Distinguishing Five Models of Affirmative Action

David Benjamin Oppenheimer

Follow this and additional works at: https://scholarship.law.berkeley.edu/bglj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38Z00P

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Gender, Law & Justice by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Distinguishing Five Models of Affirmative Action

David Benjamin Oppenheimer†

I. INTRODUCTION

Over the last two decades few topics have been more controversial than affirmative action. To its critics, affirmative action is both a euphemism for discrimination against white men and a system that bureaucratizes the entire society at the cost of meritocratic decision making; it is a symbol for all that has gone wrong with American society since the sixties. To its supporters, it is a first step towards remedying the crime of slavery and eliminating the discriminatory preferences that have guaranteed white men the easiest paths to wealth and power; it is a symbol of justice, and a promise of a future of hope.

For all of the debate, all of the court decisions discussing affirmative action, and all of the articles and books on the subject, there is no consensus on what the term "affirmative action" means. The purpose of this essay is to clarify the issue by identifying and distinguishing five models of affirmative action, and to suggest that the debate focuses too much attention on the use of quotas. I herein propose that in discussing affirmative action we often confuse its many manifestations, which can be grouped into five models: strict quotas favoring women or minorities (Model I); preference systems in which women or minorities are given some preference over white men (Model II); self-examination plans in which the failure to reach expected goals within expected periods of time triggers self-study, to determine whether discrimination is interfering with a decisionmaking process (Model III); outreach plans in which attempts are made to include more women and minorities within the pool of persons from which selections are made (Model IV); and, affirmative commitments not to discriminate (Model V).

† Clinical Assistant Professor of Law, University of San Francisco; J.D. Harvard Law School, 1978; B.A. University Without Walls-Berkeley, 1972. The author gratefully acknowledges the assistance of Professors Stephanie Wildman and Trina Grillo of the University of San Francisco, Professor Jan Vetter of the University of California (Boalt Hall), and Lily Hamrick and Carrie Newkirk of the BERKELEY WOMEN'S LAW JOURNAL for their critical reading of this article.
AFFIRMATIVE ACTION

It is my premise that the broad differences between these five models, and the confusion over the meaning of affirmative action, exacerbates the disagreement about its legitimacy. The confusion may also help explain the result in two recent employment discrimination cases concerning affirmative action and sex discrimination, which are discussed infra in relation to the five models.

II. The Five Models

Model I, the quota model, is probably the model which is most often viewed by the public as the “typical” affirmative action plan. In a true quota model a certain number of jobs, or promotions, or classroom seats, are set aside to be occupied only by women or minorities. The affirmative action plan described in the lead opinion in Regents of the University of California v. Bakke is a Model I plan. In Bakke, a white candidate for medical school sued the University, complaining that he was rejected because the school set aside sixteen spots exclusively for minority students in each entering class of the medical school at its Davis campus. Minority students could be considered for admission either under the regular process or the affirmative action program, but white students, regardless of their qualifications, could only be considered under the regular admissions program. The Court held that the University’s plan constituted impermissible race discrimination in violation of the fourteenth amendment.

The plan described in the majority opinion of the Court’s recent decision in City of Richmond v. J.A. Croson Co. is another example of Model I affirmative action. In that case, the city of Richmond, Virginia

---

2 438 U.S. 265, 272-75 (1978). The Court issued six separate opinions in Bakke. Justice Powell, who provided the swing vote, wrote the lead opinion for the Court.
3 Id. at 319-20. One issue that the University neglected to raise in its defense is that in 1974, the year that Allan Bakke was denied admission, only 15 students were admitted under the special admissions program. The sixteenth spot was returned to the regular admissions process. J. Dreyfuss & C. Lawrence, The Bakke Case: The Politics of Inequality 41 (1979). Given this fact of its apparent flexibility, the special admissions program was really a Model II plan, not a Model I plan.
Another interesting fact that Dreyfuss and Lawrence note is that at the time Bakke applied to Davis, the medical school had a third method of admitting students. The admissions committee had an understanding with the school’s dean that the dean could select as many as five students for each entering class. This was not an uncommon practice at medical schools, and it acted as a sort of affirmative action program for the well-connected. Dreyfuss and Lawrence point out that Bakke could have almost as easily been bumped off the admissions list by one of these “privilege quota” students as by one of the special admissions students. This issue was not raised in the case. Id. at 24-25.
4 Bakke, 438 U.S. at 320.
passed an ordinance requiring its contractors to set aside a minimum of 30% of their work on city contracts to subcontract out to minority-owned firms. The effect was that minority-owned firms could compete for 100% of the available work, while white firms could compete for only 70% of the work. Here too the Court ruled that the plan violated the fourteenth amendment. In both *Bakke* and *City of Richmond* the Court’s rejection of the plan was premised on the plan’s contravention of the principle that racial preferences violate the fourteenth amendment, but both recognized the possibility that plans linked to evidence of prior discrimination and limited in their scope to remedying that past discrimination could be permitted.

Although they are scrutinized most closely by courts, Model I plans are not uniformly rejected as improper. The Supreme Court approved a Model I plan in *United Steelworkers v. Weber*. There, a union and an employer agreed to create a program to train existing employees for skilled craft positions. Fifty percent of the positions in the training program were reserved for Black employees. The Supreme Court rejected a challenge brought under the federal employment discrimination law by a white worker who was denied participation in the program. The Court reasoned that the plan was limited in scope and duration, created new opportunities for white as well as Black workers, and was tied to prior discrimination.

