

ARTICLES

Understanding Affirmative Action*

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Introduction

The term “affirmative action” is a political lightning rod. A discussion of its merits is almost always heated, and accompanied by an underlying consideration of the sensitive subjects of race and racism, gender and sexism. Support for, or opposition to, affirmative action has become a defining position for public figures. For example, opposition to affirmative action was a central theme of the recent presidential campaign of California Governor Pete Wilson, Senator Phil Gramm, and columnist Pat Buchanan, and was initially one of the primary issues raised by the campaign of former Senator Robert Dole.¹ Their rhetoric in the summer of 1995 led Vice-Presidential candidate Jack Kemp, a long-time supporter of affirmative action, to warn then-Senator Dole and the other Republican candidates that he might not support the Republican presidential ticket.² Democrats are expressing concern that the Republican Party is using the issue as a “wedge” in the campaign, while President Clinton’s “Mend it—don’t end it” speech in support of affirmative action has been described as a defining moment in his campaign for re-election.³ Yet for all the debate about affirmative action, there is little discussion, let alone agreement, on what the term means.⁴ This Article is both an attempt to forge a

1. See Louis Freedberg, *Dole Ready to Kill Affirmative Action*, S.F. CHRON., July 27, 1995, at A1, A11.

2. See Robert Novak, *Kemp Wants No Part in Affirmative Action War*, BUFFALO NEWS, July 28, 1995, at 3C; Jake Thompson, *Kansan Proposes Ending Federal Minority Set-Asides*, KANSAS CITY STAR, July 28, 1995, at A5; Steven A. Holmes, *Preferences Are Splitting Republicans*, N.Y. TIMES, July 29, 1995, § 1, at 6. When Kemp accepted Dole’s offer to join the Republican ticket, he reversed his long-held position on affirmative action. See Larry Margasak, *Affirmative Action Foes Gain Ally: Jack Kemp*, S.F. EXAMINER, Aug. 13, 1996, at A1.

3. Alison Mitchell, *Clinton Regains His Voice with 3 Speeches*, N.Y. TIMES, July 23, 1995, § 1 at 10.

4. “‘Affirmative action’ enjoys no clear and widely shared definition. This contributes to the confusion and miscommunication surrounding the issue.” AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT 1 n.1 (1995). See also Louis Freedberg, *Race, Gender—UC Vote Didn’t Clear The Air*, S.F. CHRON., July 24, 1995, at A1, A9 (“For Governor Wilson, it is reverse discrimination and ‘the deadly virus of tribalism’; for Jackson, it

clearer definition of affirmative action and an argument in support of its continuation.

Part I is descriptive. It sets forth how affirmative action works in the areas of employment, school admissions, and public contracting. I suggest that affirmative action may be carried out through five principal methods.⁵ Method I, quotas, is the use of absolute floors or ceilings for the selection of women or minorities. Quotas are the most controversial, yet the least used, form of affirmative action. Under current law, they are permitted only under highly unusual circumstances. Method II, preferences, allows the consideration of race, sex, or ethnicity in making selections. Preferences are used only under strict legal guidelines when necessary to counteract the effects of discrimination. Method III, self-studies, is the examination by decision-makers of how they select employees, contractors, or students. When such studies reveal disparities between the race, sex, or ethnicity of the available selection pool and the persons actually selected, they may lead to the imposition of goals and timetables. These are used to measure progress in eliminating discrimination or to equalize the makeup of the workforce with the pool from which it is selected. Method IV, outreach and counseling, is the use of targeted recruitment to increase the pool of minority or women applicants from which selections are made. Outreach and counseling programs are often adopted as a result of self-studies which reveal disparities in the selection of minorities and women. Method V, anti-discrimination, is the adoption of aggressive non-discrimination policies, such as diversity training and anti-harassment training.

Part II analyzes the decisions of the United States Supreme Court that have adjudicated various affirmative action plans. Although the Court has never spoken with a single voice in this area, and has frequently issued badly splintered decisions, some basic principles nonetheless emerge from its affirmative action decisions of the past nineteen years. First, to the extent that affirmative action in employment and contracting includes race-conscious decisionmaking,⁶ it is

is opportunity, hope, an 'even playing field'; for Clinton, it is a flawed but essential tool that should be mended, not ended. At other times in the debate, 'affirmative action' seems to have a shifting meaning; it might be a simple minority recruitment program, or race and gender goals in hiring. It might be minority set-aside provisions in state and federal contracting, or the quotas that are often cited but rarely used.").

5. I first identified these models in an earlier work. See David B. Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42 (1989).

6. Most of the Court's decisions in the area have involved affirmative action plans directed toward blacks and Hispanics, and thus have focused on race-conscious decision-making. Although women constitute a majority of the population, they are nonetheless

permissible only as a remedy for discrimination. The standard by which a court determines whether evidence of discrimination justifies the use of race-conscious remedies varies. Those standards range from evidence of a manifest imbalance in traditionally segregated job categories used to justify a voluntary private affirmative action plan,⁷ to strong evidence of discrimination with a substantial continuing effect used to justify a publicly-imposed affirmative action plan,⁸ to a preponderance of the evidence that discrimination has caused concrete harm, offered in an adversary proceeding, to justify a judicially-imposed affirmative action plan.⁹ But in every case the underlying justification for an employment or contracting affirmative action plan is evidence of discrimination against women and minority group members requiring remedial action.¹⁰

Second, the Court has consistently required affirmative action programs to be narrowly tailored to the purpose of remedying discrimination. In practical terms, this means (1) a plan must be flexible, employing goals rather than quotas, (2) it must be limited to fully qualified applicants, (3) it must provide for some continuing opportunities for whites and for men, (4) it must not require the reduction of existing positions held by incumbent whites and men, and (5) it must be temporary—designed to last no longer than necessary to remedy the discrimination that justified the plan.¹¹

Part III reviews some of the recent data regarding the psychology of discrimination in American society. This data suggests that we live

frequent targets of discrimination, are often underrepresented in the workplace, and, relative to men, lack economic power. They are thus treated as a "minority" group in many affirmative action programs. One of the Supreme Court's decisions in this area was solely concerned with affirmative action for women, and applied the same standards as those used in race/ethnicity cases. *See Johnson v. Transportation Agency*, 480 U.S. 616 (1987). *Johnson* involved statutory rights, not constitutional rights, and a conflict is developing among the circuit courts of appeal over whether a constitutional challenge to affirmative action for women should be analyzed differently because sex discrimination is not subjected to the same constitutional scrutiny as are race and national origin discrimination. *Compare Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) (affirmative action plan for minority-owned contractors reviewed under strict scrutiny test and rejected; affirmative action plan for women-owned contractors reviewed under intermediate scrutiny test and approved) *with Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989) (affirmative action plan for women-owned businesses reviewed under strict scrutiny test).

7. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

8. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

9. *United States v. Paradise*, 480 U.S. 149 (1987).

10. In the area of school admissions the Court has deferred to the school's interest in diversity as a justification for limited affirmative action programs. *See discussion infra* Part II.

11. *See infra* notes 44-46 and accompanying text.

in a society in which race, ethnicity, and gender play a powerful role in how people are judged. On a broad basis, white Americans view black and Hispanic Americans as less intelligent, less hard working, less honest, and more violent than whites. Similarly, men of all races and ethnicities tend to view women as less able workers and leaders than men. These views correspond with the hostility or ambivalence of many whites and men toward the enforcement of civil rights laws. The data also demonstrate that whites, on an individual level, are frequently uncomfortable with or hostile toward blacks, Asian Americans, and Hispanics, and are often unwilling to interact with them, help them, or live in the same neighborhoods with them. These prejudices, which are sometimes subconscious, help to explain why discrimination remains a potent force in American life.

Part IV describes some of the many ways in which discrimination operates in American life. This section illustrates why broad-based remedies like affirmative action are still needed to counter the effects of discrimination. It draws on the disciplines of sociology, social psychology, political science, demography, business management, education, psychology, and medicine. Within these fields, scholars have found ample evidence that we continue to be a society in which great privileges are afforded to white men not by virtue of their personal merit, but because of the accident of their birth. This section reviews the evidence that race, ethnicity and gender are potent indicators of privilege in the areas of employment, education, housing, health care and business opportunities, treatment by the criminal justice system, and wealth or poverty. The evidence is persuasive that the cause of these great disparities is racism and sexism, and that they can only be corrected by broad remedies. The principal remedy available is affirmative action.

Although I conclude that the need for affirmative action is substantial, its support is uncertain, and the very concept is under attack. Four arguments fuel the opposition to affirmative action: (1) affirmative action requires racial quotas to be used in place of merit selection; (2) affirmative action requires unqualified persons to be selected for jobs, schools and commercial contracts; (3) because of affirmative action, most employment and commercial discrimination in contemporary society is experienced by white men, rather than minority group members or women; and (4) affirmative action is intended to counteract the discrimination of the past, not the present, and thus requires this generation of white men to pay for past discrimination that they did not cause and from which they did not benefit. I hope to demon-

strate in this article that each of these arguments is without merit. I hope further to persuade the reader that affirmative action must continue to be part of our society—otherwise the dream of an equal society will never be fulfilled.

I. The Practice of Affirmative Action

There are at least five methods of race- and gender-conscious practices which are covered under the umbrella of affirmative action: (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) anti-discrimination. Any rational discourse on the question of affirmative action ought to begin with some attempt to identify the type of affirmative action at issue.

A. Method I — Quotas

Quotas, the use of minimum or maximum participation levels in the selection of women and minority group members, are the subject of much of the debate, and much of the rancor, on the topic of affirmative action. This is ironic, since the Supreme Court has consistently held since the late 1970s that racial quotas by the government and by businesses subject to government regulation are impermissible.¹² Although there were debates and litigation as far back as the 1940s regarding the potential benefits and detriments of proportional hiring, and some plans actually operating in the late 1960s and early 1970s to guarantee that a predetermined number of minority group members were selected for admission to certain schools,¹³ any contemporary discussion of quotas must be recognized as highly theoretical. We may argue the merits of affirmative action quotas, but the Court has foreclosed any further experiments with such plans. They are a dead letter.

12. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (affirmative action plan disapproved); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (affirmative action plan approved subject to limitations).

13. For example, the U.C. Davis Medical School reserved sixteen of its one hundred spots for disadvantaged students (although it didn't always use all of the spots reserved). See discussion of *Bakke*, *infra* at Part II. Although not mentioned by the Court in its decision in *Bakke*, the medical school had a second special admissions plan which was not challenged. In what might be called an affirmative action plan for the well-connected—five spaces in each class were reserved for the dean's personal selection. JOEL DREYFUSS & CHARLES LAWRENCE, III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 41 (1979). Such "privilege quotas" are the norm at major private universities. See John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993).

B. Method II — Preferences

Preferences are properly at the center of the current debate. To proponents of affirmative action, they are a necessary remedy for continuing discrimination. To opponents, they are everything that is wrong with affirmative action. Governor Pete Wilson of California sees them as immoral.¹⁴ Supreme Court Justices Scalia and Thomas see them as stigmatizing for African Americans.¹⁵ Justice O'Connor worries that they are used as a cover under which de facto quotas are applied.¹⁶

Affirmative action preferences may take many forms. In school admissions, race may be used as a factor in assessing an applicant, in the same way that a school may consider geography, athletic achievements, or other factors that help ensure a diverse student body.¹⁷ Even where there is no history of discrimination, a school's decision to seek diversity among its students is considered to be within the sphere of its academic freedom; in the absence of quotas, the government will not interfere with a school's use of race as a factor in admissions decisions.¹⁸

In employment, the categories of race, ethnicity and gender may be considered as factors in selecting employees for hire or promotion, but only under limited circumstances explained more fully in Part II. When these categories are considered under bona-fide affirmative action employment plans, they may be used as preferences in a number of circumstances. First, in choosing among candidates who are evaluated as fully qualified, race or gender may be used as the decisive factor. Second, when a list of candidates is being assembled from which a selection is to be made, it may be expanded if it is found to have few or no female or minority candidates, provided that the added candidates are fully qualified for the position. Third, when the selection of a candidate is being considered, race, ethnicity or gender may be used as one factor among many in evaluating competing qualified candidates. Fourth, when selections are made under the supervi-

14. See B. Drummond Ayres, Jr., *Affirmative Action's End? Now It's Not That Simple*, N.Y. TIMES, July 24, 1995, at A1.

15. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring); *Id.* at 2119 (Thomas, J., concurring).

16. This concern was sufficiently strong to provoke Justice O'Connor to question the wisdom of liability for discrimination based on a "disparate impact" analysis. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

17. This is the formulation of Justice Powell's decision in *Bakke*. See discussion *infra* Part II.

18. See discussion *infra* Part II.

sion of a court, segregated lists may be established and used alternately, assuming there are a sufficient number of qualified candidates to satisfy the selection criteria.¹⁹

In contracting, as in employment, race or gender-based preferences are strictly constrained by law. The government may only consider gender, ethnicity or race in awarding contracts when there is strong evidence that illegal discrimination sufficient to require a present legal remedy has occurred.²⁰ When justified, these categories may be used as preferences in a number of ways, which are sometimes lumped together under the term "set-asides." This term is misleading. Except in a few federal programs now under review, the government may not set aside a portion of a contract to be performed exclusively by women and minorities. It may only set a goal for minority participation and attempt, through various procedures, to meet that goal.

There are four basic Method II preference strategies used by the government to meet affirmative action goals. First, a bid may be reduced by a certain percentage to improve a minority or female contractor or vendor's competitive position. This may increase the likelihood that the female-owned or minority-owned business will be awarded the contract. For example, a \$1,000,000 bid to lay sewer pipe by a qualified minority-owned business, or a business determined to be socially and economically disadvantaged, may be given a 2% minority preference, thus reducing the bid amount to \$980,000. If a white-owned contractor bid \$981,000 the minority-owned business could nevertheless be awarded the contract, and paid \$1,000,000 to perform.

Second, points may be added to the minority or female-owned business' bid to achieve the same purpose. Using the previous example, the minority-owned contractor could bid \$980,000, thus underbidding the white contractor's bid of \$981,000, but be paid \$1,000,000 to perform the work.

Third, white male-owned businesses submitting bids may be given a competitive advantage if their bid includes an agreement to use mi-

19. One obvious form of preference, which to the author's knowledge is not used in race-conscious employment selections, is to add points to the scores of the favored group. For example, many states add points in grading civil service exams taken by veterans of the United States armed forces. Unlike racial or gender preferences, a veterans' preference may be absolute, as is the case in Massachusetts. *See Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (veterans' preference upheld against sex discrimination challenge).

20. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (affirmative action plan disapproved); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (affirmative action plan remanded). *See also* discussion *infra* Part II.

nority or female-owned businesses as subcontractors for a certain amount of the work to be performed. To continue with the previous example, a white male contractor submitting a \$1,000,000 bid who agreed to subcontract at least \$100,000 of his work to female or minority-owned firms would be given a 2% bidding preference, reducing the bid to \$980,000 for competitive purposes. Alternatively, the white male contractor might be given a bonus for using women or minority-owned subcontractors. In this example, he might be paid \$1,020,000 on a \$1,000,000 bid.

Fourth, white-owned businesses submitting bids may simply be required to promise to use female or minority-owned businesses for a minimum amount of the job, or to obtain a waiver establishing that no qualified minority or female-owned subcontractor was available or willing to bid competitively on the job. In the above example, the white male contractor with the \$1,000,000 bid may be required to subcontract \$100,000 of the work to women or minority-owned subcontractors, or establish that after a good faith effort it found insufficient women or minority-owned firms to meet the requirement, as a condition of bidding on the job.

Under any of these systems, the preference may only be used to raise minority or female participation to the level it would be expected to reach in the absence of discrimination.

C. Method III — Self-Studies

Affirmative action plans that require self-studies, such as how a business' employment selection decisions are made, are far more common than are preference plans. As a result of Executive Order 11246, first adopted by President Lyndon Johnson, any entity, public or private, doing substantial business with the federal government, is required to engage in a self-study.²¹ Approximately \$90,000 American businesses are regulated under this provision.²² As a result of the *Croson* and *Adarand* decisions, such studies are required before the government can authorize any Method II affirmative action preference plans.²³

21. See 41 C.F.R. § 60-2.11 (1995).

22. A bill introduced by Senator Robert Dole in 1995 would eliminate this form of affirmative action. See Louis Freedberg, *Dole Ready to Kill Affirmative Action*, S.F. CHRON., July 27, 1995, at A1, A11.

23. These decisions have spawned a cottage industry of affirmative action consulting firms who specialize in conducting the studies necessary to justify a plan. Michael Gebhardt, *Documenting Discrimination*, RECORDER, July 14, 1995, at 1.

In the case of employment or contracting, self-studies focus on a comparison between a business' actual hiring or contracting selection and the available pool of qualified employees or businesses within the geographical region from which the selections were made. For example, a plumbing contractor may compare the race and gender of the plumbers it hires with the race and gender percentages of plumbers seeking work in the geographical area from which it does its hiring. It might also compare the number of minority or women-owned businesses with which it subcontracts, compared with the pool of subcontractors with which it works. Further inquiry is required when a significant disparity is found between the available selection pool and the actual selections. In the face of a significant disparity, practices that are identified as discriminatory must be eliminated, goals for minority hiring or contracting may be set, and timetables to study progress may be established.

As discussed more fully in Part II, goals and timetables adopted pursuant to a Method III self-study must meet most of the standards imposed on Method II preference plans in order to withstand legal scrutiny: they must be flexible and waivable, limited in time, adopted for the purpose of eliminating a manifest imbalance or substantial disparity, and no broader in scope than the discrimination that caused the disparity.²⁴

Other less rigorous forms of self-study also occur regularly. For example, all large employers are required by the Equal Employment Opportunity Commission (EEOC) to keep track of the race, ethnicity, gender, and age of their employees and applicants for employment, and to categorize them by income and employment position.²⁵ The data need not be reported to the government unless it is deemed necessary to evaluate a discrimination complaint. However, the very act of data collection may help employers recognize patterns suggestive of discrimination, and thus serve as an impetus to act.

Similarly, public entities other than the federal government may require their contractors to keep track of their hiring patterns to serve as a reminder of their obligation not to discriminate. For example, in response to the *Croson* decision, the city of Berkeley, California, dropped its mandatory Method II affirmative action plan for city vendors and contractors, and instituted a "voluntary compliance" plan

24. See, e.g., *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

25. See 29 C.F.R. § 1602.7 (1995).

that requires contractors not to discriminate and to provide the city with workforce composition data.²⁶

In the absence of government mandates, entities may nonetheless choose to engage in self-studies for affirmative action purposes. For example, businesses may study their employment processes either for reasons of corporate responsibility or to protect against discrimination lawsuits. They might also elect to examine their employment or marketing practices to determine whether they could increase profits by directing their sales efforts at a more diverse population.²⁷

Colleges and universities may engage in affirmative action self-studies to investigate their admissions or job placement processes. Such studies are not subject to legal limitations. However, if the studies disclose ongoing discrimination that would justify a remedy, it is permissible only if it meets the standards referred to above and discussed in greater detail below in Part II.

D. Method IV — Outreach and Counseling

Outreach and counseling programs are another common form of affirmative action. The purpose of an outreach plan is to diversify the pool from which selections are made by reaching out to minorities. They are the most frequent remedy adopted in response to evidence of disparity found in Method III affirmative action self-studies. For example, an employer may find that it is hiring largely by word of mouth, and thus limiting its searches to those persons friendly with or related to its current employees. Given typical patterns of residential, social and familial segregation, if its workforce is largely white, it will be perpetuated as largely white. Or a college may recruit largely from certain “feeder” high schools. If the feeder schools are largely white, the college will be as well.

Counseling programs are a similar form of Method IV affirmative action programs. An employer may find that women or minority employees recruited under a Method IV plan need help adjusting to its “corporate culture.” Or a school may find that women or minority students feel isolated or alienated by the school environment, or otherwise need assistance to excel. Method IV affirmative action counseling programs respond to this need.

Examples of Method IV outreach and counseling programs include: programs run by colleges and universities to inform students at

26. Gebhardt, *supra* note 23, at 10.

27. See Judith H. Dobrzynski, *Some Action, Little Talk—Companies Embrace Diversity, but Are Reluctant to Discuss It*, N.Y. TIMES, Apr. 20, 1995, at C1.

minority high schools of the schools' admissions requirements; programs run by colleges and universities to enrich the academic programs at minority high schools; programs run by colleges and universities to encourage minority students to attend college; programs run by colleges and universities to encourage middle school and high school girls to consider careers in math and science; programs to provide scholarships to minority students; programs to inform woman-owned and minority-owned businesses of the criteria for applying for government contracts; programs to inform women-owned and minority-owned businesses of opportunities to bid on contracts; programs to inform women and/or minority group members of employment, career or promotional opportunities; and programs to assist women and/or minority group members in establishing their own businesses.

