

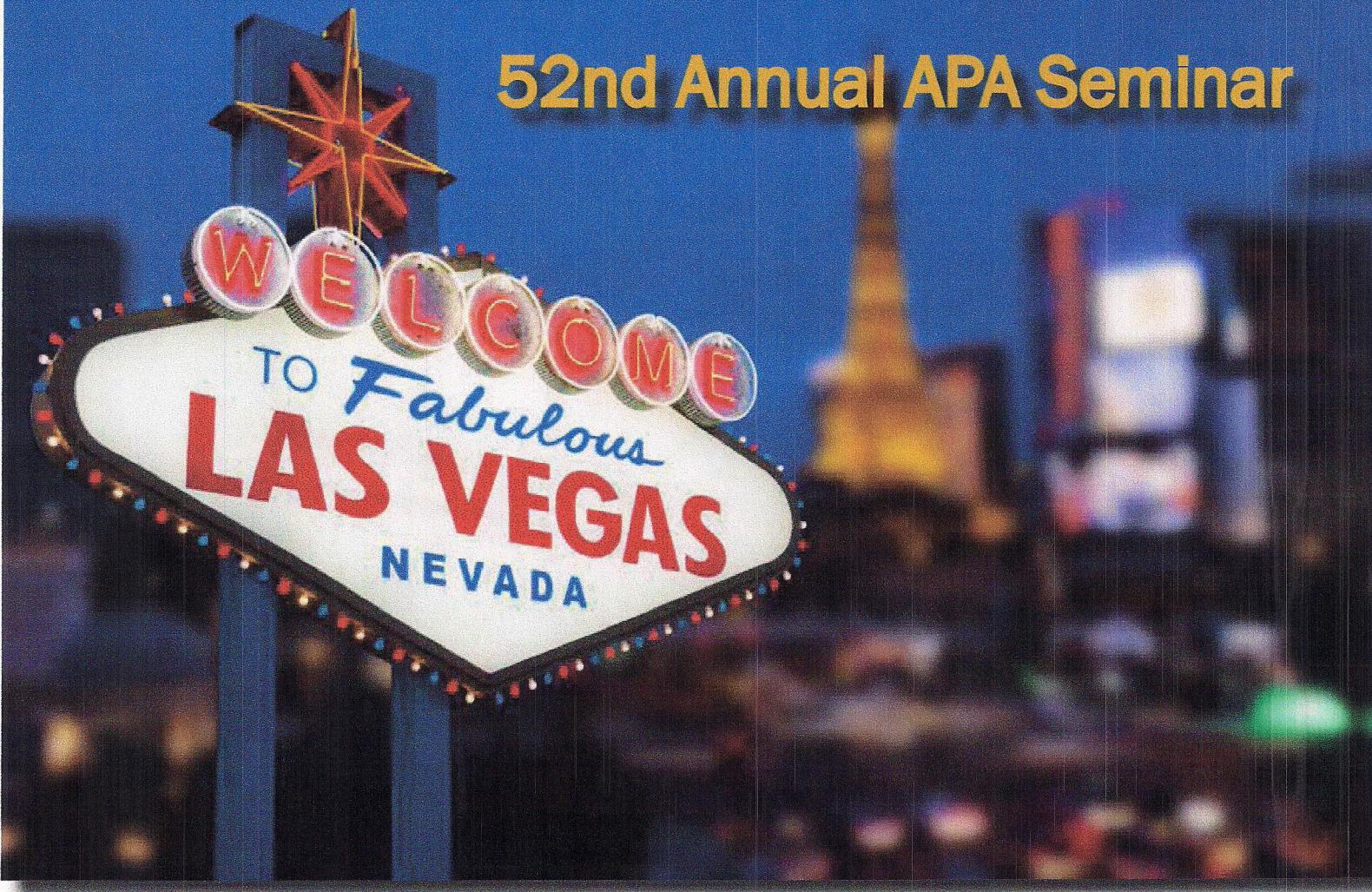
# APA MAGAZINE

The Magazine for the Polygraph Professional

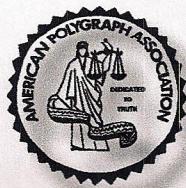
November/December 2016

Volume 49,6

**52nd Annual APA Seminar**



August 27 - September 1, 2017



## **Advancing Diversity In Law Enforcement**

Stanley M. Slowik\*

On October 5, 2016 the Civil Rights Division of the U.S. Department of Justice and the Equal Employment Opportunity Commission (EEOC) simultaneously released a report titled *Advancing Diversity In Law Enforcement* (Advancing Diversity, 2016). The report is focused on what it calls barriers to diversity in police recruitment, hiring and retention and suggests “promising practices” that emphasize inclusion of different racial and gender perspectives to change police culture and leadership.

At the heart of *Advancing Diversity* is the mandate that racial and gender diversity should be the driving force behind police recruitment and selection systems and, by implication, that the traditional police mission of public safety through the enforcement of law must be changed. Competencies such as the ability to read, write and abstain from criminal activity as an adult are redefined as obstacles and barriers to opportunity. In short, the report’s “promising practices” appear to focus heavily on making evaluations of criminal activity more expensive and difficult – a rehash of the Ban-the-Box movement (Slowik, S., 2015; Slowik, S., 2016) – while encouraging the lowering of educational requirements. The report does appear to acknowledge that there are numerous jobs that require federal, state and local licenses and certification which in turn, by law, cannot be issued to individuals with adult histories of felonious, criminal activity. Likewise, the fifty state agencies that certify police rarely make exceptions with regard to histories of criminal activity and none of these exceptions involve race or gender. Nevertheless, *Advancing*, based upon the statistical racial and gender disparities that result from evaluations of criminal activity, labels the practice a “barrier” and encourages “promising practices”, most of which are not new and have long been used by most law enforcement agencies, e.g. considering periods of accountability or the relevance of the crime. It is simply disingenuous to suggest, as the report does, that hiring standards don’t differentiate between experimental, adolescent and current drug use or that physical agility tests are not validated to work related tasks.

