

# Discrimination as a Field of Law

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## I. Introduction

The purpose of this article is to demonstrate that the time has come to recognize discrimination as a field of law, with its own place in the books, the indexes, and the curriculum.

For an area to be identified as a field of law, two conditions should be satisfied. First, the area should be large and important. Second, it should display a coherent pattern and be held together by threads of principle common to its component parts.

As to the size and importance of discrimination law, no one familiar with legal developments of the past ten years will need convincing that this condition is amply satisfied. Indeed, discrimination law may well be the leading "growth industry" in current law practice. In employment discrimination, for example, the backlog of cases of the Equal Employment Opportunity Commission this year passed the 130,000 mark, and the many state commissions have their own backlogs in proportion. As to importance, a strikingly large share of leading cases decided by the Supreme Court are in this category, with *Regents of the University of California v. Bakke*<sup>1</sup> being only the best known, and the same phenomenon is observable at the federal circuit and district court levels.

The second condition, that of interrelation between the components of the field, will therefore be the principal concern of this analysis.

Let us first sketch the dimensions and pattern of those components.

The pattern can be thought of as divided vertically and horizontally according to two features: persons discriminated against, and activities in which discrimination occurs.

As to persons, there are nine principal categories: race, sex, age,

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1. 438 U.S. 265 (1978).

religion, national origin, alienage, handicap, homosexuality, and veterans' preference.

As to activity, there are five main divisions: employment, education, housing, public accommodations, and political and civil rights.

Needless to say, the relative importance of the different categories of activity varies markedly as between the categories of persons. Thus, while employment discrimination affects every one of the nine personal categories, housing discrimination is mostly a racial matter, although age, handicap, and homosexuality problems are not unknown.

Four pervading principles or issues will be used as examples of the kind of threads that weave this field together: the disparate impact-intent dichotomy; reasonable accommodation; individual versus collective standards; and compensatory discrimination.

## II. *The Disparate Impact-Intent Dichotomy*

The issue of intent is central to every category of discrimination. There is some danger that this elementary principle may be obscured, because of various efforts to objectify proof of what is ultimately a subjective fact. But, whatever the method of proof, motive is still an indispensable ingredient in the legal concept of discrimination. If I refuse to hire you, or to rent you a house, that act is legally neutral in itself. Before it can become legally tainted, one must ask *why* I turned you away. And "why" is, of course, a subjective matter.<sup>2</sup> But there is no way you can X-ray my brain and find tangible evidence that my motive was racial.

The Supreme Court has made two major contributions to the process of objectifying prima facie proof of the subjective fact of intent. In *McDonnell-Douglas Corp. v. Green*,<sup>3</sup> the process of proof was objectified in individual employment discrimination suits by means of a four-part formula for a prima facie case: the plaintiff belongs to a protected group; the employer was seeking applicants of his qualifications; in spite of his qualifications, plaintiff was rejected; the employer continued to seek applicants of his qualifications. Note that the need to establish subjective intent is thus neatly sidestepped.

Of much more versatile application has been the *Griggs v. Duke Power Co.*<sup>4</sup> rule: if an employment test has disparate impact on a minority group, and if the test has not been "validated" for job-relatedness, the element of intent is deemed to have been prima facie

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2. "The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Constr. Corp. v. Waters*, —U.S.—, —, 98 S. Ct. 2943, 2949 (1978) (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977)).

3. 411 U.S. 792 (1973).

4. 401 U.S. 424 (1971).

demonstrated. One is considered to intend the normal consequences of his acts. The test produces discrimination; the employer intends the test; it follows that the employer intends the discrimination, since the alternative explanation of use because of business necessity has not been established. The disparate impact principle has been used or attempted in a wide and growing variety of cases involving "neutral" selection procedures — not only employment tests and educational requirements,<sup>5</sup> but arrest<sup>6</sup> and conviction<sup>7</sup> records, garnishment,<sup>8</sup> bankruptcy<sup>9</sup> or bad debt<sup>10</sup> records, height, weight<sup>11</sup> and agility<sup>12</sup> tests, drug records,<sup>13</sup> no-spouse rules,<sup>14</sup> length-of-experience requirements,<sup>15</sup> use of references,<sup>16</sup> and bans based on sickle-cell anemia<sup>17</sup> and male homosexuality.<sup>18</sup>

At about the time when the legal profession and the courts had concluded that the *Griggs* disparate-impact rule was a principle of universal application in discrimination cases, the Supreme Court cut across this seemingly consistent picture with a series of cases decreeing that in constitutional cases the *Griggs* rule did not apply, and actual intent to discriminate must be shown. Disparate impact alone was not enough, although of course it was one factor to be weighed among

5. *Griggs, id.*, also involved a high school diploma requirement as an alternative to the test. See also *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1972), holding that, although a college degree requirement for the job of airline pilot had disparate racial impact, job-relatedness had been adequately proved.

6. *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd in relevant part*, 472 F.2d 631 (9th Cir. 1972).

7. *Green v. Missouri Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975).

8. *Wallace v. Debron Corp.*, 494 F.2d 674 (8th Cir. 1974).

