PANEL: State of the Law, Current Legislation and Judicial Interpretations

Derrick A. Bell, Jr., Moderator

Mario G. Obledo
Isabel G. Webster
Issie L. Jenkins
Peter E. Holmes

LEONARD: Our first panel will include Mr. Peter Holmes, Mr. Mario Obledo, Mrs. Isabel G. Webster and Mrs. Issie Jenkins. Our moderator for that panel is Professor Derrick A. Bell.

MODERATOR—Derrick A. Bell, Jr., Professor of Law, Harvard Law School.

Because there is so little time in which to bring ourselves up to date on the subject matter—State of the Law, Current Legislation, and Judicial Interpretations, we shall first ask our speakers to convey to us their comments on the state of the law as they see it and then we can open the discussion to everyone and try to reach some conclusions.

Why don't we start with a member of a minority group that has made great strides in its struggle for equal treatment in recent years, and ask Mario Obledo, former general counsel for the Mexican-American Legal Defense and Educational Fund to begin. Mario is presently a teaching-fellow at Harvard Law School.* He received his Bachelor of Science degree in Pharmacy from the University of Texas and an LL.B. from St. Mary's University of Law in San Antonio. Those of you who have been around the civil rights area for any length of time know who Mario Obledo is.

OBLEDO: I was asked to comment on Executive Order 11246[1] as relates to higher education and particularly the minority group—the Chicano. I won't get into the explanation or the language of the Executive Order because I presume that you are acquainted with the provisions. It is the feeling of the Chicano community that the Executive Order which is designed to achieve equal employment opportunity is rather doomed to failure.

We mention that it is doomed to failure for several reasons. First of all, the Executive Order is mostly applicable to the construction industry or to the equal employment opportunity people. Basically it has three parts: the recruitment, the hiring and the training. The cases that have arisen under the Executive Order have imposed upon the construction industry the obligation to recruit and hire and train members of minority groups. The so-called Philadelphia Plan case,[2] a leading case in point, discussed most of the

* Mr. Obledo has since left the Harvard Law School to become Secretary of Health and Welfare for the state of California.

1. Exec. Order 11,246, 3 C.F.R. 406 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969), as modified by Exec. Order 11,375, 3 C.F.R. 406 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969).

2. Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

aspects concerning the Executive Order. And so it is understood that the construction industry has that obligation of affirmative action. But how does this apply to institutions of higher education? We feel that the institutions generally, have not progressed enough in the field of affirmative action. And we say that based on visual observation and some of the results that we have been able to evaluate.

For one thing, the recruitment process requires an applicant pool of available candidates, and the Chicano community does not have a so-called available pool of qualified candidates. The hiring process is directly related to the qualified pool. So the fact [is] that if you don't have a pool you don't have much hiring. The training is hinged then, first on the recruitment, and then on the hiring so that in effect there need not be any training if there are no members of the qualified pool. So it is a self-defeating proposition, and as the Executive Order enforced by HEW in the educational field merely requires a good faith effort on the part of the institution, it is very easy, I would think, to justify good faith. They would say, "we made an effort to have a qualified pool, there weren't enough qualified candidates in that pool and therefore we were unable to achieve affirmative action results."

The Executive Order in industry is enforced by the Department of Labor. In the field of education, it is enforced by the Department of Health, Education and Welfare, so that frequently different areas respond to different agencies. It seems to us that different things have been articulated for the construction industry on the one hand, and for the institutions of higher learning on another. The construction industry has started its affirmative action program and has achieved some results basically because there they start and make strong efforts at training, which leads into hiring. But the institutions of higher education have reversed it. First is the so-called recruitment and then the hiring and then the training. What I would propose perhaps, is a new idea for the institutions of higher learning. It is the obligation of these institutions to train people first, to get them qualified for the applicant pool from which the hiring process will take place.

Good faith is a very nebulous concept. I believe that one must look to the objective results in order to find out whether indeed there has been a good faith effort on the part of the institutions of higher learning. President Bok made a very important point when he mentioned that the Executive Order applied not only to the field of employment but to the field of education. For example, in the Chicano community there are approximately four teachers of law in the United States. We need more professionals.

Another point that I should add is that affirmative action plans were drafted on the 1970 Census, which was erroneous insofar as the Chicano population of the country was concerned. In a law suit filed against the Census Bureau, it was disclosed that insofar as the Brown and Black communities, there had been an undercount of the population. Between 1970 and 1974, the Census Bureau found 40% more Mexican-Americans in the United States. If you are using the 1970 Census as the basis for your affirmative action plan, perhaps you should reconsider and receive updated figures.

Briefly stated, what we are advocating is the same enforcement provisions for affirmative action plans in the construction industry and in the

institutions of higher learning. It is the obligation of the educational institutions to train people so that they may get into the qualified pool so that thereafter they may get hired as faculty in other institutions.

BELL: Ms. Isabel Webster has been a practicing attorney since 1959 and she is also an adjunct professor of litigation at Emory University Law School. She has recently been appointed by the Governor of Georgia as a member of the Personnel Board of the State's Merit System. She is a graduate of the Boston University Law School, and she has been very active in civic affairs. Presently she is President of the Atlanta Urban League. She has also been a candidate for Judge in the Civil Court of Fulton County. Mrs. Webster.

WEBSTER: Thank you, Professor Bell.

My remarks are directed to the Civil Rights Act of 1964, the amendments[3] thereto, and, the applicability of the Act to colleges and universities. The 1972 Amendments to the Civil Rights Act of 1964 broadened the coverage of the law and made it applicable to governmental agencies as well as educational institutions. Under the law as originally enacted these institutions were eliminated. This is not the case now, and the law applies to private as well as public institutions. Whether we like it or not, Title VII is the law and it must be enforced. I think that many people have problems with the enforcement of the law.

I recently heard one of our District Court Judges say in a presentation to a group of lawyers, in the form of a prayer to the almighty, "Dear God, help me please, remove Title VII from the realm of the courts." I guess that has something to say then about the problems that confront those who must enforce the law. As I said, whether you like it or not, it is the law and must be enforced.

It has indeed caused some trial judges to even leave the bench because of the voluminous nature of the case—the type of evidence that has to be presented. One of the most recent cases is the case of *Faro v. New York University.*[4] Although the court said in that case that of all the fields which the federal court should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision, the term employer does indeed include educational institutions employing 15 or more employees each working day and 20 weeks of the current or preceeding calendar year. Though the courts are reluctant to enter this area, if a proper case is presented, the court will find discrimination and must order appropriate relief. As has been pointed out, Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The enactment of the Civil Rights Act of 1964, and the Amendments thereto, was the creation of a tool which could be used to eliminate the inequities that exist between the races and the sexes. The landmark case which controls determination as to whether an employer has or has not discriminated against an employee is *Griggs v. Duke Power Company* which is found at 401 U.S. 424. The rule from that

3. Civil Rights Act of 1964, 28 U.S.C. 1964, § 1442d, 42 U.S.C. 1964, §§ 1971, 1975a et seq., 78 Stat. 241 (1964), as amended by 42 U.S.C. 2000 et seq., 86 Stat. 375 (1972).
4. 502 F.2d 1229 (2d Cir. 1973), 8 FEP Cases 609.

case is that if an action or a policy, although neutral on its face, is discriminatory in effect, that practice or policy is unlawful unless it can be justified substantially by business necessity.