Until recently, outreach and counseling programs were not controversial. In California, however, the proposed constitutional amendment eliminating affirmative action has been read as eliminating outreach and counseling plans where they target participants based on race, sex or ethnicity.²⁸

E. Method V — Anti-Discrimination

The anti-discrimination method of affirmative action is, simply, the affirmative commitment by employers, schools or contracting entities to prevent or avoid discrimination. This is the most common and least controversial form of affirmative action. Some would argue that it is not properly termed affirmative action at all. Anti-discrimination affirmative action plans may include: (1) anti-discrimination or non-discrimination policies distributed to employees; (2) complaint resolution procedures aimed at preventing or rapidly remedying discrimination; and (3) diversity training, sensitivity training and sexual harassment training for employees and management to promote cross-racial and cross-gender understanding in the workplace.

A well-designed affirmative action plan will incorporate more than a single method. For example, a Method III self-study, whether voluntary or compelled by federal regulation, may lead to the adoption of Method II goals and timetables incorporating hiring preferences, the adoption of Method IV outreach and counseling efforts, the implementation of a Method V anti-discrimination program or diversity training program, and a commitment to additional Method III

28. See letter from Elizabeth Hill, California Legislative Analyst, and Russel S. Gould, California Director of Finance, to Daniel E. Lungren, California Attorney General (Sept. 12, 1995) (on file with author).

self-studies. As one illustration, consider San Diego's affirmative action plan in the 1970s and early 1980s, which incorporated Methods II, III, IV, and V.²⁹ The plan included hiring goals, recruitment of women and minority candidates, review of testing procedures which acted as an artificial barrier to qualified applicants, and anti-harassment policies and training.³⁰ In selling the plan to the San Diego City Council, its proponent, then Mayor Pete Wilson, explained that "[i]t must come from the heart, but we must have goals to do it."³¹

II. The Law of Affirmative Action

Although the Supreme Court has generated multiple conflicting views of the legality of various affirmative action plans, a unifying theme runs through all of its decisions—affirmative action that includes race-conscious decision making is legitimate if, and only if, it is used as a remedy for discrimination. Absent evidence of discrimination for which a present remedy is appropriate, race-conscious decision making is always impermissible. The degree of evidence required will depend on the circumstances, varying from a relatively moderate standard (evidence of a manifest imbalance in traditionally segregated job categories) in the case of voluntary affirmative action undertaken by a private entity,³² to an extremely strict standard (a strong basis in evidence that illegal discrimination sufficient to require a remedy has occurred) in the case of affirmative action by a public entity.³³ But in

29. See Carla Seaquist, *Pete Wilson's Gorgeous Mosaic*, N.Y. TIMES, Aug. 15, 1995, at A15.

30. As described by one of the city's affirmative action officers:

We never set and required quotas. Why? Because unqualified hires who made mistakes would have destroyed the program that we were building. . . . The municipal work force began to mirror San Diego's population. Women and members of minority groups became police officers, firefighters, truck drivers, electricians, water-treatment operators, park-maintenance workers and lifeguards. The city achieved balance by rooting out considerations unrelated to job performance. Among other changes, the city dropped the requirement in the firefighter test that applicants handle the ladder alone—which tended to eliminate women—when in actual firefighting it is not usually a one-person task. . . . We recruited assiduously in the African American, Hispanic and Asian-American communities and among women. . . . A prototype sexual-harassment policy, one of the nation's first, was introduced.

Id.

31. *Id.*

32. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (affirmative action plan approved).

33. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (affirmative action plan disapproved); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (affirmative action plan remanded). A strict standard is required when the actor is a public entity because the Fifth and Fourteenth Amendments prohibit the government from en-

every case where the Court has approved a plan including race-conscious decisionmaking, the Court was satisfied there was evidence of discrimination which justified a remedy.³⁴

The Court has reiterated these principles in cases involving four distinguishable situations: (1) court-imposed affirmative action remedies following the entry of judgment in discrimination cases;³⁵ (2) court-approved settlements, or consent decrees, resolving the litigation of discrimination cases through the adoption of affirmative action plans;³⁶ (3) affirmative action plans adopted voluntarily by private entities;³⁷ and (4) affirmative action plans adopted by public entities.³⁸ In each of these situations, the Court has approved the use of race-conscious decisionmaking when there has been sufficient evidence of discrimination, subject to certain limitations intended to ensure that the remedy imposed was sufficiently narrowly drawn.

In the case of judicially-imposed remedies, a court may only order an affirmative action remedy that includes race-conscious decisionmaking when the defendant has been found to have illegally discriminated against the class of persons who will benefit from the remedy.³⁹ In the case of judicially-approved remedies, a court may approve a settlement in a race discrimination case that includes an affirmative action remedy utilizing race-conscious decisionmaking when there is a strong basis in evidence to believe that the defendant has engaged in illegal discrimination.⁴⁰ In the case of private entities voluntarily adopting affirmative action plans that include race or gender-conscious decisionmaking, the Court will affirm such plans where there is significant evidence that the purpose of the plan is remedial, and that the entity's prior decisionmaking was tainted by illegal dis-

gaging in classifications based on race, including classifications which benefit minorities, unless the classification is justified by a compelling state interest (such as remedying discrimination) and is narrowly tailored to the achievement of that goal. *Adarand*, 115 S. Ct. at 2100.

34. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (affirmative action plan approved).

35. See, e.g., *id.*

36. See, e.g., *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (affirmative action plan approved).

37. See, e.g., *Weber*, 443 U.S. 193 (affirmative action plan approved).

38. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (affirmative action plan disapproved); *Croson*, 488 U.S. 469 (affirmative action plan disapproved); *Adarand*, 115 S. Ct. 2097 (affirmative action plan remanded).

39. See, e.g., *Paradise*, 480 U.S. 149.

40. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986).

crimination.⁴¹ In the case of public entities adopting affirmative action plans which include race-conscious decisionmaking, such plans are permissible only where there is strong evidence that the purpose of the plan is remedial, the government's prior decisionmaking was the result of illegal discrimination, and the plan is narrowly focused to remedy only the discrimination at which it is directed.⁴²

Although the Court has approved affirmative action plans in each of these situations, it has insisted on a high barrier of protection against abuse. This signals its concern that the protection of minority⁴³ rights not result in the diminution of legitimate majority expectations. Thus, affirmative action plans which impose race or gender-conscious decision-making have only been approved when three further criteria are met.⁴⁴ First, the plan must be flexible, eschewing strict quotas in favor of fluid and amendable goals and timetables directed at increasing minority participation, rather than mere by-the-numbers decisionmaking.⁴⁵ Second, the plan must be temporary, continuing only as long as necessary to correct the problem it addresses. Third, the plan must not interfere with the legitimate settled expectations of incumbent majority members, such as existing white male employees.

These principles were hinted at in 1978 in *Regents of the University of California v. Bakke*,⁴⁶ and were first fully articulated by the Court in 1979 in *United Steelworkers of America v. Weber*.⁴⁷ Although the application of these principles has often been controversial, leading to fractured pluralities and bitter division among the members of the Court, and although that the extent of proof of discrimination required has been revised, their underlying force remains undiminished.

41. See, e.g., *Weber*, 443 U.S. at 208-09; *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (extending *Weber* to sex discrimination cases brought under Title VII, but reserving the question of whether sex discrimination is to be treated identically to race discrimination in the case of a constitutional challenge). *Johnson* is the only sex discrimination affirmative action challenge which has been heard by the Supreme Court.

42. See, e.g., *Croson*, 488 U.S. 469 (stating standard for state or local governmental affirmative action plans); *Adarand*, 115 S. Ct. 2097 (stating standard for federal affirmative action plans).

43. While women constitute a majority of the population, I include them as a "minority" group because of their relative lack of economic power.

44. See, e.g., *Wygant*, 476 U.S. 267.

45. Underlying this criteria is a fundamental principle of affirmative action—that it be a vehicle for the discovery and selection of qualified candidates, not an excuse for the selection of the unqualified.

46. 438 U.S. 265 (1978).

47. 443 U.S. 193 (1979).

Plans that meet these criteria gain the Court's approval; those that do not are deemed illegitimate.

Bakke concerned a challenge to a special admissions program adopted by the medical school at U.C. Davis. After finding that it was admitting no Mexican-American or black students, the school decided to reserve up to 16 of its 100 spots for applicants who had been economically disadvantaged.⁴⁸ Alan Bakke, a white applicant who had been rejected, challenged this plan, claiming that, given his grades and test scores, he would have been admitted if he had been a member of a minority group.⁴⁹ Therefore, he argued, the plan violated his right to equal protection under the Fourteenth Amendment.⁵⁰

In the Court's lead opinion,⁵¹ Justice Powell characterized the U.C. Davis plan as imposing a rigid racial quota that completely eliminated Bakke from consideration for the sixteen special admission spots.⁵² The Powell opinion explained that the University could impose such a remedy only if it established that it had discriminated against minority students,⁵³ or if it could prove that it was using race as a counter-weight to racial or cultural bias in the admissions appraisal process.⁵⁴ Practically then, the Court affirmed Bakke's claim that the University's plan was impermissible.⁵⁵

However, the opinion went on to suggest that the University could consider race as a factor, along with other factors such as geographic region, size of community of origin, community activities, athletic participation, and other factors traditionally used by schools to select a diverse student body as long as race was merely one factor

48. *Bakke*, 438 U.S. at 272-75.

49. *Id.* at 266.

50. *Id.* at 277-78.

51. There were six separate opinions in the case: Justice Powell was joined in minor part by Justices Brennan, White, Marshall, and Blackmun, the four of whom also submitted a joint opinion concurring in the judgment; Justices White, Marshall, and Blackmun each also submitted separate opinions; Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, submitted an opinion concurring in part and dissenting in part. *Id.* at 268. This balkanization of the Court's voice is common in its affirmative action decisions, and it seems to be in conflict with my argument that there is a core of shared principles that runs through the decisions. Examination of the opinions reveals, however, that the Court's failure to reach a consensus in this case arises from disagreements as to the level of scrutiny appropriate in judging government-sponsored affirmative action plans, and the resulting differences in when they are deemed subject to review, rather than from the restrictions described in the text. See *United States v. Paradise*, 480 U.S. 149, 166 (1987).

52. *Bakke*, 438 U.S. at 288-89 & n.26.

53. *Id.* at 300-01, 307-10.

54. *Id.* at 306 n.43.

55. *Id.* at 315.

among many intended to admit a well-rounded class.⁵⁶ Powell reasoned that governmental interference with the university's judgment, when diversity was merely a factor in its decisionmaking process, would interfere with its academic freedom in violation of the First Amendment.⁵⁷ The opinion quoted from Harvard College's description of the role of diversity in its admissions process: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."⁵⁸ Under such circumstances the use of race as a selection criterion would not violate the Constitution.

Bakke is the only affirmative action case decided by the Court involving school admissions.⁵⁹ All of the other Supreme Court cases concern affirmative action in employment or government contracting. The social interest and academic freedom issues in promoting diversity may be stronger and more apparent in education than in employment or contracting, and it may therefore be risky to draw conclusions about these other areas from the Court's statements in *Bakke*. While the Court was concerned about the effect of affirmative action on the expectations and opportunities of whites, it is clear nonetheless that the Court regarded affirmative action as a potentially legitimate remedy to be approved where necessary to counteract discrimination. Thus the Court rejected the U.C. Davis plan but made it clear that some affirmative action plans that included race-conscious decision-making would be permissible.

The Court reached the issue of affirmative action in employment the following term in *Weber*.⁶⁰ *Weber* concerned a challenge to a voluntary affirmative action plan adopted by Kaiser Aluminum & Chemical Corporation (Kaiser) as a result of its contract negotiations with the United Steelworkers union.⁶¹ The plan applied to fifteen Kaiser plants and was designed to eliminate the racial imbalance in Kaiser's employment of skilled craftworkers, almost all of whom were white.⁶² The parties agreed that instead of Kaiser continuing its practice of hiring trained craftworkers, it would develop an apprenticeship pro-

56. *Id.* at 311-19.

57. *Id.* at 314.

58. *Id.* at 316.

59. The court granted certiorari to a case involving law school admissions, but dismissed it after oral argument because of mootness. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

60. 443 U.S. 193 (1979).

61. *Id.* at 199.

62. *Id.* at 197-98.

gram with the union to train its incumbent employees in the skilled crafts.⁶³ Fifty percent of those admitted to the program would be black until the percentage of black skilled craftworkers was equal to the percentage of blacks in each plant's local labor force.⁶⁴

One of the fifteen Kaiser plants was in Gramercy, Louisiana. Because blacks had been systematically excluded from the skilled craft unions, only 5 of the 273 skilled craftworkers at the Gramercy plant were black prior to the adoption of the plan, despite a workforce that was 39% black.⁶⁵ In the first year of the plan's operation, seven black employees and six white employees were admitted into the apprenticeship program.⁶⁶ A number of white employees who sought entry, including Brian Weber, had greater seniority than some of the black employees who were admitted.⁶⁷ Weber thus challenged the plan as discriminating against him on the basis of race in violation of Title VII.⁶⁸

The Supreme Court rejected the challenge and approved the affirmative action plan.⁶⁹ The Court cautioned that its approval was based on the following facts concerning the plan: it was clearly intended to be remedial, being "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories"; its underlying intent was the same as that of Title VII, to eliminate racial discrimination against blacks; its purpose was not to impose a racial balance but instead to eliminate a "manifest racial imbalance"; it did not absolutely deprive whites of employment opportunities, since only half of the positions were reserved for blacks; it did not deprive Weber of a position to which he was otherwise entitled because the program created new opportunities for whites, as well as blacks, which previously had not existed; and it was designed to continue only until the percentage of black skilled craftworkers in the plant mirrored the population of the available work force.⁷⁰

63. *Id.* at 198.

64. *Id.* at 197.

65. *Id.* at 198-99.

66. *Id.* at 198.

67. *Id.* at 199.

68. *Id.* at 199-200.

69. Justice Brennan authored the majority opinion and was joined by Justices Stewart, White, Marshall and Blackmun; Justice Blackmun also authored a concurring opinion; Chief Justice Burger filed a dissenting opinion and joined in a second dissenting opinion by Justice Rehnquist; Justices Powell and Stevens did not participate. *Id.* at 196.

70. *Id.* at 208-09. The Court noted that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first

Although the Court's support of affirmative action plans incorporating race-conscious decisionmaking has ebbed in the seventeen years since *Weber*, the basic analysis of *Weber* has not significantly changed.⁷¹ In cases involving race-conscious decisionmaking by public entities, the Court has required far greater proof of discrimination than a mere "manifest imbalance," insisting upon strong proof of discrimination in the cause as well as in the result.⁷² The Court has thus rejected affirmative action plans where the evidence of discrimination has been insufficient,⁷³ where the settled expectations of white incumbents have been disturbed,⁷⁴ or where the plan has been too broad or open-ended.⁷⁵

Where the essential criteria described in *Weber* have been met, however, the plans have been approved. For example, in *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*,⁷⁶ the Court approved a court-imposed affirmative action plan in which the goal of 29.23% non-white union membership was set by a court-appointed administrator.⁷⁷ The union had violated Title VII by excluding blacks and Hispanics from membership,⁷⁸ and was later found in contempt of court, both for failing to obey the court's earlier remedial orders to recruit minority members and for providing special job protection to white members.⁷⁹ The union appealed the affirmative action order, claiming it exceeded the scope of remedies available under Title VII.⁸⁰

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, concluded that imposition of membership goals as an affirmative

legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.* at 204 (citation omitted).

71. The Court has, however, dropped its approval of the use of quotas in affirmative action plans. In applying the *Weber* rationale to an affirmative action plan that substituted goals for quotas, the Court held that if the plan had used quotas rather than goals it would have been impermissible under Title VII. *See Johnson v. Transportation Agency*, 480 U.S. 616, 628 (1987).

72. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). By contrast, although the Court's decision in *Weber* described strong evidence of discrimination leading to the adoption of the affirmative action plan, the Court did not reach the defense offered by Kaiser and the Steelworkers that their fear of liability for violations of Title VII justified their imposition of an affirmative action remedy. *See Weber*, 443 U.S. at 208 n.8, 209 n.9.

73. *See, e.g., Croson*, 488 U.S. at 469.

74. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

75. *See, e.g., Croson*, 488 U.S. 469.

76. 478 U.S. 421 (1986).

77. *Id.* at 440.

78. *Id.* at 429-30.

79. *Id.* at 434-35.

80. *Id.* at 440.

action remedy was permissible because it was intended to remedy a clear showing of discrimination and would have only a marginal impact on the interests of the white union members.⁸¹ Justice Powell provided a fifth vote in a concurring opinion, in which he offered five reasons to conclude that the affirmative action order was permissible. First, there was a particularly egregious violation of Title VII, and injunctive relief alone would be inadequate;⁸² second, there was no apparent less restrictive remedy, and if the district court could not impose a goal, it would have been rendered powerless;⁸³ third, the duration of the remedy was properly related to achieving its goal;⁸⁴ fourth, unlike a quota, the goal was flexible, with waivers permitted;⁸⁵ and fifth, the white union members would not be burdened by the order.⁸⁶

Similarly, in *United States v. Paradise*⁸⁷ the Court approved a court-imposed affirmative action plan governing promotions of Alabama State troopers from the rank of private to corporal.⁸⁸ The plan required the promotion of a black private for each promotion of a white private (subject to the availability of qualified black privates) until the percentage of black corporals matched the available black labor force (25%) or until a non-discriminatory promotion plan was developed.⁸⁹ Although this plan came perilously close to the kind of rigid quota the Court has usually condemned, in this setting the plan was permissible because of Alabama's long history of discrimination, combined with its failure to comply with earlier, less-exacting consent decrees and court-imposed remedies.⁹⁰ The plan was flexible, in that it operated as a goal, not a quota;⁹¹ it was "waivable and temporary in

81. *Id.* at 479-80.

82. *Id.* at 483-84 (Powell, J., concurring).

83. *Id.* at 486-87.

84. *Id.*

85. *Id.* at 487-88.

86. *Id.* at 488.

87. 480 U.S. 149 (1987).

88. *Id.* at 185.

89. *Id.* at 154-55, 163-64.

90. *Id.* at 154. The Court explained that in 1972 the district court first ordered the hire and promotion of black troopers, finding that they had been systematically excluded from employment—in the entire history of the patrol there had never been a black trooper. *Id.* at 153-54. Despite the district court order, the state simply refused to hire blacks as troopers. *Id.* at 153. The plaintiffs were forced to return for further orders to carry out the initial injunction in 1974, 1977, 1981 and 1983. *Id.* at 154-59. By 1984, although some black officers had been hired, only 4 of the 197 officers above the rank of private were black. *Id.* at 162-63.

91. *Id.* at 177. The 50% rule could be waived if there were insufficient numbers of qualified black applicants for promotion. *Id.*

application”;⁹² and the delay in promotions for white troopers did not constitute an unacceptable burden on innocent parties in the manner that a layoff might because the plan called merely for a postponement.⁹³

Similarly, in *Local 93, International Ass'n of Firefighters v. City of Cleveland*,⁹⁴ the Court approved a consent decree providing an affirmative action promotion plan that required that 33 of 66 imminent promotions to Lieutenant and 10 of 52 promotions to positions above Lieutenant be awarded to black and Hispanic firefighters who had passed the promotional exams, and set goals for further promotions over a 4 year period.⁹⁵ The district court based its approval of the plan on the considerable evidence of minority exclusion from promotions, the city's admission of discrimination, the plan's fairness to white firefighters, the reasonableness of the goals set, and the short duration of the plan.⁹⁶ Over the objections of the union, which was dominated by white firefighters, the Supreme Court treated the consent decree as a voluntary affirmative action plan and affirmed the district court's authority to approve such a plan.⁹⁷

The Court has not been reluctant to reject affirmative action plans requiring race-conscious decisionmaking where it deemed the evidence of discrimination insufficient, or the plan unfair to whites or unartfully drawn. For example, in *Wygant v. Jackson Board of Education*,⁹⁸ the Court rejected a policy that required school teacher layoffs to be governed by a combination of seniority and race.⁹⁹ The purpose of the policy was to maintain the then-existing percentage of minority teachers.¹⁰⁰ The district court approved the policy not because of past discrimination by the Board, but because it accepted the Board's arguments that minority teachers were needed as role models for minority students, and allowed the Board to consider race in layoffs in order to alleviate the effects of societal discrimination.¹⁰¹ The Supreme Court rejected these justifications in a plurality opinion by Justice Powell.¹⁰²

92. *Id.* at 177-78.

