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NOTE

THE PHILADELPHIA PLAN: REMEDIAL RACIAL CLASSIFICATION IN EMPLOYMENT

In recent years the civil rights of minority groups have been the focus of growing concern, and as a result, significant efforts have been made to promote such policies as school integration,¹ open and fair housing,² equal voting rights,³ and desegregation of facilities catering to the public.⁴ The right, however, to nondiscriminatory employment opportunities, which is essential if minority groups are to achieve the economic ability to enjoy fully their revitalized rights,⁵ has not been advanced


⁵ As stated in the House Judiciary Committee's Report accompanying H.R. 7152, later revised and enacted as the Civil Rights Act of 1964, "[t]he rights of citizenship
concomitantly. Unemployment rates among minority groups are generally twice the national average, and the Department of Labor estimates that within the next decade unemployment rates for nonwhites will increase to approximately 25 percent. In addition, whites are more likely to be employed in skilled positions than nonwhites, who frequently are consigned to unskilled and hence lower paying positions, resulting in a substantially disproportionate earning capacity. Thus, it is more probable that nonwhite workers not only will be unemployed, but even if employed, will have a lower job status with commensurately less remuneration than similarly situated whites.

Recognizing the seriousness of these problems, the Department of Labor has promulgated the Philadelphia Plan, which is designed to

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**Footnotes:**


7 In November 1969, the national unemployment rate for white males between the ages of 20 and 64 was 1.8 percent; for nonwhite males of the same age group, the rate was 3.6 percent; unemployment for persons between the ages of 25 and 54 was 1.4 percent for white males and 2.8 percent for nonwhite males. Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings* 51 (1969).


9 In November 1969, 21 percent of the total white male population was employed as craftsmen or foremen, while only 15.5 percent of the total nonwhite population was so employed; only 25.2 percent of white males were listed as blue collar operatives or nonfarm laborers, while 45.4 percent of the nonwhite male population was in the same category. Bureau of Labor Statistics, *supra* note 7, at 63. See also *CCH Employment Practices* ¶¶ 8006, at 6008-09 (1969).


The Philadelphia Plan as promulgated by these two orders is actually the second plan so named. The first plan, which was abandoned in November 1968, required con-
eliminate discrimination in hiring by contractors and subcontractors on federal and federally assisted construction projects. The Plan, however, has been the subject of considerable criticism, particularly in regard to the legality and wisdom of its underlying policy of imposing minimum employment requirements for utilization of minority group manpower. Because of the Plan's significance as a prototype vehicle for combating the deleterious effects of past and present racial discrimination, it is necessary that its legality be established.

This Note, therefore, after discussing the Plan itself, evaluates the Plan's legality by examining first, the use of Executive orders to eliminate racial discrimination by government contractors; second, the authority of the President to issue such orders; third, the constitutional objections to the Plan under the fifth amendment; and last, the Plan's legitimacy in light of the Civil Rights Act of 1964.

THE PLAN AND ITS BACKGROUND

Justification for the Philadelphia Plan was provided by extensive findings that Philadelphia's labor unions, from which building contractors obtained their employees, had discriminatory membership admission policies.\textsuperscript{11} For example, in each of the construction trades less than two percent of union membership represented minority groups,\textsuperscript{12} a ratio substantially disproportionate to the number of minority group members

tractors to negotiate minority manpower utilization goals after having been awarded federal contracts. The Comptroller General objected to this procedure, alleging that such a requirement of post-award negotiation violated competitive bidding practices. The new plan was designed specifically to meet these objections by requiring the minority group employment program to be in the bid itself. See CCH Employment Practices $ 8058, at 6096-97 (1969).

Contractors can avoid imposition of the Philadelphia Plan if they engage in a multi-employer antidiscrimination program approved by the regional director of the Office of Federal Contract Compliance, a subdivision of the Department of Labor. Order of June 27. The participating contractors are exempted, however, only if the approved multiemployer program covers all the trades included in the Philadelphia Plan. \textit{Id.}

\textsuperscript{11}Extensive documentation of discrimination was set forth in the Order of Sept. 23. The statistics demonstrating discrimination were taken from a number of sources, including surveys by the Department of Labor's Manpower Administration, the Office of Federal Contract Compliance, and the Pennsylvania Department of Labor and Industry, and public hearings conducted by the Labor Department. Order of Sept. 23.

\textsuperscript{12}The following statistics indicate the percentage of minority group membership in the Philadelphia area unions: iron workers—1.4%; steamfitters—0.65%; sheetmetal workers—1.0%; electricians—1.76%; elevator construction workers—0.54%; plumbers and pipefitters—0.51%. \textit{Id.}
qualified to work in each trade. Furthermore, union membership was denied notwithstanding both the substantial number of vacancies resulting from normal attrition and the additional positions regularly created to meet the growth of the construction industry.

Designed as a remedy for such discriminatory practices and formulated under authority of the affirmative action provisions of Executive Order No. 11246, the Philadelphia Plan requires that in soliciting bids for federal construction contracts in the Philadelphia area, contracting governmental agencies must include in their solicitations specific goals for minority manpower utilization in designated construction trades, expressed in percentage ranges of man-hours to be worked. A con-

<table>
<thead>
<tr>
<th>Trade</th>
<th>Union Members</th>
<th>Minority Workers Available</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iron Workers</td>
<td>850</td>
<td>377</td>
</tr>
<tr>
<td>Plumbers, Pipefitters</td>
<td>4,643</td>
<td>1,597</td>
</tr>
<tr>
<td>and Steamfitters</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sheetmetal Workers</td>
<td>1,688</td>
<td>625</td>
</tr>
<tr>
<td>Electrical Workers</td>
<td>2,274</td>
<td>1,270</td>
</tr>
<tr>
<td>Elevator Construction Workers</td>
<td>562</td>
<td>43</td>
</tr>
</tbody>
</table>

Id.

14 The normal attrition rate for all reasons except growth in the industry is approximately 7.5 percent. Moreover, the combination of vacancies available because of industry growth and those normally available because of attrition results in the following percentages of vacancies available in the designated trades each year: iron workers—11.2%; plumbers & pipefitters—10.4%; steamfitters—10%; sheetmetal workers—9.5%; electrical workers—9.7%; elevator construction workers—9.6%. Id.


16 The Plan originally was restricted to the Philadelphia area. Order of June 27. The Department of Labor, however, recently announced that the Plan will be applied in 19 other cities. CCH EMPLOYMENT PRACTICES, ¶ 8191 (Feb. 16, 1970).

17 Minorities include Negroes, Orientals, American Indians, and Spanish-surnamed Americans—the latter includes all persons of Mexican, Puerto Rican, Cuban, or Spanish ancestry. Order of June 27.

18 The trades included in the Philadelphia Plan are ironworkers, plumbers and pipefitters, steamfitters, sheetmetal workers, electrical workers, and elevator construction workers. Order of Sept. 23. Originally, roofers and waterproofers were included in the Plan, but were removed upon a finding that minority groups were adequately represented in these trades. 72 LAB. REL. REP. 313 (Nov. 10, 1969).

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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Iron Workers</td>
<td>5-9%</td>
<td>11-15%</td>
<td>16-20%</td>
<td>22-26%</td>
</tr>
<tr>
<td>Plumbers &amp; Pipefitters</td>
<td>5-8%</td>
<td>10-14%</td>
<td>15-19%</td>
<td>20-24%</td>
</tr>
<tr>
<td>Steamfitters</td>
<td>4-8%</td>
<td>11-15%</td>
<td>15-19%</td>
<td>20-24%</td>
</tr>
<tr>
<td>Sheetmetal Workers</td>
<td>4-8%</td>
<td>9-13%</td>
<td>14-18%</td>
<td>19-23%</td>
</tr>
<tr>
<td>Electrical Workers</td>
<td>4-8%</td>
<td>9-13%</td>
<td>14-18%</td>
<td>19-23%</td>
</tr>
<tr>
<td>Elevator Construction Workers</td>
<td>4-8%</td>
<td>9-13%</td>
<td>14-18%</td>
<td>19-23%</td>
</tr>
</tbody>
</table>
tractor responding to a bid solicitation must set forth his program for utilizing specific numbers of minority group members.\(^{20}\) The contracting agency then must award the construction contract to the lowest bidder, disregarding the bid of any contractor who does not submit a plan that would meet the goals contained in the solicitation.\(^{21}\) Finally, the ranges of minority group members to be utilized on the particular project are stated in the awarded contract.\(^{22}\)

Since the obligation of the contractor-employer to meet his Philadelphia Plan goals is an unqualified contractual promise,\(^{23}\) failure to do so is a breach of contract for which sanctions may be invoked. Nevertheless, the Secretary of Labor has directed that before invoking such sanctions, contracting agencies must allow a contractor an opportunity to demonstrate that he has made "every good faith effort" to meet his goals.\(^{24}\) In defining "good faith," however, the Department of Labor specifically stated that continued reliance upon referrals by discriminatory unions, even if pursuant to a collective bargaining agreement, will

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These ranges are subject to revision by the Department of Labor if it finds that they do not adequately reflect changing conditions in the construction labor market, but in no event may they be revised upward during the term of an awarded contract. Order of Sept. 23. The specific ranges were decided upon after consideration of several factors including:

(a) The current extent of minority group participation in the trade.
(b) The availability of minority group persons for employment in such trade.
(c) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.
(d) The impact of the program upon the existing labor force.

\(^{20}\) In order for the contracting agency to accurately determine whether a contractor's submitted affirmative action plan complies with the specified guidelines, the bidder is required to estimate by trade the number of persons to be employed on the project and the number of minority group members to be so employed. \emph{Id.}

\(^{21}\) \emph{Id.}

\(^{22}\) Order of June 27. Whenever the prime contractor subcontracts any portion of the project, he must include as a provision of the subcontract a proportionate part of his Philadelphia Plan obligations. The provisions of the subcontract bind the subcontractor to meet the goals to the same extent that the primary contractor is bound. \emph{Id.}

\(^{23}\) Although much discussion has taken place over the "good faith" standard of compliance in the Plan, the standard is not legally significant because it is not set forth in the contract and the parol evidence rule prevents a prior inconsistent writing from modifying the terms of a contract complete on its face. \textit{See} Klebe v. United States, 263 U.S. 188 (1923); United States v. Croft-Mullins Elec. Co., 333 F.2d 772 (5th Cir. 1964), \textit{cert. denied}, 379 U.S. 968 (1965). \textit{See also} A. Corbin, \textit{Contracts} § 573 (1964).

\(^{24}\) Order of June 27. The prime contractor is not responsible for the failure of a subcontractor to meet his goals or his failure to make a good faith effort to do so. If the subcontractor fails to meet his goals or to make a good faith effort, the same sanctions that are available against the prime contractor may be imposed upon him. Order of Sept. 23.
not justify failure to meet the goals,\textsuperscript{25} rather, "good faith" requires that a contractor make a significant effort to broaden his job-recruitment base.\textsuperscript{26}

If it is determined that a contractor has breached his Philadelphia Plan obligations and has failed to make "every good faith effort" to comply with the minority manpower utilization goals, the contracting agency is directed to take such "action and impose such sanctions as may be appropriate."\textsuperscript{27} Although the only sanction specifically enumerated in the Plan is disqualification from bidding on future government contracts,\textsuperscript{28} Executive Order No. 11246 provides other enforcement procedures and sanctions that can be imposed for various violations,\textsuperscript{29} including a recommendation of criminal\textsuperscript{30} or civil\textsuperscript{31} proceedings, "cancellation, suspension, or termination" of the contract,\textsuperscript{32} and ineligibility for future contracts.\textsuperscript{33}

\textsuperscript{25} Order of June 27.

\textsuperscript{26} Order of Sept. 23. To meet the "good faith effort" standard, the contractor must at least: (1) bring notice of the employment opportunities to the attention of community organizations that may know of qualified minority personnel; (2) record the disposition of all minority workers referred to him; (3) inform appropriate authorities if a union is impeding his attempts to comply with the goals; and (4) participate in minority training programs funded by the Manpower Administration of the Department of Labor. \textit{Id.}

\textsuperscript{27} Order of June 27.

\textsuperscript{28} \textit{Id.}


\textsuperscript{30} Exec. Order No. 11246, § 209(a) (4), 3 C.F.R. 410 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969). This penalty, however, is available only for filing false information, 18 U.S.C. § 1001 (1964), and its very harshness may preclude its use. For example, in 1953 a Presidential committee found that "possible criminal liability is not consonant with the philosophy" of nondiscrimination clauses in government contracts. \textit{President's Comm. on Government Contract Compliance, Equal Economic Opportunity 41} (1953).

\textsuperscript{31} Exec. Order No. 11246, § 209(a) (2), 3 C.F.R. 410 (Supp. 1969), 42 U.S.C. § 4000e (Supp. IV, 1969). If in addition to not meeting his obligations under the Plan a contractor is also violating Title VII of the Civil Rights Act of 1964, the Department of Labor or the contracting agency also can recommend that either the Equal Employment Opportunity Commission or the Justice Department take appropriate action. \textit{Id.} § 209(a) (3).

\textsuperscript{32} See \textit{id.} § 209(a) (5). Both these sanctions and civil proceedings, however, must be preceded by informal attempts on the part of the contracting agency to secure compliance through "conference, conciliation, mediation, and persuasion." \textit{Id.} § 209(b). See generally M. Sovery, \textit{Legal Restraints on Racial Discrimination in Employment} 11-17, 254-58 (1966); \textit{Note, Executive Order 11246, supra} note 29.
Subsequent to announcement of the Plan, an intergovernmental controversy arose over its legality, and the Comptroller General threatened to withhold funds from contracts executed pursuant to it, contending the "goals" were racial quotas and thus in violation of the Civil Rights Act of 1964. In response, the Department of Labor, supported by the Attorney General, reasserted the legality of the Plan, arguing that since the contractor must meet only a flexible standard—the percentage range included in the bid solicitation—and since compliance is measured by a good faith rather than an absolute standard, the Plan's goals were not quotas. The Plan is involved presently in litigation.

While the contractor may select, from within the prescribed range, the number of minority group members he will hire, he must submit in his bid a program to employ a specific number of such persons. Sim-

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37 The United States District Court in Philadelphia upheld the Plan as "clearly within the authority of the Executive Branch." Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970). Moreover, two bills were introduced in Congress to prohibit the implementation of the Plan. One bill was defeated and no action has been taken on the other. See notes 101-03 infra and accompanying text.
ilarly, if the bid is accepted, the Plan requires that the awarded contract specify the number of persons to be hired within each of the designated trades. Furthermore, even if the contract provision and bid solicitation only required the contractor to maintain an employment ratio within the given ranges, such a requirement in effect would establish a quota at the lower limit of the range.

Similarly, the good faith standard of compliance also fails to distinguish sufficiently the goals from quotas. The obligation of the contractor to employ a specific number of minority group members is absolute on its face; the good faith standard is derived from a directive in the Labor Department order establishing the Philadelphia Plan, which was designated to guide the agency heads in determining when to impose sanctions for noncompliance. Because of the dubious merit of the goal/quota distinction and because the legal validity of the Plan should be based upon its substance rather than upon definitional technicalities, for purposes of this analysis the Plan’s “goals” will be considered “quotas.”

Nondiscrimination Clauses in Executive Orders

history

Presidential attempts to eliminate discrimination by employers who enter into contracts with the federal government are by no means a recent development. For 29 years, successive Presidents have issued Executive orders pertaining to nondiscrimination clauses in contracts awarded by federal agencies. The Philadelphia Plan, which was established by the Department of Labor under the authority of the affirmative action requirements of President Johnson’s Executive Order No. 11246, simply represents a culmination of these continuous attempts to provide equal employment opportunities for minority groups.

38 See Order of June 27; Order of Sept. 23.
The first Executive order dealing with nondiscrimination clauses in government contracts was issued by President Roosevelt in 1941.\textsuperscript{41} It required that a negatively worded clause be included in all federal defense contracts, whereby employers promised "not to discriminate against any worker because of race, creed, color, or national origin."\textsuperscript{42} The order also created the Committee on Fair Employment Practice (FEPC) to receive and investigate complaints of discrimination and recommend corrective action to the contracting agency heads;\textsuperscript{43} however, despite a later order requiring nondiscrimination clauses in all federal contracts,\textsuperscript{44} and a revitalization of the FEPC,\textsuperscript{45} the committee was abolished in 1946.\textsuperscript{46} Although the nondiscrimination clause was still required, with no agency responsible for its enforcement even in an advisory capacity, compliance became completely voluntary.\textsuperscript{47} Thus, in a series of Executive orders issued in 1951, President Truman attempted to revitalize the nondiscrimination requirement by placing enforcement responsibility directly upon the contracting agencies;\textsuperscript{48} the President further instructed them to secure compliance by the same means generally utilized to

\textsuperscript{41} Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). This Order was issued in response to pressure exerted by Negroes, who threatened to march upon Washington, D. C. See L. Ruchames, Race, Jobs & Politics 12-20 (1953). See generally M. Sovern, supra note 32; Note, Executive Order 11246, supra note 29.


\textsuperscript{43} Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). The FEPC was authorized to take "appropriate steps to redress grievances which it finds to be valid." In practice, however, these unspecified "appropriate steps" entailed only recommendations to agencies, moral suasion, and attraction of public attention. See generally M. Sovern, supra note 32.

\textsuperscript{44} Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943). President Roosevelt explicitly stated to the Attorney General that nondiscrimination clauses were mandatory and must be included in all government contracts. Letter from President Roosevelt to Attorney General Francis Biddle, reprinted in 12 L.R.R.M. 2309-10 (1943).

\textsuperscript{45} Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943). The original FEPC broke down because of internal difficulties. BNA, supra note 5, at 10.


enforce government contracts. Nevertheless, the agencies still awaited complaints of discrimination before initiating investigations and taking corrective actions.

The next major development occurred in 1955 when President Eisenhower issued Executive Order No. 10557, which particularized those practices proscribed by the nondiscrimination requirement. In addition to offering equal opportunities in hiring, contractors were required to pledge not to discriminate in decisions concerning upgrading, transfers, demotions, recruiting, training, layoffs, and rates of pay. A more significant development during the Eisenhower administration, however, was the "General Agreement," in which federal contracting agencies abandoned the policy of passively waiting for complaints of discrimination in favor of an active effort to secure compliance, utilizing on-site inspections and contractor compliance reports.

In 1961, President Kennedy promulgated Executive Order No. 10925, which substantially strengthened the nondiscrimination clause by requiring contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin." Furthermore, enforcement responsibility was placed in one centralized organization, the Committee on Equal Employment Opportunity, which had power to conduct its own investigations, publish blacklists, recommend that suits be brought by the Justice Department, and terminate any contract on its own initiative. The Order also required contractors to file regular compliance reports enumerating their "practices, policies, programs and employment statistics." The scope of these affirmative action require-

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49 See President's Comm. on Government Contract Compliance, Equal Economic Opportunity 6 (1953).
52 Id.
53 President's Comm. on Government Contracts, Second Annual Report 3 (1955). A manual was issued to guide agency compliance officers. See President's Comm. on Government Contracts, Equal Job Opportunity Program (1956). Interestingly, the manual directed compliance officers to judge a contractor's efforts by comparing the number of qualified minority workers employed by the contractor with the number of such persons in the community. Id. at 10-11. Thus, the focus of enforcement changed from remediying individual grievances to the correction of discrimination against classes. See T. Kheel, Report to Vice-President Johnson on the Structure and Operations of the President's Comm. on Equal Employment Opportunity 36-41 (1962).
55 Id. at 1978.
ments subsequently was expanded to include contractors on federally-assisted construction projects.\textsuperscript{56}

The Executive order presently in effect, No. 11246,\textsuperscript{57} which was issued by President Johnson in 1965, essentially incorporates previous Orders. Thus, a contractor is required to take affirmative action insuring equal employment opportunities,\textsuperscript{58} advertise his commitment to non-discrimination,\textsuperscript{59} and file detailed compliance reports.\textsuperscript{60} Furthermore, overall supervision is placed in the Secretary of Labor,\textsuperscript{61} who has established the Office of Federal Contract Compliance (OFCC) for this purpose;\textsuperscript{62} although each agency is primarily responsible for securing compliance, rules promulgated by the Department of Labor are mandatory upon the agencies.\textsuperscript{63} Finally, the Secretary of Labor may impose a number of available sanctions for noncompliance, including cancellation, termination, or suspension, in whole or in part, and a declaration that the noncomplying contractor is ineligible for future contracts.\textsuperscript{64}

Despite this evolutionary development of Executive orders requiring nondiscrimination clauses, successively accompanied by broader and stricter obligations and remedies, there has been no significant reduction


During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, or national origin. Such actions shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employers and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

\textit{Id.}

\textsuperscript{59} Id. § 202(3).

\textsuperscript{60} Id. § 203(a), (d). The report also must include information about the policies of those labor unions that have contracts with the employer. \textit{Id.} § 203(c)-(d).

\textsuperscript{61} Id. §§ 205-06.

\textsuperscript{62} 41 C.F.R. §§ 60-1.1 to -1.47 (1969).


\textsuperscript{64} Id. §§ 209-12; see notes 29-33 supra and accompanying text.
of discrimination by government contractors. To some extent, the failure of the orders to eliminate discrimination may be attributed to the vagueness of the contract obligations, the lack of viable remedies to force compliance, and the general experience of diffused and shifting enforcement responsibility. The major reason for the ineffectiveness of the Orders, however, has been the inaction of the various agencies and committees responsible for enforcing the nondiscrimination obligations. There is no evidence that during the entire 29 years Executive orders have prohibited discrimination, any contract has ever been cancelled or that a noncomplying contractor has ever been barred from bidding on future contracts. Moreover, for the last nine years, during which contractors have had affirmative action obligations, governmental enforcement efforts have been restricted to mediation and conciliation.

As a remedy for discrimination in employment opportunities, therefore, the Philadelphia Plan is an extension of the increasingly broader and stricter requirements of successive Executive orders. It is unique, however, because in providing numerical standards, it establishes a readily ascertainable criterion by which compliance can be measured. Furthermore, by attracting public attention and by making contractors more aware of their obligations, the controversy that has surrounded the Plan may serve indirectly to stimulate greater efforts to achieve a more integrated work force. Nevertheless, the ultimate success of the Plan necessarily will depend upon the willingness of the Executive to vigorously enforce the Plan’s obligations.

EXECUTIVE AUTHORITY

Although at one time the Executive was considered by some to have “inherent power” over all matters not specifically entrusted by the Constitution to Congress or the judiciary, it is now well established

65 Fletcher Interview, supra note 8; see M. Sovern, supra note 32, at 140.
66 See generally T. Kheel, supra note 53; President’s Comm. on Government Contracts, Equal Job Opportunity Program (1956); President’s Comm. on Government Contracts, First Report (1954); President’s Comm. on Government Contract Compliance, Equal Economic Opportunity (1953).
67 See M. Sovern, supra note 32, at 11-17, 254-58; President’s Comm. on Government Contract Compliance, Equal Economic Opportunity (1953).
68 Fletcher Interview; see M. Sovern, supra note 32, at 11-17, 254-58.
69 Fletcher Interview; see Note, Executive Order 11246, supra note 32.
71 See generally T. Roosevelt, Autobiography 378, 388-89 (1916); Foley, Some Aspects of the Constitutional Powers of the President, 27 A.B.A.J. 485, 488-89 (1941); Kauper, The Steel Seizure Case: The President and the Supreme Court, 51 Miss. L.
that the Executive's domestic powers must either be derived from the Constitution itself\(^7\) or be delegated by Congress.\(^7\) Thus, since the Constitution grants Congress the exclusive power to authorize appropriations\(^7\) and, as a necessary corollary, to designate the purposes for which such monies should be spent, it has primary responsibility for implementing social policies through federal spending;\(^7\) the Executive is responsible only for executing authorized appropriations in accordance with congressional intent.\(^7\)

Since, however, such execution necessarily entails a certain degree of discretion in deciding the means to be used in expending appropriations, the Executive has an indirect power to implement social policies; it can require that appropriate covenants and provisions be included in government contracts that it awards.\(^7\)

\(^7\) Rev. 141 (1952); Note, Growing Executive Power and the Constitution, 4 Syracuse L. Rev. 109 (1952).

