race and affirmative action

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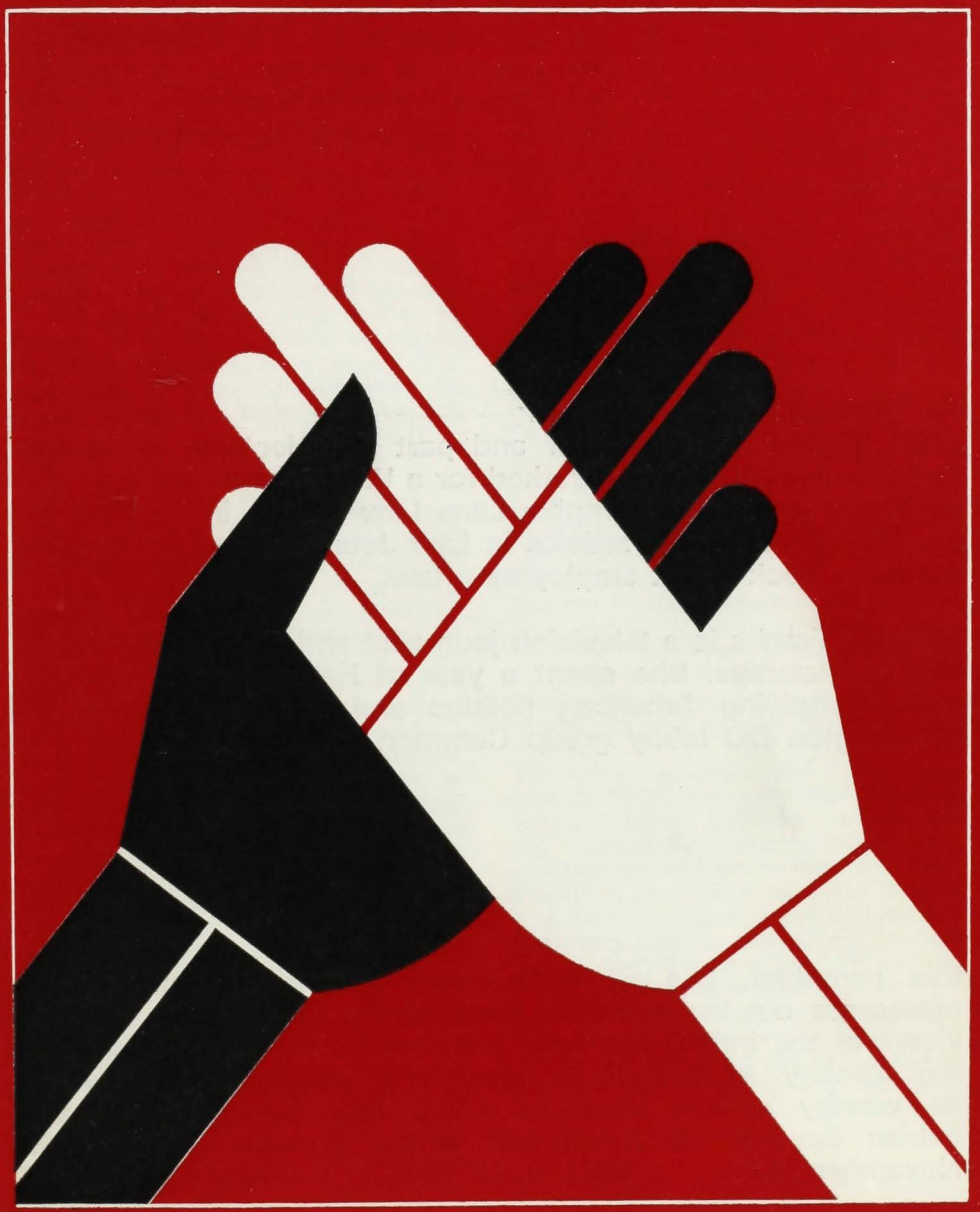

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1. underclass in the making

Time magazine has written of Britain's "underclass in the making". It pointed to the striking facts that there are no black MPs, few black councillors, no black trade union leaders and no black chief executives of large companies. The list could be extended. A mere 218 out of 127,600 policemen (0.17 per cent) are Asian or West Indian, while 4 per cent of the population are black. Just three years ago a Political and Economic Planning survey found that Asians and West Indians faced discrimination of some sort in 46 per cent of their job applications. This is confirmed by the fact that while 79 per cent of white men with educational qualifications to degree standard are in professional or managerial positions; amongst ethnic minorities the figure is only 31 per cent (David Smith, *Racial Disadvantage in Britain*, 1977). There is little to suggest that things have changed in the last three years. And it is now 15 years after the passage of the first Race Relations Act.

alienation and frustration

Alienation and frustration among immigrant communities, and particularly the younger generation, have never been stronger. Some of this is justifiably directed at the Labour movement. A report to the 1979 TUC Congress commented, "From general observation . . . ethnic minorities are under-represented at every level of the trade union hierarchy". No one could accuse Bill Keys, chairman of the TUC Equal Rights Committee, of understatement when he said "The unions were late at the starting gate so far as the racial question is concerned". As a recent Labour Party Home Policy Committee report stated, "The Labour Government failed to deliver the promised changes in the living and working conditions of Britain's ethnic minorities".

Britain has without doubt shown a benign neglect to the problems of its ethnic minorities. Legislative and administrative energies have concentrated instead on the "immigration problem". Labour bears much of the responsibility for restrictive and racialist immigration policies which have bedevilled good race relations and fuelled racialism as the "numbers game" was played with ever more intensity.

Immigration has become used to mean black immigration even though the majority of those who now enter this country to stay for longer than a year are actually white. Moreover the very term immigrant is extended to descendants born and educated in this country and this suggests that issues of race are alien, temporary problems which will disappear. A sound racial policy is dependent upon enlightened attitudes to immigration yet, even among liberal thinkers, there is the recurring and crude contradiction that *good* race relations somehow means keeping out any more blacks but being nice to those who are already here. The introduction of restrictive racialist immigration rules show that official action is also based on this approach.

The electoral fortunes of the National Front are presently in decline but Powellism lives on in the Tory Party. Mrs Thatcher's feelings were made quite apparent in her *non sequitur* uttered during the last election campaign, "The British character has done so much for democracy, for law . . . that if there is any fear that they may be swamped, people are going to react and to be hostile to those coming in". The popular media show a distinct lack of sensitivity towards racial problems, concentrating on the effects of frustration and anger and not its causes.

The violence of Southall or Bristol could so easily break out again: graffiti already warns, "Bristol yesterday, Brixton today". Immigrant communities justifiably no longer see the police as their protectors. The use of the antique "sus" law (section 4 of the 1823 Vagrancy Act) has perhaps embittered relations most of all. The fact that, in 1979, 767 out of the 1,894 arrested for this offence were black tells its own story. The House of Commons Select Committee on Home Affairs has called for its abolition: yet the Government's equivocal line shows its insensitivity to what above all other issues has united the minority community.

This pamphlet concentrates on employ-

ment, which for most people is the central issue of discrimination. It compares experience of race policy on both sides of the Atlantic and examines recent American initiatives. The central notion is that individual equality of opportunity as reflected in the Race Relations Acts of 1968 and 1976 is no longer enough. An alternative strategy to move to substantive equality must be formulated ; this means widespread affirmative action which we examine in some detail. Much of this discussion has implication for sex discrimination too, although that is not our primary concern.

In making comparisons between Britain and America, it is wrong to belittle the differences in racial history and current problems. It is also impossible to transplant solutions between legal systems with different approaches and traditions especially two which, although rooted in the same common law heritage, have diverged as markedly as the English and American. In what follows several basic differences must be kept in mind.

* Discrimination has been more pervasive and ignominious in American history. The familiar pattern started with slavery and progressed through a century of apartheid practised mainly, though not exclusively, in the South.

