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Lewis D. Solomon

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ARTICLES

AFFIRMATIVE ACTION IN HIGHER EDUCATION: TOWARDS A RATIONALE FOR PREFERENCE

Lewis D. Solomon and Judith S. Heeter***

I. Introduction

College campuses these days are not exactly scenes of joy and rapture; nor do they seem to fit the former characterization either of complacent apathy or explosive radicalism. Perhaps the writer of a 1972 editorial in the *New York Times* on "The Education Issue" best described their condition when he observed, "[h]igher education is in a financial as well as emotional depression."¹

It could be mere coincidence that in 1972 when this state of financial and emotional depression existed in higher education, HEW promulgated the Higher Education Guidelines (Guidelines) for implementation of affirmative action in the hiring and promotion of women and specified minority and ethnic groups to college and university faculties. Such a condition may today still exist in higher education where affirmative action remains a confusing and hotly contested issue on American campuses. Affirmative action alone certainly did not cause financial and emotional difficulties for higher education; indeed, any problems inherent in the implementation of the affirmative action Guidelines undoubtedly have been further aggravated by independent personal and professional biases and by the declining enrollments which signal fiscal difficulties and poor prospects for faculty employment.² Yet according to many commentators on the subject of affirmative action, implementation of affirmative action under the Guidelines has done little to alleviate, and may well have exacerbated, the "depressed" condition existing in 1972.

This article explores conditions which necessitated promulgation of the Guidelines and analyzes the requirements they impose, in the name of equal opportunity, on institutions of higher education. It examines the impact of the

* Associate Professor of Law, University of Missouri-Kansas City Law School, B.A. Cornell University 1963; J.D. Yale Law School 1966.

** Law Clerk to the Honorable Elmo B. Hunter, United States District Court for the Western District of Missouri, A.B. University of Missouri-Columbia 1971; J.D. University of Missouri-Kansas City 1976.

1 WOMEN IN HIGHER EDUCATION 4 (W. Furniss and P. Graham eds. 1974).

2 "Under conditions of slow enrollment growth, the job market of the 1970's is quite different from that of the 60's, and enrollment is likely to be virtually stationary overall in the 1970's." CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, MAKING AFFIRMATIVE ACTION WORK IN HIGHER EDUCATION 3-4 (1975) hereinafter cited as Carnegie Council. "New faculty hires ran at the rate of about 30,000 a year in the peak hiring years of the late 1960's and are likely to average about 6,000 a year in the 1980's, entirely or almost entirely for replacements, not expansion." *Id.* at 62. *But see*, Cummings, *College Enrollment in 1990 is Expected to be the Same as Today's*, N.Y. Times, Jan. 14, 1976 at 37, col. 2. *See generally* Fleming, *The Implementation of Affirmative Action Programs*, in WOMEN IN HIGHER EDUCATION, *supra* note 1, at 224. *See also*, *Discrimination in Higher Education: A Debate on Faculty Employment*, 7 CIV. RIGHTS DIGEST 19 (1975): "The reasons blacks and women are not pushing whites out of faculty positions in dramatic numbers is that there is little new hiring going on."

Guidelines on the conditions they were designed to correct, on the individuals and institutions affected, and on the goals and values inherent in societal notions of morality, civil liberty, and academic excellence. Finally, this article seeks to examine the values which are, and which most effectively should be, accommodated in any successful program of affirmative action, and suggests the direction which may prove most satisfactory for pursuing an affirmative action policy in the future. In developing a rationale for a policy of affirmative action and offering suggestions for its improved implementation, we suggest values which emphasize human needs and self-fulfillment.

As the following discussion reveals, the affirmative action issue is overwhelmingly larger than "the law," and any proposed "solution" must recognize and come to terms with the interrelated social, moral, economic and psychological factors involved. Affirmative action has powerful consequences for individual human beings, for social groups and institutions, and for the norms and relationships of the interlocking structure we call society.

Decisions affecting such complexities demand a full analysis of all relevant facts, so that certain problems of identifiable groups will be neither ignored nor blamed on others. While it may be easier to focus on immediate solutions and short-sighted goals and to follow simple explanations of human events, as opposed to understanding complex measurements, it is imperative that the difficult, broad and contextual view be taken: What are the interrelated values and objectives involved in the affirmative action issue, and how can they best be accommodated? Affirmative action clearly illustrates the important role that an interdisciplinary social science approach can play in analyzing a problem and outlining alternatives for purposes of social policy. Only by means of a rational methodology for discovering and evaluating all variables in the context of broad and long range effects will a satisfactory solution to the complex problem of affirmative action be forthcoming.

II. The Problem: Discrimination by Institutions of Higher Learning

It is a plain fact that more white males have been college professors than females or males of minority groups. The university, symbol of enlightenment, has been—intentionally or not—a sexist,³ elitist,⁴ and racially exclusive⁵ institu-

3 The rule of thumb regarding women in higher education has been "the higher the fewer." Jaffe, *Women's Place in Academe*, XV *MIDWEST Q.* 16 (1973). See Ebert, *Economists Say Universities Bias Against Women Exceeds Business*, VII-4 *CHRON. H. EDUC.* 3 (1972). In 1972, women held one-fifth of the faculty positions in colleges and universities, as compared with one-third in 1870. Nationally, women were 33% of the instructors, 20% of the assistant professors, 15% of the associate professors, and 9% of the full professors. *Id.* at 23. See also L. LEWIS, *SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS* 130 (1975). While the number of women receiving doctorates was steadily increasing, the proportion of doctorates awarded to women bore little relationship to their opportunities for faculty positions. For example, a study of Columbia University showed that from 1957 to 1968 the proportion of doctorates earned by women rose from 13% to 24%, but the percentage of women in tenured positions on the graduate faculty remained constant—at slightly over 2%. A 1970 report on the University of Wisconsin revealed that the proportion of women in the Ph.D. programs in ten departments varied from 26% to 58%, but that the proportion of women faculty members in these departments ranged from 9.6% to 19.3%. In 1968-69, women constituted 22% of the graduate students and were awarded 19% of the Ph.D.'s in the Harvard University Graduate School of Arts and Sciences, but there were no

tion. Ironically, as the chief interpreter and molder of modern values, the university community has apparently been unable to perceive the enormous problem of discrimination in modern society and within its own ranks.⁶ Instead of leading, our universities have lagged; instead of being models of compliance, they have been models of evasiveness.⁷ It is the purpose of this section to survey the

women among the more than 400 tenured professors of that graduate school. Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 118 CONG. REC. 5653 (1972) (remarks of Senator Hart). Prejudice against hiring academic women is manifested in departmental practices as well as in the attitudes of hiring officials. According to the Office of Education of HEW, women employed full-time in universities in 1972-73 earned on the average \$3500 less than their male counterpart. L. LEWIS, *supra*, at 131-32. See also, *Average Salaries of 252,000 College Faculty Members*, VII-23 CHRON. H. EDUC. 1, 6 (1973) (women earning 17% less than men); Cook, *Sex Discrimination at Universities*, 58 AAUP BULL. 279, 281 (1971). A study conducted at Columbia University and reported in 1972 indicated that the pattern of inequality continued in the area of promotions and distribution of men and women by rank:

There were 195 male faculty at Columbia who received doctorates in the 1960's. 47% are assistant professors, 38% are associate professors and 15% are full professors. There are 25 women fulltime faculty at Columbia in the same category. 96% (24) are assistant professors, one is an associate professor (tenure granted this year, Ph.D. 1961); there are no female full professors who obtained their Ph.D. in the 1960's at Columbia. Well over 50% of the men who earned their Ph.D.'s in 1963 and 1964 have been given tenure. None of the women in that group has been promoted to the rank of associate professor with tenure, although one woman is an assistant professor with tenure, an anomaly brought about by the extreme reluctance of her department to promote her. These differences in promotion rates are too great for discrimination against women not to be a large part of the story.

Murray, *supra* at 5658. For further data concerning grade average comparisons, and faculty percentages, see R. LESTER, *ANTIBIAS REGULATION OF UNIVERSITIES* 43-44 (1974); Ashcraft, *Comparison of Employment Status of Men and Women in Four-Year Public Institutions*, 44 JOPHER 60, 61 (1973); Harris, *Second Sex in Academe*, 56 AAUP BULL. 283-290 (1970); Sandler, *Backlash in Academe: A Critique of the Lester Report*, 76 TEACH. COLL. REC. 401, 402 (1975); Wall Street Journal, *Labor Letter*, July 13, 1976, at 1, col. 5.

⁴ See Harris, *Problems and Solutions in Achieving Equality for Women*, *supra* note 1.

Most people in academic life are elitists. There is a deliberate search in academic life for "the best": the best student, the best teacher, the best performance. Therefore, the aspirant for admission to the groves of academe must be the best available, if the employing peers are to be satisfied. Because more men than women are encouraged to attend graduate school, present papers at meetings, and publish them, the standard of competence has been established by male performance. More men than women have been college teachers, and therefore, the only test of performance is that of teachers who are already in the workplace.

Id. at 11. The same standard, of course, has operated to exclude minorities from academia.

The cause of "necessary elitism" consistently has been argued by those who contend that affirmative action sacrifices academic excellence. See, e.g., D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* 418 (1973); R. LESTER, *ANTIBIAS REGULATION OF UNIVERSITIES* 14-15, 27 (1975); Biaggi *Attacks Affirmative Action Plan*, 124 CONG. REC. 31641 (1972) (remarks of Congressman Podell). See generally, Bunzel, *The Quota Mentality*, 2 FREEDOM AT ISSUE 10-14 (1973); Galbraith, *The Galbraith Plan to Promote the Minorities*, N.Y. Times, Aug. 22, 1971 (Magaine) at 9, 35, 38, 40.

⁵ Statistics concerning minorities are less readily available than those concerning women. In 1972-73, black faculty members constituted only 2.9% of the total college and university faculty in the United States. Bayer, *Teaching Faculty in Academe: 1972-73*, 8 ACE RES. REP. (1973). According to the Carnegie Commission on Higher Education, all minorities in 1970 constituted only 5.3% of college and university full-time faculty. VIII-3 CHRON. H. EDUC. 8 (1973). See generally, O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 599, 721 (1971).

⁶ Although graduate school admissions have reflected the same historical discrimination, graduate programs will be discussed herein only as they relate directly to the hiring of entry-level faculty members. For a table compiled by the Office of Civil Rights of HEW showing the graduate enrollment of American Indians, blacks, Orientals and Spanish-surnamed persons as percentages of full-time enrollment at more than 650 American institutions in the fall of 1972, see IX-11 CHRON. H. EDUC. 8-9 (1974); O'Neil, *Id.* at 718.

⁷ *Hearing on Contract Compliance by Institutions of Higher Education Before the Dept. of Labor*, statement by H. Glickstein, Aug. 20, 1975, at 6. See also CARNEGIE COUNCIL, *supra* note 2, at 1; O'Neil, *supra* note 5, at 699.

early initiatives of the federal government which dealt with this problem and which led to the promulgation of the Guidelines.

In 1965, President Johnson proclaimed in Executive Order No. 11246,⁸ that as a matter of public policy "affirmative action be taken to rectify discrimination against minorities and providing that all federal contractors including universities with research contracts, agree not to discriminate against any employee or applicant for employment because of race, color, religion, or national origin." Executive Order 11375,⁹ effective in October 1968, supplemented the earlier order by forbidding discrimination by federal contractors on the basis of sex. Responsibility for issuing rules, regulations and orders for implementation and enforcement of the Executive Orders was placed with the Department of Labor, which, under authority granted in the 1965 Executive Order, has delegated its enforcement powers to the Office of Civil Rights (OCR) of HEW.

Pursuant to its rule-making authority, the Department of Labor on February 5, 1970, issued Order No. 4,¹⁰ which required each federal contractor to develop a written affirmative action program,¹¹ including specific procedures to assure equal employment opportunity. Revised Order No. 4,¹² imposing additional and more specific standards, requires that all educational institutions employing fifty or more persons and receiving \$50,000 or more in federal funds submit affirmative action plans. (Regulations have been proposed changing the limits to \$100,000 and 100 or more persons.) Each plan must include numerical goals and timetables for hiring of women and minorities (defined as Negroes, Spanish-surnamed, American Indians and Orientals) in job classifications where they are "under-utilized," or represented in proportions smaller than they exist in the labor market.¹³ Violations of these requirements subject the institutions to delay, denial, or cancellation of government contracts in whole or in part, and may result in ineligibility for future contracts.¹⁴ Colleges and universities are also subject to individual and class complaints of discrimination in academic employment which may be filed with the OCR. As a general practice, OCR refers all individual complaints to the Equal Employment Opportunity Commission.¹⁵

In the first years of the federal affirmative action program, efforts were concentrated and compliance provisions were structured primarily around the

8 Exec. Order No. 11246, 3 C.F.R. 402-410 (1970).

9 Exec. Order No. 11375, 3 C.F.R. 320-321 (Supp. 1967).

10 41 C.F.R. § 60-2.10 (1971).

11 *Id.*

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith. The objective of such efforts is equal employment opportunity. Procedures without efforts to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate.

12 41 C.F.R. § 60-2.10 (1971). "An acceptable affirmative action program must include an analysis of areas within which the contractor is inadequate." *Id.*

13 *Id.*

14 41 C.F.R. § 60-2.2 (1971). Upon a finding of noncompliance, the agency must provide the institution 30 days to show cause why penalty proceedings should not begin. Upon failure to develop an acceptable plan or show cause for such failure within 30 days, the institution is notified of the proposed sanction and provided a hearing.

15 See the discussion of procedures under the Executive Orders in *CARNEGIE COUNCIL*, *supra* note 2, at 97-100.

skilled trades.¹⁶ As government contractors, institutions of higher education were required to provide extensive data on the number of women and minorities in each position and to set specific goals for increasing the number of women and minorities in each category.¹⁷

The initial aim of Executive Order No. 11246 was to eliminate discrimination. But as President Johnson observed in his Howard University commencement address in 1965:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say "you are free to compete with all the others" and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. *We seek not just legal equality but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.*¹⁸

In 1972, this promise was still unfulfilled in academia.¹⁹

By late 1972, the general lack of improvement in remedying academic discrimination,²⁰ confusion over proper jurisdiction concerning complaints of discrimination,²¹ inconsistent and questionable interpretations by HEW's ten regional offices,²² and the general "inappropriateness" of Revised Order No. 4's labor orientation²³ indicated the urgent need for affirmative action guidelines specifically applicable to higher education. HEW, the federal agency charged with enforcement of the Executive Orders and Revised Order No. 4, responded

16 See, e.g., *id.* at 97; R. LESTER, *supra* note 4, at 64. The terms "job classification" and "availability-utilization analysis" indicate the labor orientation of the Revised Order No. 4 provisions.

