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By

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ABSTRACT

AFFIRMATIVE ACTION CONSIDERATIONS IN POLICE PROFESSIONALISM

by

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With respect to civil rights, the modern criminal justice administrator may occupy a position which is unique in history. During his professional career, many agencies have passed through a number of distinguishable stages wherein racial considerations have influenced the employment practices of police agencies. A major challenge of the contemporary administrator must be to ameliorate the effects of this past discrimination and increase the employment participation of blacks and other minorities. The manner in which such laudable objectives are achieved, however, are replete with controversy.

The issue of preferential treatment of racial minorities is both philosophically and legally complicated. To effectively confront the dilemma of providing equality of opportunity, the administrator must have broad exposure to a number of disciplines. This thesis outlines the major provisions of employment discrimination law as it applies to the criminal justice system. It also discusses the controversial affirmative action program of a municipal law enforcement agency. The major issues involved in the 'affirmative action' versus 'reverse discrimination' debate are outlined.

DEDICATION

Dedicated to the professional men and women of the Detroit Police Department, black and white, who continue to perform exemplary police service while the question of affirmative action is debated.

ACKNOWLEDGMENTS

Because the author's attitudes toward affirmative action and police professionalism have been shaped by so many persons, it is not practical to attempt to acknowledge the individual influence of each. This in no way diminishes his debt to all of these persons, even though some will not agree with all that is said in the following pages. The writer, of course, is solely responsible for his conclusions. The assistance received from the members of my thesis committee, Doctors Marvin Zalman, Erik Beckman, and John McNamara is especially appreciated. Their constructive criticism greatly improved the quality of earlier drafts. My thanks also to Donna Dziuba who proved herself to be a patient and efficient typist.

PREFACE

Subsequent to the completion of the final draft of this thesis, two important events occurred which impact on the issues addressed herein. Because of the overwhelming significance of both to the issue of affirmative action in law enforcement, the author deemed it appropriate to mention them even though they occurred after the thesis was completed.

On February 28, 1978, Judge Fred Kaess of the United States District Court for the Eastern District of Michigan handed down his decision in Detroit Police Officers Association v. Coleman A. Young. The judge held that the affirmative action promotional policy, which is discussed in detail in Chapter 4, violated both the Fourteenth Amendment and the Civil Rights Act of 1964. He ruled that white officers had been unlawfully denied their constitutional and statutory rights under the plan which gave preference to black officers for promotion.

A second, and even more significant development occurred on June 28, 1978 when the United States Supreme Court handed down its landmark decision in the reverse discrimination case of Board of Regents v. Bakke. The Bakke case and its implications in providing equality of employment opportunity in criminal justice are discussed in Chapter 6. As predicted in that chapter, the Supreme Court ruled, by a narrow 5-4 margin, that Bakke was unconstitutionally denied admission to the University of California Medical School on the basis of his race. However, as the majority of the justices were careful to point out, the outcome of Bakke does not signal a judicial endorsement for lessening opportunity for minorities. Ironically, the decision may mean that efforts at bringing blacks and other minorities into the system will need to be redoubled to be in compliance with the law.

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The Equality Dilemma

"...I have a dream that one day this nation will rise up, live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal."

--A speech by Martin Luther King, August 25, 1963

This thesis addresses an issue that has become increasingly complex, misunderstood, and pressing in terms of importance. This issue is 'affirmative action," or those efforts aimed at increasing employment participation of minorities and women in our society. While the issue transcends professional lines, the focus of this paper shall be on the law enforcement process.

Simply stated, affirmative action is a dilemma. One judge has summarized the paradox succinctly:

> How can ancient and even more recent wrongs of society be remedied and the results of prejudicial and discriminatory practices be expunged from our national slate without holding back the previously favored while the victims of the past catch up? [1]

Blacks and other minorities of this nation have been promised equality of opportunity in a variety of statutory statements. But the mere passage of legislation does not ensure the attainment of statutorily guaranteed rights. The fulfillment of Dr. King's magnificent dream of a country free from the infections of racism and discrimination remain largely unrealized, despite those paper guarantees which may exist. This fact is no less true in law enforcement than in the society as a whole. That we, as a profession, must move closer to this goal expressed by Dr. King is undebatable.

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[1] Hiatt v. City of Berkeley, (Calif. Sup. Ct.,{Civil Docket 453458}, 1975).

Nor can one debate that true professionalism of the police can only be achieved in a milieu that includes full participation of all segments of the society. Professionals that do not subscribe to the concept of equal opportunity are frauds. Thus, while there is little disagreement on the validity of ultimate ideals, the means whereby the objectives are to be achieved are controversial and replete with intricacies upon which reasonable men and women will differ. This research has been conducted with the earnest hope that some small contribution to this confused area will be made.

Historians point out that it is ill-advised to ignore the teachings of our past. It would seem, however, unnecessary to dwell here on the overwhelming evidence that throughout this nation's history, racial and ethnic considerations have acted in innumerable ways to impede untold numbers of Americans of minority origins. Obviously, societal discrimination has not been limited to blacks or ethnic groups currently viewed as a minority.[2] But our history has been particularly outrageous with reference to black citizens. It is an embarrassing historical fact that our founders, who spoke eloquently for the inalienable rights of man to life, liberty, and the pursuit of happiness at the same time accepted the slavery of blacks

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[2] For an interesting article on the problems faced by other immigrants to America, see: L.J. Andolsek, "No Matter What Boat", Civil Service Journal (January, 1973), pp.14-18.

and failed to include these protections in the first American Constitution.[3] Were the original defects not sufficiently insulting, the message of Justice Harlan's famous "The Constitution is color blind" dissent in Plessey v. Ferguson[4] failed to become embodied into case law until 1954. Clearly, anyone's review of American history will show that, with respect to equal opportunity in 1978, we do not begin with a tabula rasa and that several hundred years of racism toward black Americans cannot be discounted as if it never occurred.

Having been historically and systematically denied opportunity, it is understandable that blacks may be hesitant to dismiss experiences of inequality merely because citizenship rights are now granted on paper. A white author attempts to articulate this view on behalf of minority citizens:

> There is such a deeply ingrained prejudice in whites, leading to discrimination against blacks and other minorities, that it can be assumed that prejudice is the operative cause in any case of differential treatment, rather than concern about qualifications. [5]

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[3] For a more detailed treatment of this issue, see: Howard N. Meyer, "Honor Its Promises: The Fall and Rise of the Fourteenth Amendment," Civil Rights Digest, Vol.8:4, (Summer, 1976), pp4-13.

[4] Plessey v. Ferguson, 63 U.S. 537, (1896)

[5] Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (New York: Basic Books, 1974)p.1.

The topic of affirmative action is interesting to both police administrators and criminal justice academicians. The former's interest may be attributable in part to the fact that law enforcement agencies have been among those most frequently challenged for practicing employment discrimination. The record of those administrators in successfully defending their selection and promotion systems has been quite deficient. Courts have not shown reluctance in imposing a wide range of remedies on those agencies to compensate for unlawful practices.

The interest of academicians, on the other hand, may be linked to another tangent of the issue. Educators have recently begun to articulate the grave nature of the police responsibility and the profound influence of the criminal justice system on the society as a whole. Munro is one who has described the enormity of police power:

> No other governmental institution, at least in its normal operations, has the power of violence at its legitimate command. The use of such power imposes some rather awesome responsibilities on the police-- both institutionally and individually. [6]

Bayley and Mendelsohn, authors of the excellent text, Minorities and the Police, fully concur with this observation:

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[6] Jim L. Munro, Administrative Behavior and Police Organization (Cincinnati: W.H. Anderson, 1974), p.1.

> Policemen are entrusted with substantial amounts of authority; they may interdict, arrest, and use force. This power frightens people and they therefore hope, possibly expect, that the men who yield this power are several cuts above the average. [7]

The prestigious President's Commission on Law Enforcement and the Administration of Justice expressed this same thought in terms which were more foreboding when it warned: "One incompetent officer can trigger a riot, permanently damage the reputation of a citizen, or alienate a community against a police department."[8]

Not only has academe taken note of the general importance of the police, they have thoroughly expounded the shortcomings of the police as a societal institution. For the lack of a better term, the area is usually titled 'police-community relations.' Criminal justice students are especially sensitive to the dynamics of the relationship between the police and the community in general, and the black community in particular. Thus, affirmative action is of interest, if for no other reason, for its potential as a means of ameliorating abysmally worn relations with minorities and

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7 David H. Bayley and Harold Mendelsohn, Minorities and the Police: Confrontation in America (New York: Free Press, 1968), p.2.

8 The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (Washington: Government Printing Office, 1967), p.125.

for curtailing the incidence of police abuse. Cray's quotation represents a theme found in much police literature:

> Sooner or later, a Negro living in the Negro community will learn about police malpractice. If he is a Negro male, he will more than likely be a victim of it, or he will have a friend brutalized by the police. No Negro is immune from police malpractice, even those who consider themselves to be "middle-class" or relatively well off. It is a fact of life in the ghetto. [9]

No serious student should doubt the proper function of education in exposing police malpractice and in facilitating the transition to a more professional police establishment. On the whole, the discipline has adequately responded to that challenge. However, it has seriously failed to tackle the very complex issues raised by affirmative action.[10]

Professionals in criminal justice have failed in their responsibilities to live up to the mandate of equal employment opportunity legislation. While they should not shirk rightful censure, the blame is also shared with criminal justice educators because they too have failed in their responsibility. At the least, this responsibility includes

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9 E. Cray, The Enemy in the Streets: Police Malpractice In America (New York: Doubleday, 1972), p.279.

10 For example, many new texts discussing police recruitment and selection ignore fundamental treatment of equal opportunity issues. For example, see: J.L. Kuykendall and P.C. Unsinger, Community Police Administration (New York: Nelson-Hall, 1975), pp.243-267.

defining the environment and parameters of affirmative action. Their failure to do so has substantially contributed to the resounding defeats of challenged agencies. Too many criminal justice administrators continue to talk of employment discrimination only in terms of the blatant type of unequal treatment typified by "no blacks need apply" slogans. This is inexcusable. Knowledgeable experts in police administration recognize that in "most agencies, particularly law enforcement agencies, discrimination is not overt, obvious, or intentional."[11] In fact, subsequent chapters of this thesis will show that recent findings of discrimination in law enforcement agencies have resulted almost universally from the application of facially neutral employment practices.

This is not to imply that the transmission of this knowledge is by any means simple. It is to imply that it is critically necessary. The importance of affirmative action in law enforcement dictates that extended thought be given to the basic constitutional, legal, philosophical, and professional issues that are raised. To the extent that the implementation of affirmative action programs becomes more controversial, the consequences of having not resolved fundamental issues will become more apparent.

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[11] Timothy A. Braaten, "The Analysis of Physical Abilities and the Development of Physical Fitness Measurements to Aid in the Selection of Police Person Applicants for the City of Saginaw [Michigan] Police Department", (a report submitted to the Saginaw Police and Fire Civil Service Commission, 1976), p.16.

The law certainly presents a formidable barrier to the understanding of equal employment opportunity. A discussion of the law is no small undertaking, especially when presented by the layman for the layman. Employment discrimination law is especially complicated due to the myriad of constitutional, legislative, judicial, and administrative mandates. It is also a young, underdeveloped specialty in the law. Not surprisingly, these requirements are often contradictory and confusing. Thus, the police administrator may expect to be somewhat perplexed in this area of the law. Solace may be taken, however, in the fact that lawyers are similarly confused. In an interview in U.S. News and World Report, then incumbent Attorney General Edward H. Levi described the state of statutes, executive orders, administrative rulings, and court decisions as a "madhouse." He also warned that "the resemblence between statutes and the court decisions would be purely coincidental and usually there isn't any resemblence."[12] Although complex, the modern police administrator cannot afford the price of unfamiliarity with these laws. It is a fatal mistake for the administrator to take the position that this area should be the concern of his legal staff or the city attorney. No responsible administrator takes the position that line officers do not need a basic understanding of the complicated criminal

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12 "Reverse Discrimination--Has It Gone Too Far?" U.S. News and World Report, March 29, 1976, p.27.

law; he must likewise be cognizant of the principles of employment discrimination law if he is to understand and function in his role.

While a great deal has been written on the topic of 'police professionalism,' it is still fair to say that the concept is characterized by loose definitions. A discussion in which the ramifications of one vague topic (professionalism) are juxtaposed with another (affirmative action) can become easily entangled. It is hoped that careful examination of each area will clarify the subject to a sufficient degree that important areas will be addressed.

The most important issue is one which is being wrestled in the forum of the highest court in the land in the landmark case of Bakke v. Board of Regents.[13] The question is quickly recognized as the dichotomy of 'affirmative action' versus 'reverse discrimination.' No effort will be expended to avoid either term in these pages. Nonetheless, one must recognize a certain danger in using the 'trigger words' of the controversy lest the reader agree with or oppose a statement on the basis of preformed opinion.

It would be a much simpler assignment to deal with affirmative action if each program could simply be written off as necessary, last-resort remedies to correct invidious

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[13] Bakke v. Board of Regents of the University of California, 553 P.2d 1152, (Cal. 1976) {Calif. Sup. Ct} cert. granted, U.S. Supreme Court, Feb. 22, 1977.

and purposeful actions to exclude minorities. Significantly, intentional discrimination is not alleged in most suits challenging employment practices in most criminal justice agencies. It has been stated that law enforcement has been a forerunner in developing innovative programs to accomplish recruitment of minority members.[14] A former president of the International Association of Chiefs of Police (I.A.C.P.) voices the concern of a majority of administrators on this topic.

> [Police administrators] must emphasize the positive steps being taken by police departments across the nation to increase the number of minority groups on their forces, without abandoning the principle that the police must hire and promote only those officers who meet the highest standards of professional law enforcement. Quotas have only eroded the great progress we have made in establishing a police service that can truly serve the needs of our nation.[15]

Another group of police administrators, in smaller numbers to be sure, are becoming equally vociferous in defense of preferential treatment of minorities as one part of affirmative action programs. Incensed with the filing of an amicus curiae brief by the I.A.C.P. in Bakke which

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[14] A discussion of minority recruitment efforts by police agencies is found in Chapter 4.

[15] Francis B. Looney, "Equal Opportunity and Law Enforcement," Police Chief (July,1974), p.8.

opposed the affirmative action plan, Hubert Williams, president of the National Organization of Black Law Enforcement Executives (N.O.B.L.E.) wrote an open letter in the Police Chief magazine:

> I submit that your affirmative action programs don't work because they aren't designed to work due to the fact that the majority population in general isn't committed to doing what must be done to make equal opportunity work. 16

To a large extent, the schism between the I.A.C.P. and N.O.B.L.E. represents more than differences between two professional bodies; it represents a dichotomy of thought in the nation. On the one hand, advocates of affirmative action are quick to point out many years of societal subjugation of blacks and point out economic indicators that show minorities still are outdistanced by their white counterparts. They accuse detractors of racism and claim the term reverse discrimination is a slogan without substance. Those on the other end of the spectrum clamor that a white applicant is virtually deprived of a competitive chance after the introduction of an affirmative action program. Unfortunately, most of the talk has been on the polar positions and has contributed little to the clarification of the issue.

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16 Hubert Williams, "Minority Representation Within Law Enforcement," Police Chief, Vol. 45:2 (February, 1978), p.18.

This thesis will not set out to prove that the I.A.C.P. is right.[17] On the other hand, it will not argue that the position enunciated by N.O.B.L.E. should prevail. The reality, as subjectively defined by the author, is between the extremes. To the extent that the author's ambiguity becomes apparent and distresses the reader, he apologizes. He also reminds the reader that the two polar positions have been argued by those infinitely more competent than himself.

Racial discrimination against minorities did not end with the passage of the Civil Rights Act of 1964. It has not ended in 1978. Blacks continue to be victimized by unfair employment practices. Race has improperly played a role in recruitment, selection, and promotion of personnel in police agencies for many years. The profession is obligated, legally as well as morally, to ameliorate the present effects of prior discrimination.

On the other hand, there is the side of the issue that cannot be dismissed. This side deals with the creation of racial barriers for majority candidates. It deals with the impact of affirmative action on white employees and their expectations of advancement in a police career. It deals with the question of quotas of blacks in police hiring and

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[17] This is not to imply that the author, like the rest of society, is not opinionated on the controversy. The author would place his own attitude and bias nearer the end of the continuum represented by the I.A.C.P. position.

promotion. In the final analysis, this thesis will argue that, for constitutional reasons, most programs depending on such quotas are unlawful. But it will not be argued that our obligation is ended by mere adherence to neutral employment lists based on "merit" where blacks and other minorities are not employed or promoted in substantial numbers. This, too, offends our Constitution and fails to meet contemporary needs of law enforcement. Newton expresses one compelling argument why majority discrimination must fall:

> To the extent that we adopt a program of discrimination, reverse or otherwise, justice in the political sense is destroyed, and none of us, specifically affected or not, is a citizen, a bearer of rights--we are all petitioners for favors. [18]

To agree with Newton is to condemn reverse discrimination. Will the condemnation necessarily deny black Americans access into the mainstream of American life and the mainstream of the law enforcement community? This thesis will suggest that the two are not mutually exclusive goals. However, before that conclusion can be reached, a broad foundation to this difficult, perplexing problem must be laid.

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[18] Lisa H. Newton, "Reverse Discrimination as Unjustified," Ethics, (July, 1973), p.310.

C H A P T E R T W O

The Black Policeman

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

--Chief Justice Stone
Hirabayashi v. United States
320 U.S. 81, (1943)

It is not without some hesitance that this chapter has been written. It deals with the role of the black police officer in American society. An analysis of criminal justice literature as it pertains to black police officers appears extraneous to the narrow subject of employment discrimination. Nonetheless, its inclusion is deemed necessary.

One might argue that the topic of affirmative action should be discussed in a manner that is restricted to the law. In reality, this is not practical. The focus of affirmative action, particularly in law enforcement, often shifts to another tangent which I choose to identify as the "Effectiveness Argument." In simple terms, the argument is that blacks are more effective in policing areas heavily occupied by blacks. Any analysis of affirmative action that dealt exclusively in the law and ignored this premise implicit in many arguments would be seriously deficient.

The first chapter of this thesis encouraged criminal justice educators and theorists to foster an extended and reasoned dialogue on the controversial topic. That discourse should be broader than the interpretations of constitutions, statutes, and cases. Indeed, one would be hard pressed, in the face of convincing empirical evidence that blacks are indeed more effective policers of blacks, to argue against affirmative action. In that case, the considerable ambiguities and contradictions of the law could be declared moot. Preferential treatment could, in good conscience, be justified on pragmatic grounds. A logical starting point for

the exploration of this hypothesis is the literature of the criminal justice field.

The urban centers of our nation represent the greatest challenges to the law enforcement profession. It has been noted by many authors that serious and consequential problems are associated with urban policing and that a number of these problems are complicated by racial factors. The following quotation by author James Baldwin provides a particularly forceful description of the magnitude of the problem:

> ...The only way to police a ghetto is to be oppressive. None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people they swagger about in two's and three's controlling. Their very presence is an insult, and it would be, even if they spent their entire day feeding gumdrops to children. They represent the force of the white world, and the world's intentions are, simply, for that world's criminal profit and ease, to keep the black man corraled up here, in his place.
>
> The badge, the gun in the holster, and the swinging club make vivid what will happen should his rebellion become overt. Rare, indeed, is the Harlem citizen, from the most circumspect church member to the most shiftless adolescent, who does not have a long tale to tell of police incompetence, injustice, or brutality.
>
> It is hard, on the other hand, to blame the policeman, blank, good natured, thoughtless, and insuperably innocent, for being such a perfect representative of the people he serves. He, too, believes in good intentions and is astounded and offended when they are not taken for the deed. He has never, himself, done anything for which to be hated--which of us has? And yet he is facing, daily and nightly, people who would gladly see him dead, and he knows it. There is no way

> for him not to know it: there are few things under heaven more unnerving than the silent, accumulating contempt and hatred of a people. He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where he is, and is the reason he walks in two's and three's. [19]

This phenomenon has been the subject of sociological analysis. One useful concept is discussed by Skolnik, relating to a self-fulfilling prophecy among the police which encourages citizen confrontations.

> ...The situation feeds upon itself. To the extent that the police are bigoted and manifest prejudices in the daily performance of their duties, to the extent that they insult black people living in the ghetto, they receive the hostility and hatred of the black man in the ghetto. This hatred and hostility, in turn, reinforces the policeman's bigotry, the policeman's fear, the social isolation of the policeman from the black citizens with whom he must come in daily contact. [20]

A former Attorney General has noted that such a relationship impacts on the crime problem. Clark notes

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19 Nicholas Alex, Black in Blue: A Study of the Negro Policeman (Englewood Cliffs, New Jersey: Prentice-Hall, 1969), pp.25-26, citing James Baldwin, Nobody Knows My Name (New York: Dell, 1962), pp.61-62.

20 Thomas J. Crawford, "Police Overperception of Ghetto Hostility," Journal of Police Science and Administration Vol. 1:1 (June 1973), p.173, citing Jerome Skolnik, "The Police and the Urban Ghetto," (American Bar Association, 1968), pp.1-29.

in his major work, Crime in America, that ". . .only where the police serve with the wide cooperation of the public is there government of the people, by the people, and for the people" and that only then can effective social control be maintained.[21]

An inevitable question arises from these observations: are the influences equally operative if the police officer involved is black or white? Along the lines of this question, Bayley and Mendelsohn have concluded that police effectiveness in dealing with minorities is determined by three interrelated indices. First, an emotional predisposition to minority problems; secondly, an understanding of minority problems; and third, the ability to empathize with minority demands.[22] Utilizing this criteria, it is not difficult to move to a hypothesis that the minority police officer has greatly enhanced abilities to serve the black community. However, the body of professional literature which has addressed this topic has been hesitant to reach such a conclusion. To resolve the feasibility of the effectiveness argument, several areas must be examined.

In the legalistic sense, a central thesis of affirmative action is that it is a remedy to compensate for the past discriminatory actions of an employer.[23] The principle of

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21 Ramsey Clark, Crime in America (New York: Simon and Schuster, 1970), p.145.

22 Bayley and Mendelsohn, p.143.

23 United States v. Hayes International Corp., 415 F.2d 1038, (5th Cir., 1969).

making a plaintiff 'whole,' (i.e. placing in a position he would enjoy had it not been for unlawful discrimination) is now a well established point of law.[24] As a profession, law enforcement has most certainly been guilty of reprehensible abuses of blacks and other minorities. These abuses are a matter of record in the literature of the field as well as in many transcripts of court proceedings and congressional hearings. A discussion of this discrimination serves a dual purpose. In subsequent chapters it will be discussed in terms of legal remedies; however, it is pertinent to discuss historic discrimination here in terms of the effectiveness of black officers. Examples of pervasive discrimination are not difficult to cite, as shown by the brief sampling below.

> A Federal District Court deemed it necessary to formally enjoin the city of Mobile, Alabama from using the epithet "Nigger." [25]
>
> Black officers on patrol in Pittsburgh were informed of heavyweight champion Joe Frazier's victory over Jerry Quarry when the police radio blurted "the Nigger won." [26]

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[24] Robinson v. Lorrillard Corp., 444 F.2d 791, (4th Cir. 1971)

[25] Allen v. City of Mobile, 391 F. Supp. 1134, (S.D. Ala., 1971), Aff'd. 4 FEP Cases 1290, (5th Cir., 1972)

[26] "The Black Cop," Newsweek, August 23, 1969, p.54.

A Washington Police Chief writes that teletypes for assignment of Presidential details historically carried the admonition of ..."Send white officers only." [27]

A 1961 survey of Southern states disclosed that in only one-third of the agencies could a black officer arrest any lawbreaker regardless of color. [28]

A police department was ordered by a Federal court to desist from the practice of assigning black officers exclusively to black neighborhoods. [29]

A report of the U.S. Commission on Civil Rights found that "reports of discriminatory treatment in work assignments, promotions, and in personal interaction were more frequent in the police and fire departments than in any area of government studied by the Commission." [30]

In 1967, the Mayor of Baton Rouge ordered the Chief of Police to integrate scout car crews. The chief met with a threat of mass resignations and a protest by the Ku Klux Klan. The order was rescinded. [31]

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27 Jerry Wilson, Police Report: A View of Law Enforcement (Boston: Little Brown and Co., 1975) p.190.

28 Elliot M. Rudnik, The Unequal Badge: Negro Policemen in the South (Atlanta: Southern Regional Council,1962) p. 10

29 Baker v. City of Petersburg, 400 F2d.294 (5th Cir., 1968)

30 "For All The People...By All The People: A Report on Equal Opportunity in State and Local Government Employment," [a report of the United States Commission on Civil Rights] (Washington: Government Printing Office,1969), p.83; hereafter cited as "For All The People."

31 "For All The People,"p.85.

It is despite this pervasive pattern of historical discrimination that some persons adopt the view that the black officer is more capable of discharging police duties in a geographical area largely inhabited by members of that minority. There are some legitimate reasons for such a belief. The acceptability of a black undercover officer in covert operations has been cited by Brandstatter and others.[32] However, not all reasons could be classified as based on professional concerns. An example of the latter category is discussed by Radano in Walking the Beat; a belief that black cops can 'get away with' unprofessional behavior that is not tolerated from white officers. He describes an incident in which a black officer disperses a crowd of black youths through physical violence.[33] This philosophy has a long history with black Americans--perhaps it first started when white imperialists used natives to kidnap Africans for shipment as slaves to America.[34] It is also related to the Southern tradition of hiring blacks to enforce laws exclusively against blacks.

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[32] Arthur F. Brandstatter and Alan Hyman, Fundamentals of Law Enforcement (Beverly Hills: Glencoe Press, 1971) p.268.

[33] Gene Radano, Walking the Beat (Toronto: Collier Books, 1969), p.152.

[34] Alex Haley, Roots (Garden City, N.Y.: Doubleday & Co., 1976) pp.145-196.

A variation of the 'black effectiveness' argument focuses on the amorphous attribute of moral authority in the minority community. Paul Jacobs is an author citing this authority as a recurring theme in his writings. The following passage taken from his Prelude to Riot is a somewhat overstated example of the argument. One should note that the original text contains a disclaimer that the author is not sure that the incident actually occurred.

> In Los Angeles I heard a story of how two white officers were set upon by an angry mob in a housing project after the policeman had shot a kid who they said stole a car. And perhaps they were right, but it made no difference to the Negroes who surrounded them, ripped out their car radio, and threatened to stomp them to death. Fortunately for the officers, according to the story, they were saved from certain death by the arrival of two Negro policemen who, armed only with moral authority, broke up the scene. [35]

The argument is attractive but overly simplistic. It is evident that Jacobs' background is in journalism and not in police work. His conclusions are largely distorted from the writer's experience as a police officer in a black community in Detroit and also differ from the experience of many black officers with whom the topic has been discussed. Moreover, such an analysis is at odds with the preponderance of the literature in the field of criminal justice.

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[35] Paul Jacobs, Prelude to Riot: A View of Urban America From the Bottom (New York: Vintage, 1966), p.294.

A psychologist has described the police and blacks as "warring minorities." This conceptual framework comports with the earlier description of police-community relations provided by Baldwin.

> The police, like the black community, feel themselves discriminated against and unpopular. They feel themselves stigmatized by indices of status. They feel their ambitions thwarted and their objectives misunderstood. They feel impotent and without recourse. They feel hated and persecuted. And they sense that the situation is steadily degenerating into a future of complete hopelessness and utter helplessness. [36]

The author would submit that the black policeman is unique: he is at the same time members of dual minorities. He is hit with a double dose of what Chevigny terms the 'pariah identity.'[37] There is substantial support in the literature for such a portrayal.

The black who enters law enforcement is subject to all of the same pressures, stresses, and contradictions that confront any novice in the occupation. We have learned that these stresses and ambiguities are substantial. But the black person has additional sources of pressure. First, he has the stress of functioning in a society that often subordinates blackness. He has some amount of pressure

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[36] Hans Toch, "Cops and Blacks: Warring Minorities," in The Police, ed. Gerald Leinwald (New York: Pocket Books, 1972), p.128.