The affirmative action plans in *Weber*, *Bakke* and *City of Richmond* were voluntarily enacted, but Model I plans may also be imposed by a court. For example, in *United States v. Paradise*, the Court approved a United States District Court order imposing a 50% quota for promotions of Alabama state troopers from private to corporal. The quota was imposed after the state had ignored prior court-imposed promotional goals for over a decade.

Similarly, a Model I plan may be created by Congress. In *Fullilove v. Klutznik* the Court upheld a federal law requiring 10% of all federal funds used for local public works projects to be used for services or sup-

---

6 Id. at 712.
7 Id. at 723. The majority and dissent had a different view on how rigid, or absolute, the quota was. Richmond’s plan had an escape clause in the form of a waiver procedure. The contractor could apply for a waiver of the 30% requirement on the grounds that after due diligence it found that it was not possible on a particular job to sub-contract 30% of the work to minority sub-contractors. Id. at 750. The dissent viewed the plan as falling within Model II, not Model I.
8 Id. at 723-28.
9 *Bakke*, 438 U.S. at 320; *City of Richmond*, 109 S.Ct. at 723-28.
10 Bakke, 438 U.S. at 307-08; City of Richmond, 109 S.Ct. at 728-29.
12 Id. at 198.
14 443 U.S. at 208-09.
16 Id. at 163-65.
Model I plans are usually defended as remedial; they attempt to provide effective remedies for prior race or sex discrimination. In *Paradise*, for example, the quota was imposed because the district court found that the state of Alabama had systematically excluded Blacks from any employment as state troopers for several decades and had ignored prior goals for hiring and promotion imposed by the court. The Court concluded that no other method would succeed in forcing the state of Alabama to promote Black troopers. In *City of Richmond* the city imposed its quota after finding that less than 1% of its contractors and subcontractors were Black, although the city's population was over 50% Black. It concluded that the disparity was the result of discrimination. The Court rejected the plan in part because it rejected the city's conclusion as insufficiently supported by the facts. The city had demonstrated a disparity between population and contracts, but had not established that there was any disparity between the number of available minority contractors and the number of contracts they received.

Some Model I plans look to social needs as well as past discrimination for their justification. In *Bakke*, for example, the University claimed its plan was designed to respond to, among other things, the small number of minority physicians due to prior discrimination, and the need for physicians in medically underserved communities. And in *Wygant v. Jackson Board of Education*, the Court reviewed (and rejected) a plan that required layoffs of school teachers to be determined by both race and seniority, rather than seniority alone, in order to retain more Black teachers to act as "role models" for their Black students.

---

17 448 U.S. 448 (1980).
18 One recent article suggests that the defense and analysis of quota cases is overly concerned with proof of past discrimination, and thus too "sin"-based. See Sullivan, *The Supreme Court, 1985 Term—Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986). In this article, Kathleen Sullivan argues that the Court has erred in looking to the question of whether there was past discrimination to determine whether an affirmative action quota is permissible. Such an analysis focuses on the guilt or innocence of the sinner and the displaced white man, instead of looking to social needs. The result is a stifling sympathy for the white male "victim" as one blamelessly punished.

Sullivan proposes a forward-looking analysis that justifies affirmative action not as a remedy but as part of a design for a better society. She suggests that the justifications include: dispelling the notion that white supremacy governs our social institutions, improving services to minority constituencies, averting racial tension, and increasing diversity. Such preferences, when granted by a white majority and disfavoring whites, should not be constitutionally suspect under a *Carolene Products* analysis. See United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

In a similar vein, another recent paper suggests that the Court views Model I affirmative action plans as punitive, and permits their imposition only when prior discrimination is shown to have been malicious and thus worthy of punishment. Unpublished manuscript by Sheila Foster, associate attorney at Morrison & Foerster, San Francisco (Dec. 1987).

19 *Paradise*, 480 U.S. 149 at 171-77.
20 109 S.Ct. at 714.
21 Id. at 725.
Model II, the preference model, is distinguished from Model I chiefly by a lack of rigidity; Model II plans are race- or gender-conscious but flexible. One example is the Harvard undergraduate admissions plan described approvingly by Justice Powell in his lead opinion in *Bakke*.

Harvard's plan considers race as a factor in reviewing two questions which are applied to all applicants, but from which minority applicants are more likely to benefit: whether the applicant has had to overcome greater barriers to success which should be considered in his or her evaluation, and whether the school's need for diversity in order to offer the richest possible education to its students would be promoted by the applicant's admission. Race thus establishes a preference, but there are no absolute numerical quotas to be filled. The questions addressed in evaluating minority applicants also permit the admission, despite otherwise non-competitive grades or test scores, of unusual white applicants.

Another common example of a Model II plan, although outside the context of affirmative action, is a veterans' bonus. An example of this is found in *Personnel Administrator of Massachusetts v. Feeney*. There, Massachusetts established a hiring preference for veterans by granting them bonus points on a civil service examination. As a result, although there was no Model I quota, veterans had a significant advantage over non-veterans in competing for state jobs.

A third example of a Model II preference plan is the plan originally agreed to by the city of Memphis which became the focus of the Court's decision in *Firefighters Local Union No. 1784 v. Stotts*. There, in a consent decree settling a race discrimination claim against its fire department, the city agreed that women and minority city employees who worked outside the fire department could apply for fire department job openings before white male city employees, or any non-employees. Only if the jobs were not filled by existing women or minority employees would they be opened to others. The issue the Supreme Court considered arose when the District Court later amended its order to protect the new minority employees from layoff. The Supreme Court rejected the amendment as beyond the scope of the parties' agreement.

Model III, the self-examination model, describes a form of affirmative action which is prevalent in government and large private industries.