17 Universities were informed that for each category of employee in the university it would be necessary to specify rates of remuneration and number in each category by "racial breakdown, i.e., Negro, Oriental, American Indian, Spanish-surnamed Americans. . . ." This had to be accompanied by an "Affirmative Action Program which specifically and succinctly identifies problem areas by division, department location and job classification, and includes more specific recommendations and plans for overcoming them." The Affirmative Action Program must

include specific goals and objectives by division, department and job classification, including target completion dates on both long and short ranges as the particular case may indicate. Analytical provision should be made for evaluating recruitment methods and sources; the total number of candidates interviewed, job offers made, the numbers hired with the number of minority group persons interviewed, made job offers and hired.

Shils, *Editorial*, 1971 MINERVA 165, in D. BELL, *supra* note 4, at 417. See also R. LESTER, note 4, at 62-3.

18 D. BELL, *supra* note 4.

19 See notes 3, 5 and 6, *supra*.

20 An American Council on Education survey in 1973 showed that the number of women on U.S. faculties had increased less than 1%, from 19.1% to 20% since 1968; minority group faculty members had increased only from 2.2% to 2.9%. VIII-39 CHRON. H. EDUC. 8 (1974). See also R. LESTER, *supra* note 4, at 50; Sandler, *supra* note 3, at 403.

21 For a chart tracing the mass of federal laws and regulations concerning sex discrimination in educational institutions in 1972, see VII-5 CHRON. H. EDUC. (1972). For a general review of federal antibias policies, see note 2, *supra*.

22 See note 83, *infra*.

23 See CARNEGIE COUNCIL, *supra* note 2, at 124. For a critique of the same "availability analysis" principle as incorporated in the 1972 Guidelines, see generally R. LESTER, *supra* note 4, at 69-74.

by adapting compliance provisions to fit the unique characteristics of the approximately 900 affected colleges and universities.

III. HEW's Response: The 1972 Guidelines

After repeated delays, including the issuance and limited circulation of a 100 page draft which raised strong objections from university officials,²⁴ HEW issued its Guidelines in October 1972. Although they involved some modification in deference to the special circumstances surrounding institutions of higher education and in some instances even seemed to conflict with Revised Order No. 4, the Guidelines appear largely to be based upon the Revised Order. The Guidelines also adopt the Department of Labor's methodology and system for determining numerical goals.

The Guidelines attempt to remove any ambiguity concerning the distinction between non-discrimination and affirmative action:

"Nondiscrimination" requires the elimination of all existing discriminatory conditions, whether purposeful or inadvertent "Affirmative action" requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin Affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer.²⁵

Clearly, the Guidelines recognize that preferential treatment in the selection of faculty by race, sex, religion, or national origin constitutes discrimination prohibited by law:

In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferred treatment" which leads to the selection of unqualified persons over qualified ones. Indeed to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.²⁶

However, they fail to clarify the conflict which exists between an even-handed policy of *absolute* nondiscrimination in hiring and the requirement of "additional efforts to recruit, employ and promote qualified members of groups formerly excluded."

The affirmative action controversy centers on this conflict and the federal requirement for the development of goals and timetables in affirmative action plans. According to the Guidelines, "[g]oals are projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and

24 See R. LESTER, *supra* note 4, at 65.

25 37 Fed. Reg. 24687 (1972) (Guidelines established by HEW, at 2-3).

26 *Id.* (Guidelines at 8).

women and the expected turnover in its work force."²⁷ Thus colleges and universities bear the responsibility for setting their own goals and timetables. The Guidelines instruct these institutions to determine whether women and minorities are under-utilized in any job classification²⁸ by comparing their numbers in its current workforce with their availability in the market from which it can reasonably recruit. Whenever the comparison reveals that a hiring unit of the university (a department or other section)²⁹ is not employing minorities and women to the extent that they are available and qualified for work, it is then required to set goals to overcome this situation within a reasonable time.³⁰

While the Guidelines recognize that achievement of goals is not the sole measure of a contractor's compliance, it does represent a primary threshold for determining a contractor's level of performance and whether an issue of compliance exists. Thus, the failure to meet goals requires a determination by the contractor as to why the failure occurred.³¹

Expressly stated in the Guidelines is the admonition that "[w]hile goals are required, quotas are neither required nor permitted by the Executive Order."³² As further reassurance for that position, the Guidelines continue:

Nothing in the Executive Order requires that a university contractor eliminates or dilutes standards which are necessary to the successful performance of the institution's educational and research functions. The affirmative action concept does not require that a university employ or promote any persons who are unqualified.³³

Implementation and enforcement of the Guidelines are subject to a well-defined timetable. The Department of Labor regulations, effective April 15, 1974, set tight time limits for institutions and federal contract compliance supervisory agencies. Within thirty days of a request, the institution must submit an affirma-

²⁷ *Id.*

²⁸ 41 C.F.R. § 60.211 (1971). HEW assumes that each academic rank — professor, associate professor, assistant professor, instructor — is a separate job classification. Department of Labor regulations supplementing the Guidelines require that analysis of the employer's work force include a listing of each job classification, ranked from lowest paid to highest paid within each department, including a breakdown of any separate work units or lines of progression. The total number of male and female job-holders must be listed for each job classification, as well as the total number of male and female blacks, Spanish-surnamed Americans, American Indians, and Orientals.

²⁹ The Guidelines state that:

In many institutions the appropriate unit for goals is the school or division rather than the department. While estimates of availability in academic employment can best be determined on a disciplinary basis, anticipated turnover and vacancies can usually be calculated on a wider basis. While a school, division or college may be the organizational unit which assumes responsibility for setting and achieving goals, departments which have traditionally excluded women or minorities from their ranks are expected to make particular efforts to recruit, hire and promote women and minorities. In other words, the Office for Civil Rights will be concerned not only with whether a school meets its overall goals, but also whether apparent general success has been achieved only by strenuous efforts on the part of a few departments.

³⁷ Fed. Reg. 24694, 24695 (1972).

³⁰ "In many cases this can be accomplished within 5 years; in others more time or less time will be required." *Id.* at 24694.

³¹ *Id.* at 24686-87.

³² *Id.*

³³ *Id.*

tive action plan and detailed analysis of its labor force. The agency must then advise the contractor within 60 days whether its plan is acceptable. If the plan is not acceptable, the agency must notify the contractor and, within thirty days, complete a review of the contractor's commitment to correct any deficiencies in employment of women and minorities. If the agency determines that the plan submitted "does not demonstrate a reasonable effort by the contractor to meet all the requirements for such plans," the agency, without visiting the contractor, can begin enforcement proceedings. Such proceedings include cancellation or termination of existing contracts and declaring the contractor ineligible for future contracts. The contractor has ten days to request a hearing.³⁴

Since their issuance in October 1972, the Guidelines have been interpreted and tailored more precisely to the requirements of academia. By means of a memorandum sent to the heads of 2800 institutions in December, 1974, Peter E. Holmes, Director of OCR, attempted to assuage the "public furor" and "widespread misapprehension" about what the federal government requires of colleges and universities in their attempt to hire more women and members of minority groups. Stating that "[t]he college or university, not the federal government, is to say what constitutes qualification for any particular position,"³⁵ Mr. Holmes assured university officials that institutions of higher education are entitled to hire the best qualified persons for any position "without regard to race, sex, or ethnicity."³⁶ The memorandum also stressed that percentage goals for future hiring of women and minorities were not being applied as quotas, and stated that nowhere had his agency suspended contracts to an institution which failed to meet its hiring goals.³⁷

Indeed, during August of 1975 the Department of Labor conducted hearings for the purpose of studying the special problems encountered by universities and colleges in developing and carrying out affirmative action programs.³⁸ As a result of these hearings, changes in the manner of determining affirmative action goals and timetables were expected.³⁹ In fact, a temporary format for affirmative action plans allowed institutions to include fewer statistical data and to set some goals for faculty hiring for three-year periods rather than annually.⁴⁰ However, the final decision, announced by the Department of Labor in January 1976, did not change the Guidelines reporting provisions.⁴¹

34 41 C.F.R. §,60-2.2 (1975). See also VIII-25 CHRON. H. EDUC. 4 (1974).

35 *Text of U.S. Memorandum on College Hiring Policies*, IX-14 CHRON. H. EDUC. 8 (1974).

36 *Id.*

37 *Id.*

38 In addition to the groups and individuals invited to testify at the hearings, a number of college associations, including the American Council on Education and the Association of American Universities, presented position papers, and the Carnegie Council on Policy Studies in Higher Education released a report and recommendations on affirmative action. For the various views considered, see Fields, *Affirmative Action Changes in Offing?* X-20 CHRON. H. EDUC. 3 (1975).

39 See *id.*; Hicks, *Federal Hearings Planned on College Hiring Policies*, N.Y. Times, Aug. 18, 1975, col. 1, p. 3.

40 40 Fed. Reg. 37064 (1975). See generally X-21 CHRON. H. EDUC. 12 (1975).

41 Wall Street Journal, Jan. 5, 1976, at 8, col. 1.

IV. The Impact of the 1972 Guidelines

Although a survey conducted in the fall of 1972 revealed that the nation's faculty members were almost evenly divided on whether colleges and universities should make special efforts to recruit more women and minority group members for their faculties,⁴² the Guidelines initially were met with both cautious optimism and relief that there were no total surprises, and a general feeling that the approach was a manageable one for institutions.⁴³ The Guidelines attempt to detail the necessary remedial actions and their clarification that "good faith effort" to employ more women and minorities would be considered heavily by civil rights investigators served initially to assuage fears that the demands for hiring goals might force colleges to set unwanted employment quotas.⁴⁴

Although university faculty opinion varied concerning specific issues related to affirmative action, faculty and administrators generally were sympathetic with the elimination of prejudice from faculty employment. In the 1972-73 academic year, a national survey revealed that approximately 32 percent of male and 42 percent of female faculty members questioned favored preferential hiring for women, while 35 percent of the male faculty and 36 percent of the female faculty favored preferential hiring for minority group members.⁴⁵

Today, after nearly four years under the Guidelines, affirmative action is more than ever a hotly contested policy. Rather than inducing dramatic changes in the composition of faculties, it has instead proved to be more a case study of how difficult it is to force profound change in an institution as complex, prestigious, slow-moving, and sensitive to the economy as a college or university.⁴⁶ Many minority and women's leaders, affirmative action officers, and some administrators feel that affirmative action is not producing substantially greater hiring, retention, and promotion of women and minorities and therefore urge more stringent federal controls on academic personnel procedures. Others would like to eliminate the entire affirmative action effort as impossible and inappropriate to academia. Still others hope more money and better administration will do the job. In short, views vary sharply as to the degree and quality of the impact of the Guidelines.⁴⁷

A. *Is Affirmative Action Working?*

The failure of the federal effort to protect individuals from discrimination in higher education seems to be the one issue on which commentators agree.⁴⁸

42 See VII-8 CHRON. H. EDUC. 1 (1972). In that issue a survey conducted by Seymour Martin Lipset of Harvard University and Evertt C. Ladd, Jr. of the University of Connecticut is summarized.

43 VII-5 CHRON. H. EDUC. 2 (1972).

44 *Id.* at 5.

45 Bayer, *supra* note 5, at 30. See also Rumbarger, *The Great Quota Debate and Other Issues in Affirmative Action*, in WOMEN IN HIGHER EDUCATION, *supra* note 1, at 214.

46 See, e.g., Fields, *Affirmative Action Four Years After*, VIII-39 CHRON. H. EDUC. 1 (1974).

47 *Id.*

48 See LaNoue, *Equal Opportunity Must Begin at Home*, X-3 CHRON. H. EDUC. 32 (1975). According to a recent report by the Carnegie Council on Policy Studies, "few Federal programs are now so near to self-destruction." N.Y. Times, Aug. 11, 1975, at 13, col. 1. See also Winkler, *Colleges Urged to Act Now on Sex Bias*, VIII-1 CHRON. H. EDUC. 9 (1973).

Attacks on the "glacially slow"⁴⁹ progress of affirmative action at colleges and universities have been widespread, and even the General Accounting Office recently has acknowledged HEW's "minimal progress in making sure that colleges and universities have acceptable affirmative-action programs."⁵⁰ Indeed, at least one critic has asserted that, in view of their marginal effectiveness, the Guidelines have demonstrated themselves to be "at best irrelevant."⁵¹

As an indication of the slow start in the implementation of the affirmative action program, a survey conducted by the American Council on Education in 1973 showed that the number of women on United States faculties had increased less than one percent, from 19.1 to 20 percent, since issuance of Executive Order No. 11246 in 1968.⁵² During the same period, minority faculty members increased only from 2.2 percent to 2.9 percent.⁵³ Although 1974 figures for women reveal a larger increase, a report recently issued by HEW points out that the percentage of women among all faculty on academic year contracts in 1975 remained at the 1974 level of 24 percent.⁵⁴

Women and minorities continue to be hired primarily at the lower academic ranks,⁵⁵ and statistics show that other factors equal, married men receive higher salaries and increments than women.⁵⁶ According to a 1975 survey, the percentage of women at the ranks of professor, associate professor, and instructor has decreased, and the average salaries of men continue to exceed the average salaries of women at every academic rank and at every institutional level, in both public and private institutions.⁵⁷ Even more bleak are the results of projections by the Carnegie Commission on Higher Education that women and minority

49 X-21 CHRON. H. EDUC. 12 (1975). See also Glickstein, *supra* note 7, at 1.

50 *Id.*

51 *Hearing on Contract Compliance by Institutions of Higher Education Before the Dept. of Labor*, statement by M. Todorovich, Aug. 20, 1973 at 2. See also N. GLAZER, AFFIRMATIVE DISCRIMINATION at 69-70 (1975) (affirmative action procedures became institutionalized and strengthened at a time when very substantial progress had been made, and was being made, in the upgrading of black employment and income, a progress that had, oddly enough, taken place without benefit of such extreme measures. "It is questionable whether they reach in any significant way the remaining and indeed most severe problems involved in the black condition.")

52 VIII-39 CHRON. H. EDUC. 8 (1974). See also U.S. Civil Rights Commission, 3 FED. CIV. RIGHTS ENFORCEMENT EFFORT 305, n. 854-56 (1974).