Let's look then at the guidelines on recruitment and hiring. Where policies neutral on their face, but discriminatory in effect, have been argued to be justified because of safety or efficiency, it has been included that it must be shown the policies not only foster safety and efficiency, but must be essential to that goal.

Racial discrimination has been found in the following situations: refusal to hire job applicants because of arrest records; refusal to hire because of garnishment cases; word of mouth recruiting or recruiting at only predominantly white educational institutions; where there is a racial imbalance in the work force; where there is no showing that the requirement is significantly related to job performance an employer may not require that applicants have a high school education; making employment decisions on the basis of subjective tests, when these tests result in less employment opportunities for Blacks; failure to post notices for job vacancies; the refusal to hire bearded or long-haired males without showing business necessity; forbidding females to wear pants where it cannot be shown that the policy is necessary to the safe and efficient operation of the business, the latter being sex discrimination.

Although under the law sex discrimination is prohibited there is an exception if sex is found to be a BFOQ and that is a "bona fide occupational qualification." The law here, however is narrowly interpreted. Religion may be a BFOQ—a religious organization may require employees to have a particular religion. If organizations promote the interest of a particular or national group, national origin may be a BFOQ. Under *Weeks v. Southern Bell Tel. and Tel.*[5] the employer is required to show that all or substantially all women would be unable to perform safely and efficiently the duties of the job required. One of the most stringent tests is applied in a 9th Circuit case, *Rosenfeld v. Southern Pacific Company,*[6] under which a successful BFOQ was asserted only if an employee, individually, is not capable of performing a job. Individuals are considered on individual abilities and not on characteristics generally attributed to a group.

Courts are also looking at disparate effects of employment policies upon minorities. An increasing source of Title VII litigation has been the discriminatory effect of pension plans. The major thrust of the tax or benefit plans is that such plans discriminate against women in reduced monthly retirement payments. Inequities in the payment of insurance benefits are a violation of Title VII.

Earlier I mentioned that employers frequently use tests as pre-screening devices. The courts have generally enjoined the use of tests, unless the tests have been professionally validated in accordance with the EEOC guidelines. These guidelines have been adopted by the Supreme Court as expressing the will of Congress. The use of improperly validated tests is a violation of Title VII. The guidelines allow the use of three methods in the validation and I

5. 408 F.2d 288 (5th Cir. 1969).
6. 444 F.2d 1216 (9th Cir. 1971).

submit that you would be safe in using only the first or maybe the first two. The use of the third is questionable under most employment circumstances existing. The first and preferred forms of validation is criterion-related validity. It is said to be essential for validating entry level aptitude tests. Second, content validity may be used to determine the validity of achievement tests. And the third, construct validity—primarily concerns the testing of personality traits. Construct validity is generally inappropriate for occupational testing. In a recent case decision, however, it has been pointed out that a plaintiff must show by statistical evidence that the use of the test is in fact discriminatory against a certain class of people.[7]

Let us look for a moment at the nature of the relief granted by the court in a successful Title VII case. Under the statute, back pay is an integral part of the equitable remedy. Back pay may be awarded to compensate for losses resulting from an unlawful employment practice despite the defendant's good faith. Names and intervening plaintiffs, as well as members of a class who had filed no EEOC charges, are entitled to back pay. In *Moody v. Albemarle Paper Company*[8] the court held because of the compensatory nature of a back pay award and the strong Congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner as it must exercise its discretion as to attorney's fees in a civil rights case. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances exist. It should be noted that there are limitations in the award of back pay. The award is adjusted by deducting interim earnings, and the 1972 Act limits recovery to no earlier than two years prior to filing the charge of discrimination with the EEOC.

In this brief presentation, I have dealt mainly with recruitment and hiring practices and not as much with terms, conditions and privileges of employment. For example, promotions, compensation, classification, retaliation, seniority—these have not been covered but are examples of areas protected under Title VII. They are crucial in the determination of violation of the Act.

In summary, however, let me quote from *Griggs v. Duke Power Company*, cited previously. "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices."[9] Scrutiny of the case law does reveal some conflicting decisions in the interpretation of Title VII. The approach of most courts, however, is to interpret the statute and regulations liberally in order to erase and reduce discriminatory practices and of course, as these cases stand as precedents, they will indeed be applied to cases brought against universities and colleges.

7. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
8. 474 F.2d 134 (4th Cir. 1973).
9. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

BELL: Next we have Mrs. Issie L. Jenkins, who is Associate General Counsel of the Legal Counsel Division of EEOC in Washington. She is a graduate of the Boston University School of Law and recipient of the LL.M. Degree from the School of Public Law at George Washington University. Mrs. Jenkins.

JENKINS: Thank you, Mr. Bell.

During the past two years colleges and universities, particularly since the 1972 Amendments, have seen a proliferation of activities in the area of statutes and regulations which are applicable to them. I think it is fair to say that many have found them burdensome and I think this is a valid complaint. On the other hand, looking at the statutes, regulations and executive orders that are applicable to colleges and universities from another perspective, all of these statutes and regulations are another means of attempting to guarantee to the individual whom they are designed to protect a variety of avenues with protection of a very precious right—that is the right to equal opportunity. In that respect, Congress has found, and I don't think there is any argument, that these various avenues are necessary in order to allow the individual the broadest type of relief and the broadest means of trying to remedy the discrimination which minorities and women have been subject to.

Mrs. Webster has covered very well some of the areas of Title VII that are applicable to universities and colleges and I don't want to duplicate what she has done. However, I do want to point out several things that I think should be noted here.

First of all, I think of the whole area of law developed under Title VII will be applicable to charges of discrimination brought against educational institutions. I don't think that we perceive and the EEOC has not issued any regulations that are specifically applicable to higher educational institutions. We don't perceive the discrimination which takes place in those institutions as any different, nor should it be treated any differently from discrimination in the industrial sector, by unions, or other types of employers. Therefore, the whole body of law that has been developed under Title VII by the courts up to this time, with very few exceptions, will be applied to discriminatory acts by higher educational institutions.

In this regard Mrs. Webster has pointed out the *Faro*[10] case which dealt with the system within most colleges and universities for reappointments and for promotions. We are taking a very close look at those systems in the equal employment opportunity field. From what we have found, the systems for granting of tenure and reappointments are very, very fraught with subjective criteria from which there is no means of review; from which the appointing committees set down no criteria, set down no reasons for failure to appoint or to reappoint. At least as evidenced by the Second Circuit's viewpoint this is an area that the courts would not want to get into.