The notion that race and gender, even when packaged as diversity and inclusion, supersedes all other selection criteria echoes the EEOC’s recent failed attempts to use statistical disparities in hiring rates as prima facie proof of illegal racist or sexist practices. As discussed in detail previously (Slowik, S., 2016), no one disputes that male police applicants will have recent, work-related histories of significant criminal activity far exceeding those of female applicants. Histories of serious adult criminal conduct traditionally have been disqualifiers for positions of trust in law enforcement. Since it is an essential function that police officers be credible witnesses in court, records of criminal activity have long been used by defense attorneys to discredit police witnesses.

\*Stanley M. Slowik designs employment selection interview and training systems for federal, state and local law enforcement, public school and other government agencies. He is a frequent contributor to this Magazine regarding employment law, practices and procedures.

Contrary to *Advancing Diversity*'s assertion that adult criminal histories are primarily the result of racist and sexist police, prosecutors, judges, juries and, most importantly, false accusations by same race and gender victims, criminal histories are almost exclusively based on the individual's actual involvement in crime.

While there are no perfect selection tools or, in the aggregate, selection systems, the most valid and reliable methods are based on the applicant's recent, work related past activities. In the case of a criminal record, however, these activities are almost always minimized due to plea and charge bargaining, diversion, deferment, expungements, pardons, sealed records and, depending upon the felony crime being considered, actually getting caught.

The fact that men engage in criminal activities more often than women more than adequately explains why they are convicted more often women and why there are far more male correctional institutions - and inmates - than female correctional facilities - and inmates (Bureau of Justice, 2016). Neuroscience has concluded that this enormous gender disparity is due to a physiological difference – testosterone – which in turn appears to encourage greater risk taking which can, in turn, explain the different tendencies to engage in criminal activities between the genders. Why different racial groups of males engage in criminal activities at different rates and therefore have significantly different statistical disparities has never been empirically explained though theories of socio-economic differences, “father-less” families, lead poisoning and gang participation, abound.