53 *Id.*

54 Phillips, *Affirmative Action Programs Helping Women in Academia*, Christian Science Monitor, Mar. 8, 1975, at 23.

55 Sandler, *supra* note 3 at 403. See also X-16 CHRON. H. EDUC. 11 (1975); CARNEGIE COUNCIL, *supra* note 2, at 24.

56 Sandler, *supra* note 2, at 24.

57 Phillips, *supra* note 54. For a table of average 1974-75 salaries for full-time faculty members according to sex, see IX-19 CHRON. H. EDUC. 1 (1975); see also Sandler, *supra* note 3, at 403; Leonard, *Affirmative Action at Harvard*, X-6 CHRON. H. EDUC. 13 (1975).

The average woman faculty member earns 11.4% less than would be predicted for a man with her characteristics. Gordon, *Faculty Salaries: Is There Discrimination by Sex, Race, and Discipline?*, 64 AM. ECON. REV. 419, 424-5 (1974). According to a cross-tabulation study based on 1970 statistics of the Women's Bureau of the Department of Labor, a 35-year-old woman, newly hired, white assistant professor with a Ph.D. earns \$12,510, which is 3.7% less than a corresponding man, who earns \$12,990. A 30-year-old black female instructor with a bachelor's degree and one year of seniority earns \$10,280, or 23.1% less than a comparable man who earns \$13,370. A 45-year-old white female full professor in medicine with an M.D. and ten years seniority earns \$35,260 or 23.0% less than a comparable man, who earns \$45,790. *Id.* See also Johnson & Stafford, *The Earnings and Promotion of Women Faculty* 64 AM. ECON. REV. 888 (1974). HEW statistics from the 1974-75 school year reflect the same salary discrepancies at every teaching level. See U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, DIGEST OF EDUCATION STATISTICS 95 (1975).

groups will not be represented on college and university faculties in the same proportion as in the nation's labor force until the year 2000—and perhaps not even by then.⁵⁸

It must be noted that affirmative action is not being universally decried as a total failure. Some progress toward hiring and promotion of women and minorities unquestionably has been made. Perhaps the largest gains have resulted from publicizing the issue of bias in academia which gradually has given credence to the notion that women and minorities really have been discriminated against in a variety of ways.⁵⁹ And opponents of the affirmative action principle, resigned to its inevitability, no doubt are reassured by the federal government's demonstration that it will not make many changes very fast.⁶⁰

Since statistics permit little dispute over whether substantial progress has been made,⁶¹ the real controversy concerns the explanation for lack of progress. Careful inquiry into problems encountered in the implementation of the present affirmative action approach is the most obvious first step toward weighing its impact and suggesting a direction for the future.

V. The Problems With the Implementation of the 1972 Guidelines

The following section will outline several areas of difficulty which have arisen in the implementation of the Guidelines. The areas of difficulty to be considered are: problems of lack of good faith on the part of institutions; difficulties of compliance and enforcement; the slackening academic job market; legal difficulties and complaints of reverse discrimination; the uniqueness of the academic labor pool and job descriptions; and certain issues which must be analyzed and overcome in any successful plan of affirmative action.

A. Lack of Good Faith Effort

Some government officials and affirmative action activists contend that lack of diligent effort on the part of universities accounts for affirmative action's

58 *Pace Seen Slow for Women and Minorities . . .*, VIII-3 CHRON. H. EDUC. 1 (1973). The projections take into account several factors: the age distribution of current faculties, expected attrition rates, a student-faculty ratio of 20 to 1, and projected enrollment drop in the 1980's and pick-up in the 1990's. According to the estimates, in the 1970's 35% of the faculty members hired by U.S. colleges and universities would be women and 10% would be members of minority groups—enough to raise their representation by the end of this decade to 28.1% and 7.4%, respectively. In the 1980's—with more women and minority group members coming out of graduate schools—women would fill 45% of the openings and minorities would fill 20%. By 1990 their representation would thus grow to 29.5% and 8.8% respectively. In the 1990's—when large numbers of white males hired in the boom of the 1960's begin to retire—55% of the openings would go to women and 25% to minorities. By 2000, that would put them at rough parity with their representation in the civilian labor force. While this chain of events occurred, the percentage of openings going to white males would drop from 75 in the 1960's to 58.5% in the 1970's; to 44% in the 1980's; and to 33.8% in the 1990's. Their representation would thus decline from 76.3% in 1970 to 51.3% in 2000.

59 See Fields, *supra* note 46, at 1.

60 *Id.* at 8.

61 Lack of progress has even been acknowledged by the Director of HEW's Office for Civil Rights. See *Minority Hiring Again a Big Issue for Colleges*, 77 U.S. NEWS 53, 54 (1974).

minimal achievements.⁶² Charging that serious, open searches and objective selections of faculty members have failed to become the rule, advocates of this position cite typical examples of university resistance, among them: (1) creating a position at a lower level and hiring a pre-selected candidate, who is shortly thereafter promoted; (2) knowingly offering a position to a minority or woman candidate at a salary level or under conditions the candidate has already indicated would be unacceptable; (3) delaying the offer until the woman or minority candidate, with deadlines from other institutions, must withdraw from consideration; (4) providing the appearance of "good faith" consideration by formally listing a woman or minority candidate as the department's second choice upon certainty that the first choice, a white male, will accept the position.⁶³ Another frequent charge is that much of the hiring and promotion of women and minorities which have occurred under the banner of affirmative action has been only token,⁶⁴ the result of an ingrained resistance on the part of male academics to recognize the need for reform.⁶⁵

B. Vague and Chaotic Requirements

University administrators, on the other hand, deny accusations of bad faith, pointing instead to such problems as vagueness in the Guidelines, unavailability of adequate statistical data, and the great expense of implementing affirmative action on their campuses. University officials contend that lack of good faith may appear because institutions do not know how to locate job candidates beyond their traditional sources of new faculty members, and are uncertain as to what OCR expects of them.⁶⁶ Indeed, many university officials have suggested that HEW clarify its "good faith" effort requirement.⁶⁷ The Carnegie Council has joined these officials in calling the affirmative action requirements "confused and chaotic,"⁶⁸ and even HEW has complained to the Department of Labor that some of its requirements for affirmative action employment efforts at

62 The great white marshmallow of university structure is antithetical to affirmative action . . . Throughout the nation, affirmative action offices are being demoted or rendered ineffective as they are moved further away from the decision-making centers within the university structure. Through policy and inaction we see a broken-down charade acted out by HEW and the universities, accompanied by the manipulation of data from ineptly tuned computers.

Goodwin, *Playing Games With Affirmative Action*, X-10 CHRON. H. EDUC. 24 (1975).

63 *Id.* See also Glickstein, *supra* note 7, at 14.

Indeed, it has been suggested that some institutions may be seeking to fulfill their own prophecies of doom by limiting their recruiting efforts to demonstrate the lack of qualified women, and even go so far as to hire those who may be *less* qualified to prove their predictions that the equal employment opportunity program would destroy academic excellence.

Goldstein, *Equal Employment Rights for Women in Academia*, 74 TEACH. COLL. REC. 395, 418 (1973).

64 Fields, *supra* note 46, at 8. "This is not a zealous kind of commitment, but a resignation to do what they have to do, or do to get by." *Id.* at 9.

65 See notes 7 and 62, *supra*; see also Sape, *The Use of Numerical Quotas to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 482 (1975).

66 Fields, *supra* note 46, at 9.

67 *Id.*

68 N.Y. Times, *supra* note 48.

colleges and universities are "simply unworkable and counterproductive."⁶⁹

College administrators also point out that, until very recently, data on the sexual and racial or ethnic characteristics of degree recipients and faculty members were inadequate or nonexistent.⁷⁰ Although data on women have improved, those on minority groups still are inadequate.⁷¹ Unavailability of data concerning the labor pool has greatly hampered development of affirmative action plans. In addition, administrators blame some of the delay on the expense of the employment analyses, which has forced many institutions to dip into their reserves, rob fellowship funds, skew their priorities, and further increase their tuition rates.⁷² The Chancellor of the Berkeley campus of the University of California, for example, estimates that compliance with affirmative action requirements cost the University approximately \$400,000 in the 1975 academic year.⁷³

C. *Slow and Lax Enforcement of the Guidelines*

Delay and backlogs of cases have caused persistent criticism of affirmative action administration. OCR's style of enforcement typically involves protracted negotiations characterized by extreme reluctance to impose any penalty beyond delay in awarding of contracts or allocation of funds.⁷⁴ As of August, 1974, of the approximately 1000 schools covered by the Guidelines, HEW's Higher Education Division had found only 13 campuses in compliance with the Guidelines; over 700 schools had not even submitted plans.⁷⁵ From December 1969 to January 1974, a total of only twenty universities are recorded as having had a temporary block imposed on new contracts or renewals.⁷⁶ In May 1975, the General Accounting Office reported the "almost non-existence of enforcement action" by government agencies charged with contract compliance.⁷⁷ Although OCR warned 29 universities in June 1975 that it might withhold their pending federal contracts unless acceptable affirmative action plans were quickly forthcoming,⁷⁸ the resolution of that threat pleased no one. Since OCR lacked time to conduct a thorough compliance review before the fiscal year ended on June 30, it strongly suggested that the institutions sign a model agreement largely

69 The charge was contained in a statement filed by HEW at the opening of public hearings on implementation of affirmative action by colleges and universities in August, 1975. In one of his last acts as secretary of HEW, Caspar W. Weinberger supported administrators in complaining that the lengthy and detailed employment analyses required of colleges and universities, "coupled with a requirement for non-entry-level goals and timetables, are an unreasonable and burdensome requirement." X-21 CHRON. H. EDUC. 12 (1975).

70 CARNEGIE COUNCIL, *supra* note 2, at 47-48; Todorovich, *supra* note 51, at 9.

71 Fields, *supra* note 46 at 8; CARNEGIE COUNCIL, *supra* note 2, at 25-26.

72 *The High Cost of Compliance*, X-18 CHRON. H. EDUC. 1 (1975). Several witnesses before the 1975 Department of Labor hearings urged that all federal grants and contracts awarded to institutions of higher education include, along with administrative costs, a specified percentage to offset the costs of administering the campus affirmative action program. X-21 CHRON. H. EDUC. 12 (1975). See generally CARNEGIE COUNCIL, *supra* note 2, at 168-73.

73 Johnson, *It's Action, But Is It Affirmative?*, N.Y. Times, May 11, 1975 (Magazine) at 18.

74 CARNEGIE COUNCIL, *supra* note 2, at 155. See R. LESTER, *supra* note 4, at 109.

75 U.S. Commission on Civil Rights, III FED. CIV. RIGHTS ENFORCEMENT EFFORT 303 (1974).

76 See R. LESTER, *supra* note 4, at 4.

77 N.Y. Times, May 5, 1975, at 1, col. 3; see R. LESTER, *supra* note 4, at 107-9.

78 Fields, 29 Universities Warned U.S. May Withhold Contracts, CHRON. H. EDUC. (1975).

based upon the plan recently negotiated with the University of California at Berkeley.⁷⁹ After hasty negotiations, 13 universities signed a short agreement with OCR.⁸⁰

As a result of its spotty performance record, "the government's stiffest civil-rights stick"—the threat to withhold federal contracts—"is becoming a comic foam rubber club," and most commentators agree that the performance of OCR probably has been a major factor in the failure of affirmative action to make wider gains.⁸¹ The agency itself admits that it was not prepared to begin enforcing the ban on discrimination, and its director cites the absence of adequate

79 *Id.* The Berkeley Plan, approved on February 18, 1975, and hailed as the most far-reaching ever achieved, provides that the University of California's Berkeley campus will eliminate discriminatory hiring practices during the next 30 years by filling at least 100 faculty positions with women and minorities. Defining "under-utilization" as the "numerical disparity between the number of women or ethnic minorities employed and the number that could be expected, based on the percentage of women and ethnic minorities available," (University of California, 1 Berkeley Affirmative Action Program and Related Documents at 1), the Plan includes a utilization analysis of "ladder rank faculty" for each department where 1.0 hires or more are necessary to reach parity with the relevant availability pool. Goals have been set for 31 of 75 departments and units in the case of women, one department in the case of blacks, two departments in the case of Asians, and no department in the cases of Spanish-surnamed Americans or American Indians. *Id.* The Plan further set goals for promotion of women and minorities to the associate professor and full professor ranks in proportion to those eligible for promotion within each department and based upon the individual qualifications of each candidate. The Berkeley campus will submit yearly reports to HEW and revised goals and timetables will be formulated as required by changes in availability data, turnover rate, or new hirings. *Id.* at 2. No goal is set for increasing the supply of qualified candidates.

To develop availability data for the Plan, each University job title was reviewed to determine the census detailed or intermediate occupation which most closely reflected the job duties or prerequisite skills or qualifications. By subcategory and title code, the number of positions was then determined and compared to the qualified work force of census detailed occupations. This system revealed that most departments do not seriously underrepresent women or minorities, since, for example, there are very few women with degrees in forestry, blacks with Ph.D.'s in classics, or Orientals with degrees in Spanish.

As a result of the departmental goals — set only for those departments which need to hire one or more persons and not, for example, in departments such as civil engineering which needs .19 women to achieve parity with the availability pool — 31 departments over the next 30 years must hire a total of 95.71 women; the social welfare department must hire 1.38 black faculty members; and civil engineering and architecture need to hire 1.39 Orientals. These results, not surprisingly, have met charges of tampered availability pools from affirmative action advocates, and may tend to support university administrators who claim that affirmative action is much ado about nothing. For an excellent summary of the Berkeley Plan and the response to it, see Johnson, *supra* note 72. See also CARNEGIE COUNCIL, *supra* note 2, at 155; Fields, *supra* note 46, at 3.

80 *Universities Given Revised Agreement Form for Contracts*, Higher Education Daily, June 27, 1975; *Universities Sign OCR Pact; Will Get Contracts*, Higher Education Daily, July 1, 1975. See CARNEGIE COUNCIL, *supra* note 2, at 127-8.