---

24 438 U.S. at 306.
25 Id. at 317.
27 Id. at 264. The Court held that the hiring preference did not discriminate against women in violation of the fourteenth amendment. Even though virtually all Massachusetts veterans were men, the Court found no discriminatory purpose, because the statute distinguished between veterans and non-veterans, not between men and women. Id. at 280-81.
30 679 F.2d at 572 (consent decree § 6).
31 Stotts, 467 U.S. at 573-75.
The model typically involves utilizing goals and timetables for the inclusion of women and minorities in certain job categories. An employer begins the process by comparing its workforce with the community of persons qualified to fill its positions. This analysis will often reveal that in certain job categories the number of women or minorities is less than one would expect, given the number of qualified women and minorities in the local labor market. The underlying assumption is that, in the absence of discrimination, the percentage of qualified women and minorities in the local labor market would be approximately the same as those employed by any particular employer.

If an employer discovers a significant disparity between the number of women and minorities it employs and the number in the labor market, the employer attempts to determine the reason. If no apparent non-discriminatory reason is discovered through research, the employer adopts a goal of employing a workforce which, in time, will mirror the relevant labor market. The employer analyzes its turnover and schedules interim dates by which it expects specific progress toward its goal. These are expressed as “timetables” for progress toward the goal. The employer uses the timetables to determine whether it is meeting its goals. The operative assumption is that in the absence of discrimination the goals will be met. If they are not, there is a need for further self-examination, to determine whether discrimination is occurring somewhere in the selection system.

Most federal contractors are required to adopt affirmative action plans using the self-examination model. This model is also used in the settlement of employment discrimination cases. For example, in *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, the Court approved a consent decree which included an affirmative action plan using goals and timetables for the promotion of Black firefighters.

A variation on a goals and timetables plan which also fits within the self-examination model is the voluntary adverse impact analysis. In *Griggs v. Duke Power Co.* the Court ruled that practices which are neutral on their face, and even neutral in their intent, but have an adverse impact on a protected group, violate Title VII of the 1964 Civil Rights Act. The practice at issue in *Griggs* was the requirement that new employees have high school degrees, and in some instances that they pass two standardized intelligence tests. These requirements adversely impacted Black job applicants.

---

34 401 U.S. 424 (1971).
35 Id. at 431.
36 Id.
Attempts at voluntary compliance with the Griggs ruling may require self-examination of pre-employment or promotional tests, and other selection devices, to determine their impact. Where an adverse impact is discovered, the employer must either validate the selection device as “demonstrably a reasonable measure of job performance,” or engage in an affirmative action process of finding another, less discriminatory, selection device.

Model IV, the outreach model, is generally based on the assumption that a workforce or school enrollment which contains few minorities or women is the result of insufficient knowledge or communication. A Model IV affirmative action plan may be the result of a Model III-type self-examination, in which it is determined that more minorities or women would make themselves applicants if they were simply recruited, or recruited more vigorously. This assumption has its roots, in part, in recognition that past practices of the employer or school may have included recruiting or selection devices which were intended to screen out women or minorities, or which had that effect. Hiring based on nepotism or word of mouth, selecting from certain schools, neighborhoods or agencies, and favoring promotions from within, are all examples of such practices in the employment setting. Favoring the children of alumni or prominent community members in school admissions is another example. As subjective selection decisions which screen out minorities have come under greater scrutiny, Model IV outreach plans have become one obvious antidote.

Support programs for minorities or women are another form of Model IV affirmative action. An employer may offer special promotional classes for women or minorities to encourage them to move into jobs traditionally held by white males, or to move into management. The assumption behind such Model IV plans is that race and sex discrimination have created social barriers which make it harder for minorities and women to qualify for those positions without assistance. Similarly, schools may create special orientation and tutoring programs to support students admitted under Model I or Model II plans, or may offer such support as an inducement to attract women and minority applicants in a Model IV plan.

Model V, the non-discrimination model, has two distinct aspects.

37 Id. at 436.
38 Id.
39 See DREYFUSS & LAWRENCE, supra note 3.
40 See, e.g., Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988) (subjective or discriminatory employment practices challenged as violating Title VII may, in appropriate cases, be analyzed under a disparate impact analysis).
41 In Strauss, The Myth of Colorblindness, 1986 SUP. CT. REV. 99, the author argues that non-discrimination and affirmative action are indistinguishable in that discrimination and affirmative action cases are interchangeable in analysis. (He further argues that when so viewed affirmative action may, at times, be constitutionally compelled.) While I also conclude that
The first is active non-discrimination. Affirmative decisions such as a decision to stop discriminating, to act to avoid discrimination, to prevent employees from discriminating, and to abandon practices which have a discriminatory effect may all be part of an affirmative action program. Although the law requires non-discrimination,\(^ \text{42} \) voluntary compliance takes place over a broad spectrum. Upon self-examination, or as a result of litigation, an employer, school or governmental agency may discover that its agents are engaging in discrimination, or that it has adopted policies with a discriminatory effect. It may choose to defend its conduct or may, as an affirmative action device, decide to alter it. It may elect to train its employees regarding the obligation to avoid discrimination, or may be required to train them as affirmative relief ordered by a court.

The second aspect of Model V is passive non-discrimination. Theoretically, mere passive non-discrimination, or the resolution by judgment or settlement of discrimination claims, are distinguishable from affirmative actions to prevent or avoid discrimination. They are logically excluded from a description of affirmative action. I believe, however, that affirmative action as generally discussed and understood includes passive non-discrimination and decisions to hire or admit complainants who have alleged a discriminatory exclusion. The public perceptions of non-discrimination and affirmative action are intertwined. When a court's decision that an individual was the victim of unlawful discrimination results in the payment of damages and an order of employment, admission or reinstatement, the remedy is likely to be perceived as a form of affirmative action. When an employer-defendant, or potential defendant, agrees to a remedy to settle or avoid a discrimination action, it is even more likely to be seen as affirmative action, by observers if not by the participants. The failure to recognize that at least some of the par-

affirmative action and discrimination cases can be interchangeable, Strauss comes to his argument from a different perspective from mine, which I believe to be incorrect.