93. *Id.* at 182-83.

94. 478 U.S. 501 (1986).

95. *Id.* at 507-10.

96. *Id.* at 512-13.

97. *Id.* at 525.

98. 476 U.S. 267 (1986).

99. *Id.* at 283-84.

100. *Id.* at 270.

101. *Id.* at 272-73.

102. Justice Powell's decision was joined by Chief Justice Burger and Justice Rehnquist, and in part by Justice O'Connor; Justice O'Connor also filed an opinion concurring in part

He concluded that the role model theory conflicted with integrationist principles and permitted race-conscious decisionmaking "long past the point required by any legitimate remedial purpose."¹⁰³ "Societal discrimination, without more," he determined, "is too amorphous a basis for imposing a racially classified remedy."¹⁰⁴ Regarding the Board's attempt on appeal to admit having discriminated in its hiring and thus justify the plan as a remedy for its discrimination, Powell explained that the "trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."¹⁰⁵ A unilateral admission of discrimination, absent strong evidence, is insufficient.¹⁰⁶ Moreover, the use of race in determining layoffs as opposed to hiring decisions was regarded as highly suspect. Justice Powell reasoned that although hiring preferences have a diffuse impact on white applicants, who can be expected to submit applications to multiple employers and to have little basis for settled expectations, layoff preferences in derogation of seniority deprive white workers of an object of considerable value into which they have made a substantial investment.¹⁰⁷

Similarly, in *City of Richmond v. J.A. Croson Co.*,¹⁰⁸ Justice O'Connor, writing for a once again fractured Court,¹⁰⁹ rejected an affirmative action plan that the Court viewed as having gone beyond providing a remedy for past or continuing discrimination.¹¹⁰ The plan required non-minority construction companies entering into contracts with the city to pledge to subcontract at least 30% of the dollar amount of their contracts to minority owned businesses.¹¹¹ The City Council justified the plan based on the disclosure that although more than half of the city's residents were black, well over 99% of the city's

and concurring in the judgment; Justice White authored an opinion concurring in the judgment; Justice Stevens filed a dissenting opinion, as did Justice Marshall, who was joined by Justices Brennan and Blackmun. *Id.* at 268.

103. *Id.* at 275.

104. *Id.* at 276.

105. *Id.* at 277.

106. *Id.* at 278.

107. *Id.* at 280-83.

108. 488 U.S. 469 (1989).

109. There were six opinions by the nine justices, with between three and five votes for various portions of the lead decision. Parts of Justice O'Connor's opinion were joined by Chief Justice Rehnquist and by Justices White, Stevens and Kennedy; Justices Stevens and Kennedy each authored opinions concurring in part and concurring in the judgment; Justice Scalia filed an opinion concurring in the judgment; Justice Marshall filed a dissenting opinion which was joined by Justices Brennan and Blackmun; Justice Blackmun filed a dissenting opinion which was joined by Justice Brennan. *Id.* at 475.

110. *Id.* at 505.

111. *Id.* at 477.

construction contracts were with white-owned businesses, and that the construction contractors' associations in the region had virtually no minority businesses among their members.¹¹²

The Court found that the city had failed to establish the need for remedial action because it had not investigated why it had entered into so few contracts with minority-owned businesses.¹¹³ If the city had made factual findings based on a strong basis in evidence that it had discriminated in its prior practices, or that it had "become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry," it could "take affirmative steps to dismantle such a system."¹¹⁴ However, the inferences drawn from the low level of minority business participation and the high black population were deemed insufficient evidence; the 30% set-aside was not tied to the level of discrimination being remedied or to the population of available minority contractors; it was extended to groups such as American Indians against whom there was no evidence of discrimination in Richmond; and it operated as a quota, not a flexible goal.¹¹⁵

As a result of *Croson*, state and local governments that have adopted race-conscious selection plans for employment or contracting have been required to engage in self-studies to determine whether there is strong evidence that their selection of employees, contractors, or vendors has been discriminatory, and, if so, whether their affirmative action plan is narrowly drawn to remedy that discrimination. Where such studies have been properly performed, race-conscious selection plans have been approved by the courts.

In San Francisco, for example, the city government commissioned two statistical studies, held a series of evidentiary hearings, and invited written submissions from the public.¹¹⁶ The Board of Supervisors used this data to make detailed findings regarding discrimination in some, but not all, areas of city contracting with minority-owned and women-owned businesses.¹¹⁷ In those areas where discrimination was found, an affirmative action plan was crafted which provided a 5% bidding preference on certain kinds of city contracts to relatively small women-owned and minority-owned businesses, and to joint ventures that included a substantial amount of participation by relatively small

112. *Id.* at 479-80.

113. *Id.* at 500.

114. *Id.* at 492.

115. *Id.* at 498-506.

116. *See Associated Gen. Contractors v. Coalition for Economic Equality*, 950 F.2d 1401, 1404 (9th Cir. 1991).

117. *Id.* at 1414-15.

women-owned and minority-owned businesses.¹¹⁸ The U.S. district court and the Ninth Circuit Court of Appeals rejected a challenge to the plan by large contracting firms owned by white males.¹¹⁹

In 1995, in *Adarand Constructors, Inc. v. Pena*,¹²⁰ the Supreme Court extended its ruling in *Croson* to affirmative action plans mandated by Congress.¹²¹ Prior to *Adarand*, the Court had viewed congressionally-mandated affirmative actions plans as resting on a different footing than state-mandated plans, because Section 5 of the Fourteenth Amendment provides Congress with special powers to carry out the purposes of the amendment.¹²² In *Adarand*, the Court made uniform the rules for all government-sponsored affirmative action plans, both state and federal.¹²³

Adarand concerned the federal set-aside provisions required in most federal agency contracts.¹²⁴ These provisions promote a goal of 5% participation by disadvantaged business in federal contracts by providing contractors with financial incentives to subcontract with businesses determined by the Small Business Administration (SBA) to be socially and economically disadvantaged.¹²⁵ Small businesses owned by minority group members are presumed to be socially and economically disadvantaged under SBA regulations, although this presumption is rebuttable.¹²⁶ The lower courts reviewed the plan under an intermediate scrutiny standard, and found it to be justified.¹²⁷ The Supreme Court, in a lead opinion by Justice O'Connor,¹²⁸ required the plan to be reviewed under the strict scrutiny test applied in *Croson*.¹²⁹ As a result, federal affirmative action plans utilizing race-conscious decisionmaking will now require the kind of searching

118. *Id.* at 1404-05.

119. *Id.*

120. 115 S. Ct. 2097 (1995).

121. *Id.* at 2111.

122. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

123. 115 S. Ct. at 2117.

124. *Id.* at 2101-02.

125. *Id.* at 2102-03.

126. *Id.* at 2103.

127. *Id.* at 2118.

128. Once again there were multiple opinions. Justice O'Connor announced the decision of the Court and authored an opinion joined by Justice Kennedy and joined in part by Chief Justice Rehnquist and Justices Scalia and Thomas; Justices Scalia and Thomas each authored decisions concurring in part and concurring in the judgment; Justices Stevens, Ginsburg, Souter and Breyer each dissented, in separate opinions. *Id.* at 2101.

129. *Id.* at 2100.

self-examination by the federal government that *Croson* requires of state and local governments.¹³⁰

The Court in *Adarand* was bitterly divided, not simply on the legal question before it, but on the core issue of whether racial preferences were socially desirable. The majority held that in examining race-conscious decisionmaking by the government, decisions favoring minorities should be viewed no differently than those harming minorities.¹³¹ Justice O'Connor concluded that although the plan "stigmatizes the disadvantaged class [here white men] with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries."¹³² Justice Scalia, in a concurring opinion, argued that the government can never permit race-conscious decisionmaking: "In the eyes of the government, we are just one race here. It is American."¹³³ In dissent, Justice Stevens accused the majority of failing to recognize the "difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority."¹³⁴ Or, as he summed up the majority's view, it failed to distinguish between a "'No Trespassing' sign and a welcome mat."¹³⁵

Despite the colorful rhetoric, both Justice O'Connor and Justice Ginsburg each pointed out that the decision permits governmental affirmative action plans to embrace race-conscious preferences as long as they meet the exacting standards of the strict scrutiny test for equal protection analysis.¹³⁶ This test provides that when a government reg-

130. Within days of the announcement of the decision, the Department of Justice distributed a memorandum to federal agencies explaining the steps required to justify their affirmative action plans. See memorandum to General Counsels from Walter Dellinger, Assistant Attorney General (June 28, 1995) (on file with author).

131. *Id.* at 2097.

132. *Id.* at 2113-14. See also *id.* at 2119 (Thomas J., concurring) ("[R]acial paternalism . . . can be as pernicious as any other form of discrimination.").

133. *Id.* at 2119 (Scalia, J., concurring).

134. *Id.* at 2120 (Stevens, J., dissenting).

135. *Id.* at 2121.

136. Justice O'Connor wrote, "[F]inally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 2117 (citation omitted). Justice Ginsburg wrote, "[c]ourt review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups." *Id.* at 2136 (Ginsburg, J., dissenting).

ulation treats one race differently from another, the regulation must be strictly scrutinized to determine whether it meets a compelling governmental interest which could not be met by a less restrictive alternative.¹³⁷ Unless the governmental action is narrowly tailored to the problem it addresses, it is impermissible.¹³⁸ Both Justice O'Connor and Justice Ginsburg have apparently concluded that affirmative action plans, if properly designed, will pass this test.

Undoubtedly, one effect of *Adarand* is that some federal affirmative action plans will be successfully challenged. Those that survive will have the essential characteristics first identified in *Bakke* and *Weber*; the use of gender or race-conscious decisionmaking will be justified as remedial, based on strong evidence of discrimination which has had a continuing effect on the government's operations. These plans will be narrowly tailored to respond to the discrimination to which they are directed. They will be flexible, waivable, and temporary, and they will not upset the settled expectations of white and male employees or contractors.

III. The Psychology of Discrimination

Given that the principal justification for affirmative action is the need to provide effective remedies for discrimination, an examination of the extent to which discrimination remains a problem in America today is critical to any evaluation of the continuing need for affirmative action. Over the past fifty years, psychologists, sociologists, political scientists, and pollsters have revealed substantial evidence that discrimination is pervasive in our society.¹³⁹ Discriminatory attitudes are often unconscious, and unconscious discrimination has an enormous impact on the lives of blacks and other people of color, and on women of all races and ethnicities. There is considerable evidence that because so much discrimination is motivated by unconscious beliefs and stereotypes, minority group members and women will be significantly harmed by unintended, non-malicious discrimination. This section describes that evidence and demonstrates why special efforts beyond a commitment not to discriminate are required to overcome discrimination.

137. *See id.* at 2117.

138. *Id.*

139. I initially collected and reported on much of the data discussed in this Part in an earlier article concerning the role of unconscious discrimination in employment decisions. *See* David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

Surveys taken during the past fifty years demonstrate that views expressed by whites about racial discrimination have dramatically changed, and that virtually all whites in American society now profess a commitment to non-discrimination, at least in public arenas such as employment. If our society mirrored the expressed viewpoints of its white members, prohibitions of race discrimination would be unnecessary. When more closely examined, however, the surveys demonstrate a continuing high level of general racial prejudice held by whites against blacks, Hispanics and Asians. Although the surveys show that the percentage of whites openly supporting discrimination has dropped considerably, surveys on implementation of civil rights and more sophisticated surveys attempting to measure white stereotypes about blacks demonstrate high levels of covert racism. These surveys support the view that overt racism has lost favor socially, but racist attitudes lie close beneath the surface of our society.

Field and laboratory experiments support the conclusions of the more sophisticated surveys, which attempt to measure stereotyping instead of overt racism, the level of racist behavior observable in such experiments is disturbingly high. Given the wide variance between expressions of overt racist principles and evidence of racist behavior, it appears either that large numbers of whites are falsely denying their consciously-held racist beliefs, or, more likely, that many acts of racist behavior are motivated by unconscious, rather than intentional, racism.

A. Survey Evidence Regarding Racial Attitudes of White Americans

Three national survey organizations have been conducting regular polls on the racial attitudes and beliefs of white adults over the past five decades: the National Opinion Research Center (NORC) at the University of Chicago, the Institute for Social Research (ISR) at the University of Michigan, and the Gallup Organization (Gallup). A recent comprehensive study examines the trends exhibited by these polls from 1942 through 1987.¹⁴⁰ The data reported in the study supports the conclusion that at the level of consciously held attitudes about blacks, there has been considerable progress in whites' statements of principle regarding purely public civil rights, such as employment and public accommodations, but that these principles are not expressed as strongly in areas of private life, such as marriage and housing.

140. HOWARD SCHUMAN, ET AL., *RACIAL ATTITUDES IN AMERICA, TRENDS AND INTERPRETATIONS* (1988).

In response to questions about the principle of non-discrimination in employment, the white response indicates that overt discrimination has lost all social acceptance. In 1944, only 45% of white NORC respondents agreed that “[n]egroes should have as good a chance as white people to get any kind of job”; 55% instead stated that “white people should have the first chance.”¹⁴¹ By 1963, the year before the first major civil rights law of the century was enacted, those favoring equal opportunity had risen to 85%, and by 1972, seven years after the 1964 Civil Rights Act took effect, those in support of job equality had risen to a nearly unanimous 97%.¹⁴² If those 97% of the white population who believe, or profess to believe, in equal employment opportunity, acted in conformance with their beliefs, the problem of race discrimination in employment would largely disappear.

However, other surveys and experiments reveal a wide gap between the 97% support in principle and the number of whites refraining from discrimination. First, support for the principle of non-discrimination in employment does not translate into support for federal enforcement of employment discrimination laws. An ISR question asking whether “the government in Washington [should] see to it that black people get fair treatment in jobs or leave these matters to the states and local communities” found only 38% supporting federal enforcement in 1964.¹⁴³ By 1974 the number had declined to 36%,¹⁴⁴ and by 1987 the number had declined even further, to 33%, with another 33% stating that they had no interest in the issue, and 34% stating that the federal government should not get involved.¹⁴⁵ In other words, a plurality of the population surveyed would support the repeal of Title VII.

This difference between white support for the principle of equal opportunity and white support for federal enforcement of black employment rights is dramatic. It suggests that the 97% support in principle is an empty gesture—that true white support for equal employment opportunity is far lower. One could theorize, however, that the difference merely reflects fiscal concerns, or a preference for local enforcement of civil rights over federal intervention. Survey results on equal opportunities in housing, however, suggest that the difference is not fiscal or procedural, but substantive—that a substantial

141. *Id.* at 74-75 tbl. 3.1. Schuman eliminated the undecided and the non-responsive respondents, except as otherwise noted. *Id.* at 73-76.

142. *Id.* The question was not asked after 1972. *Id.*

143. *Id.* at 88-91 tbl. 3.2 & fig. 3.4.

144. *Id.*

145. *See id.* at xii.

number of whites are willing to lend abstract support to civil rights principles, but are opposed to seeing those principles carried out.

In surveys on open housing, 40% of the NORC respondents in 1963 strongly agreed that “[w]hite people have a right to keep blacks out of their neighborhoods if they want to, and blacks should respect that right,” and another 21% slightly agreed.¹⁴⁶ By 1982 the number of strong supporters had dropped to 14%, while another 15% still slightly agreed.¹⁴⁷ In and of itself, 29% support for allowing housing discrimination is strikingly high, but even more dramatic is that many who do not support such discrimination are nonetheless unwilling to outlaw it. In six NORC surveys between 1973 and 1983, a significant (if declining) majority, ranging from 66% in 1972 to 56% in 1983 supported a hypothetical law providing “that a homeowner can decide for himself who to sell his house to, even if he prefers not to sell to blacks” over a law providing “that a homeowner cannot refuse to sell to someone because of their race or color.”¹⁴⁸ In 1984, the number supporting an open housing law first reached 50%, dropping again in 1986, and rising back to 50% in 1987.¹⁴⁹ Since government enforcement of the law was not an issue in these survey questions, the fiscal or states’ rights explanations are not available here to explain the disparity between support for equality and support for outlawing discrimination. The 50% opposition is not opposition to government intervention; it is opposition to the existence of a legal right to open housing.

Similarly, when ISR informed its subjects in 1974 that public accommodations discrimination was prohibited by law, and then asked whether “the government should support the right of black people to go to any hotel or restaurant they can afford, or should it stay out of this matter,” 20% replied that the government should not enforce the law, another 14% replied they were uninterested in whether the law was enforced, and 66% favored enforcement.¹⁵⁰

In more private areas, even civil rights principles divorced from enforcement find substantial white resistance. In the area of intermarriage, surveys conducted as late as 1983 showed 34% of the NORC respondents favoring laws prohibiting racial intermarriage.¹⁵¹ That is, one in three white Americans not only believed that marriage be-

146. *Id.* at 74-75 tbl. 3.1.

147. *Id.*

148. *Id.* at 88-89 tbl. 3.2.

149. *Id.* at xii.

150. *Id.* at 88-90 tbl. 3.2.

151. *Id.* at 74-76 tbl. 3.1.

tween blacks and whites was wrong, but further believed that it should be illegal. While such laws carried 62% support in 1963, the support had dropped to 29% in 1977 before rebounding in 1980 and 1982.¹⁵² This rebounding was even stronger in response to the question, “[a]re you in favor of desegregation, strict segregation, or something in between?”¹⁵³ Given the opportunity to support something other than desegregation without supporting strict segregation, a full 60% of white ISR respondents favored the “in between” in 1978.¹⁵⁴ Although the number favoring strict segregation slipped from 25% in 1964 to 15% in 1978, only 35% of the 1978 respondents favored full desegregation.¹⁵⁵

A few surveys, most notably a series of questions asked by NORC between 1942 and 1968, attempted to understand the source of white racism by measuring white stereotypes about black Americans.¹⁵⁶ Beginning in 1942 NORC asked “[i]n general, do you believe that Negroes are as intelligent as white people—that is, can they learn things just as well if they are given the same education and training?”¹⁵⁷ In 1942, 53% of respondents answered that blacks were not as intelligent as whites.¹⁵⁸ By 1970, that number had declined to a still very sizable 23%.¹⁵⁹ But here again, the 77% of the whites who responded that they believed blacks to be as intelligent as whites may be overstated, because the contrary response now may be recognized as socially unacceptable even among those whites who continue to believe it to be true.

A 1990 NORC study, conducted after the Schuman study was published, sheds further light on racial attitudes of whites toward blacks in the areas of intelligence and a number of other topics in which stereotypes abound.¹⁶⁰ White subjects were asked to rate various ethnic groups¹⁶¹ regarding certain character traits, such as unintelligent/intelligent and hard-working/lazy. The subjects were given a

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Important work in this area was done in the 1940s and 1950s by Gordon Allport of Harvard. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

157. SCHUMAN ET AL., *supra* note 140, at 74-75 tbl. 3.1, 118-19 tbl. 3.4.

158. *Id.* at 118-19 tbl. 3.4.

