently situated.[128] Experience has demonstrated that "color-blind" decisions are not calculated to counter-balance social, cultural and economic realities, but simply to provide a ready mechanism for covert discrimination:

> Claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which makes the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[129]

The reality of race has been judicially recognized in employment,[130] voting rights[131] and for over a decade in school desegregation.[132] The operative ele-

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to what this extract is, it relates to the veto by the President of a bill passed by Congress in regard to the rights of certain persons, and if that is the case, it may be within the province of Congress to pass a constitutional amendment to secure those rights and the rights of others generally, and therefore, as a part of the remarks of the gentlemen from Ohio, this is certainly in order.

46 Cong. Globe, 39th Cong., 1st Sess. 1092 (1866).

127. Justice Blackmun's lament in *Bakke* still holds force today:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

438 U.S. at 403, (Blackmun, J., concurring).

128. Equal access may require accommodation for certain disabilities: a ramp to replace steps for the wheelchair-bound individual, a sign language interpreter for a deaf juror.

129. *Bakke*, 438 U.S. at 327 (1978) (Brennan, J., concurring in part and dissenting in part).

130. . See, e.g., *Fullilove*, 448 U.S. 448 (constitutional to require that at least 10% of federal funds granted for local public works projects be used to procure services of minority-owned businesses).

131. See, e.g., United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (consitution does not prohibit reapportionment plan deliberately drawn on the basis of race to enhance electoral power of minorities).

132. See, e.g., North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971). North Carolina statute provided that race could not be used in making student assignments. In a unanimous opinion Chief Justice Burger rejected such a "color-blind" approach:

> The legislation before us flatly forbids assignment of any student on account of race or

ment in these cases is their remedial purpose.[133] A pattern of discrimination against a class of people cannot be eliminated through spot remedies. Systemic discrimination must be addressed in a systematic manner. Because discrimination is insitutionalized, race-neutral injunctive relief alone will not eradicate the effects of prior discriminatory practices.

E. The Myth of Legal Sufficiency

Many majority group members believe that minorities have an advantage over them in securing the benefits of society. They point to the large body of laws designed to protect the civil rights of minorities. As one opponent of quotas recently observed: "By 1968, the entire legislative agenda of the civil-rights movement had been enacted. Armed with the vote, blacks could now go about the business of seeking economic gains through legislation, using the ballot as a sword for economic progress and a shield against discrimination."[134]

Legislation, however, is never the end of the battle. A right without an effective means of enforcement is a promise half fulfilled. President Lyndon Johnson eloquently expressed this unfortunate fact in a commencement address at Howard University in 1965:

> The voting rights bill will be the latest, and among the most important, in a long series of victories. But this victory — as Winston Churchill said of another triumph for freedom — "is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."
>
> Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.
>
> This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.[135]

Turning legislative rights into societal realities has been a constant struggle. *Brown v. Board of Education*[136] did not end dual public school systems. It was

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for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the Swann case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Bd. of Educ.*, 402 U.S. at 45-46.

133. For example, in United Steelworkers of Am. v. Weber, 443 U.S. 193 (1976), the Supreme Court upheld a voluntary affirmative action plan because it was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." Id. at 208.

134. Abrams, What Constitutes a Civil Right?, N.Y. Times, June 10, 1984, § 6 (Magazine), at 54.

135. Commencement Address at Howard University: To Fulfill These Rights, in II Pub. Papers of the Presidents 636 (June 4, 1965).

136. 347 U.S. 483 (1954).

not until 1969, 15 years later that the Supreme Court declared "all deliberate speed" an unacceptable timetable for desegregation and ordered recalcitrant school districts to terminate segregation "at once." [137] Similarly, Title VII of the Civil Rights Act of 1964 did not end employment discrimination. Rights such as retroactive seniority[138] and back pay [139] were only established through subsequent litigation. Further legislation was required to bring federal, state and local governments within the Act's purview. Even the Voting Rights Act of 1965 had to be extended several times and amended in 1982 to assure that it might effectively act as a "shield against discrimination."[140] Time has brought the realization that new and modified solutions are necessary to address ever more complicated problems. Affirmative action was a product of this realization.