\(^7\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951). In domestic affairs, the Executive has power to protect federal officers and property and to ensure the laws of Congress. U.S. Const. art. II, § 3; see Kauper, supra note 71; Speck, Enforcement of Nondiscrimination Requirements for Government Contracts Work, 63 Colum. L. Rev. 243, 244-50 (1963).

\(^7\) "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1951).

\(^7\) U.S. Const. art. I, § 9, cl. 7; see, e.g., Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1936); Sutton v. United States, 256 U.S. 575 (1921); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 610 (1838).


\(^7\) See, e.g., Goodyear Tire & Rubber Co. v. United States, 276 U.S. 282 (1928); Sutton v. United States, 256 U.S. 575 (1921); Hooe v. United States, 218 U.S. 322 (1910); The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868). When the Executive actually expends appropriated funds, he must do so consonant with congressional intent; however, he may be under no duty to expend such funds at all. See Stassen, Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations, 57 Geo. L.J. 1159 (1969).

\(^7\) Arizona v. California, 373 U.S. 546, 579 (1963); The Mail Divisor Cases, 251 U.S. 326, 329 (1920). The discretion of the President to require conditions and impose obligations in contracts varies inversely with the specificity of congressional enactments; if Congress provides detailed instructions for contracts, the President's power is correspondingly restricted, since he may not contravene congressional requirements. See United States v. Goltra, 312 U.S. 203, 208 (1941); Eastern Extension Tel. Co. v. United States, 251 U.S. 355, 363 (1920). See also G. L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963). When, however, a statute does not contain detailed requirements for contracts, the Executive is given reasonable latitude in expending funds. See The Mail Divisor Cases, supra; United States v. MacDaniel, 32 U.S. (7 Pet.) 1 (1833).
theless, by statutory interpretation, this power has been limited and applies only to contractual provisions and conditions that neither increase the cost of procuring goods and services nor restrict competition. 78

Because the Philadelphia Plan probably will increase the cost of construction projects, 79 it cannot be considered a valid exercise of the President’s executory responsibility to expend authorized appropriations; 80 however, Executive power also can be exercised validly if done pursuant to an express statutory authorization or implied congressional consent. 81 Executive Order No. 11246, upon which the Philadelphia Plan is based, does not enumerate any specific statutory authority, making only broad reference to “the Constitution and statutes of the United States.” 82 Although this vague authority has not been judicially defined, 83 two cases 84 have considered briefly the validity of a previous

78 31 U.S.C. § 628 (1964). Section 628 provides that “[e]xcept as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and no others.” Based upon this authority the Comptroller General has consistently ruled that: “Contract stipulations tending to restrict competition and to increase the cost of performance—and thereby the charges against the contract appropriations—are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the contract . . . .” 18 COMP. GEN. 285, 295 (1938); see 42 COMP. GEN. 226 (1962). See generally Paul v. United States, 371 U.S. 245, 252 (1963) (competitive bidding required in government contracts).

Based upon these limitations on executive discretion, the Comptroller General has invalidated many presidential implementations of social policies in government contracts. See Opinion of the Comptroller General (Aug. 5, 1969), reprinted in 115 Cong. Rec. S17209-10 (daily ed. Dec. 18, 1969); Speck, supra note 72, at 247-48. In contrast, however, many executive policies have been implemented by contract clauses without statutory authorization. See Speck, supra at 248-49.

79 In order to meet his quotas, the contractor may have to expend money to advertise that employment opportunities are available and may also have to participate in minority group training programs.


83 In Weiner v. Cuyahoga Community College District, the Ohio supreme court sustained the nondiscrimination requirements of both state and federal executive orders, relying upon the general policies of the federal and state governments against discrimi-
Executive order containing affirmative action obligations issued under the same general authority. In both instances, the courts found statutory authority in the general procurement statutes, which grant the Executive power to establish an "economical and efficient system of supply." The propriety, however, of upholding executive social policies on the basis of such broad authority is doubtful, because almost any Executive contractual provision then would be justified, if not expressly prohibited by Congress or the Constitution.

Although there does not appear to be any express statutory authority for Executive Order No. 11246 and the subsequent Philadelphia Plan, they do reasonably represent a valid exercise of executive discretion, consistent with an implied congressional consent. The doctrine of implied consent first was enunciated by the Supreme Court in United States v. Midwest Oil Co., in which the Court sustained executive action taken without specific congressional authorization on the ground that a "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been made in pursuance of [congressional] consent." Such acquiescence is certainly evident for nondiscrimination clauses in government contracts, which have been required by Executive order since 1941. Between 1941 and 1964, during which time 14 major Executive orders dealing with such clauses were issued, Congress enacted no legislation concerned either directly or indirectly with these Orders or their nondiscrimination requirements.


87 See Speck, supra note 72, at 244-50. The inherent limitation in basing executive authority upon the procurement statutes is that they only authorize actions that will increase the efficiency of government procurements, and, therefore, the Philadelphia Plan, which may increase the cost of procurement, will not fall within the authority conferred by such statutes.

88 236 U.S. 459 (1915); see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951) (concurring and dissenting opinions).

89 236 U.S. at 474.

90 See notes 36-59 supra and accompanying text.

91 See note 36 supra.

92 In 1959, President Eisenhower requested statutory authority for his Committee on Government Contract Compliance. The main purpose of this request, however, upon
Furthermore, rather than preempting the Executive’s power, the omnibus Civil Rights Act of 1964 strengthens the argument that Congress affirmed this authority. President Kennedy’s original proposal to Congress on employment discrimination merely requested statutory authority for his Executive order. The House, however, went substantially beyond the President’s request and passed title VII of the Act, which among other things not only prohibited discrimination in employment, but also created its own enforcement mechanisms. Nevertheless, the House did not intend to limit the President’s preexisting power to deal with discrimination by government contractors. Thus, when proposed section 711(b) of the Act, which would have authorized the President to take “such action as may be appropriate to prevent [discrimination] ... in connection with the performance of a contract with an ... agency of the United States,” was considered by the House-Senate Conference Committee, it was deleted as unnecessary and superfluous, not because it was undesirable. Likewise, the Senate did not intend to limit the Executive’s power. Many Senate leaders endorsed the President’s efforts to end discrimination in employment, and an amendment designed to make the Civil Rights Act the exclusive statutory remedy

which no action was taken, was to give more prestige to the President’s Committee. Civil Rights Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary, 86th Cong., 1st Sess., ser. 5, at 51-52 (1959). See generally Speck, supra note 72.

95 42 U.S.C. § 2000e (1964); see notes 155-57 infra and accompanying text.
97 Mr. Celler. And will the gentleman not also say that the deletion of the language of [711(b)] by the amendment does not have any effect upon existing presidential power?
Mr. Poff. Of course, the striking of language from a bill could not in any way impair existing law.
Mr. Celler. And it does not limit it and it does not broaden it. It remains intact as it is now.
Mr. Poff. That is true.
110 Cong. Rec. 2575 (1964); see id. at 1643 (remarks of Congressman Ryan).
98 See id. at 13408 (statement of Senator Humphrey).
Title VII, in its present form, has no effect on the responsibilities of the committee [President’s Committee on Equal Employment Opportunity created by Executive Order No. 10925] or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts.
BNA, supra note 5, at 330 (Clark-Case Memorandum).
for discrimination was defeated.\textsuperscript{99} Moreover, in the only instance in which Executive Order No. 10925 and the Civil Rights Act overlap, the Act itself requires that the Executive order take precedence.\textsuperscript{100}

Additional evidence of Congressional consent to executive nondiscrimination efforts and in particular to the Philadelphia Plan itself can be found in recent legislative action. In December 1969, opponents of the Philadelphia Plan introduced a bill designed to nullify the Plan by allowing the Comptroller General to withhold government funds from contracts he considered illegal. Initially passed by the Senate,\textsuperscript{101} the bill was rejected by the House\textsuperscript{102} and upon reconsideration was also defeated in the Senate.\textsuperscript{103}

\textbf{CONSTITUTIONALITY}

\textbf{THE EQUAL PROTECTION CHALLENGE}

The equal protection clause of the fourteenth amendment has been utilized traditionally by minority group members to invalidate governmental racial classifications designed to deprive them of equal opportunities and relegate them to a permanently inferior status.\textsuperscript{104} Having

\textsuperscript{99} Senator Tower proposed the following amendment to title VII:
\[ \text{[T]he provisions of this title shall constitute the exclusive means whereby any department . . . in the executive branch of the Government . . . may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer . . . covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title.} \]

\textsuperscript{100} Where an employer is required by Executive Order 10925, issued Mar. 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.


developed in the context of such discriminatory classifications against minorities, equal protection casts an unmistakable shadow across the legality of all racial distinctions. 105

Only the fourteenth amendment, however, requires "equal protection of the laws," and it only provides that such protection shall not be denied by the states. 106 Although equal protection thus would seem to impose limitations only upon state governments and not upon the federally-prescribed Philadelphia Plan, the Supreme Court, in Bolling v. Sharpe, 107 held that the requirements of equal protection can be applied to the federal government, since racial discrimination "may be so unjustifiable as to be violative of [fifth amendment] due process." 108 While the Bolling Court did not find due process and equal protection "always interchangeable," 109 subsequent lower court decisions have held


105 Fiss, supra note 1; Vieira, supra note 1; notes 109-12 infra and accompanying text. In Jones v. Alfred H. Mayer Co., the Supreme Court may have provided a new avenue for attacking racial discrimination in employment. 392 U.S. 409 (1968). In Jones, the Court held that section 1982 of the Civil Rights Act of 1866, which was passed to implement the thirteenth amendment, prohibits private racial discrimination in the sale, purchase, lease, or rental of real and personal property. Id. at 409-13; see 42 U.S.C. § 1982 (1964). In addition, addressing itself to section 1981 of the Civil Rights Act of 1866, which provides that all persons in the United States "shall have the same right . . . to make and enforce contracts," the Court expressly overruled an earlier case holding section 1981 inapplicable to employment contracts. 392 U.S. at 441 n.78, overruling Hodges v. United States, 203 U.S. 1 (1906); see 42 U.S.C. § 1981 (1964). Thus it would appear that section 1981 is an alternative remedy to Title VII of the Civil Rights Act of 1964 for private discrimination. See Dobbs v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). See also Gould, supra note 6, at 376-78; Note, Jones v. Mayer, supra note 2, at 1029.

106 The fourteenth amendment does not prohibit discrimination by private individuals. See The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882). For a discussion of what constitutes state action, see notes 145-60 infra and accompanying text.


108 Id. at 499. "In view of our decision [Brown v. Board of Educ.] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id. at 500; see 1 C. Antieau, Modern Constitutional Law §§ 8:94-96, at 643-47 (1969).

109 The Court pointed out that the "concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, and, therefore, we do not imply that the two are always interchangeable phrases . . . ." 347 U.S. at 499.
that the limitations of equal protection bind federal and state governments to the same extent.\textsuperscript{110}

The Philadelphia Plan exemplifies a new governmental use of racial distinctions; as a remedy for racial discrimination in the construction trades in Philadelphia, the Plan requires compensatory, or equalizing, treatment for previously disadvantaged racial groups. The characteristic of race, which had previously been used to deny persons equal opportunities, now is used to insure the effectiveness of remedial action.\textsuperscript{111} The constitutional issue presented by the Philadelphia Plan, therefore, is whether the federal government, consistent with existing standards of equal protection, may classify by race in order to remedy racial discrimination.\textsuperscript{112}

The constitutionality under equal protection of any classification depends upon a balancing of society’s interest in having the government classify persons in order to achieve legitimate public purposes against its


The holding of \textit{Bolling v. Sharpe}, that discrimination may be so unjustifiable as to violate due process, implies that some classifications that are unjustifiable under equal protection may not be unconstitutional under due process. To the extent that equal protection, therefore, it is not subsumed by due process, the federal government would be accountable to a less stringent standard of equal protection, thus inuring to the disadvantage of those attacking the Philadelphia Plan’s racial classifications.

\textsuperscript{111} See notes 11-16 supra and accompanying text. Classifications that single out racial or ethnic minority groups in order to remedy prior discrimination by conferring compensatory treatment upon them are known as “benign” classifications or quotas. See, e.g., Fiss, \textit{supra} note 1, at 566; Kaplan, \textit{supra} note 5. It has been suggested that because the purpose of an “invidious” classification is different from that of a “benign” classification, the latter should be subjected to a lesser standard of constitutional scrutiny. \textit{See Developments in the Law, supra} note 104, at 1104-07.


Many times racial classifications have been utilized by courts to fashion relief for discrimination, and even the Supreme Court has sanctioned the use of remedial quotas. United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); \textit{see Green v. County School Bd., 391 U.S. 430 (1968); Louisiana v. United States, 380 U.S. 145 (1965); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); Local 53, Heat & Frost Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).
interest in according equal treatment to all citizens who are similarly situated.\footnote{See F. S. Rouster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). See generally 1 C. Antieau, MODERN CONSTITUTIONAL LAW §§ 8:1−97 (1969); Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 365−68 (1949); Developments in the Law, supra note 104, at 1076−1133.} In balancing these societal interests, the courts traditionally have held that equal protection requires a reasonable relationship between governmental classification and the legitimate purpose sought to be achieved.\footnote{See, e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 589−92 (1961); Goesaert v. Cleary, 335 U.S. 464, 466 (1948); P.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). This equal protection standard requires determining a statute’s purpose, the relevance of the classification to the purpose, and whether the classification is over- or under-inclusive. See Developments in the Law, supra note 104, at 1077−87.} This test, however, is applied only to such classifications as those resulting from economic or administrative determinations within the regulatory sphere.\footnote{See, e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948). The administrative application of a statute denies equal protection only if intentionally or deliberately discriminatory. See Swain v. Alabama, 380 U.S. 202 (1965); Oyster v. Boles, 368 U.S. 448 (1962); Snowden v. Hughes, 321 U.S. 1 (1944); Mackay Tel. & Cable Co. v. City of Little Rock, 250 U.S. 94 (1919); Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918).} When classifications are based upon race, national ancestry, alienage, political allegiance, or wealth, the Supreme Court has required that there be more than merely a rational relationship between the classification and the legitimate governmental purpose.\footnote{See, e.g., Williams v. Rhodes, 393 U.S. 23 (1968) (political allegiance); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Bolling v. Sharpe, 347 U.S. 497 (1954) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national ancestry); Edwards v. California, 314 U.S. 160 (1941) (wealth); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (alienage). See generally Tussman & tenBroek, supra note 113; Developments in the Law, supra note 104, at 1087−1132.} Although several justices have argued that race can never be a permissible basis for classification and that the government must be “color blind,”\footnote{See, e.g., Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart & Douglas, JJ., concurring); Kotch v. Board of River Port Pilot Comm’rs, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting). The origin of the “color-blind” theory is the dissent of Justice Harlan in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).} it has been held that racial classifications are not “wholly
beyond the limits of the Constitution." Nevertheless, such classifications are "immediately suspect" and subjected to "rigid scrutiny" by the courts; the Government must overcome a "very heavy burden" to justify their use, demonstrating a "pressing public necessity" or a "compelling interest." By virtue of its racial classifications, the Philadelphia Plan must be judged by this strict standard of constitutional review.

Unquestionably, the elimination of racial discrimination is an extremely important national priority. The President by Executive order, Congress by the Civil Rights Act of 1964, and the Supreme Court by consistent invalidation of discriminatory classifications have recognized and attempted to eradicate the pernicious effects of discrimination upon the individual and the nation. The urgent need to

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118 Hirabayashi v. United States, 320 U.S. 81, 101 (1943); see Korematsu v. United States, 323 U.S. 214 (1944). In these cases, the court upheld the massive detention and relocation during World War II of all persons of Japanese ancestry in the western states, whether or not United States citizens, on the ground that they posed a subversive threat in light of a possible Japanese invasion. Based upon an existent national emergency, these decisions demark the outer limits of the Government's power to classify by race. See generally Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 COLUM. L. REV. 175 (1945); Rostow, The Japanese-American Cases—A Disaster, 54 YALE L.J. 489 (1945). Given the factual setting, perhaps they were wrongly decided; their significance, however, lies in the Court's willingness to consider that there are bases upon which racial classifications may be made.

119 Bolling v. Sharpe, 347 U.S. 497 (1954). "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." id. at 509. The origin of the "suspect" classifications was Korematsu v. United States, in which the Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional." 323 U.S. 214, 216 (1944); see Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

120 Korematsu v. United States, 323 U.S. 214, 216 (1944); see 1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 8:95 (1969).


122 Korematsu v. United States, 323 U.S. 214 (1944). "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." id. at 216; see 1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 8:65, at 618 (1969).


eliminate both active discrimination and its vestiges is highlighted not only by the increasingly vocal demands of minority groups for immediate equality, but also by the consequences of governmental inaction—urban unrest and perpetuation of the psychology of inferiority.\(^{127}\) Since governmental indifference to the problems of race and poverty could result in two separate societies within the nation,\(^{128}\) it would be difficult to imagine a more important national goal than elimination of racial discrimination.

Although crucial, the importance of the governmental objective alone is not dispositive of a racial quota's constitutionality. The particular quota-classification also must be "necessary" in order to achieve the legitimate public purpose of remedying discrimination.\(^{129}\) In this regard, several possible alternatives are available for forcing contractors to cease perpetuating nonintegrated work forces: nondiscrimination clauses,\(^{130}\) affirmative action obligations,\(^{131}\) Philadelphia Plan quotas, and exclusion of all white workers until blacks attain a position of relative economic parity.\(^{132}\) Nondiscrimination and affirmative action clauses, however, already have proven themselves ineffective,\(^{133}\) and exclusion of all white workers from government construction jobs undoubtedly would be ruled an impermissible exclusion, constituting reverse discrimination.\(^{134}\) Lying between these extremes, the Philadelphia Plan's quotas provide specific guidelines by which contractors may ascertain their obligations.

\(^{127}\) See generally National Advisory Comm'\(n\) on Civil Disorders, Report (1968); The Law of the Poor (J. tenBroek ed. 1966).

\(^{128}\) See generally, National Advisory Comm'\(n\) on Civil Disorders, Report (1968).


\(^{130}\) See notes 38-41 supra and accompanying text.

\(^{131}\) See notes 57-59 supra and accompanying text.

\(^{132}\) Such demands have been voiced by black power advocates. See generally S. Carmichael & C. Hamilton, Black Power (1967).

\(^{133}\) See notes 66-70 supra and accompanying text. Although these remedies proved ineffective largely because of a lack of vigorous enforcement, perhaps some of the responsibility for their failure can be attributed to their vagueness. See notes 66-67 supra and accompanying text. In fact, the need for specific remedial requirements was recognized by the Supreme Court in United States v. Montgomery County Board of Education, in which the Court upheld numerical requirements for the integration of school facilities. 395 U.S. 225, 235 (1969). Another advantage of using quotas is that they achieve integration quickly. The Philadelphia Plan's quotas will produce a meaningful level of minority employment within the next four years. See Order of Sept. 23.

\(^{134}\) The Supreme Court has recognized that the right to pursue one's occupation cannot be encroached upon arbitrarily by governmental regulations. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Ketch v. Board of River Port Pilot Comm'r, 330 U.S. 552 (1947). Furthermore, excluding all white workers also would violate the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1964).
and enable the federal government to determine quickly and accurately whether there is compliance.\textsuperscript{135} Thus, since the threat of penalties is made more real to the contractor and since enforcement action can be taken without undue delay, the Plan can produce effective integration. Moreover, the Plan does not infringe unnecessarily upon the rights of contractors or white workers. The quotas are drawn individually for each trade upon a consideration of such factors as the availability of trained minority group workers, the annual turnover rate in the work force, and the percentage of minority group personnel already employed.\textsuperscript{136} Furthermore, the quotas increase incrementally, from a presently low figure to a substantial proportion of the work force after 1973.\textsuperscript{137} The obligations upon contractors thus are increased gradually by the Plan,\textsuperscript{138} and the privileged status of white workers, attained and maintained by discrimination,\textsuperscript{139} is gradually withdrawn without immediate or overburdening economic dislocation. In addition, as presently established, the quotas do not overcompensate the previously disadvantaged minority groups and thereby do not become discriminatory against whites.\textsuperscript{140} To insure that no reverse discrimination occurs, the quotas are subject to periodic revision downward should market or demographic conditions so require.\textsuperscript{141} The Plan's carefully drawn quotas operate only as an artificial means of achieving the integration of the work force that would result if discrimination were not present.

A CONSTITUTIONAL DUTY

While it is permissible for the Government to impose remedial minority group employment quotas upon recipients of contract awards, it is


\textsuperscript{136} See notes 15-16, 27-29 supra and accompanying text.

\textsuperscript{137} See note 15 supra and accompanying text.

\textsuperscript{138} In light of Department of Labor statistics as to the availability of trained minority workers in the Philadelphia area, the only burden placed upon the contractors is that of hiring directly from the available work force rather than relying solely upon referrals from discriminatory labor unions. See notes 20-22 supra.

\textsuperscript{139} See notes 15-16, 26-29 supra and accompanying text.

\textsuperscript{140} See notes 25-27 supra. The Plan does not impose quotas that are higher than the percentage of minority group members in the work force; thus, there is no reverse discrimination. Furthermore, the argument that a classification violates equal protection because it is either under- or over-inclusive is not applicable to the Philadelphia Plan. Under-inclusion would occur if the Plan omitted a minority group that was being discriminated against from the purview of the quotas; over-inclusion would occur if some racial group not discriminated against were covered by the Plan. See Developments in the Law, supra note 104, at 1084-87, 1101-02.

\textsuperscript{141} See note 15 supra.
also arguable that the Government is constitutionally compelled to do so. In *Todd v. Joint Apprenticeship Committee*, a federal district court enjoined the steel workers' union and its apprenticeship committee from denying Negroes employment in the construction of a federal courthouse. Although recognizing that private individuals have no constitutional duty not to discriminate, the court found that there was sufficient "state action," not only because of the federal assistance given the union's apprenticeship program, but also because the union and the committee were an "integral part" of the federal construction project as a result of their referral contract with the subcontractor. Similarly, in *Ethridge v. Rhoder* a federal district court found that the "mutual interdependence" of the State of Ohio and the contractors constituted "state action," thereby subjecting the contractors to constitutional duties not to discriminate. Thus, the court enjoined the award of state con-

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144 223 F. Supp. at 20; see The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876).
145 The Federal government through two of its agencies ... is at the very least passively assisting, aiding and making it possible for the defendant Union and [Apprenticeship] Committee to realize and perpetuate their discriminatory practices. The defendant agencies in practice and in effect are permitting the Union and [Apprenticeship] Committee to practice racial discrimination and by so doing if not directly at least indirectly are denying plaintiffs their constitutional rights.
147 [W]hen a state has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner—that is, the proposed contractors acting under contract with unions that bar Negroes—this constitutes a type of "state action" proscribed by the Fourteenth Amendment ...