One theory currently gaining traction is that because different racial groups have statistically different educational proficiencies when employers set standards for education, it again is a form of de facto racial discrimination. Most colleges today devote more and more of their resources to remedial education programs since high school graduates today cannot not function at the level necessary to participate in college courses (Henniger, D., 2016). *Advancing Diversity* frames educational standards as racial barriers to opportunity without considering linking the requirements to basic police functions such as knowledge of the law and the ability to learn how to operate increasingly complicated equipment. While it appears that the military has demonstrated the ability to teach combat procedures to high school graduates, the non-confrontational, communication techniques used in community policing procedures appear to benefit from higher levels of education. As early as 1967, the President's Commission on Law Enforcement and Administration (COLEA) and again in 1988 the National Advisory Commission on Criminal Justice Standards and Goals began calling for national education standards that included college as minimums (Townes, C., 2015). Studies indicate that police officers with only a high school education account for 75% of all disciplinary actions while those who have graduated from college are only involved in 11% of similar actions (Aamodt, M., 2004). Sadly, some Departments have responded to charges of racism in educational standards by lowering their minimal requirements and simplifying or eliminating entrance examinations where college level reading and comprehension are required. Presumably, Police Academies will now follow the path of the colleges and devote more resources to remedial education. Ironically, the movement to revert to the same educational standard (high school or GED) that was used in the 1940's after WWII seems to contradict the current theory that a college degree is a necessity for better employment opportunities and that simply making college available to all without cost will remedy the statistical disparities. This theory, of course, assumes that

colleges have admissions standards essentially for the same reason that many police departments have college education standards: to discriminate on the bases of race and gender rather than any work related ability to perform.

The Office of Personnel Management (OPM), responsible for establishing many of the employment practices for federal employers, recently joined a number of state and local governments to “Ban-the-Box”, i.e. postpone requests for information about criminal activities, including prior felony convictions, until late in the selection process (Slowik, S., 2016). Presumably, requests for information about educational achievement will soon follow unless the educational standards have been lowered sufficiently. Proponents of these “promising practices” maintain that when employers are forced to delay evaluations of things like criminal activities, they will become so enamored of the applicant that they will just ignore the purpose of evaluating past criminal activity along with the numerous federal and state laws preventing felons from careers in law enforcement. The two recent (and only) research studies show that “Ban-the-Box” has exactly the opposite of its intended effect: racial minorities actually have significantly fewer employment opportunities under these programs than when employers are allowed to obtain and evaluate criminal histories early in the selection process (Doleac, J., Hanse, B., 2016; Agan, A., Starr, S., 2016). It is speculated that when employers are denied information about criminal activity, they attempt to make rational decisions based upon criminal profiling where, statistically, men engage in crime more often than women and, likewise, there are significant statistical differences within groups of males based upon race.

Law Enforcement is not the only profession being ordered to treat criminal activity evaluations as a racist and/or sexist practice. On May 9, 2016, the U.S. Department of Education created *Beyond The Box*, a guide which attempts to prohibit colleges and other educational institutions from evaluating past criminal activity as part of a school admissions program. This new directive also attempts to reverse the effects of the Common Application which was created in 2006 and is currently used by nearly 700 colleges and universities as the standard admissions application. The Common Application solicits information about past criminal activity because of concerns for student safety and the reality that some degrees involve professions that prohibit the inclusion of convicted felons and might lead to false expectations of employment. The new *Beyond The Box* specifically limits evaluation of past criminal activity to “educational goals” and excludes any mention of student safety or unrealistic career opportunities. On April 4, 2016, the U.S. Department of Housing and Urban Development (HUD) issued new guidelines (U.S. Department of Housing, 2016) for landlords providing housing to tenants receiving government rent assistance prohibiting evaluations of past criminal activities. Both of these federal agencies have concluded that evaluations of criminal activities are an intrinsically racist practice and reject the notion that schools and landlords have a priority responsibility to provide safe environments for their students and tenants. Not surprisingly, these same government agencies do not provide any indemnification to those who comply with these directives and whose students and tenants are subsequently harmed by some student or tenant who was not adequately screened. Perhaps the most unusual application of mandated diversity is the Security and Exchange Commission’s (SEC) 2010 directive that business entities under its supervision must now contain a “diversity statement” in their annual proxy disclosures (Proxy Disclosure Enhancement, Final Rule, 2010). However, when some of the