* Only 4 per cent of the UK population is black, and this body is in no sense homogenous. The 620,000 West Indians form the largest single minority, followed by the Indians (430,000), Pakistanis (240,000), Bangladeshis (50,000) and African Asians (180,000) (1979 figures). The cultures and aspirations of these various groups diverge considerably, and this accounts in part for the absence so far of any very effective immigrant voice. In the US on the other hand, 12 per cent of the population are black and 8 per cent Hispanic. These minorities possess political and economic power far beyond that exerted by those here. Today there are over 3,000 black elected officials in the US.

* Race relations have always been regulated to some degree by the Constitution, albeit as interpreted in very different ways over time, while in Britain *laissez faire* was the rule until recently. Lord Mansfield in 1772 in *Somersett's* case wiped the slate clean ; it ended slavery as a recognised institution without substituting any new race law. The British debate whether law ought to " intrude " into such a " delicate matter " was never a real issue in the US. More fundamentally, the US is a highly legalistic society. De Tocqueville commented long ago that " In America all questions eventually become legal questions ".

* As already mentioned, race relations in Britain is exacerbated by questions of immigration, in a way which is not true in the US, although perhaps it will become more significant due to the current (sometimes illegal) migrations from Mexico, South East Asia and Cuba.

2. an idea whose time has come

In the first two stages of American and British experience—the prohibition of direct and then " indirect " discrimination —legislation has progressed at a similar pace. There has been an active cross fertilisation of legislative techniques and British case law has sometimes drawn on transatlantic authorities.

The major postwar breakthrough for racial equality in the United States came from the Supreme Court rather than the legislature in the great school desegregation case of *Brown v Board of Education* in 1954. This declared unconstitutional the " separate but equal " education prevalent in the South. That policy was to be replaced " with all deliberate speed ". Although some legislation had been passed concerning voting rights in 1960, it was not until 1964 that Congress accepted the first comprehensive equal rights legislation. The enactment of the Civil Rights Act was the legacy of a series of dramatic events. Racial violence in the American South threatened to tear whole cities apart while one of the largest peaceful protest marches in history culminated in Martin Luther King sharing " his dream " with the nation. All this was coincidental with the assassination of President Kennedy. President Johnson borrowed from Victor Hugo in claiming that his statute embodied " an idea whose time has come ". It was intended to cover discrimination on the grounds of race and sex in almost all privately and publicly owned " places of public resort ", making provision for the cutting off of federal funds to those which did not comply.

It was Title VII of the Civil Rights Act which made it illegal to discriminate in employment matters. An administrative commission was given authority to operate in this area alone. The brief of this Equal Employment Opportunities Commission (EEOC) was to investigate all complaints. Only after an applicant had failed to obtain a satisfactory settlement from the EEOC could he invoke the courts. This system, which encourages long drawn out litigation, remains today, although there is now a limit of 180 days for EEOC action. The EEOC's recommendation is entitled to substantial weight in court, and it can now, after reforms in 1972, take court proceedings itself in " pattern and practice " cases against private employers. The power against public employers remains with the Attorney General.

the Race Relations Act 1968

The British Race Relations Act 1968 was not an immediate response to marches and demonstrations. It was a liberal *quid pro quo* for immigration restrictions, although the violence which erupted in 1959 in Notting Hill and Nottingham may not have been so far from politicians' minds. By any standards it was a timid measure, announced by the government as a " first step ". Most of it was concerned with " public order " ; it prohibited incitement to racial hatred and outlawed discrimination in places of public resort and the transfer of tenancies. The Race Relations Board, which was established as its enforcement arm, appreciated the limited scope of its powers, especially since 70 per cent of the complaints it received fell outside its purview. As a result it set up the Street Committee consisting of three lawyers to make recommendations for reform. This led to the passage of the Race Relations Act 1968.

This statute expanded the scope of the discrimination prohibition. Employment was covered in all its aspects, specifically including hiring, dismissal, promotion, conditions of work and advertisements. Discrimination was defined as arising where " a person on racial grounds treats another less favourably than he treats or would treat other persons on racial grounds ".

Again, however, the Act had " probably the most reluctant enforcement mechanism that could be devised by the mind of man " (Prof J Friedman). The Race Relations Board, supplemented by a separate Community Relations Commission to coordinate voluntary efforts, lacked compulsive powers to summon witnesses or to issue orders. Neither could investigate unless an aggrieved individual complained. Then they were simply to " use their best endeavours . . . to secure a settlement of

any differences between the parties concerned ". The victim could not take the matter to court himself.

It was hardly a surprise therefore that a Political and Economic Planning (PEP) report revealed in 1973 a scene little affected by the Acts. David Smith estimated that black unskilled workers had a one in two chance of being discriminated against when applying for a job. That colour was the major factor was revealed by the much lower occurrence of prejudice against a control group of Italians and Greeks. The research also found that 64 per cent of employers thought that the 1968 Act had " made little difference " to themselves or anyone else (*Racial Disadvantage in Britain*, PEP, 1973).

The situation seemed to cry out for an individual right of access to the courts. This was finally introduced in the Race Relations Act of 1976. The statute was intended partly to " harmonise powers and procedures " with the recently enacted Sex Discrimination Act (1975) and partly to amalgamate the Race Relations Board and the heavily criticised Community Relations Commission into the Commission for Racial Equality with stronger powers. Individual complaints in employment cases were now to be made to the Industrial Tribunals within three months, and to county courts in other matters. The CRE was accorded a wide discretion to assist individual applicants, although legal aid as such is still not available in Industrial Tribunals.

The British definition of discrimination was expanded to include " indirect discrimination ". This notion was originally pioneered in the United States by the Supreme Court, interpreting the Civil Rights Act, in *Griggs v Duke Power Co* (1972). The respondent's requirement of a high school education for their employees although not discriminatory in intention was discriminatory in effect since it reduced considerably the number of blacks who could qualify (12 per cent as against 34 per cent of whites). The essence of the judgement was that " Practices, procedures, tests . . . neutral on their face . . . cannot be maintained if they operate to freeze the *status quo* of prior discrimination ".

3. fettered runners—complainants in Britain

The individual's right to maintain an action for racial discrimination has been little used. Although judging from PEP research there must be some tens of thousands of acts of discrimination every year, from June 1978 to June 1979 only 394 applications were made to Industrial Tribunals in employment cases (*Department of Employment Gazette,* HMSO, December 1979). This low level may reflect an educated view of the likely chances of success. For only 58 of these complaints were upheld, and of these 19 received compensation. This success rate is much lower than in the analogous area of unfair dismissal claims; yet there is no obvious reason why frivolous claims should be greater in discrimination cases. It is also much lower than that prevailing in the United States. This largely reflects widely divergent attitudes towards questions of proof. In Britain, the complainant is like a fettered runner, weighed down by chains at the very starting line.

the British courts

The problem starts even before that starting grid. Although individual rights of access to tribunals are to be welcomed, they assuume that applicants are articulate, know their rights, and have access to lawyers. Yet as the Royal Commission on Legal Services found, the distribution of lawyers is more closely related to the distribution of owner occupiers than to the population as a whole. They are particularly sparse in areas of high minority density. Moreover, those most prone to acts of discrimination very often have language difficulties, and understandably find the English legal system a "hostile maze" (Freeman and Spencer, *Current Legal Problems,* December 1979).

The Commission for Racial Equality can under its statutory powers assist individual complaints with legal advice and even representation. Significantly, only three of the 33 successful applicants up to the end of March 1979 were not so aided. But the CRE's legal resources are small, and their budget is unfortunately in the process of being cut further.

British courts have not come to recognise that more ample principles of construction must be applied to discrimination statutes than to the usual prohibitions of the common law. These require legislative attention, and a radical change of approach on the part of the judiciary. All these problems are essentially interdependent.

Proof of discrimination. The general rule in English law is that he who brings an action must prove his case. In the criminal law, as is well known, the prosecution must prove its case "beyond reasonable doubt"; in civil cases, the plaintiff usually has to convince the court on the less stringent "balance of probabilities". This principle is modified where it is impossible, or nearly so, for the plaintiff to have access to information which he needs to prove his case. Thus in unfair dismissal cases, "the employer is the party who took the decision to dismiss. He knows the circumstances and —the reason". Before the Tories' attack on unfair dismissal in their reactionary Employment Act 1980, the burden to prove the fairness of a dismissal lay squarely, and rightly, on the employer. In employment discrimination cases, however, this has never been so. Yet this more than most allegations can be easily rationalised away, dissembled or concealed behind other ostensible reasons why an applicant was not selected, or an employee sacked. For these reasons it is very important that the onus of proof should rest on the employer on a balance of probabilities.