In a venture, such as this one, where the state as a governmental entity becomes a joint participant with private persons, the restrictions of the
struction contracts to any contractor who relies exclusively upon a discriminatory union, holding that the state is bound to "affirmatively insure" compliance by the contractors with their constitutional duties.

Taken together, Todd and Ethridge impose broad constitutional duties upon the Government, contractors, and unions. The Government may not award contracts to employers who hire exclusively on the basis of referrals by discriminatory unions, and once the contract has been awarded, the Government has an affirmative obligation to insure that the unions, the contractor, and subcontractors comply with their constitutional duties. If any of these obligations are unfulfilled, the court must grant appropriate relief, which may be in the form of racial quotas. Furthermore, upon a showing that other methods of relief would be ineffective, a court could order implementation of Philadelphia Plan-type quotas in all government contracts.

Fourteenth Amendment apply not only to the actions of the state but also to the acts of its private partners—the contractors . . .

Id. at 77-78; see Yager, Law Reform Goals in Employment, 3 CLEARINGHOUSE L. REV. 185 (1969); notes 140-44 supra and accompanying text. See generally Gould, supra note 6.

148 268 F. Supp. at 89; see Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907, cert. denied, 396 U.S. 1004 (1970). In Weiner the Ohio supreme court held that a contract could be denied to the lowest bidder if such bidder was unwilling to comply with the state affirmative action plan by insuring equal employment opportunities. Weiner v. Cuyahoga Community College Dist., supra at 40, 249 N.E.2d at 911.

149 268 F. Supp. at 88. "[The state] cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them." Id. at 87; see Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963).

150 The Ethridge court, however, stressed the fact that state officials were aware of the union's discriminatory practices and knew "to a certainty" that these unions would be employed on the construction project. 268 F. Supp. at 87-88.

151 In Ethridge, the court enjoined the state; in Todd the union was enjoined. 268 F. Supp. at 88-89; 223 F. Supp. at 23. The subcontractor was enjoined only in Todd and even then only to employ plaintiffs once they had been admitted to the union and referred to the subcontractor. 223 F. Supp. at 23.

152 Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); see Gould, supra note 6, at 377-78.


154 The justification for requiring "quota" hiring would be that as "joint participants," both the government—federal, state, and/or local—and its contractors have a constitutional obligation not merely to prevent discrimination, but to guarantee equal opportunity by "affirmative action." Relief required, therefore, would be similar to that in school desegregation cases, involving use of numerical formulae to integrate students and faculties. See United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).
TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 represents a comprehensive congressional attempt to eliminate discrimination in employment opportunities on the grounds of race, color, religion, sex, or national origin. Thus, title VII declares that discrimination by employers, employment agencies, and labor unions because of the proscribed characteristics is an unlawful employment practice; it further establishes administrative and judicial enforcement procedures available to the government and aggrieved individuals. Although the purpose of title VII is to eliminate discrimination against minority groups, it has been contended that the proscriptions of the Act prohibit the imposition of the remedial racial quotas of the Philadelphia Plan. This contention rests primarily upon two of the Act’s provisions—sections 703(a) and 703(j).

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155 42 U.S.C. §§ 2000e-2(a) to -2(h). In general, title VII became effective one year after its enactment, July 2, 1965, and currently applies to employers with 25 or more employees. Section 701(b) exempts from title VII all government units, corporations wholly owned by the United States, Indian tribes, and private membership clubs. Section 702 contains limited exemptions for religious organizations, educational institutions, and employers “with respect to the employment of aliens outside any State.” Section 703 is the operative section of title VII. The first four subsections, 703(a)-(d), define unlawful employment practices for employers, employment agencies, and labor organizations; the remaining subsections, 703(e)-(j), authorize exceptions to the definitions and scope of unlawful employment practices. Section 704 addresses discrimination in advertising and prohibits discharge for testifying on present or past charges of discrimination. Section 705 created the Equal Employment Opportunity Commission (EEOC) and describes its composition, powers, and duties. Section 706 describes the scope and nature of both judicial and EEOC relief, while section 707 describes the power of the Attorney General to bring suits for injunctive relief when there is a pattern or practice of discrimination.

156 Id. at §§ 2000e-5, -7. Before seeking judicial relief for an unlawful employment practice, an individual must file a complaint with the EEOC. Id. at §§ 2000e-5(a). The Commission then must seek to resolve the problem by informal means. Id. If, however, the state in which the violation occurred provides procedures to remedy discrimination, a 60-day grace period must be granted in order to settle the dispute locally. Id. § 2000e-5(b). If the state and the EEOC fail to resolve the problem, upon notice of such failure by the EEOC, the individual may seek judicial relief or the Attorney General may sue in the individual’s behalf. Id. §§ 2000e-5(c), -6(a); see Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 BROOKLYN L. REV. 62, 87-92 (1964); Note, Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement, 5 COLUM. J. LAW & SOCIAL PROB. 1, 13-36 (1969).

section 703(j)

In the absence of section 703(j), title VII, based upon its operative provisions, would be susceptible to a very broad interpretation. The operative section of title VII, section 703(a), declares that an employer may not "fail or refuse to hire" any individual for discriminatory reasons. While the duties imposed by this section have not been subject to full judicial interpretation, the meaning of "refuse" to hire presents no definitional problems; this requirement comprehends situations in which an otherwise qualified applicant is denied employment because of his race, color, religion, sex, or national origin.

The duty not to "fail" to hire, however, may impose an affirmative duty upon employers to broaden their recruitment base in order to insure that minority group members are aware of and apply for available positions. In contexts other than that of the Civil Rights Act, "fail" has been interpreted to denote an omission to perform a duty or appointed function. Furthermore, one commentator has argued strongly that

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160 Id. § 2000e-2(j).

161 Id. § 2000e-2(a). Section 703(c) similarly delineates the equal employment obligations of labor unions, which under the Act may not discriminate in any manner against minority group members. Id. § 2000e-2(c). Since the unions in Philadelphia are discriminatory in their admission policies, the Attorney General or an individual could bring an action against them. See notes 155-57 supra. In order to eliminate discrimination by all labor unions, however, an enormous number of individual suits would be required, and the inevitable delay in the judicial process would postpone any relief. The problems involved in defining and litigating union discrimination have been extensively explored by commentators. See generally Cooper & Sobel, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969); Gould, Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 How. L.J. 1 (1967); Gould, Seniority and The Black Worker: Reflections on Quarles and Its Implications, 47 Texas L. Rev. 1039 (1969); Jenkins, Study of Federal Effort to End Job Bias: A History, a Status Report, and a Prognosis, 14 How. L.J. 259 (1968); Walker, Title VII: Complaint and Enforcement Procedures and Relief and Remedies, 7 B.C. Ind. & Com. L. Rev. 495 (1966); Note, Fair Employment Policies and the Federal Contractor Program—Some Unanswered Questions, 37 Geo. Wash. L. Rev. 372 (1969); Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). The Philadelphia Plan circumvents many of these problems and cumbersome requirements by placing the burden upon the contractor.


163 See United States v. Heikkinen, 240 F.2d 94, 100 (7th Cir. 1957); State ex rel. Brown v. Butler, 81 Minn. 103, 106, 83 N.W. 483, 484 (1900); State v. Gasque, 241 S.C. 316, 321, 128 S.E.2d 154, 156 (1962); Blumrosen, supra note 162, at 473 n.20.
in comparison with state fair employment statutes, which merely use the word "refuse," the phrasing of section 703(a) requires employers to affirmatively seek to end discrimination.\textsuperscript{164} Thus, according to this interpretation, an employer could not continue merely to choose employees from those who apply, but would have to encourage actively minority group members to apply for available positions.\textsuperscript{165} Even more expansively interpreted, the affirmative duties of section 703(a) could be construed to require that an employer confer preferential treatment upon minority group members in order to achieve a racial balance within his work force and eliminate the effects of pre-Civil Rights Act discrimination.

Apparently recognizing that this broad interpretation could be placed upon section 703(a), Senate opponents of title VII insisted that a limiting provision be included in the Act.\textsuperscript{166} Thus, because they felt that it represented no change in the substance of the title,\textsuperscript{167} Senate proponents acquiesced to this demand and allowed insertion of the section 703(j) "no quota proviso," which states that "nothing in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group on account of an imbalance which may exist with respect to the number or percentage of persons of any race . . . in any community . . . or in the available work force."\textsuperscript{168} Since the Philadelphia Plan requires contractors to meet quotas established by reference to, among other factors, the available work force, opponents of the Plan reason that section 703(j) renders such executive action illegal.\textsuperscript{169}

\begin{footnotes}
\item \textsuperscript{164} Blumrosen, supra note 162, at 472-75. \textit{See generally} S. Rep. No. 876, 88th Cong., 2d Sess. 10 (1964); BNA, \textit{supra} note 5, at 305-17.
\item \textsuperscript{165} Blumrosen, \textit{supra} note 162, at 475-76. Similarly addressing itself to the duties of labor unions under the Civil Rights Act, which are analogous to those of employers, the Fifth Circuit has stated:

\begin{quote}
We recognize that the best of publicity programs will not fully convince Negroes that they now have the opportunity to attempt to qualify for apprenticeship training. We also recognize that no such program can hope to be as effective as parental guidance, but a good public information program can help to persuade the doubtful and the skeptical that the discriminatory bars have been removed. \textit{Such a program is mandatory . . . .}
\end{quote}

United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969) (emphasis added).
\item \textsuperscript{166} See Berg, \textit{supra} note 157, at 77-78.
\item \textsuperscript{167} 110 Cong. Rec. 13408 (1964) (Humphrey Explanation), reprinted in BNA at 302. "This Section does not represent any change in the substance of the Title;" \textit{see} 110 Cong. Rec. 6992 (1964) (Clark-Case Memorandum).
\item \textsuperscript{168} 42 U.S.C. § 2000e-2(j) (1964).
\item \textsuperscript{169} "In our view such preferential status or treatment would constitute discrimination against the white worker on the basis of color, and therefore would be contrary to
\end{footnotes}
Several compelling arguments are available to rebut the contention that section 703(j) prohibits the Philadelphia Plan’s quota system. The specific wording of section 703(j), that “nothing contained in this title shall be interpreted to require,” places two immediate limitations upon its scope and applicability.\textsuperscript{170} The explicit function of section 703(j) is to restrict the nondiscrimination requirements imposed in general by title VII and in particular by section 703; its restriction does not apply to requirements imposed by authorities other than title VII, such as Executive Order No. 11246 and the Philadelphia Plan. Moreover, even if section 703(j) were applicable beyond title VII, it still would not affect the legality of the Plan’s quotas, since the only mandatory language of the provision is that preferential treatment is not “required,” which neither states nor implies an absolute prohibition.\textsuperscript{171}

The argument that section 703(j) does not prohibit remedial quotas prescribed by authorities other than title VII is further strengthened by the fact that the Civil Rights Act was not intended to be an exclusive remedy for racial discrimination. For example, section 708 of the Act endorses state efforts to end discrimination, but places no limitations, such as are found in section 703(j), on these efforts.\textsuperscript{172} In addition, no limitation on use of a quota system is included in the remedial sections of title VII,\textsuperscript{173} which authorize courts to take such remedial “action as may be appropriate” to redress any discrimination resulting from a violation of title VII.\textsuperscript{174}


\textsuperscript{171} "[I]t is important to distinguish between those things prohibited by Title VII as to all employers covered by that act, and those things which are merely not required of employers by that act." Opinion of Attorney General (Sept. 22, 1969), reprinted in 115 CONG. REC. S17204-05 (daily ed. Dec. 18, 1969); see Local 189, Papermakers v. United States, 416 F.2d 980, 995 (5th Cir. 1969).

\textsuperscript{172} 42 U.S.C. § 2000e-7 (1964); see 110 CONG. REC. 13408 (1964) (Humphrey Explanation), reprinted in BNA at 300; 110 CONG. REC. (1964) (Dirksen Explanation), reprinted in BNA at 290.


\textsuperscript{174} If there is an intentional unlawful employment practice, "the court may enjoin the respondent from engaging in an unlawful employment practice, and order such affirmative action as may be appropriate . . . ." 42 U.S.C. § 2000e-5(g) (1964) (emphasis added). Courts consistently have rejected the contention that section 703(j) prohibits judicially fashioned compensatory orders that operate to remedy unlawful discrimination by granting preferential treatment to those persons discriminated against. See Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); Local 53, Heat & Frost Workers v. Vogler, 407
section 703(a)

Although section 703(j) does not prohibit implementation of the Philadelphia Plan, more serious legal impediments may be posed by the general proscriptive section of title VII, section 703(a), which makes it unlawful for an employer to discriminate.\textsuperscript{175} The thrust of this section is prospective.\textsuperscript{176} It requires employers to hire without regard to race after the effective date of the Act, July 2, 1965, but as qualified by section 703(j), does not require them to hire minority group members in such a manner as to remedy discrimination that occurred before the Act’s effective date.

The Philadelphia Plan, however, seeks to remedy any racial imbalance in the work force, without regard to whether such imbalance was caused by pre- or post-Civil Rights Act discrimination.\textsuperscript{177} To the extent that the Plan imposes quotas in order to remedy racial discrimination that occurred after the Civil Rights Act, it does not violate section 703(a).\textsuperscript{178} Such remedial action would be the same as that available to the judiciary under the remedial sections of title VII.\textsuperscript{179} On the other hand, if the Plan’s quotas also require an employer to remedy discrimination that occurred before the effective date of the Act, it is arguable that the

\textsuperscript{175} 42 U.S.C. § 2000e-2(a) (1964); see notes 161-62 supra and accompanying text.

\textsuperscript{176} "[Section 703(a)]'s effect is prospective and not retrospective . . . . [I]f a business has been discriminating in the past and as a result has an all-white working force, when the title [VII] comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. . . ." Clark-Case Memorandum, 110 Cong. Rec. 6992 (1964), reprinted in BNA at 329; see Griggs v. Duke Power Co. 420 F.2d 1225 (4th Cir. 1970); Local 189, Papermakers v. United States, 416 F.2d 980, 987 (5th Cir. 1969); Local 53, Heat & Frost Workers v. Vogler, 407 F.2d 1047, 1052-53 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

\textsuperscript{177} See notes 15-35 supra and accompanying text.

\textsuperscript{178} It may be argued that the Philadelphia Plan quotas do not require an employer to remedy pre-Civil Rights Act discrimination, because unions and those employers who rely on them have continued to discriminate since the passage of the Civil Rights Act. See notes 15-16 supra and accompanying text. The quotas of the Philadelphia Plan initially require 5 to 7 percent minority group employment and increase over four years to between 20 and 25 percent. Qualified minority group members constitute between 25 and 50 percent of the workers available for employment in each trade, and the annual turnover rate in each trade is approximately 10 percent. See Order of Sept. 23; notes 15-16 supra and accompanying text. If, therefore, unions and employers had been nondiscriminatory in their practices since the effective date of the Civil Rights Act and if they were to offer equal employment opportunities during the life of the Plan's construction contract, the Plan's initial final quotas easily would have been satisfied.

\textsuperscript{179} See notes 155-59 supra and accompanying text.
Plan requires employers to hire on the basis of race in violation of section 703(a)’s requirement of racial neutrality. Section 703(a), however, must be interpreted in conjunction with section 703(j), which although added to the Act explicitly to delimit the duties imposed by section 703(a), does not prohibit remedial quotas for minority group employment, declaring only that they are not required by the Act. Thus, because Congress’ general intent in enacting title VII was to eliminate discrimination against minority groups and because there is no explicit prohibition on imposing a racial quota system in order to remedy discrimination, the Philadelphia Plan’s quotas easily appear consonant with section 703(a).

Furthermore, in considering the closely analogous discriminatory practices perpetuated by employer-implemented seniority systems, courts have recognized the distinction between pre- and post-Act discrimination, but have not felt constrained to limit their relief under the Civil Rights Act only to remedying discrimination that occurred after its passage. Thus, in Quarles v. Philip Morris, Inc., the court found that although “Congress did not intend to require ‘reverse discrimination’ . . . it is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.” Even more strongly, in Local 189, Papermakers v.

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See notes 170-74 supra and accompanying text.

180 The general policy statement of title VII was as follows: “The Congress hereby declares that the opportunity for employment without discrimination of the types described in section 704 and 705 is a right of all persons within the jurisdiction of the United States, and that it is the national policy to protect the right of the individual to be free from such discrimination.” H.R. 7152, 88th Cong., 1st Sess., § 701(a) (1963). The purpose of the title remained the same although the section was deleted in the final bill. See 110 Cong. Rec. 12299 (daily ed. June 4, 1964) (Humphrey Explanation), reprinted in BNA at 304.

182 See section 703(c) imposes upon unions nondiscrimination duties that are very similar to those imposed upon employers by section 703(a). The duties of both are limited by section 703(j), 42 U.S.C. §§ 2000e-2(a), (c), (j) (1964).


184 In each of these cases, the courts found post-Act discrimination and then fashioned remedies designed to eliminate both present and past discrimination. The theory is that the federal courts have the authority to eliminate the effects of past discrimination when such discrimination results in present or future injury. Furthermore, in Local 189, the Fifth Circuit held that title VII allows compensatory action to remedy prior discrimination. Local 189, Papermakers v. United States, supra at 995.

185 Id. at 516.
United States,¹⁸⁶ the Fifth Circuit held that title VII does not prohibit compensatory training and assistance for Negro workers who have been subjected to pre-Act discrimination.¹⁸⁷ Although granting relief under the remedial sections of title VII, in both instances the courts fashioned remedies designed to eliminate not only post-Act discrimination but also the lingering effects of pre-Act discrimination.

CONCLUSION

The Philadelphia Plan, as an implementation of the affirmative action clause of Executive Order No. 11246, represents an active effort to remedy the discriminatory practices engaged in by construction unions in Philadelphia. By imposing minority group quota requirements upon recipients of government contracts, the Plan not only adopts a strong policy of nondiscrimination, but also provides a readily-applied standard whereby both the Government and contractors are able to gauge compliance. Furthermore, the Plan’s quota system is consistent with constitutional and statutory requirements. Although amounting to a classification based upon race, the quotas do not violate existing standards of equal protection. In light of the compelling national interest in ending racial discrimination, the necessity of imposing such employment requirements, and the remedial nature of the Plan, the quota schedule avoids constitutional proscriptions and does not result in reverse discrimination. Similarly, the Plan is not contrary to the 1964 Civil Rights Act, which neither preempts the Executive’s authority to independently seek to end discrimination nor precludes a program of employment quotas founded upon authority other than the Civil Rights Act itself.

The ultimate success of the Plan, however, will depend upon the Government’s willingness to energetically enforce the Plan’s nondiscrimination provisions. Since a private right of action probably is not available,¹⁸⁸ only the Government can assure the Plan’s fulfillment. Al-

¹⁸⁶ 416 F.2d 980 (5th Cir. 1969).
¹⁸⁷ Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes. This is not to say that . . . Title VII prohibits an employer from giving compensatory training and help to the Negro workers who have been discriminated against. Title VII’s imposition of an affirmative duty on employers to undo past discrimination permits compensatory action for those who have suffered from prior discrimination.
¹⁸⁸ See Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 3 (3d Cir. 1964); Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12 (N.D. Ill. 1963), rev’d on other grounds, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 (1965). In both Farkas and Farmer, the courts found that
though the expediency of shortsighted political considerations at times may militate against a strong enforcement policy, the country's commitment to eradicating racial discrimination must not be jeopardized or compromised by less than an active and complete dedication to the Philadelphia Plan's success.

Executive Order No. 10925, neither expressly nor by implication, confers upon individuals a private right of action and that administrative sanctions are the exclusive remedy for a contractor's breach. Neither the Executive Order No. 11246 nor the Philadelphia Plan itself contain provisions that could be construed to grant such a cause of action. But cf. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).
COMMENT

CLOSING PUBLIC POOLS TO AVOID DESEGREGATION: TREADING WATER

The use of delaying tactics and other evasive action by southern officials to frustrate court-ordered desegregation has been noted by the commentators and condemned by the courts. Efforts on the part of a few southern municipalities to perpetuate the segregated operation of recreational facilities, however, have been more successful. Although attempts to lease segregated facilities to private parties have been struck down because continued municipal ownership constituted discriminatory state action, courts have approved the absolute and bona fide sale of public recreational facilities. Moreover, courts have twice sustained


2 Recently the Supreme Court lost its patience with such delays and evasions and ruled that the time for all deliberate speed had ended; school districts were ordered to terminate dual school systems "at once." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969). Previously localities had attempted by various means to avoid or delay their duty to desegregate. See, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964) (county government closed its public schools and offered financial support to students attending segregated private schools); Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961), aff'g per curiam Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960) (state legislature attempted to give itself sole power to desegregate schools, to allow the governor to close any school ordered to desegregate, and to withhold state funds from desegregated schools); Cooper v. Aaron, 358 U.S. 1 (1958) (state governor ordered national guard to help prevent desegregation).

3 Muir v. Louisville Park & Theatrical Ass'n, 347 U.S. 971 (1954), rev'd per curiam 202 F.2d 275 (6th Cir. 1953) (lessee of municipally owned amphitheater held subject to the fourteenth amendment); Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965) (lessee of municipal land leased for use as golf course held subject to the fourteenth amendment); Department of Conserv. & Dev. v. Tate, 231 F.2d 615 (4th Cir.), cert. denied, 352 U.S. 838 (1956) (right of blacks to use desegregated state parks may not be abridged by leasing them). See generally Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private restaurant owner leasing space in a state owned building held subject to the fourteenth amendment). The acts of a municipality or its officials have long been considered state action for fourteenth amendment purposes. See, e.g., Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 294 (1913); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886); Ex parte Virginia, 100 U.S. 339 (1879). See also Van Alstyne & Karst, State Action, 14 STAN. L. REV. 3 (1961); Note, Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1069-72 (1969).

4 Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960). In Hampton v. City of Jacksonville, the court reviewed the city's "sale" of its golf courses to private groups to avoid their desegregation. The court indicated that an absolute sale would have
the frustration of Negro rights by upholding a municipality’s decision to close and retain possession of its facilities rather than desegregate them. A municipality’s use of this last tactic forms the factual context for this Comment.

In 1962 a reluctant federal district court granted declaratory relief requiring Jackson, Mississippi, to desegregate its recreational facilities.

been permissible, but these contracts contained a reversionary clause which the court deemed sufficient state involvement to bring the “private” courses within the fourteenth amendment. 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962).

Even where a municipality has completely divested itself of control over a facility, it may be argued that if the facility retains its public character, the private owners will be held subject to the fourteenth amendment. Evans v. Newton, 382 U.S. 296 (1966). For a discussion of this case, see note 41 infra.

5 Hampton v. City of Jacksonville, 304 F.2d 319 (5th Cir. 1962) (city officials could not be held in contempt for discontinuing operation of swimming pools in face of a court order to desegregate all recreational facilities); City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960) (city could validly close all of its public parks rather than desegregate them). Gilmore indicated that even if a city continued to operate its parks, it would not be under an affirmative duty to integrate, but only under a duty to desegregate them. 277 F.2d at 369. The Fifth Circuit later overruled Gilmore on this point and held that cities had an affirmative duty to integrate recreational facilities which they operate. United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 390 n.3 (5th Cir.), cert. denied, 389 U.S. 840 (1967).