But I submit that I do not see, and I don't think the Commission sees that with *Griggs* on the books—with the Supreme Court's mandate in that case—that selection, and employee selection criteria in higher educational institutions will be considered any differently from criteria in other institutions.

10. *Faro v. New York University, supra*, note 4.

I think we all recognize that there are certain aspects and certain things that have to be taken into consideration and that there are certain differences and certain criteria that go into determining who is a very fine faculty member, and who performs and meets the criteria. But we think that those criteria can be set out, and then it can be determined whether such criteria as set out is job related. And to the extent that the criteria demanded of a faculty member in an appointment is not related to performing in a job and is not an appropriate criteria, then it must fall as other critieria under Title VII have fallen.

Title VII, and the guidelines under it, particularly our sex guidelines prohibit discrimination on the basis of sex in the granting of fringe benefits. I would like to take this opportunity to speak particularly in the area of pension benefits which Mrs. Webster has spoken to very briefly. And that is that a number of colleges and universities provide pension benefit plans which pay out unequal periodic benefits to women. Those plans are based on sex-segregated actuarial tables. And the defense that has been set forth to the use of the unequal periodic benefits is that these sex-segregated actuarial tables are based on actuarial statistics that are valid. But Title VII demands that in the provisions of fringe benefits, that benefits must be equal for a male and a female similarly situated who are retired now in some cases $150.00 a month and the female receives $100.00 or $125.00 a month, because under the sex-segregated actuarial tables the female is expected to live longer and therefore, her benefits must be spread out over a longer period of time.

The use of such sex-segregated actuarial tables where they do produce these unequal benefits does violate the provisions of our sex guidelines which require equal periodic benefits. What in effect is happening in this area is that you are treating females as a class. The sex-segregated actuarial tables are based on the expectations of life expectancy for the male and the female based on class statistics. What Title VII demands is the treatment of the individual as an individual and not as a part of a class, which is exactly what is happening when you use the actuarial tables to produce the unequal benefits. This is an avenue and an area in which we are looking now. It is one in which OFCC has set forth two alternatives in its recent proposed guidelines.

Our guidelines provide for equal benefits only. We have commented on the OFCC guidelines, and we have encouraged them to accept the alternative which would provide for equal benefits so that the guidelines which you would have to apply would be similar. You would not be required under OFCC to provide equal pay and equal contributions, and yet if you do that and meet the provisions of the OFCC's guidelines you would be violating EEOC guidelines because you are not providing equal benefits.

As President Bok pointed out, what is needed in the area of administration of all of these laws which affect employers in higher educational institutions is some coordination between government agencies and an attempt to make their provisions similar where possible under the statutes so that the burden is less on employers. I think there is an attempt now to do that.

There is another decision, a particular decision I would like to point out

to you; and that is the decision of the Supreme Court in *Alexander v. Gardner-Denver.*[11] I saw last night at registration on the table outside, pamphlets on grievance arbitration, where discrimination—I suppose in higher educational institutions could be taken through a grievance procedure. I think the holding in *Gardner-Denver* is applicable here and it should be pointed out that Title VII rights cannot be waived and will not be waived by the submission of an employee's charge of discrimination to a grievance procedure under the collective bargaining agreement. In other words, by using the system set up under the contract, the employee does not waive, he still has open to him his Title VII rights.

Now, it seems to me that if in fact procedures are set up for solving discrimination complaints in higher educational institutions, that the use of those procedures will not preclude the charging party from pursuing Title VII rights where the rights advanced under the grievance procedure do not satisfy the requirement of Title VII.

In the area of discrimination with respect to sex, you are all familiar with the decision by the Supreme Court[12] which is in effect contrary to one of our guidelines which says that pregnancy should be treated in the same manner as other temporary disabilities. I would like to point out to you that that case was *not* a Title VII case. It was brought under the 14th Amendment, but there are several Title VII cases involving the same issue in the courts now and hopefully our guidelines will be upheld. They require that pregnancy must be treated as other temporary disabilities in the award of benefits under health and disability benefit plans. That provision is terribly important particularly to female employees of educational institutions, in the sense that without such benefits they are being treated unequal because other temporary disabilities even those that may be peculiar to males, are usually covered under health and temporary benefit plans. But in many instances, pregnancy is excluded and that is a disparate treatment and has an adverse impact on females and is contrary to our guidelines.

There are a number of charges pending now at the Commission. Between January 1973 and January of 1974, the Commission received some 1200 charges against institutions of higher education. About half of these charges were charges involving discrimination on the basis of sex. The Commission has issued seven or eight "reasonable cause" decisions in the area now and they are reported in *CCH* you might want to take a look at them. Several of these decisions do deal with the tenure provisions and reappointment provisions and the criteria for reappointment. Those may be of interest to you.

We are of course new in this area; we are developing policies and procedures which will be particularly applicable to charges against higher educational institutions. However, I don't believe that the Commission will be treating the charges and the law applicable to charges of discrimination against higher educational institutions, in any different manner than charges against any other employers. Thank you.

BELL: Thank you, Mrs. Jenkins.

11. 246 F. Supp. 1012 (1971).
12. Geduldig v. Aiello,—U. S.—(1974), 94 S. Ct. 2485 (1974).

Our fourth, and final speaker before we can get to the discussion is Mr. Peter Holmes, who is the Director of the Office for Civil Rights in HEW. He indicates that he now has a staff of 900 across the country to enforce a whole variety of anti-discrimination laws that affect the major educational institutions in the country. Peter Holmes is a graduate of Northwestern University. He did graduate work at American University. He has been with the Office for Civil Rights in HEW since 1969, and previously worked with United States Senator Robert Griffin of Michigan. Mr. Holmes.

HOLMES: Thank you, Mr. Bell.

With your indulgence, I would like to take a little different tack than the participants that preceded me and pick up on a theme that President Bok made during his previous remarks, the general subject being the state of Civil Rights law. Let me start by saying that I represent a still relatively small group of people at HEW who are responsible for enforcing a good share of Federal Civil Rights laws affecting campus life. Twenty years after the *Brown*[13] decision and 10 years after Congress passed the landmark Civil Rights Act of 1964,[14] it remains a difficult and complex assignment. We have passed from an era when civil rights enforcement was nearly universally exclaimed to one in which enforcement in some areas is often plagued by either indifference or controversy.

That resistance arises among groups who once championed the cause of civil rights in a more bouyant period is evidence enough of changing attitudes, not only in the white community but among minorities as well, not to mention the educational community. Symptomatic of the trend is that several years ago when the Office for Civil Rights was occupied with desegregating the dual school systems of the South, scarcely anyone had heard of the concept of affirmative action in employment in colleges and universities. Not until just three years ago had HEW even begun to investigate the discriminatory effect of an elementary and secondary education system that ignored the language handicaps of Mexican-American children and treated such handicaps as if they were an index of some subpart of intelligence.