Inferences and statistics. The rule about proof provides a further disadvantage because English courts fail to draw inferences of discrimination in the same way as their American counterparts. In a well known complaint of sex discrimination, a Mrs Saunders applied for the position of golf professional at Richmond. The majority of her interview was taken up with the question of a woman's suitability for such a job and there seemed no obvious reason other than sex why she did not get it. Even so the Employment Appeal Tribunal refused to infer discrimination.

The American courts recognise more clearly the inherent problems of the applicant. The Supreme Court has said "The purpose of Title VII was to encourage maximum efforts to eliminate racial discrimination . . . This purpose will not be served by turning a plaintiff out of court because direct evidence is unimpressive. Such evidence may be impossible to provide".

In particular, the American courts are willing to draw inferences from the fact that an employer in an area of high black density may not have a single minority group member in his factory, or a much lower proportion than might be expected. It cannot be denied that statistical evidence of this sort must be handled with care and it may go too far to say, as some American courts have, that such evidence alone is "fully probative" of discrimination. Most of their judges have, however, shown great skill in answering these questions.

So far, British courts, in which there has been no tradition of receiving sociological research findings and statistical information (in the form of the American "Brandeis Brief") have hardly allowed these questions to be formulated. Industrial Tribunals have taken into account as going to disprove discrimination the fact that one or two (token?) blacks are employed, yet eschew any inference from the converse. The Employment Appeal Tribunal has refused to order disclosure of the ethnic makeup of an employer's workforce on the ground that on no view could it be relevant (*Jalota v Imperial Metal Industries Ltd,* 1979), although there are signs that such an extreme position is not taken by all the judiciary (cf *Perera v Civil Service Commission,* 1979).

Class actions. The scope of statistical evidence is strongly enhanced in the United States by the existence of the "class action". By this means, an application may be made, and compensation sought, on behalf of all the black employees of a company. A pressure group can more easily mount a case on their behalf because of the liberal rule of *locus standi* (the right to bring a case) applied thereto. This recognises in a practical form that discrimination is not normally against one individual, but an entire group. Professor William Gould has commented, "When the dust settled in the late 1960s, it became clear that the most important factor for black plaintiffs was to be found in court rulings that the victims of discrimination could maintain class actions" (*Black Workers in White Unions,* Cornell University Press). In Britain the "representative action" is more circumscribed and, for little apparent reason, does not extend to Industrial Tribunals. The introduction of a widely defined class action is long overdue, and might be accomplished by simply amending the rules of court.

Discovery. That all these elements are interlinked is shown by the fact that a class action would make possible wider rights to disclosure of documents. The rules of "discovery", as these are called, are generally stricter in Britain than in the United States. While this is generally to be applauded since it prevents the courts being overloaded with an avalanche of papers, there is surely a case for relaxation of the rules in the discrimination field. The applicant here will normally have next to no idea what really went on behind the scenes in the decision not to take him on or to dismiss. Yet this will be vital to his case particularly if inferences will only be drawn *in extremis.*

English courts have been especially loath to order disclosure of confidential reports on fellow applicants. These may be necessary to demonstrate that the complainant was in every way better qualified than the person of a different race who ultimately got the position. Some objections to the release of confidential information are clearly valid. But they may usually be guarded against by prohibiting the release of names, and covering up identifying or embarassing details. The leading House of Lords' judgment, *Nasse v Science Research Council,* 1979, declared that such reports should be disclosed only when they are "necessary for the fair disposal of the case". The judgments,

however, give little guidance on the criteria for necessity, and have spawned a flood of litigation seeking to clarify the point. In these cases, Tribunal Chairmen have not always been liberal in granting applications for disclosure.

The Commission for Racial Equality should issue a Code of Practice on disclosure of documents in race discrimination cases, dealing with the interests to be regarded, the ends in view and appropriate safeguards for confidentiality.

Remedies: Compensation and injunctions. Louis Claibourne has said "No anti-discrimination law will operate successfully unless violations are costly, and appeal to the law is worthwhile for the victim". Compared with the Civil Rights Act, the remedies available in Britain are indeed frail.

No American employer can view with equanimity the millions of dollars awards which may result from a large class action as "back pay". An American applicant can expect to be given the pay and fringe benefits he would have received but for the discrimination. (the "rightful place" doctrine). In 1974 nine major US steel companies had to pay 300 million dollars for persistently indulging in discriminatory practices. In Britain, compensation is awarded on the less beneficial tort basis. Damages for injury to feelings are ludicrously small, rarely exceeding £100. An upper limit is placed on an individual's claim of £6,750. So far most awards have been under £1,000.

It is not suggested that the American virtually punitive awards should be resorted to in full measure. That would anyway be out of character with the generally lower level of damages awarded in English actions in other spheres like personal injuries. But a more generous principle of awarding damages for injury to feelings, fully recognising the ignominy of discrimination, might be introduced by statute. There should certainly be a higher maximum limit.

American courts can issue injunctions, a power denied to Industrial Tribunals and more fundamentally they can "order such affirmative action as is appropriate". They have used this power to full effect and thus set the scene for voluntary plans. As one example the San Diego Police Department, which was found to have systematically discriminated against blacks in the past, was ordered to achieve within a five year period a similar representation of each minority group in each job classification as approximates to their respective proportion in the local population. Actively supervised by the court, this sort of order positively ensures that no further discriminatory practices take place.

The judges. At its broadest the problems of individual enforcement in Britain reflect an enormous different of approach between judges on the two sides of the Atlantic. Civil rights has become firmly part of the American judicial landscape. The judiciary has built on its experience of protecting group rights under the US Constitution, especially the Fourteenth Amendment.

Britain has neither Constitution nor Bill of Rights. Our civil liberties, such as they are, are part of the judge made common law. This has some advantages but as Lord Scarman said in *English Law—the New Dimension* (Hamlyn Lectures, Stevens, 1975), "When times are abnormally alive with fear and prejudice the common law is at a disadvantage". Messrs Lester and Bindman (*Race and the Law*, Longman, 1972) stress further the limitations of the common law in this respect, emphasising "its neutrality towards profound differences in power between institutions and groups and individuals; its reluctance to expand traditional concepts of public policy in accordance with changing conditions . . . and its deference to private contractual law making". The latter element could hardly be better perceived than in the judgment of Lord Diplock in *Ealing LBC v Race Relations Board.* He considered that the Race Relations Act *restricts the liberty* which the citizen has previously enjoyed to differentiate between one person and another in declining to enter into transactions with them (*author's italics*).

This encapsulates a *laissez faire* individualistic notion of freedom, whereas the Race Relations Act 1968 which he was interpreting is clearly concerned to protect collective rights for minorities so essential to a democratic society.

This approach has been taken in many other cases. At a time when private clubs were not within the scope of the legislation, the House of Lords decided that an association with 20,000 members was a private club. Lord Denning threatened to interpret the Sex Discrimination Act virtually out of existence when he said that it should not apply to "matters of chivalry" or at all restrict "sensible administrative arrangements" (*Peake v Automotive Products Ltd*), although the Court of Appeal has recently drawn back from this position. In the infamous case where it was held that to use the word "niggers" or proclaim "one down, one million to go" (a reference to the death of an Asian) were not incitements to racial hatred, the judge implied that the Act was a restriction on free speech rather than a positive freedom in itself.

The American judges have approached the implementation of the Civil Rights Act with a sense of zeal. The Supreme Court has said that it was enacted "to eliminate the last vestiges of an unfortunate and ignominious page of our history" and should be interpreted with this in mind. Professor Gould sums up their record: "The Federal judges have paved the way and fashioned the law . . . they have shown no lack of expertise and deftness in handling the statute". This in turn reflects the wider social composition of the American judiciary, in particular the presence of a large number of black and female judges who can directly appreciate the pernicious effects of discrimination.