9. *Marshall v. District of Columbia*, 10 Empl. Prac. Dec. ¶ 10,349 (D.D.C. 1975). The case failed because of absence of proof of disparate impact.

10. *Robinson v. City of Dallas*, 514 F.2d 1271 (5th Cir. 1975). This case also failed on the facts.

11. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

12. *Hardy v. Stumpf*, 21 Cal. 3d 1, 576 P.2d 1342, 145 Cal. Rptr. 176 (1978). The female plaintiff won as to a 5'7" height requirement for police, but lost on the agility tests, including scaling a 6-foot wall, which were held job-related.

13. See *Beazer v. New York City Transit Auth.*, 399 F. Supp. 1032 (S.D.N.Y. 1975), *aff'd and supplemented on rehearing*, 414 F. Supp. 277 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 97 (2d Cir. 1977), *cert. granted*, 438 U.S. 904 (1978) (argued Dec. 6, 1978). A flat rejection as bus drivers of all persons with a methadone treatment history was held unconstitutional — but not specifically as race discrimination.

14. *Yugas v. Libby-Owens-Ford*, 411 F. Supp. 77 (N.D. Ill. 1976), *rev'd*, 562 F.2d 496 (7th Cir. 1977). A no-spouse rule in practice excluded 71 women and only 3 men. The court of appeals admitted that disparate impact had been shown, but held that a sufficient business justification had been established.

15. *Schenectady v. State Div. of Human Resources*, 10 Empl. Prac. Dec. ¶ 10,449 (N.Y. Ct. App. 1975).

16. *EEOC v. National Academy of Sciences*, 12 Empl. Prac. Dec. ¶ 11,010 (D.D.C. 1976) (adverse impact not proved).

17. *Smith v. Olin Chem. Corp.*, 555 F.2d 1283 (5th Cir. 1977) (en banc), *rev'g* 535 F.2d 863 (1976). In spite of the obvious disparate impact on blacks, the rule was held justified because of the need for a strong back in the particular job.

18. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 65 Cal. App. 3d 608, 135 Cal. Repr. 465 (1977). A flat ban on homosexuals was attacked on the theory that, since there were more male homosexuals than female, the ban constituted sex discrimination against males under the disparate impact theory. The attack failed.

others in considering the ultimate question of real intent. The landmark decision that laid down the rule was an employment case, *Washington v. Davis*.<sup>19</sup> But the cases in which it was quickly followed were a housing case, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>20</sup> and a school busing case, *Board of School Commissioners v. Buckley*.<sup>21</sup> For purposes of the present theme as to the interrelatedness of discrimination law, the point is that the controlling precedent in a housing case turned out to be found, not among housing cases, but in an employment case, and the controlling precedents in a school discrimination case were found to be, not among other education cases, but in an employment and housing case.

The *Arlington Heights* sequel<sup>22</sup> only confirms the fact that the most useful source of law in a housing case may be nonhousing law. On the remand, the Seventh Circuit in turn remanded to the district court for a determination whether there had been a violation of the federal Fair Housing Act of 1968, since, reasoned the court, this act would be analogous to the employment title of the Civil Rights Act of 1964, Title VII, under which *Griggs* was decided, and therefore actual intent would not have to be proved under the 1968 act.

### III. Individual versus Collective Standards

A second pervading issue is that of individual versus collective standards, particularly in the application of the bona fide occupational qualification (BFOQ) exception.<sup>23</sup> Here we encounter an unresolved

19. 426 U.S. 229 (1977).

The future importance of the *Washington* rule and of the distinction here discussed will depend in no small measure on the answer to the question whether cases brought under the Reconstruction Civil Rights Act, especially 42 U.S.C. §§ 1981 and 1982 (1976), are assimilated to *Washington* or to *Griggs*. Certiorari has been granted in a case holding that actual intent need not be shown in a section 1981 employment suit. *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1978), cert. granted, 437 U.S. 903 (1978) (argued Dec. 5, 1978). But two circuits have held that actual intent must be shown. *Williams v. De Kalb County*, 582 F.2d 2 (5th Cir. 1978); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977). At least two district courts have also imposed the actual intent requirement. *Arnold v. Ballards*, 448 F. Supp. 1025 (N.D. Ohio 1978); *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949 (D. Md. 1977).

20. 429 U.S. 252 (1977).

21. 429 U.S. 1068 (1977).

22. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

23. The Title VII BFOQ provision states:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e) (1976).

Note that "race" is deliberately omitted from this exception.

The counterpart to this provision in the Age Discrimination in Employment Act is essentially similar: "It shall not be unlawful for an employer, employment agency, or labor organization—I) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . ." 29 U.S.C. § 623(f) (1976).

apparent conflict between the rule evolving in the two areas of sex discrimination and age discrimination.

In sex discrimination law, the principle that has emerged from a series of circuit court decisions<sup>24</sup> is that each individual woman has a right to be judged as an individual. Thus, an employer cannot assume that, because perhaps ninety-eight percent of all women cannot lift one hundred pounds, he can therefore bar all women from a job entailing the lifting of one hundred pounds.