The shift to new and more subtle areas of discrimination has come about at a time when Congress and the Executive branch continue to broaden federal anti-discrimination law. For example, since 1964 when Congress banned discrimination on the basis of race, color and national origin in federally-assisted programs, we have seen the issuance of Executive Order 11246,[15] the provisions of which are well known to you. In 1972, Congress passed Title IX of the Education Amendment[16] prohibiting with certain exceptions, sex discrimination at universities receiving federal financial assistance. And there are provisions of the Public Health Service Act[17] which prohibit sex discrimination in the admission of students to federally-

13. Brown v. Board of Educ., 347 U.S. 483 (1954).
14. Civil Rights Act of 1964, 28 U.S.C. 1964, § 1442d, 42 U.S.C. 1964, §§ 1971, 1975A et seq., 78 Stat. 241 (1964), as amended by 42 U.S.C. 2000 et seq., 86 Stat. 375 (1972).
15. Exec. Order 11,246, 3 C.F.R. 406 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969), as modified by Exec. Order 11,375, 3 C.F.R. 406 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969).
16. Education Amendments of 1972, 20 U.S.C. § 1681 et seq., 86 Stat. 373 (1972).
17. Public Health Services Act, 42 U.S.C. § 298b-2, 85 Stat. 479 (1971).

supported Health Manpower and Nurse Training programs. And finally, there is the Vocational Rehabilitation Act of 1973,[18] which now prohibits discrimination on grounds of physical or mental handicap by federally-assisted programs.

Many of you here today represent institutions which are subject to all of these various federal civil rights provisions. Let me say that I do not envy a conscientious college official who seeks to find his or her way through the thick of these disparate elements. Some of the provisions I have referred to in fact prohibit the same kind of activity only in different language. At the same time, each has a different application and is responsive to a different set of Congressional concerns which surface momentarily at a given point in time. There is appreciable overlap of jurisdictional authority as well. For instance, the authority provided HEW under Executive Order 11246 in the higher education employment area parallels in many respects that jurisdiction of the EEOC due to the 1972 Amendment to Title VII of the Civil Rights Act which was previously referred to.

In summary, we have reached a stage in the evolution of civil rights law where the standards adopted are becoming more narrowly focused and refined. It is inevitable in such a situation that interests will clash. In striving to resolve the problems that result the federal establishment is often caught in the middle, pressured from all sides. And the issues are no longer as cut and dried as they used to be. What all of this means is that a government that is truly responsive to public sentiment may not always be the most efficient arbiter when substantial blocks of opinion in the community are unwilling or unable to reach a *modus vivendi* on fundamental points. In fact, to perceive the true public interest in the midst of controversy and competing claims is becoming more and more illusive and less conducive to quick and ready answers. We have become very much aware of this as we have atempted over the past several years to interpret into regulation language the congressional intent with respect to Title IX of the Education Amendments of 1972.[19]

Another example clearly is in the area of affirmative action. Not discrimination—affirmative action. The controversy sparked by the application of this principle to higher education has reached so far as to throw open to question in respected journals the whole idea of equality, or better, precisely how to remedy conditions which are the consequence of restrictions or barriers imposed or sanctioned in the past. The debate has spawned a rich terminology. Those with a vested interest in the status quo are apt to seize the issue of academic freedom, claiming that the federal government in requiring the universities to correct the underrepresentation of women and minorities is willy-nilly dictating reverse discrimination, and mandating the adoption of arbitrary hiring quotas. On the other side of the fence are arrayed persons who more or less look at HEW as a pawn of the higher education network which has mustered political clout in the crunch to make of the law a virtual paper tiger. Neither perception, of course, is accurate.

The discussion and debate over the affirmative action requirement has

18. Rehabilitation Act of 1973, 29 U.S.C. § 794, 97 Stat. 355 (1973).
19. Education Amendments of 1972, 20 U.S.C. § 1681 et seq., 86 Stat. 373 (1972).

been fueled by certain widespread misconceptions which continue to have currency and in some cases, to mar progress. To most people affirmative action represents an imminently sound principle. Others, however, seek to distort that principle by arguing that government pressure is requiring the employment of persons who are considered less qualified than other applicants in order to fulfill a hiring goal. For example, the charge is often heard that the test of good-faith efforts to comply with the Executive Order will inevitably lead to arbitrary federal control over hiring decisions. To the contrary, far from being a concept likely to be detrimental to the university, and to subject its hiring decisions to a new set of professional standards handed down by Washington, the concept of good faith requires only that the university define and justify the standards it applies in the decision it reaches. As a consequence, to argue that demonstrating good faith efforts is a burden that no institution will be able to sustain, is to suggest at the same time that hiring decisions are based on criteria unfathomable to the non-academic mind, or that no justifiable criteria exists at all. Affirmative action does not supersede merit. It assumes the right of an institution to hire and promote candidates deemed most qualified. But those who oppose affirmative action on the grounds that it will undermine merit, cannot at the same time dispute the test of good faith. To do so is to admit that the very standards felt to be threatened are impossible to define and if they are impossible to define one must wonder how universally applicable they are in the higher education community.

A recurrent theme found in articles about affirmative action is the notion of the heavy hand of government primed to pounce gleefully on institutions for the least offense. The request of the Department to undertake corrective action or the basis of on-site reviews and to implement effective affirmative action plans consonant in Labor Department regulations are perceived by some persons as dictatorial decrees thinly if not overtly akin to the worst features of an over-leaning federal presence. The truth of the matter is that administrative enforcement proceeding has been initiated against a university with a view to deprive the institution from receiving federal contracts. Because of the limited staff resources, the Office for Civil Rights has not yet been able to conduct comprehensive on-site compliance reviews of the vast majority of non-construction contractors under our jurisdiction. Regrettably also numerous class action complaints are still pending an investigation, and in other cases, we have not been able to review and resolve individual complaints in a timely manner. Far from applying sanctions, penalties or threats in such a manner as to constitute what some might regard as an abuse of power, the comparatively few cases in which the Office for Civil Rights has prompted the delay of contract awards is evidence enough of our continuing endeavor to provide the higher education community with every opportunity to meet its obligations. Indeed, one might say that it is precisely the length of time afforded institutions to reach a posture of compliance with Department of Labor regulations that has provoked on the other side of the aisle, persistent criticism that the Department is not enforcing the law, or at least is not doing so with that display of zeal alleged in some university circles.

Under the circumstances, I find it difficult to agree with Dr. Richard

Lester's recent assertion that demands of the higher education guidelines and the HEW Regional Offices are putting top administrators of many universities in a position where they cannot resist pressure for preference in hiring from groups of women and minorities who still see in the laws and authorities made for their protection, an unfulfilled promise.