Industrial Tribunals. Most employment discrimination cases are not determined by judge alone. Industrial Tribunals, which also hear unfair dismissal, redundancy and equal pay cases, have primary jurisdiction. Originally established in 1963, this panel consists of an employer and employee representative, with a lawyer chairman. They have frequently been described as an "industrial jury" and indeed inject a desirable element of lay justice. It may however be undesirable to have those who adjudicate, particularly in indirect discrimination cases, coming from (although not as delegates of) the very bodies which may have condoned similar discriminatory practices for years, if not decades. This would be less serious if the original intention that for discrimination cases, a race relations expert should always sit on the panel had been fully implemented.

Public Interest Law. A partial remedy lies in the formation of a specialist group of lawyers to fight race relations cases. In America, civil rights law has been fashioned by well funded voluntary pressure groups who have been able to sponsor cases in a strategic manner. The National Association for the Advancement of Colored People and the Lawyers' Committee for Civil Rights under Law are the best known. There are also hundreds of "public interest law firms" committed to this type of litigation. They provide valuable assistance to those who are suspicious of official bodies. British law centres are a nascent reflection of these groups. They however usually depend on government or local authority money. Moreover their remit is to span all areas of the law. There is a desperate need for a pressure group with the capability to take discrimination cases, and really test the law. The unit would have an important propaganda function disseminating information to communities most at risk through local offices. Its specialisation should lie in mounting indirect discrimination cases. Experience of them since 1976 has been particularly sparse, and this is not surprising since an action to challenge a widespread testing requirement, for instance, may cost tens of thousands of pounds and necessitate expert reports, evidence of effect and non-justifiably. In Britain no compensation can be awarded for indirect discrimination in the absence of intent so the incentive to mount an action is obviously reduced.

4. indirect enforcement

The United States has much more experience in indirect enforcement of discrimination prohibitions. Most effective are obligations written into all government contracts. These go well beyond the requirements of the Civil Rights Act, and are actively policed by the Office of Federal Contract Compliance (OFCC), a major division of the Department of Labor. President Kennedy's Executive Order 10925, which inaugurated this process, is the first known use of the phrase " affirmative action ". The rules now apply to every contractor employing over fifty people and having contracts worth over 50,000 dollars with the Federal Government. They are repeated on state and local levels in most parts of the country.

The first requirement in planning an affirmative action programme is information about the present composition of the contractor's workforce. He must therefore submit a Standard Form containing details about employment of minorities and women at every level, and the OFCC can make further requests for such information as it deems necessary. " Compliance reviews " are then made to monitor progress. If underutilisation is discovered in an undertaking's minority employment as compared with the local population and availability in the skiklls required, the contractor may have to make a specific commitment to correct deficiencies. By regulations, this " must include the precise action to be taken and dates for completion ".

The argument is often advanced that the gathering of racial statistics is discriminatory in itself. In Britain the controversy thus far has centred around the projected inclusion in the 1981 Census of a compulsory question on ethnic origin. The chief arguments were that this would be a gross invasion of privacy for no apparent end ; and that it might be used in the wrong hands for political purposes adverse to minority communities, in particular to restrict immigration. These points do not apply in full measure to gathering statistics in particular companies in order to mount and monitor an equal opportunities policy. Both the Runnymede Trust and the National Campaign for Civil Liberties see company workforce statistics as an essential springboard to voluntary equal employment initiatives.

This is the second part of the requirements imposed by US Contract Compliance regulations. The contractor must draw up " a set of specific and result oriented procedures to which (he) commits himself to apply every good faith effort ". This includes the setting of goals and timetables (see below). Requirements for construction companies, where traditionally discrimination has been particularly gross, are even more elaborate.

Complaints about breach of these contractual duties may be made by employees to the OFCC. There are several remedies available, although they are used sparingly. Single violations are enjoined by an administrative law judge. At the most serious end of the scale, a contractor may lose all government business, and be placed on the " contract ineligibility list " for the future. Since 1965, only eleven companies have been debarred altogether. These included the Uniroyal Corporation following its refusal to implement a realistic affirmative action programme. This put it in danger of losing 35 million dollars worth of business, and soon led to a change of policies. More commonly the Regulations hang like a sword of Damocles. One partial measure of the efficacy of these provisions is that between 1970 and 1976, black employment in government contracting firms rose by 23 per cent in contrast to the 15 per cent increase in the rest of the economy.

In Britain a rather anodyne non-discrimination clause dating back to 1968 is inserted into government contracts. It goes no further than the requirements of the Race Relations Act, and is enforced by no one in particular. The 1975 Government *White Paper on Race Relations and Immigration* (Cmnd 6234, HMSO) proposed that the Government should have power to request details of employment policies and statistics. This was not included in the 1976 Bill, and Fred Willey MP's attempt to amend it to this effect met with a cool response. The CBI fulminated that it was " appalling that govern-

ment should attempt to use its purchasing power to enforce policies not connected with the objects of its contracts". Cyril Smith MP thought it was a "step towards 1984".

It is surely vital that the Government should not abdicate its responsibility to enforce race discrimination prohibitions to the CRE quango, as must be all too tempting to the Home Office. Where it has direct power of the purse, as in dealing with contractors and local authorities, it should grasp it. The Department of Employment, working closely with the Home Office and CRE, should be given overall responsibility for contract compliance. All large contractors should be obliged to discuss their employment policies with the Department.

The lack of sensitivity to racial problems in the Civil Service itself was recently highlighted in a report by the Tavistock Institute of Human Relations. It found, for instance, that in London North Health Service (DHSS) Region, out of 317 applications for clerical officer grade jobs between June and November 1976, 110 came from minority candidates and 200 from whites. Yet only 10 of the former were offered jobs, compared with 78 whites. More minority than white candidates rejected for interview possessed the minimum educational qualifications. At all levels, minority employees were found to be employed below their level of qualifications. The Report was brushed under the carpet by the Government. In the United States the Civil Service Commission has authority to enforce standard equal opportunity programmes throughout the Federal Government. Moreover, there are many provisions by which the Government indirectly enforces affirmative action commitments in governmental or quasi governmental bodies. These include strings attached to university and college finance under Title VI of the Civil Rights Act, which was at issue in the *Bakke* case (see chapter 8), and grants under the Fiscal Assistance Act 1972 for public works projects. Another form of indirect enforcement which might be introduced with profit here is the intervention by the EEOC in licensing, planning and grant applications, putting before the appropriate authority the race relations record of the applicant. It is unfortunate that a proposal that estate agents be susceptible to being struck off their professional register because of persistent racialism was in the end dropped from the Estate Agents Bill 1979.

5. the Commission for Racial Equality

David Lane said last year of the Commission for Racial Equality (CRE) " Much of our work is undramatic, not headline material. Crises in race relations make the headlines ". Indeed the CRE should and does do much of its work behind the scenes. Yet paradoxically it is now itself making headlines because of the crisis within its own ranks. Four years after its establishment, which seemed to promise so much, the CRE is politically embattled, faced with cuts, riven by rivalries and discontent. It has not established itself as a force to be reckoned with. The CRE in its present form is either ignored or treated with scarcely concealed contempt. Its standing with minority groups has never been lower. Its first non-discrimination notice was actually torn up by the recipient.

The CRE was established as a marriage of convenience between the old Race Relations Board and Community Relations Commission in 1976 ; it was supposed to unite in one body the political and legal duties of the former with the grass roots work of the latter. It was to perform a valuable strategic function in co-ordinating the individual enforcement of the legislation with its own powers to seek injunctions for persistent discrimination, combining also work of research and promotion. Its three duties are broad : to work towards the elimination of discrimination ; to promote equality of opportunity ; and to keep under review the working of the Race Relations Act.

Central to this role is the power of formal investigation into any aspect of housing, education, employment and clubs. It can require production of documents and attendance of witnesses and at the end issue a non-discrimination notice, which may go beyond the precise terms of the statute. These, while not legally enforceable in themselves may be sanctioned by an injunction in respect of persistence in the prohibited activity. On one occasion the powers of the CRE were compared by Lord Denning, in a flight of fancy, with those of the Spanish Inquisition.