CONCLUSION:
Toward a Broader Definition of Victim

Two decades ago Gunnar Myrdal described the impact of the "Negro problem" on the moral perspective of white America:

> The "American Dilemma," . . . is the ever-raging conflict between, on the one hand, . . . the "American Creed," where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; . . . group prejudice against particular persons or types of people . . . dominate his

137. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). The Supreme Court did not approve bussing as an acceptable method of achieving intergration until 1971. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Even today, fully integrated education is a dream, not a reality.

138. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

139. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

140. The Voting Rights Act was originally enacted in 1965 to prohibit voting qualifications or procedures which would limit or deny a person's right to vote because of race or color. Pub. L. No. 89-110, 79 Stat. 437 (1965). The 1970 amendments to the Act sought to eliminate specific barriers and included, among other provisions, a nationwide ban on literacy tests and all similar devices, the abolishment of state durational residency requirements to vote for president and vice-president (except for a 30-day period for advanced registration), and a lowering of the minimum age of voters in both state and federal elections from 21 to 18. Pub. L. No. 91-285, 84 Stat. 315 (1970) (codified as amended at 42 U.S.C. 1973aa (1976). When the Act was under consideration for extension in 1975, there was evidence that minority language groups were victims of discriminatory voting practices. Congress found that such persons had "been effectively excluded from participation in the electoral process" and added provisions to protect their right to vote. Pub. L. No. 94-73, 89 Stat. 402 (1972) (codified at 42 U.S.C. 1973b(f) (1982)). In 1980, the Supreme Court had ruled in City of Mobile v. Bolden, 446 U.S. 55 (1980) that a showing of discriminatory purpose was a necessary element in establishing that a voting qualification or prerequisite violated the Act. Recognizing that intent is difficult to show, Congress adopted a "results" test in the 1982 amendments to the Act. Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 42 U.S.C. 1973(b) (1983)).

outlook.[141]

The dilemma Myrdal describes extends beyond questions of race. It concerns a basic conflict between the desire for personal benefit and the quest to improve the society in which we live. This conflict is at the center of the debate over the morality of affirmative action. We acknowledge the rights of individuals to accumulate material and social benefits. Yet, we perceive the plight of groups traditionally mired in a social and economic underclass and recognize the negative impact this condition has on society as a whole. Where do we strike the balance?

America's history is marked by a reverence for the individual. The virtues of self-help and self-reliance are firmly ingrained in such philosophies as the Protestant work ethic and laissez-faire economics. Our Constitution and Declaration of Independence defend individual rights and individual property rights. The American has thrived on the stories of individuals like Horatio Alger, whose examples offer the promise that success can be achieved through hard work. Traditionally, Americans have also assigned to individuals the responsibility for failure.[142] The unexpected and widespread effects of the Great Depression, however, caused many Americans to question for the first time this philosophy of individual responsibility.[143] The creation of such remedial programs as the Works Progress Administration and the Public Works Administration and the enactment of the Social Security Act reflected an acknowledgment that the problems the country faced were beyond the control of individuals. Today's civil rights legislation and the War on Poverty are outgrowths of this changing view of individual responsibility.

Present philosophical debates concern not so much whether to protect certain groups, but rather, which groups to protect.[144] Veterans, for example, have a special niche in the American societal framework.[145] Farmers, small businessmen, homeowners, and even oil companies get tax breaks and other forms of aid.[146] Policymakers have concluded that ongoing benefit to certain categories of citizens contributes to the common good. Similarly, policymakers have recognized the usefulness of affirmative action in assuring that the society is not deprived of the talents and contributions of black Americans. Affirmative action necessitates some sacrifices but these contribute to the com-

141. G. Myrdal, An American Dilemma lxix (1944).

142. See generally Feagin, God Helps Those Who Help Themselves, Psychology Today, at 101-10, 129 (Nov. 1972); H. Schuman, Sociological Racism, in Transaction 44-48 (Dec. 1969). As pointed out above, the federal government recognized that post-Civil War freedmen required special protection since they were not responsible for their situation.

