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Employment Equality in a Color-Blind Society

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EMPLOYMENT EQUALITY IN A COLOR-BLIND SOCIETY

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In the right to eat the bread . . . which his own hand earns, he [the Negro] is my equal and the equal of Judge Douglas, and the equal of every living man.[1]

THE U.S. RIOT COMMISSION REPORT[2] states in the introductory paragraph of its recommendations for national action in the area of employment that, "Unemployment and underemployment are among the persistent and serious grievances of disadvantaged minorities. The pervasive effect of these conditions on the racial ghetto is inextricably linked to the problems of civil disorder."[3] It seems to be a simple fact of life that the lack of jobs, or jobs above a minimal level, is one of the underlying causes of the civil disorder we have experienced in the recent past. We may expect these difficulties to continue to plague our nation until the underprivileged have employment opportunities equal to those of white America.

At the time of his death, the late Dr. Martin Luther King was moving his Southern Christian Leadership Conference, through Operation Breadbasket, in the direction of bringing pressure to bear on the economic problems of the poor. Dr. King had concluded that the economic problems of the poor were the most serious problems faced by the Negro community. As statistics show,[4] the unemployment rate for Negroes exceeds that of whites by about 50 per cent.[5]

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1 Abraham Lincoln, Lincoln-Douglas Debates, Aug., 1858.

2 *Report of the National Advisory Commission on Civil Disorders* (Bantam ed. 1968).

3 *Id.* at 413.

4 *See* Olson, *Employment Discrimination Litigation: New Priorities In the Struggle For Black Equality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 20 (1971): Fisher, *Labor and the Economy, 1969*, 93 MO. LABOR REV. 30, 31 (Table 1) (1970).

5 Fisher, *supra* note 4, at 30.

The economic boycott has proven to be one of the most effective means of achieving civil rights.[6] The reason that the boycott has been effective is readily understandable if one considers that minority groups have, until recently, received little support from other segments of society. Government agencies, as well as the courts, have in the past ignored the economic problems of minorities. Labor unions, particularly the trade unions, have displayed outright hostility towards their efforts to obtain jobs. It is to be expected, then, that minorities would turn to "self-help" devices to achieve for themselves employment opportunity when other means are closed to them. One of the most controversial aspects of the use of the economic boycott has been the demand made for quotas or proportional hiring of minority persons in numbers corresponding to their percentage of the overall work force.

The purposes of this article are first, to look at the rights of Negroes,[7] under law, to bring economic pressure to bear for employment equality, including the demand for a quota, and secondly to see how that law is satisfying today's social needs. To achieve this latter purpose, perhaps we must ask whether our society can afford to be legally color-blind? We shall look first to the private self-help devices that have been used by minorities, and then to one area of governmental intervention that has dealt directly with minority employment and the use of quotas or goals to achieve an acceptable balance of minority personnel within a given industry. From this study it is hoped that we can determine the legal limits of demands for proportional hiring both of the private "self-help" variety and those promulgated by government.

I. EARLY CASES

A. S. Beck Shoe Corp. v. Johnson[8] was the first case to arise in the United States over the right of Negroes to picket for employment opportunity. The case arose in New York during the Depression in 1934. In that action the plaintiff, whose store was located in Harlem, was

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[6] Dr. King rose to public prominence as a result of the Montgomery bus boycott. Civil rights lawyer Charles Morgan Jr. once commented that the difference between the racial attitudes of Birmingham, Alabama and Atlanta, Georgia was a result of the nature of the predominant industry in each of the two cities—one, industrial consumer orientated; the other, individual consumer orientated. As Mr. Morgan expressed it, the Negro in Birmingham could not say to his wife, "Don't buy any U.S. Steel today, because I can't work there," but the Negro in Atlanta could say to his wife, "Don't buy any Coca-Cola today." *See* Comment, *The Consumer Boycott,* 42 MISS. L. REV. 226 (1971).

[7] This of course applies to all minorities. Department of Labor data refer to all races other than white. Negroes make up about 92 per cent of races other than white. *See supra* note 4. For a comprehensive study of the racial policies of American industry see WHARTON SCHOOL OF FINANCE & COMMERCE, STUDIES OF NEGRO EMPLOYMENT Vol. I-V (U. Pa. Press 1970-71).

[8] 153 Misc. 363, 274 N.Y.S. 946 (Spec. Term. N.Y.C. 1934) [hereinafter cited as *Beck*].

granted an injunction pendente lite restraining the Negro defendants from picketing the store. The court granted the injunction notwithstanding the fact that the picketing was peaceful and that the assertions in the signs carried by the pickets were truthful. The signs contained the following assertions:

> A. S. Beck does not employ 50 per cent Negroes.
> Stay Out. Do not buy here.
> An Appeal. Why spend your money where you
> can't work? This is foolish. Stay out.
> Citizens League for Fair Play.
> An Appeal. Don't buy from this store.
> Negro serving here is a porter not a clerk.
> Stay out. Citizens League for Fair Play.[9]

The court characterized the dispute as a racial and not a labor dispute, and even though it was the result of an understandable desire on the part of those picketing that the stores in neighborhoods where they spent their money employ Negroes, the court was of the opinion that the objective sought did not justify the means used.

The next year, 1935, in the case of *Green v. Samuelson*,[10] the Supreme Court of Maryland upheld an injunction against a group of Negroes who picketed to replace white clerks by Negroes. The Maryland court refused to accept the defendant's contention that the case was akin to a labor dispute inasmuch as it was their purpose to secure employment for members of the Negro race and improve its condition. The court did concede that while the Negroes could not picket, they could organize, hold public meetings, and use personal solicitation to persuade white employers to employ Negroes. The Maryland court noted that New York had reached the same conclusion in the *Beck* case. The *Beck* case provoked a number of law review comments. The most critical of them appeared in the *University of Pennsylvania Law Review*.[11] It stated:

> [T]he impossibility of fitting the situation into the category of a labor dispute should not necessitate such a result. There may well be considerations in favor of giving such privileges to the Negro race quite as compelling as those which have brought about the liberalization of the judicial attitude toward labor. In that field, the modern tendency to permit direct action represents a hard-won advance from the early decisions condemning all combinations for common action against employers as criminal conspiracies. The court in the instant case dismissed the problem of underlying social policy by alluding briefly to potential race conflicts. While it may be conceded that such conflicts are to be discouraged, this reason for denying the picketing privilege is not altogether persuasive. Some degree of violence seems

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9 *Id.* at 364-65.

10 168 Md. 421, 178 A. 109 (1935) [hereinafter cited as *Green*].

11 83 U. OF PA. L. REV. 383 (1935).

to be an inevitable concomitant of any self-enforced improvement in the lot of previously subjected groups, as the turbulence of many labor disputes will bear witness. The alternative of abandoning all attempts at progress is scarcely preferable. There appear to be more basic factors which the court overlooked. The essential purpose behind the liberal attitude toward labor would seem to be the advisability of raising living standards and ultimately reducing the sociological and economic burdens upon the community as a whole which accompany the subjugation of any large group therein. The economic progress of the Negro race should, for this same reason, be a proper subject of community concern. A contrary decision in the principal case would have given impetus to the development of the Negro in segregated districts by obliging white employers, if they remained in the district in competition with Negro stores, to employ Negro help.[12]

Despite the dated language in referring to "segregated districts," which may not be so dated in view of our own de facto segregation today, the criticism is still valid. Other law reviews agreed with the decision upon the dual basis that: (1) to allow the picketing might cause racial riots; and (2) the lack of any public policy favoring racial privileges comparable to the public policy favoring labor demands.[13]

II. A NEW DAY—THE NEW NEGRO ALLIANCE CASE

In 1938, four years after the *Beck* case, the United States Supreme Court in a case on certiorari from the Court of Appeals for the District of Columbia held that there was a labor dispute within the meaning of Section 13 of the Norris-LaGuardia Act[14] when a Negro social action group that called itself the New Negro Alliance picketed a grocery store to persuade the store to hire Negro clerks.[15] In this case, the organization requested the company to adopt a policy of employing Negro clerks in the course of personnel changes in their stores located in Negro neighborhoods which were patronized largely by Negroes.

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[12] *Id.* at 384.

[13] *See* 35 COLUM. L. REV. 121 (1935); 48 HARV. L. REV. 691 (1935).

[14] 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (1965) Section 113 states in part:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; ... or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined). (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or if, and if he or it ... has a direct or indirect interest therein, ... (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, ... regardless of whether or not the disputants stand in the proximate relation of employer and employee.

[15] New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) [hereinafter cited as *New Negro Alliance*].

The company ignored the request and one picket, carrying a sign reading, "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!"[16] paraded in front of one of the stores one day, and threatened to picket two other stores. The Court held that the controversy came within the definitions of Section 13 of the Norris-LaGuardia Act as one arising out of a labor dispute, and that the District Court was without jurisdiction to grant an injunction against the picketing. The Court stated that the Act did not concern itself with the backgrounds or motives of the dispute but rather:

> The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment upon differences of race or color.[17]

Unlike the objectives sought in the *Beck* and *Green* cases, the New Negro Alliance had not made demands that all or even a given percentage of the clerks be Negro.

The next year, in *Anora Amusement Corp. v. Doe*,[18] a New York court upheld the right of a Negro organization to picket a theatre in protest of its policy of not hiring Negro help. The state court compared the Supreme Court's interpretation of the Norris-LaGuardia Act in the *New Negro Alliance* case to New York's counterpart of Norris-LaGuardia and found that the state statute did not apply in this case since the defendants were not included within the classes defined under the state law.[19] The picketers carried placards reading: "Do not patronize this Theatre, they refuse to employ Negro help. Negro Youth Association of Corona, 100-13 Northern Boulevard, Corona, New York."[20]

The New York Supreme Court, relying on New York case law upholding picketing[21] and the Supreme Court's holding in *New Negro*

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16 *Id.* at 557.

17 *Id.* at 561.

18 171 Misc. 279, 12 N.Y.S. 2d 400 (Sup. Ct. 1939).