To be sure, the debate over civil rights is not limited to the higher education community. The debate rages in the Congress of the United States right now. Title IX has come under attack by many people in the Congress questioning HEW's original interpretation in the proposed regulations of Congressional intent, which was scant to say the least. There is even discussion in some quarters of the Congress that there was regret on the part of the Congress that they passed Title IX under the circumstances. In Congressman Jim O'Hara's Subcommittee, the House Education and Labor Committee, hearings have been going on for a number of weeks on the issue of affirmative action with the primary focus on goals as distinguished from quotas. I am concerned that unless the concept of affirmative action and the establishment of goals gets some public support before the O'Hara Committee from a distinguished person, for example, such as President Bok, that we will have legislation enacted by the Congress that will eliminate the goal-setting obligation from the law with respect to higher education institutions.

And finally, the Congress of the United States and the House of Representatives passed recently an Amendment by Congresswoman Majorie Holt of Maryland, which quite simply prohibits the Federal Government, Office for Civil Rights in the Department of Health, Education and Welfare, from collection racial or sex data from recipients of federal financial assistance. The House passed the law by a 220 to 163, I think it was, vote, and the Amendment will be pending in the Senate when Congress returns from the election recess. The amendment quite simply undermines the effective enforcement of the Civil Rights program by the Department of Health, Education and Welfare—passed by a substantial majority in the House of Representatives. As the debate rages on we will continue in the Office for Civil Rights, to attempt to address head-on the issues in a reasonable and responsible way. I mentioned Title IX, the proposed regulation was published in June 1974 and in order that everyone have an ample time to comment, the comment period is longer than usual, 120 days, which expired on October 15, a week or so ago. I trust you have studied the provisions carefully, and provided us with comments and recommendations of your institutions. Our work in the Department is now set out for us to analyze those comments and to develop in final form a regulation.

Another major thrust of the Office for Civil Rights in the coming years must be to examine carefully, and this is a point that was made by many of the others here including President Bok, the supply side of the higher education field. Why are women and minorities not getting into certain fields? Why is the number of minorities in graduate fields not increasing at a faster rate than it is? Our experience in doing on-site reviews in connection with the *Adams v. Richardson*[20] higher education desegregation cases in 10 southern states, pointed up the need for a careful examination of certain

20. 480 F.2d 1159 (D.C. Cir. 1973), *modifying* 356 F. Supp. 92 (D.D.C. 1973).

higher education policies such as counseling, retention policies, financial aid policies, etc. Reviews on the supply side will be carried out as part of our overall Title VI and Title IX compliance responsibility. However, they will ultimately impact on the employment compliance of universities since universities of course are a source of their own labor market. It is also our intention to find better ways to help college administrators deal with the many facets of designing an acceptable affirmative action plan. The Executive Order and the implementing regulations require a great deal from institutions of higher education in terms of developing the necessary data base as President Bok mentioned, for forming the relevant analysis and formulating the right policies to meet the problems that exist. To build a plan that is at once comprehensive, effective and realistic, is not a simple matter. It costs money; it places demands on staff time; and it presumes a high degree of technical know-how and legal competence. In short, in order for us to reach a large percentage of institutions and enforce the affirmative action obligation effectively in the future, the Office for Civil Rights must continue, as we will, to clarify the specifics of that obligation and build up a strong technical assistance capability. This will remain a major policy thrust in the months and years ahead.

In conclusion, we do not construe the equal opportunity obligation as extraneous to other institution-wide objectives. In our view, effective equal opportunity in hiring, etc., should serve to strengthen an instituion's commitment to quality education and to meet future challenges. And I have no doubt that this will happen on a broad scale if equal opportunity plans are accepted by the administrators of our institutions of higher education and by our public officials in this country, and if they are designed and implemented in sound and effective manner. Thank you very much.

BELL: Let me assert the prerogative of the Chair by asking the first question, addressed to all of the members of the first panel. I would suggest quite frankly that whatever may be the benefit and the progress that can be made at the lower level—at the buildings and grounds level, so to speak, the secretarial level, pehaps some revision of pension plan inequity in colleges and universities—that what I hear this morning, reading through the lines in some cases, reading directly in other cases, and from what I know in my own experience, leads me to ask you whether or not we haven't all wasted our time thus far in this first session?

Now, of course, I can't leave out the two very inspirational talks we got at the outset from Mr. Leonard and President Bok. My only problem with inspirational talks is that I am never sure whether those who are giving them are inspiring me to work for victory or inspiring me to accept defeat, and the people who give the talks, seldom give any indication of what they have in mind. But as I look at Title VII, as I look at the *Griggs*[21] case and its progeny,[22] it seems to me that whatever their value, and I think it has been

21. *Griggs v. Duke Power Co., supra*, note 9.

22. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Johnson v. Goodyear Tire and Rubber Co. Synthetic Rubber Plant, 491 F.2d 1364 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co. 494 F.2d 211 (5th Cir. 1974); Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507 (1974); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

amazingly substantial (far more than Congress probably ever intended back in 1964) in helping open up and eliminate discrimination in jobs at the blue collar level, it is going to be very difficult to use those remedies and the courts and the processes that we have used to make the progress that we have with telephone workers, and truck drivers, and welders and things of that level, at the higher echelons of university administrative jobs, and particularly with faculty jobs.

We have relied a great deal on tests, but it seems to me that it is probably, as someone said recently, that tests are only used by employers for jobs if they don't really care who fills them. But that is certainly not true when you are talking about faculty in colleges and particularly at professional schools where tests are virtually never used, and where the reliance is on educational background, academic achievement, a range of academic experiences which for the reason that we all know, tend to leave most of the minorities that we are concerned with out. Traditionally, the employers of public support, the growing Congressional opposition, not only in terms of the lack of enough resources to enable effective enforcement, but provisions like the Holt Amendment—threaten to cut back on the whole of civil rights enforcement. When we add to that the relatively small pool of individuals, particularly in the minority groups, with the traditional qualifications, or even with the more reasonable qualifications that might be thought of, when you put all these things together, I just wonder whether it is going to be possible for us to really make any kind of progress in this area.

OBLEDO: I will respond to that. In fact, I regret not having read my remarks because what I was trying to point out is that the affirmative action program is doomed to failure with the higher educational institutions. In other words, there are two models for affirmative action. One for the construction industry and one for the educational institutions. One regulated by the Department of Labor, one regulated by HEW. They are different models. There are different enforcement mechanisms. In the construction industry, you have the model of the training and the hiring. In other words, the construction industry is creating credentials. While the academic commuintiy is searching for credentials. And there is no way, there is no way at all that the affirmative action is going to work with the institutions of higher learning. And particualarly, particularly, when I hear the remarks made by Mr. Holmes when he was saying, for instance, that there has yet been no cancellation or suspension of benefits to higher education, that they were going to enforce the Executive Order in a so-called "responsible" fashion, in effect what he was telling you, as I interpreted it, exercise good faith, tell us that you have used good faith in your recruitment policy, then of ocurse, all you need do is come back and say, we made every good faith to get a qualified pool, there are no qualified minority applicants, we have complied with the requirement and give us the money.

BELL: Mrs. Jenkins, can you tell us that what we are suggesting is not so?