Strauss argues that the principle of non-discrimination is based on ignoring essentially correct stereotypes and generalizations in deference to public policy. Thus, he believes, employers may have valid economic motives for discrimination which we insist on overriding in the interest of a greater public good. Thus is non-discrimination indistinguishable from affirmatively promoting those same interests through affirmative action. His argument depends on his premise that the stereotypes and generalizations which lead to discrimination have some general validity.

The support Strauss provides for this premise undermines his argument. For example, he points to Palmore v. Sidoti, 466 U.S. 429 (1984) as an example of the operation of his argument. Strauss at 100-08. In *Palmore*, a family court denied a divorced white mother custody of her child because she had married a Black man. The court reasoned that it is not in the best interest of a child to be raised in an interracial home. The Supreme Court reversed on the ground that the family court impermissibly used race as a factor in deciding the custody issue. Strauss defers to the trial judge's assessment that the child would be subject to significant psychological damage if raised in an interracial home. Thus, he reasons, the decision was in the best interest of the child and the reversal, although defensible as good public policy, was race discrimination. The problem with this position is the acceptance of the unsupported (and probably insupportable) finding that a child is harmed by growing up in an interracial home.

participants in a public debate about affirmative action are likely to use the term to include non-discrimination compounds the confusion which occurs when the subject is discussed.

Reduced to their simplest expressions, then, these are the five distinguishable models of affirmative action: 1) the quota model; 2) the preference, or special consideration, model; 3) the self-examination model; 4) the outreach model; and 5) the non-discrimination model.

The broad language of Supreme Court decisions on affirmative action suggests that all race-based or gender-based preferences are suspect. The decisions suggest that in order to be permissible, any plan must be narrow in scope, and tied to well-established prior discrimination. But if the decisions are examined with regard to the different models of affirmative action, one realizes that only Model I plans are suspect. Model I plans must fall within strict limits or they are impermissible; Model II plans will be carefully scrutinized but are likely to be approved, and Models III, IV, and V are uniformly permitted.

III. THE COST OF THE CONFUSION

The failure of courts and commentators to distinguish between these multiple meanings of affirmative action can make it difficult to follow the debate over its merits and legality. This is particularly true because those of us who support affirmative action as a whole tend to defend it with reference to those examples falling closest to Model V, the non-discrimination model, while those who oppose it concentrate their attacks on Model I, the quota model. Supporters look at affirmative action and see outreach and self-examination, with preferences being carefully crafted to particular situations and quotas a reluctant last resort. Critics look to affirmative action and see little but quotas, or see preferences and self-examination being utilized as a smokescreen for quotas. Given the fact that there is one common term for such disparate meanings, a critic or supporter of affirmative action whose basic concern is the use of quotas may be understood to be discussing non-discrimination, and vice versa. Two recent cases involving sex discrimination and affirmative action help illustrate the cost of this confusion.

Richardson's Case

The first case is that of Nancy Richardson, a minister in the United Church of Christ. Reverend Richardson was hired in the fall of 1977 as the associate director of student and community life at Boston Univer-

---

sity's School of Theology (BUSTH). In the summer of 1981 she was terminated. She filed a lawsuit claiming that the University terminated her in retaliation for her support of affirmative action. The case went to trial and resulted in a verdict for the University. The trial is described in a recent book entitled *Cutting The Mustard: Affirmative Action and the Nature of Excellence*, written by Richardson's attorney, ACLU lawyer Marjorie Heins.

At the time of Richardson's hire, BUSTH was engaged in a nationwide search for an established scholar to fill a newly created endowed chair in social ethics. At the suggestion of the one other woman in the department, Associate Dean Nelle Slater, who chaired the search committee, the search focused on Professor Beverly Harrison of New York's Union Theological Seminary, who was a leading voice in feminist theology. In early 1978, the BUSTH faculty voted to offer her the chair. The faculty informed Harrison that the position was hers, subject to approval by B.U. President John Silber, who had requested an informal interview. BUSTH Dean Richard Nesmith asked Harrison to send Silber a few of her articles, preferably something not feminist. Harrison arrived at the B.U. campus to discover that the “informal” interview was to be conducted by ten faculty members from various disciplines, led by President Silber, who would be questioning her on her early work. The “interview” became a hostile grilling. Harrison was not offered the job. Worried about the possible repercussions of his decision, Nesmith met with Richardson to talk about explaining the decision to the student community. Outraged by BUSTH's treatment of Harrison, Richardson refused to voice support of Nesmith's decision, and joined with other female theologians in publicly condemning it.

During his tenure as dean, Nesmith made several comments that revealed a disturbing attitude toward women. For example, regarding an interim appointment in church history, Nesmith wrote to Silber that Silber would like the candidate proposed because she was “not just a woman's woman” and that a colleague had informed him that she lacked “those edges we expect nowadays.” Regarding another female candidate, Nesmith explained to a student that he preferred to hire women who were, or had been, married, because “they knew the meaning of compromise.” Asked why he had fired the only female administrator other than Richardson, he explained that they just didn’t “dance well” together. Asked if he might not have a problem working with women, he pointed to his good relationship with Richardson. Nancy and I “stay in the saddle together,” he explained. Indeed, he promoted Richardson.