19 *Id.* at 281, 12 N.Y.S. 2d at 402.

20 *Id.* at 282, 12 N.Y.S. 2d at 402.

21 Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927).

Alliance that the purpose of the picketing was lawful, denied the motion for an injunction stating that:

> [I]n the absence of proof of misconduct, no relief should be granted, as "The right of an individual or group of individuals to protest in a peaceful manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society."[22]

This case was followed by *Lifshitz v. Straughn*[23] in 1941, a decision which may have been influenced by the line of cases upholding picketing for a closed shop. The case involved a group calling itself the "Amalgamated Labor Association" which demanded that the plaintiff enter into an agreement with it, the substance of which required the plaintiff to hire only Negroes who were members of this association. When the plaintiff refused to do so, the group picketed. The court refused to grant an injunction on the basis that a labor dispute under New York law was involved. The injunction was denied, the court noted, notwithstanding the fact that the association represented only Negro employees and that labor organized along racial lines might not contribute to the general good.

The court seemed to recognize without so stating, that unions composed primarily of Negroes were a response to the fact that major unions practiced discrimination and had no interest in organizing or helping minority workers. The rise of Negro unions is another example of the self-help devices that Negroes and other minorities have been forced to take in attempts to better their economic lot.

Contrary results were reached on basically the same facts by the California Supreme Court in the case of *James v. Marinship Corp.*[24] This approach seems to be the correct one to a situation that involves discriminatory demands being made by the picketing group, in that they were asking for a closed shop while at the same time, they excluded members on racial grounds. The California court stated that a closed shop agreement was legal in the state and that a union could use economic pressure to enforce a demand for one, even where the employees in the shop did not belong to the union and had no dispute with their employer. But it did not follow, however;

> [T]hat a union may maintain both a closed shop agreement or other form of labor monopoly together with a closed or partially closed membership.... An arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has... attained a monopoly of the supply of labor by means of closed shop agree-

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[22] Anora Amusement Corp. v. Doe, 171 Misc. at 282, 12 N.Y.S. 2d at 403; *citing* Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (Sup. Ct. 1934).

[23] 216 App. Div. 757, 27 N.Y.S. 2d 193 (2d Dept.), *appeal denied*, 262 App. Div. 849, 28 N.Y.S. 2d 741 (2d Dept. 1941).

[24] 25 Cal.2d 721, 155 P.2d 329 (1945) [hereinafter cited as *Marinship*].

> ments and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It can no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.[25]

The situation would, of course, be different if the union were open to all regardless of race, even if its purpose were to get more jobs for Negroes. The problem then would be one of convincing the court that it fairly represented the interests of non-Negroes.[26]

The *Marinship* case is a good example of how the principle of egalitarianism and the idea that the courts must be color-blind has had the practical effect of discriminating against minority groups. Superficially it would seem correct to say that closed or limited membership in a union is incompatible with a closed shop. But this is precisely the kind of discrimination that minority groups, particularly Negroes, were faced with in 1945 and are still facing today to a large extent in trying to obtain entry into the trade unions. While the closed shop is no longer legal, the hiring patterns of the construction industry, through the use of the union hiring halls, have had the same practical effect as the closed shop. It is little wonder then that minorities have organized their own unions in response to their being shut out of the predominately white trade unions. The court, in the *Marinship* case, by applying ideal standards to one union (that representing minority persons) when it could not possibly apply the same standards to others (the major predominately white trade unions) was in effect discriminating against the minority group persons involved. The court is saying in effect "thou shall not fight fire with fire."

III. THE ILLEGAL DEMAND

In 1947, in the case of *Hughes v. Superior Court*,[27] a group of Negro organizations and individuals violated a preliminary injunction issued by the Superior Court of California forbidding their picketing of a grocery store. In the proceeding on certiorari the California District Court of Appeals annulled the contempt citation and held that there was a labor dispute within the broad meaning of the term, but did not limit the right to picket labor disputes. In their demands, the Negro groups asked that the store hire a proportionate number of Negro clerks as replacements were necessary. The signs the picketers carried stated: "Lucky Won't Hire

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[25] *Id.* at *730*, 155 P. 2d at 335.

[26] Weiner, *Negro Picketing for Employment Equality*, 13 HOW. L. REV. 271, 297 (1967).

[27] 186 P.2d 756 (Cal. App. 1947).

Negro Clerks in Proportion to Negro Trade—Don't Patronize."[28] The court, in upholding their right to picket, stated that every argument that could be made in support of the right of a labor union to picket could properly be made in support of the right of Negroes to secure employment equality.

> All that we are here holding is that it is in accord with sound public policy to permit Negroes, a discriminated against, and subjugated group in our society, to picket to attempt to secure equality in employment practices from those employers who cater to Negro patronage. The right is granted not because the picketers are members of a minority group, but because that minority group is economically discriminated against, and is attempting to rectify that condition. Beyond that we do not have to and do not go in this case. We conclude therefore, that on principle the right to picket is not limited to labor disputes but may be exercised whenever the economic interest of the picketers is sufficiently important to warrant this interference with the rights of those against whom the picketers are operating.[29]

The court made short shrift of the argument that proportional hiring of Negroes was unlawful:

> Such an argument disregards the realities. Carried to its logical conclusion it would mean that a store whose patronage is entirely Negro, and where many clerks were hired, by the token hiring of one Negro, could prevent the picketing of such establishment aimed at preventing such discrimination and exploitation. Even if it be assumed that a demand for a mathematical quota, discrimination being absent, would be an unlawful demand, in the present case it is the fact that discrimination here, exists that makes what otherwise, it may be assumed, would be unlawful, lawful. Beyond that we need not go.[30]

The California Supreme Court reversed and affirmed the contempt judgment with two justices dissenting.[31] The court based its decision on *Marinship*[32] and said that if the store had yielded to the demands, the resultant policy would be the equivalent of both a closed shop and a closed union in favor of Negroes. The combination of the two was found impermissible under California's public policy.

> Because race and color are inherent qualities which no degree of striving or of other qualifications for a particular job could meet, those persons who are born with such qualities constitute, among themselves, a closed union which others cannot join. It was just such

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[28] *Id.* at 759.

[29] *Id.* at 765.

[30] *Id.* at 766.

[31] Hughes v. Superior Court, 32 Cal.2d 850, 198 P.2d 885 (1948).

[32] 25 Cal.2d 721, 155 P.2d 329 (1945).

> a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the *Marinship* case. . . .[33]

The majority felt that the fact that this demand was for a proportion of the employees, and not all, did not reduce the unlawfulness of its purpose, because to the extent of the proportion, the right to work was dependent on membership in a particular race and not the fitness for the work. "If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which the petitioners avowedly object."[34]

In a strong dissenting opinion,[35] Justice Carter pointed out that the petitioners were seeking equal treatment, not discrimination, and that in neighborhoods that were predominantly one race or the other, picketing for a proportional hiring of members of that race would be just, equitable, and in accord with sound public policy. In this case the picketers were picketing a store in a predominantly Negro neighborhood, and the customers of the store were at least 50 per cent Negro. As he pointed out:

> The petitioners by means of peaceful picketing . . . were seeking to publicize their grievances to members of their race, and to members of the white race in sympathy with their long struggle for freedom, so that economic pressure might be exerted to gain for them equality in the labor field. They requested only that a proportionate number of Negro clerks be hired as replacements were necessary. Not that any white person be fired that they might be hired.[36]

Justice Traynor thought that the holding of the majority was an erroneous application of the *Marinship* case.[37] In that case the union attempted to secure a monopoly of the jobs by a closed union coupled with a closed shop, but the court held that a union with this monopoly could not close its membership on racial grounds and simultaneously enforce a closed shop contract against those it excluded from membership. He distinguished the *Marinship* situation from the situation in *Hughes* on on the basis that the petitioners were not seeking a monopoly, but only a share of the jobs they would have had, had there been no discrimination against them.[38] He stated that rules that were developed to limit abuses of those already in control of the labor market do not apply to persons seeking to gain entrance to that market, as in this case.[39] He then pointed out that:

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[33] 32 Cal.2d at 854, 198 P.2d at 889.
[34] *Id.*
[35] *Id.* at *858*, 198 P.2d at 890 (Carter, J., dissenting).
[36] *Id.* at 861, 198 P.2d at 894.
[37] *Id.* at *867*, 198 P.2d at 895.
[38] *Id.*
[39] *Id.*

> Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done without reference to race or color or by demanding a certain number of jobs for members of this group. The majority opinion holds that economic equality cannot be sought by the second method if picketing is adopted as a means of attaining that objective. In the absence of a statute protecting them from discrimination it is not unreasonable for Negroes to seek economic equality by asking those in sympathy with their aims to help them secure jobs that may be opened to them by the enlistment of such aid. In their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. . . . There are so few neighborhoods where Negroes can make effective appeals against discrimination that they may reasonably regard the seeking of jobs in neighborhoods where their appeal may be effective the only practical means of combating discrimination against them. In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other.[40]

Upon appeal, the Supreme Court of the United States in a unanimous decision in *Hughes v. Superior Court*[41] declared that picketing by Negroes for quotas or proportionate hiring, whether based on a percentage of Negroes to whites in the neighborhood of the affected business, or on an arbitrary number, was considered an unlawful object by most states and was totally outside the protection of either the Norris-LaGuardia Act[42] or the National Labor Relations Act.[43]

Justice Frankfurter, writing for the Court, attacked the concept of proportional hiring:

> To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities.[44]

Thus, under *New Negro Alliance,* it is legal to picket to require an employer to hire "some Negroes." Now, under *Hughes,* that same picket-

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[40] *Id.* at 866, 198 P.2d at 895-6.

[41] 339 U.S. 460 (1950) (Mr. Justice Douglas not participating).

[42] 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1965).

[43] 61 Stat. 136 (1947), *as amended,* 29 U.S.C. §§ 141-168 (1964). *See* Weiner, *supra* note 26.