[37] Paul Chevigny, Police Power: Police Abuse in New York City (New York: Random House, 1969), pp.114-135

from within the black community due to his occupational choice. For example, during the 1960's (a period of substantial influx of blacks into law enforcement) the following sentiment was frequently expressed by black officers:

> It's not at all unusual to respond into a black neighborhood to assist a citizen in trouble, only to be told: 'Who the Hell wants you? I want the real police.' [38]

Bannon and Wilt's study, "Black Policeman: A Study of Self-Images" reported similar findings in Detroit officers, as did Darnton in his study of race relations among police officers. The latter study quotes a black officer assigned to an all black precinct expressing resentment over the fact of being called a traitor and a 'white man's nigger.'[39] Bannon and Wilt suggest that available data shows black officers working in the black community tend to receive more, rather than less, verbal abuse than white officers.[40]

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[38] Richard Hall, "Dilemma of the Black Cop," Life, September 18, 1970, p.63.

[39] John Darnton, "Color Line A Key Police Problem," in The Ambivalent Force: Perspectives on the Police, eds. A. Niederhoffer and A. Blumberg (Toronto: Xerox Press, 1970), p.76.

[40] James D. Bannon and G. Marie Wilt, "Black Policemen: A Study of Self Images," Journal of Police Science and Administration, Vol. 1:1 (March, 1973), p.24.

Ferrebee is one of several authors who correctly perceive the need for the police to overcome a traditional mistrust found among urban blacks and directed toward the criminal justice system.[41] At times, this low esteem has caused some new members to deny, or at least conceal, their new occupation.

> ...black officers often do not want their neighbors to know they are the police. They ask for assignments far from their homes. They wear ordinary clothes in the neighborhood where they live, changing into their uniform at the precinct station. They may tell friends and neighbors they work for the telephone company. [42]

It does not appear particularly fruitful to attempt to compare black officers with other minorities in terms of relating career choice. For example, Niederhoffer has noted that the Jewish community has no high regard for police work as a profession. However, any analogy between the problems experienced by the black and Jewish policeman seems to fall beside the mark.[43]

The 'Effectiveness Argument' is an interesting academic question. At this point in time, it should remain in academics. Empirical evidence cannot support, or on the other hand, refute the claim that blacks are more effective in policing blacks.

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41 Thomas Ferrebee, "Black Recruiting in Detroit," in The Police and the Behavioral Sciences, ed. J. Steinberg (Springfield: Thomas Publishers, 1974), p.127.

42 Clark, p.40.

43 Arthur Niederhoffer, "The Jewish Policeman," in The Ambivalent Force, supra, pp.76-77.

Frankly, insufficient systematic analysis has been made into the question of performance criteria for black (or white) law enforcement officers. The scant and inconclusive research available does not support any claim that blacks are better in serving black clients. One study conducted by the Rand Institute found black police in New York had a somewhat higher incidence of involvement in citizen complaints after ten years of service. The study disclosed that 80% of black officers, compared to 57% of white officers, were involved in complaints with citizens during the test period.[44] These findings should be compared with Reiss' statement on police brutality:

> Both Negro and white policemen, moreover, were most likely to exercise force against members of their own race. Given the racial composition of the population each polices, it becomes apparent, that in the final analysis, race is not an issue in the unnecessary use of force by the police.[45]
>
> [emphasis added]

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[44] Bernard Cohen, The Police Internal Administration of Justice in New York City, (New York: Rand Institute, Appendix C.)

[45] Albert J. Reiss, The Police and The Public (New Haven: Yale University Press, 1971), p.147.

Reiss also noted that his data suggest that while prejudicial statements were made by white officers toward blacks, in actual encounters the same officers acted no less uncivilly toward blacks than they did toward whites.[46] James Q. Wilson, author of Thinking About Crime, cites evidence illustrating that race may not be a primary factor in establishing police attitudes:

> ...[While]...the black officers are generally more sympathetic to the problems of blacks than are white officers -- they are much more likely to believe that blacks are badly treated by the city as a whole and by the police in particular -- their conception of the problems facing the police officer tends to be quite similar to that of their white colleagues. [47]

For scholarly reasons, it is quite necessary to refrain from racial stereotyping in the measurement of the merits of white versus black policemen. Justice Thurgood Marshall pointed out an obvious, but fundamental, precept when he stated: "...many people who discriminate are not prejudiced, and not all prejudiced persons express their belief in overt discriminatory actions."[48]

One must exercise great caution to not overgeneralize these findings into a supposed proof for something that

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46 Reiss, p.147.

47 James Q. Wilson, Thinking About Crime (New York: Basic Books, 1975), p.106.

48 Thurgood Marshall, "Racial Factors in Law Enforcement," in Police and Community Relations: A Sourcebook, eds. A.F. Brandstatter and Louis A. Radelet (Beverly Hills: Glencoe Press, 1968) p.162.

they do not represent. These findings cannot be interpreted as evidence that blacks are less capable than whites in policing efforts; rather, they support the elementary premise that a black person and a white person are both subject to similar limitations in similar environments. It may also be instructive to examine the citizen complaint phenomenon in light of a concept discussed by Niederhoffer in Behind The Shield. He notes the well documented sociological phenomenon of the person "who demands from his own minority group a standard of behavior more stringent than that expected of others." He further contends that this person experiences levels of dissonance sufficient to express dissatisfaction in overt terms.[49]

Given the divergent influences affecting black policemen, it is not surprising that efforts to limit their service to predominantly black areas, or to rely on them exclusively during major disturbances, has been met with less than wholly enthusiastic responses. For example, the police chief in Hartford, Connecticut was met with a five day sick call by black officers after he arbitrarily instituted a policy of reassigning black officers into exclusively black neighborhoods.[50] Similarly, the strategy of using only black officers

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[49] Arthur Niederhoffer, Behind the Shield: Police in Urban Society (New York: Anchor Books, 1969), pp. 178-198.

[50] Darnton, p. 75

to quell civil disturbances with black participants has been a matter of controversy since 1968 when Mayor Carl Stokes used it in a riot in Cleveland. It is interesting to note that a presidential commission on violence reported that the effectiveness of the strategy in Cleveland could not be adequately assessed.[51] A similar plan was outrightly rejected in Boston by black officers in the Roxbury district of the city.[52] As late as 1975, black officers in Detroit filed labor grievances against department executives as a result of large scale disturbances on Livernois Avenue. The black officers claimed they were used at the disturbance to the exclusion of white officers.

The black policeman is in the midst of searching out his proper role in law enforcement. The most critical step has been defining his role in the black community. The quandary of the black policeman at the incipient stages of the struggle was stated a decade ago by the president of the powerful New York Patrolmans Benevolent Association. He said: "They put their color ahead of their duty as police officers."[53] It has not been without some trauma that the

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51 National Commission on the Causes and Prevention of Violence, Shoot-out in Cleveland: Black Militants and the Police (Washington: Government Printing Office, 1969), pp.65-69.

52 Darnton, p.75.

53 Niederhoffer, p.186.

question of being a copy while being black has been resolved. This transitionary period may be near completion.

The strategies of the civil rights movement have changed considerably in the past twenty years. The famous marches of Dr. King and the entire philosophy of civil disobedience has largely disappeared from the modern scene. Likewise, one hears little today of the types of demands once voiced, such as the "Black Manifesto" demanding $500,000,000 for the years that blacks have been "forced to live as a colonized people inside the United States, victimized by the most vicious, racist system in the world."[54] The rhetoric of militant black associations in policing has also changed during this period. The distances travelled can be gauged by the following statement made by the president of the Guardians of Pittsburgh in response to a solicitation for aid in a minority recruitment drive. He said:

> We cannot ask the black community to send its lambs to the slaughter, nor will we become Judas goats and lead the young blacks to something that is totally against the very principles of decency and humanity for which we stand. [55]

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[54] Boris I. Bitkner, The Case For Black Reparations, (New York: Vintage, 1973), p.167.

[55] Sidney H. Asch, Police Authority and the Rights of Individuals (New York: Arc Books, 1971), p.149.

Indeed, it is difficult to articulate the ideology of the new breed of black officer. But it is clear that change has occurred from the time of the previous statement. The significance in the difference in the times and the dimensions of the philosophical growth present a real question on the validity of using the literature of five or ten years ago to define the contemporary role of the black officer. The need for newer literature is apparent. As to the new ideology, perhaps it can be summarized as a recognition of authority and a demand for overdue rights. Renault Robinson, a black officer from Chicago and a leader in the movement, summarizes the new posture well in a single sentence:

> We were hired as the white man's assistant in dealing with blacks...now we've measured our badges with his and found that they are the same size. [56]

The role of the black officer is eventually becoming established in the minds of the police administrator, the black officer, and the black officer's white colleagues. For sure, the transition has had its setbacks and periods of trauma and serious areas still need to be resolved in a quest for true equality of opportunity. From this struggle has emerged at least one important point. In the final analysis,

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[56] Darnton, p.73.

the proper role of the black police officer is the role of a professional officer.

Where does this leave us with respect to the affirmative action question? The black officer is essential to the effective operation of the criminal justice system. It is absolutely essential that a priority of that system be to recruit and retain blacks in large numbers. That effort should not be tokenism, or 'window-dressing,' and cannot be based on the mentality of blacks being assistants to deal with blacks. Blacks understand and can develop a rapport in the black community that is an asset to effective law enforcement. The inclusion of blacks is also beneficial in that majority officers will gain some enhanced understanding of the minority community by working with these officers.[57] But blacks should not be recruited for the wrong reasons. The recruitment of blacks is far from the panacea for the host of problems that any administrator or criminal justice student can tick off. Those persons holding positions of authority in the criminal justice system must face the realization that blacks, like their white counterparts, are limited in their capabilities.

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[57] For an expanded treatment of this premise, see: Michael Q. Chester, "Negro Police Officers," (unpublished Masters essay, School of Criminal Justice, Michigan State University, East Lansing, Michigan, 1972).

This chapter set out to discuss a controversial proposition: that it may be proper to grant preference to blacks in law enforcement on the basis that these individuals may provide improved service to the citizens of non-white areas. The body of professional criminal justice literature, however, fails to support that conclusion. Nor, on the other hand, does it suggest that blacks are any less effective in the police role. This conclusion is similar to that reached in a recent monograph published by the National Institute of Law Enforcement and Criminal Justice after a comprehensive survey of available literature on the subject. This report concluded:

> In short, on the basis of current evidence, it is unclear to what degree departments with large numbers of minority officers have less community tension that departments with fewer minority officers. Nor is it clear whether increased deployment of minority officers has contributed to lower crime rates or to a decline in allegations of police harrassment and abuse of minority citizens. [58]

If there is a 'bottom-line' to the literature, perhaps the statement by Regolli and Jerome comes as close as any.

> Blacks are needed at all levels within law enforcement because

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[58] Theodore H. Schell and others, National Evaluation Program: Traditional Preventive Patrol, (Washington: National Law Enforcement and Criminal Justice Institute, 1976), p.56.

> they are as capable as anyone else. Blacks should not be hired because of any special qualities they are thought to possess. [59]

Deciding that preferential treatment is not justified from an operational perspective does not end the question; it merely begins it. The moral, legal, political and practical consequences of affirmative action mandate additional scholarly inquiry and are more difficult to resolve. That probe is made more challenging since warnings such as those sounded by Cohen must be constantly pondered:

> Preference by race is malign. Its malignity has no clearer or more fitting name than racism. [60]

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59 Robert M. Regolli and Donnel E. Jerome, "The Recruitment and Promotion of a Minority Group into an Established Institution: The Police," Journal of Police Science and Administration, (December, 1975), p.416.

60 Carl Cohen, "Honorable Ends, Unsavory Means," The Civil Liberties Review (Spring, 1975), p.107; hereafter cited as Cohen, "Honorable Ends, Unsavory Means."

C H A P T E R T H R E E

The Sources of Discrimination Law

"Equal protection does not
entitle superior or prefer-
ential rights to a majority
or a minority."

--Chief Justice Burger
Griggs v. Duke Power Co.
401 U.S. 424, (1971)

Nearly a century has passed since an Associate Justice of the United States Supreme Court dissented in a case in which the majority upheld the constitutionality of the practice known as "separate but equal'; "Our Constitution is color blind, and neither knows nor tolerates classes among citizens."[61] Not until fifty-eight years later did the Court unanimously agree by striking down 'separate but equal' in Brown v. Board of Education.[62]

On its face, it might appear that the advice of the elder Justice Harlan in his dissent would contain all the wisdom one would need to understand the proper role of race in American society. It does not. To understand the concept of discrimination based on race, color, sex, national origin, or religion requires considerably more elucidation than is provided by those thirteen words. This chapter will attempt to explore several components of the legal environment of discrimination useful in defining that relationship.

As indicated in Chapter Two, a critical need exists to increase the number of blacks employed in law enforcement. The need is apparent merely by examining the racial composition of municipal police agencies. A recent report sponsored by the Law Enforcement Assistance Administration (L.E.A.A.)

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61 Plessey v. Ferguson, supra.

62 Brown v. Board of Education, 377 U.S. 483 (1954).

noted that minorities are underrepresented, in terms of population, in virtually every police department in the country.[63] The Police Foundation reached a similar conclusion in 1973 in its survey of municipal police agencies.[64] Few will dispute that the figures do not typify a serious problem in need of some corrective action. Consensus of opinion ends on this point.

One faces an initial obstacle in coming to terms with an acceptable definition of 'affirmative action.' There is no shortage of interpretations of what is denoted by the term. Thomas Sowell observes "...different policies have gone under the general label of 'affirmative action' and many different organizations -- courts, executive agencies, and even private agencies -- have got involved in formulating or interpreting the meaning of that term."[65]

The official government usage of the term is contained in the Guidelines for Employment Selection Procedures of the Equal Employment Opportunity Commission (E.E.O.C.). It reads:

> Nothing in these guidelines shall be interpreted as diminishing a person's obligation...

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63 Schell, p.51

64 Terry Eisenberg and others, Police Personnel Practices in State and Local Governments (Washington: Police Foundation, 1973), pp.58-61.

65 Thomas Sowell, "Affirmative Action Reconsidered," The Public Interest, (Winter, 1976), p.48.

> to undertake affirmative action to ensure that applicants are treated without regard to race, color, religion, sex, or national origin. [emphasis added] 66

It is difficult to gather all that is meant by the term 'affirmative action' from merely the context of the E.E.O.C. guidelines. Perhaps the formulation of alternative definitions of the concept resulted from this lack of specificity. Four additional definitions are offered.

> Affirmative action is a set of result-oriented actions and procedures by which discriminatory employment practices may be identified and corrected and by which minorities and women may be provided the equality of opportunity so long denied them because of discrimination based on race, color, religion, sex, or national origin. 67

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> Affirmative action in a general sense includes a number of remedies for employment discrimination, such as governmental prods to get employers to make good faith efforts to hire minorities or women, special training programs for minorities and women, and preferential hirings or promotions for minorities or women. 68

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66 Federal Register, Vo. 35, No. 149, §1607.14.

67 Horace G. Busnell, "Result-Oriented Affirmative Action," Municipal Yearbook (Washington: International City Management Association, 1975), p.163.

68 Harry T. Edwards and Barry L. Zaretsky, "Preferential Remedies for Employment Discrimination," Michigan Law Review Vol. 74:1 (November, 1975), p.2.

> The concept of affirmative action requires more than mere neutrality on race and sex . . . The premise of this obligation is that systemic forms of exclusion, inattention, and discrimination cannot be remedied in any meaningful way, in any reasonable time, simply by assuring a future benign neutrality with regard to race and sex. This would perpetuate indefinitely the grossest inequities of past discrimination. 69

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> [By affirmative action] ...we are talking about getting people employed. The success of the effort to overcome discrimination in this country must be measured numerically, because there is no other way to measure it. Progress can only be achieved when minorities get jobs they do not now have. 70

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While the official E.E.O.C. definition emphasizes 'affirmative action' to equalize opportunity, it is evident that the other writers stress, in varying degrees, 'affirmative action' to equalize the result. Somewhere in that subtle distinction is found the crux of the affirmative action controversy: Can one effectively achieve full participation of minorities within a framework of rules based on equality of opportunity and not necessarily equality of result?

It has been traditional that racial discrimination has been discussed in terms of differential treatment of

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69 George Roche, The Balancing Act: Quota Hiring in Higher Education [quoting J. Stanley Pottinger] (LaSalle, Ill.: Open Court Publishers, 1974), p.18.

70 Thompson Powers, Equal Employment Opportunity: Compliance and Affirmative Action (Washington: National Assoc. of Manufacturers, 1969), p.66.

a minority group by the dominant society. It is relatively recent that substantial attention has been given to alleged discrimination against the majority: 'reverse discrimination.' Many persons continue to confine the term discrimination to its traditional usage. An official of the National Association for the Advancement of Colored People (N.A.A.C.P.) can see no valid purpose in extending the traditional concept:

> There is no such thing as reverse discrimination. Those who complain of it are engaging in a deliberate attempt to perpetuate the racial status-quo by drawing attention away from racial discrimination to make the remedy the issue. The real issue remains racial discrimination. [71]

The following analysis is an expansion of this reasoning:

> ...when a company uses fast tracks for blacks in hiring and promotion, they cannot be accused of 'reverse racism' because that would require two things: (1) black control of the basic institutions of society, and (2) the use of that power to subjugate and exploit white people. Clearly, neither is the case. [72]

Thus, the emergent argument relates to this concept of 'traditional' racial discrimination versus the new 'reverse discrimination.'

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71 "Reverse Discrimination--Has It Gone Too Far?", U.S. News and World Report, March 29, 1976, p.29; hereafter cited as U.S. News and World Report, March 29, 1976.

72 Life and Work, (a newsletter of the Detroit Industrial Mission), Vol. 14:5 (Summer, 1974), p.4.

In one of the best legal articles on the subject, Professor Ely of Harvard University discusses the rational justification for extending the entire concept from the official government definition (to undertake affirmative action to ensure applicants are treated without regard to race, etc.) to the "result-oriented" definitions of the other writers, of which race-consciousness seems inextricable.

> If we are to have even a chance of curing our society of the sickness of racism, we will need a lot more black professionals. And whatever the complex of reasons, it seems we will not get them in the forseeable future unless we take blackness into account and weight it positively when we allocate opportunities. 73

This realistic point of view is shared by Professors Edwards and Zaretsky in their article on "Preferential Remedies for Employment Discrimination" in which it is noted:

> In dealing with employment discrimination cases, the courts have begun to demonstrate a growing awareness that the goal of equal employment opportunity cannot be implemented effectively solely through neutral employment practices. It would seem obvious that even if all employers here-

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73 John Hart Ely, "The Constitutionality of Reverse Racial Discrimination," University of Chicago Law Review (Vol. 41, Spring, 1974), p.723.

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> after hired on a nondiscriminatory basis, it would still be years before Blacks and women reached a status in the job market comparable to white males. [74]

It has also been argued that compelling public interests justify the preferential treatment of black applicants. The counsel for the defendant university in DeFunis v. Odegaard, a renowned 'reverse discrimination' case reaching (but not decided) the U.S. Supreme Court in 1974, adduced that the entire society benefits when blacks are brought into the mainstream.[75] Some have also justified preferential treatment of minorities on the same basis for preferring military veterans.

> Just as the public jurisdictions helped the nation to repay the debt to returning war veterans, it is important now that they help repay a debt resulting from years of public employment discrimination of minority group members, by giving preferential treatment to members of minority groups. [76]

To some extent, the Supreme Court indicated in a recent opinion that it may subscribe to this concept of a shared societal responsibility for historic employment discrimination. In a narrowly drawn opinion dealing with the "last hired--

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74 Edwards and Zaretsky, p.7.

75 John de J. Pemberton, Equal Employment Opportunity--Responsibilities, Rights, Remedies (New York: Practicing Law Institute, 1975), p.82.

76 U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort, (Washington: Government Printing Office, 1975), p.57; hereafter cited as Enforcement Effort.

first fired" seniority/layoff question, the Court sanctioned awarding "fictional" seniority to identifiable victims of past discrimination on an individual basis. Their decision required sacrifices on the part of some third parties not directly involved in the discrimination. The Court stated:

> We are of the view...that the result which we reach today-- which, standing alone, establishes that a sharing of the burden of past discrimination is presumptively necessary-- is entirely consistent with any fair characterization of equity jurisdiction. [77]

The role of the Federal government in most affairs has increased over our two hundred year history as a nation. Some now look to it as the force to deliver racial equality. One writer describes his perception of the result to be sought:

> ...the time has come...for the Federal government to act in a systematic fashion to achieve a meaningful economic parity among all racial and ethnic groups and men and women. [emphasis added] [78]

Despite the laudability of the objectives, increasing attention is being paid to carefully articulated objections that certain result-oriented programs must achieve parity

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77 Franks v. Bowman Transportation Co., 424 U.S. 747(1976)

78 Moses Lukaczer, "Assessing Progress: Employment Among Americans of Spanish Origin," Civil Rights Digest, Vol 8:4 (Summer, 1976), p.30.

for some at the expense of others. Cohen is one such commentator:

> When a resource is in short supply, and some by virtue of their race are given more of it, others by virtue of their race get less. If that resource be seats in a law school or medical school, procedures that assure preference to certain groups in allotting those seats necessarily produce a correlative denial of access to those not in the preferred categories. This plain consequence must not be lost sight of. Whether the numbers be fixed or flexible, whether quotas be established and called benign, whether the objective be 'reasonable' proportionality or approximate representation, the setting of 'benefit floors' for some groups in this context inescapably entails 'benefit ceilings' for others. [79]

The upshot of Cohen's argument, of course, is that preferential treatment based on race is unlawful since it unjustifiably limits the opportunities of majority candidates on an impermissible ground: race. Criminal justice practitioners and academicians tend to either strongly agree or strongly disagree with his conclusion. It may also be apparent that this thesis does not fundamentally differ with Cohen's assessment. But it seems that one should not get to the point of endorsing or taking exception with Cohen without

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[79] Cohen, "Honorable Ends, Unsavory Means," p.110.

at least a cursory review of the sources of law which impact on the question. An esoteric argument that a particular affirmative action program benefits 'Group X' or hurts 'Group Y' is largely moot if the program is deemed to be violative of the law. The remainder of this chapter shall discuss four broad areas of law and will provide a framework for the discussion of the legality of affirmative action contained in subsequent chapters.

A. Constitutional Provisions

Article VI, Section 2 of the United States Constitution provides that "this Constitution and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land."[80] Therefore, the provisions of the Constitution are preeminently pertinent in any inquiry into the legality of affirmative action. Three amendments are directly applicable to the issue.

> Amendment V.
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> No person shall...be deprived of life, liberty, or property, without due process of law...[81]
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> * * * * * * * *
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> Amendment XIII.
>
> Neither slavery nor involuntary servitude, except as punishment

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80 U.S. Constitution, Art. VI, §2.

81 U.S. Constitution, Amendment V.

> whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. 82

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Amendment XIV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of laws. [emphasis added] 83

In addition to the Fifth, Thirteenth, and Fourteenth Amendments, it is necessary to note two Congressional acts related to the amendments.

1. The Civil Rights Act of 1866

This legislation was enacted by Congress pursuant to the Thirteenth Amendment. It is commonly known as Section 1981 of Title 42 of the U.S. Code. It provides that:

> All persons within the jurisdiction of the United States have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens... 84

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82 U.S. Constitution, Amendment XIII.

83 U.S. Constitution, Amendment XIV

84 42 U.S.C. §1981

2. The Civil Rights Act of 1871

This legislation was enacted pursuant to the Fourteenth Amendment and is commonly known as Section 1983 of Title 42 of the U.S. Code. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured.... [85]

With reference to this act, it should be noted that municipalities are not subject to suit under §1983,[86] nor are private employers ordinarily subject to suit since the action must have been taken under color of law.[87] The administrator will note that §1983 is also a statute frequently used in unlawful arrest or incarceration actions.[88]

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85 42 U.S.C. §1983.

86 City of Kenosha v. Bruno, 412 U.S. 507 (1973)

87 Bradford v. People's Natural Gas Co., 7 E.P.D. ¶9120, (W.D., Pa., 1973).

88 Monroe v. Pape, 365 U.S. 167 (1961) and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

B. The Civil Rights Act of 1964---Legislative History

Although the previous laws are important to a complete understanding of employment discrimination, the vast majority of present litigation is brought pursuant to Title VII of this act.[89] The main provision is found in §703(a)(1), which provides that it is an unlawful practice to:

> fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. [90]
> [emphasis added]

Section 703(a)(2) further makes it unlawful:

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [91]
> [emphasis added]

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[89] The subjects of the various titles in the Act are as follows: Title I, right to vote; Title II, use of public accommodations; Title III, desegregation of public education; Title IV, desegregation of public facilities; Title V, powers of Commission on Civil Rights; Title VI, nondiscrimination in Federally assisted programs; Title VII, equal employment opportunity. Codified as 42 U.S.C. §2000(e).

[90] 42 U.S.C. §2000(e)--§703(a)(1)

[91] 42 U.S.C. §2000(e)--§703(a)(2)

As shown by the emphases of the author, a literal reading of §703(a)(1) and §703(a)(2) reveals that the language forbids, quite plainly, discrimination against any individual of any race, color, etc. A provision of lesser significance also clarifies the Congressional intent on this point:

> Nothing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer. [92]
> [emphasis added]

Although the facially unambiguous language of the act suggests that an employer is prohibited from preferring any person (majority or minority) on the basis of race,[93] it is instructive to carefully examine the legislative history of an act to determine if its wording adequately

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[92] 42 U.S.C. §2000(e)---§703(j).

[93] It is necessary to momentarily digress at this point. The Act does provide broad remedial powers to courts to fashion relief for past discriminatory action. The imposition of quota relief subsequent to such a finding has been widely upheld by appeallate courts. The legality or propriety of such judicial remedies is not questioned herein. Such cases present an issue distinct from the 'reverse discrimination' cases of Bakke and others. This subtle distinction--between the powers of a court and the prerogatives of a mere employer--is crucial to an understanding of the affirmative action dilemma in law enforcement. It is §706(9)(g) and §707(e) of the Act that provides this authority to the courts. U.S. v. Ironworkers Local 86, 443 F.2d 544 (1971).

conveys the intent of its writers. Justice Frankfurter discussed the purpose of such an inquiry in his concurring opinion in United States v. United Mine Workers of America:

> Even when a statute deals with a relatively uncomplicated matter, and the words in their natural sense would appear to give an obvious meaning, considerations underlying the statute have led this Court to conclude that the words cannot be taken quite so simply. [94]

While the weight accorded to the legislative history of a statute is largely a matter of judicial discretion, the present Court seems to give it great deference in matters relating to civil rights enforcement. The Court relied heavily on the legislative history in two recent civil rights cases. In Franks v. Bowman Transportation Co.,[95] a case involving the question of seniority rights and layoff, and in McDonald v. Santa Fe Trail Transportation Co.,[96] a case deciding if civil rights protection extends to whites, the Court quoted extensively from the commentary of legislators

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94 United States v. United Mine Workers of America, 330 U.S. 258 (1947).

95 Franks v. Bowman Transportation Co., supra.

96 McDonald v. Santa Fe Trail Transportation Co., 49 L.Ed.2d 493 (1976). The Court held unanimously, in an opinion written by Justice Marshall, that Title VII prohibits racial discrimination against whites upon the same standards as would be applicable were they nonwhites.

during the debate of the bill. This reliance on legislative history may prove illuminating in predicting the ruling of the Court in the Bakke case.[97]

The knowledge of the 'true' legislative intent behind Title VII of the Civil Rights Act of 1964 would be significant in resolving the numerous conflicts of opinion typified by controversies such as the one between N.O.B.L.E. and the I.A.C.P. mentioned earlier. Perhaps careful examination of the Act's history would reveal an intention on the part of its authors (perhaps inadequately articulated) to favor one of the competing factions over the other. This reasoning might include that Congress meant by the words "any individual" what is denoted by the words "certain individuals." Such was the ruling in Mele v. U.S. Department of Justice, a 'reverse discrimination' suit, in which the judge concluded: "Surely, it cannot be said that Congress, by enacting Title VII, intended to protect those white males who traditionally dominated the labor unions."[98]

Fortunately, the grasp of congressional intent through the examination of the statute's legislative history is facilitated by the unprecedented debate that preceeded the passage of the bill.