Yet in four years only six of these notices have been promulgated. Part of the reason lies in the legislation itself ; it is bedevilled with technical reasons for delay. Those investigated have wide powers of making representations at every turn in proceedings. Looking at the record so far, one also senses a lack of adventure on the part of the CRE. Investigations have so far been addressed only to small companies and clubs, although there is presently one under way into the housing policies of a borough council and the employment policies of the National Bus Company.

It is perhaps too early to form conclusions on how appropriate the formal investigation structure is. Chris McCrudden has proposed that minority groups be more involved in this process by adopting public hearings like those conducted by the House of Commons Select Committee on Race Relations and Immigration. There should also be a more wide ranging investigation on the lines of a Royal Commission (*A Review of the Race Relations Act,* Runnymede Trust, 1979).

Instead of accepting its complementary role the Government regards the CRE as an awkward body to be kept in line ; the relationship is full of tension and friction.

* The Home Office provides the cash and the Tories have shown their displeasure by making the CRE a victim of public expenditure cuts, lopping £1 million off their budget for 1980.

* The Home Secretary alone appoints the Commissioners to the main governing body. In April 1980 Mr Whitelaw announced that four black and one white Commissioner who were widely regarded as the most strident in opposition to the Tory Government's immigration policy would not be reappointed. Coming a few days after the Bristol riots this demonstrated the Government's insensitivity to the views of minority communities who had been completely excluded from the decision. Now it will take a long time for their successors to build up any credibility. New commissioners should be chosen for their commitment and understanding of the problems of discrimination rather than on grounds of political convenience. Those directly involved at the

grass roots should have a role in the selection process. If election by the various Standing Conferences of minority groups is impractical as yet, full consultation of, and nominations by, those and other active organisations are essential at least if the CRE is not to grow even further away from them.

* It is too easy for Government departments to off load problems with a race element to the CRE when in the end it is resources of government which must be employed to provide solutions.

* The CRE's draft *Code of Practice on Employment Practices* points to the difficulties of the present tension. It was more than three years in gestation and now it has appeared it not only lacks bite, especially as regards positive policies, but already has become a political football, with the government fast backpedalling.

weakness of the CRE

Anna Coote's trenchant remarks directed primarily to the Equal Opportunities Commission, are apposite to the CRE: "It was set up according to the same unwritten rules by which most commissions and quangos are established. These rules are designed first and foremost to satisfy the interest groups which carry most weight with government and only secondly to exercise its statutory powers and duties" (*New Statesman*, 1 December 1978).

Like many similar bodies it was staffed with the "great and the good" and not those who might best express the aspirations and problems of minority communities. David Lane, Parliamentary Under Secretary of State at the Home Office in the Heath Government and well known for his hardline views on immigration policy was by no means the most appropriate choice of Chairman. The internal working of the CRE under Lane deserve criticism in a number of areas.

* The different sections responsible for legal assistance, research and promotion work remain separate with little co-ordination; the vital utilisation of research material to support indirect discrimination cases is little advanced.

* Personality clashes have simmered below and sometimes above the surface. In particular there have been well supported allegations of bias in the appointment of local Community Relations Officers. The climax of this unrest was a strike by all community relations workers in April 1980, the first of its kind.

* No reasons are ever given when an individual, who claims he has been discriminated against, is refused legal support by the CRE.

George Schwerner's comments about the American EEOC are also relevant to its British counterpart: "A position of neutral, umpire like disinterest by a commission has been demonstrated as only slightly more effective than no commission at all. A commission *must* make itself felt".

6. the alternative strategy

As the 1976 White Paper *Racial Discrimination* put it, "Legislation is not and never can be a sufficient condition for effective progress towards equality". What it can do is to create the climate in which society views racial equality. Besides this "expressive" function, it may also act as a deterrent.

The strategy and philosophy adopted by Parliament is thus vital in many ways. So far it has been concerned with liberal notions of equality of opportunity. The next stage must move beyond this to create substantive equality. For equal opportunity is of little significance when the starting line is manifestly unequal. At worst it is like the announcement that the Ritz is open to all, or every American can become President. The concept was well described by Professor Tessa Blackstone as implying equal access to differential amounts of power, status, material wealth, whereas the notion of equality entails abolition of these differentials.

The United States has moved into what might be considered a third stage of discrimination enforcement policy which concentrates on substantive equality. There, affirmative action, the generic name for this process, derives from what can be seen about the structure of discrimination, that it is systematic, pervasive, subtle as well as overt, most susceptible to voluntary action indirectly backed by the law.

There are almost as many definitions of affirmative action as there are individual programmes. It has been used by some as a mere slogan or umbrella word covering any progress towards racial harmony. Undefined it is, as Len Maddox of the EEOC has told us, "like God and motherhood". A working definition is that adopted by the US Department of Labor: "the voluntary development of programmes which provide in detail for specific steps to guarantee equal employment opportunities going beyond passive notions of non-discrimination, and including where there are major deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunities".

It goes beyond the notion encompassed in a famous Supreme Court judgment by Justice Harlan that "the Constitution is colour blind". It has caused legal problems in the United States, culminating in the *Bakke* and *Weber* decisions of the Supreme Court. They raised profound philosophical issues to be examined later.

The position advanced here is that a wide range of affirmative action programmes should be introduced in Britain voluntarily but stimulated by government. They should be flexible and work normally through preferential training schemes for minorities. In very extreme cases, goals, targets and ultimately quotas may be necessary to achieve integration.

There are many complex reasons why the US is far along the affirmative action path while Britain has barely taken its first steps in the form of equal opportunities programmes. Besides a deeper awareness by society of the problems, and the difference already noted in the make up of the minority groups and the approach of the legal system, one may specifically point to the following:

* The vocal civil rights lobbies soon found the promise of the Civil Rights Act only half fulfilled.

* Much more emphasis has been placed on statistics of minority employment both in court enforcement and in the EEOC's and Federal Government's requirements. Thus the evidence of under utilisation was patent to all in particular companies.

* American unions have traditionally entertained broader notions of collective bargaining than their English counterparts who concentrate defensively on wages and hours. While it would be wrong to suggest that all have been to the fore in campaigning for affirmative action, some, notably the United Steelworkers and the Newspaper Guild (the journalists' union) have hoisted the standard. They have written radical schemes

into their collective bargains which are legally enforceable between union and employer. The journalists' "model clause" states "The employer shall make every effort to achieve through its hiring practices at the earliest feasible date, but no later than ——, a workforce composed of a minimum of —— from minority groups". Their 1972 Convention laid down that the local union should propose "either the percentage of minority persons in their area or that in the nation, whichever is the greater". Three years is suggested as the most appropriate final date.

* The US has a long tradition of according special privileges to certain groups in society. The national slogan is *"e pluribus urum"*. For many years ex soldiers preference in employment, particularly in the Civil Service, though controversial, has been accepted and enforced. The only British analogy, the quota for disabled workers of 3 per cent in every factory (unless exempted under the Disabled Persons (Employment) Act 1944) has been little policed.

* Affirmative action is to jobs what busing was to education. After a long period of acrimony, and the retreats of the Nixon era, busing has become established both legally and politically.

* Few American corporations could view with equanimity the enormous back pay awards of US Federal Courts or loss of US Federal Government and state contracts, while even a small employer in Britain could cock a snook at the weak British remedial provisions.

affirmative action on the ground

There remain enormous misconceptions about positive policies in Britain. Most people jump to the conclusion that what is inevitably meant by this is a rigid quota system promoting completely without regard to merit or suitability. A middle way is possible: we now look at possible affirmative action models as pioneered in the US. There 70 per cent of employers and most of the household names have such programmes, and the EEOC has produced guidelines on their contents.

Policy. Most plans begin with a declaration of policy and in some there are more affirmative words than actions. IBM's smartly produced document begins with a Corporate Policy Statement "to take positive actions to remove sex and race inequality". More significant is a commitment to review employment practices to determine whether members of minority groups are receiving consideration for jobs at executive level. The EEOC recommend that this general policy guidance should be publicised by all means possible including any company newsletter, notice boards and notices in pay envelopes. Moreover its existence should be communicated to all sorts of women's and minority organisations. IBM's method is more direct: each employee annually attends meetings at which the company's equal opportunity programme is presented and reviewed.