[44] 339 U.S. at 464.

ing becomes illegal when "some Negroes" is translated into a proportional percentage or an arbitrary number or quota. As one writer has suggested:

> [T]here is an implication that somehow it is illegal to be unreasonable in your demands. Either all your demands are for the "purpose of furthering equal economic progress" such as in *New Negro Alliance*, or asking for discrimination in reverse, and contra to state public policy, as in *Hughes v. Superior Court*. . . . The characterizations above suffer from the fatal disease of oversimplification; mere artful drafting of a picket sign or a letter to a prospective employer should not make the difference between legality or illegality. But alas, it all too often does.[45]

IV. THE AFTERMATH OF HUGHES V. SUPERIOR COURT

Accompanying the increase of civil rights activities in the 1960's there was an increasing number of suits to enjoin picketing by Negroes for employment equality. Not only was picketing enjoined, but other types of activity which were designed to bring pressure to bear on employers to hire Negroes of the type other courts[46] have allowed, even when they enjoined picketing, were now forbidden.

In *Potomac Electric & Power Co. v. Washington Chapter of CORE*[47] the defendant group was enjoined from distributing to the electric company's customers stamps bearing the words, "We believe in merit hiring."[48] These stamps were to be affixed to the stub of the bill that was returned to the company in connection with payment. The electric company contended that the stamps would make it impossible to use the stubs in its calculating machines and that the result would be confusion and havoc in its billing and accounting department. The court distinguished the case on the facts from *New Negro Alliance* as not being a labor dispute within the meaning of the Norris-LaGuardia Act, but said that even if it were deemed to be a labor dispute it would not bar relief in that the company could show irreparable or substantial injury and thus meet the requirements of Norris-LaGuardia for an injunction.[49]

The following year, 1963, in the case of *Fair Share Organization v. Nagdeman & Sons*,[50] an Indiana court said that there was no labor dispute within the meaning of Indiana state law in an action by a company to enjoin an organization from picketing in an effort to compel the company to hire Negroes on a proportional basis.

That same year the Florida state courts in *Young Adults for*

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45 Weiner, *supra* note 26, at 292.
46 Green, 168 Md. 421, 178A. 109 (1935).
47 210 F. Supp. 418 (D.D.C. 1962).
48 *Id.* at 419.
49 *Id.* at 420-21.
50 193 N.E.2d 257 (Ind. App. 1963), *cert. denied.* 379 U.S. 818 (1964).

Progressive Action, Inc. v. B. & B. Cash Grocery Store, Inc.[51] upheld an injunction against peaceful picketing for better hiring and promotion policies on the grounds that there was no obligation for the employer not to discriminate. The pickets had carried signs reading: "Qualified Negroes Can't Work Here. Don't Buy at B & B"; "Let's Not Buy at B & B Until We Get Better Jobs."[52]

The group had not asked for proportionate hiring of Negroes, only that "some Negroes be hired" in jobs other than menial ones. The case seems to be directly in point with *New Negro Alliance* yet the court in its one-page opinion avoided the necessity of making a distinction by failing to cite it.[53] Instead, the court based its decision on *Van Zandt v. McKee.*[54]

> The right to life, liberty and the pursuit of happiness, includes the right to work and earn an honest living; but it does not include the right to work for any particular individual without the latter's consent. One man's right to work stops short of the other fellow's right not to hire him.[55]

In a group of three cases[56] growing out of a sit-in protest against a St. Louis bank for the purpose of requiring the bank to hire four Negroes within two weeks, the courts held that the demand was a violation of the state's Fair Employment Practices Act[57] and that a restraining order was not invalid as being in conflict with the preempted field of the Labor Management Relations Act.[58] Both of the federal district courts that heard these cases[59] made the assumption that the demand to hire four Negroes made by the Negro group was a violation of the Missouri Fair Employment Practices Act. In *Ford v. Boeger* the court stated: "The petitioners were not protesting the Bank's discriminatory hiring policy, but were trying to force the Bank to hire four negroes which is a discriminatory practice. [Citing the Missouri Fair Employment Practices Act.]"[60] In *In re Curtis' Petition,* the court distinguished the fact

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[51] 151 So.2d 877 (Fla. App.), *appeal dismissed,* 157 So.2d 809 (Fla. App. 1963).

[52] 151 So.2d at 877.

[53] It is of course impossible to tell how this error came about, but nevertheless, someone made a mistake.

[54] 202 F.2d 491 (5th Cir. 1953).

[55] *Id.*

[56] *In re* Curtis' Petition, 240 F. Supp. 475 (E. D. Mo. 1965); Ford v. Boeger, 236 F. Supp. 831 (E.D. Mo. 1964); Curtis v. Tozer, 374 S.W.2d 557 (Mo. App. 1964).

[57] MO. STAT. ANN. §§ 296.010-.070 (1965).

[58] 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (1965).

[59] *In re* Curtis' Petition, 240 F. Supp. 475 (E.D. Mo. 1965); Ford v. Boeger, 236 F. Supp. 831 (E.D. Mo. 1964) [hereinafter cited as *Ford*].

[60] 236 F. Supp. at 838.

situation from the *New Negro Alliance* case on the basis of the lawfulness of the demand made.

> In that case a lawful demand was made. In this case the demand of CORE to hire four Negroes within two weeks flies in the face of [the Missouri Fair Employment Practices Act].
> By their demand, claiming to seek compliance with the Act, the petitioners also sought its violation. What might otherwise be a labor dispute between a union and an employer ceases to be a "bona fide labor dispute" when an unlawful demand is made.[61]

The statute involved is couched in langauge that makes it unlawful to refuse to hire someone because of race, but it does not speak in terms of discrimination in favor of racial minorities.

> It shall be an unlawful employment practice:
> (1) For any employer, because of race, creed, color, religion, national origin, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.[62]

These courts are again taking what might be called a "color-blind" approach to the Missouri statute, by saying that the statute prohibits not only discrimination against persons on the basis of race, but also that it prohibits discrimination in favor of minority persons as well. By the act of trying to force the bank to hire four Negroes CORE was not only objecting to the bank's discriminatory policies, which was the reason for the demand of course, but they were also resorting to one of the few self-help devices available to them in an attempt to get tangible results—jobs. A more appropriate action so far as the court was concerned would have been an economic boycott through the use of pickets. Even here, however, a legal demand for a given number of jobs, could not have been made, no matter how reasonable that demand might have been. This would be true even though the demand represented a proportionate number of their race in the total workforce or as customers of the bank. CORE could have, however, made a demand that a "reasonable" number of Negroes be hired. In the *Ford* case the court stated that the sit-in was not protected by the Civil Rights Act of 1964 since the illegal demand to hire a specific number of persons was preferential treatment which made the Act inapplicable.[63] The Act does expressly provide that Title VII does not require the granting of preferential treatment to any individual upon

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61 240 F. Supp. at 481.
62 MO. STAT. ANN. § 296.020(1) (1965).
63 236 F. Supp. at 841.

the basis of quotas.[64] The literal language of this section, however, does not preclude the granting of such preference, it merely states that the Act does not impose such a duty. In *United States v. IBEW, Local 38*,[65] the Sixth Circuit held that the Act did not ban affirmative relief.

> When the stated purposes of the Act and the broad affirmative relief authorization . . . are read in context with § 2000e-2(j), we believe that section [703(j)] cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices. Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.[66]

The court found that the facts of the *Ford* case were very similar to those in *Potomac Electric & Power Co. v. Washington Chapter of CORE*,[67] and that there was not a labor dispute under Norris-LaGuardia for the same reasons.

In the Illinois case of *Centennial Laundry Co. v. West Side Organization*,[68] a Negro organization asked a laundry company to hire eight Negro drivers for their routes, and upon refusal of the request picketed the establishment. The Illinois Appellate Court held that the injunction granted without a hearing was too broad. In this case the specific number of eight was arrived at as the result of a survey of the laundry company's delivery routes to determine which routes primarily served Negro customers. This survey was made in an effort to cooperate with the laundry company after they had expressed a fear of losing business in white neighborhoods if they employed Negro drivers on these routes. Nevertheless, the court stated that the request to hire any specific number of persons of a given race was still an illegal demand for a quota.[69] The court said that an injunction could restrain only the demand for a quota and could not prohibit peaceful picketing, demonstrations, or boycotts

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[64] Section 703(j) of the 1964 Civil Rights Act provides:

> (j) Nothing contained in this title shall be interpreted to require any employer, . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[65] 428 F.2d 144 (6th Cir. 1970).

[66] *Id.* at 149-50; *See also* Note, *The Philadelphia Plan: Remedial Racial Classification In Employment*, 58 GEO. L.J. 1187, 1213-18 (1970).

[67] 210 F. Supp. 418 (D.D.C. 1962).

[68] 55 Ill. App. 2d 406, 204 N.E.2d 589 (1965).

[69] *Id.* at 409, 204 N.E.2d at 592.

for any purpose.[70] On appeal to the Illinois Supreme Court,[71] the court affirmed the decision stating that a hearing on the issue was especially important on the facts in the case. The court went on to say that if the purpose of the defendant organization's activity was to force the laundry to hire a quota of Negro drivers, then under the Illinois Fair Employment Practices Act[72] and the federal Civil Rights Act[73] injunctive relief would be proper. But if their purpose was not to demand a quota, but simply to protest discriminatory hiring practices, then their peaceful picketing was encouraged by that same legislation.

The Illinois Court, in this case, followed the orthodox view that quota requests are illegal. This court, as had others, took the view that the state and federal statutes lay down a requirement of "color-blindness." This policy of color-blindness was to be applied in such a fashion that picketing, to protest discriminatory hiring policies, was a protected activity; while the request for a concrete remedy to that discriminatory policy in the form of a specific number of persons to be hired was a violation of that requirement and was to be proscribed. For those persons who had been discriminated against for long periods of time this was not being color-blind but rather it was a continuation of *status quo* discrimination. This interpretation is analogous to the long-distance runner who is forced to carry a fifty-pound weight for the first half of the race and upon being allowed to put the weight down is told that he is now being treated equally with the other runners in that now none of them is carrying weights. The fact that the other runners had the advantage of being without the additional weight from the start and are now far ahead of the runner who carried the weight is apparent. The question is, is he being treated equally by no longer requiring him to carry the weight even though he is behind everyone else in the race as a result of it, or can he be given equal treatment only by moving him forward to catch up with the other participants in the race? The latter of course is what the West Side Organization was asking for in its request for a specific number of Negroes to be hired as drivers.