159. *Id.*

160. TOM W. SMITH, NATIONAL OPINION RESEARCH CTR., *ETHNIC IMAGES, GENERAL SOCIAL SURVEY TOPICAL REPORT NO. 19* (1990).

161. The groups were whites, Jews, blacks, Asian Americans, Hispanics, and Southern whites. *Id.* at 2.

scale of 1 to 7, and asked to place each ethnic group rated on the appropriate point of the scale for each characteristic. Unlike the earlier polls reported by Schuman et al., the 1990 NORC study carefully avoided using declarative statements with which the subjects could agree or disagree, thereby reducing the likelihood that people would censor themselves from stating socially unacceptable views. For example, subjects were not asked the 1942-68 question "[d]o you think Negroes are as intelligent as white people?"¹⁶² They were instead asked to generally rate whites in intelligence, and then to do the same for blacks and other minorities.¹⁶³

Several of the resulting comparisons are illustrative of the depth of racial stereotyping in America today. Asked to rate racial groups on the characteristic of intelligence, 53.2% rated blacks less intelligent than whites, with 40.5% stating no difference.¹⁶⁴ An almost identical 53.5% rated Hispanics as less intelligent than whites, with 40.1% rating the groups as the same.¹⁶⁵ A smaller but still significant 36.3% rated Asians less intelligent than whites, with 44.6% rating no difference.¹⁶⁶

On the question of hard-working/lazy, 62.2% of the subjects rated blacks as less hard-working than whites, while 31.9% rated them equally; 54.1% rated Hispanics less hard-working than whites, while 37.2% rated them equally; and 34.2% said Asians were less hard-working than whites, while 30.3% said they were more hard-working, and 35.8% said there was no difference.¹⁶⁷ The distribution was also nearly flat regarding Asians when the respondents were asked to rate the propensity for violence; however, 56.1% rated blacks more violence prone, with 30.0% rating no difference, and 49.5% said Hispanics were more violence-prone, while 34.0% found no difference.¹⁶⁸ On the question of patriotism, 50.6% rated blacks less patriotic than whites, while 46.6% rated blacks and whites equally.¹⁶⁹ Asians were viewed as even less patriotic—55.2% said they were less patriotic than whites, while 38.6% said there was no difference.¹⁷⁰ Finally, 60.4% of

162. SCHUMAN ET AL., *supra* note 140, at 118 tbl. 3.4.

163. SMITH, *supra* note 160, at 2-4.

164. *Id.* at 9 tbl. 1.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

the respondents said that Hispanics were less patriotic, while 35.6% said there was no difference.¹⁷¹

To appreciate the significance of such a high number of whites viewing minority group members as less intelligent and less hard-working than whites, consider the effect in the area of employment discrimination. It is likely that employers selecting employees will choose those whom they view as the most intelligent and hard-working. In matters of employee evaluation, stereotypes may become self-fulfilling prophecies by way of suggestion, since most people are prone to seeing what they expect to see. An employer is thus likely, at the 97% level, to subscribe to a belief in the principle of equal employment opportunity, to articulate that belief, and to believe she is applying it. Yet she is nonetheless far more likely than not to view black and Hispanic employees and applicants, and somewhat more likely to view Asian employees and applicants, as less intelligent and less hard-working than are whites. If she applies these stereotypes in evaluating applicants and employees, the resulting decisions are likely to result in substantial discrimination against the minority employees.

The 1990 NORC study tells us much about the attitudes of whites toward minorities, and the reasons whites discriminate. As long as whites believe in minority inferiority, or to flip the term, white supremacy, they should be expected to discriminate. For the most part, however, whites do not view discrimination as the cause of minority subjugation. A 1989 study based on General Social Survey (GSS) interviews with over 6,000 non-black respondents asked directly why blacks are disadvantaged.¹⁷² The question read:

On the average blacks have worse jobs, income and housing than white people. Do you think these differences are . . .

- A. Mainly due to *discrimination*.
- B. Because most blacks have less *in-born ability* to learn.
- C. Because most blacks don't have the *chance for education* that it takes to rise out of poverty.
- D. Because most blacks just don't have the *motivation* or will power to pull themselves out of poverty.¹⁷³

Of the respondents, 9% attributed black disadvantage to inequality in education, and 21% blamed discrimination.¹⁷⁴ But many more blamed African Americans for their own predicament: 20.8% be-

171. *Id.*

172. James R. Kluegel, *Trends in Whites' Explanations of the Black-White Gap in Socio-economic Status, 1977-1989*, 55 AM. SOC. REV. 512 (1990).

173. *Id.* at 513-14 (emphasis in original).

174. *Id.* at 517 tbl. 3.

lieved that the cause of racial disparities was inborn ability, while 43.8% opined that the reason was lack of motivation.¹⁷⁵

B. Laboratory Experiments Measuring Discrimination

Although the 1989 GSS survey and the 1990 NORC survey, as well as many of the earlier surveys on implementation of civil rights laws, disclose an extremely high level of white racism, one obvious problem with survey data is whether the respondents are being truthful in their answers. As high as the numbers are, the disparity between the questions on principle and those on implementation suggests that survey results generally may underestimate the true level of white racism because the respondents are concerned about appearing to be racist. If overt racism is socially unacceptable behavior, persons being surveyed, even anonymously, may be reluctant to reveal their true beliefs.

This is borne out by a series of experiments conducted in the 1970s in which white subjects were polled regarding their views on blacks, with half hooked up to a device (a "bogus pipeline") that was described as a sophisticated lie detector.¹⁷⁶ The subjects attached to the bogus pipeline admitted holding far more negative stereotypes than did those merely asked to rate racial characteristics. For example, Sigall and Page found that the subjects hooked up to the bogus pipeline described blacks as less "honest" and "intelligent," and more "lazy," "stupid" and "physically dirty" than did those subjects not hooked up to the device.¹⁷⁷ Allen demonstrated that whites who had been rated as "unprejudiced" in a paper test on racial attitudes showed a significant reduction of expressed admiration of black public figures when hooked up to the bogus pipeline.¹⁷⁸ In Carver's study, the subjects were asked to characterize a fellow student based on a

175. *Id.*

176. The studies are documented in Harold Sigall & Richard Page, *Current Stereotypes, A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOL. 247, 247-255 (1971); Ben P. Allen, *Social Distance and Admiration Reactions of "Unprejudiced" Whites*, 43 J. PERSONALITY & SOC. PSYCHOL. 709, 709-726 (1975); and Charles S. Carver et al., *Favorable Evaluations of Blacks and the Handicapped: Positive Prejudice, Unconscious Denial, or Social Desirability?*, 8 J. APPLIED SOC. PSYCHOL. 97, 97-106 (1978). The studies are described and interpreted in Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 546-563 (1980).

177. See Sigall, *supra* note 176, at 250-51. Both groups of whites, those hooked up to the machine and those simply asked to rate characteristics, rated blacks negatively as compared to whites. *Id.*

178. See Allen, *supra* note 176, at 717-23 tbl. 4. In a paper and pencil test, the "unprejudiced" whites rated the black public figures 1.40 points (on a 10 point scale) higher than a

transcript of an interview.¹⁷⁹ The transcripts were identical, save that half identified the interviewee as black.¹⁸⁰ Those not hooked up to the bogus pipeline actually gave the black student a higher rating than the student whose race was not identified, but those persuaded that their “true feelings” were being measured rated the black student significantly lower than the other.¹⁸¹ These results suggest a high level of dissembling by many survey participants, and raise the question of whether the data revealed in the subtle 1990 NORC survey understates the true level of white racism.

One response to the limitations of survey data has been to design experiments that measure behavior, rather than attitude. Such tests can both ferret out conscious racism that the subject would prefer not to admit—as in the bogus pipeline experiments—and reveal unconscious racism, which may be unknown to the subject. In 1980, Crosby, Bromley, and Saxe examined a large number¹⁸² of field experiments conducted since the mid-1960s which attempted to test for racism by testing for the presence of discriminatory behavior. These experiments attempted to observe white subjects in an interracial situation where their conduct, if uninfluenced by racism, would be expected to be similar to their conduct with other whites.¹⁸³ The results present strong evidence that the reduction in racist views expressed in surveys does not foretell a corresponding reduction in racist behavior.

Thirty of the studies reviewed by Crosby were “helping behavior studies” in which white subjects were faced with people (half of whom were white, half of whom were black) posing as needing assistance. For example, in a number of studies a person posing as a shopper would drop a bag of groceries; the study measured whether white passers-by were more likely to help if the person in need were white or black.¹⁸⁴ In others, a person would pose as a motorist in distress to measure whether white drivers were more likely to help blacks or whites.¹⁸⁵ In Crosby’s analysis of these experiments, she found that in

matched set of white public figures. Once hooked to the machine, they rated the white public figures 0.46 points higher. *Id.*

179. *See* Carver, *supra* note 176, at 101-103.

180. *Id.*

181. *Id.*

182. Crosby chose 46 such studies that utilized “unobtrusive” experiments—experiments in which subjects were not aware that they were being studied, or were not aware that the study was examining discrimination. Crosby, *supra* note 176, at 546-47.

183. *Id.*

184. *See id.* at 549, 551 tbl. 1.

185. *See id.* at 551 tbl. 1.

40% of the studies white subjects showed discrimination against blacks.¹⁸⁶

High as it is, this 40% measure of discrimination actually may be understated due to the social scientists' conservative analysis of what constitutes non-discrimination. In the shopping bag experiment, for example, Crosby reports the experimenter's conclusion that the white subjects showed no discrimination in their willingness to help the shoppers whose bags broke, categorizing it in the "no discrimination" classification.¹⁸⁷ But, as Crosby notes, while whites and blacks were offered assistance in equal numbers, the amount of assistance offered was not equal.¹⁸⁸ Rather, 63% of the time that white subjects were aiding white women, the subjects gave complete help, picking up all of the groceries, while 70% of the time when white subjects helped black women, they gave only perfunctory help, picking up only a few packages.¹⁸⁹ When complete help and perfunctory help are distinguished, the study demonstrates that whites are twice as likely to help other whites as they are blacks.

In most of the helping behavior studies analyzed by Crosby, the subject was engaged in a face to face encounter with the person needing help. But in eight of the thirty studies, the encounter was remote. In comparing the face to face experiments with the remote experiments, Crosby found that in 32% of the face to face studies, there was white discrimination against blacks, while in 75% of the remote studies there was such discrimination.¹⁹⁰ This disparity supports the view that when engaging in public activity, whites may be more careful to avoid discriminating, but when acting privately or anonymously, most whites will discriminate against blacks.

One particular study which supports this analysis was especially striking. An envelope containing a completed graduate school application was left at an airport phone booth.¹⁹¹ The application contained a stamped, addressed envelope for submission to graduate school, a note to "Dad" asking him to please mail the application, and, as part of the application, a photograph of the candidate.¹⁹² White adults were observed picking up the application in the phone booth

186. *Id.* at 549, 550-52 tbl. 1.

187. *Id.* at 549.

188. *Id.*

189. The analysis is calculated by Thomas F. Pettigrew in *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *RUTGERS L. REV.* 673, 688-89 (1985).

190. Crosby, *supra* note 176, at 549, 552 tbl. 2.

191. *Id.* at 549, 551 tbl. 1.

192. *Id.*

and inspecting it.¹⁹³ They were found to be significantly more likely to mail the application when the applicant was white than when the applicant was black.¹⁹⁴ Crosby theorized that white helping behavior was more prevalent in face to face encounters because “[w]hites today hold prejudiced attitudes, but . . . they inhibit expression of this prejudice when the possibility of negative consequences is great. In the more removed and anonymous situations (Type 2), discrimination is much more likely to emerge.”¹⁹⁵

In addition to the helping behavior studies, another set of studies examined by Crosby measured nonverbal behavior to test for racism. Each of the four experiments in this group found measurable white racism.¹⁹⁶ For example, in one experiment white male students at Princeton were asked to interview a white or black high school student.¹⁹⁷ The interviewees were trained participants (confederates), instructed to behave in a like fashion.¹⁹⁸ As Crosby reports, “[t]he subjects sat further away from the black confederates than from the white confederates, made more speech errors when talking to the blacks than when talking to the whites, and terminated the black interviews sooner than the white interviews. In short, a marked degree of nonverbal discriminatory behavior was obtained.”¹⁹⁹

A laboratory study from 1976 demonstrated the impact of racial stereotyping on perception.²⁰⁰ White undergraduates viewed a videotape on a monitor in which one participant shoved another.²⁰¹ When the person doing the shoving was black, the subjects described the shove as violent, but when the person doing the shoving was white, it was described as harmless “playing around.”²⁰²

C. Discrimination and Psychological Development in Children

The psychology of racism is not limited to adults; It begins at an early age. A 1993 study of white children attending preschool and elementary schools in predominantly white middle class neighborhoods in Pennsylvania and Minnesota examined the degree of racial

193. *Id.*

194. *Id.*

195. *Id.* at 549.

196. *Id.* at 555-56.

197. *Id.* at 555.

198. *Id.*

199. *Id.*

200. *Id.* at 556.

201. *Id.*

202. *Id.*

stereotyping in children aged four through nine.²⁰³ Asked to assign traits like "dirty" or "clean," "smart" or "stupid," many engaged in significant racial stereotyping.²⁰⁴ For example, 72% associated cleanliness with white people; only 19% associated it with black people.²⁰⁵ Similarly, 79% associated dirtiness with blacks, 16% with whites, and 64% associated stupidity with blacks, while 27% associated it with whites.²⁰⁶ When these children were told stories in which black characters acted in conflict with the prevailing stereotypes, such as stories where blacks were hard working and whites were lazy, they were more likely to either forget the story or, worse yet, to switch the roles in remembering, recalling the black character as the lazy one.²⁰⁷

A similar study of three to six year olds measured the likelihood that children would find more humor in the depiction of an accident involving a black or Hispanic child rather than a white child.²⁰⁸ White children found the accident depictions funnier when the victim was non-white; so did the black and Hispanic children.²⁰⁹ The authors concluded that white children had a stronger racial identity than black and Hispanic children.²¹⁰ To put this differently, it appears that by age six, non-white children have internalized the racism of our society. This observation was manifested further in another study where non-white kindergarten and second grade children were found to identify with pictures of white children as those most like themselves, most like they wanted to be, and most like they would want their friends to be.²¹¹

D. The Psychology of Sex Stereotyping

The psychology of sex stereotyping is also important in understanding discrimination. Although women are legally entitled to equality of treatment in the workplace and in business transactions, sex stereotyping acts as a potent roadblock in preventing equal treat-

203. Rebecca S. Bigler & Lynn S. Liben, *A Cognitive-Developmental Approach to Racial Stereotyping and Reconstructive Memory in Euro-American Children*, 1993 *CHILD DEV.* 1507.

204. *Id.* at 1516.

205. *Id.* at 1517 tbl. A1.

206. *Id.*

207. *Id.* at 1516.

208. Paul E. McGhee & Nelda S. Duffey, *Children's Appreciation of Humor Victimizing Different Racial-Ethnic Groups*, 14 *J. OF CROSS-CULTURAL PSYCHOL.* 29 (1983).

209. *Id.* at 35-37.

210. *Id.*

211. Mary A. Newman et al., *Ethnic Awareness in Children: Not A Unitary Concept*, 144 *J. OF GENETIC PSYCHOL.* 103-112 (1983).

ment even among those who would obey the law.²¹² Studies have repeatedly demonstrated that women are viewed as having less leadership ability than men, as less assertive than men, less willing to take risks than men, less willing to take a stand than men, and less willing to defend their beliefs than men.²¹³ While measurable differences in personality between men and women do exist, the prevailing stereotypes grossly exaggerate the true differences, to the considerable disadvantage of women.²¹⁴ These stereotypes are not held only by men—as a group, women see themselves as less able than men in business and workplace skills.²¹⁵ These stereotypes significantly affect women's occupational aspirations, entry into occupations, and treatment and advancement within occupations.²¹⁶

IV. Why We Need Affirmative Action

A. Introduction

Given that the justification for affirmative action is the existence of discrimination that requires a remedy, we cannot determine whether affirmative action is necessary without considering the extent to which discrimination based on race, ethnicity, and gender continues to affect American society. Section III demonstrated the psychological foundation of contemporary discrimination and the likelihood that its victims will be women and minorities. Yet those who oppose affirmative action argue that the most likely victims of discrimination today are white men, and many Americans agree with that assessment.²¹⁷ This section is a refutation of that argument.

212. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that evidence of sex stereotyping is sufficient to prove violation of Title VII).

213. Carol Lynn Martin, *A Ratio Measure of Sex Stereotyping*, 52 J. OF PERSONALITY AND SOC. PSYCHOL. 489, 492 tbl. 1 (1987).

214. *Id.* at 497; see also Richard A. Fabes & Mary R. Laner, *How the Sexes Perceive Each Other: Advantages and Disadvantages*, 15 SEX ROLES 129 (1986).

215. Jayne E. Stake, *Gender Differences and Similarities in Self-Concept Within Everyday Life Contexts*, 16 PSYCHOL. OF WOMEN Q. 349-63 (1992).

216. Thomas L. Ruble et al., *Sex Stereotypes: Occupational Barriers for Women*, 27 AM. BEHAV. SCIENTIST 339-56 (1984).

217. See, e.g., *The Newsweek Poll, March 23-24, 1995*, NEWSWEEK, Apr. 3, 1995, at 34 (finding that twice as many respondents "think whites [are] losing out because affirmative action is a bigger problem" than "think blacks [are] losing out because racial discrimination is a bigger problem in the workplace"); *The Newsweek Poll, February 1-3, 1995*, NEWSWEEK, Feb. 13, 1995, at 34 (finding that 54% of whites agree that we have "gone too far in pushing equal rights in this country," while 64% of blacks disagree); MOLLYANN BRODIE, *THE FOUR AMERICAS: GOVERNMENT AND SOCIAL POLICY THROUGH THE EYES OF AMERICA'S MULTI-RACIAL AND MULTI-ETHNIC SOCIETY* 100 (1995) (finding that 37% of white respondents believe that whites are losing out to minorities in the workplace due to

By examining the actual differences in treatment between men and women and between whites and minority group members in the areas of education, employment, housing, health care, economic opportunity, crime and poverty, it becomes clear that race, ethnicity, and gender play a powerful role in determining treatment and privilege in American life—that to be black or brown and/or female is an enormous disadvantage in gaining access to the basic necessities of life. Because of the massive discrimination practiced today against women and minorities throughout American life, I conclude that affirmative action remains a necessary remedy.

In considering the data presented here, it is worth noting that white Americans have an exaggerated view of the number of non-whites in the United States, which may contribute to a warped view of the power of minority groups. In a recent survey, white respondents estimated the white population of the United States at under 50%, while it is actually 74% as of the 1992 census.²¹⁸ Whites estimated the black population at just over twice its actual size—23.8% instead of 11.8%.²¹⁹ The Hispanic population, which is actually 9.5%, was estimated to be 14.7%, while the Asian American population, which is 3.1%, was thought to be 10.8%.²²⁰ The white poll respondents were almost evenly split on whether most blacks have the same standard of living and opportunities as whites (47%) or have a lower standard of living and fewer opportunities than whites (51%).²²¹ Moreover, when framed entirely in terms of economic opportunity, 68% of the white respondents believe that blacks have the same or more opportunity as do white Americans to be “really successful and wealthy.”²²² Similarly, 64% of the white respondents stated that access to health care for blacks is just as good or better than it is for whites.²²³ Only 30% responded that access for blacks is worse than access for whites.²²⁴ While 51% stated that access to health care is better for Hispanics than for white Americans, only 42% believe it is worse.²²⁵ A majority of the whites polled believe that the average black American is just as well off or better off than the average white American in terms of

unfair preferences, and that this is a bigger problem than minorities facing discrimination and lack of opportunity for advancement).

218. BRODIE, *supra* note 217, at 78, 103.

219. *Id.*

220. *Id.*

221. *Id.* at 81.

222. *Id.* at 77.

223. *Id.* at 81-82.

224. *Id.*

225. *Id.* at 83-84.

education, and an equal number believe the average Hispanic American is as well off or better off as believe that the average Hispanic American is worse off.²²⁶

B. Education

Perhaps the most controversial aspect of affirmative action is the consideration of race or ethnicity as a factor in university admissions. Despite the Court's holding in *Bakke* that race may be considered as one factor among others in a school's attempt to admit a diverse student body, many argue that school admissions should be based on grades and standardized test scores alone. These critics overlook the fact that in the area of elementary and secondary education, minority children receive dramatically unequal opportunities compared to whites. Most black and Hispanic school children attend de facto segregated schools which are over-crowded, under-funded, and badly maintained.²²⁷ Perversely, those children whose needs are greatest are given the worst education. In his landmark study, *Savage Inequalities*, Jonathan Kozol exhaustively studied the spending and facilities in a number of major American communities and found that the educational services provided and money spent on education were closely linked to race, and that white children were provided with far, far more than non-white children.²²⁸

In Chicago, for example, Kozol found that the largely white suburban schools were far superior by any measure to the largely non-white city schools. Examining student/teacher ratios, physical facilities, teacher salaries, library and text book availability, and counseling programs, the differences were dramatic. In 1989, Chicago spent approximately \$5,265 per student; the largely white suburbs north of the city spent as much as \$9,300.²²⁹ The City's political leaders had abandoned the public schools, sending their own children to private schools; Governor Thompson, opposing more aid to Chicago's public schools, explained revealingly, "[w]e can't keep throwing money into a black hole."²³⁰

Kozol's findings were similar in New Jersey, where largely non-white Camden spent \$3,538 per pupil in 1989, while its next-door neighbor, largely white Cherry Hill, spent \$5,981, and nearby

226. *Id.* at 81-84.