---

46 Id.
47 M. HEINS, supra note 1.
from associate director to director of student life and community affairs in 1979.

Throughout 1980, another hiring controversy was brewing at BUSTH. A position had opened for an Old Testament specialist, and the interest of the search committee was focused on Stephen Reid, a young Black scholar just completing his dissertation at Emory University. Near the end of 1980, the faculty voted to hire him and sent their request to the central administration. There it sat. In March of 1981 President Silber began his review. Among his findings was the concern expressed by an assistant that the candidate "would not give us a Black perspective in Theology." Silber asked his provost to obtain more information on the candidate, but meanwhile Reid accepted a position at Berkeley's Pacific School of Religion. (There, the entire process from interview through vote and confirmation to final contract had taken but a few weeks.) The dean initially told the BUSTH faculty that the candidate had sold out and reneged on his promise to come to B.U. But a student learned Reid had never actually been offered a position. Nesmith then offered a different explanation: the unusual delay was required because hiring Blacks for tenure track positions requires great care. Why? Because once hired, it simply would not do to deny tenure to a Black teacher. Thus, Black candidates had to be super-qualified.

Meanwhile, in the summer of 1980 Nesmith decided to fill the vacant associate dean opening (which had been previously filled by the woman he had fired) with a white male Bible scholar who then held a position in B.U.'s central administration. Nesmith did not disclose his decision, and through the fall and winter he led the BUSTH community to believe that he was considering Dr. Julius Scott, a Black college president from Georgia. Nesmith ultimately informed the faculty that this candidate had taken himself out of the running. But faculty members later learned that until the appointment was actually made, Scott believed he was still under consideration.

Richardson felt, and explained to Nesmith, that his personnel decisions violated her belief in affirmative action. From Heins' description it appears that Richardson's definition of affirmative action included both the University's self-imposed obligation to make affirmative efforts to recruit and retain women and minorities, and its legal obligation not to discriminate in hiring and retention decisions. She was thus supporting models IV and V, the non-discrimination and outreach models of affirmative action, but was not concerned with the preference or quota models.

By the spring of 1981, Dean Nesmith was under considerable fire from faculty and students regarding his hiring decisions and the school's failure to attract female and Black faculty. Rather than supporting her dean on his controversial decisions, Richardson was openly critical, and she knew that Nesmith was unhappy about her opposition to his deci-
sions. She was nonetheless shocked when, at a May 29, 1981 meeting with Nesmith he informed her that he intended "to rearrange your relationship with the school, and you would probably experience it as termination." Her lawsuit followed.

Heins filed an action against Boston University and BUSTH Dean Nesmith with three causes of action. The first was a claim of unlawful retaliation: the defendants had fired Richardson in violation of the Massachusetts fair employment practice law because it was in retaliation for Richardson's opposition to unlawful sex and race discrimination. The second was a free speech claim: Richardson had been fired because of her advocacy in support of affirmative action, and thus in violation of her private free speech rights guaranteed by the Massachusetts Civil Rights Act, (which, unlike federal law, extends various constitutional rights to purely private actions). The third was a contract claim: the defendants had violated Richardson's contract rights by terminating her contract because she supported affirmative action, a principle which was part of the public policy of the Commonwealth, and thus breached the contract in violation of public policy. Heins viewed the second cause of action as the most important, seeing the case as a free speech case concerning the right of an individual to speak out in favor of affirmative action, even if it meant criticizing her employer. There was no claim that Richardson had herself been the victim of sex discrimination; the claim was that she had been retaliated against because of her opposition to discrimination and her support for affirmative action.

In discrimination litigation, admissions of discrimination, or other direct proof, are rare. Since only the employer knows the actual reasons for its decision, and few employers will admit discriminatory or retaliatory behavior, most cases rely on indirect proof—circumstantial evidence of discrimination coupled with the absence of any credible, non-discriminatory explanation. As the above facts demonstrate, Richardson's case was rich with such evidence.

One of the most difficult problems in employment discrimination cases is the fact that terminated employees have long histories, and no employee has a work record utterly devoid of conflicts or disagreements. Events that at the time of their occurrence seemed insignificant can be blown wholly out of proportion by an employer in a trial, thus offering justification for the termination. Most contacts between supervisor and

---

49 Discrimination law presumes that discrimination is generally intentional. One recent article suggests that if we apply our knowledge of psychology to the law of discrimination, we must recognize that intentional acts can be unintentionally discriminatory, but discriminatory all the same. Lawrence, The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 STAN. L. REV. 317, 343-44 (1987).
50 See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).
supervisee are one-on-one, with no other witnesses available to report them, and thereby help the trier of fact distinguish the severe reprimand from the minor disagreement. Even the employee who sincerely believes she had an unblemished work record may, once she charges wrongful termination, be confronted with a lengthy list of complaints.

For most employees the question is not whether the record is unblemished, but whether the blemishes actually explain the termination. The trier of fact must attempt to ascertain the employer's actual, subjective reasons for the termination. Where there are multiple reasons, some of which are lawful, some of which are not, the trier must decide whether the unlawful reasons were legally determinative.51

Heins and Richardson had a valuable start on avoiding this problem, because of Richardson's success at obtaining direct evidence about the reasons for her termination. After the meeting at which she was terminated by Nesmith, Richardson asked Nesmith for a tape-recorded follow-up meeting in which he would explain the reasons for his decision. He agreed. On tape, he explained his dissatisfaction at her being "on the firing line" on the "women's issue," that she was too far out "on the front of racism and justice," and that she was not supportive of B.U. on the Beverly Harrison decision. He further criticized some of her administrative work, complaining that she had failed to prevent noise in the cafeteria and had permitted the student government to get out of control. He agreed, however, that in administrative areas like housing and financial aid she had "succeeded." One would expect such a recording to focus the question of motivation at trial by eliminating red herrings. Yet Heins reports that in the end the case was successfully defended with significant reliance on the explanation that Nesmith was dissatisfied with Richardson's performance in the areas of housing and financial aid.