6 Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), aff’d per curiam, 313 F.2d 637 (5th Cir.), cert. denied, 375 U.S. 951 (1965). Three black citizens of Jackson contended that they had been denied the right to use the city’s public parks, libraries, zoos, golf courses, playgrounds, auditoriums, and certain other recreational facilities. Although the district court judge considered the defendant mayor and other city officials to be “outstanding, high class gentlemen” and approved of their policy encouraging voluntary separation of the races, he was constrained to grant the plaintiffs declaratory relief in light of cases following Brown v. Board of Educ., 347 U.S. 483 (1954). After Brown, in which separate educational facilities were declared inherently unequal, the desegregation of all publicly owned recreational facilities was ordered. See Watson v. Memphis, 373 U.S. 526 (1963) (parks, playgrounds, community centers, golf courses); New Orleans City Park Improv. Ass’n v. Dettiege, 252 F.2d 122 (5th Cir.), aff’d per curiam, 358 U.S. 54 (1958) (city park); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956) (beach and swimming pool); Department of Conserv. & Dev. v. Tate, 231 F.2d 615 (4th Cir.), cert. denied, 352 U.S. 838 (1956) (state park); Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), aff’d per curiam, 350 U.S. 879 (1955) (golf courses); Dawson v. Mayor & City Council, 220 F.2d 386 (4th Cir.), aff’d per curiam, 350 U.S. 877 (1955) (public beaches and bathhouses); Muir v. Louisville Park Theatrical Ass’n, 202 F.2d 275 (6th Cir.), rev’d per curiam, 347 U.S. 971 (1954) (golf course, amphitheater, and fishing lake); Willie v. Harris County, 202 F. Supp. 549 (S.D. Tex. 1962) (county park); Shuttlesworth v. Gaylord, 202 F. Supp. 59 (N.D. Ala. 1961), aff’d sub nom. Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962) (parks, tennis courts, swimming pools, zoos, golf courses, baseball parks, museum, auditorium); Moorhead v. City of Ft. Lauderdale, 152 F. Supp. 131 (S.D. Fla.), aff’d, 248 F.2d 544 (5th Cir. 1957) (golf course); Ward v. City of Miami, 151 F. Supp. 593 (S.D. Fla. 1957) (golf course); Holley v. City of Portsmouth, 150 F. Supp. 6 (E.D. Va. 1957) (golf course); Fayson v. Beard, 134 F. Supp. 379 (E.D. Tex. 1955) (city parks).

For an early prediction that Brown would be applied to invalidate state imposed
Instead of desegregating its swimming pools, however, the city closed and retained possession of its own pools, and cancelled its lease on another.\footnote{At the time, Jackson owned and operated public swimming facilities at four separate parks. The swimming facilities have not been open to any citizen, white or black, since the closing, and the city has no intention of reopening the pools on an integrated basis. In addition, Jackson had been leasing and operating the Leavell Woods pool as a public facility. When the city closed its pools, it also cancelled the lease and since then has had no interest in that pool’s maintenance or operation. Leavell Woods has continued to operate on a whites only basis, however, under the auspices of the Young Men’s Christian Association, whose objective, according to the charter of the Jackson branch, is: “[T]o develop the Christian character and usefulness of its members.” Affidavits of Carolyn Stevens & George T. Kurns, Record, Palmer v. Thompson, 419 F.2d 1222 (5th Cir.), \textit{cert. granted}, 398 U.S. 948 (1970).} In \textit{Palmer v. Thompson}, the Fifth Circuit, in a seven to six decision, rejected an effort by black plaintiffs to enjoin the closing as a discriminatory act on the part of defendant city officials violating the fourteenth amendment’s equal protection clause. The circuit court’s ruling in \textit{Palmer} is consistent with the holdings in earlier cases,\footnote{419 F.2d 1222 (5th Cir.) (en banc), \textit{cert. granted}, 398 U.S. 948 (1970).} but the equal protection concept has undergone significant development since those decisions which, along with \textit{Palmer}, must now be seriously questioned. This article will first examine the constitutional validity of the pool closing. It will then consider steps which may be taken against the private party now operating only for whites the pool previously leased by the city, steps which might also be taken against any party operating segregated private pools on a fee-admission basis.\footnote{See note 5 supra.}

discrimination in regard to recreational facilities, see McKay, Segregation and Public Recreation, 40 Va. L. Rev. 697 (1954).

Another approach which will not be discussed in this article would be to hold the defendants in contempt of the federal district court’s prior declaration that all of Jackson’s recreational facilities must be desegregated. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962). By closing the pools, the defendants in effect partially defied this judgment. It is well recognized that an attempt to prevent the execution of a court judgment constitutes contempt. See Green v. United States, 356 U.S. 165 (1958); Walsh v. United States \textit{ex rel.} White, 338 U.S. 804 (1949); United States v. United Mine Workers of America, 330 U.S. 258 (1947). Arguably defendants did not directly defy the judgment since they did not continue to operate the pools for whites only, but it has been held that violation of a court order by subterfuge is also contemptuous.
Municipal Pools. At the outset the constitutional validity of the closing seems highly doubtful in light of Griffin v. County School Board. In Griffin, the Supreme Court observed that Prince Edward County children, unlike other children in the state, were forced to go to private schools or none at all, and that the closing bore more heavily on blacks than on whites, since for some time there were no private schools black children could attend. Thus, the Court determined that the closing denied the county’s black children equal protection. The Palmer majority distinguished Griffin on three grounds: (1) Griffin involved an essential public service while Palmer did not; (2) the expenditure of public funds for segregated private academies constituted the Griffin equal protection violation while there was no comparable expenditure in Palmer; and (3) the Griffin closing was clearly motivated by opposition to desegregation whereas the Palmer closing took race into account only in weighing the impact of integrated pools on the public safety and the city’s budget.

The majority’s interpretation of Griffin appears to be a superficial effort to fashion an escape route for those southern officials determined to prevent desegregation of public recreational facilities. The majority’s characterization of municipal pools as nonessential, for example, appears totally irrelevant to equal protection considerations. The court seems to suggest that public pools are a mere privilege or benefit which may be withdrawn at will. Although a city may not be obligated to provide swimming pools, once it chooses to do so their operation is


11 377 U.S. 218 (1964). In 1954 the Supreme Court held that Virginia’s school segregation laws violated the equal protection clause. Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown was consolidated with a Virginia case). After this ruling efforts to desegregate Prince Edward County’s schools met with resistance. The Fourth Circuit ordered that “immediate steps” be taken toward desegregation. Allen v. County School Bd., 266 F.2d 507, 511 (4th Cir. 1959). In response, the county closed all of its public schools.

12 “There is no constitutional compulsion directed toward a state or its subdivision to furnish recreational facilities.” Willie v. Harris County, 202 F. Supp. 549, 552 (S.D. Tex. 1962). Most cases involving the closing or sale of public recreational facilities implicitly stand for the proposition that a city has no duty to operate any particular recreational facility. See notes 4-5 supra. For such a duty to exist, it would have to be statutory. In the relevant Mississippi statute, municipalities are merely given the power to “purchase and hold real estate . . . for all proper municipal purposes, including parks . . . to sell and convey any real . . . property owned by it . . . as may be deemed conducive to the best interest of the municipality . . . .” Miss. Code Ann. § 3374-112 (Supp. 1968). The statute is clearly framed in discretionary terms;
subject to constitutional standards.\textsuperscript{13} These standards apply not only to the operation of a nonessential service but also to its termination.\textsuperscript{14} Thus, the validity of a city’s decision to close its public pools must be tested by the same equal protection standard used in the case of a public school; the essentiality of the service is irrelevant.

While essentiality is a false issue, the question of whether a discriminatory closing alone, without affirmative action through expenditures or otherwise, can constitute an equal protection violation poses a more substantial problem. Although the facts in \textit{Griffin} involved payment of public funds to support attendance at segregated private academies, the Court indicated that even absent such payments the closing itself would be unconstitutional: “Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”\textsuperscript{15} Moreover, reading \textit{Griffin} to allow a state to close its schools to avoid desegregation so long as it does not financially support private, segregated replacements ignores an earlier action by the Supreme Court. In a per curiam ruling, the Court affirmed a district court decision\textsuperscript{16} holding unconstitutional a state statute which gave Louisiana’s governor the power to close all public schools if any were faced with a desegregation order. That ruling did not depend upon the presence of state financial aid, direct or indirect, to private segregated schools. A further indication that a discriminatory closing by itself is unconstitutional.

\footnote{13}{See note 6 supra.}

\footnote{14}{By way of analogy, it has been established that even though one has no constitutional right to a governmentally bestowed benefit, once granted it cannot be capriciously withdrawn. The Supreme Court has recently reaffirmed this principle by holding that welfare benefits cannot be withdrawn without a prior hearing comporting with due process standards. \textit{Goldberg v. Kelly}, 397 U.S. 254 (1970). The Court noted that such a termination involves state action, and it is no answer to a constitutional challenge that welfare benefits are a privilege and not a right. \textit{Id.} at 262. See \textit{Shapiro v. Thompson}, 394 U.S. 618, 627 n.6 (1969). \textit{See generally Hecht v. Monaghan}, 307 N.Y. 461, 121 N.E.2d 421 (1954) (taxi driver’s license); \textit{Wignall v. Fletcher}, 303 N.Y. 435, 103 N.E.2d 728 (1952) (individual’s driver’s license); \textit{Alpert v. Board of Governors}, 286 App. Div. 542, 145 N.Y.S.2d 534 (1955) (right to practice medicine in a public hospital). In \textit{Sherbert v. Verner}, the Court indicated that one may not be deprived of a benefit in violation of first amendment rights. 374 U.S. 398, 404 (1963). Arguably this principle should also protect one against withdrawal of a benefit in violation of the equal protection clause.}

\footnote{15}{377 U.S. at 231.}

tional may be found in dicta from *Evans v. Abney*. Writing for the majority in *Evans*, Justice Black was willing to assume, and Justice Brennan, in dissent, took as established law, the proposition that "under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility."  

Thus, under *Griffin*, the closing of a public facility violates equal protection if it is motivated on grounds of race and opposition to desegregation. The nature of the equal protection violation in a discriminatory closing may be perceived in two ways. First, the very act of such a closing may be seen as reflecting an official policy that blacks and whites should not swim together. It seems to say to the world: This locality abhors desegregated swimming to such an extent that it would rather close its pools than have them used by both races. Such a classification is impermissible since it has the psychological effect of denigrating the city’s black citizens, officially sanctioning in their minds and in the minds of others the myth of inferiority. Second, the effect of the closing is state encouragement of private discrimination, for the state by closing its pools forces citizens, if they are to swim at all, to patronize private pools. The restrictive policies of these pools are thus indirectly supported by the state in the form of increased business. Therefore, a discriminatory closing, like the discriminatory operation of a public facility, by itself constitutes an equal protection violation.

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18 396 U.S. at 445.
19 Id. at 453 (dissenting opinion).
20 See id. at 453-54 (dissenting opinion).
21 Cf. Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954). The detrimental psychological effect in *Brown* stemmed from the state's operation of a segregated system; the same harm is present when a facility is closed solely to prevent its desegregation since the message of inferiority is clear in both instances.
22 A clear example of an equal protection violation based upon state action which would have had the effect of encouraging private discrimination appears in *Reitman v. Mulkey*, 387 U.S. 369 (1967). *Reitman* involved a California constitutional amendment nullifying, in effect, recently passed open housing laws and guaranteeing the right of private property owners to refuse to sell, lease, or rent their property on the basis of race. The Supreme Court affirmed the California court's determination that the amendment constituted state encouragement of private racial discrimination and was therefore violative of the equal protection clause. While the concept of discriminatory motive is central to *Griffin*, the concept of discriminatory effect is central to *Reitman*. Since the closing of the public pools will increase the demand for the use of private swimming facilities which operate on a segregated basis, it can be argued that the closing has the effect of encouraging private discrimination. The *Palmer* court felt *Reitman* was not relevant since the public pools in Jackson "ceased to exist" while the private property in California continued to be used, but this analysis is superficial since the effect of the discrimination in *Palmer* will manifest itself in the private recreational facilities which, of course, continue to exist.
Since a finding as to the presence or absence of a discriminatory motive was crucial to the equal protection issue in Palmer, it is necessary to test the motivation behind both this closing and any similar closing against the following considerations: (1) the presence or absence of a desegregation order or a similar declaratory judgment; (2) the effect reasonably predictable from a closing in light of community practices; (3) the racial status of the facility at the time of the closing; and (4) the bona fides of the city’s offered justifications. Any closing which occurs in the face of, or under threat of, a desegregation order or following a declaratory judgment as in Palmer should be presumed to be motivated by opposition to desegregation, and a heavy burden of proof should rest upon the city to establish valid nonracial reasons.

23 While motivation is often difficult to analyze, courts have nevertheless recognized that often a determination of motives is crucial to the disposition of a case. See, e.g., Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263 (1965) (company’s closing of part of its business deemed unfair labor practice if motivated by a desire to chill unionism); Griffin v. County School Bd., 377 U.S. 218 (1964) (school closing motivated on grounds of race and opposition to desegregation held unconstitutional); Snowden v. Hughes, 321 U.S. 1 (1944) (dictum) (equal protection violation established if intentional or purposeful discrimination shown); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) (landlord may not evict tenant if motivated by desire to retaliate for tenant’s reporting of housing code violations).

24 The Palmer court accepted the defendants’ contention that they had engaged in a nondiscriminatory consideration of racial factors. 419 F.2d at 1228. The court failed to recognize, however, that the benign use of racial criteria has been limited to situations in which an attempt is being made to overcome the effects of past discrimination. See United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Green v. County School Bd., 391 U.S. 430 (1968); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); Offermann v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965), aff’d, 378 F.2d 22 (2d Cir. 1967) (dictum); Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964). See also Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 HARV. L. REV. 564 (1965); Vieira, Racial Imbalance, Black Separatism, and Permissible Classification by Race, 67 Mich. L. REV. 1553 (1969). Palmer is clearly not such a case. The black citizens of Jackson are being denied, rather than given, the opportunity to swim in desegregated pools.

25 It is well recognized that the party bringing a civil suit has the burden of showing by a preponderance of the evidence the facts which would entitle him to relief under the law. In Palmer it was necessary to prove discriminatory motivation. By indicating that the closing was immediately preceded by a court judgment declaring segregated recreational facilities unlawful, the plaintiffs established a prima facie case of discriminatory motivation and shifted the burden of rebuttal to the defendants. When defendants, as in Palmer, concede that race is a factor in their action, the burden to justify its use is extremely heavy. See, e.g., Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944). In order to justify a delay in desegregating recreational facilities, for example, the Supreme Court has ruled that a city must show “that such delay is manifestly compelled by constitutionally cognizable circumstances . . . . In short, the city must sustain an extremely heavy burden of proof.” Watson v. Memphis, 373 U.S. 526, 533 (1963). See generally Vieira, supra note 24; Note, Developments, supra note 3, at 1088-91. The defendants in Palmer did not sustain this heavy burden, for even accepting the bona fides of their alleged motives, their
Even in the absence of a desegregation order, a closing should be presumed invalidly motivated if the defendant officials, as reasonable men, could expect the natural effect of such a closing to be the encouragement of private discrimination. The Palmer defendants were undoubtedly aware of the discriminatory practices of the owners of private recreational facilities in the locality and knew that their action would effectively deprive black citizens of swimming facilities. This further strengthens the presumption of invalid motivation in Palmer. On the other hand, if there is no desegregation order or declaratory judgment and if, based on community practices, a reasonable man would not expect the closing to encourage private discrimination, the burden of proof should then rest with those asserting the presence of a discriminatory motive. Whether the facility was being operated on a segregated or integrated basis at the time of the closing would be an additional consideration. Even in the absence of a desegregation order or declaratory judgment, a closing of pools operated on a segregated basis would indicate an invalid attempt to anticipate and avoid such an order or judgment. If, on the other hand, the pools had been integrated, this fact would decrease the likelihood that the officials were improperly motivated in closing them.

A final consideration in determining motivation is the bona fides of the city’s offered justifications for the closing. If the reasons appear fabricated, this would be evidence of bad faith and would indicate the presence of a discriminatory motive. The Palmer defendants, for example, offered justifications based on economy and public safety. The economy argument must be taken skeptically since the pools in Jackson had not operated in the past so that revenues matched or exceeded

justifications for the closing were not constitutionally acceptable. See notes 27-29, 32-33 infra and accompanying text.

As to the actual presentation of evidence, both the majority and concurring opinions mistakenly argue that since plaintiffs offered no formal proof on the issue of motivation, the defendants’ justifications must be accepted as valid. 419 F.2d at 1225, 1229. In fact, plaintiffs did offer proof on the issue by pointing out that the closing immediately followed a declaratory judgment requiring desegregation. This fact alone established an obvious inference that the closing was motivated by opposition to desegregation, and it is clear that discriminatory motives may be inferred from the circumstances surrounding a particular government action. See, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964) (discriminatory motive could be inferred from the fact that schools were closed in face of a desegregation order); Pennsylvania v. Brown, 392 F.2d 120, 125 (3d Cir. 1968) (invalid motive of city which had resigned its trusteeship after Supreme Court ordered desegregation of beneficiary college held conspicuous). See generally Note, An American Dilemma—Proof of Discrimination, 17 UCH. L. REV. 107 (1949).

26 See note 22 supra and accompanying text.
expenses.\textsuperscript{27} This annual deficit appears to have been unimportant to the defendants until they felt judicial pressure to desegregate. Furthermore, the public safety rationale lacked any showing of imminent, serious violence.\textsuperscript{28} Standing contrary to their justifications, there is abundant extrinsic evidence demonstrating defendants’ disagreement with the concept of desegregated public recreational facilities.\textsuperscript{29} Such factors substantiate the presumption that the motives in Palmer were discriminatory.

\textsuperscript{27} The average operating expenses for the 1960-62 period for the Livingston, Battlefield Park, College Park (white), and College Park (black) pools were $10,000 per year per pool. The average revenues for the same period were $8,000 each for the Livingston, Battlefield Park and College Park (white) pools, and only $2,500 for the College Park (black) pool. 419 F.2d at 1231.

\textsuperscript{28} The city never attempted to operate its pools on a desegregated basis after the Clark v. Thompson declaratory judgment. Thus any assertion that the safety of Jackson’s citizens would be threatened by such operation is purely speculative, based merely on the alleged fears of the defendants. There is much reason to doubt the reasonableness of these fears since other recreational facilities in Jackson were desegregated without violence and since pools in a number of southern cities have been successfully desegregated. See Palmer v. Thompson, 419 F.2d 1222, 1230 (5th Cir.), cert. granted, 398 U.S. 948 (1970). Even assuming the reasonableness of such fears, constitutional rights cannot turn on them unless a city has first made every reasonable effort to operate the facilities safely on an integrated basis. See note 33 infra and accompanying text.

\textsuperscript{29} Instructive is the following sampling of newspaper articles which indicate the views of Mayor Thompson: “We will do all right this year at the swimming pools,” the Mayor noted, “but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling. . . . He said the city now has legislative authority to sell the pools or close them down if they can’t be sold.” Jackson Daily News, May 24, 1962, at 1. “Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson’s present segregation of the races.” Id. May 15, 1963, at 1. “Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation.” Id. May 24, 1963, at 1.

Moreover, it is useful to consider portions of the district court’s opinion in Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962). Judge Mize reflected on the history of Jackson after the Civil War, noting that the white citizens occupied one area, the “colored” another, and that the custom has been sustained throughout the years: “As this development took place, the city duplicated its parks, playgrounds, libraries, and auditoriums in the white and colored areas. Under these circumstances, members of each race have customarily used the recreational facilities located in close proximity to their homes. The defendants [including Mayor Thompson] believe that the welfare of both races will best be served if this custom is continued.” Id. at 541. The affidavit of Mayor Thompson filed during the course of the Palmer litigation quotes approvingly from Judge Mize’s language above and concludes: “I believe that the welfare of both races would have best been served if this custom had continued.” Affidavit of Allen C. Thompson, Record, Palmer v. Thompson, 419 F.2d 1222 (5th Cir.), cert. granted, 398 U.S. 948 (1970).

Finally, one must consider that “the State of Mississippi has a steel-hard, un-deviating official policy of segregation. The policy is stated in its laws. It is rooted in custom.” United States v. City of Jackson, 318 F.2d 1, 5 (5th Cir. 1963). As one
Establishing the presence of a discriminatory motive does not, however, dispose of the matter, for even an admittedly invidious denial of equal protection may be upheld upon the showing of a compelling state interest. It is instructive to focus again upon the interests asserted in Palmer—public safety and economy—questioning whether they could ever be compelling enough to justify a discriminatory closing. It is clear that a violation of equal protection usually cannot be justified on the basis of “law and order”; consequently citizens cannot be prevented from exercising their constitutional rights, as they were in Palmer, on the mere basis of an unsubstantiated fear by officials that laws will be broken. This is not to say a city must stand helpless in the face of imminent and serious violence. Rather, when it becomes clear, after a city has begun desegregated operation of its pools, that racial violence cannot be controlled, a compelling state interest arises and the pools may be closed until the danger subsides. The burden of commentator has noted, “the people comprising officialdom in the Southern states have made the practice of racial segregation a long and unvarying habit which may fairly be labeled as an official custom.” Comment, Custom as Law Within the Meaning of the Equal Protection Clause—An Approach to Problems of Racial-Discrimination, 17 Rut. L. Rev. 563, 569 (1963). It seems apparent that the Palmer defendants, officials of the capital city of a deep south state, were committed to perpetuation of the policy of segregation.

It is clear that if a discriminatory motive is not shown, there can be no equal protection violation, and the city would be free to close its pools for any reason or no reason.


“[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.” Watson v. City of Memphis, 373 U.S. 526, 535 (1963). “[L]aw and order are not . . . to be preserved by depriving the Negro children of their constitutional rights.” Cooper v. Aaron, 358 U.S. 1, 16 (1958). “[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.” Buchanan v. Warley, 245 U.S. 60, 81 (1917).

The test of whether a city could close its public facilities because of public safety might be based upon the concepts of prior restraint and clear and present danger, both of which are used to protect first amendment rights. See Near v. Minnesota, 283 U.S. 697 (1931) (freedom of press may not be subject to prior restraints); Schenck v. United States, 249 U.S. 47 (1919) (freedom of speech may be curtailed only when it presents a clear and present danger of a bona fide government interest); Gorfinkel & Mack, Dennis v. United States and the Clear and Present Danger Rule, 39 Cal. L. Rev. 475 (1951); Nathanson, The Communist Trial and the Clear-and-Present-Danger Test, 63 Harv. L. Rev. 1167 (1950). Under such a test, black citizens could not be denied the opportunity to swim in desegregated pools on the mere basis of a fear by officials of violence. Such a denial would be a prior restraint upon the exercise of valuable rights. If violence breaks out after a pool has been opened to both races, the city
demonstrating a danger which would justify both the initial closing and any continuing shutdown clearly rests with the city.\textsuperscript{34}

As for the justification based on economy, it can be argued that a discriminatory closing might be sustained if a city were truly financially unable to continue a pool's operation, although the Supreme Court has ruled that "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." \textsuperscript{35} The city should have a heavy burden of showing utter financial inability; the mere fact that revenues from pools do not meet expenditures cannot by itself justify a discriminatory closing. A federal court, which has a duty to create and effect appropriate remedies in order to protect constitutional rights,\textsuperscript{36} cannot be deprived of the power to order a city to operate pools closed in violation of equal protection merely because some expenditure of funds would be necessary.\textsuperscript{37}

should remedy the situation by punishing those who break the law. A temporary closing would be permitted only when it became impossible for the city, even with the full use of its police power, to maintain order at an integrated facility. The action of the \textit{Palmer} defendants, of course, fell far short of meeting the requirements of such a test. They did not even attempt to operate the pools on a desegregated basis.