JENKINS: Let me just speak to the point you raised about the criteria used. I see no reason and there is nothing to suggest to me that in academia some objective criteria cannot be set out for the appointment and promotion of faculty members. Now granted there may be some areas where subjective

judgments might enter into it. But I submit that at this point there can be laid down some objective standards to be followed by your faculty committees in determining reappointments and promotions. With respect to the question on proof—particularly as the EEOC and the one on one charges where there is an allegation of discrimination in reappointment—the burden of proof if we can follow the Supreme Court's decision in *Green v. McDonnell Douglas*,[23] (sic) if that person who is up for reappointment can show that objectively she was qualified, that is, she had the credentials and the recommendations and what have you, that she applied for the position or she was eligible for reappointment, was considered, that she was not appointed, and that after her consideration that job remained open, then the burden is going to be on the university to come forward with some standard other than a sex or minority standard to show why he or she was not appointed. In other words, the burden is not going to be on the government, particularly under Title VII, it is going to be on the university to have these standards, to be able to meet this burden of proof.

BELL: Mrs. Webster, do you look forward to engaging in that kind of litigation?

WEBSTER: I don't look forward to engaging in that kind of litigation because of the element of proof. Forms of discrimination are indeed much more subtle now than they have been in the past. It therefore becomes increasingly difficult to prove the case. But as Mrs. Jenkins has pointed out that following the standards in *Green vs. McDonnell Douglas*[24] (sic) as she set out, if a plaintiff shows that there was a job vacancy, that he or she was qualified to fill that position and was by-passed and the job remained open in a case like that, because of case law, discrimination will be found. Now, I am sure that there are other factual situations under which discrimination might not be found. This was the case in *Faro*.[25] I think also though, that I should point out that it is indeed your duty to do all you can to correct the discriminatory practices that *you* know exist. This was the problem facing Judge Sidney Smith in our circuit who resigned to go back to the private practice of law. He felt that the courts are now being called upon to make the kinds of social decisions that you and I should be making as individuals in the community. You know, there are just too many burdens being placed upon the courts to order you to do what is morally and legally right.

BELL: Mr. Holmes, why don't I give you a chance at the general question?

HOLMES: Well, if I understand the general question it is that you feel that we may have been wasting our time here and that we cannot accomplish what the objectives of the law are with regard to higher education—I don't share that concern. I think we can accomplish the objectives of the law with regard to higher education institutions. I think we all have to broaden our thinking though at some point. I think President Bok touched upon it, I think it is something that we have all thought about, but the issue on the supply side, particularly with regard to minorities and as Mr. Obledo mentioned,

23. *McDonnell Douglas Corp. v. Green, supra*, note 7.
24. *Id.*
25. *Faro v. New York University, supra*, note 4.

with regard to Mexican-Americans, the supply is not there, the employment opportunities in turn are not there in higher education.

OBLEDO: That's part of the training I spoke to.

HOLMES: Thus we must focus, in connection I think with our affirmative action employment programs, greater efforts with regard to the supply side. And the institution that comes forward with an affirmative action employment program that contains efforts to increase supply through its own institutional mechanism, should have that point be recognized in their affirmative action plan, and then be given credit for it.

I would like to say two things before we go on regarding Mr. Obledo's first comment. I don't mean this disrespectfully and I feel somewhat at a disadvantage, being a non-lawyer, discussing the subject of the law with a lawyer, but I think there is a basic misunderstanding about the requirements of the Executive Order, Executive Order 11246. The Executive Order 11246 is the same law that applies to construction contractors, the same law that applies to higher education institutions. It is administered by the Department of Labor, the guidelines and regulations for the program are set forth by the Department of Labor. The same guidlines and regulations apply to higher education contractors as well as other contractors, one. Two, the issue of good faith is not something I drew out of my hat to indicate that we are going to take it easy with higher education institutions. The concept of good faith is contained in the law and under the law an institution that establishes under-utilization of minorities and women in its employment work force must establish goals and time-tables. The law goes on to say that the institution must make good faith efforts to meet those goals. It's not a quota, it's a goal, they make the good faith efforts if they have done the search, and if they don't produce the parity for women and minorities then that's all right.

OBLEDO: Let me interrupt. One thing, Bell, the concept of "good faith" would be referred to in the tax law as a loophole. (Applause)

COMMENT: I would like to consult the lawyers about the legal concept of under-utilization. Under-utilization, found in 41 Code of Federal Regulations 6.2 says that a university under-utilizes when it doesn't hire minorities and women in relation to their availability.

HOLMES. "Reasonably likely to be available."

COMMENT: Availability is the issue. Under-utilization is the key to availability. If you under-utilize then that figures in your affirmative action responsibilities.

HOLMES: It triggers a part of your affirmative action responsibility. Insofar as the requirement to establish goals, there are many other affirmative action responsibilities.

COMMENT: I wanted to point out though as a logical matter that for minorities and Chicanos it would be impossible to trigger this responsibility because of the availability problem. Minorities are functionally unavailable. Being not available, they can't be under-utilized. So one charge if we want to

construe the code strictly, that minorities that are unavailable, that is that don't have Ph.D's or comparable credentials, are outside of the letter of the regulation and therefore they fall outside the law.

HOLMES: You are quite correct in what you say, it poses a problem. The availability of minorities, let's be honest about it, is low because of discrimination, effects of past discrimination in the lower and higher education process. We must focus on that supply side.

BELL: Let me say something about this because I think we should clearly distinguish in our discussion the availability of minorities for particular positions, particularly in the upper level of the universities, who have the traditional qualifications, and those who by virtue of alternative experience levels, etc., etc., might well be able to do the job if given a chance. Now determining what those alternative standards might be of course, is another question. But I think we have to be clear, because we just can't easily argue with Mr. Holmes with regard to the first. Because of discrimination and a whole range of other things the supply of minorities-that is where the women have to some degreee an advantage, they have been qualified and just been excluded—the degree of minorities with traditional qualifications is small. I suggest that in many levels based on what we see in terms of functioning of those who have the traditional qualifications actually in the job, there are people with non-traditional standards who could do no worse.

COMMENT: I was sent here for clarification of the affirmative action program. I am somewhat confused on the issue of good faith. The prime problem, at least at the universities in my state (Louisiana), is that question of supply. It is a fact that if you want to hire a Black professor with a doctorate, there's a differential of about three to five thousand dollars. By that I mean higher than the salary of the comparable white professor. I guess that that has to do with supply and demand, or the pool. It seems to me that when we call good faith a nebulous concept, or when we call good faith a loophole, you're overlooking the realism. The facts are that universities are outbid. Whatever university can afford to pay a higher price for that professor, because of the law of supply and demand, well, that's where he's going. That's understandable. But it's a realistic fact that those universities, at least in my state, are in good faith, are in fact trying, but maybe cannot meet the price. Good faith is a bona fide legal term—is a concept of law, and should be recognized as such.

BELL: Mrs. Webster, as our Southern representative, do you want to respond to that?