In *Dothard v. Rawlinson*,<sup>25</sup> the Supreme Court summed up this development: "But whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual man or woman on the basis of stereotyped characterizations of the sexes . . . ."<sup>26</sup>

Although in that passage the Court is not necessarily endorsing these cases, there follows a passage in which the Court appears to speak for itself: "In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."<sup>27</sup>

When we turn to the field of age discrimination, however, we find bus companies flatly refusing to hire any driver over the age of thirty-five in *Hodgson v. Greyhound Lines, Inc.*,<sup>28</sup> or forty in *Usery v. Tamiami Trail Tours, Inc.*,<sup>29</sup> and "getting away with it" in the circuit courts.

As confirming the present theme, we may first note that both cases felt it necessary to begin with *Weeks v. Southern Bell Telephone & Telegraph Co.*<sup>30</sup> and to distinguish the sex discrimination cases. This they did by injecting the added consideration of the safety of the bus passengers. This is undoubtedly a valid factor, but from that point on the age cases have developed rules that vary markedly in their strictness.

The Seventh Circuit held that, to sustain a flat maximum hiring age, Greyhound need only show that it had a rational basis in fact to believe that elimination of this maximum hiring age would increase the likelihood of risk to its passengers and the public.

The Fifth Circuit adopted a two-part rule: the employer must show either that all or substantially all (the *Weeks* formula) persons over the particular age are unable to perform the duties of the job

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24. *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

25. 433 U.S. 321 (1977).

26. *Id.* at 333.

27. *Id.* at 335 (citing *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969)).

28. 499 F.2d 859 (7th Cir. 1974).

29. 531 F.2d 224 (5th Cir. 1976).

30. 408 F.2d 228 (5th Cir. 1969).

safely and efficiently, or that some older persons have traits precluding safe and efficient performance unascertainable other than through knowledge of the person's age. A stunning paradox contributing to the contemporary instability of this field is that while, by application of this formula, the Fifth Circuit upheld an across-the-board maximum hiring age of forty for bus drivers, the Eighth Circuit in *Houghton v. McDonnell-Douglas Corp.*,<sup>31</sup> by an application of the same formula (a stricter application) rejected the defense as to a fifty-two-year-old pilot whose job was testing experimental supersonic aircraft! It is idle to try to distinguish the cases on the safety-to-the-public factor. Plainly, a jet plane crashing in a metropolitan area could cause much more loss of life than a bus running into the ditch. The principal difference was that the court in *Houghton* insisted on hard proof that test pilots — not just people in general — deteriorate with age. The plaintiff adduced impressive evidence proving just the opposite. In *Tamiami*, however, the court was content to rely on data as to the effects of age on the general population. Moreover, there was a much more convincing demonstration of the feasibility of detecting relevant physical disabilities in *Houghton* than in *Tamiami*.

Of course, everything depends on what the Supreme Court says when these conflicts inevitably reach it. On the strength of *Dothard*, one may predict with some assurance that, in the nonsafety cases, the Court will follow the individual rather than the collective or stereotype approach. Thus, in an age case, if the occupation involved climbing telephone poles, the Court will probably say that a fifty-year-old applicant should have the right to decide for himself if he wants to try it, and should be hired if as an individual he proves he can do the job.

As to the safety cases, the Court acknowledged in *Dothard* that this was a relevant factor. But in forecasting whether the Court will embrace the loose test of *Greyhound*, the moderately loose test of *Tamiami*, or the stricter test of *Houghton*, one has only general expressions of the Court to rely on. These expressions consistently stress that the BFOQ should be construed narrowly.

In *Dothard*, the Court said: "We are persuaded—by the restrictive language of § 703e, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition on the basis of sex."<sup>32</sup>

In a footnote, the Court cites the EEOC Guideline stating that the BFOQ "should be interpreted narrowly."<sup>33</sup>

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31. 553 F.2d 561 (8th Cir. 1977).

32. 433 U.S. at 334 (footnotes omitted).

33. *Id.* at 334 n.19 (citing 29 C.F.R. § 1604.2(a) (1977)).

One cannot resist pointing out the enthusiasm with which the Court has intensified even the EEOC's "narrowly" to its own "extremely narrow." Whatever else may be said of the *Greyhound* "rational basis" rule, it cannot by any stretch of language be called a "narrow" interpretation of the BFOQ clause—much less "extremely narrow." The only one of the three circuit court cases that comes close to fitting this description is *Houghton*—and for this reason there is good reason to expect that the ultimate rule to emerge will at least be no looser than that in *Houghton*, for both age and sex BFOQ determinations.

#### IV. Reasonable Accommodation

A third thread intersecting some of the discrimination areas is the principle of "reasonable accommodation." For the time being, the most important question is the extent to which doctrines developed for religious discrimination will be carried over to handicap discrimination.