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[97] The possible implications of Bakke in criminal justice are explored in Chapter 6.

[98] Mele v. United States Department of Justice, 395 F. Supp. 592, 10 FEP 1000 (N.D., N.J., 1975). The decision of the District Court was without the guidance of the Supreme Court's ruling a year later in McDonald v. Santa Fe Trails and is presumably bad law since it flies in the face of the ratio decidendi of the latter case.

The primary sponsors and floor managers of the Civil Rights Act of 1964 were Senators Joseph Clark (D., Penn.) and Clifford Case (D., New Jersey). Their interpretive memorandum is reprinted in Howard Sherian's seminal article, "The Questionable Legality of Affirmative Action":

> There is no requirement in Title VII that any employer maintain a racial balance in their workforce. On the contrary, any deliberate attempt to maintain such a balance, whatever such a balance might be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire on the basis of race. [99]

It is apparent that the challenge that Title VII required 'favoritism' of minorities was a key issue during the legislation's debate. An article in the Yale Law Review quotes the position of Senator Harrison Williams on that contention:

> Those opposed to [Title VII] should realize that to hire [or promote] a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill. The language of the title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In

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99 Howard Sherian, "The Questionable Legality of Affirmative Action," Urban Law Review, Vol. 51:10 (August, 1973), p.2.

> that respect, all men are to have an equal opportunity to be considered for a particular job. [100]
> [emphasis added]

Biddle's text on employment discrimination also cites a memorandum of Senator Williams to support the premise that preference on the basis of race was not the intent of the writers of the Act:

> Some people charge that ... [Title VII] favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or religion over another? Those who say that equality means favoritism do violence to commonsense. . .Finally, let me attempt to put to rest the wholly spurious argument that . . .[Title VII] would establish compulsory employment quotas. . . [101]
> [emphasis added]

Sowell has written that the dilemmas of affirmative action were known from the outset and that the legislators considered, and rejected, the proposition that the beneficent end of equality of opportunity could be justified through illegitimate means. He quotes the Senate majority whip

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100 "Business Necessity Under Title VII of the Civil Rights Act of 1964," [no author cited] Yale Law Review, Vol. 84:98 (Spring, 1974), p.117, citing 110 Congressional Record 8921, (1964).

101 Richard E. Biddle, Discrimination: What Does It Mean? (Chicago: International Personnel Management Assoc., 1973) p.8, citing 110 Congressional Record 8921, (1964)

Hubert H. Humphrey on the question of proportional representation requirements:

> The proponents of the bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. 102

Similarly, in defining the intent of the 'no-preference' clause in §703(j), Senator Williams assured that the provision would prevent unwarranted government intervention into the employment process.

> ...specifically prohibit the Attorney General, or any agency of the government, from requiring employment to be on the basis of racial or religious quotas. Under [this provision] an employer with only white employees could continue to have only the best qualified persons even if they were all white. 103

A careful reading of the legislative history of this Act discloses that the legislators intended it to represent an affirmation of a doctrine based on individual rights, as compared to rights that would be conferred due to one's status as a member of a particular racial or religious group. Support for this conclusion is found throughout the Senate

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102 Sowell, "Affirmative Action Reconsidered," p.49, citing 110 Congressional Record 12723, (1964)

103 Glazer, p.45, citing 110 Congressional Record 14331, (1964)

and House debates. For example, Representative John Lesinski (D., Mich.) read into the Congressional Record parts of a decision by Justice Charles Whitaker to express his understanding that individual achievement should not be diminished:

> As Justice Whitaker, a former member of the United States Supreme Court has said: 'Democracy, as a system of government, was never intended to be a leveler of men. It permits and was intended to permit, the gifted, the energetic, the creative, and the thrifty to rise above the masses.
>
> 'If men really want permanent equality,' continues Justice Whitaker, 'they must find it only in communism, for such is the central theme of that philosophy. Generally, men who are free do not remain economically equal, and men who remain economically equal are not free.' [104]

An examination of the statutory provisions of the Civil Rights Act of 1964 coupled with an analysis of its legislative history fails to comport with the argument that the creation of racial barriers for majority group members, for the purpose of achieving equal opportunity, is required or permitted by the legislation. The failure to cite legislative history supportive of such a position

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[104] A reprint of remarks of Representative John Lesinski (D., Mich.), cited at 110 Congressional Record (May 12, 1964)

is because no examples were found in the sources cited in the bibliography of this thesis. The conclusion that a substantial discrepancy exists between the articulated intent of Congress and many current practices taken under the authority of the legislation is supportable. Sowell's observation is correct:

> Despite the clear Congressional intent expressed by both supporters and opponents of the Civil Rights Act of 1964, the actual administration of that law has led precisely in the direction which its sponsors considered impossible. [105]

C. Griggs v. Duke Power Co.--The Landmark Case

As an examination of the mere wording of a statute is insufficient to adequately define its intent, it is not plausible to attain an understanding of employment discrimination law only from examining statutes and their history. Glazer has described the actual legislation as but one part of a troika, with the interpretations of administrative agencies as the second member, and the input of the judicial branch as the third component. He adds:

> The law, apparently, generally comes off a bad third in this troika, because after all, the

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[105] Sowell, "Affirmative Action Reconsidered," p.39

> congressmen do not enforce the law--the courts do--and the congressmen do not interpret the law, unless they are willing to undergo the elaborate ordeal of legislation again--the courts do. [106]

In order to round out this framework, therefore, it is necessary to touch on these two additional areas of the law.

The Griggs v. Duke Power Co.[107] case is the leading judicial authority in employment discrimination law. A discussion that underestimates its significance is doomed to misapprehend the subject; were one limited to a single case he should discuss Griggs. Inasmuch as this work has been prepared primarily for an audience of persons in criminal justice, an analogy to that field seems appropriate: Griggs is to civil rights what Mapp is to criminal procedure. The importance of each to its respective area has been staggering.

Griggs was a class action suit brought by black employees of the Duke Power Company of North Carolina. The crux of the case revolved around a newly imposed requirement that employees wishing to transfer to certain

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106 Glazer, p.40

107 Griggs v. Duke Power Co., 401 U.S. 424 (1971); hereafter cited as Griggs.

departments had to (1) possess a high school diploma, and (2) pass a standardized intelligence test as a condition of transfer. Significantly, the requirement was imposed on July 2, 1965, the effective date of the Civil Rights Act of 1964. These criteria were not previously taken into consideration in transfer decisions. At a full trial on merits, the District Court found that the company had "...openly discriminated on the basis of race in hiring and assigning employees" prior to the effective date of the Act; however, the court also found that such overt racial discrimination had ceased. Evidence was further presented that indicated the two new requirements "...operated to render ineligible a markedly disproportionate number of Negroes" who had sought such transfer.[108]

The key question presented in Griggs was whether a practice that was facially neutral with regard to race, and absent any racial purpose or invidious intent, could be considered to violate Title VII. The Court ruled that the use of the intelligence test and the requirement for a high school diploma were indeed unlawful, notwithstanding the fact that no conscious effort to discriminate was either alleged or proved. The test enunciated in Griggs remains

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108 Griggs, supra at 424

binding precedent in all cases of discrimination brought under Title VII

The Court's first task in Griggs was to interpret the meaning of §703(h) of the Civil Rights Act which provides:

> Notwithstanding any other provision in this title, it shall not be an unlawful employment practice for an employer...to give and act upon the results of any professionally developed ability test provided that such test, its administration or action based upon the results is not designed, intended, or used to discriminate because of race, color, sex, religion, or national origin. [109]

The Court ruled that although a discriminatory intent could not be imputed to the company by this action,[110] showing such intent is not essential to support a holding for the plaintiffs in a Title VII action. It is the consequence of the employment practice, not simply the motivation, that is within the purview of the Act. The Court noted:

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109 42 U.S.C §2000(e)(2)---§703(h)

110 The Court took judicial notice of the company's program for tuition reimbursement.

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. [111]
> [emphasis added]

The Court's unanimous opinion, authored by Chief Justice Burger, observed that "...tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. ...[Congress has] provided that the vessel in which the milk is proferred be one all seekers can use.[112] The holding is consonant with Gaston County v. United States where North Carolina's practice of requiring literacy tests for voter registration

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111 Griggs, supra, at 431

112 Griggs, supra, at 430

was struck down on Constitutional grounds.[113]

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[113] The mystery surrounding judicial decision making prompts speculation. Perhaps Justice Douglas, who voted in the majority in both cases, was influenced and influenced his colleagues with the story he recounts in his autobiography. It is a modern version of the ancient fable.

> ...A Black man had appeared for [voter] registration in a Southern town. The registrar, scanning the application, said, 'Please quote the First Amendment to the Constitution.'
>
> The Black man shook his head.
>
> 'Recite the Fourteenth Amendment.'
>
> The man again shook his head.
>
> 'Tell me, what is a bill of attainder?'
>
> He shook his head again.
>
> 'Does the crime of treason require an overt act?'
>
> The Black shook his head.
>
> The registrar, looking the applicant in the eye, asked, 'Tell me, nigger, don't you know anything?'
>
> 'One thing' was the reply.
>
> 'What is that?'
>
> 'No nigger is going to vote in the next election.'

William O. Douglas, Go East, Young Man (New York: Delta Books, 1974) p.415.

The Griggs Court did not hold that an employer was required, as a matter of law, to use only those employment practices that have no adverse impact on blacks; it merely stated that in these circumstances there must be legitimate reasons for the procedure and the requirement must be related to the specific job. The theory has been summarized by Monroe:

> If a requirement for the job can be shown on a statistical basis to be one which is met by fewer of those in a protected group than the population at large, the restriction is only valid if it can be shown to have a substantial proven business necessity, regardless of whether the restriction is intended to be discriminatory.[emphasis added] [114]

Because we do not ordinarily think of law enforcement in terms of a business, and to avoid misunderstanding, the term 'operational necessity' has been substituted for the previous term by L.E.A.A.[115] Robinson v. Lorrilard provides a useful definition of the concept:

> The applicable test is not merely whether there exists a business purpose for adhering to the challenged practice. The test is whether there exists

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114 Lawrence J. Monroe, "Minority Recruitment," Police Yearbook--1976, (Gathersburg, Md.: International Assoc. of Chiefs of Police, 1976), p.73.

115 L.E.A.A., Equal Employment Opportunity Program Development Manual (Washington: U.S. Dept. of Justice, 1974), p.117; hereafter cited as E.E.O.P. Development Manual.

> an overriding legitimate business purpose...[that] must be sufficiently compelling to override any racial impact. [116]

Therefore, the law provides that any employment practice, including those that are apparently neutral, may be challenged if a minority group member is able to show, on a statistical basis, that fewer minorities successfully pass the screening procedure than do majority group members. At this point, a *prima facie* inference of unlawful discrimination has been sustained by plaintiffs. The burden for showing the lawfulness of the procedure shifts to the defendants. The inference of unlawful discrimination can be rebutted by proof that (1) the practice is related to the job requirements and (2) that it is necessary for some reason related to the business operation.[117] The Court indicates in *Griggs* that this validation should show "a manifest relationship to the employment situation."[118] An employer has no obligation to validate a procedure which does not have a statistically disparate impact on employment opportunities afforded to members of a protected class.[119]

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116 *Robinson v. Lorrilard*, *supra*.

117 National Civil Service League, *Judicial Mandates for Affirmative Action* (Washington: National Civil Service League, 1973), p.7.

118 *Griggs*, *supra* at 424.

119 *Buckner v. Goodyear Tire and Rubber Co.*, 4 F.E.P.¶648, (1972)

The legal principle that an employer may not capriciously thwart equal employment opportunity by the construction of arbitrary 'qualifications' makes Griggs a case with far-reaching implications. While the holding definitely increases the vulnerability of an employer in litigation, one is cautioned not to extend Griggs to represent something more than it does.

Although Griggs involved unlawful practices directed at black employees, the decision does not ignore the question of civil rights protections of non-minority workers. Griggs should not be cited as judicial authority that an employer, in the name of assuring equality of opportunity for blacks, has carte blanche to take any necessary steps to achieve a racially balanced work-force. The Court's penchant for individual rights is clear throughout its decision. The following four passages from Griggs demonstrate this conviction. While mere dictum in Griggs, they portend to become the ratio decidendi of Bakke.

> Equal protection does not entitle superior or preferential rights to a minority (or a majority) [120]

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120 Griggs, supra at 424

> Congress did not intend by Title VII... to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. 121

* * * * * * * *

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. 122
> [emphasis added]

* * * * * * * *

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. ...Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made them the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. 123
> [emphasis added]

Although Griggs is the leading case authority on employment discrimination, it cannot stand alone to

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121 Griggs, supra at 431

122 Griggs, supra at 431.

123 Griggs, supra at 436.

represent the judicial component of Glazer's troika. A profusion of litigation has created a complex network of judicial standards. Chapters 5 and 6 will deal in greater depth with these other decisions. However, at this point it is necessary to examine the roles played by the various civil rights enforcement and compliance agencies.

D. Administrative Regulation of Employment Discrimination

The contact of the criminal justice administrator with Federal civil rights enforcement agencies will be primarily with the Equal Employment Opportunity Commission (E.E.O.C.) and the Office of Civil Rights Compliance (O.C.R.C.) of L.E.A.A. Under certain conditions, other Federal agencies may also retain jurisdiction.[124] Additionally, each state has its own state body to investigate charges of discrimination,[125] as do some local jurisdictions.[126]

The most significant agency in this area is the E.E.O.C. Under the original 1964 Act, its general investigatory powers were limited to private employers, but the Equal

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[124] These include the Office of Revenue Sharing (if revenue sharing funds are used to support police operations), the Office of Federal Contract Compliance (federal funds in municipal construction projects), the Office of Civil Rights Compliance of the Department of Health, Education and Welfare (if certain category grants are obtained) and the United States Civil Rights Commission.

[125] In Michigan, the Michigan Civil Rights Commission is established and acts pursuant to authority in Article V, §29 of the Michigan Constitution.

[126] In Detroit, the Department of Human Rights has the Charter authority to deal with problems of discrimination.

Employment Opportunity Act of 1972 expanded its jurisdiction to include state and local government employers. Criminal justice agencies, therefore, were not subject under the 1964 Act until March 24, 1972. E.E.O.C.'s powers to enforce its findings in the Federal courts were also strengthened by the 1972 amendments.[127]

Criminal justice agencies have a second layer of governmental scrutiny provided by the Law Enforcement Assistance Administration. Unlike E.E.O.C., there is no automatic statutory obligation to L.E.A.A.; it is incurred only by the acceptance of grant funding.

A great deal of attention has been paid to the role of L.E.A.A. funding in upgrading the technolgical capacities of criminal justice agencies. On the whole, however, administrators appear to be somewhat less aware of the stipulations that are a concomitant of the grant dollars. One such "string" is the acknowledgement of the authority of the Federal government to establish and enforce rules and guidelines based on racial or sexual discrimination in programs or activities receiving assistance.

The prospect of a total withdrawal of Federal dollars from an agency of state or local government represents quite an ominous thought to the fiscally dependent administrator. The President of Columbia University has discussed the implications of such potential losses:

> No one likes to be in the position of negotiating for his survival

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[127] E.E.O.C., Affirmative Action and Equal Employment: A Guidebook for Employers (Washington: EEOC, 1974), p.13; hereafter cited as Affirmative Action and Equal Opportunity.

> with Uncle Sam sitting at the other end of the table. Our instincts were to promise anything to get the government off of Columbia's back. [128]

This pressure to conform to the nondiscrimination rules of L.E.A.A. has similar ramifications in criminal justice agencies. Table 1 details Federal monies received in recent years by the City of Detroit. It was used in a presentation by Chief of Police Philip G. Tannian where he represented to members of the Board of Police Commissioners that their failure to adopt the controversial affirmative action promotional policy detailed in Chapter 4 could result in cutoff of Federal funds.[129]

TABLE 1

Detroit Police Department
Federal Money Received 1970-1975

FEDERAL REVENUE SHARING:	
1975-76	$ 27,628,900
1974-75	$ 27,526,205
1973-74	$ 27,118,394
1972-73	$ 28,709,651
COMPREHENSIVE EMPLOYMENT TRAINING ACT (C.E.T.A.)	
1975-76	$ 3,824,347
1974-75	$ 825,527
1973-74	$ 891,702
1972-73	$ 2,417,006
1971-72	$ 420,676
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (L.E.A.A.)	
1970-1975	$ 12,395,388
TOTAL	$131,757,798

[130]

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[128] Roche, p.5.

[129] Oral comments of Chief of Police Philip G. Tannian to Board of Police Commissioners, November 4, 1975.

[130] Board of Police Commissioners Meeting, November 4, 1975.

L.E.A.A.'s civil rights enforcement authority is established in the Omnibus Crime Control and Safe Streets Act, as amended:

> No person in any state shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title. [131]

This enforcement posture is predicated upon a laudable recognition that "full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component of the Safe Streets Act's program to reduce crime and delinquency in the United States."[132] All grant recipients are required to provide a written certification that they will comply with Title 28, Chapter 1, Subpart E of Part 42 of the Code of Federal regulations.[133] In effect, the recipient agency certifies that members of the various 'protected classes' will not be disadvantaged by the agency's employment practices.[134]

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[131] E.E.O.P. Development Manual, p.7

[132] E.E.O.P. Development Manual, p.1.

[133] E.E.O.P. Development Manual, p.5.

[134] The L.E.A.A. definition of a 'protected class' member includes women and 'minority persons'. "Minority persons shall include persons who are Negro, Oriental, American Indians, or Spanish-surnamed Americans." 28 C.F.R.§42.302(e).

The approaches to enforcement taken by the various administrative agencies have contributed to their widespread criticism. Courts, as well as employers, have leveled the criticism. In Cramer v. Virginia Commonwealth University, the Federal judge chastised the compliance agency for its encouragement of a program granting unlawful preference to women in attaining faculty positions. He wrote:

> By requiring employers to engage in widespread, pervasive, and invidious sex discrimination through the implementation of the pervading affirmative action programs, the U.S. government is merely perpetuating the very social injustices it so enthusiastically and properly seeks to remedy. [135]

One basis for the judge's concern was the usage of statistical evidence against the defendant university.

Enforcement agencies have a difficult mandate in assuring that Federal funds are not used in a discriminatory manner. Rarely, if ever, will an employer make an admission of wrongdoing. Therefore, great reliance on statistical evidence is made in administrative investigations of recipients. "Statistics often tell much, and Courts listen." [136] Statistics equate to inferences of discrimination, or nondiscrimination.

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[135] Cramer v. Virginia Commonwealth University, 415 F. Supp. 673, 12 FEP Cases 1397 (E.D., Va., 1976).

[136] Alabama v. United States, 304 F.2d 583 (5th Cir.,1962).

Glazer notes that reliance on this strategy has resulted in a disconcerting premise: ". . .in effect, the census is now to determine what is discrimination and what is affirmative action."[137] The emphasis on statistical proof is shown in E.E.O.C.'s guidelines:

> . . .if a statistical survey shows minorities and females are not participating in your work force at all levels in reasonable relation to their presence in the population and the labor force, the burden of proof is on you that this is not the result of discrimination.[138]

L.E.A.A. adopts a similar approach, and extends it to specifying appropriate numbers that it expects to find in the work force of a non-discriminatory employer:

> A significant disparity between minority representation in the service population and the minority representation in the work force may be deemed to exist if the percentage of a minority group in the employment of the agency is not at least seventy (70) percent of that minority in the service population.[139]

The procedures of the Michigan Civil Rights Commission are patterned after the Federal model. Their guidelines make clear that inadequate representation of minorities place an employer in a tenuous position in terms of defending against a claim of unlawful pattern or practice of discrimination.

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[137] Glazer, p.49.

[138] Affirmative Action and Equal Opportunity, p.7.

[139] E.E.O.P. Development Manual, p.13.

> Statistics that demonstrate a substantial disparity between the percentages of blacks available for employment in a specific community and the percentage of blacks employed by a particular business in that community may in the proper case make out a prima facie case of racial discrimination. [emphasis added] [140]

Of course, enforcement agencies are expected to have more sophistication in their investigatory techniques than to base determinations of guilt solely on statistics.[141] For example, the defenses of job-relatedness and business necessity, as noted earlier, are established by the courts.[142] Successful defenses, in theory, overcome the discriminatory inference of the statistical data. The E.E.O.C. guidelines recognize such exceptions:

> Any employment practice or policy, however neutral in intent, and however fairly administered, which has a 'disparate effect' on members of a 'protected class,' or which perpetuates the effect of prior unlawful discriminatory practices, constitutes unlawful discrimination unless it can be proven that such

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[140] Michigan Civil Rights Commission, Employment Guidelines and Interpretations of the Michigan Civil Rights Commission (Lansing: Civil Rights Commission, 1975), p.7.

[141] The "statistical pattern" approach recently suffered a setback, the dimensions of which cannot yet be fully assessed. The Supreme Court reversed a case in which the school board was found guilty of employment discrimination on the basis of the disparity between the number of minority students in the district and the number of minority teachers. The Court held such statistics may have "little probative value" in determining discrimination. Hazelwood School District v. United States: 97 S. Ct. 2736 (1977).

[142] Sims v. Sheet Metal Workers, 4 FEP ¶8081 (1972) and Buckner v. Goodyear Tire and Rubber Co., 4 FEP ¶648 (1972).

> policy is compelled by business necessity. [emphasis added] 143

The last sentence of the guideline, however, represents more of a problem than the guideline indicates. Establishing an exception to the statistical inference of discrimination must be accomplished through standards written and interpreted by E.E.O.C. These employee selection guidelines represent a second broad area of widespread criticism against the agency.

As noted earlier, the process of demonstrating the validity of a selection device and the relationship of that device to the actual job requirements is called validation. The problem areas of validation are sufficiently complex that special attention to the subject is given in Chapter 5. However, it should be noted here that there is widespread consensus that E.E.O.C. guidelines are both unreasonable and unworkable. McDermott provides a synopsis of this opinion:

> The guidelines have reached a level of specificity and stringency which no employer, even the largest, and no professional, even the most expert, can comply. 144

At least two courts appear to substantiate this finding, noting that no employment test has apparently been validated to the degree required by the E.E.O.C. guidelines.[145]

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143 Affirmative Action and Employment Opportunity, p.6

144 F. Arnold McDermott, "Merit Systems Under Fire," Public Personnel Management, Vol.5:4 (July, 1976), p.229.

145 Henderson v. First National Bank, 360 F. Supp 531 (M.D., Ala., 1973); see also: United States v. Georgia Power Co. 474 F.2d 906 (5th Cir., 1973)

Administrative enforcement efforts surely play some role in decisions made by employers to engage in preferential hiring or promotional policies. Glazer believes administrative pressure is the major impetus:

> There is a simple solution to Catch 22; proportional hiring, quotas; and every employer worth his salt knows that is the solution that E.E.O.C. ...and the rest of the agencies are urging upon him, while they simultaneously explain they have nothing of the sort in mind. 146

The two characteristics of administrative agencies combine to create this milieu. The first is this presumption of discrimination arising from statistics. Secondly, there is the intractable nature of the guidelines and the stringent proofs required to establish the job-relatedness defense. This synergestic effect of the two, perhaps contributed to by the prodding of Federal bureaucrats, convinces administrators to impose self-fashioned quotas rather than engage in a protracted legal battle in which the odds are not in his favor. 147

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146 Glazer, p.59

147 The legal weight accorded to the Guidelines also seems to be deteriorating. While the Court stated in 1974 that the Guidelines were entitled to "great deference," (Moody v. Albemarle Paper Co., 422 U.S. 405, 1975), that position has been apparently modified in subsequent decisions. In Davis, the Court rejected the applicability of the Guidelines and held they should be used only insofar as they comport with legislative history. Washington v. Davis, 96 S. Ct. 2040, 1976). Recently, in the much debated pregnancy disability case, the Court's action overturned the Guidelines (and all of the Circuits) and stated that the Guidelines should be given "some consideration" by lower courts. (Gilbert v. General Electric, U.S. 13 FEP Cases, 1659,1977).

Los Angeles Chief of Police Edward Davis, in his role as President of the International Association of Chiefs of Police, has urged a standfast philosophy against this trend. He complains:

> Washington hasn't validated one test. They haven't hired one minority for us. However, they have forced many of our colleagues into a position where they had to accept quotas very unlawfully and illegally. [148]

The issues of quotas in law enforcement cannot be ignored. But the utility of describing the problem in macrocosmic terms is limited by the fact that it is easily challenged by those who attribute the criticism to emotionalism, to a reluctance to accommodate change, or to racism. In order to attempt to blunt that vulnerability, the author is convinced of the need to address the issue in more finite, more specific terms. The next chapter will consider the implementation of affirmative action in the Detroit Police Department.

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148 Law Enforcement News [John Jay College of Criminal Justice], New York), September 21, 1976, p.3.

C H A P T E R F O U R

The Detroit Experience

"A numerical quota is certainly not affirmative action. If anything. . . it represents a failure to take affirmative action."

--Samuel Williams
President, Los Angeles
Board of Police
Commissioners

Samuel L. Williams, "Law Enforcement and Affirmative Action," Police Chief, (February, 1975), p.72.

Many articles on the topic of affirmative action are characterized by an emphasis on its philosophical or theoretical aspects. While the establishment of a theoretical framework from which policies may be developed is essential, a complete understanding of affirmative action is also dependent upon an additional appreciation of the practical effects of the issue. Obviously, theoretically oriented principles are implemented through specific policies which in turn affect real persons. Thus, this chapter will focus on one municipal law enforcement agency and its implementation of an equal employment opportunity program.

The Detroit Police Department employs 5,800 sworn and 600 civilian personnel. It is the fifth largest municipal police employer in the United States. The discussion of the agency is based to some extent on the author's own familiarity with the department; however, the major source of the material in this chapter is extracted from various departmental orders, assorted newspaper accounts, and the contents of its Equal Employment Opportunity Program (EEOP). This last document was developed by the Special Projects Section of the department in 1975. It is available for inspection by interested parties, as required by a regulation of L.E.A.A.[149] and by department policy.[150]

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[149] 28 C.F.R. §42.304(h).

[150] Detroit Police Department, General Order 76-2 published January 1, 1976.

Practitioners of employment discrimination law are quite likely to be knowledgeable in police personnel practices. When one begins a review of landmark cases, he is immediately impressed by the remarkably high proportion of police cases. There are at least four factors that account for this prevalence of police litigation. First, the police department is usually the largest agency under the direct control of the mayor. In Michigan, for example, the school system is organizationally separate and under the control of an independent board. Secondly, police employment has become attractive in urban areas in terms of pay scales. Thirdly, the police function is one of critical importance to society. As the author of Urban Justice noted several years ago, "the gatekeeping and de facto judging by policemen make the police department one of the most significant bureaucracies in city government."[151] Finally, the prevalence of litigation is due in no small part to the fact that police employment practices have historically discriminated against minorities, and that many agencies have been reluctant to cease such activity.

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[151] Herbert Jacobs, Urban Justice: Law and Order In American Cities (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p.32.

A discussion of employment discrimination in law enforcement is complicated and not easily resolved. One can find numerous examples of past discrimination against blacks and other minorities without great searching. There are also obvious disparities in terms of the numbers of blacks presently employed in police agencies. The combination of this evidence would, in most cases, present fairly conclusive evidence of racial discrimination. However, the sophisticated student must also square this evidence with substantial, bona-fide efforts that many police agencies have taken to recruit and retain blacks, particularly since 1967. Rafky notes that the absence of blacks is often determinative of an assumption of unlawful discrimination:

> Underlying charges of inadequate minority representation and unsatisfactory efforts to increase minority participation is the assumption that law enforcement agencies are guilty of racial discrimination--intentional and systematic exclusion of blacks . . . . One reason this allegation has not been systematically investigated is that its validity appears self-evident; the lack of black police is prima-facie evidence of racial discrimination by police departments.[152]

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[152] David M. Rafky, "Racial Discrimination in Urban Police Departments," Crime and Delinquency, Vol.21:3 (July, 1975), p.32.