In *San Diego Gas & Electric Co. v. San Diego Chapter of CORE*,[74] CORE had been prohibited by a preliminary injunction from exhibiting signs stating that the public utility discriminated in its hiring policies because it did not employ a certain percentage of Negroes. The utility contended that CORE was asking for proportionate hiring because in its negotiations, CORE pointed out that among the utility's work force only

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[70] *Id.* at 411, 204 N.E. 2d at 594.

[71] Centennial Laundry Co. v. West Side Organization, 34 Ill.2d 257, 215 N.E. 2d 443 (1966).

[72] ILL. REV. STAT. ch. 48, §§ 851-66 (1963).

[73] 78 Stat. 253, 42 U.S.C.A. § 200e-2(a) (1964).

[74] 241 Cal. App. 2d 405, 50 Cal. Rptr. 638 (1966).

one per cent were Negroes while seven per cent of the population of the area were Negroes. CORE countered that the percentage analysis was simply the basis of their contention that the utility was unfair to Negroes in its hiring policies and not a demand for quota hiring. The court found no evidence of a demand for quota hiring by the pickets either through signs or utterances. The signs they carried read: "End Discrimination," "Don't Fire, Just Hire," "Not More, Not Less, But Equal," "Give Us A Chance to Learn in Your Training Program," and "Count the Results! S. D. Gas & Elec. Co. is an Equal Opportunity Employer?"[75]

In a concurring opinion, Judge Coughlin stated that limiting the injunction, by a removal of the restrictions placed upon the language that could be used in the signs carried by the pickets, was not an authorization to demand quota hiring. He went on to say that:

> Where the object of picketing is unlawful, the picketing is unlawful and may be enjoined. Quota hiring based on race, creed or color is unlawful. An employer who is required to hire a designated percentage of his employees only because they are persons of a particular race, creed, or color, and perforce is requird to refuse to hire those of another race, creed, or color in order that he may employ the former, is required to discriminate against those he refuses to employ because they are not of the race, creed or color included within the percentage hiring classification.[76]

The converse of this viewpoint is that if one hires persons only of a particular race, creed or color this is in effect a refusal to hire those persons of another race, creed or color. It would seem then, that the fact that only one per cent of the work force was made up of persons of a particular race, while seven per cent of the population of the area, and presumably the same percentage of the overall work force of the area, were of this race, would be an indication of at least past discriminatory policies. If we assume that the employer's present hiring policies and practices are racially neutral or "color-blind" on their face, and they tend to perpetuate the effects of past discrimination, then it would seem that they would still be unlawful. This is true if persons who are already employed are presently affected by past racial discrimination[77] and it would seem that by analogy, at least, it would also apply to potential employees as well. Discrimination in hiring policies often times is subtle or even unconscious. The policy of giving preference in the hiring of employees to persons who are referred to the company by a friend or relative is an example of unconscious discrimination. The Eighth

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[75] *Id.* at *408*, 50 Cal. Rptr. at 641.

[76] *Id.* (concurring opinion).

[77] United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970); United States v. Virginia Elec. & Power Co., 327 F. Supp. 1034 (E.D. Va. 1971).

Circuit in *Parham v. Southwestern Bell Telephone Co.*,[78] found this type of unconscious discrimination in the telephone company's hiring policies.

> The company's recruitment policy, . . . which depended primarily upon existing employees to refer new prospects for employment, operated to discriminate against blacks . . . with an almost completely white work force, it is hardly surprising that such a system of recruitment produced few, if any, black applicants. As might be expected, existing white employees tended to recommend their own relatives, friends and neighbors, who would likely be of the same race. Where Title VII has been violated, courts may prohibit or change policies which appear racially neutral on their face but build upon pre-Title VII bias that produces present discrimination.[79]

If, for example, 95 per cent of the company's present personnel are white and only 5 per cent are Negro, even though the company would hire a Negro who was referred by a friend or relative just as it would hire a white person who was referred, it is still discrimination against those persons who have no friends or relatives employed by the company and simply walk in seeking employment. If a large percentage of the minority persons who apply for jobs are walk-in applicants, then this policy has the effect of discriminating against them.[80]

In 1967, the Georgia Supreme Court, in the case of *Williams v. Maloof*,[81] concluded that the trial court did not err in granting a temporary injunction against the picketing of retail store that refused to give information as to whether it had a policy of equal employment and equal promotion opportunities for Negroes. The court held that there was no evidence of any right being exercised by these Negroes which could justify the interference with the plaintiff's business.[82] In the one-page opinion, which does not cite the *New Negro Alliance* case, there is no evidence that the picketers were asking for quota hiring. It is difficult to understand why the observation of discrimination in a store and the protesting of that discrimination by picketing is lawful, while picketing that arises as a result of a refusal to cooperate in determining whether discrimination exists, which in itself is an indication of discriminatory practices, would be unlawful.

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[78] 433 F.2d 421 (8th Cir. 1970) [hereinafter cited as *Parham*].

[79] *Id.* at 426-7; *accord*, United States v. Dillon Supply Co. 429 F.2d 800 (4th Cir. 1970); Griggs v. Duke Power Co. 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970); United States v. Local 36, AFL-CIO, 416 F.2d 123 (8th Cir. 1969); Local 189, AFL-CIO v. United States 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Local 53, Intl. Assn. of Heat and Frost Insulators v. Vogler. 407 F.2d 1047 (5th Cir. 1969); United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D. N.Y. 1970); Quarles v. Philip Morris, Inc. 279 F. Supp. 505 (E.D. Va. 1968).

[80] Caminez, *Racial Discrimination in Employment*, 45 FLA. B.J. 640, 641 (1971).

[81] 223 Ga. 640, 157 S.E.2d 479 (1967).

[82] *Id.*

As recently as 1971, in *Colorado Civil Rights Commission v. Adolph Coors Corp.*,[83] the Colorado Civil Rights Commission had attempted to demonstrate that an employer who did not have minority persons employed in numbers equal to the percentage which these people constituted within the labor market, was guilty of discrimination, by alleging that this was an indication of discrimination per se. The issue in that case was not that of discrimination but rather a collateral issue of the Colorado Civil Rights Commission's subpoena power. The Commission issued a complaint against the defendant corporation which was not resolved by conference, and ordered a hearing and issued a subpoena duces tecum, ordering the company to make available certain documents. One of the bases for the complaint was that the corporation had "not hired nor promoted employees of minority races on a quota basis which would be proportionate to their percentage position within the over-all labor market."[84] The Court did not discuss the issue of whether or not the use of the quota by the Commission was legal, since the issue involved was that of the Commission's power to subpoena under the Colorado Anti-discrimination Act of 1957.[85] The Court did say, however, that the objections set out by the Commission in the complaint (including the failure to hire on a quota basis) did not point to any particular act or omission to act on the part of the defendant corporation that would represent an unfair or discriminatory act under the statute.[86] Thus the Colorado Court held that the failure to hire minority employees in a number proportionate to the over-all labor market is not in and of itself an indication of discrimination. The Court said that this kind of indication of discrimination was too indefinite and general and could not form the basis for any legal proceedings. However, the Fifth Circuit in *Alabama v. United States*[87] has stated that where racial discrimination was at issue "statistics often tell much, and Courts listen." The Eighth Circuit also held in the *Parham* case that statistics could be used as an indication of discrimination. "We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964."[88]

The court in the *Parham* case took judicial notice of the fact that 21.9 per cent of Arkansas' 1960 population was Negro.

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[83] 29 Colo. App. 240, 486 P.2d 43 (1971).
[84] *Id.* at ....., 486 P.2d at 45.
[85] COLO. REV. STAT. § 80-21-6 (1, 2) (1963).
[86] 29 Colo. App. at ....., 486 P.2d at 46.
[87] 304 F.2d 583, 586 (5th Cir.), *aff'd*, 371 U.S. 37 (1962).
[88] Parham, 443 F.2d at 426.

In *Carter v. Gallagher,*[89] a class action instituted against the Civil Service Commission of Minneapolis on the basis of discriminatory practices in the hiring of firemen for the city, the federal district court[90] held that the Civil Service Commission's procedure denied blacks the equal protection of the law guaranteed by the fourteenth amendment and violated their section 1981 right of freedom from discrimination in employment because of race. In fashioning a remedy, the trial court granted affirmative relief in the form of an absolute preference in fire department employment to 20 minority applicants who met the qualifications.[91] On appeal to the Eighth Circuit, a three-judge panel modified the holding of the trial court. The trial court's determination of past racial discrimination and the plan laid down by the court to insure that the discrimination had been eliminated in the filling of future positions was approved by the panel. However, that portion of the decree giving an absolute preference to twenty applicants was reversed, on the basis that an absolute preference in employment to minority applicants over white applicants with superior qualifications was discrimination in reverse against the white applicants in violation of the equal protection clause of the fourteenth amendment and section 1981 of Title 42.[92] The court supported its view on the basis that the Supreme Court in *Griggs v. Duke Power Co.*[93] had held that Title VII of the Civil Rights Act of 1964 did not require an applicant be hired simply because he was a member of a minority group which had been previously discriminated against. The Supreme Court stated: "[D]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[94] The court in *Carter* read section 1981 and the fourteenth amendment as proscribing any discrimination in employment based on race, whether it be discrimination against whites or blacks.[95] The court stated that the fact that past discrimination had existed against minorities was not justification for present discrimination against better qualified white applicants. The court adopted the view that if the qualifications

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89 452 F.2d 315 (8th Cir. 1971) (*Modified on rehearing en banc* 1972) [hereinafter cited as *Carter*].