most respected corporations in the United States chose to define diversity in management and financial terms (operational experience, interest in the organization, etc.) rather than by race and gender, the SEC suggested that it will now propose a new rule that its proponents say will allow government to allocate Board participation by groups it designates as protected (Wall Street Journal, 2016). Berkshire-Hathaway, Warren Buffet's holding company, published a proxy disclosure that states "Berkshire does not have a policy regarding the consideration of diversity, however defined. Instead, as previously discussed, The Governance Committee looks for individuals who have very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company". The Ford Motor Company defines diversity as a range of "experience in business, government, education and technology, and in areas that are relevant to the Company's global activities". The "problem", of course, is that neither diversity statement mentions race or gender.

It should be noted that all these remedies to correct statistical racial and gender disparities in education and criminal evaluations are exclusively based upon assumptions of racial and gender discrimination rather than individual performance or actions. Further, these remedies – the OPM's Ban-The-Box directive, Departments of Education and HUD mandates and the SEC redefinition of diversity, are all maneuvers that bypass any form legislative process.

The concept of diversity, in the most general sense, has great appeal when it applies to philosophical considerations. Unfortunately, there is no basis for assuming philosophies are unique for and limited to race and gender as extreme differences of thought can be found within each category. Diversity as defined by the federal mandates discussed in this article is intrinsically divisive since each job applicant must first be identified by some stereotypical characteristic. While some of these characteristics can be linked to federal law and science (race and gender) others cannot (sexual orientation and gender identity). Traditionally, employers have been allowed to use their own criteria for recruiting and selecting new employees on the basis that they know their organizations and professions and are therefore best suited for determining performance related qualifications. While most of these mandates are so new they have yet to be evaluated, those that have (Ban-The-Box) indicated they have the opposite of their intended effect: minority employment opportunities actually decline. Perhaps political mandates should focus on improving social accountability and literacy rather than lowering qualifications in these critical areas.

### References

- Aamodt, Michael, *Research in Law Enforcement Selection*, Radford University, Brown Walker Press, 2004
- Advancing Diversity In Law Enforcement*, Justice.gov/policediversity; EEOC.gov/policediversity, October, 2016

Agan, A., Starr, S., *Ban The Box, Criminal Records, and Statistical Discrimination: A Field Experiment*,  
<http://ssrn.com/abstract=2795795>, June, 2016

Bureau of Justice Statistics, [www.bjs.gov](http://www.bjs.gov), 2016

Doleac, J. and Hansen, B., *Does "ban the box" help or hurt low skilled workers? Statistical discrimination and employment outcomes when criminal histories are hidden*, National Bureau of Economic Research,  
<http://www.nber.org/papers/w22469>, October, 2016

Henninger, D., *Dumb and Dumber*, Wall Street Journal, October 20, 2016

Proxy Disclosure Enhancements, Final Rule, Security and Exchange Commission 17 CFR Parts 229, 239, 240, 249 and 274, RIN 3235-AK 28, effective: 2-28-10

Slowik, S., *Compliance Update*, APA Magazine, V48 N1, January/February, 2015

Slowik, S., *Disparate Impact and EEOC v. Freeman*, APA Magazine, V48 N3, May/June, 2015

Slowik, S., *New Federal Ban-The-Box Mandate*, APA Magazine, V49 N3, May/June, 2016

Townes, C., *Raising Education Standards Could Be The Key To Better Policing*, thinkprogress.org, February 6, 2015

U.S. Department of Housing and Urban Development, *Office of General Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate Related Transactions*, [www.hud.gov](http://www.hud.gov), April 4, 2016

Wall Street Journal, *The Diversity Police Raid the Boardroom*, August 18, 2016.