WEBSTER: Well, I can point out to you one case that I am familiar with in the industrial world and that would be *Rowe v. General Motors*[26] and the question there on the District Court level was has the employer done enough? They had set goals, they had advertised, they had tried to recruit, and their minority employment was indeed up a little bit but the Fifth Circuit held that given the supply of the total work force, if you look at the total work force, they had not done enough and found that they were indeed in

26. Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972).

violation of the Act. Now, in that case, the District Court felt that they had shown good faith, that there was plenty of evidence of good faith, but the Fifth Circuit ruled that they had not done enough. I think each factual situation will be judged really on the basis of what you have actually done, what your efforts have been. We tried another case against Lockheed-Georgia Company and they were the number one employer in our area and I felt that the District Court there was going to say that they had done enough. But then the *Rowe* decision came out and after we had tried the case for several weeks, we settled it.

LEONARD: There were three things mentioned that I'd like to reply to. One was the concept of reverse discrimination; the only way that you can have reverse discrimination is for minorities, the euphemism for Black people, Chicanos, Native Americans, Puerto Ricans and American women, to suddenly gain control of the decision-making power and then they begin discriminating against those who are presently in control, white males. Does anyone see that happening at anytime in the foreseeable future?

The other thing is, Mr. Holmes said that he is opposed to the question of quotas. He should look at the present practices in most institutions. Quotas are already being used. Practically everyone used the erroneous and out-dated Ford Foundation study which says that not more than one percent of Ph.D's are Black. Consequently, if they have on their faculty one Black professor out of 100, then they say "we have met our obligation". What is that but a negative quota? It is used at state universities and the private ones. Now, I would suggest to our friend from Louisiana, that one of the problems that Louisiana has is much like a number of other school systems: that is, when minorities and women begin to knock on the door of faculty appointments there is change in the required credentials. For many years, white people have been teaching with master's degrees, now Black people must have Ph.D's. So they change the rules of the game in mid-stream.

Another thing is what we hear about the most qualified, and I had been trying to determine what we meant by that phrase. I think Blenda Wilson of the Harvard School of Education, finally cleared it for me. She said there is no such thing as most qualified and highly qualified, that qualified is qualified. But when they add these prefixes and suffixes, what they mean is, does the person look like me, talk like me, walk like me and act like me?

JENKINS: Those are the subjective standards.

LEONARD: Precisely.

COMMENT: I have found in trying to get Black students into white colleges in Mississippi, and I have been told by Black students that they haven't received fair treatment. It may be the same with professors that they don't make them feel comfortable so it may not be a question of salary but it may be a question of comfort and making them feel at home. In many cases, this is a lot more important than money. The medical school that I was working with, where I got some Black students in, lost these students because they were being thrust around. They left and went back to the Black medical school. I don't know whether this was the case in Louisiana or not, but these are some of the experiences that I have unfortunately had.

BELL: Thank you Mr. Kaplan. Any other questions for the panel?

COMMENT: I just want to make a comment to the young man from Louisiana. When most college administrators begin to seek Black men and women, identify them as being on the graduate level and nurture them through the graduate programs, similar to programs of internships and stuff like this, that the problems would be solved very adequately throughout the country. This may not necessarily be true with regard to Louisiana.

COMMENT: If I could just briefly address the Louisiana thing too. I happen to know a little something about it. There are an awful lot of Black Ph.D's and M.A.s—professors in the state of Louisiana—right now at Southern University and on other campuses, so there is probably a larger availability pool of Black professors in Louisiana than there is nation-wide because of the existence of the Black institution.

COMMENT: That is true. Nevertheless it is still a fact that the Black Ph.D's at Southern and Grambling prefer to teach or to be at those universities. They feel an obligation or a duty to teach in these universities, and they feel that they can do the most good there.

QUESTION: I would like to explore with you and Mr. Obledo the concept of "good faith". What are the legal or the psychological implications?

BELL: I think the problem in all of this, and I will let Mario also comment, is that good faith has been the standard of desegregation at least since 1955.

. . . The concept of good faith has been so abused over the years that to have an Executive Order such as 11246 where it is the heart of its working mechanism, or to rely very strongly on it in any other area, is to leave open to current definition the usefulness which has been so eroded over the years by the evasions and the corruptions of it, and to place those who are concerned about progress in a position that I guess Mario and I have taken, which is one of pessimism.

OBLEDO: I have had a great deal of experience in negotiating with employers when the issue of good faith comes up, and I have had many, many personal disappointments when they express good faith to me when I see what the objective results are. For instance—there are two plants, one of them has a great number of Mexican-Americans, the other has virtually none, yet the firm with no Mexican-Americans said he was dealing in good faith. I walked in Washington, D.C., saw the Federal Home Administration with a great deal of Black employment. Across the hall was the Southern Chamber of Commerce, it had none. I know if I had walked in there they would have said they were acting in good faith. There are some cases perhaps that have held that the element of good faith is really irrelevant. You have to look at the objective results. So I would say, getting back to this proposition, that I think it is the obligation of the institutions of higher education to institute training programs, for instance, we want faculty—there is some question as to whether faculty can be trained. Harvard took me for instance, and I went through three months of orientation period teaching methods, watching myself on the video tape deliver a lecture. I was trained and I conclude that universities can do the same thing. But, I don't know

whether HEW has proposed that to universities and at least had some persuasive authority to say, look training is the problem.

COMMENT: I would like to make one final point and put it in the form of a proposition and rest the case with HEW again. Say that the good faith requirement and affirmative action, to have any meaning at all, would require that the affirmative action model would have the university concerned about training, not in the graduate school, but by training in high schools. When minority students come to undergraduate school, these institutions have total control of these undergraduate students, then that's where real training programs should be, not in post-graduate schools because by then it is too little too late. But at the beginning, at the outset. In my mind, the affirmative action responsibility is in training programs, in recruitment, and in hiring, and that training translates into minority students in greater and greater numbers in universities and its graduate programs.

HOLMES: I quite agree and that's what I have repeatedly said. We must in the contest of dealing with institutions of higher education under the affirmative action obligation, remember the Executive Order goes to employment only. We must broaden our perspectives and focus on the supply side along the lines which you suggest.

COMMENT: I just want to reinforce the comments of the gentleman from Louisiana. I am from Massachusetts and I want to say he is telling the truth. The last Black faculty person we hired left to go to a Black college.

BELL: One of the difficulties, and I don't want to minimize the major thing we are saying—one of the difficulites (and there may be some justification) is that assuming that there is an order of quality going on up the ladder that schools whose faculty are along the mid-way point of this point of the quality progression often are looking for and are only willing to hire—or at least are most willing to hire, those minority prospects who are much closer to the top end. Therefore when they do locate someone like that and hire them, or fail to hire them, there should not be a great surprise that there is this kind of gap. I think perhaps that one of the justifications is that they know the minority individual is going to catch such hell that he needs to be better in order to survive, and in that they may be correct. But I think they maybe need to take a harder look at what they actually have on their faculty in terms of this quality level and determine whether they aren't seeking only over-qualified minorities for particular positions. I don't think that that is a basis for discouragement when a minority invividual is hired away by one of the prestigious schools, in fact that's how the "prestigious" schools have been hiring for years. So it should be no more basis for discouragement when a minority is hired away than it should be for a "majority." Rather it should show that your hiring is on the right track and you need to go out and find some other similarly qualified individual.