81 *All Sides Criticize Law Barring Job Bias by Federal Contractors*, Wall Street Journal, Nov. 14, 1975 at 1. In fact, OCR's policy is to refrain from declaring a contractor in non-compliance without extensive evidence in a formal hearing. No formal hearing has ever been held, and show-cause orders are exceedingly rare. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 74, at 278. See CARNEGIE COUNCIL, *supra* note 2, at 115. N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975):

[T]he Federal government and its agencies engaged in the fight against discrimination — the Office of Federal Contract Compliance of the Department of Labor, with its branches spread through every government agency; the Department of Justice; the Equal Employment Opportunity Commission created by the Civil Rights Act of 1964 — are regularly denounced for inefficiency, lack of good faith, incompetence, and refusal to carry out the law. Some of the agencies of government regularly denounce others. Thus, the EEOC criticizes agencies engaged in signing contract compliance agreements for not being strict enough. Denouncing all of them is the Civil Rights Commission. . . .

statistical data as a major obstacle.⁸² OCR's uneven enforcement efforts, however, marked by uncertainty and sometimes excessive demands from federal investigators of various agencies, created hard feelings among some institutions and prompted complaints which continue today. Many observers of the enforcement program comment upon the inadequacy of the agency's staff in relation to the size and complexity of the enforcement problem,⁸³ and the variation in policies followed between HEW's ten regions.⁸⁴ Many academics feel that the government investigators "are poorly trained and seem to have little knowledge or understanding of higher education."⁸⁵ Critics of OCR's administration also cite instances in which officials were "self-righteous, abrupt, preachy, and even arrogant" when reviewing colleges' compliance with affirmative action requirements.⁸⁶

Other persistent complaints involve the proliferation of government agencies enforcing antidiscrimination and the inappropriateness of the sanctions provided. The financial problems encountered by a university, which is simultaneously involved in negotiations with several agencies, can be great indeed,⁸⁷ and may be further complicated by the threat of withholding federal contracts. As the Carnegie Council on Policy Studies in Higher Education points out, withholding of research funds would in many cases result in layoffs of nontenured personnel, as well as the restriction of training opportunities for advanced graduate students.⁸⁸ Withdrawal of funds may also unfairly penalize particular research groups when "under-utilization" exists in unrelated teaching departments,⁸⁹ and ironically may deprive the government of a research service which the offending institution was uniquely qualified to provide.⁹⁰ Some critics of this sanction argue, as OCR policy seems to indicate, that the severity of the penalties is responsible for OCR's reluctance to vigorously prosecute violations.⁹¹

D. *Shrinking Academic Job Market*

Undoubtedly, the affirmative action effort has been hindered by the fact

82 Dr. Mary Lepper has explained:

A lot of the kinds of mechanical data we're getting on top of this year, but it has made it appear, unfortunately, to our clientele that we weren't serving them. What they haven't realized is that because the program had drifted, we finally just had to call a halt, and find where we were, and get some data. There just was no point in continuing to go out to the universities and say, 'Do this, this, and this' if those things weren't feasible.

Fields, *supra* note 46, at 8.

83 CARNEGIE COUNCIL, *supra* note 2, at 151; Murray, *supra* note 3, at 5660; R. LESTER, *supra* note 4, at 105.

84 CARNEGIE COUNCIL, *supra* note 2; R. LESTER, *supra* note 4, at 103, Wall Street Journal, *supra* note 80.

85 Vetter, *Affirmative Action in Faculty Employment Under Executive Order 11246*, quoted in CARNEGIE COUNCIL, *supra* note 2, at 150; R. LESTER, *supra* note 4, at 103, 107.

86 Todorovich, *supra* note 51, at 2; *Colleges Faulted on Discrimination*, Wall Street Journal, Aug. 11, 1975, at 13, col. 3; X-21 CHRON. H. EDUC. 12 (1975).

87 See notes 21, 73, *supra*; CARNEGIE COUNCIL, *supra* note 2, at 159; R. LESTER, *supra* note 4, at 6.

88 CARNEGIE COUNCIL, *supra* note 2, at 177-8; see also Goldstein, *supra* note 63, at 421.

89 CARNEGIE COUNCIL, *supra* note 2, at 178.

90 *Id.* at 177.

91 See note 81, *supra*.

that, just as it began, the bottom fell out of the academic job market.⁹² In the current no-growth era of academia,⁹³ faculty vacancies must arise largely from turnover, not from expansion, and turnovers do not occur quickly enough to satisfy the goals and timetables demanded by current "under-utilization." Many academic administrators contend that they have very few open positions in relation to the number of applicants and, consequently, they are able to hire almost no one, whether male, female, or minority.

Further complicating this problem is academia's most distinctive and, in times of tight market, most preciously cherished personnel practice—tenure. Once awarded tenure, a faculty member typically remains at that institution until retirement or voluntary resignation. Tenure, therefore, significantly limits turnover.⁹⁴ Compliance with affirmative action regulations may require terminating, or at least drastically transforming, tenure provisions. Undoubtedly, this will provoke widespread opposition in academia.

E. *Emphasis on Quotas Instead of Equal Opportunity*

Another major controversy touches on the distinction between "goals" and "quotas." The charge is made that the federal enforcement agencies, with their scheme of affirmative action based on an estimate of "under-utilization," are attempting to require employment of women and minorities in proportion to their presence in the population. This is evidenced by the emphasis on statistics rather than on discrimination and equal opportunity.⁹⁵ According to these critics, "affirmative action" originally imposed a duty not to discriminate and a requirement to seek out candidates who might not otherwise apply for available positions.⁹⁶ Since the Department of Labor and the Guidelines impose strict requirements and threat of sanctions upon all federal contractors, however, their effect is to assume, without individual proof, that everyone is guilty of discrimination.⁹⁷ Since actual discrimination is difficult to prove, the test applied is whether favored groups exist at every level of the faculty in numbers equal to their proportion in the population. The remedy prescribed is the setting of numerical goals and dates for reaching them, and the application of an undefined "good faith effort" test if the goal is not met.⁹⁸ The effect of this procedure,

92 See Fields, *supra* note 46, at 1; Glickstein & Todorovich, *Discrimination in Higher Education: A Debate on Faculty Employment*, 7 CIV. RIGHTS DIGEST 3, 19 (1975).

93 See note 2, *supra*.

94 In 1972, colleges and universities with tenure systems, (85% of the total) had a median of 41% to 50% of their faculties on tenure. In the spring of 1971, 42% of the respondents to a national survey awarded tenure to all eligible faculty members, and two-thirds awarded tenure to 75% or more of those under consideration. At this rate, many schools will soon have faculties 'solidified' by a very high proportion of tenured personnel.

Chait & Ford, *Can a College Have Tenure and Affirmative Action, Too?*, VIII-2 *CHRON. H. EDUC.* 16 (1973).

95 "[E]qual opportunity, not even statistical distribution, is the proper objective of public policy." N. GLAZER, *supra* note 81, at 169, 66-7; D. BELL, *supra* note 4, at 417; R. LESTER, *supra* note 4, at 91-2.

96 N. GLAZER, *supra* note 81, at 58. Glazer traces the history of affirmative action since the Executive Order, and contrasts the "new concept" with the sanctions employed by the 1964 Civil Rights Act to punish only those employers found guilty of discrimination.

97 N. GLAZER, *supra* note 81; Glickstein & Todorovich, *supra* note 92, at 7.

98 See D. BELL, *supra* note 4; N. GLAZER, *supra* note 95.

claim the critics, is to change the affirmative action principle from nondiscrimination, the goal for which it was devised, to proportional representation. It is alleged that the concept of affirmative action ignores individual freedom, by creating a right to employment for women and minorities in proportion to their numbers and rewards group attribute instead of individual achievement.⁹⁹ As Nathan Glazer asserts, the emphasis has moved "from equal opportunity to statistical parity."¹⁰⁰

In recommending the abolition of goals and timetables, some commentators point to their tremendous potential for harm. First is the accusation that the utilization analysis use by department tends to inflate numerical goals¹⁰¹ and thus manifests the demand for women and minorities and the extent of the deficiency when a university cannot meet its goal. Second, in spite of the mere "good faith" requirement, from the employer's point of view the simplest way of avoiding loss of federal contracts is simply to meet the goals by any means¹⁰² regardless of the consequent hardships to non-favored groups. Thus, in practice the distinction between goals and quotas often blurs considerably,¹⁰³ prompting the insistence of some critics that getting the proportions right is not the same thing as non-discrimination.

In response to these charges, supporters of goals and timetables insist that their abandonment would immeasurably weaken affirmative action efforts on many campuses. Additionally, they argue that in civil rights proceedings, where numerical ratios traditionally are sufficient to evoke an inference of discrimination, such ratios are properly considered appropriate measures of relief.¹⁰⁴ In discrimination matters, the concern is necessarily with the result of the operation, and in cases of wholesale discrimination, determination of an appropriate result

99 "[G]roups become the basis for rights, and those who want to claim certain rights must do so as a member of an affected or protected class." N. GLAZER, *supra* note 81, at 75. *See also* D. BELL, *supra* note 4, at 419; Shanker, *Where We Stand*, N.Y. Times, Jan. 12, 1975, at 9 (quoting Congressman James O'Hara).

100 N. GLAZER, *supra* note 81, at 33-76. Several dozen prominent university professors have called on President Ford to "end the numbers games played by Government administrators." *Quotas Assailed in Faculty Hiring*, N.Y. Times, Dec. 8, 1975, at 47, col. 1.

The "numerical goals" and "precise timetables" were created because they looked like the most convenient bureaucratic solution. The officials would not have to make the moral decisions involved in a finding of discrimination . . . all they would have to do would be to check off numbers on a list and think up requirements for others to fulfill.

Todorovich, *supra* note 51, at 33.

101 Where the numbers of faculty in a department are so small that the "under-utilized" figure is only a fraction, the tendency is to round the figure to one. R. LESTER, *supra* note 4, at 79; *see also* 8 HARV. CIV. RIGHTS L. REV. 128, 139 (1973).

102 N. GLAZER, *supra* note 81, at 49; Goldstein, *Affirmative Action: Equal Employment for Women in Academia*, 74 TEACH COLL. REC. 395, 415, 421 (1973).

103 Indications of the goal/quota confusion abound: Attorney General Edward Levi was quoted as saying that hiring goals are really quotas: "What we have done is to assure ourselves that we are against quotas . . . and if we call them goals and swallow hard or stop thinking . . . then it's okay." X-20 CHRON. H. EDUC. 3 (1975); *see also*, Shanker, *supra* note 99; *Quotas Assailed in Faculty Hiring*, *supra* note 100. Senator James L. Buckley (R. N.Y.) has announced that he will seek legislation to bar the federal government from imposing employment quotas. N.Y. Times, Feb. 13, 1976, p. 25, col. 1. For arguments against goals and timetables, *see* Hook, *On Discrimination: Part 1 in NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH: TOWARD AFFIRMATIVE ACTION* (L. Selle ed. 1974). Seabury, *HEW and the Universities*, 53 COMMENTARY 38-44 (1972).

104 The Carnegie Council on Policy Studies in Higher Education recommends retention of goals and timetables in affirmative action plans, but specifies that timetables should be set for periods not exceeding five to ten years. CARNEGIE COUNCIL, *supra* note 2, at 146-7.

necessarily must resort to statistics.¹⁰⁵ While no minority group has an absolute right to be represented in a particular faculty, such persons are entitled to an equal opportunity of access, and statistics are a valid means of showing whether that opportunity has been provided.¹⁰⁶ Thus, according to this viewpoint, the establishment of goals and timetables avoids reliance solely upon the ill-defined duty not to discriminate,¹⁰⁷ and should be considered as a management information device to allow both the colleges and the regulatory agency to monitor more effectively and evaluate the progress being made toward equal employment opportunity.¹⁰⁸

Advocates of the use of goals stress that they are significantly different from the traditional concept of quotas, and point out that quotas are prohibited by the language of the Guidelines.¹⁰⁹ The distinction is drawn that:

Quota systems keep people out; goals are *targets* for inclusion of people previously excluded. Goals are an attempt to estimate what an employer's work force would look like if there was no illegal discrimination based on race or sex. No institution is required to hire women or minorities on the basis of sexual or racial preference.¹¹⁰

Further, the obligation to meet the goal is not absolute; the employer's compliance is not evaluated solely on the basis of whether it achieves its goals. On

105 The United States Supreme Court has held that *intent* to discriminate or not discriminate is irrelevant, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It is now well accepted that a statistical showing of under-representation is sufficient to establish a prima facie case of discrimination. The courts have permitted statistics to point out the wrong and guide the remedy in areas as diverse as school desegregation, jury selection, and industrial employment quotas. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (using statistical data to establish prima facie case of discrimination); *Swann v. Charlotte-Mecklenberg School Bd.*, 402 U.S. 1, 8 (1971) (involving statistics to achieve racial balance in public schools); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972) (upholding a requirement for hiring one qualified black state trooper or support person for each white hired until the force reached 25% black); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972) (approving a plan requiring one-third of future hiring to be from minority applicants); *Associated General Contractors of Massachusetts, Inc. v. Alschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); (upholding racial criteria imposed on bidders for state contracts); *Contractor's Ass'n. of Eastern Pennsylvania v. Sec'y of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (upholding Philadelphia Plan for annually increased manpower litigation goals to raise minority employment in construction trades). Thus, while quotas merely to attain racial balance may be forbidden by the Civil Rights Act of 1964, the courts have made clear that quotas or other statistical remedies to correct past discrimination are not. See also *United States v. Metal Lathers Internat'l Union No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). For other examples of result-oriented relief, see *Carter v. Greene County Jury Comm'n.*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *Whitus v. Balkcom*, 333 F.2d 698 (5th Cir. 1966) (en banc); *United States v. Mississippi*, 229 F. Supp. 925 (S.D. Miss. 1964); *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966).

106 See note 105, *supra*. See also 8 HARV. CIV. RIGHTS L. REV. at 135; Sape, *supra* note 65, at 490-92.

107 Sape, *supra* note 65, at 136. It is further explained that goals are aligned with the number of qualified women and minorities available in the academic labor pool and not in terms of their general representation in the population. Sandler, *supra* note 3, at 404.

108 Without external guidelines by which both the party in question and supervisory organizations may gauge their efforts, even well-intentioned non-discrimination may be barely distinguishable in result from continuing discrimination. Moreover, objectifying the enforcement standards reduces possibilities of purposeful evasion or abuse. Sape, *supra* note 65, at 137; see also Goldstein, *supra* note 102, at 415.

109 37 F. Reg. 24687 (1972). See notes 25, 32, 37, *supra*; Goldstein, *supra* note 102; Sandler, *supra* note 3, at 404; Glickstein, *supra* note 7, at 13.

110 Sandler, *supra* note 3.

the contrary, the only requirement is the demonstration of good faith efforts.¹¹¹ Far from pushing universities into precise achievement of quotas, some observers assert, HEW has been tolerant to the point of indifference,¹¹² and the timetables have been generous indeed. The Berkeley plan, for example, provides a period of 30 years for achieving its goals.¹¹³ If there are changes to be made, these commentators contend that they should be to strengthen the government enforcement effort, not to abolish goals and timetables.