When Title VII was first passed, with its ban on religious discrimination in employment, it may have been thought that such discrimination would take the "I-won't-hire-you-because-you're-a-Catholic" form. It soon became apparent that this was not to be the main problem. Almost all cases proved to center on religious practices, such as observing Saturday Sabbaths, rather than on religious identifications or theological beliefs. Accordingly, a specific amendment was added in 1972: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>34</sup>

In *Trans World Airlines, Inc. v. Hardison*,<sup>35</sup> a case involving the problem of adjusting work schedules to meet the needs of an employee whose religion forbade working on Saturday, the Supreme Court determined that it would have been an "undue hardship" on the employer to make the accommodation. The union had balked at allowing Hardison a shift preference that would have solved his problem, since this would have violated the collective bargaining agreement. The employer would not excuse Hardison on Saturday, because that would have impaired the functioning of his work area. Nor could another employee be shifted to fill in for him since this would have undermanned some other work area or required paying of overtime wages.

The key to the Court's holding is the following remarkable sen-

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34. Civil Rights Act of 1964, Title VII, § 701(j), 42 U.S.C. § 2000e(j) (1976).

35. 432 U.S. 63 (1977).

tence: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."<sup>36</sup>

Quite understandably, some lawyers and courts jumped to the conclusion that there was virtually nothing left of "reasonable accommodation." It became necessary to remind employers, as the Seventh Circuit did in *Redmond v. GAF Corp.*,<sup>37</sup> that they must still show that they tried to make *some* accommodation. But, even so, it remains true that the authoritative interpretation of "reasonable accommodation," like that of BFOQ, is "extremely narrow."

The principal federal statute on handicap discrimination in employment is the Rehabilitation Act of 1973,<sup>38</sup> covering recipients of government contracts and grants, and government agencies. Regulations issued under this Act contain a provision that the contractor must make: "reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business."<sup>39</sup>

Since this regulation was issued subsequent to the 1972 Title VII amendment on "reasonable accommodation" in religion cases, and since the operative words, such as "undue hardship," are identical, the question that jumps out of the page is: Will the Supreme Court carry over to physical handicap discrimination the *Hardison* rule equating *de minimis* cost with undue hardship? If it does, the protection afforded by the Rehabilitation Act will itself become *de minimis*. But if it does not, the Court will have to articulate some reason why the same words mean one thing when applied to religious discrimination and another thing when applied to handicap discrimination.

As yet no significant case law has appeared on what "reasonable accommodation" means in the context of employment discrimination against the handicapped. The nearest thing to a detailed description of what might be entailed is a list of examples provided by a Labor Department spokesman of accommodations that might be deemed reasonable depending on the particular contractor's circumstances:

Modify building architecture to include wheelchair ramps, wider bathroom stalls, and raised door numbers for the blind;

Install alternative warning devices for the deaf and the blind;

Eliminate heat-activated elevators and replace them with elevators that persons with artificial limbs can operate;

Initiate an outside interviewing and application process to make the contractor more accessible to the handicapped;

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36. *Id.* at 84 (footnote omitted).

37. 574 F.2d 897 (7th Cir. 1978).

38. 29 U.S.C. §§ 701-794 (1976).

39. 41 C.F.R. § 60-741.6(d) (1977).



Institute alternative testing methods for handicapped persons who can't take traditional tests, i.e., oral tests for the blind;

Restructure job duties where possible;

Create opportunities for job-sharing, part-time work, and work at home where possible; and

Purchase special aids for the handicapped to help them to do the job, such as special telephones for the blind.<sup>40</sup>

This is a far cry from *de minimis*. Whatever the outcome, one may be sure that the first line of defense of any employer charged with inadequate accommodating of the handicapped will be a religion case, *Hardison*.

### V. Compensatory Discrimination

The terms "compensatory discrimination" and "reverse discrimination" are sometimes used interchangeably, but they are not entirely synonymous. Reverse discrimination is the broader concept, and indeed includes compensatory discrimination, but also includes more.

The most inclusive issue covered by the term "reverse discrimination" is the question whether statutory and constitutional guarantees should be limited to the minorities whose plight originally impelled their adoption. Gradually it has become well established that they are not, in a wide variety of situations cutting across a number of discrimination categories. Thus, males can invoke sex discrimination statutes, as in the airline cabin attendant cases.<sup>41</sup> Whites can invoke Title VII in employment cases,<sup>42</sup> and the fourteenth amendment and Title VI of the Civil Rights Act of 1964 in college admissions cases,<sup>43</sup> and can even invoke section 1981, which guarantees "all persons" the same contract rights as "white citizens."<sup>44</sup> Similarly, the Supreme Court has held that whites have standing to challenge race discrimination in housing cases.<sup>45</sup> Once more it may be observed that anyone briefing a reverse discrimination question in any category would obviously be missing some important precedents if he failed to realize that the principles found in, say, employment cases might be of value in education or housing cases.

This kind of reverse discrimination has no philosophical, social, or ethical content. It is usually nothing more than giving a literal meaning to the words of a statute. Discrimination against whites is based on race, and discrimination against males is based on sex — and that is that. The point may be highlighted by adducing the one partial excep-

40. Daily Labor Report, No. 64, Apr. 1, 1977, at A-4.

41. *E.g.*, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971).

42. *E.g.*, *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273 (1976).

43. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

44. *E.g.*, *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273 (1976).

45. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

tion to the operation of this simple rationale. Reverse discrimination against persons outside the forty to seventy age group is impossible under the Age Discrimination in Employment Act (ADEA).<sup>46</sup> If one were to read no further than the primary operative section of the Act forbidding discrimination because of age, one might conclude, by analogy to the similar language of Title VII, that a twenty-year-old rejected because of an employer policy of hiring no one under forty could complain that he was indeed discriminated against "because of age." But the ADEA has something the other acts lack: a specific section limiting its protection to those within the forty to seventy age bracket.<sup>47</sup> Within that age span, however, there may be illicit discrimination in either direction, direct or reverse. The Labor Department Regulation explicitly cites the example of two men, one forty-two and the other fifty-two, and states that the employer may not turn down either in favor of the other on the ground of age.<sup>48</sup>

Compensatory discrimination is a narrower and more controversial concept than plain reverse discrimination, but it too pervades many of the segments of discrimination law. In simplest terms, the idea is that, when a group has been systematically disadvantaged by force of law for centuries, it is not enough merely to say: "We repeal the offensive laws and discontinue the offensive practices starting today; now let everybody compete on the basis of merit alone." It is not enough to say, "Let the footrace from now on go to the swiftest," when at the moment the gun is sounded, the starting-point some of the runners is hundreds of yards behind that of others.

In employment, the principal expression of the compensatory principle is "affirmative action." Employers and unions with a record of past discrimination must do more than just refrain from discriminating in the future. They must try to make up for the past by going out of their way to recruit, train, and hire members of minority groups. The counterpart in public school desegregation is, of course, the rule that it is not enough for a once-segregated school to stop deliberately segregating, or even to adopt a "freedom of choice" policy;<sup>49</sup> it must undo the effects of its past discrimination by an array of positive devices, including busing, to achieve a unitary and nondiscriminatory<sup>50</sup> system. The most recent focal point of the controversy is college admissions, with preferential admissions for minorities in professional schools figuring in two cases reaching the Supreme Court, *De Funis v. Odegaard*<sup>51</sup> and *Regents of the University of California v. Bakke*.<sup>52</sup> Other exam-

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46. 29 U.S.C. §§ 621-634 (1976).

47. *Id.* § 631.

48. 29 C.F.R. § 860.91(b) (1977).

49. *Green v. County School Bd.*, 391 U.S. 430 (1968).

50. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

51. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

52. 438 U.S. 265 (1978).

ples of compensatory discrimination may be found in housing, with attempts to undo past injustice by providing minorities with a greater share of public housing, and in business, through the Minority Business Enterprise ten-percent set-aside in the Public Works Employment Act.<sup>53</sup>

Once more, the point for present purposes is that the arguments and precedents on both sides are carried over between the different categories. The very validity of the compensatory principle involves the same considerations in all. Thus, the propriety of deliberately using race as a basis for "discrimination," although benevolent, continues to come under attack, although one might have thought that the issue was put to rest once and for all by the clear and unanimous holding and language in *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>54</sup> The familiar dispute about "quotas," and the tiresome quibble that "this is not a quota, just a goal," similarly make their appearance in all these areas, and no doubt will continue to do so, in spite of the equally clear discrediting of this quibble in Justice Powell's *Bakke* opinion.<sup>55</sup>

By far the most important unanswered question as to compensatory discrimination is the extent of the impact of *Bakke* on affirmative action in employment discrimination. Indeed, it is quite possible that the future practical significance of *Bakke* will loom much larger in the area of preferential employment measures than in its immediate area of preferential college admissions.<sup>56</sup>

The possible impact of *Bakke* on "affirmative action" may be considered under three headings: affirmative action plans imposed as a condition of obtaining a government contract; affirmative measures decreed by courts as part of the remedy for proved past discrimination; and preferential schemes voluntarily adopted by employers.

Of the three, the first is the least vulnerable. Affirmative action has always been the very heart of Executive Order No. 11246 on government contracts, and its constitutionality has been taken for granted since *Contractors Association of Eastern Pennsylvania v. Secretary of*

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53. 42 U.S.C. § 6705(f)(2) (1976).

54. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1 (1971).

55. "This semantic distinction is beside the point . . ." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 289.

56. A general discussion of *Bakke* will not be undertaken here, in view of the abundance of material already available. The most perceptive analysis up to this point is found in Van Alstyne, *A Preliminary Review of the Bakke Case*, 64 AM. A. U. PROFESSORS BULL. 286 (No. 4, 1978). One of the principal themes of this critique is the extreme instability of the decision itself and of the legal situation it leaves in its wake. For example, Prof. Van Alstyne demonstrates convincingly that the identical justices, confronted with identical facts could, without legal strain and without damage to *stare decisis*, now reach exactly the opposite result! If this is so as to the precise case decided, one need hardly belabor how much harder it is to foretell what the Court will do when the facts and even the entire category of discrimination are different. Still, one must make the best possible try, since the potential stakes, particularly in the employment and minority business fields, are enormous.

*Labor*,<sup>57</sup> upholding the "Philadelphia Plan."