It is necessary to discuss police recruitment in terms of distinguishable stages through which agencies have passed. Sowell has identified three stages applicable to racial considerations in hiring in the field of higher education;[153] his model is similarly appropriate in describing three identifiable stages in police employment.

A. Recruitment in the Detroit Police Department

STAGE 1 - A period extending from the time blacks began occupying urban centers until roughly 1967. This period is characterized by overt discrimination against minorities. During this time, blackness was weighted negatively in the allocation of employment opportunity.

STAGE 2 - A period of 1967 to 1974, which was characterized by an outreach effort to obtain minorities. The prior negative weight of blackness was eliminated, at least at the stage of recruitment.

STAGE 3 - A period beginning in 1974 and continuing to the present. The period is characterized by the contemporary usage of the term 'affirmative action.' Blackness is weighted positively, at the stage of recruitment and other stages of the employment process as well.

Obviously, such a model is oversimplistic in its approach at understanding the problem, but it is useful in terms of examining different emphases of various administrators.

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153 Sowell, "Affirmative Action Reconsidered," pp. 52-54.

The temporal framework above might be applied to the question of promotions as well as to entry level hiring. The controversy of affirmative action presents itself most clearly in the question of promotions. Police promotions are an important sign of professional achievement to the individual officer. The promotional process in Detroit will be discussed in some detail throughout this chapter. However, it is necessary that some discussion precede that presentation in order that the reader can understand the organizational setting in which the promotional controversy has occurred. This framework will deal with (1) the facts of historic discrimination against blacks by the Detroit Police Department and (2) the agency's attempts at increasing minority personnel through special recruitment programs since 1967.

There is little utility in analyzing present affirmative action programs if one ignores the situations which lead up to the need for their creation. Extensive proof that discrimination existed in the past in the Detroit Police Department is unnecessary. Those who are even remotely familiar with the historical facts of the department must acknowledge that it did exist and that it was pervasive throughout the department. Past discrimination is adequately demonstrated merely by reviewing the facts established in testimony before the United States Civil Rights Commission in its 1960 hearings on the Detroit Police Department.

Disclosures included:

- That only 133 of 4,200 sworn members, or less than 3% of the force, were black.
- That only 39 of the 133 black officers were placed in assignments other than precincts, and that over 50% of those 39 were assigned to only two bureaus (Women's Division and Vice).
- That only seven black officers held rank above patrolman (4 sergeants, 3 detectives) and that no black occupied the rank of lieutenant or higher.
- That 60% of the precincts were either void of black personnel or had less than three black officers assigned. (See Table 2)
- That more than 75% of specialized assignments in the department were completely absent of blacks.
- That scout car assignments were made on a segregated basis. When orders establishing a trial integration of scout car crews was attempted on March 2, 1960 at the Hunt Street Station, ticket issuance suffered a 90% decline in protest. [154]

Table 2

ASSIGNMENT OF BLACK POLICE OFFICERS IN DETROIT POLICE PRECINCTS, DEC. 1958 [155]

1st	3	10th	17
2nd	5	11th	3
3rd	22	12th	0
4th	1	13th	11
5th	0	14th	0
6th	8	15th	0
7th	0	16th	0
9th	24	TOTAL	94

Note: there was no 8th precinct.

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[154] United States Civil Rights Commission, Police and Blacks: Civil Rights Hearings (New York: Arco Press, 1971), pp.340-360; hereafter cited as Commission Hearings.

[155] Commission Hearings, p.341.

This portrayal of Stage I in Detroit is roughly characteristic of law enforcement agencies in general during this period. One 1954 study revealed that only one black held the rank of captain, and that no black occupied a rank higher than captain in any police agency in the United States.[156] The shift into Stage II was influenced by a number of factors. It would be unrealistic to attribute the impetus of this transition merely to pure intentions of enlightened police administrators. While many officials no doubt recognized a moral obligation to cease discrimination, other factors were more directly instrumental in effecting the change. Perhaps it was the combined effect of many factors: the newly enacted civil rights legislation, the shifting public opinion brought by the struggles of Dr. King and his movement, and the increasing influence of blacks in demands for police responsiveness. But without doubt, the most inexorable force in bringing about these changes were the civil disturbances of 1967 and 1968. The worst of these occurred during five days of rioting in the inner-city of Detroit. The rebellion was finally quashed through the combined forces of Federal troops,

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156 William H. Kephart, "The Integration of Negroes into Urban Police Forces," Journal of Criminal Law, Criminology, and Police Science, Vol. 40 (September, 1954), p.327.

national guard, and state and local police. The costs included forty-three deaths and property damage of over fifty million dollars.[157]

Perhaps it was for the fact that Detroit had the worst riot that it developed what has been termed the best minority recruitment program to bring blacks into the employment opportunities of the criminal justice system. The Detroit Police Department's efforts have been cited as exemplary in a number of contexts. The 1973 report of the National Advisory Commission on Criminal Justice Standards and Goals cites its 'special techniques' as the standard of recruiting effort to be emphasized in other agencies interested in increasing minority strength.[158] The U.S. Civil Rights Commission described the new Detroit effort as one of only two programs it believed adequate in recruiting minorities. Their report concluded that on the basis of Detroit's experience, " . . . the task of minority recruitment was difficult, but by no means impossible."[159] The success of the Detroit Police

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157 "Those Riot-Torn Cities--A Look At Progress Ten Years Later," U.S. News and World Report, August 29, 1977, p.50; hereafter cited as U.S. News and World Report.

158 National Advisory Commission on Criminal Justice Standards and Goals, Report on Police (Washington: Government Printing Office, 1973), p.333; hereafter cited as Report on Police.

159 Richard J. Margolis, Who Will Wear the Badge?: A Study of Recruitment Efforts in Protective Services (Washington: U.S. Civil Rights Commission, 1971), p.5.

Department has been noted in several of the professional articles discussing the topic of minority recruitment.[160] Further, several courts have cited Detroit's efforts in their holdings that other law enforcement agencies failed to adequately recruit minority group members.[161]

This thesis is not a treatment of the department's minority recruitment posture during State II. However, one must review the programs undertaken during that time period in order to understand the distinction between it and the latter affirmative action stage. The examples are taken primarily from the department's E.E.O.P.[162] Although the process of describing all of the programs is cumbersome, it is necessary since subjective conclusions of intent are vulnerable to skeptics in the emotional area of racial discrimination.

A. Lateral entry of a black executive from private industry into the directorship of the recruiting function.

B. Formation of a "Minority Recruitment Committee" of community leaders to mobilize community support for the program. Cooperation from churches, block clubs, business associations.

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160 For example, see: Regolli and Jerome, p.415.

161 Bailey v. DeBard, _F. Supp.___(S.D., Ind., 1975)

162 Detroit Police Department, Equal Employment Opportunity Program, pp.15-54; hereafter cited as E.E.O.P.

C. Extensive recruiting advertising in mass media. Emphasis on minority newspapers and radio stations.

D. Utilization of black television personalities such as Bill Cosby and others[163] . Formation of a corporation, The Police Recruitment Project of Michigan, Inc. to conduct concerted minority recruitment campaigns. [164]

E. Professional advertising programs developed along lines of special slogans. Advertising media utilized included newspapers, bumper stickers, posters placed in businesses, park benches, busses, etc. LEAA funding received to finance three major campaigns:

(1) There aren't enough big men to go around.

(2) Detroit needs more good Cops.

(3) Being a cop is more than just a gig.

F. Development of recruiting pamphlets showing minority officers, especially in helping rather than enforcement situations.

G. Implementation of an Officer Referral Program aimed primarily at minority officers. At one time compensatory time off was given for a referral who successfully completed the police academy.

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163 Margolis, p.16.

164 For All The People, p.73.

H. Use of minorities in recruiting staff: reported in EEOP as 85-90% black in field recruiter ranks, 50% black in supervisory positions.

I. Use of recruiting vans donated by Chrysler Corporation to recruit in inner-city schools, factories, sporting events, etc.

J. Moving recruiting function out of Police Headquarters and into site located in inner-city.

K. Simplification of application and making employment applications available at police mini-stations and neighborhood city halls.

L. Scheduling written examinations on Saturday to avoid having applicants miss work. Providing alternative dates when scheduling conflicts arise.

M. Preparation of daily slide show presentations explaining entire recruiting process.

N. Preparation of a police applicant's handbook explaining what is required of applicants and providing sample test questions of written examination. The handbook was designed to allay applicant anxiety.

O. Establishment of a Criminal Justice Careers Program in the Detroit Public Schools. LEAA grant funding utilized.

P. Recruiter Upgrade Project developed where recruiters were sent to professional sales institute for five day "crash course" in selling a police career.

Q. Establishment of a recruiting follow-up team to personally contact any applicant failing to appear for processing at any stage in the recruiting process.

R. Cooperation of Board of Education for referral of candidates who are educationally deficient.

S. Development of a referral program for free tutorial services for candidates failing the written examination by small margins.

The recitation of Detroit Police Department recruiting strategies during Stage II provides insights into the department's intent to increase minority representation. Certainly, it would be difficult to reasonably conclude that these measures are reflective of other than bona-fide attempts at recruiting blacks into the criminal justice system. If the department intended to discriminate against blacks during Stage II, at least at the entry stage, it disguised its intent very ingeniously through a myriad of minority sensitive programs.

Other large cities also attempted to adopt effective minority recruitment programs during Stage II. Lynch provides an insightful description of the efforts of the Washington, D.C. Police Department in The Black Urban Condition. He notes that the agency's attempts at recruting blacks included a "recruit-in-moviethon" in which prospects and their dates were given free passes for Jim Brown movies and a "radio-thon" during which applicants were solicited over the radio and taxicabs were sent out to bring callers in for immediate testing.[165] One recent survey

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[165] Hollis R. Lynch, The Black Urban Condition (New York: Crowell Publishers, 1973), p.365.

of cities with populations of over 50,000 showed that 69% had some special program aimed at attracting minority candidates into police departments.[166]

The emphasis of criminal justice agencies on good-faith recruitment of qualified minorities during Stage II was exemplified by other indicators as well. For example, a great number of journal articles have appeared in the criminal justice literature dealing with methods to increase the effectivenss of recruitment efforts.[167] In addition, a number of universities have established special programs aimed at providing technical assistance to police agencies,[168] and regional centers for minority recruitment have been established.[169] Some private organizations, such as the National Urban League, have awarded large grants to establish minority manpower projects for police agencies.[170]

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166 Andrew Crosby, "Minority Recruitment--Remarks," Police Yearbook--1976 (Gaithersburg, Md., International Assoc. of Chiefs of Police, 1976), p.80

167 For example, see: Bernard Cohen, "Minority Retention in the New York City Police Department," Criminology Vol.11:3, (Nov., 1973) pp.287-305; D.P. Van Blaricorn, "Recruitment and Retention of Minority Race Persons as Police Officers," Police Chief, Vol. 43:9 (Sept., 1976),pp.60-64; Richard H. Rowan, "St. Paul Police Department Minority Recruitment Program," Police Chief, Vol.44:1(Jan., 1977),pp.18-20; Robert Grant and others, "Minority Recruiting: The Tuscon Experience," Journal of Police Science and Administration, Vol.3:2 (June, 1975), pp.197-202.

168 Crime Control Digest, March 10, 1975, p.5

169 Crime Control Digest, May 6, 1974, p.9.

170 Crime Control Digest, August 19, 1974, p.7.

Stage II efforts did result in notable gains in the number of blacks employed. Darnton notes that in only a one year period (1968-1969) several cities raised their minority representation significantly. (Washington-20% to 30%; Detroit-5% to 9%; St. Louis-10% to 15%).[171] These accomplishments were, understandably, a source of pride for law enforcement administrators. Chief Jerry Wilson of Washington discusses the success of the program in Police Report:

> During the years 1969-1972, the department was able to achieve a substantial increase in the number of blacks, with an intake approximating 50 percent of all new appointees. By 1973, the total department had a ratio of 36 percent black officers, and the patrol division had a ratio of nearly 48 percent. [172]

Likewise, the advances during the period of Stage II in the Detroit Police Department were substantial. As shown in the following table, black department strength increased by nearly 500% during the Stage II years, 1967 to 1974.

Table 3

TOTAL BLACK PERSONNEL
DETROIT POLICE DEPARTMENT [173]

1961	91	1970	568
1962	101	1971	711
1963	110	1972	835
1964	115	1973	923
1965	131	1974	1019
1966	161	1975	1147
1967	214	1976	1237
1968	361	1977	1704
1969	479		

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[171] Darnton, p.75

[172] Wilson, Police Report, p.190

[173] E.E.O.P., p.5

The chart on the following page shows the percentage of black and white persons appointed to the Detroit Police Department since 1944.[174] It is apparent that during Stage II the percentage of minority officers appointed to the department never closely approximated the percentage of white officers who were appointed, despite the fact that the total number of blacks in the agency workforce increased dramatically.

A program undertaken in the Detroit Fire Department during Stage II provides insight into the position of the city administration with respect to minority recruitment. A newspaper article detailed the publicity campaign, the college recruiting program, the drive for transfer of other city employees into the Fire Department, the direct mailing campaign and other programs to bring blacks into apply. Additionally, the test was reviewed for cultural bias, the written score weight was lowered from 50% to 30%, more black test monitors were provided, a booklet of sample test questions was developed, and other efforts were made to remove 'employment obstacles' for minorities.[175] It is noteworthy that the program is described as 'affirmative

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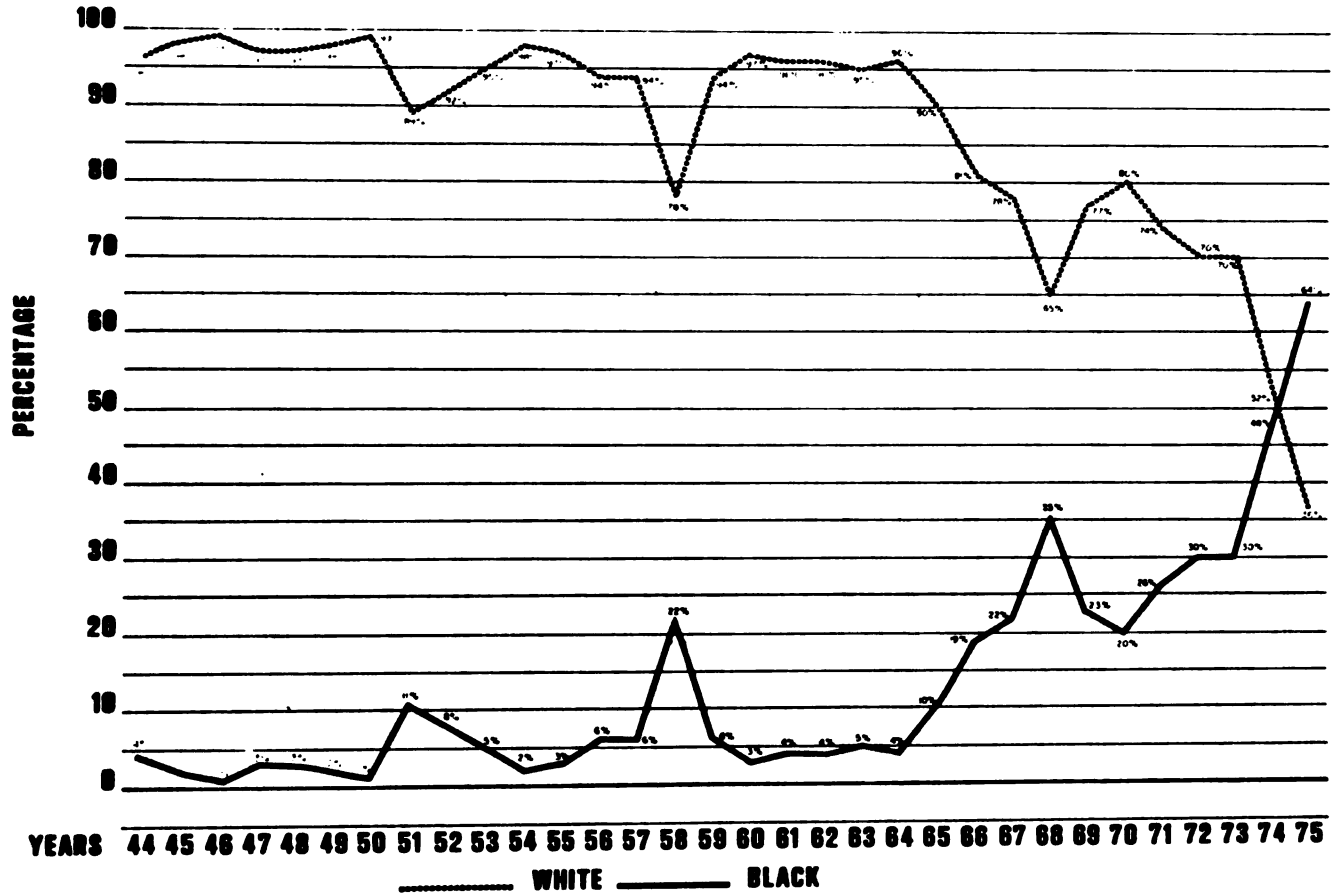
174 In reviewing this chart, it should be noted that (1) no hiring was done in 1976, and (2) that the peak in 1958 is inconsequential since only thirteen officers were hired.

175 David L. Good, "Fire Department Aims at 50% Minority Hiring," Detroit News, October 14, 1972.

CHART 1

BLACK AND WHITE POLICE OFFICERS APPOINTED TO THE DETROIT POLICE DEPARTMENT BY YEARS, FROM 1944 THRU 1975



action,' but it is unmistakably characteristic of Stage II rather than Stage III.

It appears that police administrators during Stage II were exposed to criticism for their stepped-up efforts at recruiting minorities. The comments came from both black and white incumbent officers. Some believed that the new outreach efforts were misguided; prospective applicants should want to join the department without active encouragement from the organization. Others expressed the concern that recruit quality would be lowered by the new recruiting posture. Reiss recounts one such conversation with a Detroit officer:

> I heard that they took some men from the department who met with those who applied--the colored applicants--and told them the answers to the examination and still a lot of them failed. [176]

Bannon has provided anecdotal data that points up somewhat similar concerns on the part of incumbent black officers during Stage II. While not intimating cheating, Bannon found a recurrent theme against lower qualifications to allow the hiring of greater numbers of blacks.

> These men state that they favor the hiring of more black officers, but express a concern that standards not be reduced to facilitate this goal. It appears that the underlying reason for this concern is that present black officers have the attitude that if they could pass the more rigid standards, so should new recruits. [177]

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176 Reiss, p.29

177 Bannon and Wilt, p.26

The objections of lowered qualifications and surreptitious favoritism of blacks during Stage II are groundless. An emphasis was placed on recruiting blacks, but no evidence suggests that blacks were hired at the expense of a better qualified white. For example, Director of Recruiting Ferrebee has written that recruiting strategies were abandoned if data showed they attracted more whites than blacks.[178] But this was the extent of Stage II preference. Thus, even with the sincere interest of the agency, many hurdles remained in the path of the potential minority police officer. Margolis' study places this problem in a correct perspective:

> Most of the hurdles that the black man must scale to become a policeman are, strictly speaking, no higher than those confronting the white applicant. Yet given the special burdens which the minority member carries into the race, the hurdles are virtually unnegotiable. The written tests, the character investigation, the medical examinations all combine to fulfill the minority applicant's most saturnine expectations--namely, that he has been made the victim of an elaborate white puton. A system which recruits him on the one hand and rejects him on the other. [179]

Whether Stage II was successful depends largely on one's frame of reference. It is irrefutable that the number of blacks increased signficantly. Conversely, it is also

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178 Ferrebee, p.129

179 Margolis, p.14

undisputed that still substantially more whites than blacks were appointed and that the agency workforce remained a gross understatement of the minority population of the city. Askin's estimation of the success of Stage II efforts is realistic: ". . .the reality is that conventional recruitment techniques, however vigorously pursued, have proven uniformly unsuccessful."[180]

The inadequacies of Stage II were remedied in large degree in the last of the three stages--'Affirmative Action.'

One reason for the failure of Stage II efforts is that the standard by which equal employment opportunity is judged is very stringent. The following resolution by the Berkeley, California city council is typical of the goal of many of the municipalities.

> The stated goal of this Affirmative Action Program is to achieve and maintain no less than proportional employment for all minorities and women in each department, job classification, and/or salary category throughout the city government. [181]

The City of Detroit Charter provides a similar obligation to undertake affirmative action so that all levels of government employment are reasonably representative of

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180 Frank Askin, "Eliminating Racial Inequality in a Racist World," The Civil Liberties Review, Vol.22:2 (Spring, 1975), p.100.

181 Hiatt v. City of Berkeley, supra.

the ethnic and sexual composition of the city. While both goals are laudable in an egalitarian sense, short-term practical achievement of the goal is insurmountable.

The written test is the most frequently cited obstacle to the employment of minorities. However, a number of other factors must be taken into consideration which negatively impact upon the police administrator's capacity to meet 'proportional representation' goals within a realistic timeframe.

In comparing minority strength of a police department with the minority population, it is infrequent that the comparison makes note of the fact that the reported population may contain significant numbers of very young or old persons outside the age range of police employment.[182] The very fact that an extensive outreach program is undertaken may exaggerate the failure rate of black applicants since a new group of applicants are tested. In the past, such individuals may have received no encouragement to apply, thus exaggerating the failure rate. The guidelines of the California Fair Employment Practices Commission takes cognizance of this phenomenon, but corresponding provisions are not contained in either the E.E.O.C. or L.E.A.A. guidelines.

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182 Wilson, Police Report, p.190.

> When an employer is aggressively recruiting minority group members from among the 'hard core' unemployed who have lower levels of education and experience than the general population, disproportionate rejection rates might not be judged evidence of adverse impact. 183

Not all statistical variance is the result of discriminatory treatment, although equal opportunity enforcement efforts have as their basis this assumption. Glazer astutely observes police work is not universally attractive to all segments of any particular community.

> Racial and ethnic communities have expressed themselves in occupations and work groups. Distinctive histories have channeled ethnic and racial groups into one kind of work or another, and this is the origin of many of the "underrepresentative" work distributions we see. Those distributions have been maintained by an occupational tradition linked to an ethnic community, which makes it easier for the Irish to become policemen, the Italians fruit dealers, Jews businessmen, and so on. None of us would want these varied occupational patterns maintained by discrimination. Nor, however, should we want to see [them] . . .dissipated by policies which assumed all such concentrations were signs of discrimination and had to be broken up. 184

It is not stereotypic to state that there are many reasons why blacks may have a special difficulty with law enforcement as a career choice. While this topic was

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183 Biddle, p.11.

184 Glazer, p.203.

discussed in Chapter 2, it is not difficult to cite additional authority for this belief. Ferrebee has related his difficulty in recruiting blacks during the period of the controversial S.T.R.E.S.S. operation in the Detroit Police Department.[185] This program met with much criticism due to its decoy operation and the number of criminals, predominantly black, killed through police action. A survey by the University of Michigan found that 55% of black youths between the ages 16-19 believed that the police use insultive language in their dealings, as compared with less than half that figure for white youth.[186] The black community is likely to consider their police to be brutal in enforcing the law. One 1967 study in Detroit showed that 82% of inner-city residents felt some form of police brutality existed in the city.[187] It is also frequently related that black youths have an apparently greater perception of corruption

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185 Ferrebee, p.129.

186 Angus Campbell and Howard Schuman, Racial Attitudes in Fifteen American Cities (Ann Arbor: University of Michigan Research Survey Center, 1969), p.44.

187 National Advisory Commission on Civil Disorders, Report of the Commission, {Kerner Report}, (New York: Bantam, 1968), p.302.

among the police than white youth.[188] Each of these factors influences the success of recruitment efforts.

Another explanation which is less attractive than sociological theories, but nonetheless is a real factor to be considered, is the budgetary constraints of municipal police departments. A 1969 report showed that the number of vacancies that were unfilled due to budgetary problems exceeded total minority strength in five large departments, including Detroit.[189] In addition to such constraints allowing limited hiring, the mere longevity of police service provides a major impediment to racially balancing the employer's work-force. This is due to the fact that most police officers complete a full twenty-five years of service.[190]

Lynch has described the dramatic change in the demographics of Detroit during the twenty year period, 1950-1970. His data are significant in terms of the prospects of attaining the proportional representation desired in the police force today.

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188 Nicholas Ross, The Policeman's Bible, (Chicago: Regenry, 1976), pp.25-35.

189 "For All The People," p.72.

190 A recent survey of a Detroit Police Department recruit class of 1952 showed 61% of the class finished a full twenty-five year career. Tuebor, (Detroit Police Officers Association), September 2, 1976, p.16.

Table 4

BLACK POPULATION CHARACTERISTICS OF DETROIT[191]
1950-1970

Year	Black Population	Percent Change	Percent of Total Population
1950	303,721	+103% (1940-1950)	16.4%
1960	482,223	+ 58% (1950-1960)	28.9%
1970	660,428	+ 37% (1960-1970)	43.7%

Keeping in mind that conservative estimates of the city's black population is 55-60%, it should be obvious that personnel turnover has not kept pace with the tremendous pace with which the black population has increased. So, even if blacks were recruited at the level they represented in Detroit's population in 1950 (16.4%), the present proportion of blacks would grossly understate present populations. The majority of persons joining the department in the early fifties will occupy a budgeted position until eligible for retirement in the mid-seventies. Thus, the proportional representation argument, while fine in theory, does not coincide with practical facts of employment policy.

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191 Lynch, pp442-450.

Given the rather extensive efforts undertaken during Stage II, some might argue that the minority outreach programs were actually preferential in nature. However, such an analysis would be a misconstruction of the facts, especially since actual white hires consistently outnumbered the appointment of blacks by no less than a two to one ratio. Actual preferential treatment did not begin until 1974, the beginning of Stage III. While the previous strategies might be placed into a neutral definition of affirmative action,[192] employment policies of post-1974 were marked by characteristics indicative of Stage III. It is important, therefore, to carefully define what period of minority recruitment one is discussing. When one declares support or opposition to 'affirmative action,' it is assumed that most speakers are not referring to Stage II outreach strategies; they are supporting or opposing the preferential, racially-conscious, quota-oriented strategies of Stage III.[193]

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192 See fn. 66, supra.

193 Of course, there are some persons who, by their nature, cannot support equality of rights for blacks. It is extremely troublesome, for instance, that racist, hate-inspired groups such as the Ku Klux Klan have avowed their support for Alan Bakke. It is even more annoying when racism is labeled as the motive for all critics of Stage III techniques.

The major characteristic of Stage III recruitment efforts is summarized in a single word: "Quotas." This noun has become a trigger word in the affirmative action controversy and its mere mention elicits a host of reactions, sending people into their respective corners to debate their perception of respective merits or evils of affirmative action. Precise definition of the word is appropriate in these circumstances. The word is adequately defined by the American College Dictionary:

> Quota: a proportional part or share of a fixed amount or quantity. [194]

A substantial part of Chapter 5 is devoted to an attempt to delineate the legal controversy surrounding the use of quotas and the myriad issues involved therein. However, it is necessary to note two levels of quota relief. First, there is the type imposed by a court of competent jurisdiction subsequent to a judicial determination of past discrimination. Secondly, there is the type of quota introduced by an employer on his own initiative, for any number of reasons, including good faith attempts at eradicating previous discrimination or improving a racial imbalance. I will argue in this thesis that while the first remedy is generally lawful, the second is generally unlawful and should be prohibited.

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[194] C.L. Barnhart, ed., American College Dictionary, (New York: Random House, 1963), p.996.

The Detroit Police Department is a particularly interesting case study in the fact that during Stage III, it simultaneously engaged in both types of quotas. On May 23, 1974, Judge Ralph Freeman of the U.S. District Court entered an order requiring the police department to "hire at least one qualified female for each male hired into the Department until further order of the Court." The decision arose from a class action suit, Shaeffer v. Tannian, which alleged females had been denied employment opportunity because they were required to possess higher educational qualifications than males, were given different entrance examinations, and were hired to fill a small number of vacancies traditionally occupied by women.[195] In light of the author's belief that judicially mandated quotas are a legal and appropriate means of redressing past discrimination, further analysis of Judge Freeman's order is unnecessary. Its legality and/or propriety are not questioned.