\textsuperscript{34} Whenever state action is based upon race, the state must sustain a heavy burden to justify it. \textit{See note 25 supra.}

\textsuperscript{35} \textit{Watson v. City of Memphis,} 373 U.S. 526, 537 (1963). Both the Fourth and the Fifth Circuits have ruled that inability to operate desegregated facilities on a profitable basis is no ground to delay desegregation. City of St. Petersburg v. Alsup, 238 F.2d 830, 832 (5th Cir. 1956); Department of Conserv. & Dev. v. Tate, 231 F.2d 615, 616 (4th Cir. 1956).

\textsuperscript{36} "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." \textit{Bell v. Hood,} 327 U.S. 678, 684 (1946), \textit{citing Marbury v. Madison,} 5 U.S. (1 Cranch) 137, 162-63 (1803) \textit{and Texas \& N.O.R.R. v. Brotherhood of Ry. Clerks,} 281 U.S. 548, 569-70 (1930).

\textsuperscript{37} It is unlikely that a court would order the levying of a tax in order to secure the funds necessary to operate the pools. Since the power of taxation is traditionally a legislative rather than a judicial function, courts have attempted to avoid confrontation with such a basic separation of powers issue. \textit{But cf. Griffin v. County School Bd.,} 377 U.S. 218 (1964): "[T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors . . . to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system . . . ." \textit{Id.} at 233; \textit{accord, Plaquemines Parish School Bd. v. United States,} 415 F.2d 817, 833 (5th Cir. 1969), \textit{modifying and aff'g} 291 F. Supp. 841, 848 (E.D. La. 1967). Despite the apparent judicial reluctance to force states to expend revenues, implicit in many constitutional rulings is a requirement that state or municipal funds be used in order to implement decisions. \textit{See, e.g., Green v. County School Bd.,} 391 U.S. 430 (1968) (school boards charged with affirmative duty to take any steps necessary to convert to unitary school systems); \textit{Gideon v. Wainwright,} 372 U.S. 335 (1963) (counsel must be provided by government for indigent defendants); \textit{Griffin v. Illinois,} 351 U.S. 12 (1956) (government must furnish indigent defendants with free transcript of trial proceedings); \textit{Hobson v. Hansen,} 269 F. Supp. 401, 515, 517
The defendants' use of racial criteria belies the *Palmer* majority's third point—that improper motives existed in *Griffin* but not in *Palmer*. Such a use is itself a discriminatory act unless it is for the purpose of overcoming past discrimination. The defendants also failed to justify the clearly discriminatory closing on the basis of overriding public interest because they demonstrated no danger of imminent violence and presented no evidence that the city was truly financially unable to operate desegregated pools.

**Leavell Woods and Other “Private” Pools.** Any analysis of the constitutionality of the closing in *Palmer* would be incomplete without a consideration of the legal status of the previously city-leased Leavell Woods pool, now being operated on a segregated basis by the Y.M.C.A., and, concurrently, an examination of possible challenges to other private parties who might purchase the city's remaining pools or operate others on a fee-admission basis. In regard to the Leavell Woods pool, three arguments can be advanced to compel its desegregation: (1) since the city's lease cancellation cannot change the pool's public character under the doctrine of *Evans v. Newton*, the private

(D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175, 185 (D.C. Cir. 1969) (school district must undertake massive busing program). The prospect of forcing a city to expend funds in order to operate recreational facilities on a desegregated basis should not deter a court from ordering a reopening. This is particularly true when, as in Jackson, such an order would not force a city to embark upon a completely new program, but rather would merely require the reinstating of a service long provided by the city. It must also be noted that in the case of swimming pools, the city's expenditures can be offset at least partially, and perhaps wholly, by the revenues derived from admission fees.

33 See note 24 supra.

39 See note 7 supra.

40 All three arguments would also apply to a private party who purchases one of the city's closed pools and operates it on a segregated basis. In the case of private pools now operating or which might be constructed in the future which have absolutely no association with the city, desegregation could most likely be achieved only under the 1964 or 1866 Civil Rights Act. It has been suggested, however, that *Evans v. Newton* stands for the proposition that whenever a private party engages in an activity imbued with a “public character,” he will be subject to constitutional standards whether or not the particular activity was once actually associated with government. See *Evans v. Newton*, 382 U.S. 296, 319-22 (1966) (Harlan, J., dissenting).

41 382 U.S. 296 (1966). The city of Macon, Georgia became the trustee of land under a will which stipulated that it should be used as a municipal park for white people only. After operating the park on a segregated basis for a few years, the city resigned its trusteeship in light of case law requiring desegregation of public recreational facilities. See note 6 supra. A Georgia court accepted the city's resignation and appointed new private trustees who continued to operate the park for whites only. The Supreme Court found that the park, even in private hands, was still subject to the fourteenth amendment's restrictions, pointing out that when a private party is endowed with functions which are governmental in nature, it becomes an instrumentality "of the
owners are subject to the fourteenth amendment; (2) operation of the pool is subject to the public accommodations section of the 1964 Civil Rights Act; and (3) if admission depends solely upon payment of a fee, black citizens must have an equal opportunity to pay under the freedom of contract provision of section 1981 of the 1866 Civil Rights Act.

In *Evans*, the Supreme Court subjected the operation of a park to the fourteenth amendment even after the city had turned its trusteeship over to private parties. Pointing out that a park is more comparable to a fire or police department which serves the community than to a luncheon club or social center which are more private in nature, the *Evans* majority concluded that the public character of the park required that it be treated as a public institution subject to the equal protection clause "regardless of who now has title under state law." Similarly, it could be argued that the public character of the Leavell State and subject to its constitutional limitations." 382 U.S. at 299. The Supreme Court recently altered the final outcome of *Evans v. Newton*. In *Evans v. Abney*, the Court affirmed the Georgia Supreme Court's determination that under state law the park must revert to the testator's heirs because his intention to provide a "whites-only" park had become impossible to fulfill. 396 U.S. 435 (1970), aff'd 224 Ga. 826, 165 S.E.2d 160 (1968). The Court noted that *Evans v. Newton* did not speak to the problem of whether the land should continue to be used as a park but held only that if it were operated as a park, it must be desegregated and that the city could not avoid this consequence by terminating its trusteeship. The majority opinion relied on the power of Georgia courts to carry out the wishes of the testator. Justice Brennan, in dissent, noted that but for the constitutional prohibition against operation of segregated parks, the park in question here would remain open. He submitted that a state cannot constitutionally close a facility solely to avoid desegregating it and that the result would be equally unconstitutional if the state allowed the park to revert to the testator's heirs. See note 19 *supra*, and accompanying text. He also would have found discriminatory state action on the basis of *Reitman v. Mulkey*. See note 22 *supra*.


44 382 U.S. at 302. Although the record shows no withdrawal of municipal maintenance from the park, it is clear from considering the opinion in its entirety that such a factor was not crucial to the holding. Authorities citing *Evans* have certainly not limited it to situations where municipal maintenance continues. See, e.g., Edwards v. Habib, 130 U.S. App. D.C. 126, 131 n.11, 397 F.2d 687, 692 n.11 (1968), cert. denied, 393 U.S. 1016 (1969) (state action may be found when the state permits a private organization to perform an essentially governmental function); Pennsylvania v. Brown, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968) (city which had administered a college as trustee could not terminate its connection with the college in order to escape its duty to desegregate it).
Woods pool requires that it be subject to the equal protection clause even though the city has formally abandoned its connection with the pool. The imputation of state action to a private institution is not a unique concept; state action has frequently been found despite the fact that it was "only one of several co-operative forces leading to the constitutional violation." One commentator has suggested that the test for determining if a nominally private facility should be subject to the fourteenth amendment is whether "the state [has] permitted . . . a private party to exercise such power over matters of a high public interest that to render meaningful the type of rights protected by the fourteenth amendment, the action of the private person or organization must be deemed . . . to be the action of the state." Certainly Jackson, by cancelling its lease, has permitted the Y.M.C.A. to exercise power over a matter of high public interest—a pool which, had it not been for the declaratory judgment, would have been supported by the city. Since Jackson's citizens must now swim in private pools or no pools at all, their right to desegregated use of municipal recreational facilities cannot be "rendered meaningful" unless pools of a public character are held to fourteenth amendment standards.

The success of an argument based upon the public accommodations section of the 1964 Civil Rights Act would depend upon certain facts not available in the Palmer record. In order to bring the Y.M.C.A. pool or any pool under the Act, there are two requirements: (1) the pool must be a place of public accommodation, and (2) either the pool's operation must affect interstate commerce or the discrimination by the pool's operators must be supported by state action.49 Private

48 See, e.g., Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping center); Terry v. Adams, 345 U.S. 461 (1953) (party primary); Marsh v. Alabama, 326 U.S. 501 (1946) (company town). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Id. at 506.


48 42 U.S.C. § 2000a (1964); see note 42 supra.

clubs are exempt from the Act, but judicial construction of the exemption has been quite strict; places which call themselves private clubs, but which in fact admit any white person for a small membership fee, have consistently failed to escape coverage. 50

It seems clear that a swimming pool can be considered a place of public accommodation under the Act as a place of entertainment. 51 While it has been argued that a distinction should be drawn between a place where people are spectators and one where they are participants, and that the Act should apply only to the former, 52 the Supreme Court recently rejected such a differentiation and ruled that a recreation area which included swimming facilities was a place of entertainment within the meaning of the Act. 53 An alternative approach to the public accommodations issue depends on whether there is a snack bar or soda fountain on the pool grounds, for any "facility principally engaged in selling food for consumption on the premises" is a place of public accommodation under the statute. 54 Application of the statute to such a snack bar would automatically extend to the pool if both were operated together as part of the same facility. 55

50 "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) [which defines places of public accommodation] of this section." 42 U.S.C. § 2000a(e) (1964). See Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (no plan or purpose of exclusiveness; no selective element other than race); Daniel v. Paul, 395 U.S. 298 (1969) (absence of self-government and member-ownership indicated that membership device was no more than a subterfuge to escape coverage of the Act); United States v. Northwest La. Restaurant Club, 256 F. Supp. 151, 152 (W.D. La. 1966) (club found to be organized solely to avoid Act). See generally Note, Public Accommodations Laws and the Private Club, 54 Geo. L.J. 915 (1966); Note, The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion, 44 N.Y.U. Rev. 1112 (1969); Note, Civil Rights Act of 1964—Public Accommodations—Private Club Exemption, 45 N.C.L. Rev. 498 (1967).

51 The following are included as places of public accommodation: "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment." 42 U.S.C. § 2000a(b) (3) (1964).


Even if it could be shown that the pool, or pool and snack bar, were a place of public accommodation, it would still be necessary to demonstrate either a connection with interstate commerce or state involvement in the discrimination.\textsuperscript{56} Whether the pool by itself affects interstate commerce depends upon a factual test. If the pool's "sources of entertainment . . . move in commerce,"\textsuperscript{57} then the requirement is fulfilled.\textsuperscript{58} Thus, the purchase of a diving board or other equipment from a company in another state might well be sufficient to bring a pool under the Act.\textsuperscript{59} As for a snack bar facility, a showing that it serves interstate travelers or that a substantial portion of its food supply has moved in interstate commerce would be necessary.\textsuperscript{60} Courts have con-

\textsuperscript{56} It is unnecessary to establish the link with interstate commerce if it can be shown that discrimination by the pool's operators is supported by state action. 42 U.S.C. § 2000a(b) (1964). One statutory test included in the 1964 Act provides that discrimination is supported by state action whenever it "is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof." Id., § 2000a(d)(2). Whether Congress intended this state action provision to be a mere restatement of existing law or an extension of the state action concept is unclear. See generally 78 HARV. L. REV. 684, 688 (1965); 43 TEXAS L. REV. 423, 424 (1965).

Although no case has construed the "color of custom" language in the 1964 Civil Rights Act, a recent Supreme Court decision contains a lengthy discussion of "color of custom" as it appears in 42 U.S.C. § 1983 (1964). See Adickes v. S. H. Kress & Co., 38 U.S.L.W. 4434 (U.S. June 1, 1970). In Kress a white plaintiff alleged that she was refused service at one of Kress' Mississippi lunch counters because she was with a group of Negroes and contended that the refusal was under color of custom of Mississippi. The Court ruled that plaintiff could establish a valid claim under section 1983 if she could prove that Kress refused her service because of a state-enforced custom, having the force of law, requiring segregation in restaurants. Moreover, the Court stated that such custom "must have the force of law by virtue of the persistent practices of state officials." Id. at 4441. One possible example of such a practice, the Court said, would be statements made by public officials to the effect that certain customs relating to segregation would continue in the community. Id. Mayor Thompson made such statements in regard to segregated swimming in Jackson. See note 29 supra. In addition, the city of Jackson, by the very act of closing its pools to avoid desegregating them, made it clear that it was enforcing the long-standing Mississippi custom of segregated swimming. Reasoning from Adickes, it may be argued that segregated swimming is a custom having the force of law in Mississippi. Owners of private segregated pools following such a custom could be compelled to desegregate under section 2000a(d)(2) of the 1964 Act, regardless of whether the pool affects interstate commerce.

\textsuperscript{57} 42 U.S.C. § 2000a(c)(3) (1964).


\textsuperscript{59} In Daniel v. Paul, the Court relied on the club's leasing of paddle boats from an out-of-state company, the use of a juke box manufactured by a foreign corporation, and the fact that the juke box played records made in another state. Recognizing that only minimal interstate interests were present, the Court nevertheless found them sufficient. 395 U.S. 298, 308 (1969).

\textsuperscript{60} 42 U.S.C. § 2000a(c)(2) (1964). See United States v. All Star Triangle Bowl, Inc.,
strued such requirements quite liberally, however, and have held, for example, that the interstate traveler requirement can be satisfied by only minimal evidence. 61

A final possible theory is an action based upon section 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 62 This section of the 1866 Civil Rights Act has recently been interpreted to proscribe wholly private discrimination. 63 Therefore, the often perplexing problems posed by the concepts of state action and interstate commerce need not be considered. Thus, if the Leavell Woods pool or any other private pool admitted whites upon payment of a fee but refused to admit blacks who tendered the same fee, it could be argued


61 In Daniel v. Paul, the Supreme Court noted "that it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler." 395 U.S. 298, 304 (1969). It would be equally unrealistic to assume that none of the patrons at the Leavell Woods pool was an interstate traveler, or if a snack facility is present, that none of its food moved in interstate commerce. See Katzenbach v. McClung, 379 U.S. 294, 296-97 (1964); Gregory v. Meyer, 376 F.2d 509, 511 (5th Cir. 1967).


63 See Scott v. Young, 307 F. Supp. 1005, 1008 (E.D. Va. 1969), aff'd, 421 F.2d 143 (4th Cir. 1970); Clark v. American Marine Corp., 304 F. Supp. 603, 610 (E.D. La. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). Early cases seemed confused on whether the Act was an exercise of Congressional power under the thirteenth or the fourteenth amendment. Compare, Ex parte Virginia, 100 U.S. 339 (1879) with Gibson v. Mississippi, 162 U.S. 565 (1896). Because the statute has been used infrequently, the Supreme Court has had little opportunity to clarify its position, although in one case the Court characterized the statute as directed at government action, indicating that it was enacted under the fourteenth amendment. Hurd v. Hodge, 334 U.S. 24, 31 (1948). Thus, historically, Negroes have established their right to buy tickets for admission into swimming pools only where some state involvement could be shown. See Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952), aff'd, 205 F.2d 47 (8th Cir.), cert. denied, 346 U.S. 826 (1953) (city's denial of entrance to Negroes into public pool after tender of admission fee held a violation of section 1981); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949) (aid of local police officials in ejecting black plaintiffs from private pool after tender of admission fee held violative of section 1981).

that the pool operators were depriving the black citizens of their equal right to make contracts. Such an argument was recently adopted by the Fourth Circuit as an alternative basis for granting relief in *Scott v. Young*. 64 In *Scott*, the private defendant owned and operated a large outdoor recreational area which included swimming facilities. He refused to admit Negroes who tendered the requisite admission fee. The court noted that the bestowal of a right of admission in return for a fee is "unquestionably a contract." 65 Thus, the defendant was held in violation of section 1981 since the statutory provision, as the lower court pointed out, "on its face prohibits all private racially motivated conduct which denies or interferes with the Negro's right to enter into contracts to purchase that which is freely sold to white citizens." 66

**Conclusion**

It is hoped that local attempts to frustrate the national policy of full protection of equal rights will, in time, disappear. Until that time, black citizens must continue to resort to legal processes to remedy such injustices. Where any action taken by a state or local government clearly reflects that body's aversion to desegregation, courts must be quick to afford proper relief. When city officers close public swimming pools in order to prevent their desegregation, the courts must perceive that such an act is a clear violation of equal protection and must order an immediate reopening. To rule otherwise permits a locality to avoid by cynical default its constitutional duty to provide desegregated facilities.

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64 421 F.2d 143 (4th Cir. 1970). This case was also decided on the basis of the public accommodations section of the 1964 Civil Rights Act. *Id.* at 144.

65 *Id.* at 145.

RECENT DECISION

TRUTH-IN-NEGOTIATIONS—OPENING A TWO-WAY STREET

Cutler-Hammer, Inc. v. United States (Ct. Cl. 1969)

The Truth-in-Negotiations Act\(^1\) requires that prior to the award of certain contracts,\(^2\) prospective government contractors submit cost or pricing data that is certified as accurate, complete, and current.\(^3\) Should defective data be discovered after the contract has been awarded, the Government may administratively reduce the negotiated price of the contract to eliminate its effect.\(^4\) Among the host of questions regard-

\(^2\) 10 U.S.C. § 2306(f) (Supp. IV, 1969). The Truth-in-Negotiations Act, which was an amendment to the Armed Services Procurement Act, applies only to Army, Navy, Air Force, Coast Guard, and NASA contracts. 10 U.S.C. § 2303(a) (1964). Civilian agencies, however, have promulgated comparable regulations for nondefense government contracts. Pricing Techniques, 41 C.F.R. §§ 1-3.807 (1970). The provisions of the Act apply only to contracts in which price is not established by adequate competition, catalog or market prices, or price regulation. 10 U.S.C. § 2306(f) (Supp. IV, 1969). Contracts or modifications not expected to exceed $100,000 also are exempted from the mandatory provision of the Act. Id.

Procurement by competitive bidding has become less common, because the geometrical acceleration of technology has often caused the Government to purchase products that can not be adequately defined for competitive bidding purposes or that can be produced competently by only one manufacturer. Such contracts are "negotiated" rather than awarded by competitive bidding. In fiscal year 1969, negotiated contracts represented 86.6 percent of the dollar volume of all government procurement; for military procurement the figure was 89.0 percent. Comp. Gen. Rep. B-39995(1) (1970).

\(^3\) A . . . contractor . . . shall be required to submit cost or pricing data . . . and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current . . . Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined . . . that such price was increased because the contractor . . . furnished cost or pricing data which was . . . inaccurate, incomplete, or noncurrent . . .


\(^4\) Pursuant to implementing regulations, each contract to which the statute applies must include a clause entitled "Price Reduction for Defective Cost or Pricing Data." 32 C.F.R. § 7.104-29 (1969). Should the Government allege that defective data was submitted during contract negotiations, the clause provides that failure of the parties to agree on a price reduction shall be a dispute subject to the "Disputes" clause included [1238]
ing the proper interpretation of the statute, 5 a major concern has been the permissibility of "offsets." 6 In calculating a price reduction when defective data has been submitted. In Cutler-Hammer, Inc. v. United States, 7 which represents the first judicial examination of the Truth-in-Negotiations Act, the Court of Claims sustained a contractor’s contention that such offsetting was proper.

The contract in Cutler-Hammer involved the production of complex electronic aircraft reconnaissance systems, which comprised a great number of independent subsystems, which in turn were composed of numerous parts. In accordance with the pricing method utilized in the contractor’s proposal, each particular part was listed under its appropriate subsystem, with the total quantity of such parts in the entire system noted. The contractor’s pricing personnel mistakenly assumed, however, that the total quantity noted was the required number for each subsystem rather than for the entire system; consequently, they multi-

in all government contracts. Id. The “Disputes” clause allows the contractor to appeal decisions of the Contracting Officer, who is the agent of the Government for contracting purposes, to the “Secretary or his duly authorized representative or [if an intermediate appeal is recognized] to the head of the procuring activity concerned.” Disputes, 32 C.F.R. § 7.103-12 (1969). In the Department of Defense, appeals are taken to the Armed Services Board of Contract Appeals (ASBCA), which may hear and decide questions of both fact and law. Armed Services Procurement Reg., App. A, Pt. 1 (1963). Decisions of the Board are subject to judicial review in the Court of Claims, except that Board findings of fact “shall be final and conclusive unless ... fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or ... not supported by substantial evidence.” 41 U.S.C. § 321 (1964).

5 Since the actual contract signing often follows the date of agreement on price by several months, the contractor may have an obligation to disclose cost data discovered in the intervening period. Cf. Aerojet-General Corp., ASBCA No. 12873, 69-1 CCH Bd. Cont. App. Dec. ¶ 7585. The liability of a prime contractor for defective data submitted by a subcontractor is another subject of uncertainty. See Defense Procurement Circular No. 74 (Oct. 10, 1969). The applicability of the price reduction provisions when the Government fails to secure from a contractor the certificate required by the statute has not been directly considered by the ASBCA. Cf. Aerojet-General Corp., supra, ¶ 7585, at 35,219.


6 To illustrate, suppose that a prospective government contractor knows that he will purchase from outside vendors parts A and B, each costing $100. In submitting cost data during negotiations, the contractor erroneously includes twice the cost of part A in his estimate, but also inadvertently omits the cost of part B. When both errors are later discovered the issue becomes whether the contract price should be reduced by $100 because of the overstatement of the cost of part A or whether the omission of the cost of part B may be offset against the overstated cost of part A.

plied that quantity by the number of subsystems, thus substantially overstating the cost of the parts. Nevertheless, a number of other required parts were completely omitted, making a slight net inaccuracy in the Government's favor, since the proposed contract price including both errors was lower than the correct price would have been. In a price reduction action, the Court of Claims held that the erroneous cost understatements could be offset to the extent of the overstatements and that no contract price reduction was required on the Cutler-Hammer facts. 8

Prior to the Cutler-Hammer decision in the Court of Claims, three cases 9 had raised the offset issue before the Armed Services Board of Contract Appeals (ASBCA), 10 but these decisions were not easily reconciled. Thus, it was possible to formulate tentatively the rule that offsets

8 A second issue in Cutler-Hammer involved the breadth of the statutory terms "cost or pricing" data. At the time the contract proposal was submitted, a major component of the aircraft systems was produced by only one supplier. The contractor solicited estimates from several vendors and obtained only two responses: one from the sole experienced vendor and a second, at less than a quarter of the cost of the first, from an inexperienced vendor, who did not submit a technical proposal. Id. at 1308. Although the contractor then requested a technical proposal from the second vendor, it did not disclose the lower quotation to the Government; instead, it negotiated the prime contract based upon the estimate of the experienced supplier. Id. at 1309. Consequently, the Government obtained a price reduction based upon nondisclosure of the lower quotation. On appeal, the contractor argued that a quotation so much lower than that of an experienced vendor, unaccompanied by a technical proposal, was not "cost or pricing data" that warranted disclosure. Id. at 1309. The Court of Claims, however, noted that by its request for a technical proposal the contractor did consider the vendor a possible source for the required component and therefore held that the lower quotation was "cost or pricing data" requiring disclosure. "To allow a contractor to submit data, arrive at a negotiated price, file a certificate and then use a lower component cost, when that lower cost was a definite possibility during the negotiating stage, but was not then disclosed, would defeat the purpose of the statute and contract clause." Id. at 1314.