The second use of affirmative action, as a Title VII remedy, has a slightly shakier base. This is because the remedy section of that Title contains language which, at first glance, might seem to rule out preferential hiring expressly:

Nothing contained in this subchapter 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 . . . the available work force . . . .<sup>58</sup>

One after another, however, eight circuits have interpreted this section to forbid preferential hiring only when the imbalance came about completely without regard to the actions of the employer.<sup>59</sup> This is known as "natural" imbalance. An "artificial" imbalance, permitting affirmative action, occurs when the employer's intentional hiring practices have created — intentionally or unintentionally — the disproportionately low minority representation. The Supreme Court has not yet spoken on this issue, but if, for the kind of broad reasons that made *Bakke* controversial, the Court wished to reverse the circuits, a legal formulation would not be hard to find. The Court could merely rule that the quoted passage means what it says, that it speaks only of "an imbalance which may exist" in fact and draws no distinction based on what caused the imbalance, and that if such a distinction is to be drawn it should be written in by Congress, not read in by courts.

That this possibility is not entirely far-fetched is suggested by the Fourth Circuit's disposition of the post-*Bakke* case of *Sledge v. J. P. Stevens & Co.*<sup>60</sup> In this decision, the Fourth Circuit, which is one of the two circuits that has not yet adopted the majority "natural-imbalance" rule,<sup>61</sup> reversed a quota hiring remedy under Title VII because of doubts based on *Bakke*.

The third affirmative action problem may prove to be the most

57. 442 F.2d 159 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971).

58. 42 U.S.C. § 2000e-2(j) (1976).

59. They are the First, Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth Circuits. See 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 57.10, at 11-86 n.75 (1978), for complete citations.

60. 585 F.2d 625 (4th Cir. 1978).

It may also be noted that one district court has, on the strength of *Bakke*, held unconstitutional the Minority Business Enterprise ten-percent set-aside provision in the 1977 Public Works Employment Act, 42 U.S.C. § 6705(f)(2) (1976). *Association Gen. Contractors v. Secretary of Commerce*, No. 77-3738-AAH (D.C. Cal. Oct. 20, 1978).

61. See, e.g., *Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135 (4th Cir. 1978), which is not directly contra on preferential hiring as such, but which reversed a district court requirement that an employer, guilty of prior flagrant discrimination, affirmatively inform black employees of the availability of better positions in other departments — as long as employees of all races were treated alike in this respect.

legally interesting of all. It is exemplified by *Weber v. Kaiser Aluminum Co.*,<sup>62</sup> a case that was widely discussed in the press at the time of the *Bakke* decision as perhaps the next major *Bakke*-type test case.<sup>63</sup> In order to avoid possible future litigation and to comply with Office of Federal Contract Compliance guidelines, Kaiser and the United Steelworkers entered into a collective bargaining agreement which contained an "affirmative action" clause. The agreement removed the requirement of prior craft experience for on-the-job training and instituted an entrance ratio of one minority worker to one white worker for craft positions until the percentage of minority craft workers approximated the percentage of minority population around the plant. Two seniority lists are kept, solely for determining eligibility for on-the-job training. An unsuccessful white bidder with greater seniority than a successful black brought a class action suit alleging that Kaiser and the Steelworkers were violating Title VII. After finding that the company had not previously engaged in acts of discrimination, the district court enjoined the company and the union from implementing the clause on two grounds: first, while the judiciary may establish affirmative action programs as a form of relief, the employer and union violated Title VII by voluntarily adopting the quota system; second, the court would not mandate a quota system here, because the preferred workers were not identifiable victims of hiring discrimination. The circuit court affirmed on the second ground, but rejected the first. The court stated that "societal discrimination," not employment discrimination, was involved:

Where admissions to the craft on-the-job training are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-to-one ratio, whether designated by agreement . . . or by order of the court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII.<sup>64</sup>

The court also ruled that if Executive Order 11246 mandated racial quotas for the Kaiser program in the absence of any prior employment discrimination, the order must fall before the direct congressional prohibition found in Title VII. It will be noted that this case resembles *Bakke* both in the mechanics of the plan and in the fundamental philosophical issue. The two-track plan, in which one track was completely inaccessible to whites, is strongly reminiscent of the similar separate tracks for applicants to Davis medical school. And the view that individual employers, not themselves guilty of past discrimination, cannot voluntarily take it on themselves to atone for "societal discrimination" seems to be the direct employment counterpart to the *Bakke* result—in that only four justices embraced the Brennan opinion view approving

62. 563 F.2d 216 (5th Cir. 1977), cert. granted, — U.S. —, 99 S. Ct. 720 (1978).

63. *Id.*

64. *Id.* at 226.

"Davis' articulated purpose of remedying the effects of past societal discrimination . . . ."<sup>65</sup>

Of course, it is theoretically possible that one of the four justices who joined in the Stevens opinion,<sup>66</sup> which rested exclusively on Title VI and carefully avoided expressing any opinion on the constitutional issue, might join with the "Brennan four," and thus make up a five-man majority for the philosophical view that remedying past societal discrimination is a valid justification for reverse-discriminatory action. If this constitutional view were then imported into the statutory problem in *Weber*, the stage would be set for a reversal.