F. Reverse Discrimination

Despite government assurances that affirmative action does not mean that universities must give "preferential treatment" to women and minorities in faculty hiring, a substantial backlash seems to be developing among white male academics, who charge that university commitment to goals leads inevitably to discrimination against non-favored individuals.¹¹⁴ These critics cite instances in which white male candidates were rejected on the grounds that "all unfilled positions in the University must be filled by blacks or females,"¹¹⁵ and black faculty members were offered appointments at salaries well above those for whites with equivalent or better qualifications.¹¹⁶ Some critics assert that affirmative action programs attempt to remedy discrimination by rekindling discrimination, placing an unfair burden on those who are thereby excluded. Such reverse discrimination, it is claimed, raises not only a moral,¹¹⁷ but a legal issue, since

111 41 C.F.R. § 60-2.13. See Sandler, *supra* note 3, at 405; Goldstein, *supra* note 101, at 415. The concept of "good faith effort," however, admittedly presents troublesome problems of enforcement. Rather than defining the term "good faith," the 1974 memorandum to college and university presidents from Peter E. Holmes, Director of OCR, provided several illustrations of bad faith. See note 35, *supra*. Reference to the requirement of "good faith" in other areas of the law reveals that the term's commonly understood meaning involves "honesty of purpose or intention," "freedom from intention to defraud," and "faithfulness to one's duty or obligation." See, e.g., Long Beach Fed. Sav. & Loan Ass'n. v. Federal Home Loan Bank Board, 189 F. Supp. 589, 611, 612 (S.D. Cal. 1960); *In re Pine Grove Canning Co.*, 226 F. Supp. 872, 877 (W.D. La. 1963); *Drum v. Scott*, 337 F. Supp. 588, 590 (M.D.N.C. 1972); *People v. Bowman*, 156 Cal. App. 2d 784, 320 P.2d 70, 76 (1958); *Smith v. Whitman*, 39 N.J. 397, 189 A.2d 15, 19 (1963); *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259-60 (1954). See also the provisions regarding good faith in contract interpretation, arbitration, and satisfaction clauses, requiring "absence of fraud" and dissatisfaction "honestly entertained." 17A C.J.S. Contracts §§ 318, 498(1), 495 (1963). Under the Uniform Commercial Code the test of good faith is "honesty in fact." For purposes of the federal *in forma pauperis* statute, good faith is judged by an objective standard, and if an appeal is frivolous it is deemed not taken in good faith. *Coppedge v. United States*, 369 U.S. 438 (1961); *Meyer v. State of New York*, 344 F. Supp. 1377, 1378 (S.D.N.Y. 1971). Thus, though necessarily abstract, precedent does exist for measuring a "good faith effort" of affirmative action compliance.

112 "Far from having been pushed so hard that they become quotas, goals have been soft-pedaled to the point of becoming rhetorical declarations of intent rather than yardsticks of achievement." Glickstein, *supra* note 7, at 13.

113 See note 79, *supra*; Glickstein, *supra* note 7, at 6; CARNEGIE COUNCIL, *supra* note 2, at 139-40.

114 See N. GLAZER, *supra* note 81, at 60-63, 169-195; R. LESTER, *supra* note 4, at 90; Van Dyne, *Colleges' White Men Assail 'Preference' for Minorities*, VII-18 CHRON. H. EDUC. 4 (1973); Todorovich, *supra* note 51, at 15, 20. See generally, Flaherty & Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQUESNE L. REV. 745, 763 (1974); Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 544 (1975); *Reverse Discrimination: Has It Gone Too Far?*, U.S. News, March 29, 1976, at 26.

115 N. GLAZER, *supra* note 51, at 16-19, 60-61; See Todorovich, *supra* note 51, at 16-19; U.S. News, *supra* note 114.

116 See R. LESTER, *supra* note 4, at 49; Todorovich, *supra* note 51, at 20.

117 N. GLAZER, *supra* note 51, at 205-210; Flaherty & Sheard, *supra* note 114, at 763.

under the fifth and 14th amendments to the Constitution, and the Civil Rights Act of 1964,¹¹⁸ as well as the language of the Guidelines and regulations themselves, any system of giving preference to individuals because of their race or sex is unconstitutional.¹¹⁹ If the law condemns the original discrimination against women and minorities because it was based on an irrelevant characteristic, surely it is inconsistent to advocate a policy which awards benefits on the basis of those same group characteristics.

Although the United States Supreme Court has declined an opportunity to decide the reverse discrimination issue in the context of law school admissions, Justice Douglas' dissent in that case, *DeFunis v. Odegaard*,¹²⁰ appeared to reinforce the argument for total "color-blindness":

There is no constitutional right for any race to be preferred . . . 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.¹²¹

By suggesting the abolition of the Law School Admission Test (LSAT) and the invention of substitute tests to measure an applicant's cultural background, perception, ability to analyze, and relation to groups, however, the dissent certainly seemed to recognize the need for alteration of existing institutional standards which operate to exclude minorities.¹²² The Supreme Court's inaction in *DeFunis*, and the possible import of Justice Douglas' dissent, coupled with the issue's extreme controversiality, assure that another confrontation before the Supreme Court is virtually inevitable.¹²³

Another potential issue of reverse discrimination centers around the identification of the groups for which affirmative action must be employed. Some critics complain that the goal of nondiscrimination is not always apparent from the criteria selected, and charges of preference and growing resentment between

¹¹⁸ 42 U.S.C. § 1981 (1970).

¹¹⁹ See N. GLAZER, *supra* note 51, at 196; Sape, *supra* note 65, at 485; 8 HARV. CIV. RGTS. L. REV. 128 (1973) at 174; Glickstein & Todorovich *supra* note 91, at 6. See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹²⁰ 416 U.S. 312 (1974). In 1970, the University of Washington Law School rejected the application of a white, male, Jewish student named Marco DeFunis although his undergraduate grades and test scores would have warranted admission had he been black, Chicano, American Indian, or Oriental. Contending that the law school's procedure of considering minority applications separately and by less stringent criteria operated to discriminate against him, a lower state court granted DeFunis a temporary restraining order compelling his admission to the law school. Although the Washington Supreme Court upheld the law school's admission policy and reversed the lower court, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 407 P.2d 1169, 1176 (1973), DeFunis had nearly completed law school when the case reached the United States Supreme Court. On that basis, a majority of the Court held the issue moot and refused to consider the merits of the case.

¹²¹ 416 U.S. 337-38 (1974).

¹²² *Id.* at 344.

¹²³ See Lubasch, *Race Quota for Principals Voided by U.S. Court Here*, N.Y. Times, Jan. 20, 1976, p. 1, col. 3, reporting the reversal of a court-ordered quota for school principals as constitutionally forbidden reverse discrimination in *Chance v. Bd. of Examiners*, 44 U.S.L.W. 2343 (1976). See also, Oelsner, *Reverse Bias: A New Injustice?*, N.Y. Times, Jan. 18, 1976, at 7, col. 1; Fields, *Reverse Discrimination: A Classic DeFunis case coming in Illinois*, X-1 CHRON. H. EDUC. 6 (1975). See generally, Nickel, *supra* note 114. For a discussion of preferential admissions policies and the Constitution, see O'Neil, *supra* note 6, at 705-740.

minority groups have been voiced since the issuance of the Guidelines.¹²⁴

Critics question the basis on which the "preferred" groups were selected; why was the principle extended only to Mexicans, Puerto Ricans, American Indians, Filipinos, Chinese and Japanese?¹²⁵ Why not to Jews, Italians, Irish, and other ethnic groups? And why not religious or political beliefs as the criteria? Does the non-Spanish-surnamed wife of a Spanish-surnamed American qualify for preference on grounds of ethnicity by marriage?

There is also the effect of geographical location. The Japanese, for example, may be a recognized minority in California, but not in Hawaii.¹²⁶ Clearly, these classifications raise difficult questions, involving issues of both over and under-inclusiveness, and creating new lines of resentment and conflict.¹²⁷

Responses to the issue of reverse discrimination range from outright denial to admission that in some instances the charges are justified.¹²⁸ Some observers claim that if preferences were being afforded to women and minorities, they would be revealed in statistics—which they are not.¹²⁹ The Guidelines and regulations clearly do not require a preference, but many activists assert that even if preferences are being employed, they are not necessarily discriminatory. True, as they begin to be treated more fairly, women and minorities are an economic threat to white males. Some of these men who would otherwise have been hired if women and minorities were kept out will now be turned down because they are not as well qualified as the women and minorities hired.¹³⁰ That is not reverse discrimination.

124 Now it appears that the affirmative action concept has been completely distorted to the point where it constitutes preferential treatment to such an extent as to be totally discriminatory. It discriminates against one minority group in favor of another . . . and has become a serious concern, not only to the Jewish community which seems most significantly affected, but to all who have always held to the belief that discrimination must be fought where and whenever it appears. . . .

Biaggio, *supra* note 4. See also Watkins, *Will it Be Blacks vs. Women for Faculty Jobs?*, VIII-5 CHRON. H. EDUC. 1 (1973); N. GLAZER, *supra* note 81, at 75; Seabury, *supra* note 103, at 38-44. But see N. GLAZER, *supra* note 81, at 186; *Race Quotas*, *supra* note 101, at 173.

125 See D. BELL, *supra* note 4, at 418-19. "Most immigrant groups have had periods in which they were discriminated against. For the Irish and the Jews, for example, these periods lasted a long time. Nor is it the case that all the groups that are now recorded as deserving official protection have suffered discrimination, or in the same way." N. GLAZER, *supra* note 81 at 198. Glazer concludes that:

clearly these guidelines have been issued less because of a powerful need or demand of these groups for redress (though what is asserted is undoubtedly true) than because either these groups must have decided they needed protection for themselves owing to the preferred position that other groups are attaining or because equity seemed to demand of the guideline-setters that they be included, too. Thus groups that were once content to press their advantage through education, business, informal pressures, and specific complaints because of discrimination to state and federal agencies may find, in self-defense or the desire not to lose an advantage, that they, too, must enter the arena of conflict that the government has defined. . . .

Id. at 75.

126 See Flaherty & Sheard, *supra* note 114, at 763.

127 See Nickel, *supra* note 114, at 555-7; Alexander & Alexander, *The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making* 9 SAN DIEGO L. REV. 190 (1972); see generally, *supra* note 5, at 747-751; B. BITTKER, *THE CASE FOR BLACK REPARATION* 93-101 (1973).

128 Sandler, *supra* note 3, at 407: "Some administrators have misunderstood the federal requirements and have erroneously believed that only women and minorities, including minority women, could be hired. HEW in the past has played a major role in such misconceptions. . . ."

129 Sandler, *supra* note 3, at 402-3, 418.

130 *Id.* at 407. "It is impossible to know what our society would be like today if unalloyed personal preference had been allowed full sway after slavery had been abolished." B. BITTKER, *supra* note 127, at 25. See Goldstein, *supra* note 102, at 416-418.

It is also argued that the reverse discrimination objection fails to grasp the very purpose of the law's responsibility to "so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future."¹³¹ The courts, the Congress, and government agencies have recognized that it simply is not possible to achieve equality and fairness by applying neutral principles, and have reluctantly accepted the notion that perhaps we must tolerate temporary, short-range disadvantages for white males in order to overcome our racist and sexist past. Viewed as a matter of justice, the preference satisfies the recipient's right to compensation for past injustice; viewed as a matter of utility, perhaps the public good can be promoted by distributing fair shares.¹³² Viewed in a constitutional context, the preference is ameliorative rather than invidious, and must meet only the test of rational relation to a legitimate state objective.¹³³ In remedying discrimination, therefore, some argue that it is permissible to be color-conscious in order to become color-blind.¹³⁴

G. Uniqueness of the University

Critics of affirmative action point to the special problems the Guidelines present for institutions of higher education which, it is claimed, in order to serve as centers for the advanced study of human affairs and critical evaluation of society, must enjoy a large measure of autonomy, academic specialization, and appointment on the basis of merit. Because universities are unique among federal contractors, it is felt that federal requirements should be more specifically tailored to their needs.

First, university administrators are concerned about the subtle changes in the structure of university decision-making which federal requirements may force. Commenting on the "parallel affirmative action bureaucracy" now common on university campuses, administrators bemoan the "heavy bureaucratization of the process of higher education as a result of federal interference."¹³⁵

131 8 HARV. CIV. RGTS. L. REV. at 169. It is indeed ironic that a country that used racial classifications for many years should be wary of preserving or reviving them in a program of reparations. See B. BITTKER, *supra* note 127, at 98; see generally B. BITTKER, at 108-127.

132 Nickel, *supra* note 114, at 544; see 8 HARV. CIV. RGTS. L. REV. at 163; see generally B. BITTKER, *supra* note 127, at 22, 128-137.

133 *Id.* at 175-177; Sandler, *supra* note 3, at 404; Sape, *supra* note 65, at 504-5. Precedent for the use of preferential policies in the United States may be found in the special educational and employment opportunities for veterans. Although undoubtedly, many non-veterans have felt disadvantaged by such preferences, the sacrifices made by veterans, as a group, have justified their group preference. See Nickel, *supra* note 114, at 534, 546, 548-9; Glickstein & Todorovich, *supra* note 92, at 15; House Comm'n. on Veterans' Affairs, *Provision of Federal Benefits for Veterans*, 84th Cong., 1st Sess. 258-65 (1955); The Veterans' Preference Act of 1944, 5 U.S.C. §§ 2108, 3309, 3310 (1972).

134 For example, in justifying the establishment of a priority pool comprised entirely of blacks and Spanish-surnamed Americans, the United States Court of Appeals for the First Circuit said:

The goal of color blindness, so important to our society in the long run, does not mean looking at the world through glasses that see no color; it means only that all colors are moral equivalents, to be treated on an equal basis. We believe that our society is well served by taking into account color in the fashion used, and carefully limited in extent and duration. . . .

NAACP v. Beecher, 504 F.2d 1017, 1027 (1st Cir. 1974). See also 8 HARV. CIV. RGTS. L. REV. at 131

135 Todorovich, *supra* note 51, at 22-3; see also Fields, *supra* note 46, at 9; Goldstein, *supra* note 63, at 418. R. LESTER *supra* note 4, at 126-132.