The transition into Stage III included an additional quota for blacks. However, that quota was self-imposed and was privately fashioned. Going back to the dictionary definition, this merely required that a pre-determined

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[195] Shaeffer v. Tannian, (E.D., Mich. {Civil No. 39943}, 1974).

number of new hires would be comprised of blacks.[196] Once the quota is imposed, the mere fact that the qualifications of a white candidate are higher than a black will not thwart the attainment of the stated 'goal.'[197] The quota for blacks was implemented without judicial approval.

Any criticism of Stage III cannot take the form that it was ineffective in accomplishing the desired result. As shown in Chart 1, the appointment of blacks immediately approximated the appointment rate of whites. In 1975, the number of blacks appointed to the department exceeded the number of whites for the first time in the 110 year history of the department. (No hires were made in 1976.) Final figures for 1977 show approximately 80% of new officers appointed to the department were black.[198]

Although tangential to the issue of quota hiring, one further development of Stage III recruitment policy merits examination. That policy deals with the pre-employment residency requirement.

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196 The most logical argument found in the literature that such 'goals' are not in fact quotas is that a quota would require hiring the requisite number of minority candidates, however unqualified they might be. While the distinction is somewhat semantical, I cannot dispute this point of the argument. Ben L. Martin, "The Parable of The Talents," Harper's, (January, 1978), p.23.

197 Former Chief Tannian admitted this fact on several occasions. Detroit News, August 28, 1977, p.1.

198 Detroit Police Department Recruiting Division, Annual Report, 1977.

A municipal ordinance requires residency of police officers within the corporate limits of the City of Detroit. This requirement has been challenged in litigation and the case progressed through state and federal courts. It was ultimately upheld by the United States Supreme Court.[199] As recently as 1976, the Supreme Court has upheld the constitutionality of residence requirements imposed by municipal employers.[200]

Traditionally, the only requirement for appointment to the department has been the one year state residency requirement imposed by state law. Nonresidents appointed to the department were required to establish city residency within their one year probationary period.

The pre-employment residency requirement was changed during Stage III. On April 15, 1974, nonresidents were no longer allowed to make application to the department. The policy was refined on August 22, 1974 to establish a sixty day city residency requirement prior to application.[201]

The abrupt policy change from Stage II to Stage III is somewhat unexplained. In an article published in 1974

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199 Detroit Police Officers Association v. City of Detroit, 391 Mich. 44, 58; 214 N.W. 2d, 803; 405 U.S. 950 (1972).

200 McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, (1976).

201 E.E.O.P., p.32

(but presumably written earlier), Director Ferrebee identified the elimination of all residency requirements as a major organizational priority so that the "limited black manpower pool" in Michigan could be expanded, perhaps to allow recruiting in predominantly black universities in the South.[202] However, before that goal of eliminating one barrier could be acted upon, the city precipitately erected yet another residency barrier. It appears that the motivation for the erection of that barrier was to limit the number of white applicants who would apply for employment.

The significance of the residency issue for police applicants actually extends beyond the narrow question of the geographic location of one's domicile. It is significant for a number of reasons. One consideration is the effect of the requirement on the widely discussed goal of upgrading the levels of educational attainment of police personnel.

Those proponents of higher education for police have given inadequate attention to the problem of how such requirements may conflict with affirmative action goals. The conflict between limiting the recruiting base to the city and a goal of increasing educational levels seems

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202 Ferrebee, pp132-133.

apparent. It is a true, but unfortunate fact that the greatest reservoir of candidates who possess superior educational qualifications are not found in the large cities of the nation for an entire complex of reasons.

The new policy was also significant in that it represented a reversal of a trend in public employment. The trend has been for the removal rather than the construction of barriers. Early police scholars such as V.A. Leonard recognized that pre-employment residency requirements pose an obstacle to professionalism.[203] The I.A.C.P. has taken the position that such requirements are unjustified. As long ago as fifteen years they noted:

> In a nation which is renowned for the mobility of its people, it is unrealistic for any community to limit itself in the scope of its potential employees through the use of a pre-employment residence requirement.[204]

Wilson's new book illustrates little discernable shift in this position in recent years:

> . . .a pre-employment residence requirement is counterproductive to the concept of seeking the highest possible quality in individuals for police work.[205]

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203 V.A. Leonard, Police Organization and Management (New York: Foundation Press, 1964), p.100.

204 George W. O'Connor, Survey of Selection Methods, (Gaithersburg, Md., International Assoc. of Chiefs of Police, 1962), p.9.

205 Wilson, Police Report, p.97.

In addition to its questionable advisability as an administrative practice, a pre-employment residency requirement raises significant legal questions. In Shapiro v. Thompson, the Supreme Court held that residence restrictions imposed on new applicants for welfare assistance unconstitutionally deprived citizens of the right of interstate travel.[206] Other challenges have been made on the grounds of freedom of association and equal protection grounds.[207] These decisions may preclude similar residency requirements for applicants for employment (the Court apparently decided the issue as it applies to incumbent employees in McCarthy) since the courts might logically conclude that the right to apply for a job is no less protected by the Constitution than the right to receive welfare.

While it is true that the pre-employment residency policy promoted the interests of minorities in Detroit, wide introduction of the policy would actually impede the attainment of equal opportunity goals.[208] Many suburban, all-white communities could perpetuate employment

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206 Shapiro v. Thompson, 393 U.S. 618 (1969)

207 Charles S. Rhyne, The Constitutionality of Residency Requirements for Municipal Officials and Employees (Washington: National Institute of Municipal Law Officers, 1977), pp17-44.

208 Cf. Sims v. Sheet Metal Workers, 489 F.2d 1023, 5 E.P.D.¶8081 (1973), rev'd on other grounds.

discrimination because of de-facto housing segregation. Such policies would also deny poor persons on the whole the ability to gain employment in affluent communities which have a paucity of low cost housing. In addition, it is incredible that any employer could meet the burden of showing that a residence requirement is related to job performance. Qualification for the police officer role, while admittedly difficult to define with precision, should not be related to his residence.

B. Promotions Within the Detroit Police Department

While the various facets of the Stage III recruitment policy are interesting, a most insightful inquiry is directed at the promotional policy. The most organized and vociferous criticism of the Detroit Police Department has been generated by this practice. There is little question that the program has become the most racially devisive issue in the department in a number of years. This chapter will provide a description of the mechanics of the promotional procedure, will outline the effects of the various components of the promotional model, and will discuss the ramifications of the promotional quota.

The Charter of the City of Detroit speaks directly to the question of police promotions. It requires promotions to be on the basis of a merit, civil service examination process:

> Promotions shall be made on the basis of competitive examinations administered by the Director of Police Personnel except for positions above the rank of lieutenant or its equivalent. All examinations will be prepared by the Division of Police Personnel with the concurrence of the Board of Police Commissioners. No person who has taken an examination and has been placed on a register of employees eligible for promotion may be passed over in favor of an employee with a lower examination score unless the Chief of Police files with the Board and the Division of Police Personnel written reasons acceptable to the Board. Any person having been passed over may appeal to the Board. [209]
> [emphasis added]

The promotional selection model is comprised of six components:

Table 5

PROMOTIONAL SELECTION MODEL FOR RANK OF SERGEANT [210]
DETROIT POLICE DEPARTMENT

Subject and Weights	
Written Examination	65%
Performance Rating	15%
Promotional Evaluation Board	10%
Seniority--Maximum	6%
College Credit--Maximum	2%
Veteran's Preference	2%
TOTAL	100%

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209 Charter, City of Detroit

210 E.E.O.P., p.58

On the basis of this model, every candidate attaining a score of 70% or higher on the written test is placed on an eligibility register by descending aggregate score order. The present Charter requirement is based on the traditional practice followed in the police department of making promotions in the numerical order shown on the list. However, as proponents of the program note, there have been deviations from this practice prior to Stage III. Certain past commissioners[211] did set a precedent by passing over individuals to promote a specially selected officer.

It should be noted that this practice was never actually widespread; past commissioners would occasionally promote their driver or the driver of the mayor to the rank of sergeant. The stated justification for the practice was to reward the uncompensated overtime earned by these persons in the course of their duties. However, it is also significant that the three Stage II commissioners refused to exercise their option of passing over persons for promotion. (These commissioners included Johannes Spreen, Patrick Murphy, and John Nichols.) The practice of passing over persons for promotion is euphemistically termed "dipping" by rank and file officers.

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[211] The title was changed to Chief of Police in 1974.

The distinction of whether the affirmative action practice of awarding one-half of all promotions to blacks constitutes either a 'goal' or a 'quota' is rather unimportant. Despite disagreement on terminology, the actual mechanics of the affirmative action promotional policy is not in dispute.

In simplest terms, this policy is implemented by determining the number of vacancies to be filled and by selecting an equal number of whites (in order on the list) and an equal number of blacks (irregardless of numerical standing) to comprise the promotional class.[212] The effect of the practice is to pass over white candidates, even though they enjoy a higher numerical ranking, to have the necessary number of black candidates to establish a promotional class. All candidates on the promotional register are deemed by the department to be qualified for promotion to the higher rank.

The affirmative action promotional policy was instituted by unanimous vote of the Board of Police Commissioners, upon the recommendation of Chief Tannian, on July 31, 1974. The list for sergeant emenated from a written examination of December 16, 1973. The test consisted of approximately 475 objective type questions with a time limit of four hours. This policy has continued with all promotions made since that date.

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212 Some promotions of women have been ordered by the Federal Court pursuant to the Shaeffer v. Tannian order, cited supra at fn. 195.

The initial affirmative action promotions were made despite an assurance by the Chief that he would not engage in "dipping" during his administration. At the time the eligibility list was published it stated:

> Applicants will be promoted in the order they appear on the eligible register provided they are in compliance with the college credit requirement of Personnel Order 73-360. [213]

Whereas the dipping policy of the past was based on nepotism or patronage, the new dipping policy is based on race and is administered under the affirmative action label.

The eligibility list from the December 16 examination showed 298 names of officers eligible for promotion to the rank of sergeant. In accordance with the newly adopted policy, one black for every white was promoted. However, as will be shown below, most blacks on the eligibility list who were ultimately promoted were dipped for.

On June 7, 1974, the list was extended and showed eligible positions 299-375.[214] This was in spite of the fact that well over 200 names remained on the original list. However, no black officer remained on the original list.

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213 Detroit Police Department, Personnel Order 74-108, published April 9, 1974.

214 Detroit Police Department, Personnel Order 74-193, published June 7, 1974.

(#20, #36, #41, #54, #80, #84, #86, #117, #124, #127, #129, #133, #140, #166, #171, #174, #185, #197, #204, #206, #217, #226, #239, #265, #276, #280, #286, #288, #291, and #297 were black and were promoted.)

Of the 76 individuals listed on the extension to the original order, a total of seven were promoted. (#302, #304, #314, #335, #342, #373, and #375.) All were black.

On January 6, 1975, the list was extended for a second time to show names in positions 376-500.[215] This extension was prepared despite the fact that nearly 300 individuals remained on the list with lower numerical ranking than any individual on the extension. Again, the problem was that all of those remaining on the original list and its first extension were white.

From the second extension, 21 persons were promoted to sergeant. (#376, #381, #383, #388, #401, #406, #414, #417, #419, #426, #428, #438, #440, #447, #449, #561, #465, #467, #471, #493, #494.) Each of these individuals were black. Every black who attained a minimum qualifying score of seventy percent on the promotional examination was in fact promoted to sergeant. No black remained on the list.

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215 Detroit Police Department, Personnel Order 75-6 published January 6, 1975.

While it is to state the obvious that the affirmative action policy did not adversely affect black officers, it is necessary to discuss the effect of the preference on white officers on the list. One effect on many of the white officers should be equally obvious: they were not promoted. They were deprived of the status, the financial gain, and the sense of personal achievement that are related to a promotion in the police profession. As a matter of fact, the last white male to be promoted held a position of #57 on the eligibility register. In the 437 positions between #57 and #494, there are a number of white males who believe that, had it not been for the policy adopted on July 31, 1974, they would have been promoted to sergeant. They are undeniably correct in their belief. These officers represent the "victims" of the program, the other side of the affirmative action equation. Professors Edwards and Zaretsky have noted the difficulty with benign preferences:

> No preference can be benign to all concerned parties. In DeFunis, preference was benign toward minority applicants but was malign toward white applicants. 216

The affirmative action policy is also the basis for promotions to the rank of lieutenant. Table 6, on the following page, shows promotions of sergeant to lieutenant in 1977.

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216 Edwards and Zaretsky, p.22.

Table 6

1977 PROMOTIONS TO LIEUTENANT BY NUMERICAL STANDING ON ELIGIBILITY REGISTER

	White Males		Black Males	
Promotions of 1/13/77	#1	#12	#4	#49
	#2	#15	#5	#53
	#3	#16	#13	#55
	#6	#17	#14	#60
	#7	#18	#22	#70
	#8	#19	#26	#73
	#9	#20	#31	
	#11		#33	

Females Promoted:
#10, #45, #61, #79, #85

* * * * * * * * * * * * * * * *

	White Males	Black Males
Promotions of 8/5/77	#23	#94
	#24	#96
	#25	#103
	#27	#106
	#28	#107
	#29	#116
	#30	#126

Females Promoted:
#145, #177

The first impression one may glean from the above descriptions is that the "dipping" process is patently unfair. The fairness of the promotional model however, is dependent on the fairness of its constituent parts. It is necessary to discuss each of the components of the promotional model in an attempt to determine if they are the types of "artificial, arbitrary, and unnecessary barriers" proscribed by the Court in Griggs.

SENIORITY REQUIREMENTS

It is not infrequent that public agencies have been criticized in that civil service procedures place too great an emphasis on seniority in establishing career paths for upward mobility. Whisenand and Ferguson note that such criticism is justifiable:

> Too frequently, it is assumed that the man who has the longest service . . . may confidently be expected to be successful in the management of the department. The fallacy of this procedure is demonstrated by its failure in many American cities. [217]

In addition, lengthy seniority eligibility requirements or undue weighting of seniority in promotional competition may be illegal. A court, ruling on such a question in a suit filed against the Toledo Police Department, observed:

> It is very clear that a five year eligibility rule . . . has a discriminatory effect upon promotions in the police force. It is impossible to find that requiring a long period of service . . . has any real relationship to the ability to perform in the higher rank. [218]

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217 Paul M. Whisenand and Fred Ferguson, "The Managing of Police Organizations (Englewood Cliffs, N.J., Prentice-Hall, 1973), p.227.

218 Afro American Patrolman's League v. Duck (U.S. Dist. Ct., N.D., Ohio, {Civil Number 73-327}, 1975).

The Detroit Police Department is to be commended for its insight into these legal and managerial facts. For these reasons, it reduced the eligibility requirements to compete for promotion considerably. The reduction of the time-in-grade requirement for promotion has had the effect of allowing more officers with low seniority to successfully compete for promotions.[219] The analogous problem of weighting seniority points was also addressed by the department because of its obvious impact on blacks who are likely to have lesser seniority. The department has explained that the 6% maximum seniority credit (1% for each year of service) was established after it was determined that the average black candidate competing for promotion had approximately 5½ years of service.[220]

PERFORMANCE RATINGS

The Performance Evaluation Rating, or 'service-rating, as it is known in the department, is an important component in the promotional model. The present literature is generally critical of the adequacy of rating police officer effectiveness.

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219 Police officers may compete for sergeant rank after three years of service without college; after two and one-half years with an associate degree; and after two years for candidates having a baccalaureate degree. No extra credit for advanced degrees is given.

220 E.E.O.P., p.63.

In a climate of discriminatory treatment, the subjective performance evaluation rating would serve as a good indicator of disparate treatment. There is reason to believe that the service rating served as a systemic tool of discrimination during Stage I. Unfortunately, aggregate statistical data to prove this hypothesis is unavailable. One former black officer made the following assessment in his sworn testimony in hearings before the Civil Rights Commission:

> In my police career I never took a promotion examination because I knew I could never get a service rating high enough for promotion. It seems when a white officer gets in the range of promotion there seems to be a concerted effort to help him by increasing his personnel rating. In the case of the Negro officer, they lower his rating if they think he can write a good examination. [221]

While Stage I ratings adversely affected blacks, the department's own statistical monitoring of Stage III service ratings shows no similar adverse impact. In their E.E.O.P. prepared for the Office of Civil Rights Compliance, the department noted that the ". . .Performance Evaluation Rating does not have any systematically disparate effects on the promotional opportunities of minorities."[222] One

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221 Commission Hearings, p.323.

222 E.E.O.P., p.62.

statistical analysis showed average ratings of 78.81 for whites and 75.09 for blacks.[223] This relationship is roughly similar to evidence presented in the Chicago Police Department case where average ratings for whites were 85.2 as compared to 84.3 for blacks.[224]

PROMOTIONAL EVALUATION BOARD

A similar case can be made for this component of the model introduced in 1975. As a matter of fact, the department states that its primary objective in introducing the oral board was to "provide a fair evaluation of minority members in the intangible aspects of ability that are not conducive to quantification by a written testing instrument."[225] Actual experience with the Promotional Evaluation Board has confirmed that black candidates perform significantly better on this phase of the model than their white counterparts. Commander Richard Caretti, its originator, is quoted in a newspaper article as citing the new procedure as a "forerunner of its kind in fairness and objectivity for other

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223 E.E.O.P., pp70-74. The actual difference is even smaller than suggested since it represents only 15% of the model. Thus, (78.71 x 15%) - (75.09 x 15%) = (11.81-11.26)= .55 promotional points.

224 U.S. v. City of Chicago (N.D., Ill., 1976) 11 EPD ¶10597.

225 E.E.O.P., p.64.

law enforcement agencies in the country."[226] The members of the board are ranking officers from other large urban departments and minority representation is assured by at least one black serving on each three member panel.[227]

WRITTEN EXAMINATION

While each of these factors plays an important role in determining promotional success, the written examination is the most important component. A candidate is not processed through the system unless he attains a minimum qualifying score on the examination, and because of its greater weight, a person scoring low on the written examination diminishes his chance for promotion.

In each of the other components, the thrust of the department's E.E.O.P. is to show that the factor has no disparate impact on blacks. Such demonstration is relevant insofar as an employer is not obligated to validate a procedure where no adverse impact is shown.[228] However, such a claim is not raised with reference to the written component of the examination process.

If one were to ask officials of the Detroit Police Department if the promotional examination is validated, he might receive varied responses. As we will discuss in the next chapter, determining the validity of a police examination is an extremely complex process. Rather than

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226 Armand Gerbert, "Police Test May Be Model," Detroit News, October 6, 1975.

227 E.E.O.P., p.64.

228 See fn. 119, supra.

make an assessment if the test has been properly validated, it may be more useful to enumerate those efforts undertaken to gain a test that can pass muster under the requirements of the courts and the administrative agencies.

- "Consulting expertise was used in the area of occupational analysis and educational testing. This included a study by the University of Chicago Industrial Relations Center of 300 sergeants and lieutenants to "develop a description of requisite skills and attributes and a valid statement of relevant job functions." [229]
- "Professional assessments by personnel experts to determine adequacy of testing instruments and to eliminate cultural bias. [230]
- "Inclusion of minorities in formulation, administration, and evaluation of the examination. [231]
- "Use of 'job-related test' terminology, assembled by School of Police Administration, Wayne State University to help rule out cultural bias in questions. [232]
- "Use of minority monitors during the administration of the examination. [233]
- "Use of minority representation in the appeal process. One of the two members who constituted an appeal board for exam questions was a black commander. [234]

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229 E.E.O.P., p.60

230 E.E.O.P., p.60

231 E.E.O.P., p.60

232 E.E.O.P., p.61

233 E.E.O.P., p.61

234 E.E.O.P., p.61

The use of the Detroit Police Department as a case study in examining the concept of employment opportunity in law enforcement is appropriate because in many ways, it represents the extremes of the question. During Stage I, its discriminatory treatment of blacks was the rule and is readily recognizable. My failure to cite additional examples of the abuses of this period is not attributable to the fact such evidence is unavailable; it merely represents my perception that most concede the pervasive nature of racial discrimination during that period. During Stage II, the department emerged after a devastating riot as a leader among well intentioned agencies in attempting to remove barriers to the recruitment of blacks. If one accepts the premise that actions speak louder than words, it is difficult to judge Stage II efforts as not being sincere and indicative of intent to cease prior discriminatory hiring patterns. Finally, during Stage III the department has engaged in one of the most aggressive, and controversial, affirmative action programs in the country. Along with the University of California at Davis in the Bakke suit, the Detroit Police Department program is right in the heart of the affirmative action/reverse discrimination debate. To fully understand the debate, it is necessary to examine additional aspects of the legal controversy in the next chapter.

C H A P T E R F I V E

The Discrimination Rules

"Administrators today are faced with the necessity of deciding which law they will disobey: the 1964 Civil Rights Act forbidding discrimination, or the Affirmative Action guidelines . . . which specifically require discimination on the basis of race and sex."

--George Roche, The Balancing Act, p.82

There is an adage along the lines of "Don't confuse me with the facts because I've already made up my mind." To some extent, this saying is applicable to many commonly held attitudes toward affirmative action in law enforcement. Affirmative action is one topic, it seems, where most everybody has a strong sense of either support or opposition. In the strictly philosophical sense, there is nothing wrong with condemning a practice merely because it does not square with one's personally held definition of what is proper. However, that approach can only go so far in convincing others or in bringing about change. The criminal justice professional must deal with affirmative action within a framework of facts, many ending to be legalistic by derivation. Therefore, this chapter will focus more closely on certain legal principles essential to an accurate understanding of the topic.

In this discussion of legal facts, early note must be made that they represent less than the total basis for drawing a conclusion on the issue of affirmative action. Employment discrimination law is complex, ambiguous, and is undergoing change at a rapid pace. It is likely that one can find legal support for his position regardless of which side of the controversy is being argued. This passage, taken from a letter written by Howard Glickstein to a colleague,

points out the limited utility of resolving the affirmative action issue by depending on the law.

> Unfortunately, I am not sure that my efforts to cite precedent or to distinguish the cases you rely on . . . really get us very far in bridging the differences that separates us. Those differences are bottomed on our respective notions of what must be done to eradicate and overcome the generations of discrimination suffered by blacks, chicanos, and women. 235

However, the law cannot be ignored because it is the language spoken by lawyers and the courts in resolving police employment disputes. It is also the language spoken by the compliance agencies who the criminal justice administrator will deal with on a first hand basis. Finally, it is important from a purely pragmatic viewpoint that an administrator understand where he stands vis-a-vis the law so that he is able to intelligently weigh options. Perhaps the most troublesome and misunderstood of these areas deals with the problem of testing and the validation of testing procedures.

A. Testing Validation

Psychometrics is a complicated branch of industrial psychology that involves highly sophisticated statistical theories of measurement; these techniques are largely foreign

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235 Howard Glickstein, "Discrimination in Higher Education," Civil Rights Digest, Vol.7:3 (Spring, 1975), p.14.

to the training and competence of most police administrators.[236] While this thesis cannot delve deeply into the intricacies of that field, it is essential that certain terms and concepts be within the working knowledge of the student of employment discrimination.

Administrators often become indignant and cannot understand how police employment tests can constitute unlawful discrimination. After all, the same tests are available to all takers regardless of race or sex. But the argument ignores the esoteric principles of employment testing measurement. White points out how it is possible to discriminate without having the outward appearance of differential treatment:

> In most instances unfair testing does not constitute anything as blatant as testing whites and not blacks; requiring higher scores for blacks; or failing blacks on tests no matter what their performance actually was. [237]

At its best, testing is an imprecise endeavor. One personnel psychologist has noted an intrinsic non-sequitur in the use of written tests as primary devices for occupational selection.

> Unless we intend to employ individuals for the purpose of taking written

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[236] "Beyond the Prima Facie Case in Employment Discrimination" [no author cited] Harvard Law Review, Vol. 89:2 (December, 1974) pp387-422.

[237] Whilo P. White, "Testing and Equal Opportunity," Civil Rights Digest, Vol. 7:3 (Spring, 1975), p.48.

> examinations, it must be recognized that the written examination format represents a substantial departure from the duties and responsibilities of most jobs. [238]

The major controversies generated by police affirmative action programs result from certain selection criteria being adjusted in order to facilitate hiring or promotion of minorities. The "dipping" policy of the Detroit Police Department must stand as a classic example. However, in defense of those programs it must be noted that much of the attendant discussion assumes, quite erroneously, that job qualification is synonomous with a numerical ranking obtained from the testing procedure. In order to make this statement, one would need to give greater credibility to the 'science' of testing than it has earned. As noted by O'Neil, "much experience with preferential programs confirms that many applicants who would have been excluded by rigid adherence to numerical ranking are in fact well qualified and will succeed if given the chance."[239] The experience of the Detroit Police Department with its affirmative action program bears out O'Neil's statement.

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238 Stephen Wollack, "Content Validity: Its Legal and Psychometric Basis," Public Personnel Management, Vol.5:6 (November, 1976), p.406

239 Robert M. O'Neil, Discriminating Against Discrimination: Preferential Admissions and the DeFunis Case (Bloomington, Ind.; Indiana University Press, 1975), p.101.

The courts, in implementing the Griggs standard, have often come to the conclusion that a certain testing device unfairly ranks black candidates. This finding necessarily affects other candidates. One Federal court, in attempting to define the parameters of that relationship, noted that:

> . . . At the outset, it is apparent that no applicant for public employment can base any claim of right under the Fourteenth Amendment's equal protection or due process clauses upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. 240

Edwards and Zaretsky reiterate this premise in their article in the Michigan Law Review:

> For the same reason, a person cannot legitimately claim to be a victim of reverse discrimination merely because he or she was not hired [promoted] after receiving a high score on an invalid employment test. This point is often lost in the furor over reverse discrimination. 241

While these statements may be true enough on their face, traditional personnel testing procedures have been staunchly defended against such criticisms. Two such comments are provided by Rossiter and Roche.

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240 N.A.A.C.P. v. Allen, 493 F.2d 614,618 (1974).

241 Edwards and Zaretsky, p.34.

> Surely many of our techniques of decision making and administration are about as soundly constructed as nature and art permit; they are simply waiting for better men to operate them. [242]

> While we may quibble about the arbitrary and fallible manner in which, in real life, skill and competence are ascertained, we would hardly therefore argue that such standards are worthless, or that better ones could not be devised. [243]

One obvious inadequacy to that argument, which proponents of affirmative action are quick to pick up on, is that 'merit' systems have been frequently circumvented for political or partisan reasons.[244] Glickstein notes:

> If there were some foolproof litmus test for determining merit, perhaps I would be fearful of tampering with the system. But the rules have been so rubbery in the past that I become a bit suspicious when a new rigidity is demanded as women and minorities appear at the gates. [245]

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[242] Clinton Rossiter, "The Democratic Process" in Goals for Americans: The Report of the President's Commission on National Goals (Englewood Cliffs, N.J.: Prentice-Hall, 1960) p.75.

[243] Roche, p.88.

[244] There are numerous examples of the subordination of so-called "merit systems." As noted in Chapter 4, dipping on the eligibility register to promote the Mayor's or Commissioner's drivers was common prior to Stage II promotions. See also: James F. Ahern, Police in Trouble (New York: Hawthorn, 1972) pp.107-114, for a discussion of the corruptability of the merit system. Similarly, for an explanation of the "rabbi" or "hook" method of promotion in the New York Police Department, see: Robert Daley, Target Blue: An Insider's View of the N.Y.P.D. (New York: Dell, 1974), pp.247-250.

[245] Glickstein, p.16.