On the other hand, there are two strands visible in recent Supreme Court opinions that may be developing a different pattern.

One strand may be put colloquially: "If you are not part of the problem, you cannot be made to be part of the solution." The theme dates from the first *Milliken v. Bradley*,<sup>67</sup> the Detroit school integration case. This case held that, although no really meaningful racial balance could have been achieved by reshuffling school children within the heavily-black school system of Detroit proper, it was impermissible to solve that problem by drawing into the integration plan the contiguous white suburbs, in the absence of proof in the record that these suburbs had themselves engaged in racial discrimination contributing to the problem. This theme has been consistently applied in a number of subsequent cases.

This strand reappears strongly in the Powell *Bakke* opinion. Davis had itself been guilty of no past discrimination. Hence its avowed motivation had to be one of remedying societal injustice.<sup>68</sup> Powell reviews a wide array of cases,<sup>69</sup> drawn from school desegregation, employment discrimination, sex discrimination, political rights discrimination, and the like, always with the same conclusion: general societal discrimination will not support affirmative action, for example, by a specific employer at the expense of a specific employee.

This leads to the second strand, somewhat related, which is a growing concern with the question: assuming that some kind of compensation is owed, who should pay it? Professor Van Alstyne in his preliminary analysis of *Bakke* for the American Association of University Professors puts the matter pointedly:

Viewed head on, as a *modus operandi* for the amortization of the racial national debt, without doubt there is much about the Davis

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65. 438 U.S. at 362.

66. It is quite clear that Justice Powell does not agree with the general "societal" approach: "But we have never approved preferential classifications in the absence of proved constitutional or statutory violations." *Id.* at 302.

67. 418 U.S. 717 (1974).

68. 438 U.S. at 306.

69. *Id.* at 300-03.

plan that is plainly repugnant. For one thing, it represents a most peculiar view of apportioning the burdens of providing racial restitution. The 'benefits' of that racism for which the Davis plan presumes to make partial group restitution are diffused in the 'unjust' enrichment of all white Californians including most certainly the engineers of this compensatory scheme, *i.e.*, the (predominantly white) faculty and administration of the Davis medical school. Yet, the overwhelming majority of all such white persons give up *nothing* in contribution to the amortization of that debt. They pay no higher taxes, the faculty teach no greater loads, they supervise no larger number of students, they personally forgo no perquisites or emoluments, and indeed may themselves even *profit* from their own plan — insofar as it provides them with an enhanced sense of self-esteem and peer group approval. Rather, the Davis plan presumes to impose 100% of the 'debt' it is to amortize on a hapless number of impersonally chosen surrogates from whom admission-gate transfer payments are thus to be made. The Allen Bakkes and Marco Defunises *alone* step aside.

There is, of course, no evidence that any of them benefitted disproportionately (if indeed at all) from the racism it is now their exclusive distinction to amortize; there is no evidence that any of them are better able to afford the cost than others.<sup>70</sup>

Precisely the same misgivings, translated into the employment counterpart, have been haunting the courts, from the Supreme Court on down, throughout most of the history of affirmative action. If a seniority system is struck down as discriminatory in effect, or if a quota system of some kind is imposed, it is not the employer who feels the sting—he continues to operate his plant with employees of presumably the same level of competence. Much less is it the consumer or the public at large. The entire "debt" is assumed by the individual white employee who loses his job in the name of societal reparation.

Justice Powell's reference to this carryover between the employment and the college admissions problem accordingly takes on special importance here. He referred to the leading case, *Franks v. Bowman Construction Co.*,<sup>71</sup> in which the court had found it necessary to hurt some coemployees in order to fashion the requisite remedy of constructive seniority for blacks, but the overt emphatic exclusion of societal discrimination as the source of the wrong to be remedied:

[I]n *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary "to make [the victims] whole for injuries suffered on account of unlawful employment discrimination."<sup>72</sup>

70. Van Alstyne, *A Preliminary Review of the Bakke Case*, 64 AM. A. U. PROFESSORS BULL. 286 (No. 4, 1978) (emphasis added).

71. 424 U.S. 747 (1975).

72. 438 U.S. at 301 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975))).

Note the double insistence on identifying both the person who caused the discrimination and the person who suffered from it.

In the later case of *International Brotherhood of Teamsters v. United States*,<sup>73</sup> however, the Supreme Court limited *Franks* by holding that it afforded no remedy to the victims of a bona fide seniority system to the extent that it "locked in" pre-Act discrimination. And even beyond this, it discussed at length the problem of "the legitimate expectations of nonvictim employees." It concluded that a proper balance would have to be worked out by the district court under "basic principles of equity," drawing on "qualities of mercy and practicality."<sup>74</sup>

At the minimum, this means that, in any final disposition of the affirmative action dilemma in the light of *Bakke*, it will not be automatically assumed that the displacement and disadvantaging of "innocent" white employees must be accepted as an unfortunate but inevitable by product of vindicating the rights of minority members.

#### VI. *Practical Conclusions as to Books and Indexes*

Quite apart from the intellectual satisfaction of constructing a cohesive and interrelated field of law out of the somewhat scattered materials of discrimination law, the practical benefit would lie in facilitating the briefing of discrimination issues, and particularly in ensuring that precedents from related areas, as in the examples here adduced, are exploited to the full.