227. *See generally* JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1992).

228. *See generally id.*

229. *Id.* at 54, 236 tbl. I.

230. *Id.* at 53.

Princeton, again largely white, spent \$7,725.²³¹ “What does money buy for children in New Jersey?” Kozol asks, then replies:

For high school students in East Orange, where the track team has no field and therefore has to do its running in the hallways of the school, [money] buys a minimum of exercise. . . . In mostly upper-middle [class] Montclair, on the other hand, it buys two recreation fields, four gyms, a dance floor, a wrestling room, a weight room with a universal gym, tennis courts, a track, and indoor areas for fencing. It also buys 13 full-time physical education teachers for its 1,900 students. East Orange High School, by comparison, has four physical education teachers for 2,000 students, 99.9 percent of whom are black.²³²

In New York, Kozol found that the average 1990 expenditure per pupil in the largely non-white New York City public schools was \$7,299; in largely white suburbs on Long Island the funding levels frequently rose to over \$14,000 and in some cases to over \$15,000.²³³ Even within the city, white enclaves received far more resources than non-white communities. In one illustration, Kozol compares two schools he visited in the same school district in the Bronx.²³⁴ The first, P.S. 261, is in a dark, largely windowless building—a former roller-skating rink. The building’s capacity is 900, but 1,300 students are enrolled, with classes as large as 37 students. Because there are not enough classrooms, classes “double up.” Kozol observed a class of sixth graders sharing their classroom with a class of bilingual second graders, with 63 children and adults speaking different languages as they shared a classroom designed for 20. It is, however, the only classroom in the school with a window. Because text-books are scarce, the children must share them. The school library, also windowless, holds just 700 volumes, none of which are reference books. There is no recess because there is no playground. P.S. 261 is 90% black and Hispanic; the remaining 10% of the students are Asian, Middle Eastern, and white.

In the same school district, a few miles away from P.S. 261, is P.S. 24.²³⁵ The school is in a white enclave called Riverdale. The school is light and airy. It stands next door to a playground. Behind it are sports fields. The school library, with almost 8,000 volumes, looks out on a park. A parents’ group staffs the library and raises money to

231. *Id.* at 236 tbl. II.

232. *Id.* at 157.

233. *Id.* at 83-84, 120, 123, 237 tbl. IV.

234. The descriptions of the two schools is taken from KOZOL, *supra* note 227, at 85-98.

235. New York City’s schools are divided into 32 districts. Both schools are in District 10. *Id.* at 84.

support its collection. Encyclopedias are placed in the classrooms, where classes of 22-23 students study. P.S. 24 serves 825 students. Approximately 130 are black or Hispanic, and virtually all of them are assigned to "special" classes, having been diagnosed as "retarded." The remaining 700 students are mostly white, with a few Asians.

In Detroit, Kozol reports, where the schools are almost 90% black, they are

so poorly funded that three classes have to share a single set of books in elementary schools. "It's not until the sixth grade," the *Detroit Free Press* reports, "that every student has a textbook." At MacKenzie High School in Detroit, courses in word processing are taught without word processors. . . . Of an entering ninth grade class of 20,000 students in Detroit, only 7,000 graduate from high school, and, of these, only 500 have the preparation to go on to college.²³⁶

In 1988, Detroit spent approximately \$3,600 per child for the schools, while the largely white suburbs of Grosse Point, Bloomfield Hills and Birmingham spent between \$5,700 and \$6,400.²³⁷

In California, the courts have ordered that spending by school districts be equalized in order to eliminate the imbalance and its fundamental unfairness.²³⁸ Nonetheless, some disparities are permitted, and spending in 1990 ranged from less than \$3,000 per child to over \$7,500 per child.²³⁹ In Texas, where a legal challenge to equalize school spending was defeated,²⁴⁰ spending in 1991 ranged from less than \$2,000 per child to approximately \$19,000 per child.²⁴¹ In San Antonio, with a large Hispanic school population, the 1989 school spending was pegged at \$2,800 per child, while in the largely white enclave of Alamo Heights, which is completely surrounded by San Antonio but operates an independent school district, the spending per child was \$4,600.²⁴²

Federal programs sending aid to poor school districts undoubtedly help, and a recent report by the Department of Education concludes that because of such programs, we now spend more money on

236. *Id.* at 198.

237. *Id.*

238. *Serrano v. Priest*, 18 Cal. 3d 728 (1976).

239. KOZOL, *supra* note 227, at 222.

240. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972). A decision requiring equalization was handed down by the Texas Supreme Court in 1989, but full equalization has not yet occurred. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W. 2d 391 (1989).

241. KOZOL, *supra* note 227, at 223.

242. *Id.* at 224.

primarily minority schools than we do on majority white schools.²⁴³ The authors were surprised at this finding and called for further study of the question.²⁴⁴ Their report also determined, however, that there are more students per teacher in minority districts and poor districts,²⁴⁵ and that total revenues per student are far lower in poor districts than in wealthy districts.²⁴⁶

Attracting committed teachers to black and Hispanic schools is, of course, important. Also important is helping teachers, particularly white teachers, overcome their own biases. Numerous studies have demonstrated that even well-meaning white teachers often bring to the classroom stereotypical views of their minority students that exacerbate the problem of racial and ethnic discrimination.²⁴⁷ Regardless of a child's social class standing, teachers more often than not expect black children to fail and white children to succeed, and treat them accordingly.²⁴⁸ A compilation of studies concludes that white teachers see black children as "high strung" and "rebellious," while black teachers see the same children as "energetic" and "ambitious."²⁴⁹ These differences are important because students whose teachers expect them to succeed are more likely to succeed; those whose teachers expect them to fail probably will.²⁵⁰ A 1991 study of the preferences of white fourth grade teachers found a distinct preference not to be assigned to teach black male children described as "nonsubmissive" and "independent."²⁵¹ The teachers viewed such children as less promising academically than other students with equal academic records, and as potentially more disruptive.²⁵²

In one notable study on self-fulfilling prophecy in education, psychologist Ray Rist observed a classroom of students over a three year period.²⁵³ Their kindergarten teacher sorted them on the eighth day

243. THOMAS B. PARRISH, NATIONAL CENTER FOR EDUCATION STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING 1989-90, at 59 fig. 19 (1995).

244. *Id.* at xxiii.

245. *Id.* at 39-40, 42.

246. *Id.* at 62 (districts with poorest households spend 29% less per student, even after federal assistance, than districts with wealthiest households).

247. *See, e.g.*, CAROLINE PERSELL, EDUCATION AND INEQUALITY (1977) (compiling studies on subject).

248. *Id.* at 104-05.

249. *Id.* at 113-14.

250. *Id.* at 131-32.

251. Sandra I. Ross & Jeffery M. Jackson, *Teachers' Expectations for Black Males' and African Black Females' Academic Achievement*, 17 PERSONALITY AND SOC. PSYCHOL. BULL. 78 (1991).

252. *Id.*

253. *See* WILLIAM RYAN, EQUALITY 130-32 (1984).

of school into “fast learners” and “slow learners.” Her evaluation held true as they progressed through school; by second grade those deemed fast learners were far ahead. Rist observed that the initial evaluation could be explained based on a few discernable factors. The “fast learners” were the neat, clean, verbal kids from middle-class families. Why did they do so much better than the others? Rist observed that once they were tracked, the teacher taught almost exclusively to the “fast learners,” rarely interacting with the “slow learners” except to discipline them.

In another famous self-fulfilling prophecy experiment, Rosenthal and Jacobson randomly selected 20% of the students at a San Francisco school and falsely told their teachers that they had been identified by test results as “spurters”—children who would abruptly start to do better in their school work.²⁵⁴ Most of the “spurters” spurted, showing tremendous gains in their test scores. Their teachers identified them as better adjusted and more curious. By contrast, children not identified as “spurters” who spurted anyway were viewed as disruptive and poorly adjusted.

Expectations and tracking are closely related to race and ethnicity. In 1982, white public school students were almost three times as likely to be tracked in “gifted/talented” programs than black students, and almost four times as likely as Hispanic students.²⁵⁵ Tracking in programs for the “mentally retarded” was the reverse; black students were over three times as likely to be labeled “Educable Mentally Retarded,” and for Hispanic students the increased likelihood was over 25%.²⁵⁶ In the area of school discipline, Jennifer Hochschild reports that “[b]lacks in elementary school are three times as likely to be suspended as their white peers, and secondary school blacks are twice as likely to be suspended. On average, blacks are suspended at a younger age, for a longer period, and more times than whites.”²⁵⁷

The results of this discrimination in education are hardly surprising, but they are dramatic. As of 1984, 42% of black teenagers, but fewer than 10% of white teenagers, were functionally illiterate.²⁵⁸ A 1995 study reported that a white high school graduate is far more likely to attend college than is a black or Hispanic high school gradu-

254. *See id.*

255. Robert E. England, et al., *Barriers to Equal Opportunity: Educational Practices and Minority Students*, 23 URB. AFF. Q. 635, 640 tbl. 1.

256. *Id.*; see also JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 31 (1984).

257. HOCHSCHILD, *supra* note 256, at 32.

258. *Id.* at 21.

ate.²⁵⁹ And a white high school graduate is over twice as likely to graduate from college as a black high school graduate, and almost three times as likely as an Hispanic high school graduate.²⁶⁰ For Hispanics, that gap is growing. In 1970, 5% of Hispanic Americans and 11.6% of non-Hispanic Americans held college degrees; by 1994, the figures had grown to 9% of the Hispanic population and 24% of the non-Hispanic population.²⁶¹

Despite all the controversy surrounding affirmative action admissions to colleges, more white students gain entry to Harvard College through special admission programs as “legacies”—the children of alumni—than do the total number of black, Hispanic, and Native American students altogether, including those admitted through the regular admissions program and those admitted through the special admissions programs for the disadvantaged.²⁶² At both Harvard and Yale, legacy applicants, who are overwhelmingly white and affluent, are accepted at over twice the overall admissions rate.²⁶³ The Office of Civil Rights of the United States Department of Education concluded that Harvard’s preference for legacy admissions had a discriminatory impact on Asian American applicants, but further determined that the preferences were legitimate because they were long-standing and were not a pretext for discrimination.²⁶⁴

The preference for legacies in college admissions is exacerbated by the relationship between family income and SAT scores. Average SAT scores rise dramatically with family income, from a mean total of 766 out of 1600 points for the children of families earning under \$10,000 a year, to a mean total of 1,000 for those with family incomes above \$70,000 a year.²⁶⁵ The close relationship between race and poverty²⁶⁶ guarantees that blacks and Hispanics will congregate at the low end of the SAT ladder, while the upper end will be largely white.

In sum, black and Hispanic children suffer substantial discrimination in our public schools. They attend largely separate and unequal schools; they are disproportionately tracked into classes for slow

259. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 12-13.

260. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 235 (1993).

261. See Steven A. Holmes, *Census Report Finds Hispanic Americans Lagging Further in College Degrees*, N.Y. TIMES, July 27, 1995, at A10.

262. Lamb, *supra* note 14, at 504.

263. *Id.* at 503 tbl. 1., 505 tbl. 3.

264. *Id.* at 502.

265. David K. Shipler, *My Equal Opportunity, Your Free Lunch*, N.Y. TIMES, March 5, 1995, § 4 (Magazine), at 1, 16.

266. See *infra* Part IV.H.

learners or the "educable mentally retarded;" their teachers give less to them and expect less of them; they are more likely to be disciplined; and they are more likely to drop out. Although minority students receive some assistance in college admissions from affirmative action programs, white students are more likely to benefit from special admissions preferences, based on their relationship to alumni, than are minority students based on race or ethnicity. Despite the existence of affirmative action, white high school graduates are far more likely to attend college than are minority students.

C. Employment

Blacks, Hispanics and Asian Americans earn substantially less than do whites, and in some respects things are getting worse. In 1980, the average black male worker earned \$751 for every \$1,000 earned by a white male worker.²⁶⁷ By 1990 it had dropped to \$731.²⁶⁸ Higher education helps, but not much. In 1990 the average black male college graduate earned \$798 for every \$1,000 earned by a white male college graduate.²⁶⁹ Those who attended at least one year of graduate school dropped to \$771.²⁷⁰ In 1979, Chinese American men with college degrees earned approximately \$862 for every \$1,000 earned by comparably educated white men.²⁷¹ For Japanese American men with college degrees, the comparable figure was approximately \$944.²⁷² In 1990, Hispanic men earned \$810 for every \$1,000 earned by similarly educated white men.²⁷³

Women of all races continue to earn substantially less than men. In the 1960's women earned 60% of what men earned on average; by 1993, it had risen only to 72%.²⁷⁴ The average woman with a masters degree earns the same amount as the average man with an associate (junior college) degree.²⁷⁵ Hispanic women earn less than 65% of the wages earned by white men at the same education level.²⁷⁶ An Hispanic woman with a college degree earns, on average, less than a

267. HACKER, *supra* note 260, at 101.

268. *Id.*

269. *Id.* at 95.

270. *Id.*

271. Min Zhou & Yoshinori Kamo, *An Analysis of Earnings Patterns for Chinese, Japanese, and Non-Hispanic Caucasian Males in the United States*, 35 Soc. Q. 581, 591 tbl. 2 (1994).

272. *Id.*

273. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 14.

274. *Id.*

275. *Id.* at 24.

276. *Id.* at 15.

white man with only a high school degree.²⁷⁷ As of 1995, black women earn 10% less than white women and 36% less than white men, while Hispanic women earn 24% less than white women and 46% less than white men.²⁷⁸ Almost two thirds of all working women earn less than \$20,000 annually—over one third earn less than \$10,000.²⁷⁹

Although white men make up only 43% of the workforce,²⁸⁰ they constitute 97% of the top executives (vice-presidents and above) at the 1,500 largest American corporations.²⁸¹ Black women with professional degrees who do attain top management positions earn 60% of what white men in similar positions earn.²⁸² Among physicians, women earn less than 60% as much as men.²⁸³ A recent study revealed that women graduates of the University of Michigan Law School earned just 61% of what male graduates earned after fifteen years of practice, and that after controlling for grades, career choice, experience, work hours and family responsibilities, there remained an unexplained gap of 13%.²⁸⁴

Black employment remains concentrated in the least respected, most undesirable job categories. Although blacks constitute 12% of the population and 10% of the workforce, they fill over 30% of the nursing aide and orderly jobs and almost 25% of the domestic servant jobs, but only 3% of the jobs for lawyers and doctors.²⁸⁵ In 1993, black and Hispanic men were only half as likely as white men to be managers or professionals.²⁸⁶ Similarly, women are disproportionately steered into service jobs—although there are nearly as many women as men in the workforce, under 25% of all doctors and lawyers

277. *Id.* at 21.

278. *Hearings on Affirmative Action in Employment: Hearings on H.R. 2128 Before the Subcomm. on Employee-Employer Relations of the House Comm. on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 268 (1995) (statement of Marcia D. Greenberger, Co-President, Nat'l Women's Law Ctr.).

279. See ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, SER. P60, NO. 184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992, at 150 tbl. 31 (1993).

280. FEDERAL GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 10-11 (1995).

281. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 23. The "glass ceiling" issue has been a subject of particular interest to Asian-Americans, as well as women of all races. See U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s, at 130 (1992).

282. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 23.

283. WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, WOMEN WORKERS: TRENDS AND ISSUES 35 (1993).

284. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 25.

285. HACKER, *supra* note 260, at 111, 113.

286. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 24.

are women.²⁸⁷ Women comprise over 90% of all dental hygienists, but only 10.5% of the dentists.²⁸⁸

In the area of unemployment, the situation is getting worse, not better, for blacks. During the 1970s the average unemployment rate for blacks was twice as high as it was for whites.²⁸⁹ By 1990, the black unemployment rate was 2.76 times higher than the white rate.²⁹⁰

As dramatic as these differentials are, they give us only part of the picture. Many unemployed workers are not counted by the Bureau of Labor Statistics because they have stopped actively looking for work—if we count these “hidden unemployed,” the first quarter 1992 black unemployment rate was 25.5%.²⁹¹ For black teenagers, the official unemployment rate was 38%; adding the hidden unemployed raised the true figure to almost 60%.²⁹² Moreover, unemployed blacks took longer to find new jobs than unemployed whites, and were only half as likely to qualify for unemployment insurance.²⁹³

Some have theorized that factors other than race explain the employment and income disparities between blacks and whites. A recent study tested the theories that black income is lower than white income because of education, employment status, age, sex, social class, marital status, community (city or suburb), and region.²⁹⁴ The author found that although each of these factors helped to explain the race gap in income, when all were factored in, a gap remained that was particularly large for middle-class, well educated black men employed as professionals, whom the author concluded were “a ‘truly disadvantaged’ group when compared to middle-class whites.”²⁹⁵

During periods of economic growth, one might expect those groups who are less represented in the workforce to make greater gains. But in the long business cycle upswings of the 1970s and 1980s, the relative position of black workers grew worse, not better.²⁹⁶ How-

287. ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, AT 407-409 (1994) [hereinafter STATISTICAL ABSTRACT].

288. *Id.*

289. HACKER, *supra* note 260, at 103.

290. *Id.*

291. NATIONAL URBAN LEAGUE, PERILS OF NEGLECT: BLACK UNEMPLOYMENT IN THE NINETIES 1 (1992).

292. *Id.* at 2.

293. *Id.*

294. Melvin E. Thomas, *Race, Class, and Personal Income: An Empirical Test of the Declining Significance of Race Thesis, 1978-1988*, 40 SOC. PROBS. 328 (1993).

295. *Id.* at 339-40.

296. See M.V. Lee Badgett, *Rising Black Unemployment: Changes in Job Stability or in Employability?*, 22 REV. OF BLACK POL. ECON. 55, 55 (1994).

ever, when recession and downsizing affect the economy, blacks are likely to bear a disproportionate share of the burden. For example, in the 1990-91 recession, black Americans suffered a net job loss, while whites, Hispanic and Asian Americans gained thousands of jobs.²⁹⁷ At Dial Corporation, for example, blacks lost 43.6% of the jobs cut, although they represented only 26.3% of Dial's work force entering the recession.²⁹⁸ At W.R. Grace, black workers held 13.1% of the company's pre-recession jobs but suffered 32.2% of the lay-offs.²⁹⁹ At BankAmerica and ITT, blacks lost jobs at more than twice the rate of their participation in the workforce.³⁰⁰

Employment discrimination against individual women and minority group members is pervasive. In 1994 alone, over 150,000 complaints of employment discrimination were filed with federal, state and local government.³⁰¹ By comparison, employment discrimination against white men is remarkably rare. A recent study conducted for the Department of Labor by Professor Alfred Blumrosen of Rutgers Law School surveyed every federal court employment discrimination case reported in the national reporters between 1990 and 1994, a total of over three thousand cases.³⁰² Blumrosen found that fewer than one hundred of these cases involved claims of race or sex discrimination by white men.³⁰³ He analyzed twenty-one of the cases in depth; in only six was there a finding of liability.³⁰⁴ Blumrosen also examined the impact of challenges to affirmative action employment programs. In twelve cases, the affirmative action program was upheld, while in six it was held to be improper.³⁰⁵ It is difficult not to conclude from this survey that the extent of discrimination against white men is extremely limited.

By contrast, a series of audits conducted over the past few years demonstrates a high degree of employment discrimination against minorities when matched auditor-applicants apply for jobs.³⁰⁶ A number of experiments conducted by the Urban Institute establishes that dis-

297. Rochelle Sharpe, *Losing Ground: In Latest Recession, Only Blacks Suffered Net Employment Loss*, WALL ST. J., Sept. 14, 1993, at A1.

298. *Id.*

299. *Id.*

300. *Id.*

301. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 21.

302. *Reverse Discrimination Complaints Rare, Labor Study Reports*, N.Y. TIMES, Mar. 31, 1991, at A23.