COMMENT: The salary scale for white professors is too low. One of the by-products of affirmative action is that the salary schedule is better.

BELL: I think that there is evidence that throughout the civil rights movement that whites, particularly those who have most resisted change, have been the ultimate beneficiaries of that change to an extent greater than

minorities and to the extent that there may be a tendency to raise salaries for everybody that would follow this trend.

QUESTION: One of the things that disturbs me is the backlash that we are getting about affirmative action. It is very easy to say if we get more people that is going to solve our umemployment problem. That is undoubtedly true but only in part. We have a lot of data coming in. The unemployment rate of women Ph.D's is three to four times less than men. Minority women sociologists are certainly not being hired at the same higher education institutions the same as men are being hired. There is a real discrepancy. There is a lot for women who are credentialed in the traditional way, but either minorities or females or both, are not being hired with the same regularity as their brothers are being hired.

COMMENT: I have problems with accreditation requirements.

BELL: I guess the basic thrust of your comment is whether the accreditation requirements serve as a barrier to the faculty who wants to hire, but can't find people with the Ph.D. or whatever is required to enable that institution to maintain its accrediting standards. Is there anybody in the audience who wants to comment on that? That may well be a problem.

COMMENT: If we talk about professional schools perhaps, but certainly not on the general college level.

BELL: I would think it wouldn't be at professional schools. Let me say it this way. There may be a less serious problem than you indicate, both in terms of the number of minorities with business degrees, Ph.D's or what have you. There is no accrediting standard that requires every member of the faculty to have that level right away. It really touches on the good faith of an institution who would indicate that only those minorities who have the Ph.D. standard would be considered because of accreditation standards on that. At the professional level, particularly at the law school level, which is one I know a little bit more about, there is no such requirement. As a matter of fact, the "prestigious", again in quote, schools have long since stopped hiring people because they had L.L.M., the master's degree in law. I don't think Harvard has a member of the faculty under 50 who has an L.L.M. degree. All you need have is the L.L.B., but you need it from a prestigious school, cum laude, editor of law review, what have you, Supreme Court clerks. Now some people who have the kind of qualifications are great teachers and great scholars. And some people who have those qualifications are not so good. Not bad, but no better, no better than some others out here, white or Black, who don't have those kinds of qualifications, but who because of their personalities, because of their commitment, because of their willingness to work, would be much finer teachers. So the schools say to you and will say to you, how do we know who they are? This was not a question a few years ago when the social structure was such that there was a lot of pounding on the door saying when are you going to hire somebody and you better hire somebody or else. They went around and they found, most law schools, one person each. Our institution found Mr. Leonard and they found me, you see. They took a risk that we wouldn't rape white girls in the hallways and we wouldn't say those bad street words in the classes, and we

generally would be able to conduct ourselves in a way that wouldn't embarrass them and they would be able to deal with this problem. Now, the urgency is over as Mr. Holmes pointed out so poignantly and we are talking about who has the traditional credentials. I have no doubt that my institution and other institutions will hire every Black who comes along with the Supreme Court clerkship, a prestigious . . .

LEONARD: Derrick, that is not true and you know it.

BELL: Well, no, I am talking only of the law school, Walter—there is a difference even on that level, but you see the point. So that while good faith is still there, there are serious questions about the guy who doesn't have the traditional standards, how is he going to make out? You see, where good faith is important is in the institution's willingness to take those risks, because they don't take them alone, the individual takes the risk also—that he is going to give up whatever he is doing and risk a chance that he will not make the standards that are set for an acceptable teacher or an acceptable administrator.

LEONARD: Derrick, I think that part of this is that the accrediting associations, AALS, may well set down some kind of arbitrary standard with respect to degrees, but they say nothing about the profile of personalities on a faculty. In my judgment, one of the criterion for accreditation should hinge on the extent and degree to which an institution reflected the total society. After all, aren't these institutions public trusts?

BELL: We have exhausted our time, since I usurped more than I intended, but I do want to let our panelists have just a closing word or two. Mrs. Webster, do you want to start?

WEBSTER: I just wanted to comment on this question that I would consider important, entitled artificial barriers. It's the same type situation that you find in the *Griggs* case, that the employer in that instance required a high school education, but it wasn't shown that a high school education was really related to job performance. Now I think you could take the same type situation into the college and university and say that to require this degree is—it is not necessary to have this degree in order to perform this job. Now we cannot say that we are following the standards of some organization that says that we must do this, it's just like the state protective laws. If they are in violation of Title VII, then they too must fall. It doesn't protect you to say that this is our policy because we are required to do it by state, or we are required to do it by an accrediting organization. But we have to look at what we are doing. Find out if these are indeed artificical barriers, are we requiring too much, can the job be performed with a lesser degree?

JENKINS: The only parting comment that I would like to make is with respect to the kind of remedies available to a charging party under Title VII. I think the history of the court cases has demonstrated that the courts are going to provide and fashion very broad remedies to remedy charges of discrimination. This may mean an over-hauling required by the courts.

Take a look first. You bring voluntarily your systems into lines with the requirement of the law. In that respect it seems to me that higher educational

institutions would have a lot to do; it would be to their advantage to take a look and do their own remedying, fashion their own systems to meet the requirements of the law so that you could fashion within the framework of what you can see from you own systems, rather than having it imposed on you. I think that is an obligation that the institutions ought to take on. And they ought to take them on before EEOC or HEW takes it on. Certainly the courts don't want to be bothered with it. It is really a tedious process for them. I think you would fare better by voluntarily complying and I think that is what we are all about—we are just asking voluntary compliance in a reasonable manner.

HOLMES: I would just say one brief thing and it sort of follows on the point that you Mr. Bell and also Dr. Sandler made. I think that we all must renew our faith in the objectives and our commitment to the objective of civil rights in the country. And more importantly that we must get the leaders in the country, in the academic community, in the Congress, to renew their commitment, their strong commitment to civil rights and to equal opportunity. We must define what the problems are, what the controversies are, as Mrs. Sandler said. The issue in affirmative action in higher education is goals and timetables and the Congress of the United States in its wisdom decides to correct that problem, then let's nail the focus, let's define what the problem is so that we don't throw the baby out with the bad water. That was the issue with Mrs. Holt on her Amendment and what we must do I think all of us—and it requires the leadership of the institutions of higher education—is come forward with a renewed sense of commitment and interest in civil rights enforcement and make it known publicly and within the Congress.

BELL: Thank you very much. I want to thank all of the panelists for participating and all of you.