The two headings under which discrimination has in the past been uneasily squeezed are civil rights and constitutional law. Neither one works well any more, if indeed it ever did. The trouble with the civil rights categorization is that the classification covers such a vast and varied assortment of subjects — from rights of prisoners to Jehovah's Witness handbills, and from academic freedom to hair length of national guardsmen — that it does not afford a sufficiently meaningful and usable reference point. As for constitutional law, most constitutional law is not discrimination law, and most discrimination law is not constitutional law. With the exception of the original substantive law of school segregation, the field has become almost entirely statutory. With the inclusion of state and local governments, including school districts, within such statutes as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, the need to resort to constitutional remedies in such matters as sex discrimination involving teachers, or mandatory retirement for policemen and firemen, has diminished sharply.

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73. 431 U.S. 324 (1977). The holdings at the circuit court level had all been contra.

74. *Id.* at 375.



The obvious solution for a digest, key number, or similar system would be to begin by adopting the single overall heading of discrimination. Below that heading, the next level of headings could be the five major categories of activity in which discrimination occurs — employment, education, housing, public accommodations and facilities, and political and civil rights — with perhaps a catch-all category added. Under these could be placed the nine personal categories persons to the extent they are applicable: race, sex, national origin, religion, age, handicap, homosexuality and veterans, again with a catch-all. Alternatively, these layers could be reversed. The first arrangement is probably the best from the practicing lawyer's point of view, since an area like say, employment discrimination, is already identifiable as a field of practice.<sup>75</sup>

### *VII. Practical Conclusions as to Curriculum*

The principal curricular implication of the present analysis is that there should be at least one specific course on discrimination in the law school curriculum.

If two or more courses are possible, the two possible ways of arranging the material resemble those just sketched for books and indexes.

The division can be by classes of persons discriminated against. This would mean, at the minimum, a course in race discrimination in all its aspects, and a course in sex discrimination in all its aspects. Several casebooks tailored to this approach are available. The author has been using this pattern for thirteen years, and it seems to work satisfactorily, with some adjustments to be noted in a moment.

Alternatively, the course could be based on the category of activity involved. Here the commonest example by far is combining in a single course all species of employment discrimination — by sex, race, age, handicap, religion, etc. Again, there are several casebooks available, some with particular emphasis on problems of practice.

It follows from the theme of this article, however, that either of these arrangements, adhered to literally, would miss a great deal of relevant and indeed crucial law, both in the form of past precedents, and particularly in the form of principles destined to control future controversies.

The author has attempted to meet this problem in two ways, and conversations with others in the field reveal that comparable devices have been found useful in many schools.

The first device is a feature which might be called "discrimination

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75. The author's four-volume *A. LARSON, TREATISE ON THE LAW OF EMPLOYMENT DISCRIMINATION* (1978) is accordingly arranged on this pattern.

law in the news." The papers are combed each week for developments in all areas of discrimination, and the first fifteen or twenty minutes of a class period are devoted to discussing the legal implications of the news story. It is nothing short of astonishing to discover the wealth of material that emerges in this way. If one uses the news item as a core, and then surrounds that core with the principal framework of law suggested by the item, by the end of the term it will probably be discovered that at least a rudimentary acquaintance with the entire field of discrimination law has been supplied. For example, in the November, 1978, elections, there were three referenda of different types bearing on "Gay Rights." By the time one had analyzed the decisional and legislative background, and the significance of the varying results of the ballots, one had done a virtually definitive job on the law of discrimination based on homosexuality. Needless to say, there is the added advantage that the very presence of a legal controversy in the day's news enlivens the subject and stimulates discussion.

The other device that has proved useful to enrich and diversify discrimination courses is to allow students to select topics for seminar papers from, not just the area covered by the course, but from any branch of discrimination law. Some of these may be presented by students from time to time at appropriate points in the course, again revealing the links to related discrimination areas that might be missed if a too-rigid arrangement of the material were adhered to.

### VIII. Conclusion

Certainly we are well on our way to the recognition of discrimination as a field of law that is the concern of this article. One evidence is the proliferation of case books, looseleaf services, newsletters, treatises, courses, symposia, and conferences dealing with all or part of the area. Another is the conspicuous increase in the disposition of courts to extract principles and precedents from one branch of the subject to bolster its analysis of another. In Justice Powell's *Bakke* opinion, for example, we may observe this salutary tendency carried to full flower: in support of a college-admissions issue analysis he adduces not only public school desegregation cases, but precedents as to Title VII employment discrimination, discrimination under government contracts, housing discrimination, sex discrimination in Social Security and other areas, linguistic discrimination, discrimination against American Indians, and political discrimination against a Jewish community in redrawing voting districts.<sup>76</sup>

It is hoped that the present brief summary of the field of discrimi-

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76. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 301-05 (1978).

nation law and of some of the strands that knit it together will help reinforce this trend, to the end that this young, sprawling, vigorous new entry in the legal lexicon will begin to emerge as a more orderly and manageable area of law.