Government programs of antidiscrimination enforcement designed for an industry model, it is complained, simply cannot be applied effectively to academic operations.¹³⁶

Supporters of affirmative action respond that these complaints under the guise of academic freedom and autonomy have become a "smokescreen" to obscure the basic issues.¹³⁷ The government does not attempt to hamper university governance and decision-making other than to require that such decisions are made on a nondiscriminatory basis. No specific procedures for hiring and promotion are imposed upon institutions by any government regulations.¹³⁸ The argument that the "industrial model" of the Guidelines is ill-suited for academia fails to recognize that the affirmative action concept is derived not solely from industry, but from statutes, legislative histories, the United States Constitution, and countless judicial decisions. Affirmative action, in any context, is based on equity, and colleges and universities which benefit from large amounts of government support should be able to abide by the same reasonable requirements for the utilization of public funds as do private contractors.¹³⁹

Another problem claimed to be particularly acute in academia is the alleged need to take special factors into account in dealing with utilization analysis for determining goals and timetables. College and university officials contend that the low number of women and minority faculty members is due to the lack of an adequate pool of qualified individuals to hire.¹⁴⁰ Where such shortages of supply exist, it is claimed that the existing affirmative action programs only result in re-shuffling of minorities and women as universities try desperately to meet their goals.¹⁴¹ For tenure level faculty particularly, university administrators argue that qualified supply must be defined in even more individual terms, based on reputation as a teacher-scholar and the particular university department's needs over the projected period of tenureship.¹⁴²

In addition, unlike other federal contractors, universities possess the unique ability to control through undergraduate and graduate admissions their own supply. Ignoring this fact, the Guidelines assume that most of the responsibility

136 R. LESTER, *supra* note 4, at 121, 126. See Fleming, *supra* note 2, at 228.

137 Sandler, *supra* note 3, at 408.

138 *Id.*

139 *Id.*; see also Goldstein, *supra* note 63, at 419.

140 See *College Hiring Practices Should Be Free From U.S. Nonbias Rule, Hearing is Told*, Wall Street Journal, Aug. 21, 1975, at 8, col. 1. See also R. LESTER, *supra* note 4, at 34; Fields, *supra* note 46, at 9; Sandler, *supra* note 3, at 411; Todorovich, *supra* note 51, at 8, 11, 26. A Carnegie Council study appears to bear out the claim that progress is being made to the extent of the available supply. While non-minority women constitute 16 to 17% of the pool of "qualified persons." They hold 18% tenure track faculty positions in four-year colleges and universities, and minorities represent 4 to 5% in both pool and faculty categories. CARNEGIE COUNCIL, *supra* note 2, at 5; see generally O'Neil, *supra* note 5, at 759.

141 "You're not gaining a lot reallocating pools of less than one percent," Martin H. Gerry, Acting Director of HEW's Office for Civil Rights, was quoted in the N.Y. Times, Aug. 18, 1975, at 26. In some cases, limited supply is an extreme reality. According to a recent Carnegie Council study, only about four percent of the doctoral degrees required for tenured positions in colleges and universities are currently held by members of non-female groups. *Id.* See generally O'Neil, *supra* note 5, at 722 for a discussion of such "re-shuffling" of minority matriculants. Although women hold approximately 40% of the doctorates in English, less than half of one percent of the Ph.D. degrees in engineering are held by women. R. LESTER, *supra* note 4, at 34. For a table showing percentages of Ph.D.'s granted between 1920 and 1972 that were received by women, see *id.* at 37.

142 *Id.* at 35, 49, 77.

for race or sex bias in faculties rests on the demand side and concentrate on means to achieve certain quantities of appointments and promotions for women and minorities. At least one critic of affirmative action has suggested implementation of goals for the supply side, a credit for universities achieving success in expanding the qualified supply.¹⁴³

In response, critics of university policies assert that supply shortages result at least in part from past and existing discrimination in academic admissions and, therefore, pressure on universities should not be lessened merely because at long last they take steps to relieve the shortage. Many activists charge that by concentrating on the "supply" argument, academics divert attention from those minorities and women who are already qualified and discriminated against.¹⁴⁴ Affirmative action advocates also contend that the limited supply complaint results largely from the stereotype that women and minorities are not qualified academics: "If you don't believe that 'qualified' such persons exist, then you cannot recognize them even if they walk into your office."¹⁴⁵

Finally, academics contend that universities are known for the quality of their faculties as teacher-scholars, and consequently strive, in selection of faculty, to achieve "teaching and scholarship of the highest order."¹⁴⁶ Critics of affirmative action argue that goals and timetables imposed on universities cause standards to be bent or broken, and force institutions to abandon the principle of merit hiring.¹⁴⁷

On the other side of this issue are those who seriously question whether, in the face of the informal, subjective, "old-boy" system of faculty appointments, any meaningful principle of merit hiring ever has existed in academia.¹⁴⁸ Affirmative action advocates recognize the importance of competent faculty

143 *Id.* at 33-34.

144 Sandler, *supra* note 3, at 412. For statistical refutation of many of Lester's contentions, see *id.* at 411-413.

145 Goodwin, *supra* note 62; see also Rumbarger, *supra* note 45, at 209; Sandler, *supra* note 3, at 412.

146 R. LESTER, *supra* note 4, at 14.

147 See D. BELL, *supra* note 4, at 418; R. LESTER, *supra* note 4, at 28, 29; Glickstein & Todorovich, *supra* note 92, at 15; Van Dyne, *supra* note 114. See also Nickel, *supra* note 144, at 545; Rumbarger, *supra* note 45, at 210; see generally O'Neil, *supra* note 5, at 758-9.

148 Dr. Lewis examines letters of recommendation written by academics praising other academics and analyzes the academic bureaucracy to reveal how extraneous, nonprofessional criteria, particularly sex, influence the acceptance of a candidate and his/her work. As his book's preface states, ". . . there is less attention given to excellence in research and, as is more commonly acknowledged, in teaching than most persons both within and outside the university seem to believe. The contention that the evaluation and advancement of academics turn on merit is simply untrue." L. LEWIS, *supra* note 3. See also Sandler, *supra* note 3, at 409:

The old informality of academe is rife with discrimination. Merit is simply not enough.

The 'old boys' seek out young proteges who are then taught the informal ropes of the profession. . . . It is difficult for women and minorities to be proteges: Men are often uncomfortable having lunch with a female student, spending long hours in the lab with them, or inviting minority students into their homes.

See also Glickstein & Todorovich, *supra* note 92, at 15-16; Goldstein, *supra* note 102, at 418: The closed recruiting system so prevalent in higher education is quite successful in isolating many of the most qualified women from contention, and the institutions must be willing, through affirmative action, to break out of that system to achieve their goals without sacrificing the quality they so loudly proclaim.

In articulating his "Case Against Meritocracy," Bell suggests that there never can be a true meritocracy, in view of such factors as chance, genetics, and the social compulsion of parents to pass on their positions to their children. D. BELL, *supra* note 4, at 427-33.

members in higher education,¹⁴⁹ yet contend that no principle of hiring the best qualified individual could be threatened by regulations which require the hiring of the best person on the basis of merit and without discrimination.¹⁵⁰ Some observers go so far as to suggest that diluting the merit principle might be a positive goal of government regulation. Professor Bell, for example, discusses the possibility that educational institutions are assuming a disproportionate influence in our society,¹⁵¹ reflecting the widely-recognized fact that university degrees are becoming necessary, though sometimes vacuous, credentials.¹⁵² According to Bell, meritocracy does not assure equality of opportunity; rather, it merely creates new inequality in each generation.¹⁵³ Thus, according to these jaundiced views of academic merit, employing a faculty member at least in part on the basis of race or sex as a means of breaking the cycle of inferior education, poverty, unemployment, and discrimination, has at least as great a moral justification as many of the criteria currently being used other than merit.¹⁵⁴

VI. Where Do We Go From Here? A Rationale for a Policy of Preference

Of the difficulties, catalogued above, which have plagued implementation of affirmative action since 1968, the most profound is contained in the view expressed so forcefully by Nathan Glazer: that the heritage of discrimination can be overcome simply by attacking discrimination; that the proper focus of affirmative action is equality of opportunity and not equality of result.¹⁵⁵ In answer to the assertion that there is no way to insure employment of women and minorities without discrimination,¹⁵⁶ it must first be pointed out that there is no way to demonstrate nondiscrimination without showing results. In purely pragmatic terms, nothing short of statistics revealing women and minorities occupying faculty positions will be sufficient proof that equality of opportunity is in fact being provided; there is no way to measure nondiscrimination.¹⁵⁷

149 See L. LEWIS, *supra* note 3, at 201-209; Nickel, *supra* note 133, at 545. Some wonder, however, why institutions of higher education in particular should be free to seek out the best, regardless of whether business does. Does not every pursuit have its excellence, and should not every excellence be encouraged? See N. Glazer, *supra* note 81, at 60.

150 Sandler, *supra* note 3, at 411. The Guidelines require only that the employer make "additional efforts to recruit, employ and promote qualified members of groups formerly excluded," *supra*, note 25, and the Holmes memorandum of December 1974 reasserted that institutions should hire the best qualified candidate for faculty positions. See note 35, *supra*.

151 D. BELL, *supra* note 4, at 419-20.

152 *Id.* at 409-10.

153 *Id.* at 428.

154 See Greenberg, *Affirmative Action, Quotas and Merit*, N.Y. Times, Feb. 7, 1976, at 21, col. 2.

155 See N. GLAZER, *supra* note 51.

156 Espousing Glazer's arguments and citing his book, Senator James L. Buckley recently introduced Senate Bill 3069, to prohibit the use of racial, sexual or ethnic quotas in employment, by stating, "There is no way to insure a certain result other than by discriminating." Senator Buckley's bill would reaffirm the federal government's role in requiring contractors to submit affirmative action plans to assure nondiscrimination, but would limit such programs to attempts to expand the pool of applicants. The government would be prohibited from requiring the collection of data regarding race, color, religion, sex, or national origin, and no finding of discrimination would be based solely on the composition of a contractor's workforce.

157 If numerical ratios alone can prove discrimination, then any relief which fails to end the statistical disparity is itself discriminatory—or at least inadequate to remove vestiges of discrimination. 8 HARV. CIV. RIGHTS L. REV. at 135. Under the operation of truly equal opportunity, women and minorities theoretically should be represented in the academic workforce in the same proportion as they are represented in the general population. It is for this reason that gross statistical disparities evidence discrimination and that remedying the disparity is the only objective measure of equality. See *id.* at 154-5. See also note 105, *supra*.

Secondly, and even more important, is the fact that a solution to the affirmative action dilemma cannot be expected to spring full-blown from any definition of equal opportunity. There is a higher value to be fulfilled, and it requires going beyond mere nondiscrimination. Legalistic descriptions of what is required to provide every American an equal starting position in life's race must focus on maximizing each individual's self-fulfillment. Seen in this light, affirmative action calls for the creation of a structure to promote human growth and attainment of capabilities, not as a response to any mere legal right, but as part of a larger interest in the quality of life.

Abraham Maslow, a "humanistic" psychologist, developed a hierarchical theory of human motivation which is helpful in framing both a policy rationale and a structure for implementation of human motivation. Based on a personal growth concept of human nature which envisions individuals as possessing almost infinite potential, moving in a forward direction and seeking to maximize their self-development,¹⁵⁸ Maslow's hierarchy of human needs starts at the lowest physiological level and culminates with self-actualization.¹⁵⁹ The strongest needs, those at the lower level which more strongly motivate an individual's behavior and which are inherently more important than the higher needs, must be satisfied first. When one level of need is satisfied, the next level becomes an individual's dominant motivator. Self-actualization, the highest level attained only late in life, encompasses the person's desire to maximize his full potential.¹⁶⁰ Maslow believed that the need hierarchy was based on hereditary traits common to all.¹⁶¹ He also recognized that extra-psychic determinants, such as culture, family, environment, and learning, shape an individual's potential for achieving self-actualization.

According to Maslow, social and organizational conditions may prevent the attainment of personal fulfillment.¹⁶² It is precisely for that reason that mere nondiscrimination in the name of affirmative action is not enough. Even assuming that individuals differ in natural endowments, each, hopefully, strives for

158 A. MASLOW, *MOTIVATION AND PERSONALITY* (2d ed. 1970); A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (2d ed. 1968).

159 Maslow divided the hierarchy of human motivation, based on mankind's biological propensities, into deficiency-motivated needs: physiological, safety, belonging, love, respect, self-esteem, and growth-motivated needs. *Id.* at 30.

160 For a more detailed discussion of Maslow's view of human motivation, see Solomon, *Toward A Federal Policy on Work: Restructuring the Governance of Corporations*, 43 *Geo. Wash. L. Rev.* 1263, 1267-72 (1975).

161 See A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING*, *supra* note 158, at 160, 190-91; A. MASLOW, *MOTIVATION AND PERSONALITY*, *supra* note 158, ch. 6; Smith, *Self Actualization: A Transambient Examination of a Focal Theme in Maslow's Psychology*, 13 *J. HUMANISTIC PSYCHOLOGY* 17 (1973).

162 A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING*, *supra* note 158, at 190-97; A. MASLOW, *MOTIVATION AND PERSONALITY*, *supra* note 158, at 93-94. See also E. FROMM, *THE SANE SOCIETY* 12-13, 69 (1955); Etzioni, *Basic Human Needs, Alienation and Authenticity*, 33 *AM. SOC. REV.* 870 (1968). For the view that culture preceded the development of the human brain, see Geertz, *The Transition of Humanity*, in *HORIZONS OF ANTHROPOLOGY* 42 (S. Tax ed. 1968); Washburn & Howell, *Human Evolution and Culture*, in 2 *THE EVOLUTION OF MAN: EVOLUTION AFTER DARWIN* (S. Tax ed. 1960). See generally Wilcox, *Hierarchy, Human Nature, and the Participative Panacea*, 29 *PUB. AD. REV.* 53, 57-59 (1969). Others have stressed the importance of individual differences in achievement, motivation and aspirations, plasticity and adaptability. See, e.g., J. VEROFF & S. FELD, *MARRIAGE AND WORK IN AMERICA: A STUDY OF MOTIVES AND ROLES* (1970); Hackman & Lawler, *Employee Reaction to Job Characteristics*, 55 *J. APP. PSYCHOLOGY* 259 (1971).

personal self-fulfillment, and the institutions of society, rather than impeding individual growth, must establish procedures for regulating fairly the competition and exchanges necessary to fulfill these individually diverse desires and competences.

The problem of women and minorities in higher education must be seen in this institutional context. The difficulty with equal opportunity as a principle for denying all criteria other than talent and ambition for determining place in academia is that the institution itself has impeded and restricted the access and advancement of women and minorities. Where the problem is institutional, a vague requirement of mere nondiscrimination is an inappropriate and sterile remedy; where the consequences of discrimination are viewed realistically, it is obvious that a mere order to "cease and desist" is not enough. A rationale for the concept of preference rests on compensation and the production of societal benefits, now and in the future.