The key to understanding Heins' and Richardson's failure to persuade the jury that her termination was retaliatory may be found in the distinctions between the five models of affirmative action. A great deal of Heins' book is a review of the Supreme Court's decisions on affirmative action over the past decade. Heins' description shows that she sees affirmative action as primarily falling within Model III, the self-examination model. She undertakes little discussion of the quota model and the preference model. "The original logic of affirmative action was that dramatic statistical imbalances in a school or workforce raised an inference

51 The question of how to resolve the problem of mixed motive decisions is not an easy one, and has led to different resolutions in different jurisdictions and under different legal theories of wrongful discharge. See Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 CAL. L. REV. 292, 292-93, 299-310, passim (1992). While a "sole factor" test has been explicitly rejected by both Congress and the Supreme Court (id. at 296-97, 305), courts vary in how they interpret and apply the causation requirement. Standards vary from "any part at all" (id. at 308; but see id. at 306-07) to "a motivating factor" (id. at 305, 307), a "determinative" factor (id. at 310), or a "but for" cause (id. at 302). An excellent discussion of these various tests can be found in id.; passim.
that discrimination, or discriminatory assumptions about qualifications, were at work. Ending discrimination meant finding new ways of doing business, including rethinking the assumptions that had led to the skewed results. Richardson, in turn, was concerned with outreach and non-discrimination. When she criticized Nesmith's decisions, she was concerned both with actions she saw as discriminatory in themselves, and with Nesmith's insensitivity to the value of reaching out to hire women and minorities. But since Heins failed to cogently distinguish the models of affirmative action, the jury was left to decide for itself what was at stake. It would have been easy for the jury to assume that the controversy was over giving preferences to women and minorities, or hiring them to fulfill a quota.

In a special verdict, the jury concluded that Richardson reasonably believed that Nesmith and Boston University were engaging in unlawful employment practices, and that she had acted in good faith in objecting to those practices. But, they concluded, these objections were not the reason for Nesmith's decision to terminate her. One juror explained afterwards that they were prepared to find for all three of the candidates whose cause Richardson championed, none of whom were parties, but not for Richardson.

Which view of affirmative action the jury understood, and thus what they understood Nancy Richardson to be fighting for, is unknown. But there is significant anecdotal evidence that the public generally assumes the term to refer to the quota model; that the majority view the phrase "affirmative action" as a euphemism for "reverse discrimination," or discrimination against white men. This view of affirmative action has become sufficiently prevalent that even where a court declines the trap of accepting this assumption, the press may simply reinterpret decisions to retain it. A good example of this is the media's response to the Court's decision in the case concerning Diane Joyce, the promoted road worker in Johnson v. Transportation Agency, Santa Clara County, the second case illustrating the problems that result from confusion over affirmative action.

Joyce's Case

In 1978, the Santa Clara County transit district adopted a voluntary affirmative action plan which encompassed Models II, III and IV, the outreach, self-examination and preference models. Its purpose was to encourage the employment and promotion of women and minorities in those areas of employment from which they had been historically excluded, and in which they remained underrepresented. The plan pro-

---

52 Heins, supra note 47, at 15; see also id. at 16.
vided that in judging otherwise equally qualified candidates for positions which met this criteria, it would be permissible to consider an applicant's sex or race in order to encourage job integration. The plan had no explicit quotas, and did not require, but did permit, a woman or minority to be hired over an equally qualified white male. Among the job categories covered by the plan were the skilled craft worker positions. At the time of the plan's adoption, none of the transit district's 238 skilled craft positions was held by a woman.

The year following the adoption of the plan, a position opened for a road dispatcher, a supervisory position in the skilled craft category. The prerequisites for the job included prior experience as a road maintenance worker or dispatcher. Among the twelve applicants was Diane Joyce, a nine-year county employee who had been a road maintenance worker since 1975 (and the first, and only, woman ever to fill that position) and Paul Johnson, a twelve-year county employee who had been a road maintenance worker since 1977, and had once worked in a private dispatcher position. Joyce and Johnson were first reviewed by a panel of two male interviewers, who found seven of the applicants well-qualified, granting Johnson a numerical score of 75 and Joyce a score of 73. A second panel of men then reviewed them further. One member of that panel, a former supervisor of Joyce's, referred to her as a "rebel-rousing [sic], skirt-wearing person." When she tried to arrange her interview with him, he put her off until she disclosed a particular time when she would be unavailable; he then set the interview for that time.

The second panel recommended Johnson for the job. The Agency director reviewed the panels' recommendations and agreed that Johnson and Joyce were both well qualified. For numerous reasons, including Joyce's sex and the district's affirmative action plan, he decided to promote Joyce. Johnson sued, claiming sex discrimination.

Mr. Johnson was successful in the trial court. But on review the Supreme Court reversed, holding that an employer may consider an applicant's sex pursuant to an affirmative action plan where the plan avoids the use of strict quotas, is narrowly drawn to correct a manifest imbalance given the applicable work force, and is intended to be used only until a proper balance has been established. The Court approved, as it had in the past, the operation of a Model II plan.

Johnson is the first case to extend the Court's prior decisions authorizing race-based preferences to gender analysis. For that it is significant. But there is nothing particularly surprising about the analysis or result.