303. *Id.*

304. *Id.*

305. *Id.*

306. I initially reported on these audits in an earlier article. *See supra* note 139.

crimination against blacks and Hispanics is pervasive.³⁰⁷ These studies, carried out in San Diego, Chicago and Washington, D.C., paired college-aged men with identical simulated job qualifications and directed them to seek employment, following a carefully scripted plan, from the same firms. In one of the experiments, white and black job seekers applied for entry level jobs advertised in newspapers in Washington, D.C., and Chicago during the summer of 1990. A total of 476 tests, termed "audits," were conducted. In our nation's capital, the white auditors were more than three times as likely to receive job offers as were the black auditors.³⁰⁸ In Chicago, the white auditors were twice as likely to receive a job offer.³⁰⁹ In the Chicago and San Diego tests comparing white and Hispanic auditors, the white applicants were more than 50% more likely to be offered jobs than were the Hispanic applicants.³¹⁰

Although the Urban Institute auditors were instructed to push forward with their applications unless or until they were either offered or denied the job, many real-life job-seekers will likely be discouraged from pursuing an employment application because of their treatment in the hiring process. It is thus significant that in those 45% of the D.C. audits where both auditors received interviews, the white auditors were almost twice as likely as the black auditors to be favored in terms of waiting time, length of interview, number of interviewers, positive comments and negative comments.³¹¹ For example, "a black auditor reported that he had received a very discouraging impression of the job, including the statement that 'your supervisor will work your butt off.' The white partner, on the other hand, was told that the company offered great opportunities for advancement."³¹² The discriminatory results were not uniform across all job categories. In general, blacks were more likely to encounter unfavorable treatment in higher paying, higher status jobs and in jobs involving substantial customer contact.³¹³

307. MARGERY A. TURNER ET AL., URBAN INST. REPORT 91-9, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991); HARRY CROSS ET AL., URBAN INST. REPORT 90-4, EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS (1990).

308. TURNER ET AL., *supra* note 307, at 41 tbl. 4.4.

309. *Id.*

310. CROSS ET AL., *supra* note 307, at 41 tbl. 5.1.

311. TURNER ET AL., *supra* note 307, at 45-48 tbl. 4.7.

312. *Id.* at 48-49.

313. *Id.* at 52-53.

Another series of audits was conducted between 1990 and 1992 by the Fair Employment Council of Greater Washington, Inc.³¹⁴ "The tests revealed that blacks were treated significantly worse than equally qualified whites 24% of the time and Latinos were treated worse than whites 22% of the time."³¹⁵ For example, when two pairs of testers appeared at a nationally-franchised employment agency, the black testers were given no referrals while the white testers were immediately referred to jobs.³¹⁶ A black woman applied to a major hotel chain and received no call-back, while her white counterpart was offered a desk clerk job.³¹⁷ When two equally qualified women applied for a typist/receptionist job, the black woman received no offer while the white woman was offered a better, higher paying job than the one advertised.³¹⁸ Where black testers were offered jobs, the conditions were often materially different. One pair of auditors applied at a car dealership for sales jobs; the white applicant was interviewed for the sales position, but the black applicant was told he would have to begin by washing cars.³¹⁹

Another audit, focusing on discrimination against Hispanics, found that Hispanic job auditors received 25% fewer job interviews and 34% fewer offers than did white testers.³²⁰ An audit focusing on sex discrimination found that in high-priced restaurants "men were more than twice as likely to receive an interview and five times as likely to receive a job offer than the women testers."³²¹

A recent study that combined and re-examined the results of these six controlled experiments determined that when a white job applicant was interviewed, he or she had a 46.9% likelihood of being offered the job; for a similarly qualified black applicant, the likelihood of a job offer was 11.3%.³²² In other words, the white applicant was over four times more likely to get the job than the equally qualified black applicant. In 16.7% of the cases where both applicants were offered the job, the white applicant was offered a higher starting salary, while the reverse never occurred.³²³ Where both applicants were

314. See AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 21.

315. *Id.*

316. *Id.*

317. *Id.* at 21-22.

318. *Id.* at 22.

319. *Id.*

320. *Id.*

321. *Id.*

322. Marc Bendick, Jr., et al., *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. OF BLACK POL. ECON. 25, 31 (1994).

323. *Id.* at 32.

offered a job, the average starting salary was \$5.45 per hour, but where only the white applicant was offered the job, the starting pay was \$7.13 per hour.³²⁴

Nonetheless, a majority (58%) of white respondents to the Brodie study believes that on the subject of jobs the average black American is as well off as the average white American, and 45% believe the same of Hispanic Americans.³²⁵ On the risk of losing their job, 70% of the whites surveyed believe that the average black American is as well off or better off than the average white American, and 53% believe the same of Hispanic Americans.³²⁶

As American women find the glass ceiling impenetrable, their satisfaction with work and optimism about the future decline. In the 1990 Virginia Slims poll, 37% of the women reported great personal satisfaction from their work, and 73% saw the role of women in the workplace as changing for the better.³²⁷ By 1995, only 31% were finding great personal satisfaction in their work, and only 56% saw the role of women in the workplace as changing for the better.³²⁸ By contrast, men reported greater personal satisfaction in their work in 1995 (40%) than they had in 1990 (35%).³²⁹

A recent study conducted at the University of Chicago demonstrates both how and why racism accounts for at least part of the disparity in employment opportunities between blacks and whites in urban jobs.³³⁰ The authors concluded that inner-city employers commonly direct their recruitment efforts toward white neighborhoods, and avoid recruiting from sources likely to attract large numbers of black applicants.³³¹ For example, downtown businesses would frequently advertise only in suburban or white ethnic newspapers, rather than in metropolitan newspapers.³³² This avoidance of black applicants was tied to strongly held stereotypes about black workers. Among the representative sampling of Chicago employers surveyed, 32.8% of the employment decision-makers stated they believed blacks were not dependable, 37.8% said blacks had "bad attitudes," 47.2%

324. *Id.* at 35.

325. BRODIE, *supra* note 217, at 81-84.

326. *Id.*

327. Judith H. Dobrzynski, *Women More Pessimistic About Work*, N.Y. TIMES, Sept. 12, 1995, at C2.

328. *Id.*

329. *Id.*

330. Katheryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOC. PROBS. 433 (1991).

331. *Id.* at 434, 437-39.

332. *Id.* at 438.

complained that blacks lack a "work ethic," and 50.4% responded that blacks lack "basic skills."³³³

When employers use these kinds of stereotypes in making employment decisions they violate Title VII of the 1964 Civil Rights Act.³³⁴ But employers rarely admit they are making decisions based on stereotypes, and they may not even recognize they are doing so. Although we can conclude from these studies that white employers engage in massive amounts of discrimination against minority applicants and employees, we can also conclude that identifying the individual victims of particular acts of discrimination will usually be impossible. It is precisely for this reason that class-based affirmative action remedies are necessary.

D. Housing

In their landmark study of racial segregation in America, *American Apartheid*, sociologists Douglas S. Massey and Nancy A. Denton carefully chronicle the history, causes and impact of residential racial segregation in America.³³⁵ Their findings demonstrate that

[n]o group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years. This extreme isolation did not just happen; it was manufactured by whites through a series of self-conscious actions and purposeful institutional arrangements that continue today. Not only is the depth of black segregation unprecedented and utterly unique compared with that of other groups, but it shows little sign of change with the passage of time or improvements in socioeconomic status. If policy makers, scholars, and the public have been reluctant to acknowledge segregation's persistence, they have likewise been blind to its consequences for black Americans. Residential segregation is not a neutral fact; it systematically undermines the social and economic well-being of blacks in the United States. . . . The effect of segregation on black well-being is structural, not individual. Residential segregation lies beyond the ability of any individual to change; it constrains black life chances irrespective of personal traits, individual motivations, or private achievements.³³⁶

333. *Id.* at 440 tbl. 2.

334. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that the use of sex-based stereotypes in reaching employment decision violates Title VII).

335. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993).

336. *Id.* at 2-3.

In the period between emancipation and the dramatic increase in migration to the North brought on by the industrial revolution, most urban blacks lived in largely white neighborhoods.³³⁷ In 1890, fewer than 7% of Northern urban blacks lived in predominantly black neighborhoods.³³⁸ But between 1890 and 1940, racial zoning ordinances enacted by local governments,³³⁹ periodic waves of violence directed at blacks living in white neighborhoods, block busting and steering by real estate agents,³⁴⁰ and restrictive covenants by real estate developers and "neighborhood improvement" associations pushed many more blacks into predominantly black ghettos.³⁴¹ By 1940, 32% of urban blacks lived in ghettos.³⁴²

World War II brought many black migrants from rural sharecropping to industrial cities. At war's end, a massive suburban housing boom permitted wide-scale white flight from urban centers to outlying neighborhoods. The investment in the suburbs was largely the result of FHA and VA policies. These policies favored lending money for new home construction, while disfavoring loans for rehabilitation, and denied loans to residents of neighborhoods threatened with "instability" because of their "inharmonious racial or nationality groups."³⁴³ Between 1946 and 1960, federal subsidized loans financed the building of over 350,000 new homes in Northern California; fewer than 100 went to blacks.³⁴⁴ During this same period, vast "urban renewal" projects concentrated urban blacks in racially segregated massive public housing projects.³⁴⁵ Private banks and insurance companies exacerbated the problem by engaging in widespread red-lining of minority neighborhoods.³⁴⁶

These policies reflected widespread white support for segregation. In a 1942 poll, 84% of white Americans agreed that blacks should live in separate sections of towns and cities.³⁴⁷ In a 1962 poll,

337. *Id.* at 17, 21 tbl. 2.1.

338. *Id.* at 24 tbl. 2.2.

339. See ARLENE ZAREMBKA, *THE URBAN HOUSING CRISES: SOCIAL, ECONOMIC, AND LEGAL ISSUES AND PROPOSALS* 101 (1990).

340. *Id.* at 106-107; see also JOHN YINGER, DEP'T OF HOUSING AND URBAN DEVELOPMENT, *HOUSING DISCRIMINATION STUDY: INCIDENCE OF DISCRIMINATION AND VARIATION IN DISCRIMINATORY BEHAVIOR* ix (1991).

341. MASSEY & DENTON, *supra* note 335, at 19-42.

342. *Id.* at 48 tbl. 2.4.

343. *Id.* at 54.

344. *Affirmative Actions*, Oct. 1995, at 2.

345. MASSEY & DENTON, *supra* note 335, at 49-57.

346. See generally Peter Dreier, *Redlining Cities: How Banks Color Community Development*, CHALLENGE, Nov.-Dec. 1991, at 15.

347. MASSEY & DENTON, *supra* note 335, at 49.

61% of white Americans agreed that whites had a right to keep blacks out of their neighborhoods.³⁴⁸ As a result, by 1970 the isolation of most blacks in black ghettos was complete; close to 75% of black Americans living in metropolitan regions lived in predominantly segregated neighborhoods.³⁴⁹

Despite the passage of the 1968 Fair Housing Act,³⁵⁰ segregation has not abated. Massey and Denton document the persistence of segregation in the 1970s, along with the emergence of "hypersegregation."³⁵¹ Hypersegregation exists when: (1) there is a high concentration of segregation, so that the distribution of blacks and whites in a community is highly uneven; (2) blacks are highly isolated from living near whites; (3) black neighborhoods are heavily clustered, reducing chance encounters between blacks and whites; (4) blacks are spatially distributed close to the central business district, where they are more likely to be exposed to high crime rates, social disorder, and economic marginality; and (5) the population density of the ghetto is significantly higher than that of white neighborhoods.³⁵² "People growing up in such an environment have little direct experience with the culture, norms, and behaviors of the rest of American society and few social contacts with members of other racial groups."³⁵³ Massey and Denton found that sixteen metropolitan areas, which housed over one third of the black population of the United States, were hypersegregated in 1980.³⁵⁴

Although hypersegregation is closely associated with poverty, even middle-class blacks are largely excluded from white neighborhoods. Massey and Denton found the segregation of very low-income blacks (those earning under \$2,500 per year) was virtually identical to the segregation of upper-income blacks (those earning over \$50,000 per year).³⁵⁵ In the twenty Northern metropolitan areas with the largest black populations, the average index of segregation of very low-income blacks was 85.8%; the average index for upper-income blacks was 83.2%.³⁵⁶ Massey and Denton explain this by examining the re-

348. *Id.*

349. *Id.* at 48 tbl. 2.4.

350. 42 U.S.C. §§ 3601-3619 (1995).

351. MASSEY & DENTON, *supra* note 335, at 60-78.

352. *Id.* at 74-75.

353. *Id.* at 77.

354. *Id.* at 75-76.

355. *Id.* at 84-88.

356. *Id.* at 86 tbl. 4.1.

luctance of whites to live in neighborhoods in which there are black residents:

Demand is strong for homes in all-white areas, but once one or two black families enter a neighborhood, white demand begins to falter as some white families leave and others refuse to move in. The acceleration in residential turnover coincides with the expansion of black demand, making it very likely that outgoing white households will be replaced disproportionately with black families. As the black percentage goes up, white demand drops ever more steeply as black demand rises at an increasing rate. By the time black demand peaks at the 50% mark, practically no whites are willing to enter and the majority (64%) are trying to leave.³⁵⁷

As of 1990, whites were over 50% more likely to own or be buying their own homes than blacks³⁵⁸ or Hispanics.³⁵⁹ A black-owned home had a median value of \$50,700, compared with \$80,200 for a white-owned home.³⁶⁰ Further, blacks were more than three times as likely as whites to live in housing defined by the Census Bureau as "crowded,"³⁶¹ while Hispanics were ten times as likely as non-Hispanic whites to live in crowded housing.³⁶²

A 1988 study by the United States Department of Housing and Urban Development (HUD) attempted to measure the extent to which racial discrimination infects the housing market.³⁶³ The study tested the practices of real estate agents in twenty major metropolitan areas, by sending out teams of black and white auditors to seek housing, and compared their experiences. The study revealed that when housing availability and financial assistance were considered together, the likelihood that a black homeseeker would experience discrimination by real estate agents was over 50%. When the steering of black homeseekers into black neighborhoods and white homeseekers into white neighborhoods was added, the likelihood of discrimination in the sales market was increased to greater than 60%. The likelihood of experiencing discrimination in at least one of three visits was greater

357. *Id.* at 96.

358. See ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, *WE THE AMERICAN . . . BLACKS* 9 (1993) (hereinafter *WE THE AMERICAN BLACKS*).

359. See ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, *STATISTICAL BRIEF NO. 95-4, HOUSING IN METROPOLITAN AREAS—HISPANIC ORIGIN HOUSEHOLDS 1* (1995) (hereinafter *HISPANIC ORIGIN HOUSEHOLDS*).

360. *WE THE AMERICAN BLACKS*, *supra* note 358, at 9.

361. See ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, *STATISTICAL BRIEF NO. 95-5, HOUSING IN METROPOLITAN AREAS—BLACK HOUSEHOLDS 2* (1995).

362. See *HISPANIC ORIGIN HOUSEHOLDS*, *supra* note 359, at 2.

363. MASSEY & DENTON, *supra* note 335, at 101-102.

than 90%.³⁶⁴ Where additional unadvertised units were available, the probability that they would be shown to whites but not blacks was 91%.³⁶⁵

A 1992 HUD report details the degree to which private lenders continue to discriminate against black home-buyers. HUD concluded that blacks are two-thirds more likely than whites to have their credit applications rejected. Even after correcting for loan-to-value ratios, debt burdens, and credit histories, blacks were still 60% more likely to be rejected for home mortgages.³⁶⁶

As cities have become poorer, the dual problems of inadequate housing and homelessness have dramatically increased across America. Not surprisingly, the burden falls disproportionately on non-whites. In New York City, Hispanics are three times as likely as whites to live in inadequate housing, and blacks are two and a half times as likely.³⁶⁷

The economic/political consequences of housing discrimination and post-war white flight leading to hypersegregation have been enormous for blacks. Segregation in the pre-war period occurred mostly within municipal lines. Thus, whites had local revenue responsibilities for poor blacks living in the same city, if not the same neighborhood. Municipal racial isolation grew after the war, however, as whites fled cities. As a result, not only did residential segregation grow, but whites had less responsibility to aid poor blacks through local government.³⁶⁸

In sum, blacks and Hispanics experience wide-spread discrimination in seeking housing to purchase or rent, and in seeking mortgages. The housing they do find is crowded, physically inadequate, racially segregated, and isolated from good transportation and employment opportunities. When they move into better housing in white neighborhoods, whites flee. As a result, segregated minority neighborhoods, which often have greater social needs, have a smaller tax base and can offer fewer public services than comparable white communi-

364. *Id.* at 102-03.

365. *Id.* at 104.

366. JAMES H. CARR AND ISAAC F. MEGBOLUGBE, OFFICE OF HOUSING RESEARCH, PROCEEDINGS—HMDA DATA AND MORTGAGE MARKET DISCRIMINATION RESEARCH (1992).

367. PHILIP WEITZMAN, COMMUNITY SERVICE SOCIETY OF N.Y., *WORLDS APART: HOUSING, RACE/ETHNICITY, AND INCOME IN NEW YORK CITY, 1978-1987*, at vii, x (1989).

368. Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1228-1229 (1995) (citing forthcoming report by Massey & Zoltan L. Hajnal).

ties. Unless employers, schools and governments reach out to these neighborhoods through affirmative action programs, the isolation will only grow worse.

E. Health Care

One of the flashpoints of affirmative action is the selection of students for medical school. Medical school admissions are highly competitive, and schools ultimately admit few minority students. Although blacks constitute 12% and Hispanics constitute 9% of the national population, they constitute less than 4%³⁶⁹ and 2% respectively of the nation's doctors.³⁷⁰ Thus, it bears asking whether the dearth of minority doctors affects the health of minority communities.

For Dr. Benjamin Chavis, the U.C. Davis Medical School graduate identified as the black student admitted instead of Alan Bakke, the answer is easy. In an article by Nicholas Lemann,

[h]e ticks off what the black doctors admitted under Davis's special minorities-only program (which was eliminated after the Supreme Court's *Bakke* decision, resulting in subsequent classes having only one or two black members) are doing now: almost all are in primary care in underserved areas, including his ex-wife, Toni Johnson Chavis, a pediatrician in Compton. If Chavis hadn't gotten into medical school, his patients wouldn't be treated by some better-qualified white obstetrician; they'd have no doctor at all and their babies would be delivered the way Chavis was—by whoever happened to be on duty at the emergency room of the county hospital.³⁷¹

There is substantial evidence in support of Dr. Chavis' belief. As of 1994, the infant death rate for blacks was over 2.4 times higher than the rate for whites.³⁷² Among black children in East Harlem, it was even higher.³⁷³ As Senator Bill Bradley stated, "a child's chance of surviving to age five are better in Bangladesh than in East Harlem."³⁷⁴

Further, though overall mortality rates have been dropping in the United States, this improvement has not been shared equally. While the death rate for whites dropped dramatically between 1960 and

369. STATISTICAL ABSTRACT, *supra* note 290, at 393, 407-10.

370. See Tom Philp, *UC Davis Race Case Mirrors Past Suit*, SACRAMENTO BEE, Aug. 13, 1995, at A1.

371. Nicholas Lamann, *Taking Affirmative Action Apart*, N.Y. TIMES, Jun. 11, 1995, § 6 (Magazine), at 36, 66.

372. NAT'L CENTER FOR HEALTH STATISTICS, U.S. INFANT AND GENERAL MORTALITY: RACIAL AND SOCIOECONOMIC DISPARITIES (1995).

373. KOZOL, *supra* note 227, at 115-16.

374. *Id.*

1986, the death rate for blacks has not decreased as much.³⁷⁵ As a result, the black death rate in 1993 for ages 35-45 was 51.83 per 10,000, while the white death rate was 19.98 per 10,000.³⁷⁶ Among white men aged 35-45, the death rate was 28.22 per 10,000; among black men it was well over twice as high, at 73.24 per 10,000.³⁷⁷ For women aged 35-45, the black death rate of 27.00 per 10,000 was nearly twice as high as the white death rate of 14.35 per 10,000.³⁷⁸ The average life expectancy for white men in 1993 was 8.3 years longer than for black men.³⁷⁹ The gap has grown since 1970, when it was 8.0 years.³⁸⁰ The average life expectancy in 1993 for white women was 5.8 years longer than for black women.³⁸¹

Even when corrected for education and income, the black death rate remains considerably higher than the white death rate. For example, among men between the ages of 25 and 64 who had completed 4 or more years of college, the white death rate in 1986 was 28 per 10,000; the black rate was 60 per 10,000.³⁸² For women in the same category, the white rate was 18 per 10,000; the black rate was 22 per 10,000.³⁸³ For white men between 25 and 64 earning over \$25,000 per year in 1986 the death rate was 24 per 10,000; for black men at the same income level it was 36 per 10,000.³⁸⁴ For women in this age and income category, the white death rate was 16 per 10,000; the black rate was 23 per 10,000.³⁸⁵

Although white women have a greater chance of getting breast cancer, black women are much more likely to die from it.³⁸⁶ Similarly, blacks and whites suffer equally from depression, but blacks are less

375. See generally Gregory Pappas et al., *The Increasing Disparity in Mortality Between Socioeconomic Groups in the United States, 1960 and 1986*, 329 *NEW ENG. J. MED.* 103 (1993).