For better or worse, police merit systems depend largely on the written examination. While courts have frequently asserted that a test is invalid, they less frequently elaborate a useful definition of what is entailed by such a finding. One definition of validation is provided by Rosen:

> The process of validating a test involves the degree of relationship (correlation coefficient) between a test score and some measurement of performance (criterion score). Tests are often validated concurrently, predictively, or by content. [246]

In Albemarle Paper Co. v. Moody, the Supreme Court stated that ". . .job-relatedness cannot be proven through vague and unsubstantiated hearsay."[247] While the Court indicated an insistence for validation in adverse impact circumstances, it failed to distinguish the level of validation it requires for an employee to overcome a prima-facie racial impact case. Sandman and Urban have discussed three types of validity used in the employment testing sphere:

> (1) Criterion validity: a statistical statement of the existence of a correlation between scores on a predictor and scores on a criterion measure. Some authors refer to this as empirical validity.

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246 Doris B. Rosen, Employment Testing and Minority Groups (New York: Cornell Univ., 1974) p.24.

247 Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

(2) Content validity: a test containing questions that deal in the area of the job requirements.

(3) Construct validity: A score on the test measures some trait or attribute necessary in job performance. [248]

The police administrator must be familiar with the first two types of validity. The third, construct validity, as noted by Schlei and Grossman is: ". . .such a rara avis in actual practice as not to merit further discussion."[249]

The majority of tests used in police employment do not reach the level of either criterion or construct validity. As shown on Chart 2, criterion validity requires a statistically significant relationship between the test score and the performance criteria established in the work setting. The following illustration shows a high level of correlation between the predictor and the criterion and would fulfill the requirements of a criterion-related study.

A useful definition of the other type of validity is provided by Rosenbloom and Obuchowski:

> [content validity] . . .requires that the content of the examination match, insofar as possible, the content of the job. Content validation, however, does not enable prediction of job

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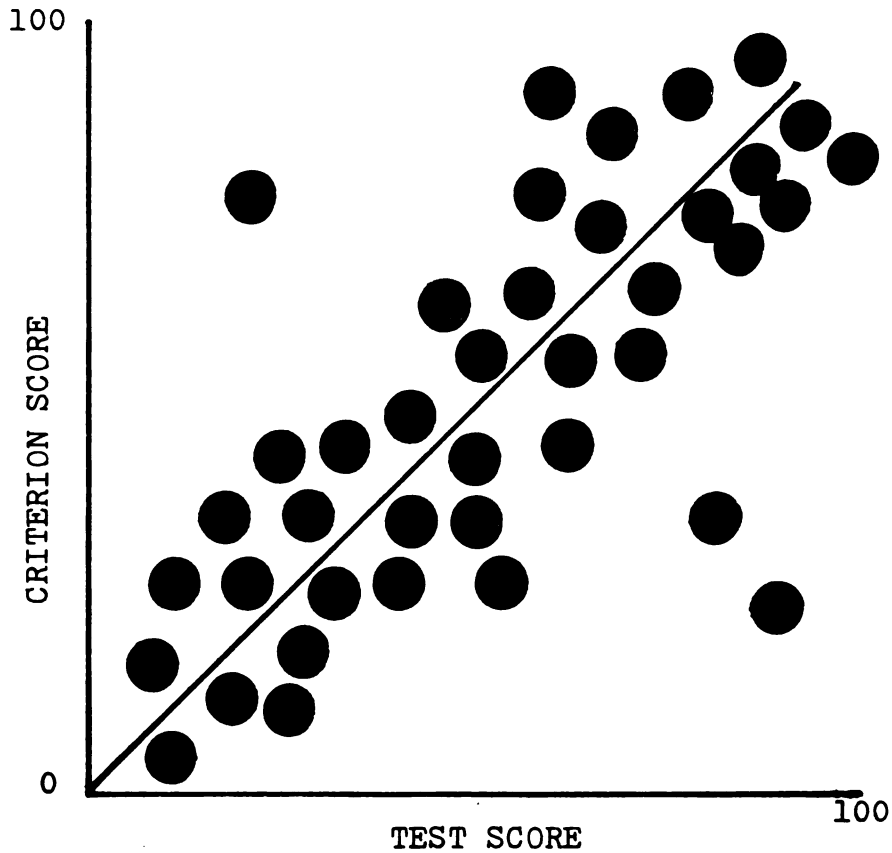
248 Bonnie Sandman and Faith Urban, "Employment Testing and the Law," Labor Law Journal, Vol.27:1 (June,1976), p.104.

249 Barbara L. Schlei and Paul Grossman, Employment Discrimination Law (Washington: Bureau of National Affairs, 1976), p.104.

Chart 2

A CRITERION RELATED
STATISTICAL DISTRIBUTION



> success on the basis of test score. That is, although it is assumed that the higher the score the better the performance on the job will be, the relationship between the two is not empirically established. [250]

The E.E.O.C. guidelines express a clear preference for criterion validity and allow content validity only where the former is shown to be infeasible.[251] Likewise, a number of courts have struck down content-valid tests where substantial adverse impact was shown by plaintiffs.[252] In one case involving the use of a content-valid test that the Federal District Court termed ". . . as good a test as any available to measure job-related areas of the entry level of police officers," the Court nonetheless ordered the Pittsburgh Police Department to ignore test results and hire according to a quota.[253]

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[250] David H. Rosenbloom and Carol Obuchowski, "Public Personnel Examinations and the Constitution: Emergent Trends," Public Administration Review (January, 1977), p.10.

[251] Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 29 C.F.R. §1607, et. seq.; hereafter cited as E.E.O.C. Guidelines.

[252] Shield Club v. City of Cleveland, 8 EPD ¶9609 (N.D., Ohio, 1974) and Douglas v. Hampton, (C.A., Dist. of Col., 1975), 9 EPD ¶9973.

[253] McDermott, p.230, citing: Commonwealth of Pennsylvania v. Flaherty, ___F. Supp.__ (W.D., Pa. {Civil No. 75-160}, 1975).

At the conclusion of Chapter 3, it was indicated that through a dependence on validation standards that are unrealistic given the state of the art in psychological testing, the Federal compliance agencies have encouraged a climate that is conducive to the preferential treatment of racial minorities. Leading experts in personnel psychology and psychometrics are the first to admit the dimensions of the problem. Wollack, a noted industrial psychologist, provides us with an unusually candid and introspective assessment of his own area of specialty.

> Typically, society permits our community of scholars to engage in their harmless theorizing without much interest or concern. It is not so much motivated out of a commitment to some lofty principle, such as academic freedom, but more out of a sense of indifference to the irrelevant. [254]

Wollack certainly has no quarrel with these colleagues who identify a wide schism between the levels of psychological theory of testing and the capacity of that discipline to deliver in the actual arena of employment testing:

> . . .there is considerable evidence that neither construct nor predictive validity is a feasible method to use in most public personnel settings for a number of reasons. For example, the extent to which social, motivational, and situational variables affect job performance makes it extremely difficult to identify job performance criteria. It

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[254] Wollack, p.397.

> may be possible in the abstract to identify job content factors pertinent to job proficiency, but job proficiency is different from job performance. The only areas in which there has been reasonable success in establishing criteria and in evaluating performance are routine and repetitive positions. 255
> [emphasis added]

A number of additional shortcomings are related to the requirement that a test must have criterion-related validity in the field of police employment. Probably leading the list is the fact that such a requirement imposes a goal that is practically unattainable. The senior industrial psychologist on staff of E.E.O.C. has testified that he knew of only "three or four" psychometrically acceptable criterion-related validation studies anywhere in existence. He further testified that he was aware of the cost of only one of those studies and that it required an expenditure of $400,000 to properly validate a bus driving test for a sample of 200 drivers.[256]

The second glaring deficiency of the theoretical application of criterion-related validity testing is that it is antithetical of police personnel needs. The ideal criterion-related study would require an agency to employ its lowest test scorer. As Mark Player, the author of Federal Law of Employment Discrimination notes:

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255 Rosenbloom and Obuchowski, p.11

256 Schlei and Grossman, p.103.

> Results must sample the full range of test scores, not just those who succeed. Based on the possibility that those with low test scores might be able to perform the job as well as those with minimal 'passing' scores, an employer who simply measures the relative performance of those who have passed the test will not have verified the test's accuracy. [257]

This observation stated differently is that the only way to test the hypothesis that low test scorers will indeed be poor performers (i.e. achieve a low criteria score) would be to give those individuals a chance to actually do the work to determine if their performance falls into the lower-left quadrant of the preceeding graph. It is doubtful that the citizenry would accept such a ludicrous proposition as giving an unqualified applicant a badge and a gun for the sake of statistical exactitude.

A third objection to E.E.O.C.'s position is that it contains a clear implication that content validity is an inferior method of measuring job-relatedness. On the contrary, generally accepted psychological standards do not recognize any such preference for a particular validation strategy.[258] Dr. Enneis, the principal draftsman of the

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257 Mark A. Player, Federal Law of Employment Discrimination (St. Paul, Minn., West Publishing Co., 1976), p.103.

258 American Psychological Association, Standards for Educational and Psychological Tests, (Washington: American Psychological Assoc., 1974), pp25-26.

E.E.O.C. guidelines, has also conceded in sworn testimony that content validation is psychometrically appropriate, even in conditions where criterion-related validity may be technically possible.[259] Wollack acclaims the astuteness of the Second Circuit Court of Appeals for arriving at a similar conclusion in Vulcan Society v. Civil Service Commission of New York:

> Cases like this one have led the courts deep into the jargon of psychological testing. Plaintiffs insist that the only satisfactory examinations are those which have been subjected to "predictive validation" or "concurrent validation," preferably the former . . . .The judge wisely declined to insist on either. The Fourteenth Amendment no more enacted a particular theory of psychological theory than it did Mr. Herbert Spencer's Social Statistics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be shown to 'bear a demonstrable relationship to successful performance of the jobs for which it is used.' [260]

Besides the dual realities that criterion-related validity is probably attainable only in the abstract sense and that content validation is psychometrically acceptable

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259 Schlei and Grossman, p.103

260 Wollack, p.401, citing: Vulcan Society v. Civil Service Commission of New York, 490 F.2d 387, 6 FEP 1045, (2d Cir., 1973).

for establishing the job-relatedness of an employment test, there are other reasons why stringent E.E.O.C. standards are impractical as applied to police employment. That inadequacy centers around the fact that no reliable, easily identified criteria of police effectiveness are presently known. Saunders in Upgrading the American Police notes the lack of such an empirical data base to properly conduct a criterion-related validation study.

> Research has yet to determine reliable indicators of aptitude or predictors for success in police work. Nevertheless, selection requirements might reasonably be assumed to include sound character, emotional stability, and above average intelligence. Such qualities, of course, cannot be measured with precision. 261

Supervisory ratings are often assumed by police administrators to satisfy the empirical requirements of a criterion measure. However, this method of showing job competence is problematic. Rosen has noted that supervisory ratings may be overly generous or harsh depending on the particular raters involved; thus providing unreliable criterion measures.[262] Courts confronting the issue

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261 Charles B. Saunders, Upgrading the American Police (Washington: Brookings Institution, 1970), p.40.

262 Rosen, p.10.

have had little compunction in striking down such ratings as the basis for establishing test validity because of their subjective nature.[263] Sturner has predicted that on the basis of current judicial trends, police agencies will soon be required to totally abandon performance evaluation procedures.[264]

Other measures that are selected as performance criteria are also vulnerable and insufficient. Robertson notes:

> A policeman must learn and understand a myriad of regulations, statutes and judicial rulings and be able to apply them. He must have sufficient ability to prepare clear and concise reports and be sufficiently articulate when testifying in court. The officer's competency is governed by much more than the ability to swing a nightstick. The job behaviors required for successful performance are thus very complex, yet the criteria that psychologists will ordinarily use, criteria such as supervisor's ratings, salary, absenteeism, turnover, etc. are themselves imperfect measures of success and usually rather simple composites of standard data whose main virtue is that it is readily available. [265]

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263 Brito v. Zia Co., 478 F.2d 1200 (10th Cir., 1973) and Allen v. City of Mobile, 331 F. Supp. 1134, (S.D., Ala. 1971), Aff'd 4 FEP Cases 1290 (5th Cir., 1972).

264 John Sturner, "Personnel Selection and Promotion Processes: Some Considerations," F.B.I. Law Enforcement Bulletin Vol.46:6 (June, 1977), p.9.

265 David E. Robertson, "Update on Testing and Equal Opportunity," Personnel Journal, Vol.56:1 (March, 1977), p.144.

One cannot overstate the significance of this observation. The statistical tracking of the number of sick days a recruit uses or the frequency of errors in writing traffic citations are threshold level functions which are of secondary consequence in determining actual police effectiveness. Nonetheless, virtually every attempt at validating police performance centers around such factors. The crucial role of the police officer in this society involves his interaction with citizens while he is in a position of enormous authority. As noted by Brandstatter and Hoover, the policeman must ". . .exercise great amounts of discretion and good judgment in a highly charged political environment."[266] The criteria of service ratings or sick time usage simply are inadequate at addressing these crucial behaviors.

In addition to identifying requisite skills needed in a job, a proper job analysis also notes the relative frequency with which the required skill is used. Courts have a tendency to downplay the necessity of infrequently required skills as not truly job-related. However, as the Sixth Circuit observed in Smith v. Troyan, a police case, this objection is theoretically flawed. The Court noted:

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266 Arthur F. Brandstatter and Larry T. Hoover, "Systemic Criminal Justice Education," Journal of Criminal Justice, Vol.4:1 (Spring, 1976), p.52.

> A lifeguard may well spend all but fifteen minutes of an entire summer observing the swimmers and keeping the beach free of litter, but in those fifteen minutes swimming ability to rescue a drowning swimmer become vitally crucial. 267

In their review of police testing procedures, courts have generally followed a strict scrutiny standard in determining test validity. It is no surprise that most challenged police tests have fallen short of this standard. It is arguable, however, that the courts have misapprehended the issue and should properly follow a less rigorous review under the Spurlock standard enunciated by the Tenth Circuit. In that case the Court noted:

> When a job requires a small amount of skill or training and the consequences of hiring an unqualified applicant insignificant, the courts should examine any pre-employment standard or criteria which discriminates against minorities. 268
> [emphasis added]

The authors of the encyclopedic text Employment Discrimination Law provide a similar interpretation of this reasoning.

> The greater the human and economic risks of failure on the job, the lower the correlation which will be required of the selection device (predictor) producing the substantial adverse impact. For example, a small

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267 Smith v. Troyan, 502 F.2d 520 (6th Cir., 1975).

268 Spurlock v. United Airlines, 475 F.2d 216, 5 FEP 17, (10th Cir., 1972).

> increment in predicting success for commercial airline pilots may pass E.E.O. muster, while conversely, substantial incremental selection success would be required for ball game peanut vendors. 269

The police function, when placed on a continuum between a peanut vendor and a commercial airline pilot must, in anyone's estimation, fall considerably closer to the latter. Surely, during the decade of debate generated by the seminal report Challenge of Crime in a Free Society, the crucial nature of the role of the police officer has emerged. However, the decisions of the Federal judiciary have been largely incongruous with this growing awareness.

When a set of recondite psychometric principles are applied to extremely complex behavioral patterns, such as those required in urban policing, the matter of devising an acceptable employment test can become protracted. The First Circuit, commenting in a case involving the Boston Police Department, noted that the public interest is served by allowing a police agency to carry forward with its normal personnel matters:

> . . .it is important to get on with the business of permanently hiring qualified police applicants on a non-discriminatory basis. That there be an invulnerable entrance examination expeditiously arrived at is essential. 270

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269 Schlei and Grossman, p.130.

270 Castro v. Beecher, 459 F. Supp.725 (1st Cir., 1972).

While the court's dictum calls for invulnerable testing procedures, the guidelines of E.E.O.C. and various judicial holdings have diminished the likelihood of any such result in the forseeable future. Before moving on from the topic of testing, brief discussion must be directed at two additional subjects: the concept of differential validity and the "Alternative Selection Device Doctrine."

The ordinary purpose of an employment test, of course, is to screen a large number of prospective employees in order to identify some smaller number who are presumably best qualified to fill the limited number of positions available. The testing instrument, in theory, is a predictor which aids in this crucial phase of personnel decision-making. In police employment, this initial decision is particularly important since those hired will generally remain in the agency for a twenty-five year career and will thereafter draw half pay for the rest of their lives.

B. Federal Testing Guidelines

At one time, there was some psychological thought (which incidentally has been formally incorporated into E.E.O.C. guidelines)[271] along the lines that this test score,

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[271] 29 C.F.R., §1607.5(b)(5).

job-performance relationship may differ between majority and minority candidates.[272] No examples of such tests are cited here since no reports of authenticated employment tests purporting to have differential validity have been disclosed in the author's review of the literature. The theory holds that majority group candidates who achieve a score of, for instance, 70% on the test may perform at "x" level, but the minority group subsample achieving a score of 65% on the test might reach the same level in actual job performance. This theory is known as differential validity.

A great deal of discussion will not be devoted to the technical arguments of differential validity since the consensus in the literature clearly indicates that the phenomenon does not exist.[273] Fincher's conclusion of the subject in her article "Differential Validity and Test Bias" summarizes the most recent thinking of her colleagues.

> Neither differential validity nor statistical adjustment for test bias is supportable by the empirical data

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272 Schlei and Grossman, p.67.

273 Support in the literature for this conclusion is overwhelming. For some examples, see: "Developments in the Law--Title VII Employment Discrimination," [no author cited] Harvard Law Review Vol. 84:5 (1974), p.1129; F.L. Schmidt and others, "Racial Differences in Validity of Employment Tests: Reality or Illusion?", Journal of Applied Psychology Vol.58:1 (August, 1973), pp.5-9; Sandman and Urban, supra, p.40; Robertson, "Update on Testing and Equal Opportunity," supra, p.146; also see U.S. v. Georgia Power Co., supra.

> available, and neither is likely to gain the conceptual or logical consistency necessary for legal, political, or administrative acceptance outside the field of psychometrics. [274]

The salient fact in regards to differential validity is not its value (nor lack thereof) in terms of scientific measurement. The point is that it effectively serves as one additional mechanism placed before the administrator who takes the audacious position that he will defend a challenged test before a Federal administrative agency or a court. Differential validity, even though current professional consensus holds it to be a nonexistent abstraction, remains in Federal guidelines. But that is not the ultimate absurdity in this illusory quest for the "valid" employment test. That coup-de-grace must be reserved for the "Alternative Selection Doctrine."

From the content of the guidelines they promulgate, it is readily apparent that bureaucrats of Federal administrative agencies having jurisdiction in matters of employment opportunity are by nature very cautious people. A police administrator having the 'wrong' numbers of minorities in his agency must rebut a prima facie case that the statistical disparity is the result of his discrimination. In this rebuttal, he is compelled to show that his test meets standards

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[274] Carol Fincher, "Differential Validity and Test Bias," Personnel Psychology, Vol.28:4 (Winter, 1975),p.481.

that many people assert no known test can meet.[275] Even the author of the guidelines, presumably a proponent of their utility, can only cite three or four tests that can pass muster under their requirements.[276] And if, per chance, an administrator were to develop the fifth test, he must check it to determine that it does not differentially underestimate the occupational potential of a subgroup of minority applicants. But it seems that even these measures could not be guaranteed to be sufficiently insurmountable so as to assure that a defendant employer could not conceivably prevail at the defense of a challenged test. This loose end was tied through the administrative creation of the doctrine dubbed the 'Kicker' by one detractor.[277]

The "Alternative Selection Device" was first enforced in Robinson v. Lorrilard.[278] It has also found its way into at least one police employment case. In Officers for Justice v. Civil Service Commission of San Francisco, the District Court noted:

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275 Supra at fn. 149.

276 Supra at fn. 256.

277 Monroe, p.73.

278 Robinson v. Lorrilard, supra.

> Even if the test were found to be valid, there has been no showing by the police department that there are no alternative means of selecting for the desired skills that would have a lesser adverse impact against [protected classes]. [emphasis added] 279

This doctrine is apparently based on a recognition that any discriminatory practice ". . .should not sweep more broadly than necessary to accomplish valid goals."[280] Monroe has provided the following explanation of the requirement:

> The Kicker is that even after the testing mechanism has been demonstrably shown to be job-related, the employer has the additional responsibility to show that there are no reasonable alternative selection practices which could accomplish the same purpose with less adverse impact. 281

Subsequent to Monroe's analysis, the Supreme Court clarified the issue in Albemarle, and properly placed the burden of showing an alternative onto the plaintiffs. Justice Stewart, writing for the majority, held:

> If an employer does meet the burden of proving that its tests are 'job-related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' 282

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279 Officers For Justice v. Civil Service Commission of San Francisco, 395 F.Supp. 378, 11 FEP Cases 815 (N.D., Cal,1975).

280 Player, p.171.

281 Monroe, p.73.

282 Albemarle Paper Co. v. Moody, supra.

Chief Justice Burger, the Griggs author, strongly dissented in the Court's endorsement of the E.E.O.C. guidelines in Albemarle.

> [The guidelines]. . .interpret no section of Title VII and are nowhere referred to in its legislative history. Moreover, they are not federal regulations which have been submitted to public comment and scrutiny as required by the Administrative Procedures Act. Those provisions are, as their title suggest, guides entitled to the same weight as other well founded testimony by experts in the field of employment testing. 283

Can a police employer ever be sure that his test is completely valid and nondiscriminatory? Careful consideration of the question must lead to a negative conclusion, for in order to fulfill the mandate of the "Alternative Selection Doctrine" one will be required to prove the nonexistence of phenomenon. It is axiomatic that this is impossible. Who can prove the nonexistence of life somewhere else in the universe? The absurdity to the example serves to prove the point; there is no way to insulate an employer from lesser adverse impact challenges. To do so requires nothing less than a cosmic search.

One of the more distressing results of the widespread intrusion into police employment practices has been the resultant coerced departure from sound administrative principles.

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283 Albemarle Paper Co. v. Moody, supra, C.J. Burger dissenting.

For example, untold numbers of police administration students have been taught that a decision to reject or approve a borderline applicant must be resolved in the favor of the department.[284] However, in light of the legal force of the guidelines and case law, an employer is realistically required to resolve borderline cases of minority applicants in favor of the applicant. An incipient trend illustrating this point is the use of arrest records in evaluating applicants for police employment.

There is widespread consensus that the general public and incumbent employees have every right to expect police candidates to be of high moral character and free from serious criminal histories. One commission recently observed that "the responsibilities entrusted to the police officer preclude the employment of the dishonest, the immature, the lazy, or the unreliable."[285] However, there is substantial question into the legality of making pre-employment inquiries into arrest records or disqualifying candidates on the basis of prior arrests. In Gregory v. Litton Industries, a private employer was enjoined from making

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284 O.W. Wilson, Police Administration (New York: McGraw-Hill), pp149-152.

285 Report on the Police, p.339.

any inquiry into arrest records.[286] In a similar case, Cairo v. Fair Employment Practices Commission, the Appeallate Court of Illinois held that disqualification for previous arrests constituted unlawful discrimination since proportionately more blacks are arrested than other groups.[287] These decisions would prove particularly unfortunate if they were to be extended more widely into the public safety sector.

The framers of the Civil Rights Act of 1964 recognized that tests and inferences drawn from tests have become an inextricable part of modern personnel management procedures. Section 703(h)[288] was known as the "Tower Amendment" after its sponsor Senator John Tower and was included as an addendum to the bill to ensure a clear understanding of legislative intent on the issue of employment testing. The Tower Amendment was to insure that employers could give and act upon the results of 'professionally developed' ability tests. But fourteen years after the passage of the law, one cannot help think that the requirements for

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286 Gregory v. Litton Industries, Inc., 316 F. Supp.401 (C.D., Cal.,1970). The reader should not be confused as to the legal meaning of the term 'test.' The guidelines explicity provide that the term includes specific qualifying or disqualifying background requirements. (29 CFR §1607.2). As such, a bar to employment on the basis of arrest or conviction constitutes an employment test.

287 City of Cairo v. Fair Employment Practices Commission, 315 N.E.2d 344 (Ill.App.Ct., 5th Dist., 1974).

288 Supra at fn. 109

employment testing would be hopelessly irrecognizable to the Act's sponsors. This result has occurred through the interaction of several factors: over-zealous administrative agencies, overly theoretically oriented experts, and confused judges reaching strained conclusions from complex scientific data outside the realm of their own training.

If employment testing is to be a continued component of personnel decision making, it is crucial that some realistic and achievable standards be established. Wollack proposes a rather simple standard that coincides with the original intent of the legislators who wrote §703(h):

> If an examination has been badly prepared, the chance that it will turn out to be job-related is small. Per contra, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial examination reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand. 289

Justice Blackmun also provides a well-reasoned commentary on the testing issue in his concurring opinion in Albemarle. It is deserving of deep reflection.

> The simple truth is that pre-employment tests, like most attempts to predict the future, will never be

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289 Wollack, §407

> completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics required, possesses the potential of being an effective weapon in protecting equal opportunity because it has the unique capacity to measure all applicants on a standardized basis. I fear that a too rigid application of the E.E.O.C. guidelines will leave the employer little choice, save an impossibly complex and expensive validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII. [290]
> [emphasis added]

Of course, the nondiscrimination bureaucrats have vigorously repudiated any inference that their underlying intent in adopting these 'scientifically based' standards was to (1): obviate legislative controls placed on their organizational prerogatives (specifically §703(j)--the anti-preference clause), or (2): to facilitate hiring patterns compatible with their own sociological perception of what form economic and social parity should take in this country.[291] Whether or not such ulterior motives are actually

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[290] Albemarle Paper Co. v. Moody, supra, J. Blackmun concurring.

[291] These standard protestations are enjoying less credibility. Official pronouncements notwithstanding, officials seem to acknowledge such an enforcement strategy, at least on an internal basis. Recently Sparks published an internal memorandum written by a compliance representative to the Deputy U.S. Attorney General. (The article is unclear as to how the memorandum was released from the government.) It reads in part: "An unstated or covertly stated reason may underlie the apparent EEOC refusal to modify its present guidelines. Under the present guidelines, few employers are able to show the validity of any of their selection

present is not the main issue; the net effect has been similar. The following two observations are typical of literally scores of related comments interspersed in the professional journals of the fields of education, psychology, personnel management, public administration, labor relations, and law.

> The legal status of employment tests has become so complicated that many employers have taken the easy road out and suspended their use even before the tests have been challenged. 292

> In many cases, employers find that hiring a few unqualified minorities to meet their quotas to be less expensive than prolonged legal actions, even in instances where a company has a good case. 293

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procedures, and the risk of their being held unlawful is high. Since not only tests, but all other procedures must be validated, the thrust of the present guidelines is to place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring." C. Paul Sparks, "The Not So Uniform Employee Guidelines," The Personnel Administrator, Vol. 22:2 (February, 1977), p.40

292 Robertson, "Update on Testing and Equal Opportunity," p..144.

293 Gopal C. Pati, "Reverse Discrimination: What Can Managers Do?", Personnel Journal, Vol. 56:7 (July, 1977), p.336.

C. The Exclusivity of Quota Remedies

The solution of disregarding test results may not be the apparent panacea it seems; its use has its own dangers. The pitfall in the theory is its failure to take cognizance of the third party majority applicant. He is likely to assert that he rightfully is entitled to the position offered to the minority applicant. Until recently, such claims had slight prospects for success. However, recent trends now suggest that redress for such individuals may be obtainable under standard civil rights litigation. The likelihood of a majority complainant successfully obtaining redress for alleged reverse discrimination is enhanced in those instances where merit-type competitive processes are used as the principal selection criterion. His chances are also enhanced in those circumstances where the aggrieved party has the benefit of being represented by a collective bargaining association. Both of these characteristics are found with regularity in modern police agencies. Even recognizing these contingencies, the administrator may decide to chance potential reverse discrimination suits rather than encounter immediate confrontations with the various compliance agencies. However, Miro Todorovich cautions the administrator who is contemplating this against deluding himself that those agencies will come to his support in the subsequent challenge. He states that the culprits who "encouraged and incited" reverse discrimination

will escape unscathed if the majority plaintiff prevails in his suit:

> The Federal government washes its hands of the . . .[employer] and proclaims its usual pieties about how reverse discrimination is not its policy. It is thus in the advantageous position of an individual who tells another to leap out a fifteenth story window, but sternly forbids incurring any injury on landing. 294

In discussing preferential remedies, it is important that the distinction between the two implementation modes discussed earlier be kept clearly in mind.[295] First, there are those affirmative action programs that represent voluntary actions of an employer and are introduced through his own initiative. Secondly, there are those remedies which have been imposed by a court as the result of a finding of past or continuing discrimination. It is necessary to examine both of these areas.