The proper objective of affirmative action is not just ending an era of discrimination, but overcoming its effects. To illustrate that objective, former President Lyndon Johnson used the image of a shackled runner:

Imagine a hundred yard dash in which one of the two runners has his legs shackled together. He has progressed 10 yards, while the unshackled runner has gone 50 yards. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that "equal opportunity" now prevailed. But one of the runners would still be forty yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make-up the forty yard gap; or to start the race all over again? That would be affirmative action towards equality.¹⁶³

As the example illustrates, when historically disadvantaged groups exist beside more advantaged groups, it simply is not possible to achieve equality and fairness by applying neutral principles. Justice requires compensating for past injuries, not just forbidding their re-occurrence.

Compensatory justice requires more than just an assurance of future "good behavior;" rather, it requires that benefits be provided to those individuals who have been wrongfully injured in order to raise them to the level they would now have if they had not been disadvantaged. In essence, compensation justifies receiving more in the present than would be fair if past losses were not considered. Thus preferential policies may be warranted for those members of groups who were previously unable to acquire faculty positions due to discrimination.¹⁶⁴

Compensatory principles may be seen as creating obligations among groups in society in at least two instances. First, compensation may be required where

¹⁶³ Exec. Order No. 11246, 3 C.F.R. 402-410 (1970).

¹⁶⁴ At one extreme, a preference may mean no more than tipping the balance in favor of one candidate when all other factors are roughly equal. At the other extreme, is the fixed quota for members of the preferred groups. A wide range of options exists between these extremes. For an excellent discussion of preferences based on compensatory justice, see Nickel, *supra* note 114, at 537-9; see also B. BITTKER, *supra* note 127; Miller, *The Case for Positive Discrimination*, 4 SOCIAL POLICY 65 (1973); see generally O'Neil, *supra* note 5.

one group injures another or unjustly enriches itself at another's expense.¹⁶⁵ Secondly, the obligation to provide special benefits may arise when society in general, rather than one group, has been responsible for deprivation to any group. The type of compensatory justice provided, therefore, may be seen as a response to the manner in which the obligation to compensate arose. For example, where one group injures another, it may be equitable for the injuring group to bear the entire burden of compensation, while when discrimination is viewed as societal, justice may be a distributive principle which requires arranging social and economic inequalities so that all groups have a share of the burdens and the benefits.¹⁶⁶

The long-range rationale of such a policy justifies the preference in terms of pure social utility, since the promotion of public welfare of the whole, by satisfying humanity's common interest in abatement of discrimination and amelioration of its effects, results in a lessening of the social conflict, resentment and strife which result from inequality.¹⁶⁷ Thus a preferential policy for minorities and women in academia is a means to a legal, moral, and socially desirable end.¹⁶⁸

Neither will a method of preferential treatment upset an academic system that has allegedly been run strictly on the basis of merit and competence. Even were it possible to evaluate effectiveness in teaching¹⁶⁹ or to objectively measure the quality of research or publication, the fact remains that colleges in general have never been noted for hiring and promoting faculty strictly on the basis of merit.¹⁷⁰ It is time to demythologize the image of the academic man (and the word "man" is used deliberately), and realize that the principle of merit does not guide academia any more than it does other occupations.

The first crack in the facade of academic merit may be seen in the confusion that has long existed concerning the very role of the professor. The rela-

165 See Nickel, *supra* note 114, at 538.

166 J. RAWLS, A THEORY OF JUSTICE 9-10 (1971); see D. BELL, *supra* note 4, at 440, 445; Nickel, *supra* note 114, at 539.

167 See Nickel, *supra* note 114, at 541; *Affirmative Action in Higher Education: A Report by the Council on Discrimination*, 59 AAUP BULL. 178, 183 (1973) [hereinafter referred to as "AAUP"]; Fuerst, *Quotas as an Instrument of Public Interest*, 4 SOCIAL POLICY 11, 21 (1973). This theme of preference in a transnational concept is developed in Solomon, *Multi-national Corporations and the Emerging World Order*, CASE WEST. RES. J. INTERN'L. L. (1975).

168 The most common use of preferential policies in the United States has been to provide special educational and employment opportunities for veterans. See note 131, *supra*. Although veterans' benefits may be justified as compensation for services rendered, they also provide compensation for injuries suffered and opportunities lost during service time.

169 Why is a definition of good teaching so elusive? In one sense it is not elusive at all. You can define good teaching any way you like. Simply take any outcome, process, or quality that seems desirable, and then define good teaching as whatever something called a teacher does to bring it about efficiently. Even a cursory fishing in the literature will net such definitions by the dozen. Good teaching has been defined as what the 'teacher' does to produce inspired pupils, excited pupils, interested pupils, creative pupils; pupils who are good citizens, who can read, do arithmetic problems and write grammatical English essays. Among other desiderata used to define good teaching are critical thinking, subject matter mastery, ideals, love of freedom, respect for law and order, universal brotherhood, various attributes of character, a love of learning and a devotion to the arts. I am sure one can add another hatful of items to this list.

Broudy, *Can We Define Good Teaching?* 70 TEACH. COLL. REC. 583-84 (1969), quoted in L. LEWIS, *supra* note 3, at 19.

170 See L. LEWIS, *supra* note 3, at 13; T. CAPLOW & R. MCGEE, *THE ACADEMIC MARKET-PLACE* 80-93 (1958); Fuerst, *supra* note 167, at 21.

tive importance of assessment of merit must be illusive at best in the absence of agreement as to what functions the ideal professor performs and with what emphasis. For example, while most professors are hired to perform teaching services for their universities, their evaluations as candidates for vacant positions or for promotions often are made principally in terms of their research contributions in their disciplines.¹⁷¹

Furthermore, as concerns the actual teaching performance of faculty members, it is apparent that, even in most leading universities, little precise information about the teaching of individual faculty is secured. Rather than by systematic evaluation by peer observation according to established criteria of effectiveness, there is evidence that what is known about a faculty member's classroom performance is constructed from rumor, gossip, and other random means.¹⁷² Though classroom teaching is universally cited as the most important single factor in evaluating faculty members, the evidence relied on often seems skimpy, irrelevant or unreliable. In short, the whole business of teaching effectiveness must be regarded as an "empirical wasteland."¹⁷³

In view of past, feeble efforts to assess classroom performance in a rational manner, it might be expected that academic competence is measured by scholarly research and publication: hence, the oft-heard notion that faculty members must "publish or perish." Indeed, statistics still appear to bear out Caplow and McGee's assertion eighteen years ago that "[i]t is neither an overgeneralization nor an oversimplification to state that in the faculties of major universities in the United States today, the evaluation of performance is based almost exclusively on publication of scholarly books or articles in professional journals as evidence of research activity."¹⁷⁴ Also borne out by recent studies, however, is their conclusion that "a faculty member who is able to publish at all, however, is not impossibly handicapped, since the actual number of publications necessary to meet tenure requirements at most universities is not large."¹⁷⁵ In all except a few leading institutions less than 10 percent of the faculty reportedly accounts for

171 T. CAPLOW & R. MCGEE, *supra* note 170, at 82. A study made in 1966 by the American Council on Education revealed that scholarly research and publications were used to determine teaching skill in 70.0% of the colleges of Arts and Science responding. L. LEWIS, *supra* note 3, at 22.

172 L. LEWIS, *supra* note 3, at 23. In 1966, the American Council on Education tabulated the responses of 1,100 deans to the question of how their faculty's undergraduate teaching was evaluated. Responses from deans of 110 colleges of Arts and Sciences that were units of large universities — where meritocratic principles are ostensibly well-implanted — reveal that the chairman's evaluation was a primary source of information about classroom performance in 98.2% of such colleges. In 71.8% of the colleges, an evaluation made by the dean himself was next in importance as a source of information. Colleague opinion was considered in 62.0% of the college. Only 2.0% utilized classroom visits for evaluating teaching competence, and only 35.0% considered student opinion. Astin & Lee, *Current Practices in the Evaluation and Training of College Teachers*, in *IMPROVING COLLEGE TEACHING* 296-311 (C. Lee ed. 1967). A 1960 report of the Committee on College Teaching of the American Council on Education notes that "the most frequently cited sources of information can be described simply as *hearsay*." Gustad, *Policies and Practices in Faculty Evaluation*, 42 *EDUC. REC.* 203 (1961), quoted in L. LEWIS, *supra* note 3, at 23.

173 L. LEWIS, *supra* note 3, at 26.

174 T. CAPLOW & R. MCGEE, *supra* note 170, at 83; *see also* note 170, *supra*.

175 *Id.* at 82.

more than 90 percent of all published research.¹⁷⁶ Thus it appears that the publish or perish doctrine may be more fiction than fact in the average institution of higher education, where some critics charge that it is used to promote the idea that an objective standard is used in arriving at decisions on hiring and promotion which in reality are made subjectively.¹⁷⁷

The extreme subjectivity of the hiring and promotion policies in academia most strongly refutes the notion that colleges and universities run on the merit principle. Non-academic considerations, often including information of a personal and non-professional nature, regularly intrude in evaluation of candidates for academic positions. In his study of 295 letters of recommendation written by professors of sociology, chemistry, and English literature in the United States in the late 1960's, sociologist Lionel Lewis concluded that faculty positions are gained at least as much by ascription as by achievement. Lewis also pointed to the important role of such non-academic considerations as family, personality, and "ability to fit into the department."¹⁷⁸

Prominent in the letters studied by Lewis is the theme that if an individual is congenial, cooperative, and likeable or effective in interaction, such a candidate will have "no difficulty in fitting into [a] colleague group."¹⁷⁹ It is telling that a disclaimer such as "I have no firsthand information, but I would guess from what I have seen [or heard] that . . .," often qualifies as information regarding teaching. Few persons described in the letters are not articulate and/or well-organized, intelligent and/or competent, congenial, cooperative, pleasant and/or warm.¹⁸⁰ Enthusiasm is another highly-valued attribute.¹⁸¹ The over-

176 Wilson, *The Professor and His Roles*, in *IMPROVING COLLEGE TEACHING*, *supra* note 172, at 104-5. "Evidence indicates that the publication record of most academics is rather skimpy. In their study of 2,451 social scientists, Paul Lazarsfeld and Wagner Thielens, Jr., found that only 1,377 of them had published three or more papers and that only 861 had published a book, aside from their dissertations." L. LEWIS, *supra* note 3, at 31. A survey published in 1970 by the Carnegie Commission study on the Future of Higher Education and the American Council on Education revealed that approximately 30% had published only one to four papers and slightly over 14% had produced between five and ten publications. Only 26.6% had published eleven or more papers. *College and University Faculty*, 1971 *DIG. EDUC. STAT.* 83. See D. BROWN, *THE MOBILE PROFESSORS* 68-73 (1967); see generally L. Lewis, *supra* note 3, at 30-35.

177 One author has stated that "'publish-or-perish' is largely a myth popularized by the few poor teachers who, lacking the one credential for tenure appointment, did indeed perish when found lacking in the other." Cartter, *University Teaching and Excellence*, in *IMPROVING COLLEGE TEACHING*, *supra* note 172, at 160; see L. LEWIS, *supra* note 3, at 40-42.

178 See L. LEWIS, *supra* note 3, at 50-82, 109-146. Lewis explains the use of letters of recommendation on the basis that "to the degree that the intent of such letters is to help establish academic qualifications, the introduction of other kinds of information opens to question the primacy of professional considerations in the recruitment of faculty." *Id.* at 50. See also T. CAPLOW & R. MCGEE, *supra* note 170, at 87-93.

179 *Id.* at 59. One letter mentioned thirteen scholars at whose feet the candidate had studied.

180 *Id.* at 57; see also T. CAPLOW & R. MCGEE, *supra* note 170, at 125.

181 The following is an excellent summary of the way the merits of candidates typically are evaluated:

We take a good look at their letters and then when they're down here we look at them and talk to them and then we take a good look into our crystal ball and pull out the best man. In other words, we're completely subjective about the whole thing. It's usually fairly simple. You can tell from a ten-minute conversation if a man will be a good teacher. . . . What counts is drive and imagination. . . . We can't afford to hire any other way. There is no other way of judging a man's research and scholarly capacities. It's extremely time-consuming, but it works.

T. CAPLOW & R. MCGEE, *supra* note 170, at 123-4.

whelming majority of extra-academic factors mentioned bore on the question of maintaining pleasant social relationships in a department.¹⁸² By their extensive emphasis on personality, Lewis concluded that academic departments are unwilling to recruit candidates who will disrupt social relationships and upset the status quo.

While most evaluators recognize the necessity of recounting a candidate's professional qualifications, they frequently lack specific information. The following extrapolated assessments of teaching ability are typical:

Except for one lecture to my seminar (which was conducted with great verve and enthusiasm) I have no information on [his] abilities as a teacher. I should expect him to be good.
He is very poised and self-confident and very personable . . . He is probably a very effective teacher.¹⁸³

To fill a void in discharging the responsibility of reviewing and measuring professional quality, irrelevant personal criteria are embraced. In the event that no meritorious accomplishment of the candidate comes easily to mind, letters of recommendation frequently list names of widely-known persons with whom the candidate has had some tie.¹⁸⁴ Or attention often is turned to the evaluator's high opinion of the candidate's spouse.¹⁸⁵ In assessing their colleagues, academics clearly are concerned with questions beyond professional performance; it would appear that universities place less emphasis on technical competence than the supporters of the standard of academic merit would lead us to believe.¹⁸⁶

Other statistics similarly reveal the importance of seemingly extraneous factors in the academic hiring process. For example, institutions are well entrenched in the habit of hiring their own graduates, and between eligible individuals of apparently equal ability and training, preference is very often shown for "connections."¹⁸⁷ Data indicate that the prestige of the institution from which a candidate received the Ph.D. and the candidate's social class origin are

182 The first figures to establish widespread "inbreeding" among faculty resulted from a study of all appointments at Indiana University between 1885 and 1937, which revealed that 43% were alumni and 20% had family members on the staff. Hollingshead, *Ingroup Membership and Academic Selection*, 3 AM. SOC. REV. 831 (1938). After a recent exhaustive analysis of the relationship of academic structure and scholarship, Peter Blau has concluded that inbreeding has "adverse effects on faculty quality" in all academic settings. P. BLAU, *THE ORGANIZATION OF ACADEMIC WORK* 273 (1973), quoted in L. LEWIS, *supra* note 3, at 111. See also T. CAPLOW & R. MCGEE, *supra* note 170, at 110-111, 132-3.