"Cost or pricing data" is now defined by the Armed Services Procurement Regulation (A.S.P.R.) as "all facts existing up to the time of agreement on price which prudent buyers and sellers would reasonably expect to have a significant effect on the price negotiations." Cost or Pricing Data, 32 C.F.R. § 3.807-3(f) (1970), as announced in Defense Procurement Circular No. 74, at 5 (Oct. 10, 1969).


10 See note 4 supra.
would be recognized only when the overstatements and understa-
ments were somehow "related." The "related" rule was first announced
in Lockheed Aircraft Corp.,\textsuperscript{11} in which the ASBCA rejected an attempt
to offset, observing that the understated costs of patent royalties and
development were "only remotely related" to the overstated costs of
materials.\textsuperscript{12} The Board held that "[t]o permit unrelated offsets would
be tantamount to repricing the entire contract, which is not within
the contemplation of the [price reduction] clause." \textsuperscript{13} Similarly, with-
out specifying the degree of "relation" requisite for offsets, the Board
determined in Cutler-Hammer, Inc.,\textsuperscript{14} on the same facts that later were
before the Court of Claims, that omissions in costs for some materials
could not be offset against cost overstatements for other materials.\textsuperscript{15} Al-
though the Board subsequently allowed offsets in material costs in
Sparton Corp.,\textsuperscript{16} it noted that the offsetting errors involved the same
component as did the overstatement and that the contractor's single
representation of the total cost of the component of each final as-
sembly was not actually overstated.\textsuperscript{17} The Board, in confirming the
Sparton decision distinguished Cutler-Hammer by observing that the
Price Reduction clause in that contract was adopted pursuant to the
Truth-in-Negotiations Act,\textsuperscript{18} while the clause in Sparton was an earlier
administratively imposed clause. Although the effect of this distinction

\textsuperscript{12} Id. ¶ 6356, at 29,450.
\textsuperscript{13} Id. Review of the Lockheed decision is now pending before the Court of Claims,
but it is unlikely that the court will consider the offset issue, since the Court of
Claims Commissioner's report recommends disposition of the case on other grounds.
Lockheed Aircraft Corp. v. United States, No. 250-67, Ct. Cl. Comm'r., Sept. 19, 1969,
\textsuperscript{14} ASBCA No. 10900, 67-2 CCH Bd. Cont. App. Dec. ¶ 6432, rev'd in part and aff'd
in part, 416 F.2d 1306 (Ct. Cl. 1969).
\textsuperscript{15} Although the Board noted that "the omitted costs are indeed less alien to the
overstated costs" than were the understated costs in Lockheed, it held that "these
too are unavailable for offset. . . . [B]oth the statute and the contractual provision
which it implements, literally limit the adjustment to pricing deficiencies which tend
to overstate the contract price." Id. ¶ 6432, at 29,826. Implicidy, therefore, the Board
rejected completely the "related" rule as a criteria for offset allowability.
\textsuperscript{16} ASBCA No. 11363, 67-2 CCH Bd. Cont. App. Dec. ¶ 6539, conf'd on reconsidera-
\textsuperscript{17} Id. ¶ 6539, at 30,379.
\textsuperscript{18} 68-1 CCH Bd. Cont. App. Dec. ¶ 6730, at 31,170. In response to the same pressures
that ultimately produced the Truth-in-Negotiations Act, price reduction provisions
similar to the post-Act clauses had been included in Department of Defense regula-
tions prior to passage of the Act. See notes 26-28 infra and accompanying text;
Roback, Truth-in-Negotiating: The Legislative Background of P.L. 87-653, 1 PUB.
CONT. L.J., July 1968, at 3, 16-17. The distinction between statutory and nonstatutory
clauses may be insignificant since the Board in Cutler-Hammer, a statutory clause
case, fully adopted the rationale of Lockheed, a prestatutory clause case.
upon the applicability of a "related costs" rule was not discussed, it
seems that after Sparton a contractor with a statutory clause could not
rely upon even the "related" rule for offset allowance.

When Cutler-Hammer was argued before the Court of Claims, the
contractor and the Government agreed that the contract clause em-
bodyied the pertinent provision of the Truth-in-Negotiations Act.19
Thus, the court's task of interpreting the clause became one of
interpreting the Act.20 The Act itself is inconclusive on the off-
set issue, providing only that the contract price "shall be ad-
justed to exclude . . . sums . . . by which . . . such price was
increased because the contractor . . . furnished cost or pricing data
which . . . was inaccurate, incomplete, or noncurrent . . . ." 21 The
Government argued that only those defective cost elements that in-
crease the contract price are within the contemplation of the statute.22
The contractor, however, contended the statute was applicable only
to the extent that the contract price is increased due to defective cost
data, arguing that if inaccurate data includes sufficient offsetting un-
derstatements, no price reduction at all is required.23 The court, speaking
through Judge Durfee, considered both interpretations equally reason-
able,24 and since, in its opinion, the legislative history of the Act did
not contain any meaningful discussion of the offset issue,25 the court

19 Brief for Plaintiff at 27, n.11, Brief for Defendant at 16, Cutler-Hammer v. United
States, 416 F.2d 1306 (Ct. Cl. 1969).
20 The court did not explain the relationship of statutory interpretation to contract
interpretation. It is arguable, however, that since the intent of the contracting parties
is to effectuate the statute, ambiguities in contract language should be resolved by
reference to the statute. Additionally, because failure to conform to the statute
would render the contract illegal and void, any contractual ambiguity should be
22 This view finds some support in the statutory language that the contract price
shall be adjusted to exclude "sums" by which defective data caused the contract
price to be increased. If the legislature had provided for exclusion of any "sum" by
which the price had been increased, the intent to allow offsets and exclude only the net
overstatement could have been much clearer. Use of the plural "sums" may evidence
an intent to exclude multiple specific overstatements rather than the single net over-
statement.
23 Brief for Plaintiff at 28, Cutler-Hammer v. United States, 416 F.2d 1306 (Ct. Cl.
1969).
24 416 F.2d at 1311.
25 Except for a minor and inconclusive discussion, the issue was not considered in
the Senate hearings on the bill. An industry association representative pointed out
to the Senate Committee on Armed Services that "language as it stands provides only
a one-way street . . . . It is unfair . . . . because it says nothing about the situation in
which . . . . there have been mistakes which accrued to the Government's benefit."
Hearings on H.R. 5532 Before the Senate Comm. on Armed Services, 87th Cong., 2d
based its interpretation of the Act upon its determination of the Act’s purpose and intent.

The Truth-in-Negotiations Act was passed largely in response to purported abuses by contractors of the incentive-type contract, in which the Government and the contractor negotiate a target cost of performance and the contractor is rewarded with additional profit if his actual cost is less than the target cost.\textsuperscript{26} Although the incentive contract obviously was designed to encourage aggressive efforts toward greater efficiency, it is equally obvious that the contractor can benefit greatly by negotiating the target cost at the highest possible level. Moreover, supporters of the Act were convinced that inflated cost estimating was prevalent and that the Department of Defense was unable to correct the practice either because of organizational lethargy or lack of statutory compulsion.\textsuperscript{27} Accordingly, the Truth-in-Negotiations Act was passed, requiring the Armed Services to obtain contractor certification of the accuracy of cost data submitted in negotiations and providing a price reduction remedy for false certification.\textsuperscript{28}

Judge Durfee reasoned that permitting an offset allowance would not conflict with the declared congressional intention\textsuperscript{29} to “put the in-

Sess. 100 (1962) [hereinafter cited as \textit{Hearings}]. The Senators apparently regarded this statement as an argument for increases in contract price rather than mere offsets and cautioned the witness that “what we are talking about has to do with negotiations downward, not negotiations upward.” \textit{Hearings} 102. Subsequently, the association submitted substitute language, which contained a provision for offset allowance. \textit{Hearings} 103. However, the language was not included in the statute as enacted.

Congressman Hebert, who introduced what became the Truth-in-Negotiations Act, proposed in the next Congress, an amendment to the Act which specifically would have allowed offsets. The bill was never voted upon. Roback, supra note 18, at 24-27.

\textsuperscript{26} Statement of Congressman Vinson, \textit{Hearings} 15. See Roback, supra note 18. The incentive contract typically includes a target cost of performance and a target profit expressed in dollars. If the actual cost is less than the target cost—an “underrun”—the contractor is paid a percentage of the “underrun” in addition to the actual cost and target profit. If actual cost is higher than the target cost—an “overrun”—the contractor is paid target cost and target profit, plus only a portion of the overrun. Thus, the contractor is rewarded for underruns with more profit and penalized for overruns with a lower profit. See 32 C.F.R. §§ 3.404-4 (Fixed Price Incentive Contracts), 3.405-4 (Cost-Plus-Incentive-Fee Contracts) (1969).

\textsuperscript{27} See Statement of Congressman Vinson, \textit{Hearings} 17-18.

\textsuperscript{28} See note 3, supra. The price reduction remedy does not depend upon a contractor’s fraudulent or dishonest conduct; price increases due to inadvertent error are also recoverable. “[U]nder no circumstances should anyone get more profit as the result of a mistake; . . . if you make an honest mistake, you should not be rewarded with additional profit; and if you cheet as to what is estimated cost, you should pay for it.” Statement of Senator Symington, \textit{Hearings} 102.

\textsuperscript{29} 416 F.2d at 1312. Judge Durfee’s opinion was motivated primarily by equitable principles; he did not find specifically that the statutory purpose would be advanced by allowing offsets, but only that it would not be harmed. “[T]here would seem to be no reason not to allow offsets.” \textit{Id}. 

centive profit where it belongs; that is, on demonstrated performance of the work and not by deception in negotiations." 30 Offsetting could never raise the contract price, 31 and therefore the only extra profits available to contractors would remain those realizable through increased efficiency. 32

Dissenting, Judge Davis agreed that neither the statutory language nor the legislative history gave a clear answer to the offset question, but he considered that on balance the court should "force the lock, in this instance, in the Government's favor." 33 He viewed the cursory legislative history dealing with offsets as tending to reject their allowance 34 and opined that the legislative aim "to spur contractors into more careful and correct pricing" 35 clearly would be advanced by the rejection of offsets. 36

Even accepting Judge Davis' statement of legislative purpose, equitable considerations militate against disallowing offsets. If the goal of the Act is to insure a "true" estimated cost, which the contractor would propose in the absence of any errors, then a reduction calculated by offsetting understatements against overstatements in an imperfect contract will result in a revised price that reflects the "true" estimated cost. To the extent that the contract price is reduced below this cost level by disallowing offsets, the price reduction clause functions as a penal rather than as a merely remedial mechanism, 37 even though the

30 Statement of Congressman Vinson, Hearings 16.
31 416 F.2d at 1312. The statute provides that the contract price shall be adjusted to exclude a price increase attributable to defective data. 10 U.S.C. § 2306(f) (Supp. IV, 1969).
32 "When [cost overstatements and understatements are] offset against each other, at least to the extent of the overstatements, the only savings that can be produced are those brought about through 'demonstrated performance of the work.'" 416 F.2d at 1312.
33 Id. at 1317 (dissenting opinion).
34 Id. at 1316; see note 25, supra.
35 416 F.2d at 1317 (dissenting opinion).
36 Id.
37 It can be argued, however, that price reduction without offsets imposes no penalty at all; the Government is merely acting to protect against cost overstatement, while the contractor should protect himself against understatements by accurate pricing. The Government should not insure the contractor against his own errors. See Roback, supra note 18, at 26. Nevertheless, this argument ignores the reality of unavoidable error in bidding for complex systems, often done under severe time limitations. Even under favorable estimating conditions, the complete elimination of error is impossible. Absent a unilateral price reduction provision, the contractor must accept a certain possibility of error and rely on the assumption that overstatements and understatements will tend to balance each other statistically, thus minimizing the net effect of error in the proposed price. The statistical balance is the contractor's insurance against error; offsetting in a price reduction environment functions merely to retain the balance, not to provide the contractor a governmental surety against his own errors.
history of the Act includes numerous indications that the legislators viewed the remedy as corrective only. 38 Judge Davis accordingly conditioned his dissent; pointing out that the price reduction sought in Cutler-Hammer would only reduce the contractor's profit, 39 he deferred judgment as to whether offsets also should be rejected "where [they] would impose an actual loss on the contractor (a loss which would not exist if offsets were permitted)." 40

Both the majority and the dissenting opinions discussed the decision's impact upon the phenomenon of "buying-in," a technique whereby a contractor seeks to obtain a competitive contract by bidding at an unrealistically low price with the intention of "getting-well later." 41 Such a "buying-in" contractor expects either that his contract subsequently will be modified to reflect technical advances or to refine the Government's requirements, or that separate, "follow-on" contracts will be available without competition. In either case, inflated cost estimates in later arrangements could compensate for any loss on the initial underpriced contract. Judge Davis contended that allowing offsets would tend to encourage this practice, since a contractor faced with a potential price reduction resulting from discovery of overstated cost data in a contract modification could offset his initial intentional understatements, thus insuring a profitable overall price while retaining the benefit of an originally low bid. 42 In contrast, Judge Durfee seemed to confuse the "buying-in" issue. Noting that the statute as construed would provide only for offsets and not for price increases, he concluded that a contractor who understates total costs could not increase the total price to a realistic level by pointing out specific understatements. 43 The danger Judge Davis foresaw, however, was not that the contractor could obtain a price increase by disclosing his prior cost understatements, but that he could unilaterally recover understatements by subsequent overstatements.

If the subsequent arrangements are by a new and separate contract, rather than by a modification of the original contract, "buying-in" is unaffected by an offset allowance. Since the Price Reduction clause of

38 "The costs [the contractor] misspeaks because of ignorance would not result in harm to him." Statement of Senator Symington, Hearings 26. "[A] truthful, honest contractor would have nothing to fear under this bill," Statement of Congressman Vinson, Hearings 25. "[T]hey shouldn't be punished if they made an honest mistake, only if they deliberately set a high figure." Statement of Senator Symington, Hearings 99.

39 416 F.2d at 1318 (dissenting opinion).

40 Id.


42 416 F.2d at 1318 (dissenting opinion).

43 Id. at 1312.
the Truth-in-Negotiations Act refers only to cost data submitted in negotiating one particular contract, \(^{44}\) offsetting between contracts is not possible. Moreover, if offsetting is permitted only for understatements in the same transaction—such as a particular contract modification—for which the Government is claiming a reduction, then “getting-well” by overpricing in a subsequent modification would be impossible. The conclusion that offsets are to be thus limited comports with the language of the statute \(^{45}\) and may satisfy Judge Davis’ concern that allowing offsets would encourage “buying-in.”

The Government did not seek certiorari in Cutler-Hammer, \(^{46}\) possibly because the Department of Defense can circumvent the decision by rewriting the Price Reduction contract clause to expressly exclude offsets. \(^{47}\) Although nothing in the Cutler-Hammer decision challenges the legitimacy of this approach, \(^{48}\) the wisdom of such a step is questionable. Equity favors the allowance of offsets, \(^{49}\) and if nothing more, Cutler-Hammer reflects a policy judgment that effective public con-


\(^{47}\) The offset allowance is not mentioned in the present Price Reduction clause. 32 C.F.R. § 7.104-29 (1970), as announced in Defense Procurement Circular No. 74, at 10 (Oct. 10, 1969). However, the Armed Services Procurement Regulations were amended in 1967 to provide that “[a]s a general rule, understated cost or pricing data shall not be ‘set off’ against overstated cost or pricing data in arriving at a price adjustment,” Defective Price or Cost Data, 32 C.F.R. § 3.807-5(a) (1970), as announced in Defense Procurement Circular No. 57, at 13 (Nov. 30, 1967). This provision, however, should not affect the Cutler-Hammer result for post-1967 contracts, since the language is not incorporated into the contract document and the regulation is not of a type generally accorded the “full force and effect of federal law.” See Gibinic, Contract by Regulation, 32 Geo. Wash. L. Rev. 111 (1963).

The Department of Defense has announced that “until further notice” offsets are to be allowed within “the same pricing action” and that the offsetting understatements need not be in the same category as the claimed overstatements. The Department cautions, however, that the announcement “is not to be construed as foreclosing a change of policy in the future.” Defense Procurement Circular No. 77 (Mar. 23, 1970).

\(^{48}\) The court did not hold that offsetting was compelled by the statute, but only that “there would seem to be no reason not to allow offsets” in the absence of statutory provision. 416 F.2d at 1312. Thus, the benefits of offsetting may be waived by the contractor if he agrees to a contract clause excluding them.

The statute does not prescribe specific contract language, leaving the drafting of the Price Reduction clause to regulation. If the contractor specifically agrees not to claim erroneous cost understatements in a government claim for a price reduction based on cost overstatements, the court might find that there is now a “reason not to allow offsets” and enforce the contractual agreement imposed by regulation.

\(^{49}\) See notes 29, 37-38 supra and accompanying text.
tracting is not impaired by offsets in the Truth-in-Negotiations environment. Such an interpretation of Cutler-Hammer's import should govern the Department of Defense's regulation revision committee during deliberation of possible changes to the Price Reduction clause.
BOOK REVIEWS


Crime novels are not usually reviewed by law journals. The Godfather by Mario Puzo, however, is not an ordinary crime novel. It purports to be a fictional version of the real life activities of the bosses of organized crime. According to the jacket blurb, "Puzo takes us inside the violence-infested society of the Mafia and its gang wars . . . . It is a spell-binding story, written with authentic knowledge of this particular milieu and with the hand of a master story teller." Apparently the references to the Mafia were a concession to the reader who may not have kept up with Joe Valachi's betrayal to the federal government of the secrets of organized crime activities and structure. We now know from Valachi that the real name of the crime organization in America which we have labeled the Mafia is "La Cosa Nostra." 1

The focus of this review is the authenticity of Puzo's story, but it is also his treatment of the subject matter from the point of view of the attitudes he seeks to create for the reader. The latter question is significant because the particular image of organized crime Puzo has drawn is being perceived by hundreds of thousands of American readers since The Godfather has maintained its leading position on the best seller list for many months.

I was asked to assess the realness of Puzo's portrayal of organized crime characters and events because as District Attorney of Philadelphia I prosecuted persons reputed to be organized crime bosses, and later, as a criminal defense lawyer, I represented others with similar reputations. Of course, this did not make me an expert on organized crime, but it provided me with some benchmarks with which to measure The Godfather. However, more revealing for me as source material were Peter Maas' The Valachi Papers; the Task Force Report on Organized Crime by the President's Commission on Law Enforcement and Administration of Justice; Donald R. Cressey's Theft of a Nation and Ralph Salerno's The Crime Confederation. Together,

1 Recently, Attorney General John Mitchell has issued a memorandum to Justice Department officials, including FBI Director J. Edgar Hoover, asking that they stop using the terms "mafia" and "La Cosa Nostra" because they are repugnant to Italian-Americans. This request, which he said had the concurrence of President Nixon, applies to news releases, speeches and other public statements. See The Washington Post, July 24, 1970 § A, at 7.
these references report everything that is publicly known about that form of crime commonly referred to as organized or syndicated crime.

It is obvious to me that Puzo created his characters and events in *The Godfather* almost completely from Joe Valachi's story. The answer to whether *The Godfather* is real, therefore, depends on the validity of Joe Valachi's disclosures. Valachi is the self-styled "soldier" in the Luciano-Genovese New York Family who, in 1962, turned informer to the United States Government on the criminal organization he called the "Cosa Nostra." His decision to talk to Federal agents came at a time when he was facing the death penalty for the killing of a fellow inmate at the United States Penitentiary in Atlanta, Georgia. Valachi claims to have mistaken the inmate for the "executioner" assigned to kill him by Vito Genovese, who also was an inmate in Atlanta at that time. Since the time of Valachi's revelation, he has been in federal protective custody, and according to law enforcement sources, a one-hundred thousand dollar price tag has been placed on his life by the "Cosa Nostra." 

Joe Valachi's description of the paramilitary organization of "Cosa Nostra" families is the very framework of Puzo's story of organized crime within which all of his characters fit. The story follows the fortunes of one of the five New York families of the "Cosa Nostra." This is the Corleone Family, headed by the boss of the family, shrewd, benevolent, but deadly Don Vito Corleone. To those subservient to him and to whom he has extended his protection, he is also affectionately known as the Godfather. In a sense, the Godfather role played by Don Vito Corleone lends a meaning to the family reference, but the Corleone Family, like all other "Cosa Nostra" families, is not a true family. Following Valachi, Puzo describes it as a tight criminal organization having a boss at the top supported by an under boss who in turn supervises a number of "caporegimes," lieutenants. These lieutenants direct a large number of "soldiers" throughout the various criminal activities of the family. A special counselor to the Boss, called the

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2 Mr. Puzo also had available to him the Task Force Report on organized crime published by the President's Commission on Law Enforcement and Administration of Justice in 1967. This report gave official recognition of Valachi's description of organized crime and presented a detailed review of the organizational structure of "La Cosa Nostra." But it lacked the many personal history stories provided by Valachi revealing the daily activities of organized crime participants which had to be the grist for Puzo's mill.


4 Id. at 23-24

5 Id. at 42.

6 Id. at 31-34 and 120.
“consigliere,” provides legal and policy advice concerning every phase of the Family’s activities.\(^7\)

We learn how Don Vito Corleone shapes his family in the early 1930’s after a major war with a boss of bosses named Salvatore Maranzano.\(^8\) Puzo picks this incident out of real history using an actual gangland figure. In *The Godfather*, Puzo makes Don Vito Corleone the victor of the war, emerging as the most powerful boss of the New York “Cosa Nostra” families.\(^9\)

It is interesting to consider whether Puzo intended Don Vito Corleone to represent any specific organized crime boss of that period. Perhaps because of the name Vito, many readers have believed Puzo intended Corleone to represent the notorious Vito Genovese. Actually, Genovese was a lieutenant to “Lucky” Luciano who was one of Maranzano’s victors. Another Luciano lieutenant was Frank Costello. Genovese had to flee to Italy in the 1930’s, and when Luciano was deported to Italy after World War II, Frank Costello became the boss of the Luciano Family. Later, Genovese returned and planned to take control away from Costello. An unsuccessful attempt was made on Costello’s life and Costello chose not to fight back. This secured Genovese’s position for the time being. We know these facts partly from police records of gangland shootings. The details are filled in by Joe Valachi’s story.\(^10\)

In Puzo’s story, *The Godfather* Don Vito Corleone actually resembles a combination of all three, “Lucky” Luciano, Vito Genovese and Frank Costello. Like Luciano and Genovese, he is the shrewd victor in the war against Masseria, the executioner of Maranzano and the boss of a leading New York family. Like Frank Costello, he narrowly


\(^9\) Salvatore Maranzano was, however, the victor of the famous Castellamarese gang war of 1930-31 which destroyed the organized crime empire of Giuseppe Masseria (Joe the Boss). The war took its name from the Sicilian area of Castellamare where many of the victors of the war were born. It was Masseria, not Maranzano, as related in *The Godfather*, who was slaughtered in a Coney Island restaurant through the treachery of his lieutenants. Maranzano himself was later shot down by rivel bosses who feared he was attempting to establish a dictatorship similar to Masseria’s. This was in 1931 and not in 1933 as related in *The Godfather*, and the bosses who ordered Maranzano’s death were “Lucky” Luciano and Vito Genovese. The killing of Maranzano led to the division of New York among five independent and fairly equal “Cosa Nostra” families. These events are dramatically related in Peter Maas’ *The Valachi Papers* at pages 83-112 and in Ralph Salerno’s *The Crime Confederation* at pages 85-87. In *The Godfather*, Puzo has Don Vito Corleone playing the roles of both Salvatore Maranzano and “Lucky” Luciano.

escapes an attempt on his life and resists the involvement of the "Cosa Nostra" in the illegal narcotics traffic.\textsuperscript{11} It seems obvious that Puzo wove his tale from the threads of the real life activities of New York organized crime leaders and emerged with the character of Don Vito Corleone. However, as I shall indicate later, he improved upon the organized crime models and created in Don Vito Corleone a noble gangland leader unknown to the actual murky world of organized crime.