54 Id. at 624 n.5.
55 Id.
56 See 770 F.2d 752 (9th Cir. 1984) (noting that the district court granted Mr. Johnson a retroactive promotion and back pay, and enjoined the Agency from further discrimination).
57 480 U.S. at 635.
It is completely in line with the prior decisions permitting (although not requiring) carefully crafted voluntary affirmative action plans, be they Model I or Model II.58

What was surprising about *Johnson* is the reaction it provoked. When the decision was handed down, the media misreported it, treating the holding, to quote the *Los Angeles Times* and *The Christian Science Monitor*, as providing that “an employer may promote a woman over a more qualified man as part of an effort to get more women into better-paying jobs.”59 *Fortune* magazine characterized *Johnson* as “an opinion guaranteeing still more quotas in employment.”60

IV. THE RELATIONSHIP BETWEEN AFFIRMATIVE ACTION AND DISCRIMINATION

The media misreporting of *Johnson* is telling, as was the attitude towards affirmative action evidenced by the trial judge in Richardson’s case. When Heins sought an instruction under her cause of action for violation of public policy, which asserted that as a matter of law, affirmative action is the public policy of the Commonwealth of Massachusetts, the defense argued that this assertion was one of fact, not law, to be resolved by the jury. The judge, in clear error, ruled that the question was one not of law or fact, but instead was a political question, and should therefore be determined by the jury. He was unwilling to endorse that affirmative action, as he understood it, was the public policy of Massachusetts.

The jurors willing to find for the three applicants for whom Richardson advocated, but not Richardson, the judge unwilling to declare affirmative action the public policy of the Commonwealth, and the media misreporting of the *Johnson* case all lend support to the view that there are two related critical facts about affirmative action which civil rights advocates need to recognize. The first is that many Americans believe, at least as an abstract statement of policy, and probably as an article of faith, that our society ought to be meritocratic—that all discrimination based on race or sex is wrong. The second is that the public often understands affirmative action to refer to the quota model, and in turn views this as “reverse discrimination”—sex and/or race discrimination against whites and/or men, and believes that this too is wrong.

The public belief that affirmative action is a euphemism for reverse discrimination represents, in part, a failure on the part of those of us who believe in affirmative action to present our position effectively. Certainly one type of affirmative action is the operation of quotas and/or prefer-

---

58 See generally supra discussion accompanying notes 1-31.
ences for minorities and women for particular positions or programs. But affirmative action as practiced daily is far more likely to mean the self-examination, outreach and non-discrimination models. Outreach, consciousness raising, and the re-examination of standards are far more a part of the activity of personnel offices and civil rights advocates alike than administering preferences or quotas. And as important a role as they already play, these models ought to be even more prominent.

Application of Model III, for example, ought to force us to examine the underpinnings of the selection systems for which the quota is sometimes the lazy solution. It is only when we accept the MCAT exam, with its questions which examine the test takers' knowledge of grand opera as part of its segment on “general knowledge” as a valid indicator of who should be admitted to medical school, that we resort to Model I to find a way to admit more minority applicants. The problem of the MCAT exam should have been at the heart of the Bakke case. But because of the way the case proceeded through the courts, there was no challenge of the assumptions about merit, and how it is measured, which underlie the University’s reliance on the MCAT examination as the key to determining medical school admission. By its framing of the facts and argument, the Court and the litigants (the white challenger and the University) made it all too easy to avoid treating affirmative action as a re-examination of why the standards being applied resulted in the exclusion of minorities, and instead treat it as a heavy-handed device to correct social imbalance by replacing merit selection with quotas. By loading the question, the answer was pre-ordained.

For the same reason that the Court ought to have questioned the medical school’s use of the MCAT, law schools must question their reliance on the LSAT. The test accurately predicts success in the first year of law school, but has a statistically adverse impact on Blacks. We cannot validate it as a predictor of success in the legal profession. Should we nonetheless accept it as non-discriminatory? If not, we need to determine what remedies are appropriately used to eliminate the exam’s apparently discriminatory effect.

More broadly, it is the application of Model III which demands that we ponder whether, when white men administer a system which, in gen-

---


62 The University did not raise the discriminatory effect of the MCAT as part of its defense.

63 Memorandum from Law School Admissions Council (Feb. 15, 1989) (LSAT correlation studies).

64 In the fall of 1988, the mean LSAT score for white test takers was 33.08, while the mean score for Black test takers was 23.79. See Distribution for Candidate Referral Service Candidates, Law School Admissions Council (Jan. 13, 1989).

eration after generation, results in a determination that those who are smartest, or ablest, or most worthy of success are white men, it is discrimination to conclude that the standards being applied are biased. It demands that we ask, when 238 positions are held by 238 men, if the promotion of a woman into one of those positions looks like a discrimination problem. And it asks that we further examine, in reviewing that woman's qualifications, whether it is relevant that the group of reviewers who found her equally qualified as her less experienced male competitor were all men? We have failed to make this understanding of affirmative action, and the questions it raises, the focus of the public debate.

But to make matters far worse, all too often a description of a decision as being an "affirmative action" decision is nothing of the sort. Instead, when women and minorities are hired or promoted into positions they have earned by competing on the same terms as the white men who were passed over, or admitted into schools because their abilities and accomplishments have been recognized, the disappointment of the unsuccessful candidate is cynically assuaged with the explanation that affirmative action required the choice.

To change the nature of the debate and the perception of affirmative action is a monumental task. But the task is made more difficult because affirmative action has become such a loaded, and unpopular, term. The cases involving the quota model are the most provocative. They are the most difficult to defend and the most likely to command public attention. They also represent a tiny portion of the litigation concerning discrimination, and yet they are the most visible. Their unpopularity taints all discrimination cases. While civil rights supporters need to continue to support the appropriate application of the quota model, we also need to recognize its limited role, and isolate these cases from the remainder of anti-discrimination law. We need to recognize that it is because the other models are more easily understood to be anti-discrimination models that they command greater public support.