376. American Statistical Index, *Monthly Vital Statistics Report*, Oct. 11, 1994, at 14 tbl. 4.

377. *Id.*

378. *Id.*

379. *Id.* at 17 tbl. 7 (73.0 years for white men, 64.7 years for black men).

380. *Id.* (68.0 years for white men, 60.0 years for black men).

381. *Id.* (79.5 years for white women, 73.7 years for black women). The gap narrowed from the 7.3 year gap in 1970. *Id.*

382. Pappas et al., *supra* note 375, at 106 tbl. 1.

383. *Id.*

384. *Id.*

385. *Id.*

386. Gina Kolata, *Deadliness of Breast Cancer in Blacks Defies Easy Answer*, *N.Y. TIMES*, Aug. 3, 1994, at C10.

likely to receive treatment because of diagnostic errors.³⁸⁷ Although blacks make up just 12% of the national population, their children constitute 46% of the children suffering from lead poisoning.³⁸⁸

Severe uncontrolled hypertension occurs considerably more often among blacks and Hispanics than among whites.³⁸⁹ One effect is that blacks have an almost four times greater chance to suffer from hypertension-induced end-stage renal disease (ESRD).³⁹⁰ Blacks wait almost twice as long (3.9 months compared to 7.6 months for whites) for their first kidney transplant, the preferred treatment for ESRD.³⁹¹

While the precise cause of these differences cannot always be determined, the effect is evident: blacks and Hispanics need more health care and get less. For example, a 1993 report in *The New England Journal of Medicine* documented that black victims were over three times more likely to die from their heart attacks.³⁹² Poor children, who are disproportionately black and Hispanic, are far less likely to receive basic childhood vaccinations than non-poor children.³⁹³ Asthma deaths in Harlem and the South Bronx are eight times higher than the national average.³⁹⁴ The Centers for Disease Control and Prevention have calculated that, overall, blacks are five times as likely as whites to die of asthma.³⁹⁵

One link between poverty and disease may be hunger. A recent study on childhood hunger in the United States reported that children suffering from hunger are four times more likely to suffer from fatigue and inability to concentrate, more than twice as likely to suffer from anemia, and more than 50% more likely to suffer from frequent colds

387. See generally Harold W. Neighbors et al., *The Influence of Racial Factors on Psychiatric Diagnosis: A Review and Suggestions for Research*, 25 COMMUNITY MENTAL HEALTH J. 301 (1989).

388. SARAH E. ROYCE, *LEAD TOXICITY: CASE STUDIES IN ENVIRONMENTAL MEDICINE* (1992).

389. Steven Shea et al., *Predisposing Factors For Severe, Uncontrolled Hypertension in an Inner-City Minority Population*, 327 NEW ENG. J. MED. 776, 779 (1992).

390. Ian Ayres et al., *Unequal Racial Access to Kidney Transplantation*, 46 VAND. L. REV. 805, 810 (1993).

391. *Id.* at 807.

392. Lance B. Becker et al., *Racial Differences in the Incidence of Cardiac Arrest and Subsequent Survival*, 329 NEW ENG. J. MED. 600, 601 (1993).

393. National Center for Health Statistics, Press Release, *Annual Report on Nation's Health Shows Continued Disparities*, June 22, 1995.

394. Adam Nossiter, *Asthma Common and on Rise in the Crowded South Bronx*, N.Y. TIMES, Sept. 5, 1995, at A1.

395. *40% Rise in Asthma and Asthma Deaths*, N.Y. TIMES, Jan. 7, 1995, § 1, at 10.

than other children.³⁹⁶ Hunger strikes far more black and Hispanic children than their portion of the population.³⁹⁷

Another likely cause of the difference in medical care received by minority group members is their relative lack of medical insurance. In 1993, 14.2% of the white population lacked medical insurance (including private, group and government insurance), compared to 20.5% of the black population and 31.6% of the Hispanic population.³⁹⁸ Another factor may be the role that employment discrimination plays in causing health problems. Recent studies of black and Hispanic women have linked discrimination in the workplace with high levels of physical and psychological ill health.³⁹⁹

Even when insurance availability is equalized, dramatic differences in medical treatment remain. A 1994 survey of studies of Medicare beneficiaries disclosed that black patients were far less likely than white patients to receive certain important heart and vascular procedures, and certain other surgical procedures (reduction of fractures of the femur, other arthroplasty of the hip, total knee replacement, total hip replacement, laminectomy, excision of disc, and spinal fusion).⁴⁰⁰ Where black patients did receive these procedures, they suffered a higher mortality rate, suggesting that doctors did not refer them for the procedures until they were more seriously ill than their white counterparts.⁴⁰¹ In a few areas, such as amputations of the lower limb, blacks received more procedures than would have been expected.⁴⁰² The authors concluded that:

[b]lack persons may be more likely to receive procedures that reflect delayed diagnosis or initial treatment (palliative or advanced-stage cancer treatment), poor or infrequent medical care (diabetes and vascular disease progressing to amputations and skin necrosis/infection), or severe illness for which management of diabetes or hypertension has failed (ESRD). It is generally

396. COMMUNITY CHILDHOOD HUNGER IDENTIFICATION PROJECT, A SURVEY OF CHILDHOOD HUNGER IN THE UNITED STATES 22 tbl. 2.4 (1995).

397. *Id.* at 14 tbl. 2.1.

398. ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL BRIEF NO. 94-28, HEALTH INSURANCE COVERAGE—1993, at 2 (1994).

399. David R. Williams et al., *The Concept of Race and Health Status in America*, 108 PUB. HEALTH REP. 26, 30 (1994).

400. A. Marshall McBean & Marian Gornick, *Differences by Race in the Rates of Procedures Performed in Hospitals for Medicare Beneficiaries*, 15 HEALTH CARE FINANCING REV. 77, 81-82 tbls. 2 & 3 (1994).

401. *Id.* at 85.

402. *Id.* at 84 tbl. 5.

believed that these four procedures may often be avoided or delayed by comprehensive and continuous medical care.⁴⁰³

In some cases, studies demonstrate that racial differences in medical care can be directly attributed to racism. Two 1993 reports on the treatment of heart disease are particularly telling.⁴⁰⁴ The Ayanian study examined a nationwide sample of over 27,000 Medicare patients who underwent coronary angiography in 1987. (Angiography is a diagnostic procedure used among people with symptoms of heart disease to determine whether they need to have their arteries cleared — “revascularized” — either through angioplasty or coronary artery bypass surgery.) Prior to the study, it had already been well established that blacks with coronary heart disease are less likely to receive angiography than are whites.⁴⁰⁵ It was therefore theorized that among those who overcame the barriers necessary to enter treatment by a cardiologist and have the angiography performed, an equal or greater number would be found to need revascularization.⁴⁰⁶ Instead, the study found that whites were 78% more likely to receive a revascularization procedure within 90 days of their angiography than were blacks.⁴⁰⁷

The racial disparity found in the Ayanian study was unaffected by diagnosis; regression analysis established that among Medicare patients confirmed to have serious heart disease who would benefit from angioplasty or bypass surgery, whites were significantly more likely to receive treatment as were blacks.⁴⁰⁸ In attempting to determine the cause of this disparity, the authors of the Ayanian study found that “[p]hysicians were less likely to recommend CABG [bypass] surgery to blacks than whites, despite equivalent numbers of diseased arteries and more severe angina among blacks, suggesting physicians were more aggressive in their therapeutic approach for white patients.”⁴⁰⁹

The Ayanian study left open the possibility that economic factors, such as availability of supplemental insurance, affected the results. The Whittle study helped address that question. It also examined the racial disparities in revascularization procedures by examining the

403. *Id.* at 88.

404. John Z. Ayanian et al., *Racial Differences in the Use of Revascularization Procedures After Coronary Angiography*, 269 JAMA 2642 (1993); Jeff Whittle et al., *Racial Differences in the Use of Invasive Cardiovascular Procedures in the Department of Veterans Affairs Medical System*, 329 NEW ENG. J. MED. 621 (1993).

405. *Id.*

406. *Id.* at 2642-43.

407. *Id.* at 2642.

408. *Id.*

409. *Id.* at 2645.

treatment of 822,930 heart disease patients at United States Veterans Affairs [VA] hospitals between 1987 and 1991.⁴¹⁰ By using VA patients, who all receive free medical care, the study eliminated any consideration of ability to pay.⁴¹¹ It also eliminated any incentive among the physicians to recommend unnecessary treatment, as VA physicians are usually salaried.⁴¹² In every diagnostic category, whites underwent the procedures more frequently than did blacks. Overall, whites were 50% more likely than blacks to undergo angioplasty, and 122% more likely to undergo coronary bypass surgery.⁴¹³ The evident conclusion is that physicians, the vast majority of whom are white, take better care of white patients than black patients, even when there are no economic factors at stake.

Another test comparing treatment of white and black patients focused on the likelihood that a physician would breach patient confidentiality and report a patient's HIV-positive status to public health officials.⁴¹⁴ The authors posed a series of hypothetical problems to white physicians, and thereafter corrected for all factors other than race.⁴¹⁵ They determined that when all other factors were held constant, white doctors were over ten times more likely to breach the confidentiality of black patients than white patients.⁴¹⁶

Although minority group members have substantially less access to health care, whites perceive the opposite. In a recent survey, 64% of white respondents stated that access to health care for blacks is just as good or better than it is for whites.⁴¹⁷ Only 30% responded that access for blacks is worse than access for whites.⁴¹⁸ Similarly, 51% believe that access to health care is better for Hispanic than for white Americans, while 42% believe it is worse.⁴¹⁹

Women also appear to suffer from sex bias by male doctors in certain research and treatment areas. For example, although cardio-

410. Whittle et al., *supra* note 404, at 621-22. The study also examined how frequently patients with heart disease were diagnosed through angiography. It found that whites were 38% more likely to receive the procedure than were blacks. *Id.* at 623, 625 tbl. 3.

411. *Id.* at 621.

412. *Id.*

413. *Id.*

414. Judith A. Schwartzbaum et al., *Physician Breach of Patient Confidentiality Among Individuals with Human Immunodeficiency Virus (HIV) Infection: Patterns of Decision*, 80 AM. J. PUB. HEALTH 829 (1990).

415. *Id.* at 829-30.

416. *Id.* at 831-32 & tbl. 5.

417. BRODIE, *supra* note 217, at 81-82.

418. *Id.*

419. *Id.* at 83-84.

vascular disease is the leading cause of death among women, "women have been enrolled in limited numbers or excluded entirely from many of the major research trials on which the treatment of cardiovascular disease have been based."⁴²⁰ Recent studies suggest that women heart attack patients are less likely to receive coronary revascularization and are less likely to receive pharmacological treatment than male heart attack patients.⁴²¹

In sum, our health care system does a far better job in treating white male patients than in treating other patients. Although part of the reason for the difference is undoubtedly poverty and lack of insurance, another part is clearly discrimination by white doctors. Integrating the profession with more black and other minority physicians and other medical workers is a necessary prerequisite to equal medical care for minority group members. Similarly, the male bias of the medical profession is harmful to women patients. When it is gender-integrated, it will serve the needs of women more fairly. Because affirmative action substantially assists minorities and women in obtaining positions in the medical profession, it is an important tool in equalizing medical treatment throughout the United States.

F. Economic Opportunity

Another barrier experienced by minorities and women is discrimination in economic opportunities. Andrew Young believes that discrimination in access to capital is the greatest current impediment to black participation in the economy.⁴²² As of 1990, blacks owned only 2.4% of the businesses in the United States, and 85% of those businesses were sole proprietorships with no employees.⁴²³

When minority and women-owned businesses cannot borrow money, they cannot compete. And when they are shut out of contracts by white male-owned businesses, they have no opportunity to prove themselves. For example, after a study conducted by the Federal Reserve Bank of Chicago in 1992 disclosed broad evidence that banks approved fewer loans to blacks and Hispanics than to whites, a new study was commissioned in response to intense criticism by bank-

420. Frederick E. Kuhn & Charles E. Rackley, *Coronary Artery Disease in Women: Risk Factors, Treatment, and Prevention*, 153 ARCH. INTERN. MED. 2626, 2626 (1993).

421. See generally Mikael Dellborg & Karl Swedberg, *Acute Myocardial Infarction: Difference in the Treatment Between Men and Women*, 5 QUALITY ASSURANCE HEALTH CARE 261 (1993).

422. Telephone interview with Andrew Young (Apr. 5, 1994).

423. AFFIRMATIVE ACTION REVIEW, *supra* note 4, at 24.

ing leaders.⁴²⁴ In the second study, the Fed again found convincing evidence of race discrimination.⁴²⁵ The new study established that among loan applicants with bad credit ratings, disapproval rates were twice as high for black and Hispanic applicants as they were for white applicants.⁴²⁶ The study research director attributed the difference in treatment to possible unconscious racial bias by white loan officers.⁴²⁷ Rather than acknowledge that racism affects banking decisions, the chief economist of the American Bankers' Association attacked the study as part of a "continuing saga of trying to beat up the banking industry."⁴²⁸

The banking industry responded to the first report by lobbying heavily against requiring banks to compile data on the race and gender of their small business loan customers.⁴²⁹ If such data is not collected, studies like the Chicago Fed study will be more difficult, if not impossible to complete. A survey based on interviews with major bank CEOs estimates that less than .5% of small business loans are made to minority businesses.⁴³⁰ In April of 1995, under intense pressure from bankers and Republicans in Congress, the Federal Reserve Bank, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision announced that they would drop their proposal to require reporting and collection of such data, although it would be encouraged on a voluntary basis.⁴³¹

Discrimination in contract bidding is another economic barrier. In a post-*Croson* study conducted by Kings County, Washington, dozens of women and minority construction contractors testified about their exclusion from private and government work, claiming that although their prices were competitive and their work quality high, they were continually rejected from contract work unless an affirmative action plan required minority participation.⁴³² The owner of a minority-owned engineering company reported hearing comments

424. See Keith Bradsher, *A Second Fed Bank Study Finds Disparities in Mortgage Lending*, N.Y. TIMES, July 13, 1995, at D1.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. See *id.*

430. Telephone interview Robert Gnaizda, General Counsel, The Greenlining Coalition (July 19, 1995).

431. Robert D. Hershey, Jr., *U.S. Regulators Drop A Proposal Aimed at Bias in Banks' Lending*, N.Y. TIMES, Apr. 19, 1995, at A1.

432. See *Coral Constr. Co. v. Kings County*, 941 F.2d 910, 917-918 (9th Cir. 1991).

like, “[t]here is no minority requirement on this project, so we are going to use someone else.”⁴³³

A similar study in San Francisco found that available MBEs [minority business enterprises] received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. . . . For example, in prime contracting for construction, although MBE availability was 49.5%, MBE dollar participation was only 11.1%; in prime contracting for equipment and supplies, although MBE availability was 36%, MBE dollar participation was only 17%; and in prime contracting for general services, MBE availability was 49% although MBE dollar participation was only 6.2%.⁴³⁴

The statistical findings were supplemented by

numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded the contracts as low bidder, and MBEs being harassed by City personnel to discourage them from bidding on city contracts.⁴³⁵

In Los Angeles, out of every dollar spent on construction by the county government in 1994, ninety-five cents went to white-owned construction firms, while Hispanic firms received about four cents and black contractors received less than a penny.⁴³⁶

An in-depth study conducted in 1990 by Feagin and Imani examined the construction industry in a major Southern metropolitan area.⁴³⁷ In examining the experience of 76 minority contractors, they found race discrimination across the industry.⁴³⁸ Construction unions exclude blacks from union membership and allocate jobs unfairly to black members.⁴³⁹ White contractors exclude black contractors from private jobs, make late bid requests on public jobs in order to technically satisfy affirmative action requirements while making actual bidding by black contractors impossible, and engage in bid shopping and bid switching to help white friends.⁴⁴⁰ When blacks get contracts, em-

433. *Id.* at 918.

434. *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991).

435. *Id.* at 1415.

436. Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L. Q. ___ (1995).

437. Joe R. Feagin & Nikitah Imani, *Racial Barriers to African American Entrepreneurship: An Exploratory Study*, 41 SOC. PROBS. 562 (1994).

438. *Id.*

439. *See id.* at 568-70.

440. *See id.* at 570-75.

ployers discriminate with late payments, racial epithets, and harassment.⁴⁴¹ Government officials act in collusion with white contractors and issue unfair performance evaluations.⁴⁴² Banks and insurance companies discriminatorily reject blacks for loans and bonds and impose higher rates and prices.⁴⁴³ White suppliers impose higher prices or simply refuse to deal.⁴⁴⁴

When affirmative action programs are used to create economic opportunities for women and minority-owned firms, they often come under heavy political attack. For example, when the Resolution Trust Company began hiring law firms to represent it to recover assets from banks it took over, it found it was retaining almost exclusively white male-owned firms. As a result of vigorous efforts to find minority- and women-owned law firms with expertise in banking and liquidation work, and push points to retain more such women and minority-owned firms, it was able to increase its minority and female participation to 13% of the total dollar value of its work. Although that left 87% of the legal work for firms in which a majority of the ownership was by white men, the program was heavily criticized as using unfair and unwarranted preferences.⁴⁴⁵

Another problem that contributes to the exclusion of minority group members from economic opportunity, and to racial segregation in housing, is insurance redlining—refusing to issue insurance to residents of certain areas. In a study of homeowner's insurance underwriting in Milwaukee, Wisconsin, the authors found a substantial link between the ability to purchase insurance, the quality of insurance, and race.⁴⁴⁶ Essentially, private insurers avoided largely minority neighborhoods. If residents of such neighborhoods were able to purchase insurance, it was likely to be through a government-sponsored insurance plan offering a less comprehensive policy.⁴⁴⁷ The authors found that "the racial effect remains substantial even after controlling for variables such as income level, poverty status, age of housing, and turnover rates—factors that the financial industry has

441. *See id.* at 575-77.

442. *See id.* at 577-78.

443. *See id.* at 578-80.

444. *Id.* at 580-81.

445. *See* Benjamin Wittes, *RTC Affirmative Action Bids Farewell*, *RECORDER*, July 22, 1995, at 1, 6.

446. Gregory D. Squires & William Velez, *Insurance Redlining and the Transformation of an Urban Metropolis*, 23 *URB. AFF. Q.* 63, 74 (1987).

447. *See id.*

argued are the key indicators of the relative risk associated with individuals and neighborhoods."⁴⁴⁸

As Squires and Velez suggest,

The relatively greater difficulty in obtaining insurance in minority communities has several implications. Home ownership becomes more difficult in those areas. Property values are lower as a result. Consequently, individuals accumulate less equity in their homes. Over time, such areas become less attractive for investment, so private investors, including insurance companies, allocate their capital elsewhere. Such uneven development is exacerbated when scarce public dollars follow the flow of private dollars, leading to further deterioration of municipal services in urban communities.⁴⁴⁹

On the consumer side of the business aisle, women and minority group members often pay more than white men for the same product. For example, a 1991 study revealed that sellers of new cars demand higher prices from white women than they do from white men, higher prices from blacks than whites, and the very highest prices from black women.⁴⁵⁰ The differences are not small. In a test of ninety Chicago car dealerships using 180 test teams, the author found that white men were offered cars at an average price of \$362 over the cost to the dealer, white women at \$504 over cost, black men at \$783 over cost, and black women at \$1,237 over cost.⁴⁵¹ Comparing the initial offers, white men were asked to pay \$818 over dealer cost, white women were asked to pay \$829 over dealer cost, black men were asked to pay \$1,534 over dealer cost, and black women were asked to pay \$2,169 over dealer cost.⁴⁵² The author estimates that the added costs to blacks from price discrimination could total \$150,000,000 annually for new car sales alone.⁴⁵³ Once the car is purchased, race also plays a significant role in the cost of insuring it. Prior to the passage of a recent insurance reform initiative, residents of primarily black and Hispanic neighborhoods in California typically paid almost twice as

448. *Id.* at 73.

449. *Id.* at 75.

450. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

451. *Id.* at 828 tbl. 1. In additional tests using 400 similar negotiations, these results were largely confirmed: white women were asked to pay \$211 more than white men, black women were asked to pay \$397 more, and black men were asked to pay \$1,022 more. *Id.* at 828 n.36.