In \textit{The Godfather}, the principal criminal activity of the Corleone Family is gambling. The wealth produced by the Corleone gambling enterprises was enormous and was protected by a wide network of official corruption ranging from low ranking police officers to the prosecutor's office, the judiciary and the legislature. As Puzo tells it, the Godfather's power could reach everywhere and any person. The Godfather initially sought to obtain what he wanted through the exchange of favors or the power of the purse. Failing these, he would achieve his desire through the use of naked force, including cold blooded murder.

According to Puzo (and Valachi, and the President's Crime Commission), the boss of the family never showed his hand in any of these transactions. From the carrying out of the daily criminal business of the family to specific assignments involving the achievement of something of value for the family or a friend of the family, the boss was insulated by the layers of the organizational structure.\textsuperscript{12} The "button men" or "hit men" who might ultimately be given the assignment to cripple or kill any individual never knew the source of the command. Their immediate superior transmitted the order and it was blindly carried out without question. Betrayal by a member of the family could result in his own sentence of death which would be carried out by another member of the family, treating the matter impersonally as just business.\textsuperscript{13}

Puzo provides a startling example of Don Vito Corleone's ability to extend his influence and power to such major American industries and institutions as Hollywood filmland and the Academy Awards. Don Vito Corleone helps one of his "Godsons" become a major film star, despite the opposition of the most powerful and wealthy tycoon in the movie industry. The sheer brutality and cruelty of Don Vito's method in securing this promised favor provides one of the most

\textsuperscript{11} Id. at 245-46.
\textsuperscript{12} Id. at 105-07; M. Puzo, supra note 8, at 49; Task Force Report: Organized Crime 7-8.
\textsuperscript{13} M. Puzo, supra note 8, at 434.
blood chilling occurrences in the book.¹⁴ Don Vito then arranges for his protégé to win the Academy Award for Best Actor of the Year through the power of his criminal organization. Puzo presents a particularly ugly picture of the life and people of Hollywood and the reader is led to compelling conclusions as to the real life models. These episodes do not come from Joe Valachi, but must come from other sources which have dealt with gangland ties with Las Vegas and certain movie stars.

After Puzo develops the background of the Corleone Family and the nature of its power, he introduces the basic plot of the story. The status of the Corleone Family is threatened by an unsuccessful attempt on the life of Don Vito Corleone when he refuses to join other families in New York in the tremendously profitable drug traffic. Fierce battles among the New York families erupt, leading finally to the resurgence of the primacy of the Corleone Family, albeit through the leadership of a new Godfather, young Michael Corleone, who succeeds his father when the great Don Vito dies. Thereon hangs another tale of which I shall speak shortly.

Puzo has cleverly blended a number of scenes, characters and events taken directly from Joe Valachi’s story. For example, the scene of Michael Corleone’s “execution” of the fictional narcotics boss Sollozzo and the corrupt police captain McCluskey appears to be an adaptation of Joe Valachi’s description of the murder of Giuseppe Masseria in a Brooklyn restaurant by two of his own lieutenants which was engineered by “Lucky” Luciano.¹⁵ Another example is Puzo’s description in The Godfather of the practice of the “button men,” or soldiers, of “going to the mattresses” during interfamily wars in New York. The family soldiers converted apartments into fortified dormitories by bringing mattresses for all of the armed occupants who might have to be staked out in such apartments for lengthy periods of time. This description of gang warfare involving the use of mattresses to permit the quartering of sizeable numbers of gang members was first revealed by Joe Valachi.¹⁶

A dramatic event in The Godfather, which has its counterpart in Joe Valachi’s story of an actual notorious occurrence, is the unprecedented gathering together of organized crime bosses from every part of the country at a meeting in New York. In real life, this gathering was at the Apalachin, New York estate of Joseph Barbara, a lieu-

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¹⁴ Id. at 67.
¹⁵ P. Maas, supra note 3, at 104.
¹⁶ Id. at 110.
tenant in the Magaddino Family of Buffalo, New York. In *The Godfather*, this conclave takes place after the death of Sonny, the heir apparent to Don Vito Corleone’s empire. Don Vito calls the meeting to end the bloody war among the New York families and to settle the question of “Cosa Nostra” involvement in narcotics traffic. In *The Godfather*, the meeting of “Cosa Nostra” bosses is held in the board room of a bank. According to Joe Valachi’s story, the heads of “Cosa Nostra” families were called together for the meeting at the Apalachin home of Joseph Barbara so that Vito Genovese might explain his role in the killing of the “enforcer” Albert Anastasia and secure his leadership of the Luciano Family. There is an interesting parallel in the personalities of the real life Albert Anastasia and Puzo’s fictional character Sonny. Both were hot-headed killers whose acts of violence frequently caused troublesome waves which interfered with the regular profitable business activities of the families.

Knowledgeable members of state and federal law enforcement agencies believe most of Valachi’s story. They point to the many gaps it has filled in police records about gangland killings and happenings and also to police data which corroborate a great number of specific events referred to by Valachi. It is significant that the account of organized crime included in the President’s Commission on Law Enforcement and Administration of Justice closely parallels Joe Valachi’s previously published information. This is also true of the books published by Professor Donald R. Cressey, a scholar in the field of organized crime, and Ralph Salerno, formerly a member of the Central Intelligence Bureau of the New York City Police Department during much of the period of organized crime activity related by Valachi.

There is some evidence of an organizational superstructure of organized crime similar to the one described by Valachi. It is unlikely that

17 *Id.* at 260-66.
18 *Id.*
20 The primary source of this evidence is the “DeCavalcante tapes” transcribed on 2300 pages of tape “logs” which the Department of Justice made public on June 10, 1969. These tape logs were the product of almost four years (1961-1965) of FBI “bugging” of the office of a Kenilworth, New Jersey, plumbing and heating company run by Simone Rizzo (Sam the Plumber) DeCavalcante. The action of the Department of Justice making these records public resulted from a court order granting a motion for their disclosure to DeCavalcante and his lawyer made by DeCavalcante’s lawyer. “Sam the Plumber” was reputed to be the boss of the New Jersey “Cosa Nostra” family. In *The Mafia Talks* compiled and edited by Joseph Volz and Peter J. Bridge, selected excerpts of these “bugged” conversations between DeCavalcante and others contain frequent references to the “Cosa Nostra” and to organizational labels identical to those used by the President’s Crime Commission. It is significant that the FBI had
it takes the rigid paramilitary form which Valachi detailed and which has been accepted without challenge by the Report of the President’s Crime Commission and such experts as Salerno and Cressey. As Cressey points out, this formal structure remarkably resembles the organization of the Sicilian-Italian Mafia. Valachi no doubt was familiar with this Mafia structure of the old country and may have dressed up his “Cosa Nostra” to conform to its tradition. On the other hand, the Italian-Sicilian Mafia model could have been the basis for the structure of organized crime in America because, in the 1920’s, Mussolini’s crackdown on the Mafia of Southern Italy and Sicily caused many Italian-Sicilian Mafia leaders to migrate to America.

However, before Valachi’s revelations, none of the organizational labels, such as capo (the boss), consigliere (counsellor), or caporegime (lieutenant) ever surfaced or were familiar to persons coming in contact with organized crime leaders, either as law enforcement officers or as defense lawyers. The new name for the organization, “Cosa Nostra,” was first publicly announced by Valachi. Ralph Salerno, who combatted organized criminals in New York for a number of years as a police intelligence officer, never used that name prior to Valachi’s reference to it.

In the early 1950’s, I investigated and prosecuted members of the Philadelphia criminal organization. I have listened to hour upon hour of recorded wire-tapped conversations between reputed leaders of organized crime and never once heard the name “Cosa Nostra” mentioned or any reference to the Mafia organizational titles used by Valachi. As a defense lawyer representing individuals charged by the government as being active in organized crime, I was not privy to such

these tapes when Valachi made his offer to “talk,” and it has been suggested by some knowledgeable persons that Valachi’s revelations of organized crime’s structure and name was assisted by the DeCavalcante tapes and other records from wiretaps and “bugs” in the possession of the FBI which they could not use because they were illegally obtained.

22 Id. at 27.
23 The FBI had been hearing these names during the electronic surveillance of “Sam the Plumber” since 1961, but there is good reason to believe that they did not share this information with any other law enforcement agency. William Hundley, former chief of the organized crime and racketeering section of the Department of Justice is quoted on the fly leaf of Peter Maas’ The Valachi Papers as saying: “What Valachi did is beyond measure. Before him we had no concrete evidence that anything like the Cosa Nostra existed. In the past we’ve heard that so and so was a syndicate man, and that was about all ...”
24 P. Maas, supra note 3, at 1.
references. I remember having long conversations with Mickie Cohen about his earlier activities as the overlord of organized gambling and prostitution in Los Angeles. It was clear from these discussions that Mickie operated within a form of organization which included leadership above him in other parts of the country, but he always referred to this organization as “The People.”

Perhaps this concern over names is much ado about nothing. Cosa Nostra loosely translated means “our thing”. Rather than being the newly revealed name of the crime syndicate, it may only be a reference used by Valachi and other organized crime figures to “the organization,” or “our group,” similar to the one Mickie Cohen used when he spoke of “The People.” 26

Whatever one calls it or however it is described, organized crime does in fact require a definite structure. This is where Valachi’s story accurately relates the happenings in the everyday world of organized crime. For example, Valachi tells of the gambling operations based on a lottery system known in many places as the “numbers operation.” Such an operation is in fact big business requiring numbers writers, pick-up men, bankers and others all the way up the line. Valachi’s discussion of loan shark operations, organized prostitution, the narcotics traffic and other organized criminal activities reveals that these criminals are indeed engaged in big business. There are many similarities to legitimate business operations. The organized criminal is supplying a large consumer public with commodities it wants but cannot obtain through lawful channels. In order to sell their products efficiently and at a profit, organized criminals must have top management, middle management and laborers. Additionally, because of the illegality of the operation, the organized criminal in business must also employ fixers to corrupt public officials and muscle men to enforce discipline within the group, as well as to prevent interlopers from grabbing their business operations.

This is the crime confederation that Salerno talks about and which literally constitutes an outlaw government within the framework of legitimate society. The stilted, rigid structure of the Italian-Sicilian Mafia outlined by Valachi, and glamorized and stylized by Puzo in The Godfather, almost resembles a comic opera compared to the real

26 It must be remembered that many of the overheard conversations of organized crime figures are completely or partly in Italian. The use of Italian names for positions in a criminal organization may be given too much weight by certain law enforcement officers as formal designations in a rigid structure. Dr. Cressey made this point when he explained that a special group of organized crime experts meeting at Oyster Bay, New York, rejected “Cosa Nostra” as the name for American organized crime. TASK FORCE REPORT: ORGANIZED CRIME 27.
hustle-bustle organization running the illegitimate and legitimate activities in the world of organized crime.

Puzo's literal acceptance of a secret and tightly controlled criminal organization, which insulates the boss on top from the activities of his men below, makes his story in this regard more fiction than real. Undoubtedly, he relied on Valachi and the report of the President's Crime Commission which accepted this structure produced by Valachi. Valachi's own tale illustrates over and over again how the so-called bosses, like Vito Genovese, got involved in the grubby details of the criminal business itself. Indeed, Valachi contradicts himself, if he is to be taken seriously, concerning the secrecy of the operation and the layers of insulation between the bosses and the soldiers. Joe Valachi never claimed to be anything more than a soldier in the Luciano Family. Yet he is able to provide numerous inside details about the plans and acts of "Lucky" Luciano, Frank Costello and Vito Genovese, as well as those of the bosses of other New York families. Valachi is able to recount who gave the orders to "execute" various gang members. For example, Valachi tells us that it was the greatly feared Albert Anastasia who, in a fit of anger, ordered the killing of the citizen informer Shuster when he received considerable publicity for being responsible for the capture of the prison escape artist Willie Sutton. As a soldier in the world of Puzo's Godfather, Valachi could never have known such secrets, but as a real life busy operator in organized crime, it is highly likely that Joe Valachi became privy to many details of accurate information concerning the operations of organized crime in which he was so intimately involved.

I can draw on a personal experience to illustrate the same point. In 1955, as District Attorney of Philadelphia, I successfully prosecuted Angelo Bruno on a gambling charge. Bruno was caught running out of a numbers bank. A wire tap on a telephone in the numbers bank had recorded Bruno's voice checking a long list of numbers on a tally sheet; Joe Valachi has named Angelo Bruno as the present head of the Philadelphia Cosa Nostra family. In 1954, Joseph Ida was identified as holding this position at the famous Apalachin conclave of organized crime leaders, but Bruno must then have been a lieutenant if he is today the head of the Philadelphia Family. If Valachi's description of the organizational layers of insulation for Cosa Nostra bosses is accurate, what was a boss like Bruno doing checking a numbers tally

27 P. Maas, supra note 3, at 117-29.
28 Id.
29 Id. at 213.
sheet in a numbers bank? Real life organized crime doesn't fit this
neat little stylized structure. It is nonetheless deadly.

Joe Valachi does reveal raw facts of organized crime, and *The Godfather* reflects this story to a large extent. There is nothing fictional
about Puzo's account of the enormous profits reaped by organized
crime's gambling empire. There is nothing fictional about Puzo's ac-
count of corruption and influence which permits organized crime lea-
ders to acquire such wealth with little interference from local law
enforcement. There is nothing fictional about Puzo's accounts of brutal
beatings and murders carried out by "hit men" on the orders of organ-
ized crime leaders. The fault in Puzo's book lies in the fact that de-
spite the revelation of these ugly and horrible truths of organized crime,
even the sensitive reader does not become outraged.

This is because Puzo has presented an entirely romanticized version
of organized crime. From the beginning of the book to the end, the
reader is led to identify sympathetically with Don Vito Corleone's em-
pire and to applaud his successes and despair in his setbacks. Don Vito
is presented somewhat in the image of a noble Robin Hood. He dis-
penses great favors, calling in the debts from time to time but only
reasonably, with understanding and a sense of fairness.

In the very beginning of the book, Don Vito demonstrates that the
system of American justice in its courts of law offers no protection
to a father whose daughter has been raped by two young hoodlums.
In contrast, Don Vito's justice is swift, leaving these boys (despite
powerful fathers who can influence judges) hospitalized with almost
every bone in their bodies broken. It is difficult for the reader to avoid
feeling satisfaction at this result.

The entire telling of the story is a simplistic portrayal of criminals
living by an internal code of honor. The Corleone Family acts heroically
in its adventures, even with regard to its criminal conduct. Don Vito
is satisfied to engage only in illegal gambling activities and resists the
involvement of the New York Families in the vicious narcotics traffic.
Don Vito's personal family life is warm and appealing, with Mamma
Corleone cooking peppers in the kitchen and praying daily in church
for her husband's soul. Even the deadly lieutenants and "button men"
who kill for Don Vito Corleone perform their speciality with a skill
and loyalty that prompts admiration on the part of the reader.

This is not the story told by Joe Valachi. Valachi certainly recounts
how great wealth is acquired by the members of organized crime units
through criminal acts, but their daily activities as told by him are
grimey and ugly, involving violence, corruption, and frequent betrayal.
Valachi's story portrays the organized crime bosses as feeding upon
one another, each waiting for the next to let his guard down before striking. So it is, all the way down the line, each member grabbing what he can get for himself, having little concern or sensitivity for the interests of those tied to his own destiny in crime. Joe Valachi makes it clear that the participant in organized crime is in and out of favor, frequently lives poorly on a disproportionate share alloted to him from the “take,” and must always be on the lookout for the thief, the betrayer, or the killer from within his own ranks. He corrupts and is corrupted and serves masters who are extreme egotists, thirsting for power and yearning above all for respectability which legitimate society will not afford them, despite its willingness to be corrupted by the purse of organized crime.

This part of the story of organized crime, so vividly told by Joe Valachi, is not reflected in The Godfather. Rather, Puzo tells a great American success story which has a happy ending with the Corleone Family surmounting all of its obstacles. The cruelest twist of all is the fate of Mike Corleone, the youngest son of Don Vito, who begins the story as an outright foe of organized crime, seeking a life in legitimate society. A decorated Marine hero in World War II who falls in love with the daughter of a minister, Mike rejects his father’s ways. Puzo has an excellent opportunity to demonstrate that the rewards of an honest life in legitimate society can be more satisfying to most of us than the power and wealth available to the organized criminal, but he refuses to let Mike out; he uses the attempt on Don Vito’s life to rudely reverse Michael’s destiny. Abruptly changing his personality and beliefs, Mike is willing to murder a corrupt police captain and a leading dealer in narcotic drugs to save the Corleone Family from the threat of extinction as a power in the organized crime world. From Puzo’s point of view, and unfortunately the reader’s, it all has a happy ending. Mike Corleone is diverted from his career in legitimate society and ends up destroying the gangland enemies of the Corleone Family and taking over the leadership of the Family from Don Vito upon Don Vito’s death. He is the new Godfather and he quickly demonstrates that he can play this role as shrewdly and as viciously as his father did before him.

Michael’s success is in the mold of the model of success against which so many of the youth of America have turned. Similar models can be found in the lives of powerful labor leaders or leading industrialists who have obtained power and wealth by crawling over others without regard to law or concepts of morality. There is no shortage of similar models in our highest echelons of government. Indeed, the turn around in Michael Corleone’s life in The Godfather reinforces the familiar
saying so frequently heard in competitive American society: "Nice guys finish last." What a shame it is that the reader of Puzo's book can turn the last page with a feeling of satisfaction, perhaps unconscious of the fact that he has just condoned organized crime.

Samuel Dash*


During the past several years, significant attention has been devoted to the serious problem of undernutrition and hunger in America. National awareness of the severity of hunger in this nation began to dawn after a committee of prominent doctors\(^1\) published the results of their investigation into the nutritional and health conditions of children in Mississippi. The doctors found children losing their health, energy, and liveliness, for whom "hunger is a daily fact of life," and who "are suffering from hunger and disease and directly or indirectly . . . are dying from them—which is exactly what 'starvation' means."\(^2\)

In May and June of 1968, the publication *Hunger, U.S.A.* by the Citizens' Board of Inquiry into Hunger and Malnutrition in the United States, the C.B.S. documentary "Hunger in America," and the Poor Peoples' Campaign gave national currency to the fact that millions of Americans, in all regions of the country, suffer from hunger and malnutrition. More recently, hearings conducted by the Select Senate Committee on Nutrition and Human Needs have clearly established that the health of low-income families in America has been severely impaired by malnutrition. Testifying before the Select Committee, Dr. Arnold E. Schaefer revealed the preliminary findings of the Department of Health, Education and Welfare's National Nutrition Survey.\(^3\)

The report was alarming:

a. Two out of three (63\%) low-income American children under six have less than half the minimum essential amount of iron;

b. One in three (34\%) are anemic and have unacceptably low hemoglobin levels;

c. One in three (33\%) are at an unacceptable vitamin A deficiency level; and

d. The average low-income child suffers substantial physical growth retardation.

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\(^1\) Dr. Joseph Brenner—Medical Department, Massachusetts Institute of Technology; Dr. Robert Coles—Harvard University Health Services; Dr. Alan Mermann—Department of Pediatrics, Yale University Medical School; Dr. Milton J. E. Senn—Sterling Professor of Pediatrics, Yale University; Dr. Cyril Walwyn—private practice, Yazoo City, Mississippi; and Dr. Raymond Wheeler—private practice, Charlotte, North Carolina.


The data from the survey showed that a very high number of poor persons suffer from such nutritional diseases as rickets, goiter and anemia. In addition, marasums and kwashiorkor—diseases of severe malnutrition usually resulting in death and thought to be found only in developing nations—were found in the H.E.W. Survey.  

Against this background of unconscionable American tragedy, Nick Kotz paints a poignant political panorama of legislative and administrative apathy. Although the three basic Federal food programs—the Commodity Distribution, Food Stamp, and School Lunch Programs—could effectively end hunger in this country, Kotz shows how political inertia and insensitivity have caused these programs to fail. Instead of making the food programs responsive to the needs of the poor, the Department of Agriculture has administered them in a manner that has primarily benefited big farmers. In so doing, the Department has received the approbation of the respective Congressional Agriculture Committees.

Perhaps the most important contributions made by Kotz’s book is his thorough documentation of the sometimes silent, but always powerful, control that is exerted by a few legislators over the Agriculture Department’s food program policies. Led by three conservative congressmen—House Subcommittee on Agriculture Appropriations Chairman Jamie Whitten (D. Miss.), House Agriculture Chairman W. R. Poage (D. Texas), and Senate Agriculture Committee Chairman Allen Ellender (D. La.)—Congressional committees have tragically stifled meaningful food program reform. Instead of striving to provide poor people with adequate nutrition, these Congressmen have placed a higher premium on fiscal economy.

Mr. Kotz demonstrates how Congressional indifference to hunger in America has been compounded by bureaucratic callousness under the Johnson and Nixon Administrations. President Johnson devoted minimal attention to the nutritional needs of the poor; his priorities in time and finances were devoted to the war in Vietnam. Inheriting a legacy of huge war expenditures, President Nixon has devoted more energy to making promises than to feeding the hungry. Indicative of this was his admonition to Agriculture Secretary Clifford Hardin at a White House meeting: “You can say that this Administration will have the

4 Id. at 675-77.
first complete, far-reaching attack on the problem of hunger in history. Use all the rhetoric, so long as it doesn’t cost any money.”

As a result of these political obstacles, the Federal food programs have provided little assistance to the poor. An example of an unsolved problem is the fact that in hundreds of counties, all indigents—no matter how poor, hungry, or malnourished—have been denied access to the Food Stamp and Commodity Distribution Programs. County officials in these areas have refused to establish either of the programs for administrative, fiscal and/or political reasons. Under these circumstances, the Department of Agriculture has refused to implement directly either of the two food programs, deferring to state and local preference. In one case, the Department even balked at instituting a food program in 16 California counties, despite a Court order requiring such implementation, until a motion for contempt was filed against the Secretary of Agriculture.