183 Crane, *Social Class Origin and Academic Success: The Influence of Two Stratification Systems on Academic Careers*, 42 SOC. EDUC. 3-11 (1969).

184 See L. LEWIS, *supra* note 3, at 120-123; T. CAPLOW & R. MCGEE, *supra* note 170.

185 *Id.* at 109.

186 *Id.* at 111.

187 The American Association of University Professors has recognized "a certain circularity in the verification of standards insofar as professors may discern 'excellence' in others who resemble themselves, and thus, by their appointment and advancement decisions, generate the proof that merit is the function of those resemblances." AAUP, *supra* note 167, at 181. In affirming the principle of affirmative action, the report acknowledges that the denial of access to women and minorities in part:

has resulted from unexamined presuppositions of professional fitness which have tended to exclude from consideration persons who do not fall within a particular definition of the acceptable academic person. . . . Insofar as few are called, the range of choice must necessarily be a narrow one, and those fewer still who are chosen tend to mirror the profession's image of what it is, not what it should or might be.

Id. at 179.

as important as publications for hiring in leading universities.¹⁸⁸ Obviously, since candidates of lower social class origin, including members of minority groups, are less likely to have received their degrees from prestigious institutions, they are thus less likely to obtain positions in prestigious universities. As we have seen, the cumulative effect of such ascriptive qualities as social class, prestige, and ability to get in the status quo has been devastating for minorities and women.¹⁸⁹

As Caplow and McGee noted, academic recruitment in theory is mostly open, but in practice, it is mostly closed. Women and minorities tend to be excluded from the academic profession not always intentionally, and not solely because they have low prestige, but because they are outside the prestige system entirely. Fearing "Bogie-Man" candidates who "won't fit in," departments invoke the so-called merit principle which assures their exclusion. Only by means of a structure which requires something more, which is capable of *re*-structuring academia by confronting restrictive standards of professional quality and opening the hiring and promotion process, will the institutional scope of academic discrimination be effectively countered.

An important element of this re-structuring is the development of appropriate meritocratic criteria, which recognize that there is no inherent conflict between the principles of intellectual and scholarly merit and of equality of access to the academic profession for all persons, and that the old model of academic excellence was too narrow to serve individuals or society very well. Equal opportunity, after all, involves more than the opportunity to develop mediocre competence in the area of someone else's strength. Status in any context is relative and on any single measure of status there will always be a lower half. One way to reduce the number in the lower half is to expand the number of dimensions on which status is measured. The concept of academic excellence must be expanded to accommodate other values deemed important in our society.

The application of a preference for women and members of minority groups is thus a means of overcoming the misapplication of meritocratic principles, rather than subverting them. Heretofore, academia has denied itself access to great reservoirs of talent and intellectual vitality by ignoring the important abilities and experience of disadvantaged and discriminated groups. As the AAUP itself has recognized, institutions of higher education can justify the use of preferential policies for the reason that the narrowness of its traditional criteria must be considered deficient on the very grounds of excellence itself.

VII. Implementation of a Policy of Preference

Successful implementation of affirmative action in higher education requires

188 See AAUP, *id.* at 179; Miller, *supra* note 164, at 69-70.

189 See AAUP, *id.* Ironically, academia long has recognized the value of employing preferences in student admissions policies. For example, colleges and universities have always sought out and made concessions to holders of particular non-quantifiable talents, such as leadership, character, and ability to kick a field goal. Similar relaxation of admissions criteria has been utilized where the applicant is physically handicapped, the offspring of an alumnus or faculty member, or a resident of the proper geographic area. O'Neil, *supra* note 5, at 703-5; see B. THRESHER, COLLEGE ADMISSIONS AND THE PUBLIC INTEREST 56, 57, 59-61 (1966).

acceptance of three basic tenets. First, some form of preference for hiring and promotion of women and members of minority groups is both necessary in order to benefit heretofore disadvantaged groups and desirable for society as a whole. Second, the costs which accompany these benefits must be spread as evenly as possible across society. Finally, a more rational decision-making structure must be established in order to implement affirmative action policies toward the objective that, to the utmost extent possible, everyone benefits.

A preferential policy may be effective by continuation of the five categories currently accepted by the federal government as warranting affirmative action. Although undoubtedly both over-inclusive and under-inclusive with respect to some individuals, these categories—blacks, American Indians, Orientals, Spanish-surnamed, and women—do appear most reasonably to include the major disadvantaged groups existing today. Other groups alleging a pattern of discrimination, or individuals desiring relief, may assert their remedies under the provisions of Title VII¹⁹⁰ or through complaints filed with the Equal Employment Opportunity Commission¹⁹¹ or the Department of Labor.¹⁹² Rather than streamlining the enforcement process under one agency, as has been suggested,¹⁹³ the present four-pronged approach, which provides multiple avenues of relief for the discriminated and opportunity for diverse viewpoints to be heard, should be continued.

The preference adopted should resemble that traditionally afforded to veterans in this country; in other words, women and minorities should be deemed *additionally* qualified by reason of their sex, race, or ethnic group.¹⁹⁴ In essence, this system would involve including additional grounds of academic qualification based on the overall contributions to the academic community, such as the ability to serve as a "model" or "mentor."¹⁹⁵ Rather than restricting the preference to situations in which two candidates are deemed otherwise equally qualified, as it currently is employed in a small minority of universities, it should be exercised in favor of every candidate who is a member of a designated category, since the determination of "equal" qualifications easily may be skewed by the very factors of historic institutional discrimination which society should strive to overcome. Moreover, while serving as compensation for past discrimination, such a system of "bonus" qualification has the additional advantage of safeguarding an important element of traditional meritocratic criteria in that candidates who are totally unqualified will not be aided sufficiently by a few additional "points" to attain a faculty position undeservedly. Thus the concept of academic merit may be expanded but not abandoned.

By enacting a preference for certain groups, however, we must take care to avoid forcing the entire burden of society's obligation onto hapless white males.

190 42 U.S.C. §§ 2000e-5 et seq. (1970).

191 See 29 C.F.R. § 1601.6 et seq. (1975).

192 See 40 C.F.R. § 60 et seq. (1971); 20 C.F.R. § 31.1 et seq. (1975).

193 See R. LESTER, *supra* note 2.

194 For example, a university utilizing a point system for evaluating candidates could award five additional points to members of preferred groups.

195 The American Association of University Professors has endorsed this method of broadening the criteria for evaluating faculty. CARNEGIE COUNCIL, *supra* note 2, at 129; see AAUP, *supra* note 157, at 179.

This is particularly true if it is concluded that society as a whole, not merely white males, should bear the responsibility for institutional discrimination. If society in general is responsible for past discrimination, then all members of society have a role in bearing that responsibility; otherwise, all the costs of implementing a desired social policy are borne by a group no more deserving of such oppressive treatment than the groups formerly disadvantaged and now preferred under affirmative action schemes.¹⁹⁶ In addition, and extremely important from the standpoint of resource management, displacement of qualified white males costs society the benefit of their participation in academia. Expansion of opportunities in higher education, therefore, is a basic necessity if affirmative action is to be more than a zero-sum game in which the employed are required to lose if the discriminated are to gain.¹⁹⁷

To insure an equal distribution of the burden, particularly in view of the limited number of openings in the current and prospective academic job market, continued participation of qualified white males in academia must be assured by federal funding of additional faculty positions. Such can be accomplished either through direct appropriations or by expanded government contracts for increased research and additional educational facilities.¹⁹⁸ Like the comprehensive Health Manpower Training Act of 1971,¹⁹⁹ enacted to increase the number of places in medical schools by rehabilitating and expanding current facilities as well as constructing new ones, such a program would alleviate the discriminatory situation in academic hiring without displacing white male candidates. Meeting the great financial cost of additional faculty positions, of course, would require a reallocation of social resources in keeping with the priority of broadened human development toward which our society must strive. With focus on the values we advocate within the context of the social order we strive for, this adjustment in federal expenditures may be not only practicable, but necessary.²⁰⁰ The 14th amendment, after all, is a national commitment to a standard of conduct; accepting it means accepting its ethical underpinnings and devising, by whatever means available, the most acceptable remedy for its breach.²⁰¹

A more rational framework for affirmative action decision-making requires a broad-scale view of the problem, since any attempt to adjust the ratio of minority to non-minority group members in academia will affect the individual and group interests involved, as well as the interests of the institution, the aca-

196 For a discussion of this "enterprise liability" theory, see 8 HARV. CIV. RIGHTS L. REV. at 163, 166; see also, Miller, *supra* note 164, at 67-9; see generally B. BITTKER, *supra* note 127, at 128-137.

197 For an analysis of the concept of synergy and the conflict resolution—through the production of benefits for various sides in a dispute see A. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* Ch. 4 (1971); J. & M. CRAIG, *SYNERGIC POWER: BEYOND DOMINATION AND PERMISSIVENESS* (1974); Benedi, *Synergy*, 72 AM. ANTHROPOLOGIST 320 (1970).

198 See R. LESTER, *supra* note 4, at 150; CARNEGIE COUNCIL, *supra* note 2, at 192; Miller, *supra* note 164, at 69; Havighurst, *Individual and Group Rights in a Democracy*, 4 SOCIAL POLICY 13, 26 (1976); Epstein, *Reverse Discrimination*, 118 Cong. Rec. 29788, 29790 (1972) (added by Cong. Eilberg).

199 42 U.S.C. §§ 201 et seq. (1971).

200 One source of this revenue may be revealed by answering whether defense spending really is, or should be, our nation's highest priority: Would we prefer to serve as a model of excess military might or of equal opportunity?

201 See B. BITTKER, *supra* note 5, at 26, for a discussion of reevaluating democratic priorities.

demic community, and society at large.²⁰² These interests must be isolated, analyzed independently, and accommodated wherever possible. The following proposals suggest such a framework.

First, goals and timetables should be continued, under the continued authority of HEW. Categories of minority groups qualifying for a preference should be re-evaluated at 10-year intervals and revised, if necessary, in terms of then existing academic situations. This is required because of the hopefully changing nature of the situation in terms of the available pool of candidates and the rehabilitative action by higher education institutions. Goals and timetables should not exceed a period of 10 years.²⁰³

While it should be recognized that the Guidelines already are sufficiently tailored to meet any special needs of academia,²⁰⁴ however, it must be emphasized that HEW needs assistance in reaching truly rational, acceptable decisions concerning the acceptability of university plans for affirmative action. First, experience has shown that the agency requires greater expertise and stronger emphasis on consistency among the ten regional Offices of Civil Rights. Accordingly, stronger efforts and additional funding are required to provide sufficient staff of high calibre.

Secondly, and extremely important, is the need for OCR to consider all relevant factors before making its decision to accept or reject a university's affirmative action plan. In order for the agency to appropriately evaluate the circumstances and reach the most equitable decision, a vehicle must be established to assure that agency officials hear as many voices and weigh as many considerations as possible during the process of negotiation with the university. In addition, a method should be inserted at the level of negotiation between a university and the OCR to resolve any impasses which may arise in formulation of the plan without resorting immediately to delay or cut-off of federal contracts. To accomplish this objective, the university and HEW, as adverse parties, should submit their differences to arbitration by individuals mutually selected. Such a procedure would provide the opportunity for the fresh views of the arbitrators, under a "think tank" approach, to outline possible alternatives and hopefully to break the deadlock.²⁰⁵ The arbitration would not be binding however, and HEW—further enlightened by the arbitration process—still would pronounce the final word concerning acceptability of the university's plan.

If dissatisfied with the outcome of negotiation, the university, of course, would be free to pursue its traditional avenues of relief from the agency's action. By assuring consideration of all possible views and incorporating input from

²⁰² For a more detailed discussion isolating these relevant interests, see 8 HARV. CIV. RIGHTS L. REV. at 159.

²⁰³ The Carnegie Council has recommended that timetables should be set for periods not exceeding five to ten years. *Carnegie Council's Affirmative Action Recommendations*, CHERON. H. EDUC. 3, 4 (1975).

²⁰⁴ Congress rejected the idea that academia warranted more special treatment in 1972, by amending Title VII to delete the exemption for educational institutions. See *Sandler, supra* note 3, at 416.

²⁰⁵ Lester has advocated the use of arbitration to handle individual grievances at the university level by resort to a panel of outside faculty members. See R. LESTER, *supra* note 4, at 96. Given the possible biases of faculty members, however, it would appear preferable to rely on traditional arbitration techniques, particularly where, as here, expertise in education may not prove as valuable as a common-sense, fresh perspective.

impartial arbitrators, this scheme affords the greatest assurance that the agency's decision will in fact have been made rationally. The plan offers the further probability that all relevant factors will be weighed and that a creative, mutually satisfactory solution will be reached without resort to the courts. Although the result of this procedure is compromise rather than strict adherence to the notions of "legal rights" often asserted by minority and white members of the academic community, it is essential to recognize the necessity of compromise in such a volatile, complex situation where no solution can be viewed as a unitary circumstance and the best result is a balance of diverse interests, rights, and obligations.

Finally, institutions of higher education must accept their primary responsibility for creating equal opportunity and maximizing individual fulfillment in academia. Essential to this effort is a thorough re-examination and revision of the procedures and criteria utilized in faculty selection and promotion. Of extreme importance also is development by colleges and universities of grievance procedures which begin and conclude, where possible, at the university level. To further this objective, individual allegations of discrimination and complaints by groups which are not recognized by HEW as deserving of preference should be heard by an arbitration panel whose decision would be nonbinding on the university and the federal government.²⁰⁶ Such a procedure has the advantage of being more expedient than litigation, less costly, and more likely to produce a mutually acceptable outcome. Furthermore, it may allow for recognition of local or regional minority groups or specific disadvantaged individuals as deserving of a preference due to local circumstances which would not be warranted on a national basis.

VIII. Conclusion

A society, we believe, should promote institutions and arrangements which will further human growth and development as part of a larger interest in the quality of life. Implicit in the analysis of affirmative action lies a reassessment of the role of higher educational institutions in society. While higher educational institutions must serve society by stressing knowledge and quality, they must also meet their obligations to serve individuals—faculty members, students and citizens—who are members of disadvantaged groups. By facing the problem of affirmative action with a broad contextual view and with the goal of maximizing individual fulfillment, it is possible to implement a policy of preference, as developed in this article, for disadvantaged groups in academia. Such a policy will yield benefits for both society and disadvantaged persons.

²⁰⁶ See R. LESTER, *supra* note 4, at 96; *Carnegie Council's Affirmative-Action Recommendations*, *id.* at 4; LaNoue, *supra* note 48; *but see* Sandler, *supra* note 4, at 414.