452. *Id.* at 832 tbl. 2.

453. *Id.* at 823 n.18.

much for auto insurance as residents of primarily white neighborhoods.⁴⁵⁴

Although the evidence of economic discrimination against blacks is overwhelming, it is not widely acknowledged by whites. In responding to the Brodie survey, the white participants were almost evenly split when asked whether most blacks have the same standard of living and opportunities as whites (47%) or a lower standard of living and fewer opportunities than whites (51%).⁴⁵⁵ And when framed entirely in terms of economic opportunity, 68% of the white respondents believed that blacks have the same or more opportunity to be “really successful and wealthy,” compared to 31% who believe blacks have less opportunity.⁴⁵⁶

G. Crime

Of all the areas of American society in which minority group members face discrimination, the most significant may be the criminal justice system, which is widely recognized to be infected with racial discrimination at every stage of the process. On any given day in 1994, 30.2% of black men aged 20-29 were under the control of the criminal justice system, either through jail, prison, probation or parole.⁴⁵⁷ By comparison, the “control rate” for the Hispanic population of the same age was 12.3%, and for whites it was a mere 6.7%.⁴⁵⁸ In 1989, the “control rate” for young black males was 23.0%, and the rate for young Hispanic males was 10.4%.⁴⁵⁹ Consequently, while the overall population of the United States is approximately 12% black, the prison population is over 45% black.⁴⁶⁰ Among new inmates admitted to prison in 1994, almost three quarters were either black or Hispanic.⁴⁶¹

454. Gary Williams, *“The Wrong Side of the Tracks”: Territorial Rating and the Setting of Automobile Liability Insurance Rates in California*, 19 HASTINGS CONST. L.Q. 845, 849-52 (1992).

455. BRODIE, *supra* note 217, at 81.

456. *Id.* at 77.

457. MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 tbl. 1 (1995).

458. *Id.*

459. *Id.* at 5 tbl. 3.

460. HACKER, *supra* note 260, at 236.

461. Fox Butterfield, *More in U.S. Are in Prison, Report Says—Number of Inmates at the End of 1994 Has Tripled Since 1980*, N.Y. TIMES, Aug. 10, 1995, at A7. The arrest rate for blacks in 1992 was five times higher than the arrest rate for whites (3,929.4 per 100,000 compared to 792.6 per 100,000). See also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993*, at 422 tbl. 4.5 (1994) [hereinafter SOURCEBOOK].

The main reason for the increase in the incarceration of young blacks is increased and discriminatory enforcement of the drug laws. In 1983, there were 57,975 incarcerated drug offenders; by 1993 there were 353,564.⁴⁶² Although blacks constitute approximately 13% of all American drug users,⁴⁶³ they make up 35% of those arrested for drug possession, 55% of those convicted of drug possession, and 74% of those imprisoned for drug possession.⁴⁶⁴ Another 16% of those incarcerated for drug use are Hispanic.⁴⁶⁵

One major reason for this disparity in drug use incarceration is that while the police rarely arrest middle-class white drug users, they arrest middle-class black drug users as frequently as "underclass" black drug users.⁴⁶⁶ Another reason is the way in which the criminal justice system treats crack cocaine. Crack cocaine, which is more likely to be used by blacks and other minority group members than powder cocaine or other illicit drugs,⁴⁶⁷ is the only drug that carries a mandatory prison sentence for mere possession.⁴⁶⁸ Possession of crack cocaine carries a federal sentence mandatory minimum of five years in prison.⁴⁶⁹ Similar possession of powder cocaine carries no mandatory minimum, and a maximum sentence of one year in prison.⁴⁷⁰ Thus, young black crack cocaine users are subjected to far harsher punishment than young white cocaine users.

The difference in treatment of minority and white cocaine users is further exacerbated by arrest and prosecution decisions. While blacks make up an estimated 38% of the users of crack cocaine, they constituted 84.5% of federal crack possession convictions in 1993,⁴⁷¹ and 90% of those convicted in 1994.⁴⁷² By contrast, although almost half of all crack users are white, only 3.5% of those convicted for possession in 1994 were white.⁴⁷³ In 1995, the United States Sentencing Commission proposed the elimination of the five-year mandatory

462. See Mauer & Huling, *supra* note 457, at 11 tbl. 5.

463. *Id.* at 9.

464. *Id.* at 12 fig. 1.

465. *Id.* at 13 tbl. 6.

466. See *Id.* at 9.

467. An estimated 38% of crack cocaine users are black. *Id.* at 11. An estimated 54% of crack cocaine users are non-white. See Jeffrey Abramson, *Making The Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A11.

468. Charisse Jones, *Crack and Punishment: Is Race the Issue?*, N.Y. TIMES, Oct. 28, 1995, § 1, at 1, 9.

469. Abramson, *supra* note 467, at A11.

470. *Id.*

471. See Mauer & Huling *supra* note 457, at 11.

472. Jones, *supra* note 468, at 9.

473. *Id.*

minimum sentence for crack cocaine possession and treating crack and powder cocaine the same, arguing that the distinction was racially discriminatory, but Congress rejected the proposal.⁴⁷⁴

Among the fifteen American cities with the largest black populations, none have proportional representation of African Americans on their police force.⁴⁷⁵ The result is mostly white police forces patrolling largely black and Hispanic neighborhoods. In their treatment of non-white residents, the police are not only more likely to arrest them than they are whites, they are also more likely to exercise their authority to shoot them. Several studies have found that the percentage of police shootings involving black victims far exceeds the percentage of blacks in the population.⁴⁷⁶ Although a debate has raged over whether the higher proportion of blacks shot by the police reflects police bias or higher black criminal activity, a landmark study of shootings by the Memphis police revealed that blacks were at far greater risk of being shot by police than can be explained by either their proportion of the general population or their proportion of arrests.⁴⁷⁷ The study found the death rate by police shooting of unarmed non-assaultive black men was eighteen times higher than the comparable white death rate.⁴⁷⁸

Another place where racial bias is revealed in the criminal justice system is the discretionary decision by prosecutors on how to charge crimes. A number of studies reveal that in the exercise of prosecutorial discretion, race plays a significant role. For example, a study conducted on over 33,000 felony cases charged in Los Angeles County found that black men were 50% more likely to be prosecuted for serious crimes than were white men, and Hispanic men were even more likely to be prosecuted than were black men.⁴⁷⁹ Of those white men arrested, 26% were prosecuted, while 39% of black arrestees were prosecuted, as were 42% of Hispanic arrestees.⁴⁸⁰

Nationally, among those arrested in 1991 for juvenile delinquency, the likelihood of detention prior to juvenile court disposition

474. *Id.*

475. HACKER, *supra* note 260, at 236.

476. See generally James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. OF CRIM. LAW & CRIMINOLOGY 707 (1982) (collecting studies).

477. *Id.* at 720.

478. *Id.*

479. Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 176, 185 tbl. 2 (1987).

480. *Id.* at 185 tbl. 2.

was over 50% greater for black children than for white children.⁴⁸¹ Black children were almost twice as likely to be bound over to adult court and tried as adults.⁴⁸²

Once charged, a criminal defendant will often be offered an opportunity to plead to a lesser offense, or "plea bargain." A study of California judges, prosecutors and public defenders revealed that 16% of judges and 68% of public defenders believed that race or ethnicity effects the outcome of a plea bargain.⁴⁸³ Responding to a differently worded question, 34% of the judges and 89% of the public defenders agreed that racial bias is at least a little evident in the plea bargaining process.⁴⁸⁴

A two-year study conducted for the National Institute of Corrections examined all cases of prison inmates in California, Michigan and Texas for the year 1978.⁴⁸⁵ The study found that whites were more likely to be able to plea bargain, were less likely to be sentenced to prison if convicted, and served, on average, shorter prison sentences than blacks or Hispanics.⁴⁸⁶ Among those whites convicted of crimes in federal court in 1990, 76.6% were sentenced to prison.⁴⁸⁷ Among blacks, 79.3% were sent to prison.⁴⁸⁸ In the state courts, the average sentence for white felony offenders in 1990 was 45 months.⁴⁸⁹ For blacks, it was 58 months.⁴⁹⁰ The disparity was particularly high for rape. While white rapists were sentenced to an average of 98 months in prison, black rapists were sentenced to 157 months.⁴⁹¹ By 1991, the average sentence in state court for whites was 63 months for all offenses; for blacks, it was 74 months.⁴⁹² A 1991 survey of 34 states, focusing on the amount of time served by prisoners before their first

481. The rate was 17.3% for whites, 26.2% for blacks. SOURCEBOOK, *supra* note 461, at 549 tbl. 5.78.

482. *Id.*

483. SAN JOSE MERCURY NEWS, SUMMARY OF RESULTS: CALIFORNIA CRIMINAL JUSTICE SURVEY, 8 (1991).

484. *Id.*

485. Joan Petersilia, *Racial Disparities in the Criminal Justice System: A Summary*, 31 CRIME & DELINQ. 15 (1985).

486. *Id.* at 21 tbl. 2, 22 tbl. 3.

487. SOURCEBOOK, *supra* note 461, at 493 tbl. 5.21.

488. *Id.*

489. *Id.* at 538 tbl. 5.61.

490. *Id.*

491. *Id.*

492. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM, 1991, at 17 tbl. 1-10 (1994).

release from prison, confirmed that blacks served more time than whites.⁴⁹³

In the area of race and the death sentence, a study by Keil and Vito examined all 407 cases in which a person was charged, indicted, convicted and sentenced for murder in the State of Kentucky between the years 1976 and 1986.⁴⁹⁴ The authors found that "race is inextricably bound up with the way in which the capital sentencing process operates."⁴⁹⁵ Prosecutors were far more likely to seek the death penalty for blacks who killed whites than in any other racial combination.⁴⁹⁶ In almost half the cases (22 of 45) in which a black person was charged with killing a white person, the prosecutor sought the death penalty.⁴⁹⁷ When a white person was charged with killing another white person, the prosecutor sought the death penalty just over one fourth of the time (72 of 273).⁴⁹⁸ When a black person was charged with killing another black person, the death penalty was sought less than one time in six (12 of 75).⁴⁹⁹ And in no case in which a white person was charged with killing a black person did the prosecutor seek the death penalty (0 of 14).⁵⁰⁰ When the "seriousness" of the murder was taken into account (whether the victim was a stranger, whether the defendant was a deliberate killer, and whether the defendant had a history of violence) the racial bias in the exercise of prosecutorial discretion remained.⁵⁰¹

A similar study of all 413 Florida cases in which a person was sentenced to death between 1976 through 1987 yielded similar results.⁵⁰² Among defendants convicted of killing whites, blacks were more than twice as likely as whites to be sentenced to death.⁵⁰³ Although the population of the United States is approximately 12% black, 40% of all American prisoners on death row were black by the end of 1992.⁵⁰⁴

493. *See id.* at 76 tbl. 6.9, 77 tbl. 6-10.

494. Thomas J. Keil & Gennaro F. Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 *CRIMINOLOGY* 511 (1989).

495. *Id.* at 528.

496. *Id.* at 518 tbl. 1.

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *See id.* at 520-21.

502. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 *FLA. L. REV.* 1 (1991).

503. *Id.* at 22.

504. *SOURCEBOOK*, *supra* note 461, at 666 tbl. 6.109.

In a 1991 California survey, 14% of the judges and 76% of the public defenders questioned disagreed with the statement, "Race/ethnicity has no effect on the length of sentence imposed in criminal cases,"⁵⁰⁵ and 16% of the judges and 77% of the public defenders disagreed with the statement, "Race/ethnicity has no effect on the type of sentence imposed in criminal cases."⁵⁰⁶

Viewers of *L.A. Law* could be excused for thinking that many of the judges imposing criminal sentences were themselves minority group members. Popular culture often depicts large numbers of minority judges, but in truth there are few. A 1995 survey conducted for the California Judicial Council revealed that in California, where the white population is 57%, nearly 90% of the Superior Court judges are white.⁵⁰⁷ At the federal level, of the 438 judges appointed between 1981 and 1992, 398 of them (over 90%) were white, 17 were black, 21 were Hispanic, 2 were Asian, and only 50 were women.⁵⁰⁸

Minority group members interact with the criminal justice system as victims as well as defendants. In a study on segregation and crime, Douglas S. Massey writes: "blacks are far more likely to be crime victims than are whites. Black teenagers are eleven times more likely to be shot to death and nine times more likely to be murdered than their white counterparts."⁵⁰⁹ In a study examining the link between racial segregation and black homicide deaths in 125 central cities, Massey and other social scientists found that "black-white segregation was by far the most important variable in explaining inter-city variation in the black murder rate, dwarfing the effect of control factors such as income inequality, poverty, education, occupation, age composition, population size, and region."⁵¹⁰ Between 1974 and 1992, the assault victimization rate for whites has been stable—in 1974 it was 24.8 per 1,000 population, and in 1992 it was 24.6 per 1,000.⁵¹¹ By contrast, for black assault victims, the rate has risen from 23.5 per 1,000 (less than the white rate) to 33.5 per thousand.⁵¹²

505. SAN JOSE MERCURY NEWS, CALIFORNIA CRIMINAL JUSTICE SURVEY, *supra* note 483, at 7.

506. *Id.* at 8.

507. AR ASSOCIATES, RACIAL AND ETHNIC COMPOSITION OF THE CALIFORNIA TRIAL COURTS, A REPORT TO THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS, draft at app. B (1995).

508. *See* SOURCEBOOK, *supra* note 461, at 72 tbl. 1.63.

509. Massey, *supra* note 368, at 1205.

510. *Id.* at 1209.

511. SOURCEBOOK, *supra* note 461, at 272 tbl. 3.28.

512. *Id.*

H. Poverty

In a society in which wealth and status are inextricably bound, the link between race and poverty is undeniable. The United Nations has reported that if the black and white populations of the United States were considered separate nations, white America would rank first in the world in wealth, while black America would rank thirty-first.⁵¹³

In 1992, 38.1% of black families and 30.3% of Hispanic families had less than \$15,000 in annual income, compared to only 13.8% of white families.⁵¹⁴ Between 1989 and 1992, a period in which all families saw a drop in income,⁵¹⁵ the drop was more severe for black and Hispanic families than for white families.⁵¹⁶ The median annual income for 1992 reveals that black families had a median income of \$21,161, compared to \$23,901 for Hispanic families, and \$38,909 for white families.⁵¹⁷ For the same year, 42.6% of black families and 35.4% of Hispanic families had an income level that placed them in the bottom 20% of all households, as compared to 16.8% of white households.⁵¹⁸

While unemployment may account for some of the difference in income between whites and minorities, unemployment does not tell the whole story. Among male, year-round, full-time workers, blacks and Hispanics had much lower median incomes than did whites in 1992: \$22,942 for blacks, \$20,312 for Hispanics, and \$31,737 for whites.⁵¹⁹ Among female year-round, full-time workers, 26.9% of the black women and 36.6% of the Hispanic women had earnings below the federal poverty line.⁵²⁰

While income differences certainly indicate that minorities continue to face economic disadvantages relative to white people, differences in wealth are even more stark. In 1991, white households had nearly ten times the median net worth of black families, and over

513. UNITED NATIONS 1993 HUMAN DEVELOPMENT REPORT 26 (1993).

514. STATISTICAL ABSTRACT, *supra* note 287, at 469 tbl. 714.

515. The median income of families in 1992 dollars fell from \$38,710 in 1989 to \$36,812 in 1992. *Id.* at 469 tbl. 715.

516. Between 1989 and 1992, an additional 2.8% of black families and an additional 3% of Hispanic families fell below the \$15,000 per year income level, compared to only an additional 1.1% of white families. *Id.* at 469 tbl. 714.

517. *Id.* at 469 tbl. 715.

518. *Id.* at 470 tbl. 717.

519. *Id.* at 472 tbl. 722.

520. ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL BRIEF NO. 94-3, THE EARNINGS LADDER: WHO'S AT THE BOTTOM? WHO'S AT THE TOP? 2 (1994).

eight times the net worth of Hispanic households.⁵²¹ The typical white American household in the pre-retirement years of 51-61 has \$17,300 in assets while the typical black family in the same pre-retirement years has \$500 in assets, and four out of ten have no assets at all.⁵²²

By examining who became poor and who left poverty in 1992, the Census Bureau has determined that blacks were only half as likely as whites to leave poverty, and more than twice as likely to enter poverty.⁵²³ Hispanics were one and a half times as likely to leave poverty, and again over twice as likely to enter poverty.⁵²⁴ The chronic poverty rate for whites was just 3%; it was 12% for Hispanics and 16% for blacks.⁵²⁵

Poverty hits minorities perhaps most severely at the beginning and at the end of their lives. Of people over 65, one third of blacks, and 22% of Hispanics lived below the poverty line in 1992, compared with 10.9% of whites.⁵²⁶ Similarly, of children under six over 50% of blacks, and 44% of Hispanics, lived below the poverty line in 1992, compared to 14.4% of whites.⁵²⁷ Although the national population is 12% black and 9.5% Hispanic, among households suffering from hunger 29.4% are black and 13.7% Hispanic.⁵²⁸ It is axiomatic that no child should go hungry. It is obscene that we can predict which children will go hungry based on their race.

V. Conclusion

The work of social scientists chronicled herein is strong evidence of pervasive unconscious racism within our society. For one perspective on how close it lies to the surface of consciousness, consider the statement of a Boston-area psychiatrist, as reported by Jonathan Kozol:

When they [his suburban neighbors] hear of all these murders, all these men in prison, all these women pregnant with no husbands, they don't buy the explanation that it's poverty, or public

521. In 1991, white households' median net worth was \$44,408, while for black households it was \$4,604 and for Hispanic households it was \$5,345. STATISTICAL ABSTRACT, *supra* note 287, at 482 tbl. 742.

522. See Keith Bradsher, *Rich Americans Tend To Earn It, New Study Finds*, S.F. CHRON., July 25, 1995, at A2.

523. ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL BRIEF NO. 95-20, POVERTY'S REVOLVING DOOR 1 (1995).

524. *Id.*

525. *Id.* at 2.

526. STATISTICAL ABSTRACT, *supra* note 287, at 476 tbl. 731.

527. *Id.* at 476 tbl. 729.

528. COMMUNITY CHILDHOOD HUNGER IDENTIFICATION PROJECT, *supra* note 396, at 14 tbl. 2.1.

schools, or racial segregation. They say, 'We didn't have much money when we started out, but we led clean and decent lives. We did it. Why can't they?' I try to get inside that statement. So I ask them what they mean. What I hear is something that sounds very much like a genetic answer: 'They don't have it.' What they mean is lack of brains, or lack of drive, or lack of willingness to work. Something like that. Whatever it is, it sounds almost inherent. Some of them are less direct. They don't say genetics; what they talk about is history. 'This is what they have become, for lots of complicated reasons. Slavery, injustice or whatever.' But they really do believe it when they say that this is what they have *become*, that this is what they *are*. And they don't believe that better schools or social changes will affect it very much. So it comes down to an explanation that is so intrinsic, so immutable, that it might as well be called genetic. They see a slipshod deviant nature—violence, lassitude, a reckless sexuality, a feverish need to over-reproduce—as if it were a character *imprinted* on black people. The degree to which this racial explanation is accepted would surprise you.⁵²⁹

Since 1978, the Supreme Court has continually affirmed that affirmative action is an appropriate remedy for discrimination in employment, contracting, and school admissions. Although the Court has required significant proof of discrimination before permitting race- or sex-conscious decisionmaking, particularly by the government, and has further insisted that voluntary quotas not be permitted and that affirmative action plans be limited in time and scope, it nonetheless permits such plans to operate when these criteria are met.⁵³⁰

We now face a move to end affirmative action. It is premised on three false foundations: first, that affirmative action permits the use of quotas and the selection of unqualified persons for jobs, contracts and school admissions; second, that discrimination against white men is common, and that the cause of such discrimination is affirmative action; and third, that discrimination against women and minority group members is no longer a serious social problem. I hope that this Article has successfully demonstrated that each of these premises is demonstrably false.

We live in a society in which we who are white men are privileged by our race and gender, and in which women and racial and ethnic minority group members are subjected to widespread discrimination which makes it far more difficult for them to succeed. Among the few effective solutions to this vast social problem is the remedy of affirmative action; the time has not yet come for it to be ended.

529. Kozol, *supra* note 227, at 192 (emphasis in original).

530. See generally *infra* Part II.