Officer and policy formulation. An officer is usually appointed to assume overall responsibility for guidance and coordination in implementing and administering the programme. He should not be a low level bureaucrat, particularly if he works out of the very personnel department whose policies he is policing. The EEOC urge that he should report directly to the company's chief executive officer: this symbolises that he has the support of top management. He is charged in particular to develop office and grievance procedures which can be used by supervisors and other employees with equal opportunities problems. Under the full time officer, machinery should be established to encourage maximum participation to keep policy under review. At Polaroid, which has forward looking policies in this respect, there are five special task forces on the status of women. Their areas of responsibility include corporate policies and company practices management awareness and legal compliance.

Recruitment. Affirmative action focuses on the reasons why minorities and women have not come forward for work, or have

not been appointed. It is now recognised widely in the US that word of mouth recruiting, typical of so much of industry, tends to replicate the racial characteristics of the existing work force. Thus the Massachusetts Affirmative Action programme says "Basic to providing equal employment opportunities is a practice of employer advertising of all available positions". Moreover, in special "outreach" policies advertisements will be placed in newspapers and magazines with a high readership among specific minority groups.

Selection tests must be fully validated: the employer should show empirically in his affirmative action programme that any selection procedure is predictive of, or significantly correlated with, important elements of the job for which candidates are being evaluated. A start has been made in this respect in Britain by the action brought against British Steel who were using language tests for manual workers.

An important feature in the US has been the issue by the EEOC of *Uniform Guidelines on Employee Selection Procedures* providing detailed requirements. Moreover it defines "test" very widely as "any measure of procedure used as a basis for any employment decision . . . including the full range of assessment techniques from paper and pencil tests . . . probationary periods . . . and casual interviews".

Training. The affirmative action programme will often make training a central element. In the leading Supreme Court case of *Weber v United Steelworkers* the white plaintiff was complaining of reverse discrimination because of a craft training programme at Kaiser Aluminium's Gramercy plant, Louisiana. This was designed ultimately to redress the gross underrepresentation of blacks in skilled jobs and was partly a response to a major class action brought by black workers in another factory. The policy was to admit one black for every white to the scheme until the percentage of blacks in skilled positions approximated to that in the workforce as a whole.

Again, as a result of a settled case, the very important Greyhound Bus Company agreed to reserve places at their Driver Training School until 25 per cent were filled by suitably qualified women. The company undertook to inform every female trainee who did not make the grade in precisely what respect her performance was deficient.

Goals and targets. Goals and targets to promote minority employment are the heart of the programme. They are so sensitive that they very often remain secret. It is thus difficult to determine whether the plans described are representative, although it is believed that they are. This is particularly so since little reserch has been done on affirmative action in the US.

The fundamental question is whether there is a real distinction to be drawn between goals and quotas. That attempted by proponents of a middle way, among whom number the EEOC, and arguably the American courts, runs thus: goals should be definite and precise, significant and attainable. But they are not carved in stone: they may be revised upwards or downwards depending on changing conditions, and as more detailed information becomes available. The Carnegie Commission Report wrote, "The failure to meet a goal calls for an inquiry into the reasons for failure: to fail to meet a quota calls for penalties" (*Making Affirmative Action Work in Higher Education*, Carnegie Commission, 1976). Thus goals do not require the selection of unqualified persons, and are inclusive rather than exclusive.

The pioneer in this respect was the "Philadelphia Plan" formulated under government guidance in the 1960s for that city's construction industry primarily because of the resistance of the unions to accepting blacks for craft positions.

It laid down ranges for a rise from 5 per cent minority utilisation to 22-26 per cent in three years' time for ironworkers. Similar progress within fairly wide bands was called for in several other categories. In fact the targets were met within the prescribed period.

The unusually elaborate programme of ATT (American Telephone and Telegraph) was instituted following a very important multi-million dollar court settlement. The company extrapolated from census data the likely population of the labour areas within which the company operated for each year until 2000. It then laid down goals and timetables for complete proportional parity for all occupational grades and within all departments by the end of a 20 year period. The first instalment covers three years and "compliance reviews" are due quarterly. Any shortfall between targets and performance has to be justified by management, and success in implementing the affirmative action programme has been formally promoted to be one of the principal criteria by which management performance is judged. This has implications in determining management's pay.

If there is any general rule of thumb in respect of targets, it is the advice given by the EEOC and OFCC (Office for Federal Contract Compliance). This suggests a target for minorities of around 80 per cent of their presence in the surrounding neighbourhood and skill in question.

7. affirmative action in Britain

Positive policies in Britain are very much in their infancy and show little sign of rapid growth. This is notwithstanding the Street Committee Report which said "In employment we attach more importance ultimately to affirmative action which stamps out discrimination than to the processing of individual complaints" (HMSO, 1967).

A survey carried out in 1975 found that of the 283 firms questioned at plant level, only a small minority, 14, had formulated programmes. Even then only three could point to specific instances when action was taken. The first companies in the field are special in a particular way, either in that they are nationalised (British Airways) or local authorities (Camden and Lambeth); or because they are subsidiaries of American multinationals (Mars); or because they have traditionally been liberal employers (Marks and Spencer). As Lady Seear said in a lecture (addressing specifically the question of equal opportunities programmes for women), "At present many organisations see no reason to take any action beyond perhaps the introduction of a fig leaf of an equal opportunities policy" (*Department of Employment Gazette*, HMSO, September 1979).

The rather moderate plan (by American standards) adopted by the London Borough of Camden produced an almost hysterical response. This shows a fundamental misunderstanding of, or outright opposition to, the aim in view.

There are, however, some encouraging elements on the horizon.

* Four non-discrimination notices have so far been issued by the CRE after formal investigation. Three concern access to pubs and clubs, the fourth the conduct of a children's home. All demand some form of positive action to ensure that the same cannot happen again, and the keeping of records to monitor progress. These are to be sent for examination to the CRE. If used creatively in the employment area, they could make up for the lack of court enforced affirmative action in Britain. Undertakings currently being formally investigated include the National Bus Company.

* There is the unenforceable duty imposed by Section 71 of the Race Relations Act 1976 on local authorities of which many seem presently unaware. They have a duty to ensure that their functions are carried out "with due regard to the need to eliminate unlawful discrimination, and to promote equality of opportunity".

* The Women's Conference of the TUC at least sees some element of positive discrimination in favour of women as a vital strategy in achieving equality.

There is a so far little used exemption for positively discriminatory training under the Race Relations Act (section 37). Section 38 is broader if more vague. It permits preferential access to "opportunities for doing work" at any employer's establishment. There must be either (a) no one or (b) a small proportion of the favoured group in proportion to "all those employed by the employer there" or in comparison with "the area from which that employer normally recruits persons for work".

The provision of equal opportunities programmes is central to the CRE's new Code of Practice on Discrimination in Employment.

Employers may over time adopt such policies out of enlightened self interest. It may partly be a question of "getting the ball rolling" so that it gradually becomes "bad form" and adverse to a company's image not to have a programme.

At the forefront of corporate plans in Britain is that of British Airways. Arising from the realisation that there are only forty coloured cabin crew out of 7,000 and that only 5 per cent of the very large minority staff are in what might be called prestige jobs, it concentrates on internal training. Special courses are laid on for Asian shop stewards, and for white supervisors and managers, in the problems faced by coloured workers. English language courses are to be provided by the personnel department. An employee

has a right to request a formal explanation of treatment he feels to be discriminatory.

Another British approach is that taken by the Polytechnic of North London to redress the very low number of West Indian teachers. West Indian students without sufficient O and A level GCE passes are offered a preparatory year's study instead of having to take the usual GCEs.

No British scheme discovered has publicly acknowledged goals and timetables, and it is only by this means that proper review can be made of an employer's success or otherwise in implementing the rest of the plan. As Baroness Seear has said, "To make equal opportunities a reality an organisation must set out to achieve a realistic objective by a given date".