90 The district court decree, which was not reported, was entered on March 9, 1971. *Id.* at 318.

91 The trial court order read, in part, as follows:

> That the defendants herein . . . give absolute preference in certification as fire fighters with the Minneapolis Fire Department to twenty (20) Black, American-Indian, or Spanish-Surnamed-American applicants for fire fighter who qualify for such positions on the basis of the examinations given pursuant to the Minneapolis Civil Service Commission fire fighter examination . . . and who meet the requirements of said examination. . . .

Id.

92 *Id.* at 325.

93 401 U.S. 424 (1971).

94 *Id.* at 430-31.

95 452 F.2d at 325.

required for the job are fairly established, then, to give a minority preference was to "visit the sins of the father upon the sons." The court refused to recognize the possibility that past discriminations of all types, might be a factor affecting the qualifications of minority persons generally.

On rehearing en banc the court modified the holding of the three-judge panel by reversing that portion relating to preferential hiring.[96] The issue on the rehearing was limited to a determination of the appropriateness of the remedy ordered by the trial court. The court pointed out that in giving an absolute preference the trial court had gone further than any appellate court in granting a preference to overcome the effects of past discrimination and that the absolute preference did appear to violate the equal protection rights of whites who were better qualified for the jobs.[97] The court then pointed out that the Supreme Court in *Louisiana v. United States*[98] had held that there was an affirmative duty to eliminate the discriminatory effects of the past actions as well as to prohibit discrimination in the future.[99] The court observed that there was wide power in the trial court, sitting as a court of equity to fashion a remedy to enforce the Civil Rights Acts and the equal protection clause of the fourteenth amendment, including the power to eradicate the effects of past discrimination.[100] They pointed out that the anti-preferential treatment section of Title VII[101] did not apply in this case since this action was not predicated upon that statute but under section 1981 and the fourteenth amendment. The court stated, however, that even the anti-preferential treatment section of Title VII did not limit the court's power to order affirmative relief to correct the effects of past discrimination. In looking for guidelines to shape a remedy the court observed that other courts had: required unions to recruit sufficient blacks to make up a given percentage of the membership in the union's apprenticeship programs;[102] ordered unions to alternate white and black referrals;[103] required a motor carrier to hire a given number of Negroes as drivers on an alternating ratio of one Negro for each white;[104] upheld the Philadelphia Plan which required the establishing of percentage goals for the employment of minority workers.[105] The court pointed out that none of these remedies

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[96] *Id.* at 327. The decision was 7-2.

[97] *Id.* at 328.

[98] 380 U.S. 145 (1964).

[99] *Id.* at 154.

[100] 452 F.2d at 329.

[101] § 703(j) of the 1964 Civil Rights Act. *See supra* note 64.

[102] United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 447 (1971).

[103] Cases cited *supra* note 63.

[104] United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970).

[105] Contractors Assn. of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 92 S. Ct. 98 (1971).

required an absolute preference to minority persons for the first vacancies available in contrast to the remedy of the trial court in *Carter* which granted an absolute preference. The court reaffirmed the panel's contention that an absolute preference would operate as a denial of equal protection to whites who were equally or better qualified for the positions sought. At the same time, they acknowledged the need to eliminate the effect of past discrimination. In order to accommodate these two considerations, which the court considered conflicting in results, they arrived at a remedy which the court seems to characterize as a compromise. This remedy was to institute a ratio for hiring minority persons who were qualified under the qualification standards approved by the court. This ratio was set at one minority person for every two non-minority persons hired by the fire department. The ratio was to be in effect until there was a fair approximation of minority representation to the population mix of the area. The court accepted the trial court's determination of twenty as meeting this proportionate representation. In answer to the contention that this remedy would be establishing an illegal quota the court explained:

> Such a procedure does not constitute a "quota" system because as soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions. However, as a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination, more than a token representation should be afforded. For these reasons we believe the trial court is possessed of the authority to order the hiring of 20 qualified minority persons, but this should be done without denying the constitutional rights of others by granting an absolute preference.[106]

The court concluded its opinion by outlining the considerations it had been guided by in fashioning its remedy in this particular case. These considerations were as follows: the Supreme Court's approval of the use of mathematical ratios as "a starting point in the process of shaping a remedy";[107] the reluctance of minority persons to apply for employment, because of their knowledge of the past discriminatory hiring practices of the fire department, without some positive assurance that they would be hired on something more than a token basis; the speculative nature of the ability of the qualifying test to rank qualified applicants, in the order of their degree of qualification, as well as to separate the qualified from the unqualified; and the minority representation in the over-all population mix of the area.[108]

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[106] 452 F.2d at 330-331.

[107] *Id.*

[108] *Id.* at 331.

Two of the judges dissented on the basis that the court's minority preference provision was still discriminatory against white applicants whose qualifications are superior to those who are employed under the proposed ratio.[109]

The Eighth Circuit has, in the *Carter* case, attempted to draw a distinction between those proportionate hiring procedures which establish a quota and thus, are illegal, and those which do not, and are therefore legal. The difference between the two seems to be that the court's remedy is *temporary* in nature, in that once the twenty minority persons are hired to make up for the past discriminatory practices of the fire department, then, all future hirings will be on a racially nondiscriminatory basis. Thus, once minority persons have had a chance to "catch up" they will compete equally with whites and the number of minority persons employed by the fire department could then be either greater or smaller than their proportionate numbers in the population at large. This infers then, that the absolute preference of twenty positions for minority persons in the fire department, as established by the trial court, has some other effect. It is true that the trial court's remedy would have given the first twenty vacancies to qualified minority persons while the Eighth Circuit's remedy spreads this out over the first sixty vacancies on a one out of three ratio. The effect of this would be that whites are not completely excluded from consideration for the first twenty vacancies. However, as critics of the quota approach will point out, of the first sixty vacancies to be filled, it is theoretically possible for better "paper" qualified whites to be discriminated against. This descrimination is justified by the court in that it will eliminate the effects of past racial discrimination and give the fire department the approximate number of minority persons it would have had but for the discriminatory practices. Therefore, the court has reasoned, since this eliminates the effects of past illegal practices it is legal. The student of the judicial reasoning process will, I suspect, be able to understand the court's reasoning process. It is not our purpose to delve into that topic. It is the man on the street, however, both black and white, who will be troubled by the court's reasoning process. In all of the cases we have discussed in this article, where a request to hire a given number of minority persons has been made, the reason for such a request has been to correct the effects of past racial discriminatory practices. It has never been suggested in any of these cases that once the minority group achieved that proportional number then all other members of the group would be excluded from consideration for employment until there was an opening within the quota. The idea of quotas or proportional hiring has always been to make up for past practices. It would seem then, to this writer, that a better solution would be for the court to admit what it is doing in straightforward

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109 *Id.* at 332 (dissenting opinion).

way and simply state that quotas, based on ratios in hiring, which will reflect a reasonable approximation of the minority representation in the population, is a constitutional necessity to eliminate the effects of past racial discrimination. To put it in the layman's language, let the court call a spade a spade. The *Carter* court has gone further than any appellate court in the country in establishing quotas. Let us hope that the next appellate court to consider the question will take the next step and recognize the quota for what it is, a constitutional necessity to eliminate the effects of these illegal past practices.

V. QUOTAS OR GOALS? EXECUTIVE ORDER 11246

Up to this point this article has dealt with the attempts of private groups and individuals to deal with the problems of employment discrimination through whatever private means they had at their command (primarily the picket and quota demands). Now let us explore how government, primarily the federal government, has come into the picture and what solutions it is offering.

With the passage of the Civil Rights Act of 1964 devoting an entire title to job discrimination and employment practices[110] and Presidential Executive Order No. 11,246,[111] the federal government decided that it could introduce a plan to deal with the problem of minority employment, at least on federally funded construction projects.[112] The plan required that contractors take affirmative action to ensure that minority applicants were employed upon these federally funded projects.

One of the first courts to hear the merits of such a plan held that it was constitutionally valid.[113] The case arose in Ohio in a taxpayer's action to enjoin a county community college board from awarding a construction contract to any but the lowest bidder. The college had

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110 42 U.S.C. § 2000 (e) (1964).

111 Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reaffirmed in,* Exec. Order No. 11,478, 3 C.F.R. 133 (1969).

112 Section 202 (1) of Exec. Order No. 11,246, 3 C.F.R. 339 (1965), is directed at all governmental contractors and provides:

> The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated equally during employment, without regard to their race, creed, color, or national origin. Such action shall include but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training; including apprenticeship.

For the background of Executive Order No. 11,246 and Title VII of the Civil Rights Act of 1964 *see* Herbert and Reischel, *Title VII and The Multiple Approaches to Eliminating Employment Discrimination,* 46 N.Y.U. L. REV. 449 (1971); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971).

113 Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E. 2d 907 (1969), *cert. denied,* 396 U.S. 1004 (1970).

purchased the land from the City of Cleveland under an agreement that all construction would be done under the requirements of the federal government, including the requirement of setting up bidding practices and providing for affirmative action to assure equal opportunity in employment.[114] The low bidder had submitted an Affirmative Action Plan including a "manning table" showing the number of minority persons who would be on the job by month and year. However, this plan made equality in hiring subject to availability, and dependent on referral of all labor from the union.[115] The union local that supplied this contractor with labor had between 1500 and 1600 white members and six Negro apprentices.[116]

The bid was rejected by the college because of the language used by the contractor in his plan. The college contended and the court agreed that the "if available" provision negated the provision to assure non-discrimination against minorities. The trial court stated that the use of the phrase "if available" poisoned the very purpose of Title VII of the Civil Rights Act and Executive Order No. 11,246.[117] The court stated:

> There has . . . come a time when firmness must be used against *all* who do not feel able or inclined to cooperate in the equal employment effort. The statute and the Executive Order implementing it are in the Court's opinion in full keeping with the constitutional guarantee of the rights of all citizens.[118]

The court pointed out that the college had not prescribed any ratio between white and minority group employees, nor had it required bidders to guarantee to maintain a ratio quota system. The trial court stated that the evidence failed to show that the college or any federal officer had required "preferential treatment for any individual or any group for the purpose of achieving racial balance."[119] The Ohio Supreme Court in affirming[120] the trial court's decision stated that the issue was whether or not the "policies of the United States and the State of Ohio against

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[114] Weiner v. Cuyahoga Community College Dist., 15 Ohio Misc. 289, 238 N.E. 2d 839 (C.P. 1968).