Federal equal employment opportunity legislation was first introduced in Congress in 1943, but was not enacted until 1964 because of strong opposition. One author attributes the ultimate passage of Title VII to a compromise that denied enforcement powers to the newly

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294 Miro Todorovich, "Discrimination in Higher Education," Civil Rights Digest, Vol.7:3 (Spring, 1975), p.18.

295 Supra at fn. 93.

created Equal Employment Opportunity Commission. Its role was envisioned only as concilatory.[296] The trade-off for the weak administrative agency was the fact that the Federal courts were to have broad powers in enjoining unlawful activity and providing remedial relief to victims of employment discrimination. Lopatka has commented that these powers included the right to order an employer to hire, promote, reinstate, transfer, pay retroactive awards, or generally ". . .provide any other equitable relief as the court deems appropriate."[297] Congress further entrusted the judiciary with the authority to provide, in its sound discretion, race conscious remedies for race conscious injuries.[298] The Supreme Court, in interpreting the Act, noted that such judicial remedies to compensate for discrimination may take many forms and may be "awkward, inconvenient, and bizarre."[299]

A statement of the exclusivity of the authority to fashion certain type remedies for employment discrimination is found in U.S. v. Ironworkers Local 86:

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296 Player, p.95.

297 Kenneth T. Lopatka, "Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees Who Protest Discrimination in Private Employment," New York University Law Review Vol.50:6 (December, 1975), p.1219.

298 Biddle, p.8.

299 Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, (1971).

> . . .unlawful employment practices may be enjoined by the court and such affirmative action as the court may deem appropriate. . . . There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power. [300]

It is clear then, that courts have considerable power to remedy employment discrimination. As the judge pointed out in Weber v. Kaiser Aluminum and Chemical Corp., courts are not bound by the racial prohibitions of Title VII when fashioning relief.[301] However, a much thornier and less clear issue involves the extent of the measures which may be taken by the police administrator, who obviously is subject to the prohibitions of Title VII, to remedy his agency's past discrimination or to bring himself into compliance with Federal guidelines. Pemberton frames the right question in this regard.

> [Are employers] . . .too, legally privileged (as is a court) to impose an adverse impact upon white males because their self-analysis shows that white males have been the beneficiary of their past discrimination? [302]

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300 U.S. v. Ironworkers Local 86, supra.

301 Weber v. Kaiser Aluminum and Chemical Corp., 415 F. Supp. 761 (1976), A'ffd. (5th Cir., 1977), 16 FEP Cases 1.

302 Pemberton, p.110.

Courts are certainly willing to delegate certain aspects of their authority to the E.E.O.C. or to a well intentioned employer. For example, it is inconceivable that any court would object to any employer voluntarily making a backpay award to a minority employee who he discovers has suffered unlawful discrimination. An award of retroactive seniority might pose some problem since vested employment rights of others could come into focus. However, the question of delegating the extraordinary relief that a racial quota represents is entirely another question.

The judiciary as a whole has expressed a healthy ambivalence toward racial quotas as tools for remedying the effects of past discrimination. The First Circuit's decision in Altshuler reflects the magnitude of this concern:

> It is by now well understood. . .that our society cannot be completely colorblind in the short term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed . . . . Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities. 303

The other side of the coin, however, is noted by the Third Circuit. The racial quota is a vehicle of last resort.

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303 Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir., 1973); cert. denied 416 U.S. 957.

> A racial quota is inherently obnoxious, no matter what the beneficient purpose. Such a quota is demeaning and devisive. At best, it is a lesser evil. It is not to be encouraged. 304

The Second Circuit in Kirkland described the judicial role in terms of striking a delicate balance between competing interests:

> . . .no remedy is perfect. Each must of necessity require some persons to forego some benefits. The advantage of an appropriately tailored goal or quota is that it goes the furthest toward remedying past wrongs with the least harm to others. 305

While appeallate courts have recognized the necessity for quotas as judicial relief in tightly drawn circumstances, the Supreme Court has yet to determine whether or not such a remedy is available to the private employer. Lower courts have reached varying conclusions. The Court may address the problem in Bakke, even though that case does not deal with employment quotas per se. An initial obstacle when a ripe employment case reaches the Court will be in clarifying the terms used to describe the relief. When a court says that 50% of new hires will be black, admittedly this is a quota. No one has a problem with the

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304 Oburn v. Shapp, 521 F.2d 142 (3rd Cir., 1975)

305 Kirkland v. State Department of Corrections, 520 F.2d 420 (2nd Cir., 1975).

choice of the word since courts are clearly vested with the authority to use quotas. However, an employer must call the same employment practice a "goal" since quotas appear to be unavailable to employers. At such time as the Court confronts that case, the semantics should not prevent consideration of the issues. As the Fifth Circuit noted in Weber, ". . .attempts to distinguish a numerical goal from a quota have proved illusory."[306] The Pennsylvania Commonwealth Court also observed that the distinction will be of little discernable difference to the victim of reverse discrimination.[307] The Detroit Police Department case seems a likely prospect for the resolution of the issue in the Supreme Court.

Employers who become defendants in reverse discrimination suits can put forth a number of arguments in justification for preferential treatment of racial minorities. The judge in Brunetti v. Berkeley did not dispute the defendant's position that an employer should not wait to be sued over past discrimination before it takes steps to increase minority representation.[308] A second justification put forth

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306 Weber v. Kaiser Aluminum and Chemical Corp., supra, 16 FEP Cases 5 (5th Cir., 1977).

307 Chmill v. City of Pittsburgh, 15 FEP Cases 477, 452 (Pa. Commonwealth Ct., 1977).

308 Brunetti v. City of Berkeley, ____F. Supp.____(N.D., Cal., 1975), 11 E.P.D. ¶10,884.

may be a reliance on Federal guidelines indicating that preferential treatment is consistent with Federal policy. For example, the United States Commission on Civil Rights has advocated adopting procedures "which make race, ethnicity, or sex a criterion of selection when promoting or hiring in accordance with an affirmative action plan."[309] The challenged employer might also attempt to rely on the fact that high ranking Federal administrators, such as the Director of Civil Rights Compliance of the Department of Health, Education and Welfare, tacitly support self imposed quotas. He stated that ". . .while H.E.W. does not endorse quotas, I feel that H.E.W. has no responsibility to object if quotas are used by universities on their own initiative."[310] They may also rely on advise from industrial psychologists who advise their clients that ". . .the danger of adverse government action . . .is small" in cases of lowering required scores for minorities to reach affirmative action goals.[311] Public employers may also be lead to believe that these positions are strengthened by court rulings holding that there is no fundamental right to be fairly

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309 Enforcement Effort, p.656

310 Roche, p.20.

311 William C. Byham and Morton Spitzer, The Law and Personnel Testing (Washington: American Management Assoc., 1971), p.143.

considered for public employment. For example, veterans may be preferred so long as there is a rational basis for the preference.[312]

These justifications notwithstanding, most of the courts confronting employment cases wherein strict minority quotas were imposed without judicial sanction have been constrained to find such programs unlawful. These courts have been largely unimpressed with defenses that the actions were taken pursuant to the employer's obligations to a Federal compliance agency.[313] This is obviously related to judicial recognition of the fact that these administrative agencies lack the statutory authority to seek or provide such relief.[314]

In Cramer v. Virginia Commonwealth University, the defendant school contended that since its continued existence was dependent upon Federal subsidies, it had no choice but to

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312 Feinerman v. Jones, 356 F. Supp. 252 (M.D., Pa., 1973).

313 A consent decree established by E.E.O.C. and executed under the authority of a United States District Court is an exception to this statement.

314 Quite the contrary is true. The enabling legislation of L.E.A.A. strictly forbids that agency from imposing any quota upon a recipient agency. "Notwithstanding any other provision of law nothing contained in this chapter shall be construed to authorize the Administration (1) to require, condition the availability or amount of a grant upon the adoption by an applicant or grantee under this chapter of a percentage ratio, quota system, or other program to achieve racial balance in any law enforcement agency." §518(b) of the Crime Control Act.

conform to H.E.W.'s nondiscrimination guidelines. It contended that the discrimination it undertook against the white plaintiff job applicant was only because of its good faith attempt to compensate for past discrimination, as required by the guidelines. The court did not accept the argument. It ruled that ". . .reliance on such discriminatory practices to achieve quotas or goals is the unconstitutional means to achieve an unconstitutional end."[315]

Likewise, a university affirmative action plan was struck down in Flanagan v. Georgetown College because of differential treatment of applicants. The court, in its verbal censure of the school, noted:

> While an affirmative action program may be appropriate to ensure that all persons are afforded the same opportunities or considered for benefits on the same basis, it is not permissible when it allocates a scarce resource (be it jobs, housing, or financial aids) in favor of one race to the detriment of another. [316]

In an analogous case in the realm of police employment, a New Jersey court held that a plan for hiring one minority for one white until the police force was 15% minority was

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[315] Cramer v. Virginia Commonwealth Univ., supra.

[316] Flanagan v. Georgetown College, 417 F. Supp.377 (D.C., 1976)

unlawful. It noted that if a voluntary plan finds jobs for blacks merely by denying those jobs to whites, it "piles discrimination on top of discrimination."[317]

At least three circuits have emphasized that bad plans to correct past discrimination will not pass constitutional muster. In Carter v. Gallagher, the Ninth Circuit reversed an absolute preference for minorities because ". . .we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another."[318] In Bridgeport, the Second Circuit commented on the subjects of police morale and the racial attitudes of bypassed officers:

> . . .the imposition of quotas will obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate, rather than diminish racial attitudes. . . .We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted. [319]

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317 Lige v. Town of Montclair, (N.J. Sup. Ct., 1976) 13 FEP 1697.

318 Carter v. Gallagher, 142 F. Supp. 315 (9th Cir., 1971).

319 Bridgeport Guardians v. Bridgeport Civil Service Comm., 482 F.2d 1333 (2nd Cir., 1973).

A similar admonition was provided by the Third Circuit:

> Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others lest we abandon the basic principle of nondiscrimination that sparked the effort to pry open those doors in the first place. [320]

The proper course for the Supreme Court to take in addressing this problem has been stated by the Fifth Circuit in Weber. The court held, quite properly, that an employer is without authority to impose a strict numerical quota for or against any group, minority or majority. "Quota systems must be imposed with great caution, and only the judiciary should be entrusted with fashioning and administering such relief."[321]

The clear legislative insistence on quota relief being available exclusively as a concomitant to a judicial finding of discrimination is entirely proper; it is a policy consistent with our history of governmental separation of powers. In fact, it seems so superior to a privately fashioned remedy so as not to necessitate explanation. However, because of the pervasive nature of the claim that private employers can impose quota relief, an overview of the sundry protections afforded in the judicial process will be briefly noted.

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[320] Commonwealth v. O'Neil, 4 FEP 1286 (3rd Cir., 1972)

[321] Weber v. Kaiser Aluminum and Chemical Corp., supra.

American courts work under formalized procedures evolved through hundreds of years of jurisprudential experience. Protections such as the disqualification of a judge should he have a personal stake in a controversy tend to minimize the chance of bias or prejudgment. The procedural rules of evidence serve to focus upon the issues in dispute and to exclude unreliable or prejudical sources of evidence. The doctrine of stare decisis tends to provide a decision-making continuity and predictability. Additionally, the court system provides an elaborate mechanism for appeallate review, including access to the United States Supreme Court. This Court is the ultimate government authority in interpreting constitutional issues and is free to vacate actions by the two other branches when necessary to secure a right established by the Federal Constitution.[322]

Courts and law are open institutions; courtroom proceedings are accessible to those who are interested and statutes are written down in books available to the inquisitive. Contrastingly, the person being affected by an employer's privately fashioned quota can only surmise as to the rationale applied since he cannot be privy to decisions made behind closed doors, inaccessible to public scrutiny or

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322 Marbury v. Madison, 1 Cranch 137, 5 U.S. 137 (1803).

public input. As noted by Justice Brandeis, "sunlight is said to be the best disinfectant."[323] Courts are rather unique in their capacity to provide that openness. The judge in Reeves v. Eaves made a similar observation in ruling on an affirmative action program in an urban police department:

> . . .if preferential or discriminatory action is necessary to overcome the effects of any prior discrimination, it must come by court decree--not by a subjective, individualized selection procedure where there is no opportunity to objectively ascertain the extent of the discrimination, or its necessity within the requirements of the United States Constitution. [324]

The requirement that an extraordinary remedy for discrimination be fashioned by a court also serves as an effective check against the danger of arbitrary or capricious actions from being undertaken by an employer. Some authors have attempted to assert that it is unnecessary for courts to examine voluntary quotas because they are imposed by a white majority government. Professors Ely and Askin have put forth this argument:

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[323] Kenneth Culp Davis, Administrative Law Text (St. Paul: West Publishing, 1972), p.102.

[324] Reeves v. Eaves, 411 F. Supp. 531 (N.D., Ga., 1976).

> It is unjustifiable, of course, for members of socially dominant groups to use race as the basis for excluding members of powerless minorities, thereby stigmatizing them as unfit. . . .But the issue we are discussing is quite different. We are talking about a situation in which institutions dominated by members of the racial majority decide, as a short-term expedient, to favor the minority in an effort to foster racial harmony, to promote racial harmony, to promote racial integration, and to eliminate racial stigmas. 325

> A white majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted to underestimate the needs and deserts of whites relative to those of others. 326

The theory, though, is obviously flawed, at least with respect to some programs. It is no longer acceptable to make stereotypic characterizations of reality which portray all public employment decision-making as being carried out by white chief executives. In an increasing number of urban areas, adverse employment decisions affecting majority workers are imposed by minority decision-makers acting as agents of minority dominated political structures. Even the terms "minority-majority" are of dubious utility in cities such as Detroit where the black population approximates

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325 Askin, p.102

326 Ely, p.735

60%. To carry this idea one step farther, the author has established a hypothetical scenario to demonstrate the potential abuse involved in a judicial delegation of the power to impose an employment quota.

This scenario takes place in a major urban center in the South which has a significant minority population. It also has a black mayor and a city council which is predominantly black. The city fathers are properly concerned over the inadequate number of minorities in the city's fire department and the need to compensate employees for the past discrimination of previous city administrators. Pursuant to the city's assessment of these circumstances, it recognizes that it has an obligation to fashion an appropriate remedy by imposing an 'affirmative action goal.' It has announced its immediate intention to fill all existing vacancies (twenty-eight) in the superior ranks of the Fire Department with all black candidates. To do so, however, the city must disregard a promotional eligibility roster established through a recent competitive process. The promotional model involved a written examination, an oral interview, and a practical "fire-tower" simulated exercise conducted and evaluated by the staff of the training division. Efforts to ensure that the examination process was 'job-related' date back several years. Further, to assure continuation of the new policy, the department announces that all future promotions will be awarded exclusively to blacks until such time as 51% of all superior officers in the Fire Department

are black. In making this determination, the administration asserts its recognition of the "unfortunate" fact that the consequence of the new 'goal' will be that no incumbent white firefighter can be considered for promotion for a period of some fifteen years. The city administration has made the specifics of its plan known to the E.E.O.C., which then provided a written endorsement to the city, that in its opinion, the proposed actions are a valid means of discharging the employer's legal responsibilities under Title VII of the Civil Rights Act of 1964.

An appropriate criticism would be that one should not construct hypothetical scenarios in a scholarly paper since they are obviously self-serving in establishing the validity of the point the author seeks to make. The author would concur in such criticism, but it is inappropriate here. The facts recited in this scenario are neither contrived nor fictional. They are reconstructed from the facts presented to the Georgia State Superior Court in the case of International Association of Firefighters Local 134 v. City of Atlanta.[327]

The Firefighters case is an admittedly flagrant example of excessive abuse of an administrator's discretion. The court properly enjoined the city's plan to promote only

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[327] International Assoc. of Firefighters (IAFF) Local 134 v. City of Atlanta (Ga. Superior Court, 1975), 11 EPD ¶10,676.

blacks, observing that ". . .the cure must not rival the disease by providing legal sanctuary for a new crop of oppressive procedures."[328] But the case establishes several points. Employers are prone to draw inappropriate and excessive conclusions if left to strike the delicate balance between the competing interests of minority and majority workers. This is the reason for the legislature's circumscription of the authority to impose quota relief to the courts. After all, were it not for a long history of inappropriate actions by employers, there would have been no need for the creation of Title VII in the first place. One should recognize too, that the bounds of voluntary quotas are limited only by the imagination of the designer. Could another administrator examining the same facts have determined that the 51% figure, the current black population of Atlanta, should be reached immediately, thereby causing the demotion of incumbent white superior officers? Or could one analyzing demographic trends surmise that fifteen years hence the population of the city will be 75% minority, thus moving the appropriate 'goal' from 51% to 75% and the consequential wait for the white aspirant for a promotion

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328 I.A.F.F. Local 134 v. City of Atlanta, supra.

from fifteen to twenty-five years? Certainly, it is not stretching too far one's imagination to conceive such conclusions being drawn.

The Firefighters case also serves to establish the legitimacy of the Congressional decision to withhold enforcement powers from Federal administrative agencies in matters of civil rights. If E.E.O.C's endorsement and active encouragement of the employer's proposed quota is consistent with equitable conciliation, then that agency's understanding is repugnant to all statutory and constitutional provisions. There is a lesson to be learned by the Latin maxim, nihil iniquius quam aequitatem nimis intedere (nothing is more unfair than to stretch equity too far).

There is a final point with reference to the judicial delegation of quota relief. That question involves the temporal aspect of employment discrimination remedies. Newton expresses the valid and natural concern of those who are potentially disadvantaged by such a remedy.

> How will we know when opportunity privilege is expired. How much privilege is enough? When will the guilt be gone, the price paid, the balance restored? What recompense is right for centuries of exclusion? What criterion tells us when we are done? 329

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329 Newton, p.311.

Ms. Newton's questions can receive at least partial answers. When a court imposes quota relief, its order should address itself to at least some of her expressed misgivings. Edwards and Zaretsky comment:

> Virtually every court that has ordered preferential treatment has recognized [time limits]. . . and the orders have been formulated to run either for a specific, limited period of time or until a specific, limited percentage or numerical goal is achieved. 330

A self-imposed quota, on the other hand, generally denies this important benefit to the perplexed majority candidate unsure of his standing as the result of an affirmative action program. Significantly, the Detroit Board of Police Commissioners has never announced when its controversial promotional policy will cease and when racially neutral employment criteria will be introduced. As such, it would not meet the judicial standard for court-imposed quotas. As the Fifth Circuit notes:

> [quota relief]. . .is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective neutral employment criteria can successfully operate to [promote] public employees solely on the basis of job-related merit. 331

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330 Edwards and Zaretsky, p.32

331 N.A.A.C.P. v. Allen, supra.

Justice Pashman of the New Jersey Supreme Court also discussed the necessity of limiting the scope of quotas in his dissenting opinion in Lige v. Town of Montclair:

> Quotas which are limited in scope and which are properly designed to a particular area and a limited end will not encroach upon principles of fairness and reasonableness. [332]

The mere fact that there is no way to limit a privately fashioned quota to proper time frames or to insure that it is mandated by proper concerns is sufficient reason to bar the aggrandizement of the awesome power of the racial quota beyond the judiciary.

An Ingham County [Michigan] decision illustrates a related deficiency in the judicial logic used in reviewing affirmative action plans which discriminate in reverse.[333] While Circuit Judge Ray Hotchkiss ruled in the favor of a reverse discrimination victim (the plaintiff ranked #1 on an eligibility roster but was bypassed by a black male who ranked #11), his basis for the holding is lacking and creates a loophole for future litigants. The judge, while recognizing that a preferential quota is a proper method of remedying prior discrimination, noted that no such showing was made at trial.

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[332] Lige v. Town of Montclair, supra, J. Pashman dissenting.

[333] The Detroit News, August 27, 1975.

> The crux of the matter in this case is that the record before the court fails to establish that the M.E.S.C. [Michigan Employment Security Commission] has discriminated in hiring and promotion at level 14 so as to justify preferential promotion of non-whites and women as remedy. [334]

With all due respect to the Court, this solution flies in the face of established judicial practice of not requiring proofs for that which is obvious or admitted to.[335] If all the judge will require is that the record reflect past discrimination, future defendants will stipulate to the same in order to justify their own quota action and prevail at the lawsuit. If such admission will determine whether self-imposed quotas will stand, every defendant in a reverse discrimination case will hereafter readily admit that either he or his predecessors (preferably the latter) failed to provide equal opportunity to minorities. Such a simplistic standard would leave aggrieved white parties without effective judicial recourse, since their burden would be to prove that the employer did not discriminate in the past, despite the active admission by the employer that he did.

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[334] The Detroit News, supra.

[335] The long standing legal principle is represented by the Latin phrase, ea que manifesta sunt non indigent probacione.

Even the Griggs 'business necessity' test may need further thought and refinement with regard to reverse discrimination cases. The following quotation by former Detroit Chief Tannian in his affirmative action presentation to the Board of Police Commissioners aptly demonstrates a strained application of the Supreme Court's intention in Griggs. He is quoting the Federal guideline incorporating the Griggs 'business necessity' test. He interprets the guideline as mandating the proposed promotions out of numerical sequence.

> I quote, any employment practice or policy, however neutral in intent and however fairly and impartially administered, which has a disparate effect on members of a protected class, . . .or which perpetuates prior discriminatory practices, constitutes unlawful discrimination unless it can be proven that such policy is compelled by business necessity. [The Chief added]...And I submit that there is no such business necessity [for not promoting lower ranked blacks] in this department. 336

I suggest that no one can prove that there is a compelling business necessity reason for following such a list if the chief executive of the agency denies the existence of such need. The substantive objection must take another form.

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336 Oral comments of former Chief of Police Philip G. Tannian to Board of Police Commissioners, November 4, 1975. The guideline is reproduced supra at fn. 143.

One cannot consider the 'business necessity' test or civil rights legislation in general outside the environment in which they were created. They were devised by Justices who too many times were compelled to protect the rights of blacks and other minorities from the worst imaginable types of racist practices. The test was developed near the end of an era when the court was compelled to judicially proscribe such discriminatory acts as preventing blacks from sitting at a lunch counter, from attending a public university, from riding in the front of a public bus, from exercising the fundamental right of an American to vote. When it came time for the Court to tackle the difficult matter of employment discrimination, it had come much too far to allow it to frivolously conclude that employers who had previously discriminated would now cease doing so voluntarily and provide blacks equal opportunity. It recognized, and acted upon that recognition, that recalcitrant employers would follow the law only when strong judicial standards were enforced. The 'business necessity' test was precisely such strong medicine.

The Griggs standard and the 'business necessity test' should not be abandoned. These are still viable and useful standards for the vast majority of discrimination in police employment situations. The strenuous objections of this thesis notwithstanding, the majority of discrimination practiced today, particularly in the private sector, remains directed at minority individuals and not the white male. In

one sense, it is commendable that some agencies have gone so far in reversing Stage I discrimination that a real concern must now be voiced over race discrimination against whites. But insofar as any unlawful discrimination exists, it must be dealt with by courts according to laws prohibiting discrimination. The earlier Supreme Court little envisioned the dimensions of the thorny constitutional crises created by the DeFunis and Bakke cases when it structured the business necessity test. These cases contain facts far from the earlier forms of blatant discrimination against minorities. The Court, wisely, saw discrimination at that time in terms allowing blatant discrimination, or proscribing discrimination through stringent measures. Obviously, however, the alternative to the present affirmative action programs is not the prior exclusion of minorities. The time has now come for the Court to clarify the law and create a refined judicial standard which effectively controls contemporary discrimination in all its varied facets.

The Bakke case, which will be discussed in more detail in the following pages, should provide some clarification on this confused issue. Until the Court makes a definitive statement on the limits of voluntary affirmative action, the lower courts must continue to zealously ensure that no person is denied employment opportunity by reason of his or her race, sex, color, national origin, or religion. In order to do so, courts must have at their legitimate disposal unique powers and access to extraordinary remedies when

securing rights provided by law. In most cases, its most awesome and powerful weapon is the quota. The appeallate courts will continue to ensure that the lower courts exercise this tool very cautiously. But all courts must assure that this remedy, appropriately depicted as 'inherently obnoxious,' is not delegated beyond the judiciary. Congress has not seen fit to provide either administrative agencies or private employers with the quota sanction. Until such time as they see fit to do so, or the Supreme Court provides direction to the contrary, any attempt to usurp this exclusively judicial function must be thwarted, lest the intent of Congress and the Constitutional framers be subverted.

C H A P T E R S I X

A Constitutional Direction for Equality of Employment Opportunity

"One emerging from the rash of opinions with their accompanying clashing of views may well find himself suffering a mental blindness."

--Justice Tom Clark
Baker v. Carr
369 U.S. 186, (1962)

The task of providing equal employment opportunity in police agencies has emerged as one of the major challenges facing police administrators in 1978. The challenge promises to become greater before it is lessened.

Earlier in this thesis, the author outlined a model encompassing three stages of employment discrimination in the Detroit Police Department. Stage I represented a period of pervasive, invidious discrimination toward blacks; Stage II represented a period of good-faith efforts to increase minority representation, with marginal results; and Stage III represented an aggressive affirmative action program marked by quota hiring and promotional practices wherein blacks are given preferential treatment. While not all criminal justice agencies have followed such a paradigm, the author believes that a fourth period is about to emerge in the field: "The Post-Bakke Stage."

Many persons involved in the civil rights movement are understandably distressed by the fact that courts have become willing to include whites under the protections of Title VII and the Equal Protection Clause of the Fourteenth Amendment, especially in the context of affirmative action. They point out that these laws were born out of a legislative concern that blacks and other minorities were denied basic freedoms. One cannot convincingly argue that discrimination against majority persons was the raison d'etre of these acts. Zimmer has commented on this irony:

> To use the equal protection clause to protect the majority while effectively denying protection to racial minorities is an anomaly that can only be achieved by the triumph of a mechanistic application of judicial formulae cut loose from the policy and purpose of the Civil War Amendments. 337

While it is true that the specific circumstances giving rise to civil rights legislation involved providing protections for racial minorities, it does not follow that nondiscrimination provisions are therefore inapplicable to whites. The message of the Supreme Court, at least during the post-Plessey era, has been to emphasize the unlawful impropriety of racially classifying citizens. Its message in Loving v. Virginia is typical of that guidance:

> Over the years this Court has consistently repudiated distinctions between citizens solely because of ancestry as being odious to a free people whose institutions are formulated on the doctrine of equality. 338

There is little indication that the Court is anxious to radically depart from this line of precedent and now endorse a new type of racial quota imposed without judicial guidance.

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337 Michael J. Zimmer, "Reverse Discrimination: Will the Court Act to End the Second Reconstruction?", Arkansas Law Review Vol.31:370 (Winter, 1978), p.389.

338 Loving v. Virginia, 388 U.S. 1 (1967)

Both as true and as ironic as it is that a white person may be able to effectively deny some benefit to a black by invoking a law which was passed to ensure the rights of blacks, our law contains many ironies. The Court's challenge in explaining this apparent contradiction would certainly be less onerous than justifying a holding that the Constitution does not apply equally to every American citizen. It is a much stranger anomaly that is encountered when one attempts to put forth a logical explanation of how equality can mean that one citizen should be more equal than another.[339] As Justice Sutherland noted in Home Building Co. v. Blaisdell, ". . .a provision of the Constitution. . .does not mean one thing at one time and an entirely different thing at another."[340] It will be difficult for the Court to philosophically condone discrimination against either whites or blacks; the Constitution is a document that must protect individual citizens, and not races of citizens. This constitutional argument was thoughtfully presented in the DeFunis case:

> For at least a generation the lessons of the great decisions

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339 For an expanded treatment of the fallaciousness of the "equality from inequality" proposition and its applicability to law enforcement, see: Erik Beckman, "Affirmative Action: Are Some More Equal Than Others?", The Michigan Police Journal Vol.52:7 (July, 1977), pp.5-7.