As a first step, we ought to examine whether cases labeled as affirmative action cases cannot be legitimately viewed analytically as discrimination cases. In so doing, we may be more effectively able to move toward the affirmative action goal of eliminating discrimination.

V. Richardson and Joyce Revisited: Applying the Non-Discrimination Model

In Richardson's case, what would have happened if Heins and Richardson had pursued only the first cause of action, and had argued that the termination was based not on Richardson's general advocacy of affirmative action, but simply on her vocal objections to the failure to hire the three Black or female candidates? Numerous witnesses were
available to testify that she was vocal in her opposition to each of these decisions. Indeed, the jury agreed in the special verdict that she had a good faith belief that the University was unlawfully discriminating. The evidence was equally clear that, whatever other objections he may have had, the dean was quite unhappy with Richardson’s advocacy. Thus presented, the case would have been far simpler to understand. There would have been no argument over the policy status of affirmative action.

Would it have also seemed a greater unfairness to the jury if Richardson was presented not as the champion of an abstract and controversial policy but as someone who, for ethical reasons, would not stand by while others were victimized because of their race or sex? Heins tells us that the jury basically liked and respected her client and did not entirely believe the dean. Why then didn’t the jurors vote their sympathies? They may, of course, simply have decided that, sympathy notwithstanding, there was a failure of evidence to support the proper standard of proof and their oath thus required them to ignore what their hearts told them was right. But jurors generally do what they believe is right. If she had concentrated on discrimination, and left affirmative action out of the picture, Heins would have improved her client’s chances of prevailing.

The same problem is raised by the Court’s decision in the *Johnson* case. *Johnson* is ripe with hints that what was really going on was an unarticulated recognition by the transit district that to promote Johnson over Joyce would have been sex discrimination against Joyce. The district could have defended its decision on this basis. Instead, perhaps because it was easier, it relied on its affirmative action plan to explain its choice.

For example, although Justice Brennan notes that one of the interviewers described Joyce as a “rebel-rousing [sic], skirt-wearing person” he ascribes no particular significance to it; he simply notes it and moves on. In a Model I (quota affirmative action) analysis, this is simply an interesting fact. But if the case were being examined from the point of view of discrimination, this comment would be at the center of the discussion. Why did Johnson rather than Joyce merit the promotion? One of the two people who made that recommendation also saw fit to comment on her skirt-wearing, a trait which certainly appears to be gender-related.66 Moreover, he connected her skirt-wearing with her rabble-rousing, a clear disparagement. If Johnson, with fewer years experience in the qualifying job, had been promoted over Joyce on the recommendation of a man who connected his own bad impression of Joyce with her gender, thus depriving her of a promotion into a job category in which the employer had never hired a woman, the case would stink of sex dis-

---

66 *But see* General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976), in which the Court held that pregnancy was not gender-specific. If pregnancy is not gender-related, perhaps skirt-wearing is also one of those characteristics that suggests no particular gender relation.
AFFIRMATIVE ACTION

61
crimination. Instead, the employer was able to shift the focus, to John-
son's advantage, by terming its unwillingness in these extreme
circumstances to ratify the supervisor's discrimination as "affirmative
action." If Brennan had not passed so quickly by this gem, but had
instead lingered and polished it a little, the case might have been both
easier to understand and, for many, easier to accept. To explain the
case as an affirmative action case may simply obscure the sex discrimina-
tion against Ms. Joyce that was at its core.

VI. CONCLUSION

In a society that has systematically denied the rights of women and
minorities by operation of law and custom, it is folly to expect a principle
of non-discrimination alone to remedy the problem of inequality. With-
out thorough re-examination of the standards we apply, whether to
employment applications, school admissions, or professional licensing,
we will never change the dominance we now permit based on race and
sex. Without aggressive outreach, it is delusional to expect minorities in
particular to find their way to the "starting line" from which all are now
expected to have an equal sprint. And without sustained enforcement of
the anti-discrimination laws, there is no reason to hope for change. But
within this framework, when cases described as affirmative action cases
reach the courts, they should be carefully examined to see if they can be
analyzed as non-discrimination cases. In discussing affirmative action, it
is incumbent on us to clarify which model we are describing. To the
extent that cases challenging race and sex preferences benefitting women
and minorities can be re-examined this way and distinguished from other
discrimination cases, the goal of non-discrimination will benefit.

67 Another fact passed over in Johnson was the fact that following his filing of the lawsuit, Mr.
Johnson was promoted into the dispatcher position. He thus found himself in a position simi-
lar to Allan Bakke, who was completing his third year of medical school at Davis when the
Court invalidated the University's special admission plan and ordered him admitted. See 18
Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976) (California Supreme Court
directed the trial court to order Mr. Bakke's admission to the University).

It is, of course, a basic principle of law that subsequent remedial action should not be
viewed as an admission of prior improper conduct. But in the area of discrimination law I am
tempted by experience to argue that defendants should be permitted to argue that their subse-
quent remedial action may constitute evidence of non-liability. In the past ten years I have
handled over 100 cases charging employment discrimination on behalf of women and minori-
ties. I can recall only one case in which my client was promoted after filing a complaint of
discrimination, and that promotion came under highly unusual circumstances. Far more
often, the plaintiff is isolated, subjected to harassment, or simply fired. A rule that recognizes
this reality and provides that evidence of a promotion following a complaint of discrimination
shall constitute admissible evidence that the conduct complained about was not discrimina-
tory might be a very effective Model II affirmative action device.