[115] The final submission of Reliance Mechanical Contractors, Inc. (the low bidder) stated: "This company will continue to make every reasonable effort to see to it that Negro apprentices are employed and placed on this project. However, this company cannot and, therefore, does not guarantee that it will have Negro apprentices on the project." The contract was then awarded to the second low bidder whose assurance of equal employment opportunity and minority group representation on the job was expressed in its statement: "You are hereby advised that we will have Negro representation in all crafts employed on this project." 19 Ohio St. 2d at 36, 249 N.E.2d at 909.

[116] 15 Ohio Misc. at 291, 238 N.E.2d at 841.

[117] *Id.* at 295-96, 238 N.E.2d at 843.

[118] *Id.* at 297, 238 N.E.2d at 844.

[119] *Id.* at 298, 238 N.E.2d at 845.

[120] Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied* 396 U.S. 1004 (1970). The vote in favor of the college was 5-2.

discriminatory employment practices may be positively enforced by a public body through the medium of improvement contracts."[121] In holding that the policies could be so enforced, the court pointed out that neither a guarantee of Negro employment or quotas for the employment of minorities was required or sought. To do so, the court stated, would be a violation of the Civil Rights Act of 1964. That the successful bidder had, in fact, pledged Negro representation on the job did not show such a violation since there was no evidence that its pledge was either required or solicited.[122] All that was sought from the successful bidder was an unequivocal statement that would assure equal employment opportunity, while the low bidder refused to make anything more than equivocal assurances. The difference was that of saying, "I *will* try to have minority persons on the job," and saying "I will try to have minority persons on the job *if* the union supplies them to me."

In 1969 the Department of Labor issued a regulation pursuant to Executive Order No. 11,246 which was entitled "The Revised Philadelphia Plan."[123] The Plan covered six construction trades[124] and geographically applied to the five counties in Pennsylvania in the Philadelphia metropolitan area. In substance, the Plan required that bidders on all construction contracts in the Philadelphia area, which were subject to Executive Order No. 11,246, must, in the affirmative action plan they were required to

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[121] *Id.* at 37, 249 N.E.2d at 909.

[122] *Id.* at 39, 249 N.E.2d at 910.

[123] The Philadelphia Plan was originally issued in 1967 in the Department of Labor Order of Nov. 30. The Plan was suspended by the Labor Department after the Controller General held that the post-award negotiation violated the competitive bidding principles by imposing requirements on bidders which were not specifically set out in the solicitation for bids.

> [T]here would appear to be a technical defect in an invitation's requirement for submission of a program subject to Government approval prior to contract awards which does not include or incorporate definite standards on which approval or disapproval will be based. We believe that the basic principles of competitive bidding require that bidders be assured that awards will be made only on the basis of the low responsive bid submitted by a bidder meeting established criteria of responsibility, including any additional specific and definite requirements set forth in the invitation, and that award will not thereafter be dependent upon the low bidder's ability to successfully negotiate matters mentioned only vaguely before the bidding.

47 Comp. Gen. 666,670 (1968). The court in the *Weiner* case disagreed with the Comptroller General, however, and upheld the Cleveland Plan, which could be challenged upon the same basis. The Revised Philadelphia Plan was the direct result of the opposition of the Comptroller General. For a discussion of the Comptroller General's position see Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 358-61.

[124] Iron workers, plumbers and pipe fitters, steamfitters, sheetmetal workers, electrical workers, and elevator construction workers.

submit with their bid, "set specific goals of minority utilization which meet the definite standard included in the invitation for bids."[125]

The order was based on Labor Department findings that while the overall minority group's representation in the entire construction industry in the Philadelphia metropolitan area was thirty per cent, in the affected trade unions, representation was approximately one per cent.[126] The order established ranges within which each contractor's minority group employment goals should be set.[127] However, these goals are not absolute requirements. If the contractor meets the goals he will be presumed to be in compliance with the Plan. If, however, he fails to meet the goals, there is an opportunity provided for him to show that a good faith effort was made to meet them. Only if this good faith test is not met will sanctions be imposed. The Philadelphia Plan contains the provision that in determining whether a contractor is in compliance with it, the contractor may not use the excuse that the union which supplies him with labor fails to refer minority employees.[128] As a result of this Plan, the Contractors' Association of Eastern Pennsylvania filed suit charging that the plan was in conflict with Title VII of the Civil Rights Act and was also a violation of the fifth and fourteenth amendments. The major thrust of the Association's contention was that the Plan required "quota" hiring in that the contractor was forced to hire a definite percentage of minority employees. The court rejected this argument and stated that the Plan does not require the hiring of definite percentage, but merely requires that the contractor make a good faith effort to meet the goals set. The court stated that, "[i]f a contractor is unable to meet the goal but has exhibited good faith, then the imposition of sanctions in our opinion would be improper and subject to judicial review."[129]

Judge Weiner set out the public policy argument that supports a conclusion that the Plan was not inconsistent with the requirements of Title VII of the Civil Rights Act or the Constitution when he stated:

> The strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows. These two rights are not only equal but a must,

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[125] Contractors Assn. of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002, 1005 (E.D. Pa. 1970). *See also* Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. REV. 225 (1971); Comment, *The Affirmative Action Requirement of Executive Order 11,246 and Its Effect on Government Contractors, Unions and Minority Workers*, 32 MONT. L. REV. 249 (1971).

[126] 311 F. Supp. at 1005.

[127] These ranges for minority group employment goals are: first year—4 to 9 percent; second year—9 to 15 percent; third year—14 to 20 percent; fourth year—19 to 26 percent. *Id.*

[128] *Id.* at 1006.

[129] *Id.* at 1010.

> and when realized will bring into full play that protection to which our Constitution and statutes are dedicated.[130]

Judge Weiner concluded his opinion by saying that it was his belief:

> [T]hat the denial of equal employment opportunity must be eliminated from our society. It is beyond question, that present employment practices have fostered and perpetuated a system that has effectively maintained a segregated class. That concept . . . is repugnant, unworthy, and contrary to present national policy. The Philadelphia Plan will provide an unpolluted breath of fresh air to ventilate this unpalatable situation. Justice demands an end to all artifices that prevent one, who because of color is estopped from enjoying the same opportunities that are accorded to those of different color. The destiny of minority group employment is the primary issue and the Philadelphia Plan will provide an equitable solution to this troublesome problem.[131]

In affirming the decision of the trial court, the Third Circuit held that the use of an Executive Order to promulgate the Philadelphia Plan was valid as being within the implied authority of the President and was not prohibited by Constitutional or Congressional enactment.[132]

In speaking of the plaintiff's contention that the Plan violates the basic prohibitions of Title VII the court said:

> To read [Title VII] in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. *Clearly the Philadelphia Plan is color-conscious. Indeed the only meaning which can be attributed to the "affirmative action" language . . . is that Government contractors must be color-conscious.*[133]

Comment on the Plan in various law journals[134] has not been all favorable. Most of the commentors feel that the plan is unworkable because the labor union and not the contractor is the proper party to be pressured if minority groups are to be properly represented in Government construction contracts. The solution offered by the comments does

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130 *Id.*

131 *Id.* at 1012-13.

132 Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied* 92 S.Ct. 98 (1971).

133 *Id.* at 173. (Emphasis added.)

134 Coleman, *The Philadelphia Plan Goes to Washington*, 57 A.B.A.J. 135 (1971); Gosseen and Moss, *The Philadelphia Plan: A Critical Analysis*, 23 N.Y.U. CONF. ON LABOR, 169, 204 (1971); Comment, 65 NW. U. L. REV. 643, 662 (1970); Comment, 8 HOUSTON L. REV. 342, 355 (1970). Comment, 47 N.D. L. REV. 123 (1971); Comment, 17 U.C.L.A. L. REV. 817 (1970); Comment, *The Philadelphia Plan: Equal Employment Opportunity in The Construction Trades*, 6 COLUM. J. L. & SOC. PROB. 187 (1970); Note, *The Philadelphia Plan: Remedial Racial Classification in Employment*, 58 GEO. L.J. 1187 (1970).

vary, however, from a view that the Plan is the imposition of a quota or proportional representation system which is contrary to both the Constitution and Title VII,[135] to the view that strict racial quotas are constitutionally necessary and permissible.[136] It is perhaps too early to evaluate the success of the Philadelphia Plan. There is a great deal of merit to the contention that a more realistic and meaningful program could be developed by compelling the trade unions, as well as the contractors, to adopt the affirmative action plan requirements.[137] As the Plan developed in its first year, there was little visible difference in the composition of construction crews that were,[138] in theory at least, meeting the requirements of the Plan.

While the Philadelphia Plan was in the process of litigation, the federal district courts of at least two other states were upholding the validity of the affirmative action plan requirement of Executive Order No. 11,246. In *Joyce v. McCrane*,[139] the federal district court in New Jersey held that a state plan which set up goals of 30 per cent to 37 per cent utilization of minority group employees did not invalidate the

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135 Coleman, *The Philadelphia Plan Goes to Washington*, 57 A.B.A.J. 135, 138 (1971).

136 Racial quotas are a factual necessity to combat the grossly unfair and unequal employment conditions which exist on Federal construction contracts. They are also a constitutional necessity. This is true because the Federal Government is required to eradicate conditions of present and past discrimination in which it has been involved through past action, and because it cannot now take part in racial discrimination. Past policies of contract issuance have contributed to, and present "color-blind" policies support, racial discrimination. [Footnotes omitted.] Thus, an affirmative duty must be imposed on the Government to end and undo the effects of this discrimination through the only effective means available, racial quotas....