In areas that do have a food program, there are still numerous problems. Most significant is the preclusion of millions of poor people from Federal food assistance due to the prohibitively high Food Stamp purchase prices. Instead of setting prices that are “equivalent” to an indigent-household’s “normal expenditures for food,” the Agriculture Department’s food stamp charges are far in excess of poor peoples’ humble means. Consequently, in Mississippi, where participation in Federal food benefits ironically has been better than in most other states, only 45,901 out of 121,147 welfare recipients—the very persons who are most in need of food assistance—have been able to obtain stamps.

The School Lunch Program has been similarly insufficient to alleviate hunger. Kotz points out that:

(P)oor children suffer especially because several thousand American schools, with 9 million students, have no facilities for

9 But see Jay v. United States Dep’t of Agriculture, 308 F. Supp. 100 (N.D. Texas, 1969). The District Court held that it was violative of Congressional intent to deny Federal food benefits in 109 Texas counties on the irrational basis of place of residence. The Department of Agriculture was ordered to “immediately put into effect, in the shortest time feasible and at Federal expense, the Commodity Distribution Program in every Texas area that has no Food Stamp Program.” Id. at 107.
12 Presently there is litigation pending in the Fifth Circuit Court of Appeals that challenges the Agriculture Department’s stamp prices as being violative of the Food Stamp Act. West v. United States Dep’t of Agriculture, No. 29340 (5th Cir.).
13 See Brief for Appellant, West v. United States Dep’t of Agriculture, No. 29340 (5th Cir.).
providing school lunches. More often than not, these are older 
ghetto schools in America’s largest central cities or poor rural 
schools—the schools containing the most poor children.14

In addition, wherever School Lunch Programs exist, impoverished stu-
dents have been unable to obtain their Federally-subsidized school 
lunch entitlements. Although needy children have a statutory right to 
free or reduced-price lunches,15 most school boards have refused to com-
ply with this legal requirement.16 Therefore, the vitally-important 
lunch program has provided little aid to the poor but has significantly 
subsidized the mid-day meals of the rich and middle class.

Mr. Kotz’s book details all of these problems with precision and 
insight. His political acumen adds incisive analysis to an absorbing de-
scription of our country’s most ironic problem. From his book, one must 
conclude that the Federal food programs have failed. Since the justifi-
cation for their very existence is based on the dismal performance of 
our inadequate and archaic welfare laws, it seems clear that only a 
Federal program of adequate income maintenance—as opposed to the 
continuation of the categorical assistance programs17 or the inaugura-
tion of the meager Family Assistance Program—will finally end hunger 
in America.18

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14 N. KORZ, SURPA note 8, at 58-59.
17 See Shaw v. Governing Bd. of the Modesto City School Dist. and Modesto High 
School Dist., Civ. Action No. S-1336 (S.D. Cal., March 6, 1970); Stogner v. Page, 
18 The recent White House Conference on Food, Nutrition and Health, conducted 
in December 1969, arrived at a similar conclusion. The Conference determined that 
hunger could be eradicated only if families of four were guaranteed an annual income 
level of $5500. Such an improvement in our social welfare laws would obviate the 
necessity of continuing the present Federal food programs.

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Mr. Pollack has litigated almost all of the Federal food program law suits.

The literature of patent law is being enriched with a highly useful working tool for the practitioner, the student, the judiciary, and anyone else interested in keeping up with current developments in patents. Something new really has been added—something white and something blue. A looseleaf service manual from Matthew Bender & Company, Patent Law Perspectives is intended to provide current critical commentary on significant developments in patent law, available almost as fast as they happen.

Divided into sets of pages, the blue pages, which are cumulative, constitute annual reviews. The white pages are the monthly coverage of current developments, to be issued 11 months out of the year. Bearing the key numbers of the authors’ new synoptic analysis of the law, the blue and white pages are filed together by topics and in combination give the picture from the 1966 starting point of the service to date on any given subject.

To get the book off the ground, advantage was taken of annual reviews of patent law already done by two of the three authors which are reworked to fit the plan of the manual. The blue pages therefore constitute, as to each topic, three annual reviews for the years 1966-67, 1967-68, and 1968-69. Following these are the white pages constituting, at this time, current 1969-70 developments.

**About the Authors.** Anyone experienced enough to know that not everything in print is to be believed and that everything in print is an expression of some individual’s thinking, albeit checked and possibly modified by someone else, would want to know whose critical comments he is reading and what, if any, bias may exist. The authors of Patent Law Perspectives are an unusual combination of balanced talent.

Irving Kayton is Professor of Law at The George Washington University Law Center, directs its patent law program, and was, when he came there in 1964, the first full-time professor of patent law in the country. In 1967, he produced a casebook, Patent Property, Cases and Readings. Before electing the academic life, Professor Kayton worked in the patent law departments of Bell Telephone Laboratories, General Precision, Inc., and the General Electric Company. After obtaining his LL.B. in 1957 at New York University, he obtained master’s and doctor’s degrees at Columbia University School of Law, writing a dissertation published in two parts under the titles Can Jurimetrics Be of
Value to Jurisprudence?, and Retrieving Case Law by Computer: Fact, Fiction, and Future. Professor Kayton has also founded, and directs, Patent Resources Group, a continuing legal education enterprise for the advancement of patent law and the profession.

The second author was the second full-time professor of patent law in the country, James B. Gambrell, who teaches graduate courses in the subject at the New York University School of Law. He also currently heads up the Patent Law Program of the Practising Law Institute (PLI). Previously, he taught economics for a year, served two years as Director of the Office of Legislative Planning of the United States Patent Office, and thereafter was in the private practice of patent law for several years in California. Like Professor Kayton, he is in his early forties.

Donald R. Dunner, who got his law degree in 1958 at the Georgetown University Law Center, spent one year as an examiner in the Patent Office and two years as law clerk (now known as Technical Advisor) to Chief Judge Johnson of the United States Court of Customs and Patent Appeals (CCPA), 1956-58. (He and the writer started their careers on that court simultaneously.) Mr. Dunner is in the private practice of patent and related law in Washington, D.C., and is also an Associate Professorial Lecturer in Law at George Washington where he teaches a course in Court Review of Patent Office Decisions, an outgrowth of a 1969 seminar on practice before the CCPA for which he compiled the first book of materials relating to practice before that court. He has also lectured on patent law subjects before the PLI and John Marshall Law School.

The Modus Operandi. As Patent Law Perspectives will disclose in a forthcoming supplement, the three authors have divided the contents of the book into three areas, each author taking primary responsibility for the initial writing of the commentaries in one of the areas according to his expertise and predilections. The basic plan is to cover four issues of the United States Patent Quarterly (USPQ) in each monthly Developments section, selecting therefrom—and from any other source material, such as the Official Gazette of the Patent Office, law reviews, speeches, etc., for the corresponding period—significant developments for critical analysis. Patent law is the basic subject. While some unfair competition cases are dealt with, no attempt is made to cover copyright or trademark case law developments except as they may have a bearing on patent law or procedure. The authors get to-

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gether monthly for a couple of days of intensive editorial consultation on the basis of their separate drafts, and the published materials are the result of their critiques of one another’s work.

Occasionally a difficult legal problem turns up in the sense that the patent law is getting confused—a not infrequent occurrence—and the authors deem research into the background of the problems desirable, in which case the matter may be given considerable study, with the help of personnel available to one or more of the authors. The output amounts to a brief article on the subject. The authors’ objective includes improvement of the law as well as reporting.

Appraisal of the Book. As stated in the beginning, there is something new here. This is not just another textbook. In fact, it is not in the least a textbook, though anyone reading it through would get a good short course in patent law and have the advantage, furthermore, of knowing what is going on now, not just what went on in the past.

Time is money in the practice of law and surely an important factor in any kind of practice manual is how long it is going to take to find what you are looking for. This book has two kinds of easy access. For someone trying to get into the right slot for the first time, there is a “Finder Index,” an alphabetical index which shows imagination in many of the terms included. Fortunately, it is looseleaf and thus capable of improvement. A thing like this could not be at its best on the first try and the authors can do a real service by injecting more words into their index as time goes on. Under “A” it starts with “A & P Case,” though this is not the table of cases. The last item is “Award of Costs,” but for some odd reason under “C” one does not find “Costs,” which would be the logical place to look—at least to a lawyer—for cases on costs. To include both “Combination Claims” and “Combination Inventions” with reference to the same section in both instances seems overdoing it a bit. But a finder index of this type is a great idea. An older author who used to carry this to an extreme was Edward Thomas in his books on chemical patents.

Faster access, at least to one who has acquired a familiarity with the book, may be available through the index tabs which correspond to the seven main divisions of the synopsis. A list of them discloses the general scheme:

A. VALIDITY AND PATENT OFFICE PROCEDURE
B. INFRINGEMENT, LITIGATION AND PROCEDURE
C. INTERFERENCES
D. UNFAIR COMPETITION AND OTHER PROTECTION
E. GOVERNMENT CONTRACTS AND AWARDS
F. LICENSING AND SALE-TAXATION
G. ANTITRUST, INEQUITABLE CONDUCT AND MISUSE

Under each of the index tabs, the first page carries a synopsis dividing the main heading into sections, subsections, and sometimes sub-subsections making location of the discussion of the problem at hand quick and easy. Once into the right section, the reader has only to follow it through the several annual review blue pages by its number and then into and through the several white “Current Developments” pages. There is a certain educational value in being able to view the development of a point of law chronologically by years, thus gaining insight into how it came to be what it is.

There is, of course, a Table of Cases keyed to the synoptic section numbers, and a Supplemental Table of Cases covering the white “Developments” pages. If one knows the name of the case to begin with, or just the name of a party to an inter-parties case since the cases are listed both straight and reversed, the section where it is discussed can be found directly.

An interesting and valuable feature of the monthly “Developments” issue is a yellow cover sheet carrying a “PLP SUMMARY” on which the authors point out, item by item, in from one to three lines, what they consider to be the most important developments covered by their monthly discusions.

The authors have a laudable professorial attitude toward the courts and don’t mind calling a spade a spade—i.e., a goof a goof. Their text sparkles with such terms as “unfortunate,” “confusing,” “sheer nonsense,” “evident irritation,” and the like. While there may be some small-minded, easily irritated judges who will not like such characterizations of their opinions, we should no longer be living in a world of make-believe. Judges do err and they do get reversed on appeal, sometimes erroneously too. It is a healthy influence that three well-qualified and scholarly commentators should be frank. It seems more desirable than leaving criticism exclusively to counsel in the case, to students on law reviews, and to authors whose articles often appear much too late. As an involved opinion-writer, I shall personally await with eagerness what Patent Law Perspectives has to say about my opinions—and hope sometime to find the time to read what has already been said. Just as drama critics often succeed in improving subsequent productions, so here courts can be made to improve their thinking if they will. There is no possibility here of putting the show off the boards. Bad legal productions tend to go on and on.
Such current critical commentary of pending litigation raises an interesting question. There recently appeared in 52 JPOS 132 (Feb. 1970) a comment from annoyed counsel in a case who was displeased with the content of an article about a District Court opinion which he and his opponent were both appealing. The author of the article, from his point of view, was evidently on the wrong side. Counsel made it clear that he considered comment on a case *sub judice* to be improper—at least when the comment was contrary to his position. Opinion of the bar on this question is probably divided; much of it is not thought through. Perhaps there is some justification for objection to the expression of mere opinion on the *outcome* of a case by those who know more about its facts than is disclosed in a lower court opinion, but this should be distinguished from critical analysis of how a court has handled a discussion of the *law*. From this writer's personal point of view as an appellate judge, guidance from any source as to what the law is or should be is more than welcome, and I do not know of any judge who does not feel free to look for enlightenment on this score to any source available and with any research assistance he can get. It appears to be the intent of the authors of *Patent Law Perspectives* to aid the courts in developing sound law and in avoiding confusing constructions. Their comments should be more than welcome and the libraries of all courts dealing with patents should be equipped with this facility. *A fortiori*, so should the offices of practicing lawyers.

Some minor matters call for comment. Why is the publisher increasing his typesetting problems and costs by using "U.S.P.Q.," a citation which has never been used by that publication? In 1935 (Vol. 26) it was changed from "U.S.Pat.Q." to "USPQ." Similarly, the Court of Customs and Patent Appeals switched from the cumbersome "C.C.P.A. (Patents)" to the simpler CCPA more than a decade ago. The authors of *Patent Law Perspectives* use CCPA in their text but the citations are all given as "C.C.P.A." People who quote the book are likewise compelled to reproduce all of those unnecessary periods.

For many years now, the useful literature of patent law has been moving away from the old-fashioned textbook. Much of it has appeared in the form of hard-cover publications of edited and collected papers read at seminars such as *Dynamics of the Patent System* and *The Law of Chemical, Metallurgical and Pharmaceutical Patent*, and in scattered law review articles. Now, for the first time, we are offered a continuing systematic analysis on a month-by-month basis. It bodes well for a sounder development of the law and the relative youth of
the authors safeguards its continuation. At a price of $150 for one year’s subscription, it seems a justifiable business expense.

Giles S. Rich*

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The United States is in the midst of an intense debate about crime and how it can be controlled. There are few, if any, domestic issues about which so many people feel so intensely. Every time the media publish new statistics reflecting rising crime rates, describe another sensational murder, or show a confrontation outside the Pentagon, a courthouse in Chicago, or on a college campus in California, the public's concern deepens.

Since crime is an important issue, we should all welcome increasing public interest in it. Such interest is essential if the public is to support larger expenditures for the police, courts, correctional systems, and perhaps most importantly, programs to prevent juvenile delinquency. Public interest and support is even more critical if the criminal justice system is to move away from traditional and generally ineffective methods and to develop significantly new approaches.

Discussion of our serious crime problem has unfortunately not been on a high level. Instead of discussing honestly the great complexity of the problem and the need to develop new programs to deal with it, our politicians have all too often attempted to use the crime issue for their own political advantage. Rather than debating which approach would be most effective, the discussion has been reduced to little more than a discussion of who is tough and who is soft on crime.

A useful analogy is the national debate on Communism in the early fifties. Exploiting public fear, politicians attempted to make toughness against both internal and external Communism the litmus test of Americanism. As a result, even intelligent, liberal leaders felt compelled to support nonsensical positions in order to show that they could be just as tough as those who proposed them. What other possible explanation is there for liberal sponsorship of the Communist Control Act of 1954 which both threatened civil liberties and was completely ineffective?

The level of discussion concerning Communism has risen appreciably. Most national politicians now discuss facts rather than simply play to public emotions. Communism is recognized to be different in different countries; suggestions are made about approaches for improving relations, internal Communism is mentioned little, if at all, and the entire discussion reflects the assumption that Communists are people to be dealt with, not devils to be crushed.

Unfortunately, politicians have not given up demogoguery—many of them have merely substituted crime for Communism. During the
1968 campaign, Richard Nixon blamed Attorney General Ramsey Clark for rising street crime, even though (1) the federal government has no direct power over local law enforcement; (2) the Johnson Administration had sponsored the first comprehensive study of crime in almost forty years; and (3) it had obtained enactment of the first federal grant-in-aid program for local criminal justice systems. Mr. Nixon further claimed that poverty has little to do with crime. He stated that "we will reduce crime and violence when we enforce our laws," as if this was not already a primary goal. He suggested that Supreme Court decisions had been "irrelevant and frivolous" and had raised "unreasonable obstacles to law enforcement," even though most experts, whether they approve or disapprove of recent court decisions, feel they have little impact on the level of crime. He promised as "a first order of business to sweep the streets of Washington free of those prowlers and muggers and marauders."

This kind of talk has not been confined to the presidential campaign. Debates in Congress, mayoiralty elections across the country, and civic meetings all increasingly reflect this kind of irrational, unthinking rhetoric. The test is the toughness of the talk, not the intelligence and effectiveness of the remedy.

In this atmosphere, the country needs an honest politician's guide to crime control. Unfortunately, the book of that name written by Norval Morris and Gordon Hawkins is not such a guide. While I would not dispute its honesty, and while I agree with almost all of its proposals, it fails even to deal with the great issues of 1969 and 1970 concerning criminal justice in this country.

The Honest Politician's Guide to Crime Control is really a 1967 book. Early in that year, the President's Crime Commission issued a long and comprehensive report which was supported by volumes of other material. That report was in effect a litany of reforms, most of which had long been supported by leaders in the field of criminal justice. The list included more education, higher salaries, and longer training for policemen; more skilled rehabilitative personnel for corrections and greater emphasis on probation and community treatment rather than incarceration; removal of alcoholism and various other offenses from the criminal laws; stricter gun control; community centers to help juveniles when they first are getting into trouble; and more money for research so that future programs can be based on facts rather than intuition and emotion.

Messrs Morris and Hawkins support all these proposals and almost all the other recommendations of the Crime Commission. Indeed, not only their proposals but their terminology is often identical. Occasion-
ally, when the Crime Commission is silent on a particular subject, the Honest Politician's Guide adopts proposals of another group of leading reformers of the criminal justice system, the American Law Institute's Model Penal Code.

I do not wish to be unkind. This is a worthwhile book for anyone who has not read the Crime Commission report. It is certainly more readable and entertaining than the report itself, and, in this reviewer's opinion, almost all its recommendations are sound and should be adopted.

The authors do go beyond the Crime Commission report in at least two significant respects. They make a convincing case that disarmament, not just gun licensing and registration, is perhaps the most important step we could take to reduce murder and other violent crime. Admittedly, the problem of enforcement will be difficult in view of the staggering number of weapons now in the hands of the American public. However, as the authors suggest, generous government payments to owners of guns might persuade them to turn in most guns and at least sharply reduce the prevalence of guns.

I also agree with the authors that the insanity defense makes very little sense. There is no sharp line between people who should be held criminally responsible for their acts and those who should not. Furthermore, as the authors point out, why should a man be excused from criminal responsibility because of mental illness but not because he has been forced to live his life in a black ghetto?

When the purpose of the criminal law was largely vengeance, to punish a person for his evil deeds, it made no sense to punish a person who committed an offense because he was insane. We have as a society, however, been moving for a long time, although much too slowly, towards treatment and rehabilitation as a response to crime. We should by now be providing medical and other appropriate treatment for all offenders rather than arbitrarily dividing those to be treated from those to be punished. Of course, ending the insanity defense will only be useful if it leads toward expanding effective rehabilitation programs to all offenders, not contracting them.

Important as they may be, the issues discussed in this book—disarmament, abolition of the insanity defense, and the recommendations of the Crime Commission—are not the issues of 1970. There are at least four questions today which are far more basic.

The first involves priorities. Should scarce tax dollars be largely poured into increasing the size of the police department and improving police equipment and technology? Stated differently, can crime be controlled by placing principal reliance on force? In the District of Columbia, the District government, under orders from the Adminis-
tration, is increasing the police department from 3,100 to 5,100 men. This increase of almost 70 percent within a period of approximately two years will leave the District with 50 percent more police officers per population than any other city in the country. Proposals are now being made to increase the department to 6,000 men. Yet, the District has only a handful of disjointed programs to deal with juvenile delinquency, even though more than half of all serious crime is committed by youths under 18.

The national situation is similar. The Administration’s 1971 fiscal budget contains almost 500 million dollars for grants-in-aid for the criminal justice system and only 15 million for prevention of juvenile delinquency. Based on past experience, three-quarters of the grant money will go to police departments and only six percent to the courts and 14 percent to corrections. Further, it is likely that the states and local governments will be influenced, in spending their own funds, to follow these same dubious priorities under leadership from Washington.

The second issue is closely related to the first. In his campaign speeches, President Nixon insisted that the real problem is that the courts have deprived the police of adequate power to enforce the law and that the courts are too lenient on criminals. The Administration has proposed an omnibus crime program for the District of Columbia which includes preventive detention, broader powers for the police to wiretap and to enter homes, mandatory sentences for repeaters, and transfers of many juvenile offenders from juvenile to adult courts. Nationally, the Administration’s organized crime bill gives greater power to law enforcement officers. Most Congressmen, fearful of seeming soft on crime, are bent on outdoing the Administration in supporting “tough” but ineffective proposals. Far from reducing crime, these programs are likely to increase conflict, setting black against white, rich against poor.

The third issue is how much can we reduce crime without overcoming poverty and discrimination which are the underlying causes of crime. Morris and Hawkins criticize research which has demonstrated the high correlation between bad housing, unemployment, and the other factors of poverty on the one hand and crime on the other. They suggest that such research has little value because everyone knows that poverty and discrimination are related to crime and the research results do not provide any specifics on how to treat offenders.

This is rather a strange conclusion. President Nixon stated clearly in his campaign speeches that he does not believe that poverty and crime are interrelated. As a result, he has proposed huge increases in funds for the criminal justice system, with little additional money for
eliminating poverty, and he has also supported considerable backsliding in ending discrimination. In contrast, the Crime Commission stated that "before the nation can hope to reduce crime significantly or lastingly, it must mount and maintain a massive attack against the conditions of life that underlie it." The country must choose between these competing philosophies.

The fourth principal issue of 1970 is whether our criminal justice system will be used for political purposes and be seriously damaged thereby. It seems increasingly clear that the police and the courts are being employed for political repression. One need not be a member of SDS, a Yippie, or a Panther to believe that both the national administration and many local governments and police departments are prepared to prosecute dubious cases, provoke shootouts, and engage in various forms of harassment against groups which they believe to be dangerous.

At the same time, these groups almost welcome the confrontation. They too are prepared to use the criminal justice system for their own purposes. Political trials give them the opportunity to dramatize, often through deliberate disruption, what they believe to be the total corruption of the American political and economic system. Therefore, the two sides are, in effect, made for each other. Each needs the other. The losers are of course those of us who want a judicial system which can handle alleged criminal offenders fairly and effectively.

We do need an Honest Politician's Guide to Crime Control which would deal honestly and bluntly with these basic issues of 1970, for we must resolve these emotional and underlying problems before we can get to the more technical questions discussed by the Crime Commission and this book. It is not very useful to discuss the nuances of community treatment of offenders or of youth service bureaus for juvenile delinquents if the country is sharply divided concerning whether the emphasis should be on more policemen, more police power, longer sentences, or political trials.

It is also not enough to have a long list of useful recommendations which, if adopted, would reduce crime. Any Honest Politician's Guide must tell us how to get the whole job done. For some reason there is not a word on this subject in the entire book. Yet, this is precisely what an honest politician needs to know. The shelves of libraries are filled with old reports and books which proposed reforming the criminal justice system. It is instructive to remember that the excellent report of the Crime Commission headed by Attorney General Wickersham in 1931 went largely unheeded and that the report of the Presi-
dent's Commission in 1967 merely repeats many of these same recommendations.

A good test for implementation concerns gun control or, better yet, disarmament. The polls tell us that most Americans want at least much stricter control. Despite this popular support, despite the murders of America's finest leaders, despite the urgings of most police officials across the country, our politicians have done almost nothing. They have yielded to a small but extremely energetic and vocal gun minority—the same minority which generally yells the loudest about supporting the police and doing something about crime. Many an honest politician would like to know how to overcome the gun lobby and get effective gun legislation. The details of the legislation are much less important than the strategy to obtain it.

We do need a book for honest politicians—and for other honest and serious Americans as well. Such a book should start way back at the beginning. It should talk about what an effective crime program would consist of, devoid of political rhetoric and demogoguery. It should present convincing evidence for these programs rather than assume that all right-thinking men agree. Finally, and most important of all, it should tell specifically how such an effective program can be implemented. I only question whether the politicians and citizens who really need to read such a book would do so.

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