143. K. Gronbjerg, Poverty and Social Change 46-49 (1978).

144. See, e.g., Sedler, Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective, 26 Wayne L. Rev. 1227, 1227-28, 1241-44 (1980).

145. See, e.g., Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979).

146. These groups are not necessarily comparable and different considerations have entered into the decisions that they should be protected. Nonetheless, these examples indicate that our society is willing to deviate from its deference to individualsim in appropriate circumstances.

mon good.[147] We aspire to be a pluralistic society, but we cannot achieve that goal by espousing policies and theories which deny group wrongs and prohibit group remedies.

The scope of this article exceeds statutory definitions of victim and legal responsiblities. It is not intended, however, to encourage emphasis on questions of guilt or innocence. Attempts to assign fault only serve to inhibit progress and engender acrimonious denials. We should focus instead on rectifying the causes and effects of longstanding discrimination. If innocence is our concern, we cannot forget that blacks as a class have been the innocent victims of racial discrimination. If morality be our guiding light, we cannot deny the morality of seeking to remedy discrimination. Affirmative action is not without its costs. But the cost of allowing the effects of discrimination to linger from generation to generation is far greater than the cost of remedial action now.[148]

We should not limit the term "victim" to discrete, indentifiable persons in the context of racial discrimination. Perhaps we should not limit it at all. For, in a broader sense, we are all victims. The systematic exclusion of segments of society from society's benefits injures the social whole. When society fails to make maximum use of the talents, resources and energies of all its people, the loss is irretrievable.[149] As a guardian of the common good, government has a vested interest in effective affirmative action. Individuals and private parties may ignore traditional patterns of discrimination and exclusion.[150] Government cannot afford to take such an ostrich-like approach to the

147. Daniel Maguire wrote that:

> *Social justice* concerns individuals' debts to the common good. Fundamentally, this means that citizens owe a contribution toward making the social whole a context in which human life can flourish — a context in which respect and hope are present for all. That task is immense and never finished. No one can say he or she has cared enough, dared enough, been creative enough and thus had paid in full what is owed to the common good. The guilt of apathy and insufficient caring affects us all . . . . Voting, joining citizens' lobbies, cooperating with justifiable enlistment, et cetera, do not exhaust our debts to the needs of the social whole. Racism, classism, and sexism reign. Respect and hope for all persons do not obtain and we are all debtors on that account.

D. Maguire, supra note 6, at 68-69.

148. The United States Commission on Civil Rights described the cumulative effects of discrimination:

> Discriminatory actions by individuals and organizations are not only pervasive, occurring in every sector of society, but also cumulative, with effects limited neither to the time nor the particular structural area in which they occur. This process of discrimination, therefore, extends across generations, across organizations . . . and across social structures in self-reinforcing cycles, passing the disadvantages incurred by one generation in one area to future generations in many related areas.

Dismantling the Process of Discrimination, supra note 51, at 12.

149. See P. Miller, The Dimensions of Poverty, in Poverty as a Public Issue 32 (B. Seligman ed. 1965) (Council of Economic Advisors estimated that underutilization of blacks in the labor force resulted in an annual loss of 2 1/2% of GNP and deprived low-income people of $13 billion in income in 1961, one quarter of the national defense budget).

150. In *Weber*, 443 U.S. at 208, the Supreme Court allowed a "private, voluntary, race-conscious affirmative action plan" because its purpose, (to break down segregated employment

welfare of its citizens.[151] The race problem is not a black problem. It is a problem which should stir the conscience of the entire nation. The lofty ideals of equality embodied in our Constitution are, in reality, a claim on the bank of justice.

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patterns) mirrored the purpose of Title VII. The Court, however, emphasized that because the plan was voluntary, it was "not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act." Id. at 200.

151. The responsibility of public institutions to remedy class discrimination must be greater than that of private institutions. A public institution guilty of discrimination has violated one of the fundamental principles of the Constitution by failing to "promote the general Welfare." While private entities may feel morally bound to rectify their wrongs, governments have an obligation to restore the public trust and to undo the effects of prior illegal activity.