To rely on the "color-blind" ability test is to acknowledge, accept, and perpetuate acts of past discrimination against the minority worker. Thus, to compare abilities or experience will result in the non-white being turned away on the basis of past racial considerations.

Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 U.C.L.A. L. REV. 817, 832, 834 (1970).

137 Dobbins v. Local 212, I.B.E.W. 292 F. Supp. 413 (S.D. Ohio 1968), held the Civil Rights Act of 1866 applicable to union discrimination. The court concluded,

Membership in and/or a referral status in a union is a contractual relationship and/or a link in the chain of making a contract. The subject matter is, therefore, within 42 U.S.C. 1981.

At least since *Jones* v. *Mayer*, a strictly private right, be it in the property field as such, or in the contract field as such, is within the protection of the Civil Rights Act of 1866 against interference by a private citizen or a group of citizens. Governmental sanction or participation is no longer a necessary factor in the assertion of a § 1981 action. Even assuming that it is, the extent of government (Federal, State and local) financing of the activity (building, etc.) in the geographical area, and specifically in the activities in which journeymen electricians engage, is sufficient in this case (approximately 75%) to answer the requirement. [Citations omitted.]

Id. at 442. *See* Cooper v. Aaron, 358 U.S. 1 (1958); and Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967). *Accord*, Todd v Joint Apprenticeship Committee, 223 F. Supp. 12 (N.D. Ill. 1963), *remanded with instructions to dismiss as moot*, 332 F.2d 243 (7th Cir.), *cert. denied*, 380 U.S. 914 (1964). *But see* Gaynor v. Rockefeller 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627 (1965); But *cf.* Waters v. Paschen Contractors, Inc. 227 F. Supp. 659 (N.D. Ill. 1964).

138 *Integration Drive Fails To Overcome*, Business Week, June 6, 1970, at 48.

139 320 F. Supp. 1284 (D. N.J. 1970).

so-called "Newark Plan." Provided that, as with the Philadelphia Plan, sanctions could not be imposed if the contractor tried in good faith to meet these goals but was unable to do so.

The State of Illinois, in order to comply with Executive Order No. 11,246 and the Federal Aid Highway Act of 1968,[140] developed a plan[141] whereby unemployed minority group persons would be recruited, tested, trained and placed in the state's federally aided highway construction program. The plan was designed to attract minority group persons from a two-county area in Southern Illinois for training in six major trades[142] involved in highway construction. The Plan provided for an initial period of classroom and practical training designed to give the trainee the basic elements of the craft. After the trainee received these basic skills he was to be given on-the-job training to develop his skills to the level of journeyman. To provide this on-the-job training, contractors were required, under the Plan, to hire trainees at the minimum rate of one trainee for every four journeymen. In an action for a declaratory judgment the federal district court held that the agreement did not violate the Civil Rights Act or the fifth or fourteenth amendments.[143] In upholding the Plan and the minimum ratios that it encompasses the court discussed the public policy justification for such a plan:

> There is no doubt that there is a need to eradicate these past evil effects, and to prevent the continuation in the future of these discriminatory practices. Inasmuch as such practices have continued for decades, there is no infallible and certain formula which will erase decades of history and alter a distasteful set of circumstances into a utopian atmosphere. Discriminatory practices have taken place, and something must be done in order to rectify the situation. Such practices must be eliminated by responsible and responsive governmental agencies acting pursuant to the best interest of the community. Basic self interests of the individual must be balanced with social interests, and in circumstances where blacks have been discriminated against for years, there is no alternative but to require that certain minorities be taken into consideration with respect to the specific minority percentage of the population in a given area in order to provide a starting point for equal employment opportunities. In this regard, it is the feeling of this Court that minimum ratios, where, de jure or de facto, based upon race are constitutional and valid when adopted for the purpose of implementing affirmative action to achieve equal employment opportunities.[144]

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140 P.L. 90-495; 82 Stat. 815.

141 The Ogilvie Plan.

142 "Ironworkers, Cement Masons, Operating Engineers, Laborers, Carpenters, and Teamsters," *see* Southern Illinois Builders Assn. v. Ogilvie, 327 F. Supp. 1154, 1159 (S.D. Ill. 1971).

143 Southern Illinois Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971).

144 *Id.* at 1159.

The court infers without specifically saying, that, as with the Philadelphia Plan, contractors are to be given an opportunity to show that they are making a good faith effort to comply with the plan before any sanctions will be imposed upon them.

VI. WHICH WAY NOW?

One cannot help but observe the similarity in the courts' treatment of the private demand for employment opportunity and their treatment of the government's Affirmative Action Plans. In the first instance, with the recent exception of the *Carter* case, so long as the demand is not couched in language requiring that a specific number of persons be hired, but is only a demand for a "reasonable racial balance" then the demand is not a quota and is valid. The Affirmative Action Plan's goal requirements have not been characterized as quotas because sanctions have not been imposed for failure to meet these goals if a good faith effort to do so is made. We may, therefore, conclude that to make an absolute demand for a quota is illegal, while that same demand phrased in the language of reasonableness, either through the "good faith effort" test or a "reasonable racial balance," is legal. While the logic of this distinction is almost irresistible to the legal mind, to the Negro in want of a job it may well be nothing but equivocation. To the Negro this sophistic reasoning is being carried out at his expense. One commentator has expressed what well may be the attitude of the majority of American Negroes. "One man's 'reasonable balance' when reduced to figures either as a percentage of total workers employed or as a set number . . . is another man's quota."[145]

To the Negroes who are advocating some form of equitable redress for their grievances within the framework of our legal system, it is little comfort to say that a quota or proportional hiring plan violates the principle of egalitarianism. Professor Charles V. Hamilton stated what must be considered the crux of the issue to black Americans when he wrote:

> What black and white America must understand is that egalitarianism is just a *principle* and it implies a notion of "color-blindness" which is deceptive. It must be clear by now that any society which has been color-conscious all its life to the detriment of a particular group cannot simply become color-blind and expect that group to compete on equal terms.[146]

Certainly the National Commission on Civil Disorders was not being color-blind when it in effect advised a "quota" in its recommendation

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[145] Weiner, *supra* note 26, at 293.

[146] Hamilton, *An Advocate of Black Power Defines It*, N.Y. Times, Apr. 14, 1968, § 6 (Magazine), 22, 81.

that two million new jobs be found in the public and private sectors within the next three years.[147]

There are times perhaps, when our legal system cannot afford the luxury of being color-blind. The courts are now recognizing that fact, just as the Second Circuit recognized it in *Norwalk CORE v. Norwalk Redevelopment Agency*,[148] when Judge Smith stated:

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.[149]

This is not to say that preferential treatment in employment, either by private employers or by government, is a panacea for the Negroes' problems in our multi-racial society. As Professor John Kaplan has pointed out: "There is a certain irony in climaxing a long struggle in the name of equality by demanding inequality."[150] The problems raised by this issue have no easy solution.[151] For example, cities that are already facing financial crises can ill afford the additional burden of higher building costs brought about by not accepting the lowest bid when the lowest bidder fails to agree to comply with an affirmative action plan. It is no answer, however, to say that because the issues raised are difficult, both pragmatically and philosophically, that nothing can be done.

If our legal and social systems are to survive the continuing crisis that we face, means must be found within the systems to alleviate the just grievances of our economically disadvantaged minorities.[152] Until this is

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147 *Report of the National Advisory Commission on Civil Disorders*, 421-23 (Bantam ed. 1968).

148 395 F.2d 920 (2d Cir. 1968).

149 *Id.* at 931-32. *See also* Caddo Parish School Bd. v. United States, 289 U.S. 840 (1967); Youngblood v. Board of Pub. Instruction, 430 F.2d 625 (5th Cir. 1970); Offermanor v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

150 Kaplan, *Equal Justice In An Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 364 (1966).

151 Professor Kaplan concentrates his attention on what he considers three main questions:

> [F]irst, can the government require private employers to prefer Negroes in hiring; second, to what extent may an employer be permitted to grant preferential treatment to Negroes if it so desires—especially in a jurisdiction covered by a fair employment law which prohibits discrimination aganst a job applicant because of his race; and third, under what conditions may Negroes be granted preference in public employment.

Id. at 368

152 This includes, of course, not only the Negro who makes up the largest single group among the disadvantaged, but also the American Indian, the Mexican-American, the Puerto Rican, and the Appalachian white.

done, the major social ills that plague us will continue. One thing seems clear; in dealing with the conflicting interests of different groups within society we cannot impose ideal standards on one group when we do not have the power to impose similar standards on the other.[153] To take the position that we must be color-blind is in effect doing just this. This position overlooks the fact that we, as a society, have never been color-blind. A more realistic approach would be to accept the fact that society is not color-blind and on that basis attempt to meet the challenge. The federal government's Affirmative Action Plan for government contractors is one attempt to meet this challenge. This is admittedly an experimental program and it is perhaps too early to evaluate its success. It may well turn out, as its critics predict, that the more effective action would be against the unions and not the contractors.[154] Certainly the use of the affirmative action plan is not without precedent. For many years the federal government has given preference to certain classes of persons. The "GI Bills" after World War II[155] and the Korean War[156] are examples of job preferences being given to a particular class of persons, in this case veterans. The purpose of this discriminatory treatment in favor of the veteran has been to discharge the debt of gratitude owed to those who serve the nation in times of perils and to provide a means for those persons to in effect "catch up" with those who did not have their lives disrupted by military service. The preference given to veterans has never been considered by the courts as an unlawful form of discrimination in government employment.[157]

Certainly a grateful nation owes a debt of gratitude to its men and women who served it in time of war, but is that debt any greater than the one it owes those citizens it has allowed to suffer the odious abuses of racial discrimination?[158]

There are other statutory examples of preferences being given in governmental employment, such preference being based upon race alone, and not upon prior governmental service. These statutes deal specifically with preference being given to Amercan Indians in a variety of jobs in

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153 Hughes v. Superior Court, 32 Cal. 2d at 866, 198 P.2d at 895-96.