The legal means are available to make affirmative action a thriving reality in Britain: it is the will, and pressure, both private and governmental which is lacking. As a first step Government money should be made available to assist experiments in affirmative action plans and in particular to preferential training schemes.

8. Bakke: a solomonic compromise

The philosophical problems of how far affirmative action programmes should go can best be organised around the leading American case, *Bakke v Regents of the University of California.* It raised in a particularly stark way the justification or otherwise of quotas. Did affirmative action which meant getting someone in, inevitably mean excluding another? What balance was to be struck between claims of equality, justice and meritocracy? Was there any real distinction between "benign" and traditional discrimination? These questions had been raised before at a lower judicial level ; they were answered somewhat inconclusively. The only previous case to reach the Supreme Court was declared "moot" (that is, there was no necessity for judgement). There, De Funis, a Jew, claimed to have been discriminated against by the University of Washington Law School but, by the time the case came to trial, he had already spent two years at another university. The *Weber* case, which came later, while vital in that it directly concerned employment, in many ways reiterated the arguments of *Bakke* and reached a similar conclusion.

Many see Bakke's case as the most important development in America's race policy in the 1970s. While in the previous decade civic rights issues had an enviable simplicity, directness and clarity about them, now there could be no easy answers. The traditional liberal consensus of Jews, blacks, the poor and the unions, which dated back to the days of the New Deal, was sorely split.

In 1973 and 1974, Allen Bakke, a white Californian of Scandinavian ancestry, applied to the University of California's Davis Medical School. In both years there were a hundred places in the entry class ; he was only considered for 84 of them. Applications were assessed under two sets of procedures. Under the Regular Admissions Programme for which all races were eligible, the criteria for selection were those usual in American universities for graduate courses. Medical school entry is notoriously competitive, and at Davis an applicant with an overall grade point average of 2.5 out of a possible 4 would normally be rejected summarily. Yet under the Special Admissions Programme, 16 places were specifically reserved for blacks, American Indians, and persons of Asian and Hispanic descent. Applicants with grades well below 2.5 were admitted under this procedure. Bakke had a grade point average of 3.5 and felt particularly aggrieved that he was rejected in the same years as several candidates with apparently much lower scores were admitted. In fact the average grade points of students admitted to Davis in 1973 and 1974 were 3.49 and 3.29 respectively, both below Bakke's.

He contended in court that the special programme contravened the Fourteenth Amendment to the US Constitution which ensures "equal protection" of the law to all, regardless of colour ; Article I of the California Constitution ; and Title VI of the Civil Rights Act 1964, which prohibits "discrimination under any program . . . receiving any Federal financial assistance". The college's arguments in defence of their special programme which the California Supreme Court rejected, were that all students admitted met the minimum educational requirements necessary; over and above them, there were many other criteria besides formal academic excellence to be considered in judging admissions; one of these was that without the programme there would be a return to a virtually all white professional school; and furthermore, neither Bakke nor anyone else had an inalienable right to be admitted to college.

In the United States Supreme Court, there was a bare majority of five Justices out of nine for two propositions, although the total of five was differently constituted for each. Firstly, Bakke should be admitted because the Davis scheme was unconstitutional ; it was a rigid quota which deprived the applicant of the right to be treated individually and equally. But, secondly, a college could consider race in its admission procedures, where the aim was to secure ethnic and racial diversity in the student body. Mr Justice Powell, the only judge to accept both findings, approved the scheme operated at Harvard where race might be considered in the same way as sporting ability or geo-

graphical mix. But, in his view, the court could not condone giving compensatory treatment *per se* to one group at the expense of another unless " the extent of the injury and the consequent remedy will have been judicially, legislatively or administratively defined . . . Isolated segments of our vast governmental structures (such as universities) are not competent to make these decisions ".

the care for quotas

The central arguments for such quotas revolve around the pragmatic premise that they are the only way to achieve racial justice, and that the ends justify the means. It is a cry almost of desperation, that nothing else can work. This was the approach of Justice Thurgood Marshall, the only black member of the Supreme Court in *Bakke*. He noted that " Measured by any benchmark of comfort and achievement, meaningful equality remains a distant dream for the black ". Without active quota based programs, the US would remain a divided society, and the courts had recognised this by granting such remedies when discrimination was proven. It should not annul voluntary efforts to the same end.

Quotas should only be temporary: they are a sort of societal shock treatment to remove, comparatively quickly, the effect of years of discrimination. Mr Justice Blackmum in *Bakke* saw them as a once-and-for-all process: " Within a decade at most affirmative action plans will be an unnecessary relic of the past ".

Those who argue for quotas as an affirmative action strategy reject an analogy with the invidious exclusionary criteria of the past as " superficial ". Professors Cohen, Nagel and Scanlon explain their use of this adjective by saying that " Blacks were excluded because they were thought inferior and undesirable ; they were really discriminated against because they were black and it was an insult of the most fundamental kind ; under a preferential policy, white males are not being told they are inferior . . . The aim is simply to help women and minorities ".

But is it justifiable to use the same means of correcting inequality as created it in the first place? The Federal judge in the case of *Erie Human Relations Committee v Tullio* thought it was. He said, " Like the infections of the human body which are cured by injections of the same poison, the anti-toxin of affirmative action is a justified remedy to the toxin of discrimination ". If this is to rise above mere rhetoric, it must make the point that blacks suffered because they were black, and any remedy must be on the same basis.

Since the time of Plato and Aristotle, merit has been seen not only as a good ground on which to award privileges but the best. It is a strong counter-argument to quotas that we should not want poorer policemen, firemen, teachers, bankers or scientists for the sake of some levelling goal. The minority community itself would stand to lose from this as much as anyone.

It would be easier to sustain this contention if one were confident that our society actually upholds the value of achievement purely on merit. On the contrary, in many instances, there is not even the serious pretence of a qualification required for positions of substantial power, authority and influence. Mr Justice Blackmum in *Bakke* saw it as " somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning . . . have conceded preferences . . . to those possessed of athletic skills, to children of alumni, to the affluent who may bestow their largesse on the institution ". Indeed it is a little known fact about the *Bakke* case itself that in addition to the 16 places set aside for minorities at Davis there were several in the exclusive gift of the Dean and reserved for the children of the powerful and rich (who, incidentally, would almost certainly be white).

Such practices are, if anything, probably even *more* common in Britain where the " old school tie " retains a tenacious grip. The closed scholarship system at Oxford

and Cambridge Universities is a good example. It provides a quota for the rich and privileged, access being confined in the main to the inner circle of established public schools. Mediocre but wealthy children are thereby shielded from open competition.

Moreover if merit is taken seriously it must surely encompass future promise as much as past performance. Mr Justice Douglas said in the *De Funis* case that "A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverence and ability that would lead a fairminded admissions committee to conclude that he shows more promise for more study than the son of a rich alumus who achieved better grades at Harvard".

The prize at stake was admission to medical school, and it is surely the case that, above a certain level of grades and scores, other qualities are vital for a good doctor.

In 1976 the medical school awarded its most coveted prize for the student most likely to succeed as a doctor, to a student of Guyanese origin, who had entered by the special admissions procedure.

The first duty of doctors, like all professionals, is to serve the community. There may be an inherent value in training doctors who are more likely to want to work in ghetto areas. In the United States, where shamefully there is no national health service, even more than in Britain, there is a chronic shortage of doctors in such districts.

stigma and injustice

The main arguments against *quotas* are essentially moral, rejecting the pragmatism of the proponents. Many of the arguments would not spurn moderate *goals*, although there are some who assert that there is little but labels to distinguish these two concepts. Bernice Sadler sees the difference in noun as "semantic . . . so much sophistry or political jargon". She thinks, "What is a positive goal for one group must be a negative quota for its complement, and this is simply a logical truth . . . and especially so in a time of scarcity" (*Commentary Magazine*, 1977).