340 Home Building Co. v. Blaisdell, 290 U.S. 398, 448 (1934), J. Sutherland dissenting.

> of this court and the lessons of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. This is the classic hard case making very bad law. [341]

The strength of this nation's Constitution is that it is an eloquent statement of fundamental principle. The Court, to uphold the Constitution, must discuss racial discrimination in fundamental terms. The Anti-Defamation League's amicus brief in DeFunis case strikes at the essence of the protection afforded by the Constitution:

> If the Constitution prohibits exclusion of blacks and minorities on racial grounds, it cannot permit the exclusion of whites on racial grounds. For it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded. [emphasis added] [342]

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341 Amicus Curiae Brief of the Anti-Defamation League of B'Nai Brith in DeFunis v. Odegaard in Phillip B. Kurland Gerhard Casper, Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (Arlington, Va.: University Publications of America, 1975), p.264; hereafter cited as Amicus Brief of Anti-Defamation League.

342 Amicus Brief of Anti-Defamation League, p.265.

By treating racial discrimination in fundamental terms, Bakke has become the most difficult civil rights case the Supreme Court has ever had to face. The Constitution has historically been the document that has assured the rights of the unpopular, the disenfranchised, and the weak. The nine justices of the Court have very often represented the last resort for these persons to protect them from blatant abuse from government officials. Affirmative action, on the other hand, presents an entirely different set of problems for the courts. Those persons who discriminate because of affirmative action discriminate for different and compelling reasons. Not for a moment should a comparison be drawn between the practices of people like George Wallace and "Bull" Connors and the present advocates of preferential treatment programs. The differences between the former and the latter are enormous; indeed the most socially conscious people of our society tend to identify with the second group. Were good motives the criterion used by the Supreme Court in judging the constitutionality of state action, the University of California at Davis would undoubtedly prevail. However, Mr. Bakke will prevail before the Court.

The police, perhaps more than any single institution, are aware that good intentions are insufficient to survive constitutional assault. Police officers sometimes forget that they cannot ignore the rights of citizens to achieve

order in society. When the police do forget the fundamental principle that our Constitution protects individual rights, courts exercise their Constitutional duty and remind them. More than anything else, what we should learn from Mapp, Escobedo, Miranda and Rochin is that this democracy is based on adherence to fundamental principles, and that these protections cannot be violated even for the beneficient objective of removing violent criminals from our midst. If our adherence to fundamental principle is sufficiently compelling to demand the release of an ostensibly guilty murderer or rapist, the fundamental principle can apply no less to the matter before the Court in Board of Regents v. Bakke.

> Civil libertarians must perennially combat the efforts of well intentioned persons to achieve honorable ends through unsavory means. Stopping illicit traffic in hard drugs does not justify wiretapping or no-knock searches; military intelligence needs do not justify a little torture; national security does not justify political surveillance or the suppression of 'dangerous' opinions. Generally--and rightly--we insist that in a healthy polity certain instruments are precluded by fundamental principles, political and moral. Some of these principles are specifically embodied in our Constitution. [343]

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[343] Cohen, "Honorable Ends, Unsavory Means," p.106

Of course, the commitment to fundamental principle embodied by the Constitution requires substantial sacrifice by the American people. Because of our adherence to the Exclusionary Rule, thousands of dangerous persons have been released because inculpatory evidence was obtained by the police in a manner that violated the Fourth Amendment. Because of our adherence to the freedom of speech guarantee of the First Amendment, citizens must now tolerate the resurgence of a hate-filled group of sociopaths who revel in reminding us of the greatest atrocities of this centrury: the American Nazi Party. But the First Amendment must protect despicable speakers because the principle involves protected speech, and not the particular set of speakers. When a racial preference policy conflicts with the equal protection of a constitutionally protected right, it must be the program and not the right that falls. To this extent, the American Nazi Party and the affirmative action question pose similar dilemmas for the civil libertarian.

> Civil libertarians are well advised to be cautious in belittling the force of the equal protection clause when it serves their purposes to do so. Others, whose purposes are as compelling to them as ours are to us, will find this practice very convenient, to our distress. [344]

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344 Cohen, "Honorable End,Unsavory Means," p.107.

A former president of Brandeis University agrees that constitutional protections cannot be based upon situational ethics:

> The University of California in the Bakke case is asking the Supreme Court of the United States to declare that, for laudable social purposes, race may be used to classify, differentiate among, favor some and discriminate against other Americans. If the Supreme Court agrees, all minorities, and indeed, all Americans, will live to regret that day. [345]

Chief Justice Charles Evan Hughes made a profound statement on judicial interpretation of constitutional law when he observed: "the Constitution is what judges say it is."[346] For those interested in the outcome of the Bakke case and what this Court will say that the Constitution is, we can look to that guidance which the justices have given us in previous cases.

The Burger Court is perhaps most remarkable for its departure from the liberalism of the Warren Court era. However, it is not recommended that one analyze the affirmative action/reverse discrimination issue in terms of the liberal-conservative dichotomy. The fact that such analysis

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[345] The New York Times, September 13, 1977, p.32.

[346] Harold J. Berman and William R. Griener, The Nature and Functions of Law (New York: Foundation Press, 1958), p.19.

is overly simplistic is best demonstrated by the opinion of Justice Douglas in the first "Bakke-type" case, DeFunis v. Odegaard. Although a majority ruled the case moot since the plaintiff was about to graduate from the law school where he had first been denied admission because of his race, Justice Douglas alone felt compelled to confront the profound issues raised by the case.[347] His comments leave little doubt how he would hold in Bakke, had ill-health not forced his retirement.

Justice Douglas' remarks in the DeFunis case are cogent for many reasons, one of which is to refute those who would ascribe ill motives to critics of preferential treatment. Certainly white supremists or ultraconservatives will object to affirmative action, but not all those who object can be classified as either racists or conservatives. Indeed, no one remotely familiar with the modern history of the Supreme Court could have the arrogance to question the "liberal" credentials of William O. Douglas. He has been the singularly most consistent advocate for minority and individual

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[347] The mootness argument of the DeFunis majority is not overwhelming. For example, only one week previously the Court decided the substantive issue of whether strikers were entitled to welfare benefits under New Jersey law. However, the strike had long since been settled and the strikers returned to work. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974). In 1977, the Court ruled on the issue of whether a state may set different minimum drinking ages for men and women, even though the plaintiff had since attained the age of majority. Craig v. Boren, 429 U.S. 190 (1977).

rights in this century. He has been the most articulate spokesman for the doctrine of constitutional supremacy, possibly dissenting in more cases involving a constitutional infringement upon individual rights than any justice in the history of the Court. His liberal philosophy was such as to lead a man who would later become President to bring impeachment proceedings in the House of Representatives against him.[348] If it true, as many historians claim, that the mark of a great justice is that his dissenting opinions later become the majority law, the DeFunis and Bakke cases will help establish the greatness of Justice Douglas' career. Douglas was ready to face the Bakke issue four years before his colleagues have choosen to do so. His comments in DeFunis are sure to be seen again in Supreme Court decisions.

> There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its merit in a racially neutral manner. [emphasis added] [349]

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[348] For an account of Gerald R. Ford's 1970 attempt to impeach Justice Douglas, see: Louis M. Kohlmeir, God Save This Honorable Court (New York: Scribner, 1972), pp.181-193.

[349] DeFunis v. Odegaard, 96 S. Ct.1704 (1974). J. Douglas dissenting.

> The state may not proceed by racial classification to force strict population equivalencies for every group in every population, overriding individual preferences. The Equal Protection Clause commands the elimination of barriers, not their creation in order to satisfy our theory as to how society ought to be organized. [350]

Although the leadership of Justice Douglas is now absent, enough is known of the other justices to surmise the majority will not endorse the concept of penalizing Bakke in order to further the affirmative action program at the University of California. The McDonald v. Santa Fe Trails decision,[351] insuring Title VII protections for whites on the same basis as non-whites, cannot be interpreted as a precedent arguing against Bakke's position. Even more interesting is the 1976 case of Davis v. Washington, a decision some describe as the worst single decision of the Court in eighty years.[352] In this case, the Court reversed a Fourteenth Amendment discrimination suit brought against the Washington, D.C. Police Department on the basis that its examination disqualified a disproportionate number of blacks. The Court held that the Griggs statutory standard

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350 DeFunis v. Odegaard, supra.

351 Discussed supra at fn. 96.

352 Laughlin McDonald, "Has the Supreme Court Abandoned the Constitution?", Saturday Review, May 28, 1977, p.10.

discussed in Chapter 3 had been erroneously applied in this constitutional case. The Court held that one must demonstrate an intent to discriminate in litigation brought under the Fourteenth Amendment.

> We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious discrimination forbidden by the Constitution. 353

Since Bakke is also a Fourteenth Amendment case, the basis for the California's Supreme Court's ruling does not appear to conflict with Davis. That Court held:

> We cannot agree with the proposition that deprivation based on race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than the minority. We have found no case so holding, and we do not hesitate to reject the notion that racial discrimination may be more easily justified against one race than another. 354

A majority of justices have indicated on several occasions their strong beliefs on the subject of reverse discrimination. For example, Justice Stevens, the newest

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353 Davis v. Washington, supra.

354 Bakke v. Board of Regents, 553 P.2d. 1152.

member of the Court, made the following statement when he was sitting on the Seventh Circuit Court of Appeals:

> Racial discrimination is as bad when practiced against whites as against blacks. Discrimination against Americans of Polish, German, or Italian ancestry is just as indefensible against Americans of African ancestry. The fact that a particular group. . .has suffered its own special injustice. . .does not make one such group different from any other in the eyes of the law. [355]

Chief Justice Burger has expressed serious misgivings about the entire concept of preferential treatment. His comments in Franks v. Bowman Transportation suggest that he does not believe that an innocent white party can be disadvantaged in order to provide recompense to the victim of prior discrimination. Mr. Bakke obviously fits into this category.

> In every respect an innocent employee [in a discrimination case] is comparable to a 'holder-in due course' of negotiable paper or a bona-fide purchaser of property without notice of any defect in the seller's title. In this setting, I cannot join in judicial approval of 'robbing Peter to pay Paul.' [356]

Justice Powell, who was joined by Justice Rehnquist, expressed similar concerns of the need to demonstrate some culpability

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355 Robert S. Boyd, "Stevens' Rulings Right-Center of Court," Detroit Free Press, November 30, 1975, p.14C.

356 Franks v. Bowman Transportation Co., supra, C.J. Burger, dissenting.

of a disadvantaged white in their dissenting opinions in the same case:

> Some commentators have suggested that the expectations of incumbents somehow may be illegitimate because they result from past discrimination against others. . . .Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination of the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectation does not result from discrimination against others, but on his own efforts and satisfactory performance. [357]

Even the Court's only black justice, Thurgood Marshall, who dissented in Davis and pointed out that his holding in McDonald did not reach the issue of affirmative action, has previously expressed the opinion that racial classification is constitutionally impermissible. In 1947, Justice Marshall, as a lawyer for the N.A.A.C.P., eloquently argued the unconstitutionality of racial classifications in the case of Herman Sweatt, a black who was denied admission to a Texas law school because of his race.

> There is no understandable factual basis for classification by race, and under a long line of decisions

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[357] Franks v. Bowman Transportation Co., supra, JJ. Powell and Rehnquist, dissenting.

> of the Supreme Court, not on the question of Negroes, but on the Fourteenth Amendment, all courts have agreed that if there is no rational basis for the classification, it is flat in the teeth of the Fourteenth Amendment. 358

The clear evidence, when considered in its totality, indicates that the Supreme Court will uphold the lower court, agreeing that Alan Bakke has been unconstitutionally denied his seat at the University of California Medical School because of his white race. That decision will be yet another affirming that the dissenting opinion of the first Justice Harlan in Plessey v. Ferguson.

> In respect of civil rights, all citizens are equal before the law. The humblest the peer of the most powerful. The law regards man as man, and takes no account of his race when his civil rights as guaranteed by the supreme law of the land are concerned. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of their race. 359

Obviously, to hold against Bakke would be to deprive him of the enjoyment of a right, for no other reason than his

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358 McGeorge Bundy, "The Issue Before the Court: Who Gets Ahead in America?", The Atlantic, (November, 1977) p.43.

359 Plessey v. Ferguson, supra, J. Harlan dissenting.

race. If the Court were to do so, it would fall into the same flawed thinking as the Plessey majority; a doctrine long since conceded as being inimical to constitutional government.

Those police administrators who will take great joy in the outcome of Bakke may experience jubilation which is short-lived. As Kilpatrick notes, "the DeFunis [Bakke] Syndrome presents a fairly elementary problem in constitutional law,. . .but it presents a fearfully difficult problem in social policy."[360] The constitutional question having been disposed of, both the criminal justice educator and administrator will be thrust unto the cutting edge of the Post-Bakke confusion. The remainder of this thesis will present the author's sense of the direction our field should take after the Supreme Court drops its bomb shell that will send shock waves through the professional and academic communities.

The initial, inevitable consequence of Bakke will be that it will be widely misread; people will understand Bakke as being a judicial endorsement for lessening opportunity for minorities and women. That interpretation of the decision could not be more grossly miscontrued. The alternative to "reverse discrimination" quota programs is not the

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[360] James J. Kilpatrick, "The DeFunis Syndrome," Nation's Business, Vol. 62:6 (June, 1974), p.13.

retrogression to a few years ago when blacks were allowed to hold only a token number of menial jobs in the criminal justice system. To prevent that result, Bakke will make it necessary to redouble our efforts.

Bakke will be as significant a landmark case for what it does not do, as for what it does. Bakke will not overrule any currently valid precedent of the Supreme Court. Most importantly, Griggs v. Duke Power Co. will be unaffected by Bakke and will remain the most important case in employment discrimination law. Consequently, to understand the legal setting of this fourth stage, we must read these two landmark cases concurrently.

We should be beyond the point of debating the essentiality of blacks in the criminal justice system. Those who would minimize the importance of minority participation are referred to the following statement by Hubert Williams. His warning of the possible recurrence of civil uprisings in our cities is by no means an idle threat.

> The recognition that I speak of is simply that, if you continually deny people access to the system, so that they can become an active part of it, you are likely to find that they will eventually be frustrated into engaging in a form of protest that is both dangerous and undesirable for all of us. [361]

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361 Williams, p.20.

Our role in continuing to increase minority representation is now more essential than it ever has been for reasons that are philosophical and legal as well as practical. But the effect of Bakke will be to greatly compound the complexity of our challenge. This is neither surprising nor unusual; no one has ever claimed that our form of government creates small challenges for those sworn to uphold its Constitution. When the Supreme Court decides, for example, that wiretapping violates the Constitution, it does not generally concern itself with the manner the police will henceforth use to convict upper-level narcotics dealers. That problem belongs to the police, while the judiciary merely notes the fact that one method is to be precluded from further consideration because of its conflict with fundamental principle. While some, like McGeorge Bundy, argue that ". . .there is no racially neutral process of choice that will produce more than a handful of minorities,"[362] a reading of the Griggs-Bakke doctrine must hold that he is wrong.

It should not be surprising if during this fourth stage, we find a dramatic increase in the number of criminal justice agencies being found guilty of racial discrimination

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[362] Bundy, p.44. Compare this argument to the reasoning used by those who assert that there is no alternative means of apprehending upper-level narcotic dealers without wiretaps.

against minorities, just the opposite of what one might expect after a Bakke-type decision. As we discussed earlier, Griggs provides a two-prong test in employment selection litigation. First, the plaintiff must show that an employment test has some adverse impact on a minority candidate. Secondly, the defendant employer can justify the adverse impact as nondiscriminatory if successful at establishing the job-relatedness and operational necessity of the selection criterion. Bakke will not change this formula, so that employers who would have been found guilty of racial discrimination before Bakke will continue to be found guilty after Bakke. Nor will Bakke, I assume, diminish the powers of the courts to fashion equitable relief for past discrimination, including the imposition of racial quotas in hiring and promotion.

We have previously discussed the fact that an employer has no real duty to justify the validity of selection criteria until it is shown that it has an adverse impact on a protected class; once the adverse impact trigger forces validation, the employer faces a substantial, if not overwhelming, problem in proof. It would be idealistic to expect that Bakke will resolve the problems involved in demonstrating validity pursuant to government guidelines. As the National Conference of Black Lawyers pointed out in their amicus brief in Bakke, many issues will remain in need of future clarification:

> . . .the debate will continue regardless of the outcome of the instant case. The notion that a decision on this issue from the court will be sufficiently 'definitive' so as to put this entire issue to rest is not in accord with reality. History bears out amicus curiae's belief that the legal, political, and practical problems of achieving a national consensus are not likely to be resolved by this Court's decision on the merits of this case regardless of how definitive the ruling may be. [363]

For some period of time after the Bakke decision, employers will be placed in a difficult position. Under Griggs, an employer will face a violation of Title VII if blacks are disproportionately screened out, since few employers will succeed at validation attempts under current stringent standards. Under Bakke, an employer will be precluded from using race as the decisive factors in employment decisions. In the past, cities like Detroit have avoided the need to validate by racially balancing the result. Where does all of this leave the employer? I submit that we will need to enter into a period where blacks will achieve jobs through enlightened 'minority sensitive' employment criteria.[364] This term is meant to

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[363] National Conference of Black Lawyers, Affirmative Action in Crisis: A Handbook for Activists (Detroit: National Conference of Black Lawyers, 1977), p.44.

[364] The 'minority sensitive' term was used by the United States in its amicus brief in Bakke. The term 'affirmative action' may need to be replaced since it is identified with self-imposed quotas.

distinguish Stage IV from its predecessors. It will differ from Stage II, which was largely ineffective in terms of measurable results, because it will not only encourage blacks to apply for jobs but it will judge blacks on job-related criteria that minimizes adverse impact. It will differ from Stage III because it will not violate Title VII or the Fourteenth Amendment.

We can be sure that institutionalized racism leaves its scars. For an entire complex of reasons, we were not successful with using the racially neutral attempts of Stage II. Stage III techniques, effective as they are, will fall under constitutional challenge. While Bakke will mandate an immediate cessation of self-imposed racial quotas, the current state of employment discrimination law will not allow us to return to Stage II, and certainly never back to Stage I. Stated succinctly, during Stage II we did not go far enough, during Stage III we have gone further than is permissible. During Stage IV, therefore, it would not be inaccurate to say that in order to remain within the law, police administrators must take all available steps to insure that qualified minorities are employed up to, but not including, the imposition of a racial quota.

There is absolutely no constitutional conflict in the practice of giving special consideration to educationally or financially disadvantaged persons in school admissions or employment decisions. After all, the attainment of the

same credentials might represent vastly different standards of achievement for the deprived applicant. Justice Douglas' comments in DeFunis illustrate this concept.

> A Black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverence, and ability that would lead a fair-minded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. The applicant would not be offered admission because he is Black, but because he has shown the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. . . . [365]

In retrospect, we will see that the special admissions program in Bakke violated the Constitution not because it was designed to help disadvantaged applicants, but because it did so only on the basis of race and that it was in fact unavailable to any majority applicant, regardless of special circumstances. O'Neil notes that universities routinely make decisions on other factors than test scores and grade point averages; the willingness of universities to waive academic criteria for athletes is constrained only by the rules of the National Collegiate Athletic Association.[366] Neither a special admissions program for the

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[365] DeFunis v. Odegaard, supra, J. Douglas, dissenting.

[366] O'Neil, p.49.

educationally disadvantaged or the athletically superior offends the Constitution as long as the basis for the classification is not race. As Cohen writes, to say that all blacks are disadvantaged, or conversely, that all whites are advantaged, is simply unrealistic.

> . . .compensatory preference for injury suffered ought not be given to those who, whatever their color, have not suffered the injury being compensated for. Simply being of a given race or color is not injury. It is not blackness or brownness for which compensation might be given, but the damage done to blacks and browns. Not all members of these minority groups have been so injured. And for those among them who have not been deprived of family, and schooling, and means, compensatory relief is not in order. Compensation based on race, therefore, is also unjustly overinclusive. 367

As the reader is aware, however, it is one thing to theoretically discuss determining an injury of discrimination or measuring achievement in light of barriers overcome by a minority, and yet another to devise a workable employment selection procedure encompassing these abstract features. When decision-makers must select, for example, 50 supervisors from a potential pool of 2,000 eligible candidates, it is impractical to subjectively compare the history of each

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367 Cohen, p.106

with any degree of precision. Therefore, our emphasis on achieving success through 'minority sensitive' employment decisions must be focused on the restructuring of selection criteria. Indeed, if we are to achieve significant results, nothing less than radical change is in order.

At its best, a police promotional system is nothing more than a tool at the disposal of the police administrator. As long as the tool contributes to the overall organizational goals set by the administrator, its continued use can be justified. Conversely, when the tool ceases to contribute to goals, or actually subverts their attainment, the indicated course of action is to modify the tool into one that comports with organizational priorities. There is nothing sacred, in any sense of that word, about a particular set of selection criteria.

There is little doubt that the present Detroit Police Department promotional selection model (without the corrective effect of affirmative action dipping policies) conflicts with a major organizational priority of the department: to assure that the makeup of the department resembles the makeup of the community. Perhaps one could justify such a conflict if most blacks on the department were unqualified to assume supervisory positions, but this is obviously not the case. Few people have convincingly argued that blacks selected under the affirmative action model have been unable to function in the sergeant and lieutenant ranks, thus bringing into question whether or not the test

is useful in discriminating among qualified and unqualified candidates. The oft-cited argument that affirmative action has deprived the citizens of the best qualified supervisors is attractive for its value as rhetoric, but it is not a compelling reason for retaining present selection models.

The most plausible explanation for the apparent adverse impact of the promotional selection model is the written examination. As noted in Chapter 4, the performance evaluation rating, the oral board interview, and the seniority, education and veteran's preference components have no systematic adverse impact on blacks. For this reason, particular attention must be focused on the written examination component.

Obviously, a police sergeant is seldom required to take a written examination during his routine tour of duty as a field supervisor. There seems, therefore, nothing inherently flawed in questioning the propriety of this great reliance on a single measure of supervisory aptitude. Nor is there civil rights authority for the proposition that somehow the written test is a preferred means of selection of police personnel. Thus, once the police administrator is aware that the written test poses a systemic barrier to the advancement of blacks its purposes should be greatly scrutinized. This is true even in cases where the administrator believes that the test might withstand a court challenge;

hopefully, we will be able to say more for our methods of Stage IV selection that merely they are not illegal.

The first obstacle in devising alternative methods of selection is to learn more about present testing procedures. What does the written examination actually measure? While we assume that the instrument measures job knowledge and perhaps potential for leadership, it might be equally true that our written tests measure other factors as well. If such a study were to be undertaken, the author's hypothesis in the study would be that success on the written test is highly correlated to job knowledge, but that it is also highly correlated to a number of additional factors including reading speed, reading comprehension, vocabulary level, study skills and study preparation, and 'test wiseness.'[368] It may be appropriate to briefly explain the basis for this hypothesis.

While one must be on guard to avoid falling into stereotypic traps of explaining why blacks, as a class, seem to be adversely affected on written employment tests, it seems that part of the explanation must be related to our problems in urban education. Ryan discusses a point in

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[368] "Test wiseness is the ability to use characteristics of tests and test taking to reach the full potential of one's knowledge and aptitudes." Jason Millman and Walter Pauk, How to Take Tests (New York: McGraw Hill, 1969), p. xiii.

Blaming the Victim that is worthy of careful consideration:

> No one remembers to ask questions about the collapsing buildings and torn textbooks; the frightened, insensitive teachers, the six additional desks in the room; the blustering frightened principals; the irrelevant curriculum; the bigoted or cowardly members of the school board; the insulting history books; the stingy taxpayers; the fairy-tale readers. . . .This is Blaming the Victim. [369]

We know that there has been a general decline in reading ability and language proficiency in elementary and secondary education for a number of years. Employers frequently complain that job applicants with high school diplomas are unable to read. These societal problems are even more acute in large urban centers where the majority of black candidates for law enforcement positions are found. While no one can presently say exactly what part academic skill plays in scoring well on objective examinations, we do know that a successful candidate must read an immense amount of material, assimilate the material rapidly, and make correct decisions from options which are quite similar. A comparable problem is involved with test vocabulary. While a person with an average vocabulary may be unable to choose the correct option in objective-type questions containing the words "heterogenity," "cognitive dissonance," or "normative versus existential perspectives,"

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[369] William Ryan, Blaming the Victim, (New York: Vintage, 1976), p.4.

he or she may be very competent in dealing with street situations facing police officers.

Study skills are undoubtedly another significant factor in achievement, especially if some candidates have been out of an academic environment for a long period of time. While it is true that the person who is willing to devote a great period of time in preparation for a promotional examination demonstrates exceptional motivation, there is no empirically established relationship of that job preparation to job success. Indeed, most students openly acknowledge that studying for some examinations involves the memorization of massive amounts of material, the greatest part of which will be promptly forgotten as soon as the examination bluebook is turned in.

The ability to write high examination scores on police promotional tests may be more indicative of one's potential as a criminal justice scholar rather than one's potential as a police supervisor. Competition on a written promotional examination is not greatly different than competition on a college test, except possibly for the subject matter involved. No one would dispute that it is important that a supervisor be knowledgable in the requirements of the law or department procedures, but without some assurance that the knowledge is retained for some period into the job tenure, there is some question as to the weight it should properly be given.

Realistically, it will be necessary to retain the written examination in promotional selection models. However, the adverse impact of the examination could be lessened without great challenge. For instance, if it is true that reading ability is related to job success, there is no reason why it would be impossible to reimburse officers who enroll in reading improvement classes. Tuition refund programs currently exist in many cities, including Detroit. Similarly, there is nothing preventing the departments from instituting promotional classes, to be attended by officers on their off-duty time with no cost to the officer. Of course, the programs must be available without regard to race, etc.

In addition to upgrading test taking skills of interested officers, other options exist to revise the promotional selection model to incorporate equal employment opportunity considerations. For example, a decrease of the weight of the written examination from 65% to 40% and a concomitant increase of the oral board examination from 10% to 35% of the model would immediately increase the number of minorities promoted if historic data on oral board results continue. Perhaps participation of members of the community in the oral board process would also be significant in improving minority participation at supervisory levels. There could certainly be no constitutional objection

to such a change and there is not strong evidence that such a procedure would be less empirically valid than the emphasis on the written test.

In terms of future needs, it is recommended that research be undertaken to find ways of selecting potential officers and supervisors who are capable of introducing the radical change needed if we are to professionalize the American police. We must find individuals who are committed to the development and implementation of a new type of police service. We must find individuals who are responsive to the minority community, and are committed to facing the extra challenges urban policing pose. Many of those persons who possess such characteristics will be black, and if they are selected for those reasons, administrators need not fear civil rights liability. The mistake will be made when race is substituted as an indicator of such commitment. The writer's thoughts are vividly depicted by Goldstein:

> With proper instruction, recruits should be able to understand the cosmopolitan nature of an urban area and appreciate differences among cultures. They must learn to tolerate unconventional behavior and respect divergent lifestyles. They must be able to appreciate the meaning of freedom and be sensitive to the awesome consequences stemming from the unbridled use of authority. They must take on the commitment

> to protect constitutional guarantees. They must subscribe to the value our society attaches to limiting the use of force and they must learn to appreciate the controls exercised over the use of police powers and the role of the community in directing and reviewing police conduct. 370

This thesis has not, and cannot, prescribe how the criminal justice system will meet the dual challenges of selecting this new officer and assuring that minorities have full and equal participation in the system. That it must do so is obvious and that we must accomplish the goal quickly imperative. A priority of the system should be directed toward finding the means. Justice Douglas has given us words to remind us why it is necessary:

> Such a program might be less convenient administratively than simply sorting. . .[officers] . . .by race, but we have never held administrative convenience to justify racial discrimination. 371

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370 Herman Goldstein, Policing A Free Society (New York: Lippincott, 1977), p.263.

371 DeFunis v. Odegaard, supra, J. Douglas, dissenting.

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