154 *Supra* note 137.

155 Veterans Preference Act of 1944 § 12, 58 Stat. 390, *as amended*, 5 U.S.C.A. § 3502 (a) (1967).

156 Veterans Readjustment Assistance Act of 1952 § 101 *et. seq.*, 66 Stat. 626 (1952).

157 "[I]t has always been the congressional policy to grant veterans a preference in obtaining and keeping government employment...." Schaller v. United States, 288 F.2d 700, 703 (Ct. Cl. 1961). "The veterans' preference act was enacted for the purpose of discharging... the debt of gratitude the public owes to veterans who have served in the armed services in time of war, by granting them a preference in original employment and retention thereof in public service...." Valentine v. McDonald, 371 Mich. 138, 144, 123 N.W.2d 227, 230 (1963).

158 *But see* Kaplan, *supra* note 150, at 371.

connection with the Indian Service.[159] One can make the observation that these racially based preferences have been of little help to the Indian and have not eliminated the shameful treatment of him. But they do establish precedent for legislation allowing preferential treatment based on race.[160] This is not to suggest that legislation is necessarily the best answer, although it should be considered, perhaps in much the same context as the social welfare legislation of the depression years when state minimum wage laws for women were held to be valid. In that time of national crisis, the United States Supreme Court,[161] in addition to upholding the right to set a minimum wage requirement for women in furtherance of a state policy of protection, stated that:

> There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being but casts a direct burden for their support upon the community. *What these workers lose in wages the taxpayers are called upon to pay.* The bare cost of living must be met.[162]

It is as true today as it was during the depression of the 1930's that society pays a social cost far greater in terms of higher welfare costs, crime rates, and lost potential contribution, as a result of racial discrimination, than it would pay to mount programs to eradicate such conditions. In balancing the social equities it would seem that, in the final analysis, we have but one path to follow.

It can be argued that the path has already been legally laid out for us in the thirteenth, fourteenth, and fifteenth amendments and the legislation enacted by Congress to implement them. These Civil War Amendments were enacted to transform the realities won on the field of battle into law. They were intended to clear away the remnants of slavery and the debilitating effects of the "badges" of slavery that remained.[163] In effect, these amendments were designed to do something special for the

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159 These preferences include jobs as interpreters, 4 Stat. 737 (1834), *as amended,* 25 U.S.C.A. § 45 (1963); assistant matrons and industrial teachers in Indian schools, 30 Stat. 83 (1897), *as amended,* 25 U.S.C.A. § 274 (1963); clerical, mechanical and other help on reservations, 23 Stat. 97 (1884), *as amended,* 25 U.S.C.A. § 46 (1963); and as herders, teamsters and laborers, 28 Stat. 313 (1894), *as amended,* 25 U.S.C.A. § 44 (1963).

160 Section 703(i) of Title VII allows businesses on or near Indian reservations to adopt hiring policies which give preferences to Indians. 42 U.S.C. § 2000e-2 (i) (1964). *See* 25 VAND. L. REV. 234, 236 (1972), for a discussion of judicially approved minority preference programs in employment to correct past discriminatory practices.

161 West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

162 *Id.* at 399. (Emphasis added.)

163 The Civil Rights Cases, 109 U.S. 3, 20 (1883) (Harlan, J., dissenting). Slaughter House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

Negro. Thus under these amendments and the enacted legislation to implement them, the courts can develop a stricter set of rules in regard to racial discrimination than it can against other types of discrimination, religious for example.[164] For many years the courts rejected the notion that these amendments were designed to aid the Negro. There has, however, been a return to the idea in recent years as shown by the case of *Jones v. Alfred H. Mayer Co.*[165] In that case the plaintiff brought suit alleging that the defendant had refused to sell him a house for the sole reason that he was Negro. In reversing the lower court decision for the defendant, the court held that, "[section] 1982 bans *all* racial discrimination, private as well as public in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[166]

Mr. Justice Stewart, in speaking for the majority, pointed out that it has long been agreed that:

> The Thirteenth Amendment authorized Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."[167]

He then pointed out that the refusal to sell property to a person because of his race is one of the badges and incidents of slavery that Congress is empowered to abolish under the thirteenth amendment.[168] He makes a comparison of the Black Codes enacted after the Civil War as a substitute for slavery with today's exclusion of Negroes from white neighborhoods as a further refinement and a substitute for the Black Codes. Just as the Black Codes are relics of slavery, so too is the refusal to sell property to one on the basis of his race.[169]

The court, in *Jones*, for the first time barred purely private racial discrimination without the sanction of state law. They did so by finding constitutional authority for congressional action in the area of Negro

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[164] Justice Stewart points out in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that section 1982 deals only with racial discrimination and not with other types such as religious or national origin. *Id.* at 413.

[165] 392 U.S. 409 (1968) [hereinafter cited as *Jones*].

[166] *Id.* at 413.

[167] *Id.* at 441 n. 78 (quoting from The Civil Rights Cases, 109 U.S. at 22).

[168] *Id.* at 439.

[169] *Id.* at 442-43.

rights in the power created by the thirteenth amendment "to pass *all laws necessary and proper for abolishing all badges and incidents of slavery* in the United States."[170] Congressional action took the form of the Civil Rights Act of 1866 which was enacted to implement that amendment.[171]

The court in *Jones* applied the Act only to private land developers on the basis of the facts involved. However, by their use of the legislative history, the court could have logically extended the Act still further[172] and have abolished all private discrimination in the areas covered by the Act.[173] Certainly the rationale that was used in the *Jones* case could be applied to employment discrimination on the basis that section 1981's protection of the right to make and enforce contracts would cover employment contracts. There is considerable evidence that the drafters of the Civil Rights Act of 1866 believed that the Act insured to Negroes the right to an "equal opportunity to bargain for their labors."[174] This contention has been accepted by the courts since the *Jones* decision. In *Young v. International Telephone & Telegraph Co.*[175] the defendant contended that section 1981 did not apply to the employment situation. The court, in refusing to accept this contention, stated:

> In the context of the Reconstruction it would be hard to imagine to what contract right the Congress was more likely to have been referring. Certainly the recently emancipated slaves had little or nothing other than their personal services about which to contract. If such contracts were not included, what was? Certainly the situation of former slaves with respect to their labor was a matter of grave concern in the Congress when the 1866 Act was passed.[176]

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170 *Id.* at 439 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883) (emphasis added by the *Jones* court). *See also* Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones* v. *Alfred H. Mayer Company* 22 RUTGERS L. REV. 537, 538-39 (1968) [hereinafter cited as *Kinoy*].

171 *Ex parte* Riggins, 134 F. 404 (5th Cir), *rev'd on other grounds,* 199 U.S. 547 (1904).

172 Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer,* 55 VA. L. REV. 272-300 (1969).

173 The Civil Rights Act of 1866 is now embodied in 42 U.S.C.A. sections 1981, 1982 (1970). The pertinent language in section 1981 is: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence,... as is enjoyed by white citizens...." Section 1982 provides: "All citizens of the United States shall have the same right... as is enjoyed by white citizens... to inherit, purchase, lease, sell, hold and convey real and personal property."

174 Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866,* 36 U. CHI. L. REV. 615, 619 (1969).

175 438 F.2d 757 (3d Cir. 1971).

176 *Id.* at 760; Sanders v. Dobbs House, Inc. 431 F.2d 1097 (5th Cir. 1970).

There is a public policy justification for applying the *Jones* case rationale to employment discrimination cases. First, the Negro is our largest minority group. To alleviate the discrimination in employment against him would go a long way in alleviating a large percentage of all discrimination in this area. Secondly, the Negro is the one minority group that has shown the greatest tendency to become disillusioned about ever becoming full-fledged citizens.[177] A Negro separatist movement[178] is a possibility our society must face. If the disparity in income between blacks and whites in this country is not attacked in one way, it is apt to be attacked in another. At the very least, failure to reduce the gap will probably lead to more unrest, particularly among ghetto youth.

VII. CONCLUSION

To say that the issue of preferential treatment for Negroes is complex is an understatement of the first magnitude. It is more akin to the fabled Gordian knot. The issue raises more difficult, practical, and moral problems than any other issue facing us today. But face it we must, for the social and moral consequences of not facing it are even greater. There is perhaps no way to loosen the knot. If that is the case, then we must cut through it with new solutions, one of which may be the technique used by the Supreme Court in the *Jones* case. Another possible approach is that taken by the Eighth Circuit in *Carter* and allow temporary quotas for the purpose of allowing Negroes to catch up to where they would have been but for the past discriminatory treatment. One should not expect to find easy solutions within our legal system. These are problems that grew out of three hundred years of immorality, immorality that for most of that time has had the sanction of law behind it and has been firmly planted in our moral code. Mr. Justice Douglas in his concurring opinion in *Jones* points out how that immorality has affected the white man as well as the black.

> The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality.... Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.[179]

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[177] *See generally Report of The National Advisory Commission on Civil Disorders* (1968).

[178] Johnson, *Black Assembly Voted at Parley*, N.Y. Times, March 13, 1972, § 1, at 1, col. 7.

[179] 392 U.S. at 445 (Douglas, J., concurring opinion).

The executive, legislative and judicial branches of government[180] must meet the constitutional obligations required of them to remove all the remaining remnants of chattel slavery.[181] However, until the ingrained racial attitudes of white Americans change and discrimination becomes immoral and offensive to the vast majority of our citizens, government may be able to do no more than ease the problem somewhat at the critical pressure points. Perhaps the most important role that the legal system can serve at this time is to create a legal climate in which racial discrimination does become immoral.

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180 The statute [section 1982] under present judicial development, depends entirely on private enforcement. Although damages may be available, in many cases there may be no damages or the damages are difficult to prove. To ensure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorney's fees should be available. . . .
Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-48 (5th Cir. 1971).

181 *Kinoy, supra* note 170, at 542.