Most opponents say that the ends however commendable do not justify the offensive means of quotas. In *Bakke*, Mr Justice Powell rather understated this argument when he said, "There is a measure of inequity in forcing innocent persons in the respondent's position to bear the burden of redressing grievances not of their making". They disagree fundamentally with Professor Ronald Dworkin's view that "In certain circumstances, a policy which puts many individuals at a disadvantage is nevertheless justified because it makes the community as a whole better off". Instead, this is the worst sort of "vicarious liability" where the present generation is made atone for the sins of their fathers (*Taking Rights Seriously*, Duckworth, 1978). Nathan Glazer thinks that "compensation for the past is a dangerous principle" on several grounds. Not only is it a particularly invidious form of strict liability, without any fault on the part of the sufferer at all, but also "It can be extended indefinitely and make for endless trouble. Who is to determine what is proper compensation for the American Indian, the black, the Mexican American, the Chinese or Japanese?" (*Affirmative Discrimination*, Basic Books, 1976). For the black is it to be the billions of dollars in reparations once demanded from whites by the boxer George Forman?

To many, the very idea of the quota is offensive, and often for sound historical reasons. Glazer sums up the mood: "There is perhaps nothing more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as 'benign discrimination' or 'affirmative action', the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one to prefer another". Quotas are also rejected as a blunderbuss solution to problems. They mean that government, educational institutions and employers must involve

themselves in the ugly business of defining and applying standards based on race and ethnicity. They detract from the ideal powerfully expressed by Mr Justice Harlan at the end of the last century that "The Constitution is color blind". Thus Professor Bickle of Yale has stated that "Racial quotas derogate from the human dignity and individuality of all to whom they are applied; they are invidious in principle as in practice . . . The history of the racial quota is a history of subjugation not beneficience".

Quotas are based on a concept of group rights, while a liberal society generally recognises individual rights as paramount. They emphasise membership of particular racial and ethnic groups, and accord privileges on this basis even though affinity to them is really not at all strong. They thus infringe the goal of an integrated society in which skin colour will have no more significance than eye and hair colour. Gordon P. Means accepts that "the system of group special rights does innvolve considerable social costs and is a rather crude strategy for inducing social transformation". He goes on to say, however, that "Where group identity and communal and ethnic prejudice permeate a society, it is naive, if not hypocritical, to talk about the equality of opportunity based on individual achievement".

Central to Glazer's opposition to what he sees as "reverse discrimination" is his view that any suggestion of quotas has positively harmed desirable practices of dealing with racial differences which were emerging between 1964 and around 1972. He points to great progress by blacks in employment and *per capita* income, and enormous strides in political power. This, he claims, was achieved by a broad consensus of public opinion now shattered by the quota issue. And those who gain through quotas are not necessarily those most in need. To the question "who gains?" he poses the answer, "Surely only those members of the specified injured groups who are in competition for jobs or places in schools, who would not have competed successfully, and only where that competition is against non-members of such groups. Those who currently hold satisfactory positions, those who could compete successfully, those not in competition, and those competing against other members of injured groups gain nothing". The policy at one and the same time excludes many poor whites and includes many prosperous blacks.

Further it is invidious to pick and choose and define protected groups. Why should blacks, and not Italians, Slavs and Greeks, be considered for special treatment?

black criticism

The black community's basic criticism of quota based affirmative action concerns the enormous sense of stigma on the basis of colour. It calls into question all achievement by blacks. The black student is seen as treated in a certain way because he is black rather than because of his qualities or lack of them as a person. The idea that quotas will provide necessary role models for blacks is dismissed as pure paternalism. The leading black economist, Thomas Sowell, himself a product of the Harlem school system, has forcefully expressed the sentiment that "Those black people who are already competent and who could be instrumental in producing more competence in the next generation will be completely undermined as black becomes synonymous in the minds of black and white alike with incompetence and black achievement becomes synonymous with charity or pay offs". This was the basic message of the only substantive judgment in the *De Funis* (*ibid*) case.

The noted liberal Mr Justice Douglas thought that the assumption behind quotas was that "blacks and browns cannot make it on their individual merit. That is a stamp of inferiority that a state is not permitted to place on any man". This is tokenism of the worst kind, and the black promoted thereby finds himself cut off from his own community, yet not quite accepted by white society. For these reasons the psychologist, Kenneth Clark, views quotas "with

vehemence and abhorrence . . . a perpetuation of racism, interpreted by the black as condescension ".

There are powerful arguments on both sides of this issue. And the solution, for Britain as well as the United States, is best found in that vague " middle ground " which the nine justices in *Bakke* attempted to sketch out. Quotas would be divisive, stigmatising and lack popular support; which would make them counter productive. They violate important principles of distributive justice, consistency, equality and due process of law. Quotas however can be a valuable instrument, when formulated voluntarily and enforced with goodwill.

9. conclusion

The debate about racial issues in Britain has over the last 15 years been dominated by the immigration numbers game. Now the focus must shift to what type of multiracial society we want.

In 1976 Roy Jenkins described his ideal of "equality of opportunity accompanied by cultural diversity in an atmosphere of mutal tolerance". That finely balanced wish remains far from being fulfilled.

It is true that "Civil rights statutes cannot build houses, create jobs, remake society". They can however serve as a blueprint and a call to action. The Race Relations Act must be amended to reverse the burden of proof, facilitate class actions, and provide a wider exception for compensatory discrimination.

That is not enough; the statute is based on the premise that most discrimination arises out of prejudice; in fact inequality is rooted in the very fabric of our society. It can be best removed by positive action, voluntary action. In this respect we have much to learn from American experience although it could be folly to copy it. Their comprehensive equal opportunities policies tailored to each company, widespread throughout industry, and containing firm commitments should be emulated here. The unions have a major role to play not only in educating shop stewards to lead multiracial workforces but in fighting for true affirmative action to be introduced by management through collective bargaining. With strengthened individual enforcement powers, utilised more forcefully by a specialist group of committed lawyers, employers would have to take their equal opportunities obligations more seriously. The first priority is training, both in language, where the present generation is made to generally compensate for worse schooling in inner city areas. Probationerships, and training on the job should be considered for those without formal qualifications. Flexible goals and targets should be included to measure the success of the policy.

In very exceptional cases there are grounds for the use of quotas. The police are an obvious example. Adequate minority representation is essential, particularly in areas with a large ethnic minority population. A recent American judgment said that "the visibility of black policemen in the community is a decided advantage for all members of the public". Incidents like the Bristol riots of April 1980 and the continuing bitterness engendered by "sus" laws make this need clearer than ever.

The Minority Rights Group survey (*ibid*) concludes, "The lesson of American experience is that massive governmental involvement on several fronts is vital to the successful operation of an anti discrimination programme". The Government's massive purchasing power should be used as a carrot and stick to encourage firms to formulate positive policies. Companies willing to take initiatives to improve race relations should be able to call on government money. And the government must put its own house in order.

There is the discontent seething below the surface among ethnic minorities. So far equality of opportunity has only reached the centre of attention when violence erupts, and has remained there only briefly. Now a wholehearted sustained commitment is required at all levels if minorities are not to have to endure social injustice, political indifference and malignant neglect for decades more.

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race and affirmative action

Riots in Bristol in April 1980 brought to the surface latent racial tensions within British society. The Race Relations Acts inaugurated fifteen years of benign neglect of the hardships endured by minorities. And nowhere is this more so than in employment. Legal procedure has fettered those complaining of discrimination; the Commission for Racial Equality is in disarray; equal opportunity policies are rarely implemented.

This pamphlet examines some of the more promising initiatives taken in America to promote black employment. The authors tackle the thorny problem of quotas by examining the important *Bakke* case, and advocate the voluntary introduction in Britain of a form of affirmative action. It is essential to replace the traditional goal of equality of opportunity with substantive equality. This is the only way that British race relations can move from piety to effectiveness.

fabian society

The Fabian Society exists to further socialist education and research. It is affiliated to the Labour Party, both nationally and locally, and embraces all shades of socialist opinion within its ranks — left, right and centre. Since 1884 the Fabian Society has enrolled thoughtful socialists who are prepared to discuss the essential questions of democratic socialism and relate them to practical plans for building socialism in a changing world. Beyond this the Society has no collective policy. It puts forward no resolutions of a political character. The Society's members are active in their Labour parties, trade unions and co-operatives. They are representative of the labour movement, practical people concerned to study and discuss problems that matter.

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